

**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION
IN THE MATTER OF AN APPLICATION BY
THE DIVERSITYCANADA FOUNDATION
AND
THE NATIONAL PENSIONERS FEDERATION
(APPLICANTS)**

**PURSUANT TO PART I
OF THE CRTC RULES OF PRACTICE AND PROCEDURE
AND SECTIONS 24, 27, 47, 56 AND 62
OF THE *TELECOMMUNICATIONS ACT***

**TO REVIEW AND VARY
TELECOM DECISION CRTC 2015-211**

**(The DiversityCanada Foundation and
the National Pensioners Federation -
Application seeking relief for
wireless customers affected by
TELUS Communications Company's
Large Prepaid Balance Policy)**

17 AUGUST 2015

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Nature of the Application

1. The DiversityCanada Foundation (“DiversityCanada”) and the National Pensioners Federation (“NPF”) file this Application pursuant to Section 62 of the *Telecommunications Act*, S.C. 1993, c.38 (“the Act”) and under Part I of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) to review and vary Telecom Decision CRTC 2015-211 (“the Decision”).
2. DiversityCanada/NPF submit that the Commission erred in law and in fact in finding that Telus was entitled to change terms of the agreement under which it provided pay-per-use services to consumers; that Telus did not subject consumers to duress; and that Telus did not unjustly discriminate against its customers when it made it mandatory that they acquire services under monthly plans after October 20, 2013.
3. In particular, DiversityCanada/NPF submit that the Commission:
 - i) made an erroneous finding of fact that Telus' terms of service entitled it to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans;
 - ii) failed to apply the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change;
 - iii) failed to apply the proper test to determine whether there was duress;
 - iv) failed to provide reasons for its determination that Telus did not subject consumers to unjust discrimination and, therefore, breached its duty of procedural fairness; and
 - v) came to a decision that was contrary to the policy objectives of the *Telecommunications Act*.
4. DiversityCanada/NPF therefore respectfully submit that there is substantial doubt as to the correctness of the Decision, and request that the Commission vary the Decision so as to provide the relief requested in the original Part I Application, namely, order Telus to:
 - i) refund, with interest, all sums deducted for 30-day rate plans or 30-day add-ons under this policy from all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013;
 - ii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that the Large Prepaid Balance policy does not automatically apply to sums which were in their account prior to the introduction of the policy;
 - iii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that the Large prepaid Balance policy applies to sums that accumulate after

October 20, 2013, and that if their total balance (sums accumulated before October 20, 2013, plus sums accumulated after October 20, 2013) exceeds \$300, they may choose to draw down the balance by acquiring a 30-day rate plan or a 30-day-add-on under the Large Prepaid Balance policy.

The Facts

Pay-per-use agreements and monthly plans

5. TELUS Communications Company (“Telus”) offers prepaid wireless services which enable consumers to pay certain sums in advance in order use services such as voice calls, text messaging, picture messaging, video messaging, and web browsing.
6. Telus offers two entirely distinct contractual agreements that allow consumers to prepay for wireless services. One is the pay-per-use arrangement and the other is the monthly plan.
7. Under a pay-per-use agreement, customers acquire so-called “top-ups” which allow them to place funds into their prepaid wireless accounts. Pay-per-use customers have full discretion over which services they use and the volume of each service they use. By drawing on the balance in their prepaid accounts, prepaid wireless, pay-per-use customers pay for each service *as and when* they use a service.
8. Consequently, a customer who has no need to make any calls, send any messages, or use any data in a given month can choose to not to use any of these services. If the customer also does not receive any calls or messages, the customer will not have incurred any cost for the use of wireless services for that month.¹
9. Conversely, under a monthly plan, Telus designates a suite of services that are available to its prepaid monthly plan customers within a given month. With monthly plans, Telus determines which services would be available and what volume of each service would be available to the customers who pay a predetermined fee for the allowed usage.
10. Monthly plan customers pay the fee for the suite of services even if they do not actually make use of the range or volume of services allowed under their monthly plan.

¹ Under the pay-per-use payment arrangement, Telus contracts with consumers to leave the balance of the funds in their accounts intact and available for the customers' use for a period of time that is determined by the value of a top-up. For example, Telus contracts to allow consumers to use a top-up of \$15 on a pay-per-use basis for 30 days after it is activated.

If consumers make a further top-up before the end of the designated period, the balance in the account is carried over to the new service period created as a result of the activation of the new top-up. However, if the consumer does not make any further top-up, Telus seizes the entire balance in the account and claims the funds “expired”.

Telus' change of policy making it mandatory that pay-per-use customers with balances over \$300 subscribe to monthly plans

11. As of October 20, 2013, Telus introduced a policy making it mandatory for prepaid customers with a balance of \$300 or more to subscribe to a 30-day rate plan or a 30-day add-on. For pay-per-use customers thus affected, Telus also removed the requirement that top-ups be acquired to avoid balance “expiry”.

12. The policy, included as Appendix A, says in part:

If you have a balance of \$300 or more ***you are required*** to have a 30-day rate plan or add-on on your account. If you don't already have a 30-day rate plan or add-on, ***we will automatically add*** our least expensive voice and messaging plan – Talk + Messaging 10 – to your account when you reach a balance of \$300 or more. For just \$10 per month, it gives you 50 minutes of local talk time and 50 Canadian text messages - a 75% discount on our pay-per-use rates. So you can use your phone more often with greater cost certainty. You can stop topping up and the \$10 will be deducted from your account balance every 30 days.

As long as you have a 30-day rate plan (like Talk + Messaging 10) or a 30-day add-on on your account, you will no longer need to top up. The rate plan on your account will ensure that your remaining balance does not expire. You can use your existing balance to cover the cost of the monthly rate plan. This means that customers who have the Talk + Messaging 10 plan or any other 30-day rate plan added to their account no longer need to top-up until their balance reaches \$0. [Emphasis added]

13. In a footnote in the notice about the new policy, Telus reminds customers that “TELUS Prepaid balances are non-refundable as per the Service Terms.”

14. Under this policy, therefore, Telus switches the agreements of pay-per-use customers to monthly plans. Short of ending their relationship with Telus and thereby losing their balance of over \$300, pay-per-use customers have no escape from this fate, even if they have no need to make or receive 50 minutes worth of local calls or send or receive 50 Canadian text messages per month.

Telus' terms of service

15. Prepaid wireless services are provided under standard form agreements. Telus' terms of service spell out the rights and obligations of the company and of its customers.

16. Below is the section of Telus' standard mobility service terms concerning prepaid services. .

17.

- ***Rates for prepaid service may change without notice.***
- Prepaid service credits are valid for a fixed period of time from the day they are activated (thirty days unless another period of time is indicated on your prepaid card or receipt).
- Unused credits for pay-per-use services will carry over if you top up your account with additional credits or purchase a rate plan or add on within seven days after the end of the

service period. For prepaid rate plans or add-ons, any included minutes, messages or data will not carry over.

- If the credits on your prepaid account are \$300 or more, and you do not subscribe to a thirty day rate plan, our least expensive thirty day rate plan that includes voice and messaging services will automatically be added to your account.
- Prepaid service credits are non-refundable. After ninety days with a zero balance, your account will be automatically deactivated. [Emphasis added]

18. The fourth bullet contains the terms which introduced the new stipulation making it mandatory that customers acquire monthly plans.
19. As the first bullet makes clear, under the terms of service, Telus was entitled to make changes to one thing and one thing only without notice: *the rates* at which customers would be charged for wireless services.

The Wireless Code

20. Following an online consultation, a public hearing, and further written submissions, on June 3, 2013, the Commission issued Telecom Regulatory Policy CRTC 2013-271, which introduced the Wireless Code.
21. DiversityCanada participated in the proceeding and requested that the Commission prohibit the practice whereby wireless services providers apply expiry dates to the funds in the accounts of prepaid wireless consumers. The Commission chose not to ban this practice, and, instead, required wireless services providers to provide consumers with a seven-day grace period to top up, in Section J of the Wireless Code.
22. In Section D 1 of the Wireless Code, the Commission included clauses to regulate material changes to consumer contracts. However, the Commission omitted prepaid consumers from this section of the Wireless Code.
23. The text of Section D 1 is as follows:

D. Changes to contracts and related documents

1. Changes to key contract terms and conditions

(i) A service provider must not change the key contract terms and conditions of a postpaid wireless contract during the commitment period without the customer's informed and express consent.

(ii) When a service provider notifies a customer that it intends to change a key contract term or condition during the commitment period, the customer may refuse the change.

(iii) As an exception, a service provider may only change a key contract term or condition during the commitment period without the customer's express consent if it clearly benefits the customer by either

- a. reducing the rate for a single service; or
- b. increasing the customer's usage allowance for a single service.

The Part I Application

24. On July 17, 2014, DiversityCanada/NPF submitted a Part I Application regarding Telus' policy of forcing prepaid wireless, pay-per-use customers to acquire monthly subscriptions.

25. The Application was filed on the following grounds:

- a) Telus breached the basic contract principle whereby the consent of the contracting party is required in order to make a material change to a contract;
- b) Telus abused its unequal bargaining power and placed prepaid wireless, pay-per-use customers under duress, thus rendering any such-formed contract invalid;
- c) The duress persists, and allows no reasonable opportunity for consumers to annul the contracts for 30-day rate plans or 30-day add-ons, thus rendering any such contract void;
- d) Telus' policy contravenes s. 27(1) of the *Telecommunications Act*;
- e) Telus' policy contravenes s. 27(2) of the *Act*;
- f) It is not in the public interest to allow a carrier to unilaterally change an agreement with consumers or to place consumers under duress and retain the profits from so-doing.

26. The Application included consumer complaints, directly to Telus and indirectly in Internet postings, protesting the changes introduced by the new policy.

The Answer

27. In their Answer of September 05, 2014, Telus argued that all agreements for prepaid wireless services are extinguished on the purported expiry date of the most recent top-up, and therefore, on October 20, 2013, there was no existing contract that was altered by Telus' new policy.

28. Telus also sought to characterize the policy as one that merely introduces the additional option of allowing prepaid wireless, pay-per-use consumers to draw down their balance by means of a monthly subscription.

29. In the Answer, Telus also argued that it was entitled to make the change in question based on the clause in the terms of service which states: “Rates for prepaid service may change without notice.”
30. Telus' Answer included the argument that duress had not been proved since it claimed the circumstances did not meet a “two-pronged test”: a threat of economic harm that could constitute illegitimate pressure; and all other options being “impractical to a high degree”.
31. Additionally, Telus noted that prepaid wireless services are offered in a forborne environment, and argued that its prices for such services, and the terms and conditions it offers with those services, are just and reasonable and not regulated by the Commission under section 27(1) of the *Telecommunications Act*. As such, Telus, further argued, its Large Prepaid Balance policy, being a forborne term of a prepaid wireless services plan is, by definition, just and reasonable.
32. Finally, in its Answer, Telus argued that there was no undue preference or undue disadvantage as Telus treated all prepaid wireless customers equally.

The Reply

33. In the Reply, DiversityCanada/NPF submitted that Telus' claim that there was no existing contract was invalid because, i) only the value of the current top-up constitutes the consumer's consideration for a new agreement for service and can be governed by new terms of service; and, ii) the accumulated balance is carried over, and when this happens, the contractual terms which existed at the time the previous top-ups were acquired remain intact.
34. DiversityCanada/NPF submitted that as long as Telus held consumers funds that were handed over under the original agreement, Telus was obligated to render the services agreed to, under the conditions originally agreed to, or refund those sums.
35. Furthermore, in the Reply, DiversityCanada/NPF refuted Telus' characterization of the policy as merely offering consumers the additional option of drawing down their balance through monthly subscriptions by pointing to the fact that this was neither optional nor additional. Instead, drawing down the balance through a monthly subscription was a mandatory requirement which replaced the consumer's ability to continue topping up and paying on a pay-per-use basis.
36. On the issue of what the terms of service entitled Telus to alter, DiversityCanada/NPF submitted in the Reply that there was no contractual term entitling Telus to change the nature of the agreement from one whereby services are acquired on a pay-per-use basis to one whereby customers acquire service through monthly subscriptions.
37. DiversityCanada/NPF submitted that Telus' entitlement to change rates is no proof that it is similarly entitled to change the fundamental nature of the prepaid wireless, pay-per-use

agreement.

38. Further, in the Reply, DiversityCanada/NPF submitted that Telus failed to present the correct test for duress. DiversityCanada/NPF submitted that the proper test for duress had been brought to the Commission's attention in the case law cited in the Part I Application.
39. DiversityCanada/NPF submitted that the present circumstances proved that there was duress: consumers were not allowed to refuse Telus' Large Prepaid Balance policy, they were *required* by the company to comply with the changes the policy introduced, therefore their conduct could not be said to be voluntary; and Telus had not shown that consumers had affirmed the changes introduced under the Large Prepaid Balance policy.
40. Additionally, DiversityCanada/NPF refuted Telus' argument that the Commission's long-standing policy of forbearing from regulating the wireless sector under section 27(1) precluded it from intervening. DiversityCanada/NPF submitted that as an administrative tribunal, the Commission is required to ensure its decisions are legal, reasonable and fair.
41. As such, DiversityCanada/NPF argued the Commission could and should use its broad powers under section 24 of the Act (to impose any condition on a carrier) to direct Telus to provide services under agreements that are valid, that do not subject consumers to duress, and that do not contain material changes to which consumers have not voluntarily agreed.
42. On the issue of undue preference or undue disadvantage, DiversityCanada/NPF submitted that Telus' statement that it treated all prepaid wireless customers equally was irrelevant, and reiterated that the undue preference or undue disadvantage was with respect to prepaid wireless, pay-per-use customers and Telus itself.
43. DiversityCanada/NPF submitted that there was undue and unreasonable disadvantage to consumers and undue and unreasonable preference to Telus with respect to the mandatory expending of sums and consequent profiting by Telus when consumers drew down their balances to pay for monthly subscriptions.
44. DiversityCanada/NPF further submitted that drawing down on balances placed consumers at an undue or unreasonable disadvantage by foreclosing on the opportunity for them to fully benefit from any favourable outcome of the appeal of the Commission's decision not to prohibit expiry dates on prepaid wireless account balances. Conversely, DiversityCanada/NPF argued, the policy confers on Telus the undue or unreasonable preference of escaping the full consequences of an outcome that may be favourable to consumers as it would have reduced its liability to consumers when the balances were drawn down.
45. In the Reply, DiversityCanada/NPF amended the relief requested. The amended version is presented in the section titled "Relief requested" in this present Part I Application to review and vary the Decision.

The Decision

46. On May 21, 2015, the Commission issued Telecom Decision CRTC 2015-211 (The DiversityCanada Foundation and the National Pensioners Federation - Application seeking relief for wireless customers affected by TELUS Communications Company's Large Prepaid Balance Policy). The Decision in its entirety is included as Appendix B, and relevant passages are quoted in the sections below.

Criteria for Review and Variance

47. In *Telecom Information Bulletin CRTC 2011-214, Revised guidelines for review and vary applications* (25 March 2011) the Commission restated its revised guidelines for review and vary applications under the new *CRTC Rules of Practice and Procedure*.
48. According to the revised Guidelines, the test for an application brought under s. 62 of the *Telecommunications Act* is:
[. . .] that there is substantial doubt as to the correctness of the original decision, for example due to
(i) an error in law or in fact;
(ii) a fundamental change in circumstances or facts since the decision;
(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.
49. DiversityCanada/NPF note that the Guidelines also state in para. 6 that: "there may be instances where [the Commission] will first decide whether a review is warranted – for example, where it considers there was a procedural error – and only then conduct a proceeding to determine whether to vary the decision."
50. DiversityCanada/NPF submit that there are no circumstances that should influence the Commission not to undertake this review and vary application and that it is in the public interest that this application go forward.
51. In this regard, DiversityCanada/NPF note the following statement in Telecom Order CRTC 2015-240:
14. The Commission reminds DiversityCanada that, in Telecom Order 2015-132, it considered that "DiversityCanada's initiation of multiple proceedings that essentially relate to the same issues has resulted in an unreasonable use of Commission resources." By submitting a third application on essentially the same issue, DiversityCanada has undermined its credibility and therefore impaired its ability to represent any group or class of subscribers." [Footnote marker omitted]
52. DiversityCanada/NPF respectfully submit that this Part I Application can not be said to be an application "essentially on the same issue" as any previous Part I Application initiated by DiversityCanada/NPF.

53. Moreover, DiversityCanada/NPF submit that DiversityCanada/NPF have not submitted three applications “on essentially the same issue”.
54. The following is a summary of the proceedings initiated before the Commission by DiversityCanada/NPF:

August 30, 2013 File#: 8662-D53-201312321

Part I Application to Review and Vary Section J of Telecom Regulatory Policy CRTC 2013-271

Submissions: The Commission erred in law and in fact in not providing reasons for rejecting the evidence and arguments presented by consumer interest groups during the proceeding to develop the Wireless Code, and in not properly considering the evidence and arguments in support of prohibiting the application of expiry dates to prepaid wireless balances. The errors raise substantial doubt as to the correctness of Section J of the Decision.

August 01, 2014 File#: 8662-D53-201407536

Part I Application to Review and Vary Telecom Order CRTC 2014-220

Submissions: There is substantial doubt as to the correctness of the Commission's Decision to deny costs on the grounds that it is contrary to the Commission's stated intention with respect to its costs award procedure; it is contrary to the Court's ruling concerning the costs awards procedure before an administrative tribunal similar to the Commission; and it is based on erroneous findings. (Evidence and arguments pertaining to the last ground were not intended for consideration by the Commission and were included solely for the purpose of being placed on the public record.)

July 17, 2014 File#: 8665-D53-201406877

Part I Application regarding Telus' policy of forcing prepaid wireless, pay-per-use customers to acquire monthly subscriptions

Submissions: Telus breached the basic contract principle whereby the consent of the contracting party is required in order to make a material change to a contract; Telus abused its unequal bargaining power and placed prepaid wireless, pay-per-use customers under duress, thus rendering any such-formed contract invalid; the duress persists, and allows no reasonable opportunity for consumers to annul the contracts for 30-day rate plans or 30-day add-ons, thus rendering any such contract void; Telus' policy contravenes s. 27(1) of the *Telecommunications Act* or should be regulated under s. 24 of the Act; and Telus' policy contravenes s. 27(2) of the Act. (Where discussion of prepaid wireless balance expiry appeared, it was tangential, and the practice of prepaid wireless balance expiry, in and of itself, did not form part of the grounds on which the Part I Application was brought.)

55. DiversityCanada/NPF submit that the one constant in all three Part I Applications is that DiversityCanada/NPF have represented the interests of prepaid wireless consumers.

56. Furthermore, DiversityCanada/NPF submit that, as can be seen from the above, each of the three Part I Applications concerns separate and distinct issues with respect to the rights of prepaid wireless consumers:
- 1) the validity of the decision to include Section J of the Wireless Code, which permits the application of expiry dates to prepaid wireless account balances;
 - 2) the validity of the Commission's decision to deny costs to DiversityCanada/NPF for their participation in the Part I proceeding on Section J of the Wireless Code;
 - 3) the validity of a change in policy implemented by Telus, making it mandatory that consumers with a balance of over \$300 switch from a pay-per-use payment arrangement to monthly plans.
57. Unlike the August 30, 2013 Part I Application, this present application is not concerned with the legitimacy of the practice whereby wireless service providers seize the balance in consumers' accounts on a so-called "expiry date".
58. Unlike the August 01, 2014 Part I Application, this present application is in no way concerned with costs award procedures of administrative tribunals.
59. And unlike all three previous applications, this present application is concerned with the validity of Telecom Decision CRTC 2015-211, and seeks a review and variance of the decision that resulted from the third of the above-mentioned Part I Applications.
60. DiversityCanada/NPF submit that this Part I Application is brought on legitimate grounds as s. 62 of the Act provides that parties who do not agree with the outcome of a procedure may apply to the Commission for a review and variance of a decision.
61. DiversityCanada/NPF respectfully submit, therefore, that in the public interest (as this matter involves the integrity of consumer contracts), and that based on principles of natural justice and due process, this Part I Application should go forward.

The Issues

62. DiversityCanada/NPF respectfully submit that the following are the issues to be determined in this Part I Application:

I) Did the Commission make an erroneous finding of fact that Telus' terms of service entitled it to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans?

II) Did the Commission fail to apply the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change?

III) Did the Commission fail to apply the proper test to determine whether there was duress?

IV) Did the Commission fail to provide reasons for its determination that Telus did not subject consumers to unjust discrimination and, did the Commission, therefore, breach its duty of procedural fairness?

V) Is the Decision contrary to the policy objectives of the *Telecommunications Act*?

Entitlement to change contractual terms

ISSUE I) *Did the Commission make an erroneous finding of fact that Telus' terms of service entitled it to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans?*

63. As noted above, the Commission's Guidelines state that a decision may be reviewed and varied if there is “substantial doubt as to the correctness of the original decision, for example due to (i) an error... in fact...”

64. Furthermore, the *Federal Courts Act*, R.S.C., 1985, c. F-7, (under which the Commission's decisions may be subject to judicial review) states that a decision may be declared invalid or unlawful if a tribunal “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”

65. DiversityCanada/NPF respectfully submit that the Commission based the Decision on an erroneous finding of fact that was not supported in the material before it.

66. At paragraph 16 of the Decision, the Commission stated:

TCC's introduction of the policy did not place affected customers under economic pressure. TCC's terms of service acknowledge the possibility of the WSP making changes to the terms of its prepaid contracts. Furthermore, TCC provided advance notice of the policy's introduction and only applied the policy to individual customers upon their first "top-up" after the 20 October 2013 introduction of the policy.
[Emphasis added]

67. The Decision, itself, provides no evidence to support this finding of fact.

68. DiversityCanada/NPF submit that a review of the record would demonstrate that *no evidence was presented by any party* to support this finding of fact by the Commission.

69. Moreover, DiversityCanada/NPF submit that the evidence on the record demonstrates the contrary: the terms of service presented by Telus' made it clear that the company was not entitled to make the changes that it did.

70. Whether the terms entitled Telus to change the nature of payment arrangement was a point of contention during the proceeding.

71. At paragraph 2 of its Answer in the Part I proceeding, Telus stated as follows (with the emphasis as found in the original, and the footnote removed):

The policy change was instituted by TELUS by way of an amendment to the TELUS standard mobility Service Terms. The specific addition to TELUS' wireless service terms is included in bullet 4 below, which bullets are part of the TELUS standard mobility Service Terms concerning prepaid services.

- Rates for prepaid service may change without notice.
- Prepaid service credits are valid for a fixed period of time from the day they are activated (thirty days unless another period of time is indicated on your prepaid card or receipt).
- Unused credits for pay-per-use services will carry over if you top up your account with additional credits or purchase a rate plan or add on within seven days after the end of the service period. For prepaid rate plans or add-ons, any included minutes, messages or data will not carry over.
- If the credits on your prepaid account are \$300 or more, and you do not subscribe to a thirty day rate plan, our least expensive thirty day rate plan that includes voice and messaging services will automatically be added to your account.
- Prepaid service credits are non-refundable. After ninety days with a zero balance, your account will be automatically deactivated. [Emphasis added]

72. Furthermore, at paragraphs 25 and 31 of its Answer, Telus referred to the first provision of the terms it quoted at paragraph 2 of its Answer as it sought to establish that it was entitled to change terms of the agreement for prepaid wireless services, including the essential nature of the agreement. Telus stated:

25. ...the customer can only purchase what is being offered by TELUS, and nothing obliges TELUS to maintain any prepaid offer in the marketplace. In fact, TELUS' prepaid wireless service terms deal with precisely this point because prepaid service rates are subject to change at any time.

31. Finally, if DCF's position that one prepaid contracts begins when a customer sets up a prepaid account and only ends when the customer closes the account were to be accepted by the Commission, then TELUS would be forbidden from ever making any changes to terms, conditions or prices for prepaid services and a customer. This is not consistent with either TELUS' mobility service terms, because rates are subject to change.... [Emphasis added]

73. In the Reply in the Part I proceeding, DiversityCanada/NPF disputed Telus' claims and submitted:

53. ... there is no contractual term in the agreement entitling Telus to change the nature of the agreement from one whereby services are acquired on a pay-per-use basis to one whereby the customer acquires service through monthly subscriptions.

54. DiversityCanada/NPF submit that Telus' entitlement to change rates is no proof that it is similarly entitled to change the nature of the prepaid wireless, pay-per-use agreement.

74. DiversityCanada/NPF submit that the Decision lacks transparency as it does not state which provision of Telus' terms the Commission found entitled the company to “[make] changes to the terms of its prepaid contracts”.

75. However, given DiversityCanada/NPF's assertion that there was no contractual term in the agreement entitling Telus to change the nature of the agreement, and given that Telus, itself, referred solely to the rate change provision, DiversityCanada/NPF submit that it is reasonable to conclude that the Commission could only have had the rate change provision in mind when it determined that Telus' terms entitled the company to “[make] changes to the terms of its prepaid contracts”.

76. DiversityCanada/NPF submit that it is factually incorrect to find that a clause which permits Telus to change the prices for wireless services entitled the company to change the nature of the payment arrangement under which consumers contracted to receive wireless services from one that was on a pay-per-use basis to one requiring the acquisition of monthly plans.

77. DiversityCanada/NPF submit that the changes introduced went far beyond an adjustment to the rates charged to consumers (which the terms permitted Telus to adjust without notice), and resulted in a complete overhaul of the business model under which consumers received services (which no provision of the terms entitled Telus to alter).

78. DiversityCanada/NPF submit that the Commission's finding that Telus' terms entitled the company to make this radical change to its contract was an erroneous finding of fact, contrary to the evidence before it.

79. Thus, DiversityCanada/NPF submit there is substantial doubt as to the correctness of the Decision, requiring it to be varied as requested.

The Test for the Requirement of Consent

ISSUE II) *Did the Commission fail to apply the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change?*

80. As noted above, the Commission's Guidelines state that a decision may be reviewed and varied if there is “substantial doubt as to the correctness of the original decision, for example due to (i) an error in law...”
81. DiversityCanada/NPF submit that the Commission made an error in law on the question of whether Telus had breached the basic contract principle of obtaining consent in order to make a material change to the agreement.
82. DiversityCanada/NPF submit that the Commission did not apply the proper test to come to a determination on this issue.
83. The Commission’s complete analysis and determinations on the issue were as follows:
10. The [Wireless] Code clearly states that all of the Code’s sections apply to postpaid contracts, while only certain specified sections apply to prepaid services. Section D1 of the Code does not apply to contracts for prepaid services. *As set out in the Wireless Code policy, the Commission is of the view that, when customers renew their prepaid accounts via “top-up” they are accepting the key terms and conditions of the contract offered by a wireless service provider (WSP). As such, the Commission did not find it necessary to prohibit changes to key contract terms and conditions for prepaid services.* Instead, the Commission stated that it expected WSPs that provide prepaid wireless services to clearly publicize any change to their services.
11. The Code took effect on 2 December 2013 and therefore did not apply when TCC introduced the policy. The Code began to apply to all new or amended wireless service contracts from that day forward.
12. Furthermore, TCC provided affected customers with 60-days’ advance notice of its policy’s introduction, which publicized the upcoming changes to its service terms and was consistent with the expectations set out in the Code. [Emphasis added]
84. As can be seen, the Commission's analysis focused squarely on a provision of the Wireless Code.
85. However, DiversityCanada/NPF submit that, notwithstanding the Wireless Code, the Commission should consider basic common law contractual principles to determine whether or

not a contract exists between Telus and its customers.

86. DiversityCanada/NPF submit that basic contractual principles should be considered to establish when one party makes an offer and another party accepts that offer, thus forming a contract.

87. This was underlined by the Supreme Court of Canada in *Charlebois v. Baril*, [1928] SCR 88, 1927 CanLII 56 (SCC), in which the Court said:

To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended or to his authorized agent.

88. DiversityCanada/NPF submit, therefore, that in order to determine whether there was an existing contract requiring consent for any material change, the Commission was required to examine the offer that was made by Telus and accepted by consumers.

89. In the Part I proceeding, DiversityCanada/NPF submitted to the Commission that a contract existed for the sums accumulated in consumers' accounts prior to the introduction of Telus' new policy.

90. The prior accumulated balances, DiversityCanada/NPF argued, were given to Telus by consumers and were held by Telus on behalf of consumers under an agreement whereby Telus contracted to provide wireless services on a pay-per-use basis.

91. DiversityCanada/NPF argued that this agreement for pay-per-use wireless services could only be extinguished when the consumer had exhausted all these funds and Telus had provided the corresponding services.

92. DiversityCanada/NPF argued that if Telus no longer wished to provide services on a pay-per-use basis with respect to these funds, it was required to either obtain consent for a change in the existing agreement, or to provide consumers with a meaningful opportunity to refuse the change, (ie an option that would not result in consumers having to forfeit their accumulated funds, or that would not force them to spend the funds on services they did not require.)

93. Furthermore, in the Reply, DiversityCanada/NPF pointed out that Telus itself noted (at paragraphs 11 and 54 of the Answer) that it is the value of a current top-up that forms consideration for new contracts for prepaid, pay-per-use wireless services. DiversityCanada/NPF submitted that this meant that only the value of new top-ups could be subject to the terms introduced by Telus' new policy, and that prior accumulated sums were subject to the terms that were in existence at the time those top-ups were previously made.

94. As can be seen from the quoted analysis and determination, the Decision did not examine these arguments. It failed entirely to probe the offer that was made by Telus and accepted by consumers, including the issue of whether prior accumulated balances formed part of the consideration for each new top-up.

95. DiversityCanada/NPF submit that the failure to do so was an error in law.
96. Furthermore, DiversityCanada/NPF submit that the Commission made an error in law in the test that it did use, as it relied on an invalid provision of the Wireless Code.
97. DiversityCanada/NPF submit that a fundamental principle in law is that no public authority can make rules, regulations, or laws that are contrary to the law. The Supreme Court of Canada articulated this principle at paragraph 28 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

98. In the Part I proceeding, DiversityCanada/NPF raised the question as to the validity of the provision of the Wireless Code on which the Commission eventually relied in the Decision.
99. As can be seen in the paragraph 10 of the Decision, quoted above, the Wireless Code purports to exclude prepaid wireless contracts from the stipulation (applied to post-paid contracts) that a Wireless Services Provider must obtain consent in order to make material changes to a consumer agreement.
100. In the Part I proceeding, DiversityCanada/NPF submitted that this is a fundamental contractual principle, and that the Wireless Code should recognize the rights of prepaid wireless consumers.
101. DiversityCanada/NPF submit that, regardless of the length of their contracts with carriers, all consumers are entitled to fundamental contractual rights. DiversityCanada/NPF therefore submit that every individual who has a contract with a wireless services provider is entitled to protection from material changes to that contract for the duration of that contract – whether it be 30 days, 60, days, 365 days, two years, or indefinitely.
102. DiversityCanada/NPF respectfully submit that (in the language of the Supreme Court) the Wireless Code cannot overstep the Commission's legal authority and abrogate prepaid wireless consumers' fundamental contractual rights.
103. DiversityCanada/NPF submit, therefore, that the provision of the Wireless Code which abrogates prepaid wireless consumers' fundamental contractual rights is invalid.

104. Thus, DiversityCanada/NPF submit that the Commission made an error in law in using an invalid provision of the Wireless Code as the test to determine whether Telus had breached the basic contract principle of obtaining consent in order to make a material change to the agreement.
105. In conclusion, DiversityCanada/NPF respectfully submit that a proper examination of the offer made and accepted in this matter would lead the Commission to vary the Decision so as to recognize that Telus was required to obtain valid consent in order to change the agreement and failed to do so.

The Test for Duress

ISSUE III) *Did the Commission fail to apply the proper test to determine whether there was duress?*

106. DiversityCanada/NPF submit that the Decision was not correct because the Commission failed to apply the proper test to determine whether Telus had subjected its customers to duress.
107. In the Part I proceeding, DiversityCanada/NPF had drawn the Commission's attention to the test for duress as outlined in *Byle v. Byle*, 1990 CanLII 313 (BC CA) (“*Byle*”). This judgement makes reference to a UK ruling, *Pao On v. Lau Yiu Long* [1980] A.C. 614 (Privy Council)(“*Pao*”), which Telus also relied on in its Answer.
108. In *Byle*, the Court quoted *Pao*, noting that the passage offered “the proper approach” to determining whether there was duress:

In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have **an alternative course open to him such as an *adequate legal remedy***; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner*, relevant in determining whether he acted voluntarily or not.
[Emphasis added]

109. In *Byle*, the Court went on quote a US ruling on the issue of ratification of a contract:

In resolving this crucial issue, we are mindful of the well-established principle of law that a contract entered into as the result of duress is not void, but merely voidable, and is capable of being ratified after the duress is removed. Ratification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it.
[Emphasis in the original]

110. DiversityCanada/NPF submit that, according to the principles outlined by the Court in *Byle*, the Commission was required to apply the following test to determine whether there was duress in the present case:

- * Did consumers protest the changes Telus' sought to introduce with its new policy?
- * Did consumers have an alternative to the changes Telus sought to introduce that was an adequate legal remedy?
- * Did consumers have independent legal advice?
- * Did consumers have the opportunity to annul or void the agreement that introduced changes under Telus' new policy?
- * If so, did consumers eschew the opportunity to annul or void the agreement, and, in so doing, ratify the agreement?

111. DiversityCanada/NPF respectfully submit that a reading of the Commission's analysis and determinations on the subject of duress would demonstrate that the commission failed to apply the proper test:

16. TCC's introduction of the policy did not place affected customers under economic pressure. TCC's terms of service acknowledge the possibility of the WSP making changes to the terms of its prepaid contracts. Furthermore, TCC provided advance notice of the policy's introduction and only applied the policy to individual customers upon their first "top-up" after the 20 October 2013 introduction of the policy.

17. By providing 60-days' advance notice, TCC ensured that its prepaid customers could draw their account below \$300 before this policy was introduced if they did not wish to be affected. Customers with prepaid balances over \$300, who did not wish to cancel their contracts with TCC, also had the following options:

- * continue to "top-up" their accounts, and remain subject to the policy, and subscribe to a monthly prepaid rate plan;
- * stop "topping-up" their accounts, remain subject to the policy, and subscribe to a monthly prepaid rate plan for as long as their balance allowed (i.e. 30 months with a balance of \$300);Footnote 3 or
- * stop "topping-up" their accounts and revert to purchasing services using existing credits on a pay-per-use basis at any point after the balance dropped below \$300.

Affected customers could also choose from the following account management options offered by TCC:

- * transfer the credits to another prepaid customer; or
- * use the credits to acquire a new device.

18. TCC's policy is consistent with the determination set out in the Code that WSPs are not required to carry over wireless prepaid account balances indefinitely.

19. In light of the above, TCC did not subject its customers to duress and therefore the terms of

prepaid service contracts have not been made invalid for this reason. [Emphasis added]

112. The Decision mentions two ostensible alternatives open to consumers who did not want to be affected by changes Telus sought to introduce with its new policy:
- * draw their account below \$300 before this policy was introduced;
 - * cancel their contracts.
113. DiversityCanada/NPF respectfully submit that the Commission erred when it failed to examine whether these were adequate legal remedies.
114. Furthermore, DiversityCanada/NPF respectfully submit that such an examination would show that neither was an adequate legal remedy.
115. The original agreement allowed consumers to maintain and add to their account balances and use the funds entirely at their discretion to purchase wireless services as and when they chose. The accumulation of a balance of over \$300 demonstrated that these customers chose to sparingly consume wireless services.
116. The first ostensible alternative the Decision mentions would require consumers with a balance of say, \$400, to suddenly engage in \$116 worth of phone calls and text messaging, etc within 60 days. This would bring the balance down to \$284. In order to permanently prevent their balance exceeding \$299, these consumers would acquire \$15 top-ups, but would have to consume the entire amount within the allotted 30 days.
117. DiversityCanada/NPF submit that this scenario does not represent an alternative to being affected by the new policy, as the Decision represented it to be. DiversityCanada/NPF submit that such consumers are still subjected to the new policy as the sums in their accounts accumulated under the original contract are illegitimately counted by Telus towards the \$300 threshold introduced under the new policy, without the consent of these consumers.
118. By contrast, as the third bullet in the requested relief indicates, consumers were entitled to choose whether or not *they* would agree to *allow* Telus to count sums accumulated under the original contract towards any balance exceeding \$300, which they would draw down by acquiring a 30-day rate plan or a 30-day-add-on under the Large Prepaid Balance policy.
119. DiversityCanada/NPF therefore submit that drawing down the balance to below \$300 was part and parcel of the duress to which Telus subjected consumers, and did not present consumers with an adequate legal remedy.
120. DiversityCanada/NPF submit that the second alternative mentioned by the Decision is a far less adequate legal remedy as it imposes the ultimate economic harm. Cancellation of the contract would result in consumers losing the entire balance.

121. Furthermore, DiversityCanada/NPF submit that had the Commission applied the other aspects of the proper test, the Commission could not but find that Telus had subjected consumers to duress:
- * the evidence on the record included consumer complaints, directly to Telus and indirectly through Internet postings, showing that consumers protested the changes Telus' sought to introduce with its new policy;
 - * consumers did not have independent legal advice on the issue;
 - * the changes introduced by the new policy were mandatory and permanent, and at no point did Telus give consumers the opportunity to annul or void the new agreement which subjected them to the changes; and
 - * as consumers had no opportunity to annul or void the new agreement, they could not be said to have ratified it.
122. In conclusion, DiversityCanada/NPF submit that the Commission erred in failing to apply the proper test to determine whether Telus had subjected consumers to duress, resulting in an incorrect outcome, which should not stand.

Procedural Fairness

ISSUE IV) *Did the Commission fail to provide reasons for its determination that Telus did not subject consumers to unjust discrimination and, did the Commission, therefore, breach its duty of procedural fairness?*

123. DiversityCanada/NPF submit that the Commission failed to provide reasons in the Decision for its determination that Telus did not subject consumers to unjust discrimination. Failure to provide reasons is a breach of procedural fairness.
124. In *Baker v. Canada (Minister of Citizenship and Immigration)*,² the Supreme Court of Canada set out circumstances in which reasons are required:

“...it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, ***when there is a statutory right of appeal***, or in other circumstances, some form of reasons should be required. . . .
[Emphasis added]

2 1999 2 SCR 817 (“*Baker*”); para. 43

125. Section 64 (1) of the *Telecommunications Act* states: “An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.”
126. Consequently, the Commission is required to provide reasons for its decisions as part of its obligation to comply with principles of natural justice and procedural fairness.
127. In *R. v. Sheppard*³, the Supreme Court underscored that, where there is a statutory right of appeal, there is a requirement for reasons that demonstrate how the evidence and arguments were assessed:

...where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention.

128. The required standard for reasons was outlined in *Clifford v. Ontario (Attorney General)*.⁴ Here, the Court emphasized that, in its reasons, a decision-maker must set out the major points in issue, and must demonstrate how the issues were weighed in order to arrive at the eventual conclusion:

[29] It is not sufficient for the Tribunal to simply summarize the positions of the parties and baldly state its conclusions. Reasons are required; not merely conclusions: *Megens v Ontario Racing Commission*, (2003) 64 O.R. (3rd) 142 (Div.Ct.). As was stated by the Ontario Court of Appeal in *Gray v. Ontario (Disability Support Program, Director)* (ON CA), (2002), 59 O.R. (3d) 364 at 374-375, 212 D.L.R. (4th) 353 at 364 (C.A.):

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. **Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.**

[30] For a tribunal such as this one, on issues of the importance involved here, the failure to provide meaningful reasons supporting its decision is itself a breach of the principles of natural justice that will warrant quashing the tribunal’s decision: *Baker; Megens v. Ontario Racing Commission*. This is particularly the case in light of the conflicts in the evidence and the apparent failure of the Tribunal to place the onus on the correct party. [Emphasis added]

129. DiversityCanada/NPF submit that the Decision failed to meet the standards outlined above.

³ 2002 SCC 26, [2002] 1 SCR 869; para 46

⁴ 2008 ON SCDC (“*Clifford*”)

130. In its determination on the issue of unjust discrimination, the Commission stated:

27. The Commission's analysis of an allegation of undue preference or unreasonable disadvantage under subsection 27(2) of the Act is conducted in two phases:

* it must first determine whether the conduct in question is discriminatory or constitutes a preference; and

* where it so determines, it must then decide whether the discrimination is unjust or the preference is undue.

The burden is on the applicant to demonstrate that the conduct is discriminatory or preferential. In establishing whether discrimination or preference exists, it is necessary to identify two comparable entities or groups which are being treated differently by a Canadian carrier. ***The applicants have not provided any evidence that customers affected by this policy are being treated any differently than any other group or entity in a comparable situation.*** Therefore, the Commission is unable to conclude that TCC has violated subsection 27(2) of the Act. [Emphasis added]

131. DiversityCanada/NPF respectfully submit (in the words of the Court, above) that in the Decision, the Commission "baldly state its conclusions" but does not touch on the points in issue, as it was required to do.

132. In the Part I proceeding, DiversityCanada/NPF submitted that affected consumers are in a comparable situation with Telus, and are being treated differently than Telus in two respects:

1) the first looks at the preservation/expenditure of the account balances in simple monetary terms;

– consumers suffer the undue and unreasonable disadvantage of having to pay for services they never requested and are unlikely to use, and which the agreement they entered into with Telus prior to October 20, 2013 did not require them to acquire;

– conversely, Telus gives itself the undue and unreasonable preference of profiting by forcing consumers to expend sums that the agreement it entered into with consumers prior to October 20, 2013 did not require consumers to expend;

2) the second looks at the account balances as the subject property in a matter that is live and subject to further review;

– as the Commission's decision not to prohibit expiry dates in the Wireless Code is under appeal, Telus' policy (making it mandatory that consumers draw down on their balance) places consumers at an undue or unreasonable disadvantage by foreclosing on the opportunity for them to fully benefit from any favourable outcome of the appeal;

– conversely, the policy confers on Telus the undue or unreasonable preference of

escaping the full consequences of an outcome that may be favourable to consumers, in that the company would have significantly reduced its liabilities to consumers by making it mandatory that they expend the funds in their accounts.

133. DiversityCanada/NPF note that none of these points are mentioned in the Decision, and submit that the Decision fails to set out the Commission's findings of fact on the issue of unjust discrimination and the principal evidence upon which those findings were based.
134. DiversityCanada/NPF submit that the Decision fails to show the “path” the Commission took to arrive at the conclusion that there was no unjust discrimination. The Decision fails to disclose the reasoning process followed by Commission and does not reflect consideration of the main relevant factors.
135. In conclusion, DiversityCanada/NPF respectfully submit that the failure to provide reasons is an error in law, and the Decision should be overturned.

The Policy Objectives

ISSUE V) *Is the Decision contrary to the policy objectives of the Telecommunications Act?*

136. DiversityCanada/NPF submit that the Decision should be overturned as it is contrary to policy objectives of the *Telecommunications Act*.
137. As noted above, in the *Dunsmuir* ruling, the Supreme Court affirmed that “[all] decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.”
138. The Commission's enabling statute is the *Telecommunications Act*. Among the policy objectives included in the Act are the following:
- 7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
 - 7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and
 - 7(h) to respond to the economic and social requirements of users of telecommunications services.

- 139.** DiversityCanada/NPF respectfully submit that in requiring the Commission to facilitate “orderly development”, to ensure “efficient and effective” regulation; and to respond to “the economic and social requirements of users of telecommunications services”, the Act requires the Commission to ensure that carriers conduct their business in a manner that respects the common law, including obtaining consent to a material change of a consumer contract and not subjecting consumers to duress.
- 140.** In the Part I Application, DiversityCanada/NPF had submitted that Telus' policy contravened subsection 27(1) of the Act, which states carriers must not charge unjust and unreasonable rates. DiversityCanada/NPF argued that since Telus had subjected consumers to duress, it did not have valid consent to implement the new policy, and thus any rate charged under the policy was unjust.
- 141.** In the Reply in the proceeding, DiversityCanada/NPF made an amendment, requesting, instead, that the Commission use its powers under subsection 24 of the Act to impose “any conditions” on the offering and provision of any telecommunications service by a Canadian carrier. DiversityCanada/NPF had argued that this section empowered the Commission to order Telus to operate under consumer contracts that “are valid, that do not subject consumers to duress, and that do not contain material changes to which consumers have not voluntarily agreed.”
- 142.** DiversityCanada/NPF submit that the policy objectives required the Commission to ensure that its regulation of Telus was efficient and effective so as to ensure the company did not operate under invalid agreements; did not subject consumers to duress and did not make material changes to consumer contracts without consent.
- 143.** DiversityCanada/NPF submit that the Commission erroneously determined that its long-standing policy of forbearing from regulating rates for telecommunications services precluded its intervention in this matter.
- 144.** In the Decision, the Commission stated:
25. With regard to subsection 27(1) of the Act, the Commission has repeatedly found that current retail markets are sufficiently competitive to ensure that the rates for wireless services are just and reasonable and has accordingly forborne from rate regulation in these markets. Therefore, the Commission considers that the policy has not contravened subsection 27(1) of the Act.
26. It would be inappropriate in the circumstances to grant DiversityCanada/NPF's request that the Commission do indirectly through section 24 of the Act what it has forborne from doing under subsection 27(1) of the Act.
- 145.** DiversityCanada/NPF respectfully submit that, far from being “inappropriate”, relying on section 24 of the Act to intervene in this matter was not only required (as just submitted), but would not have been unusual for the Commission.

146. DiversityCanada/NPF submit that the issue the Commission was requested to decide upon in the Part I Application was not Telus' rates, but, rather, the underlying nature of the contract under which Telus charged those rates.
147. DiversityCanada/NPF highlight that the Commission, itself, has previously taken the position that its long-standing policy of forbearing from regulating rates did not preclude it from regulating carriers to ensure the legality and fairness of the contracts under which carriers provide services to their customers.
148. In the Wireless Code Decision, Telecom Regulatory Policy 2013-271, the Commission said:
23. The Commission is required by the Act to exercise its powers to ensure that the policy objectives set out in the Act are fulfilled. Since 1994, the Commission has not regulated wireless services in as much detail as it does some other telecommunications services, having found that there is sufficient competition to protect the interests of users of wireless services.[4]
24. However, the Commission has retained its powers under section 24 and subsection 27(2) of the Act regarding wireless services to ensure that it has the tools necessary to address instances when market forces alone are not ensuring that the policy objectives in the Act are being met.
25. In Telecom Decision 2012-556, *the Commission found that, although it is appropriate to continue to decline to regulate certain aspects of wireless services, including rates and the competitiveness of the marketplace, it is necessary at this time to impose additional measures for consumers, using its powers under section 24 of the Act.* [Emphasis added]
149. DiversityCanada/NPF submit that by failing to similarly find that it was necessary to use its powers under section 24 to impose the condition on Telus that the company not subject consumers to duress and not make a material change to consumer contracts without consent, the Decision was contrary to the policy objectives requiring efficient and effective regulation, and responsiveness to the economic and social requirements of users of telecommunications services.
150. In conclusion, DiversityCanada/NPF submit that the Decision should be varied so as to comply with the policy objectives in the Act. Accordingly, DiversityCanada/NPF request that the Commission provide the relief requested in this Application.

Relief Requested

151. In summary, DiversityCanada/NPF submit that the Commission erred in law and in fact in the Decision, raising substantial doubt as to the correctness of the Decision.
152. DiversityCanada/NPF therefore respectfully request that the Commission review and vary the Decision so as to order Telus to:
- i) refund, with interest, all sums deducted for 30-day rate plans or 30-day add-ons under this policy from all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013;
 - ii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that the Large Prepaid Balance policy does not automatically apply to sums which were in their account prior to the introduction of the policy;
 - iii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that the Large prepaid Balance policy applies to sums that accumulate *after* October 20, 2013, and that if their total balance (sums accumulated before October 20, 2013, plus sums accumulated after October 20, 2013) exceeds \$300, they may *choose* to draw down the balance by acquiring a 30-day rate plan or a 30-day-add-on under the Large Prepaid Balance policy.
153. All of which is respectfully submitted this 17th day of August, 2015.

Parties Served

Regulatory Affairs, TELUS Telecommunications Company <regulatory.affairs@telus.com>

Notice

This application is made by Ray Kindiak, legal counsel, c/o DiversityCanada Foundation, 95 Hutchison Avenue, Elliot Lake, ON P5A 1W9 [Email: telecom_policy@diversitycanada.org]. A copy of this application may be obtained by sending a request to telecom_policy@diversitycanada.org

TAKE NOTICE that pursuant to section 25, and, as applicable section 26 of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, any respondent or intervener is required to mail or deliver or transmit by electronic mail its answer to this application to the Secretary General of the Canadian Radio-television and Telecommunications Commission (“Commission”), Central Building, 1 Promenade du Portage, Gatineau (Québec) J8X 4B1, and to serve a copy of the answer on the applicant within 30 days of the date that this application is posted on the Commission’s website or by such other date as the Commission may specify.

Service of the copy of the answer on the applicant may be effected by personal delivery, by electronic mail, or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.

If a respondent does not file or serve its answer within the time limit prescribed, the application may be disposed of without further notice to it.

****End of Document****

APPENDIX A:

Telus Prepaid Account Balance Policy
(printout from Telus website 23/04/2014)

Français Region: **ON** Business Mobility Find a store RegisterLog in | Cart | Home Phones Tablets M Services it Plans Add-ons Support Your account
Getting started Phones & devices Coverage & travelling Billing Learning centre**FEATURED DEALS**Don't miss out! **Shop now** ▶

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Search for support

**Advanced search** ▶To enhance your experience please [select a device](#)**Neighbourhood**

Ask questions and get answers ▶

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Learn more about your new BlackBerry® Z10 4G LTE.[See what's new](#) ▶

Prepaid Account Balance Policy

Additional resources

- Prepaid Account Balance Policy ▶
- TELUS SharePlus Plan ▶
- Unlimited Talk and Family Share plans ▶
- HD Voice ▶
- 10 digit dialing ▶
- Unsolicited calls and text messages ▶
- Registering on the do not call list ▶
- Free local birthday calling ▶

Important changes to your TELUS Prepaid account

The TELUS standard mobility [Service Terms](#) have recently changed. As of October 20, 2013, TELUS Prepaid customers with a balance of \$300 or more are required to maintain a 30-day rate plan or a 30-day add-on on their account.

We recognize that customers top up each month to ensure their balance does not expire¹. These changes help to ensure that customers can use their existing balance without having to worry about topping up.

If you have a balance of \$300 or more you are required to have a 30-day rate plan or add-on on your account. If you don't already have a 30-day rate plan or add-on, we will automatically add our least expensive voice and messaging plan – Talk + Messaging 10 – to your account when you reach a balance of \$300 or more. For just \$10 per month, it gives you 50 minutes of local talk time and 50 Canadian text messages - a 75% discount on our pay-per-use rates. So you can use your phone more often with greater cost certainty. You can stop topping up and the \$10 will be deducted from your account balance every 30 days.

As long as you have a 30-day rate plan (like Talk + Messaging 10) or a 30-day add-on on your account, you will no longer need to top up. The rate plan on your account will ensure that your remaining balance does not expire. You can use your existing balance to cover the cost of the monthly rate plan. **This means that customers who have the Talk + Messaging 10 plan or any other 30-day rate plan added to their account no longer need to top-up until their balance reaches \$0.**

What you need to know

You have a balance of \$300 or more

If you do not have a 30-day rate plan, the **\$10 Talk + Messaging rate plan (50 local minutes + 50 Canadian text messages)** will be automatically added to your account. It is our least expensive voice and messaging plan and offers a 75% discount on our pay-per-use rates. The \$10 cost of the rate plan will be automatically deducted from your existing account balance every 30 days.

Rest assured, this change will not result in you losing your account balance. As long as this rate plan, or another 30-day rate plan, remains on your account, you will no longer need to top up until your balance reaches \$0. Your existing balance will be used to cover the cost of the rate plan and depending on the size of your balance you may not have to pay anything more for your Prepaid service for two or more years.

TELUS will send notifications via email and text message to inform you when this plan has been added.

If you receive the \$10 Talk + Messaging rate plan, you can [select another rate plan](#) by logging in to [Your Account](#) or [contact us](#)². You may choose from any 30-day rate plans.

TELUS will not disable automatic top ups at \$300. You have the option to disable auto top ups in [Your Account](#) or by [contact us](#).

If you already have a 30-day rate plan, you can keep your current rate plan. By setting the 30-day rate plan to automatically renew from your account balance, you no longer need to top up to ensure your remaining account balance does not expire.

NOTE: If you do not have an email address on file, you will only receive a text notification. If you have opted out of receiving text or email notifications from TELUS, you will not receive these notifications. [Contact us](#) to update your notification preferences.

You have a balance of less than \$300

There will be no changes made to your account.

You are not required to maintain a rate plan. However, if you do not have a rate plan, you must regularly top up your account or your balance will expire after:

- 30 days with a \$10 top up
- 60 days with a \$25 or \$50 top up
- 365 days with a \$100 top up

Even though you are not required to maintain a rate plan you can always take advantage of our rate plans which offer great value and can be deducted from your account balance.

You can set a 30-day rate plan to automatically renew to keep your account balance from expiring.

TELUS will send notifications via email and text message when you reach \$200, \$250, and \$290 to remind you of the changes that will take effect if your balance reaches \$300.

NOTE: If you do not have an email address on file, you will only receive a text notification. If you have opted out of receiving text or email notifications from TELUS, you will not receive these notifications. [Contact us](#) to update your notification preferences.

Ways to use your account balance

You can purchase a 30 day [add-on](#) or a [rate plan](#) and set it to automatically renew from your account balance.

You can transfer a portion of your balance to another TELUS Prepaid customer³.

You can use your account balance to purchase a new device and accessories³.

1. TELUS Prepaid balances are non-refundable as per the Service Terms
2. New rate plan can be selected when the current 30 day period ends
3. Some conditions apply

Q&A

Will TELUS disable my automatic top ups when my account reaches \$300?

No. TELUS will not disable automatic top ups at \$300. You have the option to easily disable auto top ups yourself in [Your Account](#) or by [contacting us](#).

Can I continue to top up if I'm over \$300?

Yes. You can continue to top up your account balance and you can still use any non-refundable voucher PINs you may have purchased. However, you do not need to top up to keep your remaining account balance from expiring if you have a 30-day rate plan set to auto-renew.

What happens if my balance drops below \$300?

You are no longer required to maintain a rate plan. However, if you set your 30-day rate plan to automatically renew on your account, your remaining balance will not expire. Once your balance reaches \$0, you need to top up to maintain your services.

If you no longer maintain a rate plan on your account your balance will expire if you do not top up.

Can I remove the \$10 Talk + Messaging rate plan from my account?

A 30-day rate plan is required if your balance is over \$300. You can remove the Talk + Messaging 10 rate plan if you would like to choose a different one. If you would like a different plan, remove the auto-renew option of the Talk + Messaging 10 plan and select a different 30-day rate plan of your choice.

You are not required to maintain a rate plan once your balance drops below \$300. If you choose to remove all rate plans from your account, you must top up to ensure your balance does not expire.

Can I buy the \$10 Talk + Messaging rate plan?

No. The \$10 Talk + Messaging 10 plan is automatically added to accounts that have a balance of \$300 or more. It is not available for purchase.

Can you refund my balance?

No. TELUS Prepaid balances are non-refundable as per the [service terms](#). However, there are other [ways to use your account balance](#).

Will my balance expire if I stop top ups and have a 30-day rate plan?

No. As long as you have a 30-day rate plan or add-on that auto-renews successfully every 30 days your balance will not expire and you do not need to top up.

If your balance drops below \$300 and you remove rate plans from your account, you need to top up to ensure your balance does not expire.

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APPENDIX B:

Telecom Decision CRTC 2015-211



Telecom Decision CRTC 2015-211

PDF version

Ottawa, 21 May 2015

File number: 8665-D53-201406877

The DiversityCanada Foundation and the National Pensioners Federation – Application seeking relief for wireless customers affected by TELUS Communications Company’s Large Prepaid Balance Policy

*The Commission **denies** the DiversityCanada Foundation and the National Pensioners Federation’s application that asserted that TCC made a material change to customer contracts without consent when applying its Large Prepaid Balance Policy (the policy); TCC subjected customers to duress when applying the policy; and the policy contravenes subsections 27(1) and 27(2) of the Telecommunications Act. Accordingly, the Commission is **denying** the applicants’ request that TCC should be required to exclude certain wireless customers from the application of the policy and to credit those customers certain amounts incurred under that policy.*

Application

1. The Commission received an application from the DiversityCanada Foundation (DiversityCanada) and the National Pensioners Federation (NPF) [collectively, DiversityCanada/NPF or the applicants], dated 17 July 2014, regarding TELUS Communication Company’s (TCC) prepaid wireless, pay-per-use Large Prepaid Balance Policy (the policy).
2. The policy, which came into effect on 20 October 2013, applies to all of TCC’s prepaid customers. Under the policy, a prepaid customer who has accumulated an account balance of \$300 or more is required to subscribe to a monthly prepaid rate plan or a monthly add-on plan. If such a customer does not subscribe to a monthly prepaid rate plan or a monthly add-on plan, TCC automatically adds the least expensive voice and messaging plan to the customer’s prepaid account; the cost of this plan is then deducted from the customer’s prepaid account balance every 30 days.
3. In their application, as amended in their reply submission dated 26 September 2014, DiversityCanada/NPF requested specific relief for TCC wireless customers affected by the policy. Namely, TCC should be directed to
 - refund, with interest, in the form of credits to customers’ accounts, all sums deducted for 30-day rate plans or 30-day add-on plans under the company’s policy from all customers who were existing prepaid wireless, pay-per-use customers prior to 20 October 2013;

- inform all customers who were existing prepaid wireless, pay-per-use customers prior to 20 October 2013 that the policy does not automatically apply to sums that were in their account prior to the introduction of the policy; and
 - inform all such customers that the policy applies to sums that accumulated after 20 October 2013, and that if their total balance (i.e. sums accumulated before 20 October 2013, plus sums accumulated after 20 October 2013) exceeds \$300, they may choose to draw down the balance by acquiring a 30-day rate play or a 30-day add-on plan under the company's policy.
4. The Commission received interventions regarding DiversityCanada/NPF's application from TCC and various individuals. The public record of this proceeding, which closed on 27 October 2014,¹ is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

5. The Commission has identified the following issues to be addressed in this decision:
- Did TCC make a material change to customer contracts without consent when it applied the policy to those customers?
 - Did TCC subject customers to duress in applying the policy, thus making the contract changes caused by the policy invalid?
 - Did TCC's policy contravene subsections 27(1) and 27 (2) of the *Telecommunications Act* (the Act)?

Did TCC make a material change to customer contracts without consent when it applied the policy to those customers?

6. DiversityCanada/NPF submitted that the policy represented a material change to the pre-existing agreement between TCC and its customers regarding prepaid wireless services, noting that the company had not received consent from these customers for such a change. In this regard, the applicants argued that section D1 of the Wireless Code (the Code)² requires a customer's informed and expressed consent before making changes to the key terms and conditions of a contract and that this section should apply to prepaid customers in the circumstances of this case.
7. The applicants argued that any balances accrued before the date of the policy's introduction, 20 October 2013, cannot be counted toward the \$300 account balance

¹ On 27 October 2014, TCC responded to a request for additional information from Commission staff dated 21 October 2014.

² The Code was established by the Commission in Telecom Regulatory Policy 2013-271 (the Wireless Code Policy).

limit set by the policy and that the contractual terms which existed prior to that date must remain in force unless a customer consents to a change.

8. TCC argued that the policy only affects prepaid contracts, and that section D1 of the Code does not apply to prepaid contracts. By providing 60-days' advance notice prior to the introduction of amendments to its prepaid terms of service, TCC asserted that its current policy is consistent with the expectations set out in the Code.
9. Further, TCC submitted that the introduction of the policy did not amend existing contracts as prepaid wireless service contracts expire after the defined expiry period elapses or once a customer actively chooses to "top-up" his or her prepaid account. By "topping-up" their prepaid account after the policy was introduced, customers accepted that the policy would apply to their prepaid wireless service contracts going forward, both to the "top-up" amount and to any amount already accumulated on their prepaid account.

Commission's analysis and determinations

10. The Code clearly states that all of the Code's sections apply to postpaid contracts, while only certain specified sections apply to prepaid services. Section D1 of the Code does not apply to contracts for prepaid services. As set out in the Wireless Code policy, the Commission is of the view that, when customers renew their prepaid accounts via "top-up" they are accepting the key terms and conditions of the contract offered by a wireless service provider (WSP). As such, the Commission did not find it necessary to prohibit changes to key contract terms and conditions for prepaid services. Instead, the Commission stated that it expected WSPs that provide prepaid wireless services to clearly publicize any change to their services.
11. The Code took effect on 2 December 2013 and therefore did not apply when TCC introduced the policy. The Code began to apply to all new or amended wireless service contracts from that day forward.
12. Furthermore, TCC provided affected customers with 60-days' advance notice of its policy's introduction, which publicized the upcoming changes to its service terms and was consistent with the expectations set out in the Code.

Did TCC subject customers to duress in applying the policy, thus making the contract changes caused by the policy invalid?

13. DiversityCanada/NPF submitted that TCC has greater bargaining power than the prepaid customers whose account balances it holds, arguing that a significant portion of these customers would have been unlikely to fully understand their rights when TCC introduced the policy or to have had legal representation to advise them. DiversityCanada/NPF argued that, when TCC applied the policy to its prepaid customers, TCC exploited this unequal bargaining power and subjected these customers to duress.
14. The applicants argued that TCC provided its prepaid customers with an account balance of at least \$300 with no alternative to being subscribed to a monthly plan.

Customers who objected to the policy could only protest by ending their relationship with TCC, which would also mean forfeiting their prepaid account balance.

15. TCC submitted that it had not abused its bargaining power in implementing the policy. TCC also submitted that economic duress requires one party to force a new or amended agreement on another through the application of illegitimate pressure that forecloses other options. TCC argued that the company had simply set an account ceiling for pay-per-use prepaid services. In its view, introduction of the policy has not caused, or has not threatened to cause, any economic harm to its customers, but rather, the policy creates new options for its prepaid customers to use the accumulated balance in their prepaid accounts.

Commission's analysis and determinations

16. TCC's introduction of the policy did not place affected customers under economic pressure. TCC's terms of service acknowledge the possibility of the WSP making changes to the terms of its prepaid contracts. Furthermore, TCC provided advance notice of the policy's introduction and only applied the policy to individual customers upon their first "top-up" after the 20 October 2013 introduction of the policy.
17. By providing 60-days' advance notice, TCC ensured that its prepaid customers could draw their account below \$300 before this policy was introduced if they did not wish to be affected. Customers with prepaid balances over \$300, who did not wish to cancel their contracts with TCC, also had the following options:
 - continue to "top-up" their accounts, and remain subject to the policy, and subscribe to a monthly prepaid rate plan;
 - stop "topping-up" their accounts, remain subject to the policy, and subscribe to a monthly prepaid rate plan for as long as their balance allowed (i.e. 30 months with a balance of \$300);³ or
 - stop "topping-up" their accounts and revert to purchasing services using existing credits on a pay-per-use basis at any point after the balance dropped below \$300.

Affected customers could also choose from the following account management options offered by TCC:

- transfer the credits to another prepaid customer; or
 - use the credits to acquire a new device.
18. TCC's policy is consistent with the determination set out in the Code that WSPs are not required to carry over wireless prepaid account balances indefinitely.
 19. In light of the above, TCC did not subject its customers to duress and therefore the terms of prepaid service contracts have not been made invalid for this reason.

³ TCC's default monthly prepaid rate plan for customers subject to the policy costs \$10. Subject to applicable taxes and 9-1-1 service fees, customers with a balance of \$300 could maintain their accounts without further top-up for 30 months.

Did TCC's policy contravene subsections 27(1) and 27(2) of the Act?

20. DiversityCanada/NPF submitted that the policy contravenes the Act, in particular subsection 27(1), which requires that every rate charged by a Canadian carrier be just and reasonable, and subsection 27(2), which prohibits unjust discrimination by Canadian carriers.
21. The applicants submitted that, if TCC subjected any of its customers to duress, the rates charged to those customers under the policy could not be just and reasonable and, as such, the policy contravenes subsection 27(1) of the Act. Further, DiversityCanada/NPF argued that if the Commission decided not to intervene under subsection 27(1) of the Act, it could still provide relief to affected customers under section 24 of the Act, which allows the Commission to impose conditions on the offering and provision of services by Canadian carriers.
22. The applicants submitted that affected customers are unduly and unreasonably disadvantaged by having to pay for a monthly plan that they did not request and are unlikely to make full use of. Therefore, TCC is giving itself an undue and unreasonable preference by forcing customers to expend funds that their prepaid wireless contracts did not require them to expend prior to the introduction of this policy. As such, the policy contravenes subsection 27(2) of the Act.
23. TCC submitted that its prepaid wireless services are offered in an environment where the Commission has forborne from rate regulation pursuant to subsection 27(1) of the Act.⁴
24. TCC further submitted that DiversityCanada/NPF had not established that the test for unjust discrimination or undue preference had been met. DiversityCanada/NPF did not identify two similarly situated entities or groups that were being treated differently by TCC. Furthermore, there is no unjust treatment of customers as TCC is permitted to change the nature of its prepaid service offering. The policy provides a reasonable way for customers to use large accumulated prepaid credits while maintaining their accounts.

Commission's analysis and determinations

25. With regard to subsection 27(1) of the Act, the Commission has repeatedly found that current retail markets are sufficiently competitive to ensure that the rates for wireless services are just and reasonable and has accordingly forborne from rate regulation in these markets. Therefore, the Commission considers that the policy has not contravened subsection 27(1) of the Act.
26. It would be inappropriate in the circumstances to grant DiversityCanada/NPF's request that the Commission do indirectly through section 24 of the Act what it has forborne from doing under subsection 27(1) of the Act.
27. The Commission's analysis of an allegation of undue preference or unreasonable disadvantage under subsection 27(2) of the Act is conducted in two phases:

⁴ TCC cites Telecom Decisions 98-18 and 2012-556 in support of its position that its policy does not contravene subsection 27(1) of the Act.

- it must first determine whether the conduct in question is discriminatory or constitutes a preference; and
- where it so determines, it must then decide whether the discrimination is unjust or the preference is undue.

28. The burden is on the applicant to demonstrate that the conduct is discriminatory or preferential. In establishing whether discrimination or preference exists, it is necessary to identify two comparable entities or groups which are being treated differently by a Canadian carrier. The applicants have not provided any evidence that customers affected by this policy are being treated any differently than any other group or entity in a comparable situation. Therefore, the Commission is unable to conclude that TCC has violated subsection 27(2) of the Act.

29. In light of all the above, the Commission **denies** DiversityCanada/NPF's application.
Secretary General

Related documents

- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, Telecom Decision CRTC 2012-556, 11 October 2012
- *NBTel Inc. – Forbearance from regulating cellular and personal communications services*, Telecom Decision CRTC 98-18, 2 October 1998

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