

Appendix F: Submissions in the costs award proceeding that led to Telecom Order CRTC 2015-132

- i) Application for Costs by the DiversityCanada Foundation/NPF Part I Application to Review and Vary Telecom Order CRTC 2014-220 (8662-D53-201407536) -- (Cover Letter)
October 14, 2014

- ii) Reply to Answers to Application for Costs by DiversityCanada/NPF Part I Application to Review and Vary Telecom Order CRTC 2014-220 (8662-D53-201407536)
November 06, 2014



DiversityCanada Foundation

Setting people on the path to success

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October 14, 2014

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

BY GCKEY

Dear Mr. Traversy:

**Re: Application for Costs by the DiversityCanada Foundation/NPF
Part I Application to Review and Vary Telecom Order CRTC 2014-220 (8662-D53-201407536)**

The DiversityCanada Foundation (“DiversityCanada”) on its own behalf and on behalf of the National Pensioners Federation (“NPF”) hereby submits the attached costs claim.

Claim

Pursuant to s.66 of the *CRTC Rules of Practice and Procedure*,¹ DiversityCanada/NPF hereby apply for an award of costs with respect to the above-noted proceeding.

DiversityCanada/NPF submit that we have met the test for an award of costs, in that:

(i) We represent a group or body of subscribers that has an interest in the outcome of the proceeding. DiversityCanada, a federally-registered not-for-profit organization which works to protect the rights and promote the interests of the disadvantaged, the vulnerable, and the marginalized, arranged legal and research services as part of its representation of the NPF before the Commission. The NPF is a non-partisan, non-sectarian organization composed of 350 seniors chapters and clubs across Canada with a collective membership of 1,000,000 seniors and retired workers. The mission of the NPF is to stimulate public interest in the welfare of aging Canadians and its goal is to help seniors and retirees have a life of dignity, independence and financial security.

(ii) We believe we assisted the Commission in developing a better understanding of the matters that were considered. Our submissions were focused and structured; they highlighted the public policy considerations which underpin the cost awards procedures of administrative tribunals and examined why Telecom Order CRTC 2014-220 should be varied in order to support those public policy considerations; we provided the Commission with legal precedents which underscore the importance of costs awards in facilitating public participation in the Commission's proceedings; we also pointed out inaccuracies in the Answers of the respondents in this proceeding. Whether or not the Commission ultimately agrees with our positions in this proceeding, we submit that we provided helpful comments.²

¹ Being the Appendix to Broadcasting and Telecom Regulatory Policy CRTC 2010-958.

² Here, we echo the Public Interest Advocacy Centre, a senior public interest group which made this statement in its costs application, re 8687-T66-201402891, shortly after Telecom Order CRTC 2014-220 was issued.

(iii) We participated in the proceeding in a responsible way. Our submissions were meticulously researched and developed efficiently by a competent and experienced team comprised of legal counsel and a consultant.

DiversityCanada/NPF submit the costs claimed were necessarily and reasonably incurred: the proceeding is significant because the deviation from Telecom Regulatory Policy CRTC 2010-963 represented by Telecom Order CRTC 2014-220 introduced uncertainty in the Commission's costs awards procedures which could adversely affect public participation in Commission proceedings; there was no duplication of substantive submissions as DiversityCanada/NPF was the sole consumer interest group that participated in the proceeding; and the time claimed is comparable to time claimed and awarded in other similar proceedings (such as 8620-P8-201400845 and 8665-P8-201400762).

DiversityCanada/NPF are filing a summary bill of costs (in Form V), as well as Form I and Form III, as a PDF attachment to this application.³ Hard copies are available and may be made available to any party, upon request.

Apportionment

DiversityCanada/NPF make no submission as to apportionment of payment, but notes that Answers were filed by the Canadian Wireless Telecommunications Association and by TELUS Communications Company.

Payment

If costs are awarded, respondents should make payment as follows:

DiversityCanada Foundation
95 Hutchison Avenue
Elliot Lake, ON P5A 1W9

If you require any further information regarding the details of this application for costs, please do not hesitate to reach me at 705 848 6194 or at the following email address:

telecom_policy@diversitycanada.org

Yours truly,

[original signed]

Raymond Kindiak
Legal Counsel

cc CWTA [by e-mail only]
TELUS Communications Company

³ Being the appropriate forms listed in Broadcasting and Telecom Information Bulletin CRTC 2010-453, as amended from time to time.



November 06, 2014

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

BY GCKEY

Dear Mr. Traversy:

Re: Reply to Answers to Application for Costs by DiversityCanada/NPF Part I Application to Review and Vary Telecom Order CRTC 2014-220 (8662-D53-201407536)

1) The DiversityCanada Foundation (“DiversityCanada”) and the National Pensioners Federation (“NPF”; collectively “DiversityCanada/NPF”) submit these Reply comments in response to Answers to their costs Application filed by the Canadian Wireless Telecommunications Association (“CWTA”), as well as by TELUS Communications Company (“Telus”). Notwithstanding the responses herein, DiversityCanada/NPF submit that not addressing a party's submissions does not indicate agreement with that position.

Criteria for costs awards

2) As set out in s.66 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, applicants for an award of costs must demonstrate that they:

- i. have, or represent a group or a class of subscribers that has, an interest in the outcome of the proceeding;
- ii. assisted the Commission in developing a better understanding of the matters that were considered; and
- iii. participated in a responsible way.

3) Both the CWTA and Telus raised objections concerning the second and third criteria. For the reasons outlined below, it is DiversityCanada/NPF's submission that the CTWA and Telus have failed to establish that DiversityCanada/NPF did not assist the Commission in developing a better understanding of the matters that were considered or that DiversityCanada/NPF did not participate in a responsible way.

Assisted the Commission in developing a better understanding

4) In its *Guidelines for the Assessment of Costs*, the Commission provided a non-exhaustive list of factors that would be taken into consideration when assessing whether a costs applicant fulfilled the requirements under this heading:

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.

5) As the illustrative list indicates, this criterion involves an examination of whether the applicant submitted material which added to the fullness of the record, and enabled the Commission to gain an appreciation of the matter that was under consideration from various perspectives.

6) **CWTA:** The CWTA offered two grounds for its objection under this criterion.

7) First, the CWTA claimed that DiversityCanada/NPF's Part I Application was based on a misinterpretation of Telecom Order 2014-220.¹ Apart from making broad statements, the CWTA provided little analysis of the Order to show what, in its opinion, is the proper interpretation of the decision, and to demonstrate how DiversityCanada/NPF misinterpreted the decision.

8) DiversityCanada/NPF submit that the Commission's reasons for denying DiversityCanada/NPF's costs in Telecom Order 2014-220 are contained in paragraphs 20 and 21 of the decision. DiversityCanada/NPF further submit that the Part I Application, itself, provides ample evidence that DiversityCanada/NPF responded to the plain meaning of the relevant paragraphs.

9) As for the second ground, the CWTA claimed DiversityCanada/NPF did not assist the Commission since "the public policy references to support its misinterpretation are already well known by the Commission".²

10) The CWTA noted "references to Supreme Court of Canada rulings related to CRTC cost awards processes, as well as past CRTC decisions", which DiversityCanada/NPF agree are, obviously, already known by the Commission.

11) However, the CWTA made no attempt to establish that the same was true of other legal submissions in DiversityCanada/NPF's Part I Application.

12) For instance, the CWTA did not establish that any party in any proceeding before the Commission had previously brought to the Commission's attention the decision in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19; or in *Canadian Natural Resources Limited v. Babb*, 2014 ABSRB 39; or any in of the cases cited in section 3.1 of DiversityCanada/NPF's Part I Application.

¹ CWTA Answer, dated October 24, 2014, para. 2

² *Ibid*, para. 5

13) Furthermore, with this objection, the CWTA appeared to suggest that DiversityCanada/NPF did no more than merely cite jurisprudence already known to the Commission and, therefore, did not assist the Commission in developing a better understanding of the matters under consideration. DiversityCanada/NPF respectfully submit that this is an inaccurate portrayal of the Part I Application.

14) DiversityCanada/NPF' Part I Application provided the Commission with an analysis of the intent of the Commission's costs awards procedure (as gleaned from the Commission's own decisions and the Supreme Court's ruling on the Commission's costs awards procedure) as well as an analysis of how Telecom Order 2014-220 was contrary to the Commission's stated intent. DiversityCanada/NPF also provided an analysis of the matters involving costs awards before Alberta administrative tribunals, and presented arguments to demonstrate the similarities with the Commission's costs awards procedures, and the relevance of the Alberta decisions to the matters under consideration.

15) DiversityCanada/NPF therefore submit that, contrary to the CWTA's claim, DiversityCanada/NPF did assist the Commission in developing a better understanding of matters that were considered.

16) **Telus:** Telus offered three grounds for its contention that DiversityCanada/NPF did not assist the Commission with developing a better understanding of matters that were under consideration.

17) First, Telus claimed that DiversityCanada/NPF failed “to comprehend that costs awards by the Commission are and have always been discretionary”.³

18) DiversityCanada/NPF submit that there is no basis for this claim, given section 3.1 of the Part I Application (titled “A discretionary decision may be reversed if it is contrary to the purpose for which the discretion is exercised”), the second paragraph of which states: “The Commission's decisions on costs awards are discretionary.”

19) Second, Telus, stated (also at paragraph 15): “Filing a review and vary of a discretionary decision absent a clear legal error is futile at best and an abuse of process at worst.”

20) DiversityCanada/NPF submit that this objection raised by Telus (that there was no legal error) concerns the merits of the Part I Application rather than the manner in which DiversityCanada/NPF made their submissions to the Commission (ie the merits of the costs awards application).

21) Telus' objection is inextricably tied to the outcome of the Part I Application. The only way Telus' argument can succeed is if the Commission were to decide that the Part I Application failed to disclose a legal error.

22) However, it has been established by the Supreme Court of Canada and the Commission itself that the outcome (the success or failure of the substantive application) is not a criterion upon which costs awards decisions should be based.

³ Telus' Answer, dated October 27, 2014, para. 15

23) In *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190, the Supreme Court of Canada underscored the fact that the Commission's costs awards procedure is not strictly based on the principles of indemnification as found in the Court (where there are adversaries and awards are based on the outcome, with the winner being awarded costs), but, instead, is intended “to ensure effective participation in its hearings”.

24) At paragraph 26 of the decision that led to Telecom Regulatory Policy CRTC 2010-963, the Commission stated:

The Commission considers that automatically denying costs when a costs applicant's application under Part VII of the Telecommunications Rules or Part 1 of the Rules of Procedure has not been successful could have a chilling effect on those who wish to raise issues of public interest. The Commission finds that its current approach of assessing each costs application on its merits remains appropriate.

25) And, at paragraph 12 of Telecom Order 2014-220, the Commission stated:

Further, the Commission agrees with DiversityCanada that costs applications are treated on their merits, regardless of the outcome of the proceeding for which the costs are sought.

26) In summary, the above shows that the decision to award costs is not based on the merits of the substantive application (that is, whether or not the applicant's submissions in the Part I Application are such that they would be accepted by the Commission). Instead, costs awards procedures have their own separate set of merits which concern the manner in which the applicant participated in the Part I proceeding, including matters such as filing evidence, presenting structured and focused submissions, offering a distinct point of view, etc.

27) DiversityCanada/NPF, therefore, respectfully submit that Telus' submission (that costs should be denied on the basis that the Part I Application failed to disclose a legal error) should be disregarded.

28) Third, Telus claimed that DiversityCanada/NPF did not assist the Commission, arguing thus, at paragraph 16 of its Answer:

“This last point about a legal error is particularly prudent given DCF's reference to *Kelly v. Alberta*. This jurisprudence is off base and irrelevant to the issue of awarding costs by the Commission in this process. In the *Kelly v. Alberta* case, the decision revolved around denying costs based upon a different regulatory tribunal, under an Alberta piece of legislation. Therefore, DCF's cited case has no relevance to the Commission's costs claims process.” [Footnote marker omitted]

29) DiversityCanada/NPF note that a legal precedent does not have to be binding to be relevant; this is recognized throughout the judicial system and a common refrain in jurisprudence is that “while [the cited decision] is not binding, it is instructive”. In fact, the Part I Application itself includes a decision by the Alberta Surface Rights Board pointing to the relevance of the *Kelly* decision to its procedures, even while noting that the *Kelly* decision concerned a different regulatory tribunal.

30) DiversityCanada/NPF submit the cited case is relevant as the issues considered in the *Kelly* decision (such as the inappropriateness of the principle of indemnity in proceedings before an administrative tribunal concerned with defending the public interest) mirror issues considered by both

the Commission, itself, and the Supreme Court in its decision on the Commission's costs awards procedure.

31) Furthermore, DiversityCanada/NPF submit that the reasoning of the administrative tribunal in denying the Kelly interveners' costs claim was so nearly identical to the Commission's reasoning in denying DiversityCanada/NPF's costs claim that the reviewing court's determination that the tribunal's decision could not stand should be of assistance as the Commission considers the application to review and vary Telecom Order 2014-220.

Participated in a responsible way

32) **CWTA:** The CWTA argued, in paragraph 8 of its Answer, that the time claimed by DiversityCanada/NPF did not reflect a reasonable use of resources and submitted that the claim of the outside consultant should be reduced. DiversityCanada/NPF submit that the CWTA's objection lacks merit as it is based on erroneous assumptions, and should be disregarded.

33) In stating that DiversityCanada/NPF's "legal counsel contributed only 9.4 hours reviewing and revising the documents", the CWTA based its position on the incorrect assumption that the time *claimed* represents the total amount of time *expended* on the file.

34) The fact is that the time on the cost claims forms of both claimants is only a portion of the time actually expended. The CWTA has failed to appreciate that consumer interest groups routinely exclude time spent on participating in Commission proceedings from their costs claims in order to satisfy the Commission's requirement that costs claims be reasonable. A recent example of another consumer group placing this practice on the public record can be found in the June 12, 2014 costs claim regarding Mobile TV Undue Preference applications by the Public Interest Advocacy Centre ("PIAC"), in which the general counsel excluded "considerable time" spent on the file. Additionally, while the Commission has established that applicants are entitled to costs for replying to Answers in costs awards procedures,⁴ consumer interest groups routinely do not submit claims for such time.

35) Furthermore, the CWTA fails to appreciate that DiversityCanada/NPF's use of resources fulfils the Commission's requirement that costs applicants act responsibly by avoiding incurring excessive costs, as well as the Commission's expectation that there would be a reasonable apportionment of the claims between claimants in the higher and lower claim categories.

36) This requirement can be seen, for example, in Telecom Order CRTC 2010-85, in which the Commission reduced the claim of an outside legal counsel (who was at the highest rate bracket) by 35 per cent, while noting that all of the other costs applicants used in-house counsel, junior counsel, articling students, and/or legal assistants for their legal work.⁵

37) DiversityCanada/NPF's legal counsel is licenced by the Law Society of Upper Canada, and paragraph 1 of the commentary at section 6.1 of that body's *Rules of Professional Conduct* states: "Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer."⁶

4 Taxation Order CRTC 98-9, para. 34

5 Telecom Order CRTC 2010-85, para. 47 - 48

6 See <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147499502>

38) DiversityCanada/NPF's outside consultant earned a Master's (with distinction) in international journalism and has 27 years of research and writing experience, including writing for major Canadian and international media organizations such as *The Globe and Mail*, the BBC, and the Associated Press. Her career required her to develop competence in quickly and efficiently sifting through large amounts of data for the important information, and in communicating complex subjects so that they are readily understood by readers of all backgrounds. Since 2011, DiversityCanada/NPF's outside consultant has been engaged in researching and writing on telecom issues and has developed a breadth and depth of knowledge on the business, technical, legal, and public policy aspects of the Canadian telecom sector.

39) With this training, experience, and subject matter expertise, DiversityCanada/NPF's outside consultant is competent to do the required work, under the supervision of legal counsel, to enable DiversityCanada/NPF to participate in Commission proceedings. Accordingly, DiversityCanada/NPF's legal counsel directly supervised the work of the outside consultant (a non-lawyer at a lower rate than the legal counsel), frequently reviewing the assigned work to ensure its proper and timely completion.

40) DiversityCanada/NPF submit that the quality of submissions in the Part I proceeding (which were meticulously-researched, focused, and structured) and the quantum and apportionment of the costs claim reflect that DiversityCanada/NPF have participated in a responsible way.

41) **Telus:** Paragraphs 11 to 13 of Telus' Answer appeared under the heading "DCF's Review and Vary Application Does Not Constitute Responsible Participation." DiversityCanada/NPF respectfully submit that Telus' arguments in this section of its Answer should be disregarded as they are concerned with the merits of the Part I Application to vary Telecom Order 2014-220, as well as the Part I Application to Vary Section J of the Wireless Code, rather than the merits of the costs application. Nevertheless, DiversityCanada/NPF make the following submission.

42) With respect to the Part I Application to review and vary Telecom Order 2014-220, Telus stated, at paragraph 11: "There was simply no basis to seek further clarity from the Commission on this matter."

43) In other words, Telus holds the view that there is no matter to be considered. This contrasts with the Commission's decision to allow a proceeding to be held on the matter. As indicated in section 4.2 of DiversityCanada/NPF's Reply Comments in the Part I Application, the Commission retains the discretion to not allow a proceeding on a Part I Application where it decides that the application does not disclose a *prima facie* case; and has exercised this discretion in recent times.⁷

44) Given the content of the Part I Application (which demonstrates that a provincial Court of Appeal considered that a nearly identical administrative decision required reversal), and given that the Commission did not exercise its discretion to close the file, DiversityCanada/NPF submit that the facts and circumstances do not support Telus' claim that DiversityCanada/NPF acted irresponsibly by filing a Part I Application that has no basis.⁸

7 Part I application by the Public Interest Advocacy Centre to review and vary Telecom Decision CRTC 2014-349; and Part I application by Bell Aliant Regional Communications regarding In-Call Location Update

8 At paragraph 12 of its Answer, Telus sought to argue that the fact that no other consumer group participated in the substantive proceeding somehow proved that Telecom Order 2014-220 had no implications for the Commission's costs awards procedure. As small organizations with scarce resources, DiversityCanada/NPF are aware that consumer interest groups do not have the capability to participate in every proceeding that may be of concern. DiversityCanada/NPF respectfully submit that it is neither reasonable nor logical to conclude, as Telus does, that the non-participation by other

45) Finally, DiversityCanada/NPF note that although not mentioned under the heading “DCF’s Review and Vary Application Does Not Constitute Responsible Participation”, the notion of “abuse of process” appears four times in Telus’ Answer:

“It is TELUS’ belief that the filing of R&V2 and the subsequent request for costs of such a flawed application constitute an abuse of process.” (para. 4)

“TELUS recognizes the benefit to consumers and citizens that the current process provides and it certainly recognizes its duty to pay costs to parties where they participate responsibly. But it is clear to TELUS that this is not such an instance and that DCF is attempting to abuse the costs claim process.” (para. 7)

“Given that DCF has filed an invalid application seeking review and variance when the Commission has been completely transparent as to why the original costs claim was denied, TELUS is of the opinion that DCF’s filing of the current R&V2 has approached the standard where the Commission should automatically deny costs to DCF. For DCF to seek costs where the preceding applications have been serially dismissed by the Commission is an abuse of process.” (para. 10)

“Filing a review and vary of a discretionary decision absent a clear legal error is futile at best and an abuse of process at worst.” (para. 15)

46) Telus, it would appear, claims abuse of process on the following grounds: i) in its opinion the Part I Application to review and vary Telecom Order 2014-220 is without basis; and ii) the initial Part I Application to review and vary the Wireless Code and the initial costs application were dismissed.

47) Apart from making the broad claims of abuse of process, Telus provided neither arguments nor evidence to substantiate this accusation, nor did it explain what form of abuse it alleges.

48) One form of abuse of process involves initiating a proceeding where there is no hope of success (for ulterior motives, such as harassing other parties).

49) However, DiversityCanada/NPF submit that it cannot be said that DiversityCanada/NPF's Part I Application was initiated without any reasonable hope of success, given precedents reversing administrative decisions that did not accord with the intent for which the discretion was exercised as DiversityCanada/NPF assert is the case with Telecom Order 2014-220; and given the decision in the *Kelly* case already discussed.

50) DiversityCanada/NPF submit that in alleging abuse of process, Telus has not met its burden to prove that DiversityCanada/NPF had disreputable ulterior motives, or that they did other than bring forward a Part I Application in good faith.

consumer groups demonstrates that “there is no risk to the legitimacy of the costs claims process arising out of Order 2014-220”. The fact is that, while it did not participate in the proceeding to review Telecom Order 2014-220, PIAC, the most senior and most active consumer group before the Commission, did directly address the central ground on which the Part I Application is based. PIAC did so in a costs claim submitted shortly after the Order was issued (as indicated in DiversityCanada/NPF's October 14, 2014 Application for costs). To reiterate, Telecom Order 2014-220 was issued on May 08, 2014. On July 16, 2014, PIAC submitted its claim for costs in the **8678-T66-201402891** proceeding, including the following statement, which, to DiversityCanada/NPF's knowledge had not previously appeared in a costs application: “Whether or not the Commission ultimately agrees with our positions in this proceeding, we submit that we provided helpful comments.”

51) Another form of abuse of process involves attempting to re-litigate a matter. Re-litigating is not the same as appealing a matter. An attempt to re-litigate involves using the same evidence and arguments to address issues that have been finally decided. In an appeal, the appellant argues that in considering the evidence and arguments, the decision-maker misapprehended the facts and/or made an error of law, rendering the decision reversible.

52) DiversityCanada/NPF note that, while related, their Part I Application to review and vary Section J of the Wireless Code and their Part I Application to review and vary Telecom Order 2014-220 deal with distinct subject matter (with some overlap, which DiversityCanada/NPF took into account, stating that the material was not intended for determination by the Commission and, instead, was intended to simply be placed on the public record).

53) Furthermore, DiversityCanada/NPF note that both Part I Applications were brought on grounds that the decisions should be reviewed because of errors of fact and/or errors of law.

54) In other words, all of DiversityCanada/NPF's participation before the Commission has been in the normal course of consumers accessing the Commission's procedures to assert their rights, including their right to redress.

55) DiversityCanada/NPF submit, therefore, that Telus has failed to substantiate the abuse of process that it alleged.

Conclusion

56) DiversityCanada/NPF submit that, contrary to the claims of the costs respondents, they have satisfied all criteria for an award of costs in that they represented a group or a class of subscribers that has an interest in the outcome of the proceeding; they assisted the Commission in developing a better understanding of the matters that were considered; and they participated in a responsible way.

57) If you require any further information regarding this application for costs, please do not hesitate to reach me at 705 848 6194 or at the following email address:

telecom_policy@diversitycanada.org

Yours truly,

[original signed]

Raymond Kindiak
Legal Counsel

cc CWTA [by e-mail only]
TELUS Communications Company