PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

26 May 2015

John Traversy
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

VIA GCKey

Dear Mr. Traversy,

Re: Review and Variance of Telecom Order CRTC 2015-194 -
Determination of costs award with respect to the participation of the Consumers' Association of Canada and the Public Interest Advocacy Centre in the proceeding leading to Telecom Decision 2015-70 regarding the expiry of certain time-limited exogenous factors
Application of PIAC and CAC

1. The Public Interest Advocacy Centre ("PIAC") as counsel for itself and the Consumers Association of Canada (CAC) (collectively CAC-PIAC) submits the following application pursuant to Section 62 of the Telecommunications Act, R.S.C. 1993, c.38 ("the Telecommunications Act" or the "Act") and under Part I of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) (the "Rules of Procedure") seeking a review and variance of the above referenced decision.

Nature of the Application

2. CAC-PIAC hereby apply to review and vary a Commission costs decision. In the above-noted decision, the CRTC reduced CAC-PIAC's cost claim by 40%, on the basis that:

> . . . the Commission considers that the amount of time claimed by CAC/PIAC of 35.4 hours is excessive in light of the nature of the proceeding and the degree of the costs applicants' participation in it. The proceeding initiated by Bell Canada et al.'s application was narrowly focused and was not unduly complex. CAC/PIAC's

written intervention was similarly narrowly focused. Further, CAC/PIAC used the services of senior legal counsel at the highest allowable rate. Costs applicants should rely on articling students or junior counsel to the extent possible to avoid incurring excessive costs, as stated in the Commission's Guidelines for the Assessment of Costs.

3. The above finding reveals several errors of law. The finding also has wide-ranging policy and participative effects on the public interest that CAC-PIAC are duty-bound to bring to the CRTC's attention.

4. Due to the legal errors and the Commission's failure to appreciate the larger implications of its decision, CAC-PIAC request that the CRTC review and vary its decision to reduce the costs claim of CAC-PIAC and to order payment of the full costs claimed, ideally with reasons to guide future applicants making similar interventions and costs claims.

Test for Review and Variance

5. The Commission has a wide power of review and variance of its own decisions; wider perhaps than the CRTC has recently been known to act in these applications.

6. Applicants typically rhyme off the factors listed by the Commission in the "test" for a review and vary application to succeed. See: Revised guidelines for review and vary applications, Telecom Information Bulletin CRTC 2011-214, 25 March 2011 at para. 5. We shall do the same for the record. They are:

> (i) an error in law or in fact;
>
> (ii) a fundamental change in circumstances or facts since the decision;
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> (iii) a failure to consider a basic principle which had been raised in the original proceeding; or
>
> (iv) a new principle which has arisen as a result of the decision.

7. However, the examples given by the CRTC in that paragraph are just that. The exact operative wording is in the preamble to those examples and it is: "applicants must demonstrate that there is substantial doubt as to the correctness of the original decision".

8. The Commission in fact has a wide discretion to review and vary when the decision is incorrect. This is such a case; one that may not fit as neatly into the rote categories of example above but is justified because the decision is wrong.

9. We first detail the factual and legal errors making this decision wrong. Then we detail the policy and practical implications of the decision that make it wrong.

Errors of Fact and Law by the Commission

Errors of Fact

10. First, the original application made by Bell Canada and the interventions, answers and submissions decision were completely complex, contrary to the CRTC's finding that the "application was narrowly focused and not unduly complex". [Emphasis added.]

11. We take the liberty of reproducing the first paragraph of Bell Canada's 90+ page initial application (which includes 5 technical appendices and was filed with 6 attendant tariff applications totalling 20 additional pages of 9.5 point type) to demonstrate the complexity of the issue, the language and the relief requested:

> ES1. Pursuant to Part 1 of the Rules, this Application is made by Bell Aliant, Bell Canada, and Télébec to request the Commission's approval of rate reductions, rebates and updates to our price cap indices for certain price cap baskets to reflect the expiry of certain time-limited exogenous factors. Coincident with this Application, we are filing Bell Aliant Tariff Notices (TNs) 495 and 496, Bell Canada TNs 7438 and 7439, and Télébec TNs 474 and 475 under separate cover, which outline the specific rate reductions we propose to make to bring our rates into compliance with the adjusted price cap indices which reflect the reversal of the exogenous factors at issue. As discussed in this Application, the proposed effective date of these rate reductions is 1 January 2015, which is coincident with the date of other planned rate changes for certain companies, and will therefore minimize disruption and potential confusion for our customers.

12. Bell felt it necessary to produce a table within the opening paragraphs of its application, to, in effect, tell the Commission what it was talking about:

Table 1

Summary of Exogenous Effective and Expiry Dates for Bell Canada

Basket	Exogenous Adjustment	Length of Recovery Period	Method of Recovery	Start of Recovery Period	Expiry of Recovery Period
Residential Non-HCSA	WNP	6 years	Drawdown from Bell Canada's deferral account	1 June 2007	31 May 2013
	ELCA	3 years			31 May 2010
Residential HCSA	WNP	6 years	Rate increases (filed in TN 7108)	18 June 2008, pursuant to Order 2008-171 and 28 Jan 2009, pursuant to Decision 2009-35	17 June 2014
	ELCA	3 years			17 June 2011
Business Basic	WNP	6 years	Rate increases (filed in TN 7109)	17 March 2008, pursuant to Order 2008-72	16 March 2014
	ELCA	3 years			16 March 2011
Other Capped	WNP				
	ELCA	3 years	Rate increases (filed in TNs 7118, TN 7119, NST 888)	1 June 2008, pursuant to Order 2008-100	31 May 2011

13. The application did not get any easier from there. The application dealt with historical price cap determinations and basket constraints for three companies in relation to two different exogenous adjustments.

14. In short, the application manifestly was complex. To find the contrary is an error of fact.

15. Second, the CRTC made a factual error that less senior counsel could have handled this file “cheaper”.

16. Any counsel seeking to respond appropriately to Bell’s application would have had to understand not only the Commission’s price caps regime for ILECs, but also the exogenous factor concept and the Commission’s refinement of those factors in the last few years. Since the exogenous factors were paid out of the deferral accounts, having a counsel with more than a passing knowledge of the history and existence of the deferral accounts was also a good idea.

17. Only senior counsel could, in the judgment of the General Counsel of PIAC and as accepted by CAC, efficiently absorb and respond to this application without clearly excessive time to research and understand the underlying conditions and rules and rulings necessary to even begin to formulate a response in the time allotted to respondents to the application to comment. As a result, CAC-PIAC engaged such senior counsel as the only time and work-efficient way to respond adequately, for the customers, to the application.

18. That senior counsel spent the time required to understand the application, to define the consumer position in consultation with PIAC's General Counsel (whose time – billable at the same rate – was only 1.1 hour added to the costs claim) and to make submissions thereon to the CRTC – without the need to background research the concepts at play.

19. The Commission's finding that less senior counsel or even articling students (!) could have handled much of the file is factually wrong. This would be impossible given the nature of the file and the usual period to reply to the application.

Errors of Law

20. The Commission made an error of law (or mixed fact and law) in assuming that senior counsel time or the overall time spent was even in issue. No party objected to CAC-PIAC's costs claim. No party responded to our costs claim. No party questioned the amount or quality or necessity of senior counsel's time on this application.

21. In effect, therefore, the Commission has, of its own motion, reviewed the costs claim on another basis.

22. Therefore the Commission, in fixing costs, must have considered these and only these factors:

> 68. The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:
>
> > (a) whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;
> >
> > (b) the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and
> >
> > (c) whether the applicant participated in the proceeding in a responsible way.

23. Neither subs. (a) nor subs. (c) were ever in issue in this proceeding. Therefore the Commission "must" have decided that CAC-PIAC did not "[assist] the Commission in a better understanding of the matters that were considered".

24. Yet, CAC-PIAC were <u>successful</u> in their intervention. The CRTC explicitly accepted our argument that the Bell companies were required to pay compound interest on the monies wrongly appropriated as the companies had use of funds improperly, if inadvertently, acquired.

25. The dollar and cents effect on subscribers was to save them money. Considerable money. By Bell's own calculation, customers' savings, thanks to the interest finding and other aspects of the Commission's decision that were clearly based on CAC-PIAC's

arguments, total over $257,000. This easily outweighs the costs claim, which was $10,670 and which the Commission reduced to $6402.

26. It is therefore an error to conclude that CAC-PIAC's efforts were not "helpful" to the Commission unless the Commission does not consider that customers paying the correct amount, rather than an inflated amount, is in the public interest or is an instance of setting "just and reasonable" rates.

27. We note that the only guidance for costs applicants as to the Commission's exercise of discretion in determining if an intervention has provided the Commission with a better understanding of the issues is in the Guidelines[1] at paras. 6-7:

> 6. In evaluating whether an applicant has contributed to a better understanding of the issues, the considerations that the Commission will generally take into account include:
> a. whether the applicant filed evidence;
> b. whether the contribution was focused and structured; and
> c. whether the contribution offered a distinct point of view.
>
> 7. The above list of considerations is not exhaustive and the factors considered are entirely within the discretion of the Commission, depending on the circumstances of each case.

28. Based on these factors, the CAC-PIAC submission was focused and structured and definitely provided the distinct consumer point of view. The nature of the proceeding largely precluded CAC-PIAC from adducing competing evidence and this criterion was largely irrelevant here.

29. If the Commission based its consideration of the assistance of CAC-PIAC's submission on other factors, it was incumbent on the Commission to demonstrate this reasonable reliance on other factors by listing them or at the very least clearly implying this in the costs decision. That it did not do, saying only "the amount of time claimed by CAC/PIAC of 35.4 hours is excessive in light of the nature of the proceeding and the degree of the costs applicants' participation in it". This seems to imply that the Commission considered not the contribution to its understanding but rather its own view of what it would take to produce the material that CAC-PIAC offered to help the Commission.

30. Therefore the Commission erred in law by conflating its view of "excessive time" or "too senior counsel" with the only factor required for the costs award, namely if CAC-PIAC assisted the Commission.

31. Even if we accept that the Commission may base its determination of whether a submission is helpful by imagining how it would have managed to produce the work itself, then <u>where no respondent questions a costs claim, the Commission, when acting to reduce or change the amount claimed, must act in accordance with the principles of natural justice</u>.

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[1] Being the attachment to Telecom Regulatory Policy CRTC 2010-963 (23 December 2010). Online: http://www.crtc.gc.ca/eng/archive/2015/2015-194.htm#fnb1

32. Thus, in deciding this costs claim, the CRTC made two further legal errors in relation to the conclusion that excessive time was spent or that "too senior" counsel was retained.

33. First, the CRTC has exercised its discretion unreasonably. The Guidelines offer this on excessive time:

> Excessive Time
>
> 18. In evaluating whether or not the time expended by a claimant is excessive under the circumstances, the considerations that the Commission will generally take into account include:
> a. the extent of the applicant's participation, the degree of complexity of the issues to which that participation related, and the amount of documentation involved in the proceeding;
> b. the degree of responsibility assumed by the claimant;
> c. the duplication of substantive submissions among claimants;
> d. the experience and expertise of the claimant; and
> e. the time claimed and awarded in the proceeding or in other similar proceedings.
>
> 19. The above list of considerations is not exhaustive and the factors considered are entirely within the discretion of the Commission, depending on the circumstances of each case.

34. Although the Commission reserves ultimate discretion to consider other factors, it is clear that on the above factors, our costs claim should reasonably have been fully awarded, as:

(a) CAC-PIAC were fully involved at all stages and indeed, were the only public interest and consumer groups to make any comment whatever; the issues as noted above were complex telecommunications regulatory law; and the documentation was challenging, if not quite as voluminous as a multi-party policy hearing, but still substantial for a Part 1 application.
(b) CAC-PIAC assumed responsibility for the entire public interest/customer viewpoint.
(c) There was no duplication as CAC-PIAC were the only respondents.
(d) PIAC has appeared before the Commission on telecom matters regularly for nearly thirty years and is expert in the consumer aspects of telecommunications regulation.
(e) The time claimed, as noted, was not objected to by any respondent (which fact was not averted to by the Commission), and as noted above was not excessive given the nature of the proceeding.

35. Had the Commission based its determination of why the time spent was excessive on other factors not mentioned above, it was incumbent on the Commission to demonstrate this reasonable reliance on other factors by listing them or at the very least clearly implying this in the costs decision. That it did not do, saying only "excessive in light of the nature of the proceeding and the degree of the costs applicants' participation in it".

36. In this review and vary application, we have demonstrated that the Bell application was complex and actually a small world unto itself – and the fact that it was "narrowly focussed" on unjust enrichment for not following a regulatory decision did not make that narrow focus "easy".

37. The suggestion that our response to the application was not extensive enough is simply wrong. The CAC-PIAC intervention was focussed and efficiently explained complex ideas in an economical fashion, as one would expect from the submissions of senior counsel. Adding "bulk" beyond the 5 pages of intervention would not have made the argument better. In addition, as noted, the CRTC accepted a key point in this submission, namely the compound interest argument, which saved consumers over $250,000.

38. Secondly, the Guidelines in fact do not say when and how to use senior counsel.[2] In the absence of such rules, the reasonable judgment of dedicated General Counsel is the best evidence absent the request by the Commission to explain such use.

39. As noted in para. 23 of Telecom Regulatory Policy CRTC 2010-963, "When senior counsel are relied on, applicants may be asked to demonstrate with supporting rationale why this reliance was necessary." [Emphasis added.] However, the CRTC never alerted CAC-PIAC to the possibility of an issue with senior counsel time on this costs application and, contrary to the natural justice implied by the above sentence, never accorded CAC-PIAC the opportunity to explain the use of senior counsel.

40. Note that when the CRTC took to dispensing with taxation as a true matter of course, the goal was to reduce administrative burden. See Telecom Public Notice CRTC 2002-5, at para. 6: "The Commission considers that the process of fixing costs immediately in costs awards is a more efficient process because it permits the quantum of costs awarded to be determined more expeditiously and reduces the administrative burden on the Commission and the parties involved."

41. At that time, the CRTC observed that it was approving almost all costs claims and it noted in para. 8 of the same Notice that: "Accordingly, the Commission hereby announces that it will, in general, fix the costs to be paid as part of the costs awards process and will, therefore, proceed with the taxation process only in exceptional circumstances."

42. The Commission further noted that respondents would have an opportunity upon receipt of the costs claim to make representations much as they had done in costs taxations. (para. 7).

43. Where, however, such an inquiry is to be undertaken (such as to justify choice of senior counsel over junior counsel) the process, as detailed in the Guidelines above, contemplates a clear opportunity for the costs applicant to explain such a choice BEFORE the costs decision is issued by the Commission.

44. However, as the Commission has now undertaken, *in camera*, the determinations usually made by a costs officer after hearing from the parties as to the appropriateness of any claim in a taxation, the problem arises that the Commission *in camera* makes a determination, such as the present one about complexity and appropriate use of senior counsel, to which the applicant should have had an opportunity to speak.

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[2] The Guidelines simply say: "23. Applicants are encouraged to rely on junior counsel and articling students to the greatest extent possible. When senior counsel are relied on, applicants may be asked to demonstrate with supporting rationale why this reliance was necessary." [Emphasis added.]

45. As a result the CRTC has inadvertently removed the right to hear the other side before deciding on a matter that requires such an opportunity to be provided, given the practical and tactical and public interest considerations that the applicant had to consider (again, with no guidance whatever from the Commission, other than a warning in vague rules to "not be excessive" or "to consider the appropriate level of counsel"). This is an error of law in that the Commission has proceeded in a manner that is contrary to the requirements of natural justice.

Policy and Practice Implications of the Decision

46. The result of this costs award has two nefarious policy implications. First, it will clearly discourage the public and their representatives, to spend the necessary time and effort to scrutinize any complex or technical matters before the Commission, even if doing so could save ratepayers hundreds of thousands or more dollars – all for minor savings that the Commission, on its own motion without any opportunity to hear from such advocates, decides is "excessive".

47. Such a result will result in a "free pass" to corporate applicants who may now be incented to make large, complex applications and hide much that could affect consumers within them. The Commission will not have the benefit of public interest scrutiny which is to be encouraged by its very costs rules.[3] This is a huge loss to the public interest and effectively ring-fences public participation to the larger CRTC policy hearings and not its day-to-day work.

48. Secondly, advocacy groups such as PIAC that arrange for senior counsel to work on consumer files simply will not be able to engage such counsel as those counsel rightly will conclude that the risk of working with consumer groups is too high to bear and they will instead work for industry associations and TSPs.

49. As a result, the Commission will doom consumer and public interest groups to entry-level or at best low level counsel with the result that those cases which require the big guns will simply be lost to the companies. This, again, is a result that the cost award regime at CRTC had seemingly had some success in levelling the playing field between the companies and their customers. It would be contrary to the public interest to return to the old days when the Commission itself was the only scrutineer of corporate claims.

[3] See *Bell Canada* v. *Consumers' Assoc. of Canada*, [1986] 1 S.C.R. 190 at para. 30.

Conclusion

50. The Commission's initial costs order was incorrect. The Commission wrongly concluded that our costs application was excessive and it did not appropriately consider the assistance to the Commission that our intervention provided. The Commission did not provide CAC-PIAC an opportunity to explain its use of senior counsel or the time spent in violation of the rules of natural justice and the Commission's own costs Guidelines.

Relief Requested

51. For the reasons above we ask that the Commission review and vary Telecom Order 2015-194 and grant CAC-PIAC its full costs of participation in the underlying application.

Yours truly,

[original signed]

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