

October 7, 2013

John Traversy
Secretary General
Canadian Radio-television and Telecommunications Commission
Les Terrasses de la Chaudière
1 Promenade du Portage
Gatineau, Québec J8X 4B1

Dear Mr. Traversy,

Re: The DiversityCanada Foundation's Part I Application to review and vary Section J of Telecom Regulatory Policy CRTC 2013-271

1. The Canadian Wireless Telecommunications Association (CWTA) is the recognized authority on wireless issues, developments and trends in Canada. It represents cellular, PCS, messaging, mobile radio, fixed wireless and mobile satellite carriers as well as companies that develop and produce products and services for the industry, including handset and equipment manufacturers, content and application creators and business-to-business service providers. CWTA is pleased to file its comments with respect to the above-noted review and vary application.
2. In this submission, CWTA sets out its response to DiversityCanada's Part 1 application to review and vary section J of the Wireless Code of Conduct. Specifically, CWTA respectfully submits that this application should be rejected without costs awarded to the applicant, because:
 - i. The Commission reasonably explains the resulting policy ruling on pre-paid expiry dates;
 - ii. The Commission's decision is based on clear and sufficient evidence;
 - iii. The Commission was not required to consider the issue of unjust enrichment because it was outside of the scope of the proceeding; and,
 - iv. DiversityCanada does not meet the criteria for cost awards with respect to this application.
3. In its Application dated 3 September 2013, DiversityCanada Foundation, on its own behalf, and on behalf of the National Pensioners and Senior Citizens Federation (DiversityCanada), makes multiple claims contending the Commission erred in law in arriving at its decision on Section J of the Wireless Code of Conduct (Expiration of prepaid cards). Specifically, DiversityCanada makes the following three claims in support of its Application: (i) the Commission failed to provide adequate reasons for rejecting DiversityCanada's call for a ban on pre-paid card expiry dates; (ii) the CRTC decision is based on no evidence or ignored evidence; and (iii) the Commission failed to consider DiversityCanada's unjust enrichment argument.

4. It is evident from the record of the proceeding that each of these arguments is incorrect. The Commission did not commit an error of law in rejecting calls for a ban on pre-paid service expiry dates and, as such, should dismiss DiversityCanada's Application in its entirety.

The Commission reasonably explains the resulting policy ruling on pre-paid expiry dates

5. DiversityCanada's primary ground in support of its Application is the Commission's purported failure to provide sufficient reasons for not adopting DiversityCanada's proposal to ban Wireless Service Providers (WSPs) from applying expiry dates to pre-paid service payments.
6. The Supreme Court of Canada articulated the standard for reviewing the adequacy of reasons in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*¹ as follows:

Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."

In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome. [emphasis added]

7. The Commission's review of the Wireless Code proceeding record and its reasons for its decisions in respect of pre-paid wireless services demonstrate that the Commission's reasons satisfy the *Newfoundland and Labrador Nurses* threshold.
8. The Supreme Court's ruling in *Newfoundland and Labrador Nurses* further states:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusions. ... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decisions and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.² [emphasis added]

¹ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708 at para. 14 (Newfoundland and Labrador Nurses decision)

² *Newfoundland and Labrador Nurses*, *ibid*, para 16.

9. In paragraph 347 of TRP 2013-271, the Commission identified the two key pre-paid service issues as (1) whether consumers should be able to carry forward pre-paid balances if unused; and (2) whether late “top ups” should be permitted.³
10. The Commission ruled that WSPs are required to provide a 7-day period beyond the expiry date of pre-paid service as a grace period in which consumers can top up and maintain their accounts. Its reasons for this 7 day grace period are: (i) it would not be an onerous period for WSPs; (ii) it provides more clarity; (iii) it balances consumer interests; and (iv) it provides increased flexibility.
11. Paragraph 349 sets out the Commission’s reasons for rejecting Diversity Canada’s call to ban pre-paid expiry dates. These reasons are clear and transparent:

In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service. The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate.
12. This is a clear finding of fact, that all wireless services including pre-paid services provide on-going access to the WSPs’ networks while a customer’s account is open and valid. Banning expiry dates, as proposed by DiversityCanada was found to be inappropriate in light of this fact.
13. Not only do the Commission’s reasons enable the reader to understand why calls for a ban on expiry dates were rejected, but its conclusion is reasonable when understood in the context of the Commission’s findings on this point. For all of these reasons, DiversityCanada’s claims regarding the lack of sufficient reasons are incorrect and should be rejected by the Commission.

The Commission’s decision is based on clear evidence

14. DiversityCanada’s second claim is that the Commission made its decision not to adopt pre-paid expiry dates without any basis in the underlying evidence or by ignoring evidence. Neither claim is correct.
15. For example, DiversityCanada claims at paragraph 46 of its Application that the WSPs put no evidence before the Commission to support the proposition that top-ups constitute payment for network access for specified services for a limited time period. The record directly contradicts this claim. Bell specifically addressed this point in its 15 March 2013 Reply Comments, as follows (at para 27):

One intervener argued that consumers who top up their pay-per-use pre-paid accounts have not contractually consented to time-limited top ups and account balances. This is incorrect. As one example, Virgin Mobile's terms of use clearly advise about top up expiry:

“You must maintain a positive balance of funds in your Virgin Mobile account in order to use the Services. To add credit to your account you must "Top Up." If your account carries a zero dollar (\$0) credit balance for more than one hundred and twenty (120) consecutive days from

³ Paragraphs 348 to 350 are the penultimate paragraphs in terms of providing the rationale for the Commission’s rulings on these issues.

the expiry of your last "Top Up" it will be closed and your telephone number will be reassigned. All Top Ups ... have specified active periods and an expiry date. The active period starts on the date you place the Top Up on your account. Any Top Up balance left on your account after the expiry date is forfeited and non-refundable. If you Top Up your account before your existing credit expires or is used up, then your existing credit is added to the New Top Up value and the active period of the earlier Top Up is extended so that the later expiry date of the two Top Ups is valid for the entire amount."

From a customer information deficit standpoint, section D1.3 will fully address the concerns raised about pre-paid service by requiring the WSP to inform consumers at the time they enter their contract about the applicable pre-paid usage period and conditions applicable to their pre-paid balance and, by virtue of the application of section D1.2 to pre-paid, do so in plain language. No future regulation of pre-paid balances is required.

16. Additionally, a discussion of the time-limited nature of top ups is found in the service agreement filed by NorthernTel:⁴

"If you use an Automatic Top-Up Program to top up your prepaid account, funds may take up to 48 hours to be deposited in your account. The top-up amount will include an amount to clear any negative balance. Value deposited into your prepaid account is available as prepaid credits for your Service and such credits are non-refundable, non-transferable, and will expire after a specified time period."⁵

17. The foregoing review completely refutes DiversityCanada's that the Commission's decision is unsupported by evidence.

The Commission was not required to consider the issue of unjust enrichment because it was outside of the scope of the proceeding

18. DiversityCanada's third argument is that the Commission committed an error of law by failing to consider DiversityCanada's unjust enrichment claims. This assertion is also incorrect. Furthermore, this issue was not among the issues on which the Commission requested comments. As the Commission stated in Telecom Notice of Consultation 2012-557, the purpose of the Wireless Code consultation was to determine the content of a wireless code, to whom it should apply, how it should be enforced, and how to assess the Code's effectiveness. As such, the issue of unjust enrichment was outside the scope of the proceeding.
19. In any event, CWTA denies that the practice of retaining balances from consumer accounts when they are not topped up is a case of unjust enrichment.

DiversityCanada's request for a cost award should be denied

20. DiversityCanada has submitted that the Commission "Grant DiversityCanada's reasonable costs related to this application." As this request does not follow the Commission's established processes for the awarding of either interim or final costs, as set out in sections 60-69 of the CRTC Rules of Practice and Procedure, and

⁴ See Responses - KMTS, NorthernTel and Télébec – Telebec-CRTC-29Nov12-3-ATT.pdf, paragraph 12.

⁵ See also Rogers 10 December Response at paragraph 49; Telus 18 December Reply at paragraph 27; CWTA 1 March Final Submission at paragraphs 23-26; Telus 1 March Final Submission at paragraphs 8, 53-58; MTS 15 March Final Reply at paragraph 18.

contains none of the supporting documentation that must accompany such a request, the CWTA submits that this request cannot be entertained.

21. Further, CWTA opposes any granting of costs to DiversityCanada with respect to this application on the grounds that it does not meet the criteria for cost awards. Specifically, the application does not “assist the Commission in developing a better understanding of the matters to be considered.”⁶ The very basis of DiversityCanada’s application is to revisit matters on which the Commission has already demonstrated a clear understanding. Granting costs for an attempt to re-open decisions that DiversityCanada does not agree with would be tantamount to rewarding meritless review and vary applications.

Conclusion

22. In conclusion, CWTA respectfully submits that this application should be rejected without costs awarded to the applicant, because:
- i. The Commission reasonably explains the resulting policy ruling on pre-paid expiry dates;
 - ii. The Commission’s decision is based on clear evidence that was before it;
 - iii. The Commission was not required to consider the issue of unjust enrichment because it was outside of the scope of the proceeding; and,
 - iv. DiversityCanada does not meet the criteria for cost awards with respect to this application.

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⁶ Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, SOR 2010/277, Section 61(1)(a)(ii).