Canadian Internet Policy and Public Interest Clinic
Clinique d'intérêt public et de politique d'internet du Canada

Tamir Israel
Staff Lawyer
(613) 562-5800 x2914
tisrael@cippic.ca

January 23, 2010

VIA FAX AND WEB-FILE

Mr. Robert A. Morin
Secretary General
Canadian Radio-Television and
Telecommunications Commission
Ottawa, ON., K1A 0N2

Dear Mr. Morin,

RE: Telecom Notice of Consultation CRTC 2009-716: Review of CRTC costs award practices and procedures

We respectfully ask that you accept this submission, comprising CIPPIC's initial comments to Telecom Notice of Consultation CRTC 2009-716. For greater certainty, this submission will be sent by E-Pass as well as by fax.

Please feel free to contact me if you have any questions with respect to this submission.

Yours Truly,

Tamir Israel
Staff Lawyer

Attachments

BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Submission to Telecom Notice of Consultation CRTC 2009-716: Review of CRTC costs award practices and procedures

Initial comments of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

January 22, 2010

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)
University of Ottawa – Faculty of Law
57 Louis Pasteur Street, ON., K1N 6N5
Tel: (613) 562-5800 ext. 2553
Fax: (613) 562-5417
www.cippic.ca

Table of Contents

I. Introduction

[1] On September 25, 2009, a Part VII application ("Application") requesting the Commission to review its costs awards practices, procedures and precedents was filed by Barrett Xplore (BXI), various Bell companies (Bell), Cogeco Cable, Northwestel, Rogers Communications, Saskatchewan Telecommunications (SaskTel), Shaw, Télébec, Société en commandite and TELUS (collectively the Applicants).[1] On November 23, 2009, the Commission issued Telecom Notice of Consultation CRTC 2009-716 in response to that Application, asking for comments on all aspects of its practices and procedures relating to the award and taxation of costs.[2] CIPPIC is writing to provide its response to the Application and to the Commission's request for comments.

[2] CIPPIC wishes to register its view that in light of the review of costs procedures conducted in 2007, it is not of the view that such a comprehensive review is necessary at this time. The Applicants have pointed to a number of reasons they believe the current process is flawed, each of which CIPPIC will address below. The impetus behind the Applicants' complaint, however, appears to be costs claims emerging from one, single proceeding – PN 2008-19.[3] The Applicants point to PN 2008-19 as an example that CRTC costs jurisprudence has devolved into a "free-for-all" of sorts that has led to excessive and burdensome costs awards. This one proceeding aside, CIPPIC sees no increase in Telecom costs award trends at all.

[3] With respect to the PN itself, in CIPPIC's view it would be a mistake to adopt more restrictive cost rules in response to this proceeding. As explained below, that particular proceeding raised a number of key and distinct issues that warranted the larger than usual amount of public interest attention and participation it attracted. While this participation was rigorous, it was no less than the proceeding itself demanded and the result of those efforts were

[1] Bell et. al., Part VII Application to request a review of the procedures for the awarding of costs, September 25, 2009.
[2] Telecom Notice of Consultation CRTC 2009-716.
[3] Telecom Public Notice CRTC 2008-19.

of great assistance to the Commission – both in the proceeding itself, and in future proceedings as it will continue to grapple with the issues first raised therein. That the total quantum of costs across all public interest parties in this proceeding was large does not, in and of itself, demonstrate that any of these participated in an undisciplined manner. Indeed, the Applicants have yet to point to any specific contribution made by CIPPIC or other respondents that was duplicative or less than helpful to the Commission. Given the novelty of the issues raised in that proceeding, as well as the breadth of economic, technical and legal questions involved and the seriousness of the matters at stake – the Internet is an essential element of Canadian society and many different public constituents depend on its open unimpeded operation – CIPPIC does not view this isolated proceeding as indicative of a need to overhaul CRTC costs procedures.

[4] With respect to some of the specific suggestions made by the Applicants, CIPPIC believes these will not further the Commission's objective of ensuring public interest issues are presented fully and rigorously in its proceedings. Many of these suggestions will merely compound existing inequities in resources already impeding the ability of public interest groups to match the financial and human resources the Applicants have at their disposal. The Applicants aim to put strict limitations on the extent to which public interest groups will be able to participate in proceedings – regardless of the merits of their resulting contributions. In addition, many of these suggestions will only be a further drain on resources as public interest groups, potential costs respondents, and the Commission alike will be preoccupied with litigating subsidiary points such as budgets or whether groups should be merged instead of focusing on substantive regulatory matters. In CIPPIC's view, many public interest groups may be unable to or deterred altogether from participating under such terms.

[5] Below, CIPPIC begins by highlighting the special circumstances raised by PN 2008-19 that justified a larger than standard amount of public interest attention and participation. It proceeds by assessing some of the concerns raised by the Applicants. It does not believe that

these are justified or that drastic changes to current procedures are necessary. Nonetheless, as the Commission is taking the time to reconsider these procedures, it does make a few suggestions for improving public interest participation as well as streamlining procedure processes. If the Commission feels it is necessary to make additional changes beyond these, it generally aware and supportive of PIAC's suggestions which are mostly based on the Ontario Energy Board.

II. Telecom Public Notice CRTC 2008-19

[6] The Applicants point to PN CRTC 2008-19 as indicative of several problems that have become endemic in CRTC costs procedures.[4] CIPPIC does not believe that the PN signifies a need to depart from existing CRTC costs procedures and precedents. In CIPPIC's view, both the effort and the amount of public interest attention attracted by PN 2008-19 was fully justified, and the resulting participation by public interest parties was responsible and productive. The proceeding raised novel multi-faceted public issues of great importance and complexity. In issuing the PN, the Commission essentially took the targeted issues that were cursorily addressed in TD CRTC 2008-108[5] and multiplied them exponentially, while at the same time expanding the proceeding to include *all* ISPs, with their varying network architectures, as well as all consumers (now including, for example, those with disabilities). Finally, it explicitly set a much higher evidentiary bar. Given this increase in complexity and scope and the importance of the issues at stake, public interest costs generated by the PN appear reasonable in relation to those generated by TD CRTC 2008-108.

[7] The Internet plays a central role in the lives of many Canadians. It is because of this centrality that any activity which threatens to degrade it in meaningful ways will impact on different cross-sections of Canadian society, including on those with disabilities, on the artists and innovators who use the Internet as a platform and the people who rely on them, and on

[4] Application, *supra* note 1 at para. 3.
[5] Telecom Decision CRTC 2008-108.

consumers in general. It is this broad impact that, in CIPPIC's view, prompted such earnest participation in these hearings by a number of public interest parties. The impact of what was occurring was simply far reaching. ARCH and CAD, for example, were alone in comprehensively addressing how the emerging evidence and complex issues raised in this proceeding can impact on those with disabilities.

[8] The proceedings themselves raised many novel economic, technical and legal issues that had yet to be addressed by the Commission in a comprehensive manner. There was as of yet no regulatory framework for traffic management, and it was unclear at the outset of the proceeding in what manner existing limitations in the *Telecommunications Act* would apply in this new context if at all. CIPPIC along with PIAC and other groups proposed a test based on section 1 of the Canadian *Charter* that has formed the basis of this new regulatory framework.

[9] In order to do so, it was necessary to gain a deeper understanding of the technologies in question as well as their impact. As the Applicants were the only repository of this information, it was also necessary to bring in experts so that this evidence could be tested and assessed in a meaningful way. CIPPIC notes that by its calculations, about 1/3 of its costs as well as those of all cost claimants generally in this proceeding covered expert fees. CIPPIC further points out that it would have found it impossible to participate in any meaningful way in this proceeding without this economic and technical expertise.

[10] Indeed, the Commission itself set a high evidentiary bar for this proceeding in its Telecom Decision CRTC 2008-108, where it noted the need for more evidence on a number of key economic and technical issues relating to traffic management.[6] In this respect, CIPPIC wishes to note that while the Applicants suggest it is improper for experienced counsel to recover costs for "legal research" and "familiarizing oneself with the topic of a proceeding",[7] this can hardly be the case in a proceeding raising such novel economic and technical issues. It is

[6] See Telecom Decision CRTC 2008-108 at paras. 33, 43 in particular, 45, 46, 56, 67, and especially 79.
[7] Application, *supra* note [xxx] at para. 28.

fairly commonplace for experienced trial lawyers to spend time familiarizing themselves with the factual elements raised by the topic of a new proceeding. Indeed, effective participation in most procedures will require some level of legal research as well, regardless of level of experience. This is especially the case in a proceeding such as the PN that required a new examination of the concepts of unjust discrimination and common carriage. But in CIPPIC's experience, it is difficult to participate effectively in *any* legal or regulatory proceeding raising new technical issues without conducting some background legal research, regardless of level of experience.

[11] In pursuing its mandate, with its focus on the intersection between law and technology, CIPPIC is often confronted with proceedings in which legal principles must be applied in novel ways to accommodate new technologies and the activities they facilitate. In our experience, this often requires a nuanced understanding of broad ranging technical and legal issues, often crossing many regulatory contexts. In proceedings such as the PN, where there has been a lack of transparency around practices and technologies, the synthesis of new technical evidence and, more so, the application of legal principles to that synthesis can be a time consuming process. In the PN, it was necessary to understand the nature of different DPI technologies, how it is used by various ISPs in Canada, competing views of how P2P traffic operates, the impact of various ISP throttling practices, global and Canadian trends in traffic growth, the amount and duration of actual congestion on a network, who actually causes this congestion, and many more factors, as well as the legal implications of all this.

[12] As this was the first time the Commission addressed these issues in such a comprehensive manner, CIPPIC does not find the costs incurred by public interest parties in this proceeding to have been in excess of what was necessary and reasonable in order to address the complex issues raised, nor that it was anything less than it should have been. The contributions of the various public interest parties had significant impact on the proceeding, were not duplicative, and contributed greatly to the Commission's understanding of the issues

before it.[8] In CIPPIC's view, those costs should not be viewed in light of this proceeding alone, as subsequent traffic management proceedings will be able to benefit from both the factual record produced herein and the legal regulatory framework for applying it.

[13] For these reasons, CIPPIC is of the opinion that the PN is not indicative of any need for the Commission to reconsider its costs jurisprudence.[9] CIPPIC has serious doubts as to whether less rigorous or multi-faceted public interest participation in this proceeding would have met the Commission's objective of receiving fully informed public interest participation in this proceeding.[10]

III. Applicants' concerns are unjustified

[14] CIPPIC does not think reliance on PN 2008-19 as an example of flaws in CRTC costs procedures to be valid. It additionally finds little merit in the specific substantive concerns raised by the Applicants. These can be summarized as such:

a.) Lack of clear criteria for entitlement to costs
b.) Lack of clear criteria for allocating costs among costs respondents; and
c.) Lack of clear incentives for public interest participants to act responsibly.[11]

The overall impact of these flaws is that, in the Applicants' opinion, there are no checks on who can participate in what proceeding and to what extent. Each of these concerns will be addressed below.

A. Lack of clear criteria for costs entitlement

[15] The Applicants argue that current CRTC participation criteria are not effectively addressing its objective of ensuring rigorous public interest participation in its proceedings,

[8] For more details, see generally: CIPPIC, *Reply to Costs Respondents' Response regarding CIPPIC's application for costs*, Telecom Public Notice CRTC 2008-19, October 5, 2009.
[9] Application, *supra* note 1 at para. 2.
[10] See *Bell Canada v. Consumers' Association of Canada,* [1986] 1 S.C.R. 190 (S.C.C.) per Le Dain, J., at para. 5.
[11] Application, *supra* note 1, generally.

particularly with respect to imprecise factors for determining when in-house counsel rates will be applied.[12]

[16] On this issue, CIPPIC notes that the CRTC criteria in place, those articulated in Telecom Costs Order CRTC 2008-11 are appropriate and well in line with the Supreme Court of Canada's recognition that public interest intervention in CRTC proceedings should be flexible so as to obviate the need for artificial counsel-client arrangements.[13] Higher in-house counsel rates are intended to reflect the added costs and liabilities taken by counsel as distinct from the client. The underlying assumption is that external counsel are justified in billing clients higher rates as these reflect those added costs and liabilities, and these are the factors the Commission considers in deciding whether to award external or in-house counsel rates.[14] The market rate for such services is set in the CRTC's *Guidelines for the Taxation of Costs* and these in turn are reflective of this added cost and liability that lawyers with external counsel arrangements undertake vis-à-vis their clients. Where such arrangements are not in place, public interest groups will typically accept in-house counsel rates.[15]

[17] While it is in the nature of public interest groups to have interests generally aligned with their clients, that criteria alone is not sufficient in and of itself to determine whether "a genuine consultant relationship exist[s]" as suggested by the Applicants.[16] More importantly, in that it will not properly reflect the added costs and liability that lawyers meeting the 2008-11 criteria undertake, adopting such criteria will diminish the ability of public interest groups to participate rigorously in regulatory matters, as they will be required to supplement time spent on such proceedings from other sources in order to fully account for costs and liabilities incurred in doing so. CIPPIC notes again that the Supreme Court has already expressly approved the types of

[12] *Ibid* at para. 26.
[13] *Bell, supra* note 10 at para. 19.
[14] Telecom Costs Order CRTC 2008-11.
[15] Telecom Costs Order CRTC 2008-5.
[16] Applicants, *supra* note 1 at para. 26, citing Telecom Costs Order CRTC 2008-3.

counsel arrangements at issue here as well as the long held Commission policy of fostering the "developing and maintaining of expertise in regulatory matters."[17]

[18] On a final note, while it was not raised directly in the Application, in recent costs proceedings regarding CIPPIC's participation in PN 2008-19, it was claimed that CIPPIC and its client CDM had a direct interest in the proceeding in question.[18] This was based on joint membership in the SaveOurNet.ca coalition, of which both CDM and CIPPIC are members, by some for-profit parties to the proceeding. CIPPIC wishes to reiterate that those for-profit members are not controlling members of the SON coalition.[19] They have joined it in support of its public interest objective of preserving an open internet for all Canadians, which they also may share. The fact that a few for-profit ISPs happen to support a public interest position does not, in CIPPIC's view, invalidate that position as one in the public interest.[20]

Suggested Improvements

[19] If the Commission is to explore changes to its criteria for costs entitlement, CIPPIC would suggest that instead of limiting these, the Commission's objective in costs would be better met by expanding them so as to cover public interest participants currently excluded.

[20] Specifically, as noted in the Commission's *Guidelines for the Taxation of Costs*:

> costs generally will not be awarded for time spent by the applicant's support staff, administrative staff, officers and directors, acting as such, in connection with its participation in the proceeding.[21]

While this issue does not impact on CIPPIC's capacity to participate in CRTC proceedings directly, it does impact on non-profit organizations such as the Campaign for Democratic Media. In Public Notice CRTC 2008-19, for example, CDM expended significant effort preparing for and participating in the proceeding. While, as is commission practice, CIPPIC requested

---

[17] See, for example, CIPPIC, *Reply to Costs*, TPN CRTC 2008-19, *supra* note 8 at para. 42 and *Bell, supra* note 10 at para. 15 in particular.
[18] Barrett Xplore, *Response to Costs Applications in PN 2008-19*, September 14, 2009 at para. 7, TELUS, *Response to Costs Applications in PN 2008-19*, September 25, 2009 at para. 9. This issue is raised indirectly in the Application: supra note 1 at para.
[19] See CIPPIC, *Reply to Costs*, PN 2008-19, *supra* note 17 at para. 37 and following.
[20] See also CIPPIC, *Reply to Costs*, PN 2008-19, *supra* note 17 at para. 37 and following.
[21] CRTC, *Guidelines for the Taxation of Costs*, as revised April 24, 2007, at para. 8.

compensation for travel expenses incurred by CDM directly, the time of its officers was not claimed. Organizations such as CDM play a vital role in the telecommunications regulatory environment. In this proceeding specifically, Mr. Steve Anderson of CDM testified before the Commission on grassroots views held by Canadian supporters of his organization with respect to the traffic management practices of ISPs as well as the importance of an open internet to Canadians.

[21] In addition, CIPPIC requests that the Commission formalizes the current standard practice of awarding public interest costs in non-rate based hearings. This appears to be its intention by moving its costs rules from their current location, embedded in its rules and procedures for Part III telecom rate hearings, to their new proposed home in Part 4, Division 2.[22] However, CIPPIC would like additional clarification that public interest groups participating in other proceedings with a public interest component may claim costs as well. For example, in Telecom Regulatory Policy CRTC 2009-657, the CRTC established a new complaints-based adversarial process for assessing ISP traffic management practices under s. 27(2). CIPPIC wishes to clarify that public interest costs will apply to any participation otherwise in line with current rules and guidelines, and also in the public interest.

[22] Finally, CIPPIC is generally supportive of PIAC's requests to re-examine rates allocated to experts. It is essential for public interest groups to be able to attract expert witnesses, particularly as CRTC regulation becomes increasingly technical.

B. Lack of clear criteria for allocating costs among respondents

[23] In the past, the CRTC has been in the practice of reducing the number of potential costs respondents in order to alleviate the administrative burden that would arise from causing public interest groups from collecting from numerous respondents. The Applicants ask the

[22] Broadcast and Telecom Notice of Consultation CRTC 2009-602.

Commission to adopt new criteria for the number of respondents based solely on the quantum of costs involved (<$1000 = <3 respondents; $1,001-$10,000 = <6 respondents, etc.).[23]

[24] CIPPIC holds no strong views on this issue, but would like to make two points. First, in situations where costs are allocated by TOR, the Applicants' proposed solution does not appear to be workable except in exceptional circumstances. The unfortunate reality in Canada is that a small number of ISPs control an immense proportion of telecommunications market share. The result of this is that, in many costs awards, the proportion of costs to be borne by these other parties would be negligible. It would be inefficient in CIPPIC's view to force organizations representing a small proportion of market share to pay costs – not least because the alleviating effects these additional respondents shall have on existing respondents will also be negligible.

[25] Second, in CIPPIC's view, given the objective of costs awards in CRTC proceedings (ensuring rigorous public interest participation), it does not seem appropriate to impose costs burdens on individual respondents in cases where such costs would be unduly restrictive and where other parties are better able to carry those costs. For this reason, TOR apportionment appears a logical and equitable method of appropriating costs in the majority of situations, as it will reflect both the relative benefit gained by the respondent in having a functioning regulatory system in place and the capacity of that party to carry those resulting costs.

C. Lack of clear incentives for public interest parties to act responsibly

[26] The Applicants claim there is a lack of clear incentives for parties to act responsibly and in a disciplined manner.[24] CIPPIC disputes this. There are a number of incentives for public interest parties to act responsibly. Speaking for CIPPIC, our decision to participate in regulatory proceedings is premised on the importance of the issues raised to our public interest mandate and our ability to allocate the hefty financial and time resources such proceedings require. The unfortunate reality is that there is no shortage of pressing public interest matters that fall within

[23] Application, *supra* note 1 at para. 31.
[24] *Ibid*.

the scope of our mandate. Assuming for the moment that the full extent of our participation in a regulatory proceeding will be compensated for through costs, that participation will still be tempered by competing priorities. Given the size of our organization, we simply do not have the human resources to expend more on a regulatory proceeding than we feel is necessary to achieve our public interest purpose therein. Fulfilling this objective in the *various* projects we undertake is our primary motivation. While lack of financial support may limit our capacity to undertake an important public interest issue we would wish to pursue, an overabundance of such support would not permit us to expend more effort on such a proceeding than we felt was necessary. In our view, public interest parties such as our own are inherently restrained in this manner from the "free-for-all situation" that the Applicants describe.[25]

[27] The CRTC's current costs procedures are well suited to complementing such inherent limitations. Where a substantive portion of a public interest party's submissions did not contribute to a better understanding of the issues before the Commission, were superficial or duplicative of other organizations, or where groups were ill-prepared, the Commission has not hesitated to reduce resulting costs awards, in accordance with its existing rules.[26]

[28] There is, then, no need for greater incentives to reduce costs. More to the point, the Applicants' suggestions would, in CIPPIC's view, be counter productive in reducing costs, and merely serve to divert energy and resources to subsidiary issues. For example, the Applicants propose that the Commission require public interest participants to prepare a budget prior to participating in a Telecom proceeding.[27] CIPPIC is uncertain how this requirement, culled from a different regulatory environment, would work within the procedural framework of the CRTC. For one, whereas in the Régie de l'Energie du Québec from which this practice is borrowed, it appears that all public interest parties must seek prior leave to intervene, this is not the case in

[25] Application, *supra* note 1 at para. 12.
[26] For a sample, see: Telecom Costs Order CRTC 92-7, Telecom Letter Decision CRTC 93-7, Telecom Costs Order CRTC 93-7, Telecom Costs Order CRTC 88-9, and Telecom Letter Decision 89-4.
[27] Application, *supra* note 1 at para. 21.

CRTC proceedings.[28] If the CRTC were to adopt budget requirements of this sort, it would have to readjust its entire process to allow for public interest groups to prepare budgets, submit them, and then to defend them when they are inevitably challenged by opposing parties.

[29] All such challenges, moreover, will occur in a factual vacuum, as neither the Commission, nor the parties will be able to gauge the proposed challenges against the actual complexity of the proceeding. Complexity and substantive contribution are not purely a function of the number of days scheduled for a hearing or pages in a submission, and these evolve over time, as proceedings progress. As noted above, PN 2008-19 served as a good example of this type of situation where complex issues required a greater degree of participation. In CIPPIC's view, it would be very difficult to assess this type of activity before entering a proceeding.

[30] For this reason, CIPPIC believes that the Applicants' suggested chart is unworkable as well. The Applicants suggest limiting preparation hours a priori on the basis of the projected length of proceedings. CIPPIC does not see how this could be workable on a general basis given the lack of consistency regarding preparation requirements across different CRTC proceedings. In addition, this approach would create additional administrative inefficiencies, as public interest parties will, on many occasions, be obliged to challenge such pre-established limitations before deciding to enter specific proceedings to ensure they are able to fully participate. This will only further delay CRTC functioning and burden everyone with additional costs on side issues not related to the substance of the actual proceedings themselves.

[31] Finally, CIPPIC finds this approach inherently inequitable as it would provide the Applicants or any other party adverse in interest to the public interest with a significant advantage over public interest parties. Many of the Applicants are already far better funded than CIPPIC and other similarly situated public interest parties. In addition, the Applicants have extensive in-house regulatory staff and support staff. The Applicants are free to calculate for

[28] *Ibid*., at para. 21, citing section 7 f the Régie Costs Guide: An interested party that is planning to submit a claim for costs to the Régie must attach a budget…to its application to intervene.

themselves the value of particular proceedings to them and how much of these human and financial resources they accordingly wish to invest. Public interest groups are to begin with inherently limited in their ability to match such resources. The suggested changes would hamper them further by eliminating their capacity to expend more than 24 hours in preparation for a three day hearing, for example.

[32] Also, while setting intervenor-specific limitations on participation may be appropriate, broadly speaking, in adversarial proceedings where such intervenors raise subsidiary public interest issues, that is *not* the objective of Telecom costs awards. In such proceedings, the interest that CIPPIC and similar parties present to the Commission is one that is central and necessary to its deliberations. Such issues are not subsidiary, but primary. To place further restrictions on the ability of these public interest groups to participate as fully as their well-funded and often numerous opponents would impede the Commission's ability to carry out its function.

[33] Similarly, the Applicants' suggestion that the CRTC adopt a policy to force public interest groups into joint submissions[29] appears unjustified, unfair, and likely to lead to more procedural delay as parties challenge such orders on a case by case basis. In addition, there appears to be no need for any such requirement as the Commission already has the capacity to limit costs awards where an unreasonable amount of duplication between similarly interested parties has occurred.

[34] On this point, CIPPIC would like the Commission to clarify that duplicative does *not* refer to duplication of issues, but to duplication of substance. For example, in Public Notice 2008-19, ARCH and CIPPIC may have addressed many of the same issues – indeed many of these issues were defined by the Commission itself in the PN. However our substantive responses on these issues would not be identical. The same applies to CIPPIC and PIAC submissions in

[29] Application, *supra* note 1 at para. 22.

such proceedings, as, indeed, it applies to those of the multiple Applicants. CIPPIC wishes to reiterate that in many proceedings, the Applicants themselves as well as those sharing similar interests to them will choose to provide individual responses. Many of these will address similar issues and will in fact request similar remedies, but do so in far different ways and employ different strategies.[30]

[35] The public interest is multi-faceted, and not easily bundled together. Where possible, public interest groups will and do collaborate, as was the case in PN 2008-19. In that proceeding, PIAC and CIPPIC, for example, coordinated by sharing technical and economic experts and by focusing their submissions on different aspects of the issues raised in the proceeding.[31] In light of time and resource constraints, the incentives are there for public interest groups to do so to the extent that it is possible. Forcing joinder of public interest groups where they do not deem it appropriate is also likely to increase the time and effort spent on issues subsidiary to the main proceeding as CIPPIC and others will in many cases feel obligated to challenge such actions. Also, it does not appear to CIPPIC that forcing disparate groups to make joint submissions will in fact limit costs, as the joint entity will still be required to address all facets of the issues before it.

[36] CIPPIC would additionally like to note that there are no available sources of public funding for participation in CRTC proceedings. Generally speaking, much of CIPPIC's funding and that of many other public interest groups is earmarked for specific activities. In CIPPIC's case, this often relates to its teaching mandate or to specific projects on specific issues. Funding from sources of this type cannot be allocated to regulatory hearings. CIPPIC relies on costs awards from the CRTC and from judicial proceedings as a means of justifying and funding activities of that type.

---

[30] Compare for example TELUS' participation in Public Notice 2008-19 with that of Bell. While both requested a free hand to manage traffic as they saw fit, they did so by quite different means.

[31] See CIPPIC, *Costs Reply*, TPN 2008-19, *supra* note 17 at para. 26 and following.

Suggested Improvements

[37] With that in mind, CIPPIC agrees that costs justification procedures could be streamlined further, while providing greater clarity as to processes for challenging costs claims. This would be in line with the CRTC's obligation under the Policy Direction to "continue to explore and implement new approaches for streamlining its processes."[32]

[38] The Applicants have requested that the Commission require costs claimants to justify in a comprehensive manner the ways in which their contributions have added to the Commission's understanding of the issues upon making their initial costs requests.[33] It is not certain what this would entail, but it appears to CIPPIC to be an inefficient and backwards approach to costs justification.

[39] Most public interest groups will feel that their submissions have been helpful to the Commission's understanding of the issues before it. Indeed, it is not clear why any public interest party would wish to make submissions that were not, in its view, so. To force public interest groups to line by line justifications of their entire submissions over the course of a proceeding appears to be inefficient. Typically, if a party takes issue with the quality of participation of a costs claimant, the onus is on that party to indicate which aspects of this participation are problematic. This is a far more efficient method of assessing the degree of contribution made by participants, as it will lead to discussions over those particular aspects of a public interest party's submissions that a cost respondent finds problematic as opposed to a lengthy one-sided defence of every aspect of those submissions. A similar approach should be formalized for assessing the extent to which costs claimants have participated in a responsible manner.

---

[32] Governor in Council, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, December 18, 2006, s. 1(c)(iv).
[33] Application, *supra* note 1 at para. 25.

[40] This presumption is analogous to that already formalized in the *Guidelines for Taxation of Costs*, which state that "[s]ubject to the respondent's right to comment thereon, and provided the applicant's claim is within these Guidelines, it will normally be accepted as presented."[34] CIPPIC asks that a similar presumption of compliance be adopted with respect to the existing s.44(1) criteria to participate responsibly and to contribute to a better understanding of the issues before the Commission.

[41] In addition to providing a more logical and streamlined process for assessing the validity of costs applications, this approach will perhaps provide guidance for costs respondents as well. Focusing on broad, general claims of undisciplined participation and non-specific suggestions that parties have duplicated submissions, for example, may not be helpful without a clear indication of where such duplication occurred and what specific portions of a cost claimant's submission failed to assist the Commission, in the respondent's view. With such specific guidance, which the Commission has provided in the past and can add to in the future,[35] CIPPIC is confident the current framework and incentives for responsible public interest participation can be adjusted if necessary on a case by case basis.

IV. Conclusion

[42] In conclusion, while CIPPIC sees no pressing need to overhaul CRTC costs procedures, it believes the suggestions it makes above would improve the capacity of public interests organizations to participate in telecommunications proceedings and ensure streamlined procedures for assessing the acceptability of costs claims.

END OF DOCUMENT

[34] Guidelines, *supra* note 21 at para. 5.
[35] See *supra* note 26.