

PETITION TO THE GOVERNOR IN COUNCIL TO VARY

TELECOM DECISION CRTC 2014-101

**APPENDIX B:
DETAILED DESCRIPTION OF
PREPAID WIRELESS BALANCE EXPIRY**

Prepaid wireless balance expiry

1. Whether on a time-plus-usage business model or a pay-per-use business model, prepaid consumers experience balance expiry in the same way.
2. Some time-plus-usage business model customers (*ie* consumers with a monthly plan) may never have the problem of balance expiry because they prepay only their monthly fee and never carry extra funds on their balance. Others may place extra funds on their account to purchase additional services as packages (called “add-ons” or “boosters” by some service providers), or on a pay-per-use basis. If these latter time-plus-usage customers miss the expiry date associated with their last top-up, the service provider will seize their unused funds and claim they “expired”, meaning these customers will lose any extra funds they had on their account.
3. The customers that most regularly suffer as a result of balance expiry are those in the pay-per-use category. Customers on a pay-per-use business model almost always carry a balance and some have balances of hundreds of dollars. These customers have to add a top-up (of at least \$10) every month in order to preserve the funds in their account. They have total discretion as to when to “spend” these funds, and as some rarely use the services, they accumulate large balances.
4. Balance expiry is associated with the last top-up a consumer has made. The wireless service providers (“WSPs”) state the consumer must make an additional top-up otherwise the balance would expire in 30 days, or some other time period, according to the size of the top-up.
5. WSPs apply expiration dates to top-up payments according to the amount of the top-up. For example, Virgin Mobile Canada says a \$15 top-up expires after 30 days; Telus says a \$25 top-up expires after 60 days; Rogers says a \$100 top-up expires after 365 days.
6. If a customer makes a top-up before the expiry date of the most recent top-up, the cash already in the account is preserved and the cash balance is increased by the value of the new top-up. For example, the account of *a brand new customer* who bought a \$15 top-up on January 01 that would expire in 30 days would appear as follows:

Date	Description	Cash balance
Jan 01	Initial purchase of prepaid services	\$15
Jan 05	Browsed 40 pages (ie used \$4 in services)	\$11
Jan 31	Expiry day: purchase \$15 top-up	\$26
Feb 01	Day after expiry date: balance preserved	\$26

7. If, however, the customer does not make a top-up before the expiry date, the WSP seizes the entire cash balance remaining in the customer's accounts. For example, the account of a brand new customer who bought a \$15 top-up on January 01 that would expire in 30 days would appear as follows:

Date	Description	Cash balance
Jan 01	Initial purchase of prepaid services	\$15
Jan 05	Browsed 40 pages (ie used \$4 in services)	\$11
Jan 31	Expiry day: no further top-up purchased	\$11
Feb 01	Day after expiry date: balance confiscated	\$0

8. If a top-up is not made before the expiry of the most recent top-up, the WSP seizes all the cash in the customer's account. This includes cash that accumulated prior to the purchase of the most recent top-up bearing the expiry date. The account of a customer of four years, for example, who accumulated a balance of \$300 over those previous four years, and who bought a top-up on January 01 that expired in 30 days would appear as follows:

Date	Description	Cash balance
Dec 31	Accumulated balance from previous four years	\$300
Jan 01	Purchase of further \$15 top-up	\$315
Jan 05	Browsed 40 pages (ie used \$4 in services)	\$311
Jan 31	Expiry day: no further top-up purchased	\$311
Feb 01	Day after expiry date: balance confiscated	\$0

9. Thus, the customer loses a total of \$311 on the expiry date.

10. An expiry date purports to entitle the WSP to confiscate the remaining cash balance on the top-up associated with such a date. However, the above example clearly demonstrates that WSPs confiscate *prior accumulated cash funds* which are entirely unrelated to the most recent top-up and which have no expiry date attached to them.

WSP's defence of balance expiry during

11. During the CRTC's Wireless Code Proceeding, the wireless sector's primary defence of the practice of balance expiry went as follows: The purchase of a top-up creates a time-plus-usage agreement allowing the consumer access to the provider's wireless system. Activation of a top-up starts the clock ticking on that access. When the time runs out on the access period, the unused portion of the balance is taken by the service provider as consideration for the access provided.
12. During the CRTC's Wireless Code Proceeding, representatives of the WSPs often compared the prepaid wireless business model to that of a car rental agreement. This, however, is a specious comparison. In the car rental example, the customer pays up front for a service and what expires is simply the usage purchased if not all the service/time paid for is utilized.
13. By contrast, the pay-per-use wireless consumer deposits funds into an account in order to purchase services or goods immediately or at some time in the future *as and when* the consumer uses those services or goods. So, unlike a car rental agreement when unused service/time expires, what happens with prepaid wireless balance expiry is that the industry places expiration dates on the *unused funds* in consumers' accounts, not on any unused service or time.

Analysis of prepaid wireless balance expiry: Most recent top-up

14. Balance expiry, as carried out by wireless service providers, is a fundamentally flawed business practice.
15. All WSPs tell consumers that top-up payments are the means by which they can add funds to their account to pay for the services or to purchase the goods available via the wireless network. The providers purport to apply an expiry date to that top-up which entitles them to seize the remaining balance at the end of a specified period, eg after 30 days.

16. In the examples above at paragraphs 6 to 8, with respect to the January 1 transaction alone, at the end of the 30-day period, each customer has an unused balance of \$11. The WSPs would seize each of these balances at midnight of the expiry date.
17. The industry's defence of this action is that when customers activated their top-ups, they started the clock ticking because activation gave them access to the wireless network. The industry is claiming, therefore, that the amount taken upon balance expiry is consideration for access to the wireless system. Access, in this context, the industry says, is a commodity in and of itself, and is paid for with the remaining balance.
18. Even if the industry's argument (that the unused balance is consideration for access to their system) is taken at face value, it is impossible to find the other elements of a contract in this transaction.
19. For there to be a valid contract, there must be three elements: an offer, an acceptance and consideration to seal the agreement.
20. A survey of the evidence presented by consumer groups during the CRTC's Wireless Code Proceeding (such as top-up cards, promotional materials and terms of service, included as Appendix D and Appendix E) would show that no service provider on the market today makes any express offer to any prepaid customer (whether a pay-per-use customer or a time-plus-usage customer who makes an extra top-up to purchase extra services) of "access to the network" to be paid for with the funds remaining from a top-up payment.
21. If the offer was never expressly made, it can not be said to have been accepted. It is simply not possible for a consumer to agree to purchase something which the consumer does not even know is being offered.
22. Where there is no offer, there can be no acceptance. Therefore, balance expiry cannot be justified as payment of consideration for access to the service provider's system as the WSPs argued it was during the CRTC's Wireless Code Proceeding.

23. Furthermore, the language of the top-ups, as shown in the evidence included in Appendix D and Appendix E, is quite explicit. All WSPs refer to the “expiry” of funds in prepaid wireless accounts. The seizure of funds upon an expiry date is a very specific act; one that is distinct from and wholly incompatible with the receipt of payment for a service for which a customer agreed to pay. The language used by the WSPs, therefore, makes it very clear to consumers that their unused funds are seized from them by the WSPs and that they have not voluntarily agreed to hand over those funds to the WSPs in exchange for any service of any kind.
24. A closer look at the industry's argument reveals that it is problematic when considering the situation of time-plus-usage customers who have placed extra funds into their accounts to purchase extra services. They have already paid for access that month. According to the WSPs' argument, these customers' unused balances are taken as payment for “access to the system” for that same month if they happen to miss the expiry date for their next top-up payment. This is patently unfair.
25. The industry's argument is particularly of concern for the pay-per-use consumers, who are told by the industry that they have total discretion in how they use their funds. Pay-per-use consumers have an expectation that they determine when and to what they apply their cash balance.
26. If “access to the system” is offered as a commodity in and of itself requiring a separate payment (as opposed to being factored into the rates for pay-per-use services), then pay-per-use customers expect to also determine when and if they will purchase such a commodity.
27. In other words, these customers require an express offer for “access to the system” to be made, which they would expressly accept – if they wished to have it.

Analysis of prepaid wireless balance expiry: Prior accumulated funds

28. The practice of seizing prepaid wireless balances on a purported expiry date is most flawed when applied to prior accumulated funds.
29. In the example above at paragraph 8, the expiry date relates to the \$15 top-up purchased on January 1. On January 31, the entire balance of \$311 is seized.

30. According to the industry's argument, the service provider claims the unused \$11 from the top-up for access to the system for the month. But what about the other \$300 accumulated from prior top-ups that was in the customer's account? By the WSPs' argument, this sum is also consideration for “access to the system” during the month of January. This, however, cannot be justified as there is no offer of access to the wireless network for \$311 for a 30-day period, which the customer accepted. A review of the evidence in Appendix D and Appendix E will show that no WSP makes any offer of this nature.
31. Conditions placed on a current top-up purchase have no bearing on the accumulated balance in consumers' prepaid wireless accounts. Therefore, it is unfair that consumers are deprived of these accumulated funds and WSPs are unjustly enriched when they confiscate funds that have nothing to do with the transaction on which the purported balance expiry date is applied.

Future performance agreements and provincial prohibition on expiry

32. The offer the WSPs make to prepaid consumers is one for which the application of expiry dates is prohibited all across Canada.
33. Service providers tell consumers that top-ups are the means whereby they can add funds to their account to purchase goods and services from among the variety of goods and services offered. Top-ups are presented in the same manner as retail gift cards and are sold in retail outlets along with gift cards for various retail establishments. Top-ups can also be made online or over the phone. Top-up payments constitute an offer to consumers to pay up front and to have the discretion to acquire goods and services of their choosing whenever they want from their wireless provider.
34. Such arrangements are called future performance agreements. The cash, funds or credits in such accounts are protected in every province against expiry. Consumers cried out against the corporate abuse through which they were deprived of their prepaid balances and retailers were unjustly enriched; their elected representatives responded and enacted laws to protect consumers from this abuse. Yet, this same harm has continued unabated in the wireless sector.

35. The CRTC's consultation to develop a national wireless code was precisely the opportunity for this issue to be addressed to ensure consumers would not be denied protections they are entitled to under provincial laws.
36. Furthermore, top-ups are a prepayment products similar to the prepayment products offered by banks and other financial institutions. The Federal Government acted decisively to protect consumers' cash funds in these accounts from being confiscated on purported expiry dates.
37. There is no legitimate reason why the cash funds similarly held in prepaid wireless accounts by consumers should not be protected against expiry.
