

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

**PURSUANT TO PART I
OF THE CRTC RULES OF PRACTICE AND PROCEDURE
AND SECTIONS 27, 56, 62 and 64
OF THE *TELECOMMUNICATIONS ACT***

**TO REVIEW AND VARY
SECTION J OF
TELECOM REGULATORY POLICY CRTC 2013-271**

03 SEPTEMBER 2013

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1.0 - Nature of the Application

1. The DiversityCanada Foundation, on its own behalf and on behalf of the National Pensioners and Senior Citizens Federation, (“DiversityCanada”), files 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 Section J of Telecom Regulatory Policy CRTC 2013-271 (the “Decision”).
2. DiversityCanada submits that the Commission erred in law and in fact in not providing reasons for rejecting the evidence and arguments presented by DiversityCanada, and in not properly considering DiversityCanada's evidence and arguments in support of prohibiting the application of expiry dates to prepaid wireless balances.
3. In particular, DiversityCanada submits that the Commission:
 - a) failed to provide adequate support for its Decision and, therefore, breached its duty of procedural fairness;
 - b) ignored relevant facts and, therefore, arrived at an unreasonable conclusion; and
 - c) failed to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported “expired” top ups.
4. DiversityCanada therefore respectfully requests that the Commission:
 - i) Rescind Section J of the Decision;
 - ii) Hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless account balances;
 - iii) Allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless account balances;
 - iv) Grant DiversityCanada's reasonable costs related to this application.

2.0 - Background

5. As stated in *Telecom Regulatory Policy CRTC 2013-271*, in Telecom Decision 2012-556, the Commission determined that it was necessary to establish a mandatory code of conduct for wireless service providers (“WSPs”). The Wireless Code was intended to address the clarity and content of contracts for wireless services and related issues to ensure that consumers are empowered to make informed choices in the competitive market.
6. In Telecom Notice of Consultation 2012-557, the Commission initiated a proceeding to develop the Wireless Code (“the Proceeding”). The Commission asked for comments on the content of the Wireless Code; to whom the Wireless Code should apply; how the Wireless Code should be enforced and promoted; and how the Wireless Code’s effectiveness should be assessed and reviewed.
7. The Commission stated its preliminary view that the Wireless Code should address the clarity of WSPs’ contract terms and conditions; changes to these terms and conditions; contract cancellation, expiry, and renewal; the clarity of advertised prices; the application of the Code to bundles of telecommunications services; customer notifications of additional fees; privacy policies; hardware warranties and related issues; loss or theft of hardware; security deposits; and disconnections. The Commission also called for comments on any other provisions that would enable consumers to better understand their rights with respect to mobile wireless services.
8. In Telecom Notice of Consultation 2012-557-3, the Commission published the “Wireless Code Working Document” (the Draft Code) to stimulate discussion and debate. The Proceeding included a two-phase online consultation as well as a public hearing, which took place from 11 to 15 February 2013. Following the oral portion of the Proceeding, participants in the hearing submitted Final Written Comments and Final Replies.
9. The Commission received comments from over 5,000 participants, including hundreds of individual Canadians, as part of the online consultation and interventions in the Proceeding.
10. The following WSPs participated in the Proceeding: Amtelecom Limited Partnership;

Bell Aliant Regional Communications, Limited Partnership, Bell Canada, KMTS, and NorthernTel, Limited Partnership (collectively, Bell Canada et al.); Bell Mobility Inc., on behalf of itself, Solo, and Virgin Mobile; Bragg Communications Inc., operating as EastLink (EastLink); Data & Audio-Visual Enterprises Wireless Inc., operating as Mobilicity (Mobilicity); Globalive Wireless Management Corp., operating as WIND Mobile (WIND); Hay Communications Co-operative Limited; Huron Telecommunications Co-operative Limited; Mornington Communications Co-operative Limited; MTS Inc. and Allstream Inc. (collectively, MTS Allstream); Nexicom Mobility Inc.; Northwestel Inc.; People's Tel Limited Partnership; Public Mobile Inc. (Public Mobile); Quadro Communications Co-operative Inc.; Quebecor Media Inc. on behalf of Videotron G.P. (Videotron); Rogers Communications Partnership (RCP); Saskatchewan Telecommunications (SaskTel); Sogetel Mobilité inc.; TBayTel; TELUS Communications Company (TCC); and Vaxination Informatique (Vaxination).

11. The following consumer advocacy groups participated in the Proceeding: the Consumers Council of Canada (CCC); DiversityCanada; Media Access Canada (MAC) on behalf of the Access 2020 Group of Accessibility Stakeholders; the Mouvement Personne d'Abord du Québec; the Public Interest Advocacy Centre, as well as the Consumers' Association of Canada, and the Council of Senior Citizens' Organizations of British Columbia (collectively, PIAC et al.); the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) on behalf of its client, OpenMedia.ca (OpenMedia); the Service de protection et d'information du consommateur (SPIC); and l'Union des consommateurs (l'Union).
12. Other participants included the following: the Canadian Wireless Telecommunications Association (CWTA); the Commissioner for Complaints for Telecommunications Services Inc. (CCTS); the Competition Bureau of Canada; Glenn Thibeault, Sudbury, Member of Parliament; the Government of Alberta; the Government of Manitoba's department of Healthy Living, Seniors and Consumers Affairs; the Government of the Northwest Territories; the Government of Ontario; the Government of Quebec through the ministère de la Culture et des Communications and the Office de la protection du consommateur; the Government of Yukon; the Office of the Privacy Commissioner of Canada; Drs. Catherine Middleton, Tamara Shepherd, Leslie Regan Shade, Kim Sawchuk, and Barbara Crow, professors and researchers of Communications studies (collectively, Middleton et al.); and Shaw Telecom Inc.
13. The following individuals appeared at the public hearing: Mr. Terry Duncan; Mr.

Glenn Fullerton; Mr. Tana Guindeba; Mr. Nasir Khan; Mr. Michael Lancione; Mr. Allan Munro; Mr. Frederick A. Nakos; Mr. Rainer Schoenen; and Mr. Daniel Sokolov.

DiversityCanada's position

14. During the Proceeding, DiversityCanada called for a ban on the practice whereby wireless providers place expiry dates on prepaid wireless "top up" payments. DiversityCanada noted that with prepaid wireless services, customers pay certain sums in advance and these amounts are recorded as cash balances or electronic credits. The balance in customers' accounts are reduced by the value of the goods or services purchased. Customers can add to their account balance by making further deposits, called "top ups". Wireless providers apply expiration dates to these top ups according to the amount deposited (eg a \$15 top up expires after 30 days). If a customer makes a top up payment before the expiry date, all funds already in the account are preserved and the balance is increased by the value of the top up. If, however, the customer does not make a top up before the expiry date, the wireless provider seizes the entire balance remaining in the customer's account.
15. DiversityCanada disputed the claim made by wireless service providers that the business model for prepaid wireless services was universally one whereby top ups are consideration for access to the wireless network for specific services, for a specified period of time.
16. DiversityCanada made the distinction between the two types of prepaid wireless services. One is a monthly plan, whereby customers do indeed pay for access to the wireless network for specific services and for a specified time.
17. The other type of prepaid wireless service is the pay-per-use service. DiversityCanada presented evidence that service providers advertise prepaid wireless pay-per-use account balances as cash balances that are to be used by subscribers to make purchases from among a variety of goods and services available via the wireless networks.
18. DiversityCanada also noted that customers with prepaid monthly plans also have pay-per-use funds (ie customers who pay their monthly service fee and add further top ups in order to purchase extra services) and that these pay-per-use funds are also seized by the wireless providers under the pretext of balance expiry.

19. DiversityCanada argued that for prepaid pay-per-use customers, the wireless service providers' claim of an "access to system" business model could not be inferred because: i) there was no offer of the nature claimed by the wireless providers, and, therefore, ii) there was no acceptance by consumers of any offer of the nature claimed by the wireless providers.

20. Furthermore, DiversityCanada argued that because of the nature of the offer actually presented (ie, top up are cash balances for use by consumers at their discretion to buy goods or services offered by the WSPs) the assertion that remaining balances are taken as consideration for access to the network:
 - represented either false advertising as to the nature of top ups; or
 - represented unilateral changes to material terms of the agreement;
 - was unfair to customers with monthly plans who already paid the sum agreed to for network access;
 - resulted in unjust enrichment of wireless service providers who confiscate the remaining balances;
 - resulted in a more egregious form of unjust enrichment when the accumulated balances from prior top ups that are unrelated to the most recent top ups are confiscated as payment for "access for a specified time" associated with the most recent top up.

21. Additionally, DiversityCanada argued that because top ups are advertised/offered to the public as cash balances, they were future performance agreements akin to gift cards or prepaid purchase cards, and that all provinces had banned the application of expiry dates to such payments. DiversityCanada called on the Commission to prohibit prepaid wireless balance expiry in order to ensure prepaid wireless customers enjoyed the protections they were entitled to under provincial laws.

22. At section 19 of the Decision, the Commission dealt with the expiration of prepaid wireless cards by reviewing the positions of the parties, providing its analysis and stating its determination. As can be seen from this section (quoted in full below), the Commission made no mention of the arguments raised by DiversityCanada, which conflicted with the arguments and assertions made by the WSPs. Neither did the Commission state any reason why it rejected the arguments made by DiversityCanada.

19. Expiration of prepaid cards

Positions of parties

339. Prepaid wireless service cards (prepaid cards) are subject to an expiry date determined by the WSP and ranging from 15 days to one year following activation, depending usually on the value of the card (e.g. a \$100 prepaid card generally has a later expiry date than a \$30 card). To continue service and/or carry over credits beyond the expiry date, consumers can choose to “top-up” or add money to their account via the WSP’s website and/or by purchasing additional prepaid cards.

340. Many consumers submitted that they were frustrated that their account balances expire immediately if they do not “top up,” and that, if they missed the end of their account by one day, their balance would be lost. These consumers therefore requested that the Commission require WSPs to carry over prepaid account balances indefinitely.

341. Some consumer groups and individuals submitted that the Wireless Code should prohibit the expiration of prepaid cards (i.e. services not used within the timeframe allotted should roll over indefinitely).

342. WSPs argued that prepaid cards should not be prohibited from expiration, since the business model is based on providing time-limited access to the network.

343. The CWTA submitted that prepaid services are not defined solely by the purchase of minutes. The CWTA stated that prepaid service models provide access to the network (e.g. the ability to receive or send calls, text messages or data) as well as predetermined usage volumes (e.g. a set number of minutes, texts or megabytes; or unlimited usage for a fixed duration). Prepaid wireless service balances also typically do not have an expiry date; rather they have a usage period that begins once the balance is activated. Many prepaid services allow customers to carry over unused minutes to a new usage period as long as the customer refreshes the account before the end of the term.

344. RCP and Bell Canada et al. argued that customers already understand how prepaid services function and how to manage their accounts. They submitted that consumers are already informed of the conditions applicable to their prepaid balances, including the usage period. Bell Canada et al. further stated that alternatives already exist to prevent account expiry.

345. WSPs generally agreed with the CWTA that a prepaid card is substantially different from a gift card, in that prepaid cards are a billing mechanism for a specific service over a period of time. SaskTel stated that once a prepaid card is activated, there is recognition that the card has been used to purchase an ongoing service, and that there is a cost to retaining this service over time.

346. SaskTel argued that if a prepaid balance were to never expire, customers might purchase a

prepaid plan and use the device infrequently or only in cases of emergency. SaskTel expressed concern that this could result in significant numbering resources being assigned to devices that are infrequently or never used. TCC also argued that it would not be reasonable for a WSP to be obligated in perpetuity to a customer, especially when the company has no contact information for the customer and cannot even know if they reside in Canada or are deceased, for example. For these reasons, TCC argued that there must be a time when a prepaid account is considered to have been abandoned, and the accounting standard is 90 days.

Commission's analysis

347. The Commission considers that consumers' key requests related to prepaid cards are (i) for WSPs to carry over their account balances (which may be represented in terms of minutes, text messages, or other usage) indefinitely if unused; and (ii) for consumers to be able to "top up" their accounts a bit late.

348. The Commission considers that WSPs should hold prepaid card customers' accounts open for seven days following expiry of an activated prepaid card to give customers more time to "top up" their accounts. The Commission considers that such a requirement would (i) not impose a significant burden on WSPs; (ii) improve clarity regarding prepaid service billing and policies; (iii) balance consumer interests with current market realities; and (iv) increase flexibility for frequent users of prepaid services.

349. The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs to carry over their prepaid unused minutes indefinitely. In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service. The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate.

Commission's determinations

350. In light of the above, the Commission requires WSPs to hold prepaid customers' accounts open for at least seven days following the expiry of an activated card at no charge to give customers more time to "top up" their accounts and retain their prepaid balance.

3.0 - Criteria for Review and Variance

23. 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*.
24. Under 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.
25. 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."
26. DiversityCanada submits that there are no circumstances that should put the need for this review into question, and that it is in the public interest that this application go forward.

4.0 - Reasons for Review and Variance (Errors in Law or in Fact)

4.0 a) Absence of Reasons

27. The Commission provided no reason as to *why* it rejected DiversityCanada's position or the evidence presented by DiversityCanada. DiversityCanada submits that the absence of reasons amounts to a breach of procedural fairness which raises substantial doubt as to the correctness of Section J of the Decision.

28. Paragraphs 347 to 349 of the Decision come under the heading "Commission's analysis". The first two paragraphs in this section deal with the rationale for implementing a new seven-day "grace period" to expiry dates on prepaid wireless services. The only paragraph that deals with the decision not to prohibit expiration of prepaid wireless account balances is paragraph 349, in which the Commission says:

"The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs to carry over their prepaid unused minutes indefinitely. In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service. The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate."

29. This, however, is not a *reason* for not prohibiting the application of expiry dates on prepaid wireless services. Instead, DiversityCanada submits that this is a conclusion, and it does not indicate how or why the Commission came to its determination. It is akin to the statement "my reasons are that I think so" mentioned to by Keith J. in *Re Canada Metal Co. Ltd. et al. and MacFarlane*¹, at p. 587.

30. Neither in paragraph 349 nor in the other parts of the Decision does the Commission explain, for instance, why it rejected DiversityCanada's arguments that the nature of the offer for pay-per-use prepaid wireless services was not as claimed by the WSPs; that the terms of the prepaid pay-per-use agreements could not be reconciled with the

1 1973 1 O.R. (2d) 577

WSP's contention that prepaid wireless cards were payments for access to the network; and that the WSP's contention represented either false advertising or unilateral changes to an agreement. Nor does paragraph 349 address why the Commission did not agree with DiversityCanada's assertion that unjust enrichment occurs when prior accumulated sums unrelated to current top ups were seized.

31. 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. The Supreme Court of Canada held in *Baker v. Canada (Minister of Citizenship and Immigration)*² at paragraph 43:

“...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. . . .

32. 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.” Therefore, every party with an interest in the Decision has a statutory right of appeal and ought to have been provided a written explanation for the Decision in order to make a determination as to whether an appeal should be pursued.
33. DiversityCanada submits that the summary and the conclusion provided by the Commission are not sufficient to satisfy the crucial role that reasons play in the judicial process. The required standard for reasons was outlined in *Clifford v. Ontario (Attorney General)*³, in which a tribunal was castigated for delivering a decision by merely stating that its conclusion was “[based] on all of the evidence”, in similar fashion as the Commission merely stated that it considered the evidence on the record did not support the prohibition of expiry dates on prepaid wireless services. In *Clifford*, the court said at paragraph 29 to 30:

2 1999 2 SCR 817 (“*Baker*”)
3 2008 ON SCD C (“*Clifford*”)

[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.

34. The Proceeding before the Commission was not an instance in which the evidence was such that no reasons were required. In fact, the opposite is the case. As in *Clifford*, the Proceeding presented an instance in which there were conflicts in the evidence.
35. In the Proceeding, the WSPs testified that prepaid wireless top ups were payments for access to the network for specified services for a specified period of time, but submitted no further evidence that this is the manner in which the offer for such services was presented to prepaid wireless consumers. DiversityCanada contradicted the assertion of the WSPs and testified that no offer of the nature claimed by the WSPs had been made to consumers. Furthermore, DiversityCanada presented evidence, including WSP's advertisements, which it argued proved that prepaid wireless top ups were promoted to consumers as cash balances over which consumers retained discretion to spend on goods and services of their choice, and, as such, these cash balances could not be seized as payments for access to the network for specified services over a specified period, based both on the common law and on provincial consumer protection legislation that protected such forms of payment.
36. DiversityCanada submits that the Commission's Decision does not show how the Commission assessed the evidence and the conflicting positions to arrive at its

conclusion. In *R. v. Sheppard*⁴, the Supreme Court of Canada established the necessity of doing so, when it stated at paragraph 46:

...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.

37. DiversityCanada submits that the Commission's Decision does not provide enough support for its Decision. The absence of reasons in the Decision prevented DiversityCanada and every prepaid wireless consumer who has an interest in the Decision from giving informed consideration to grounds for appeal. Thus, an error of law has been committed.
38. DiversityCanada submits that the record provides no assistance in ascertaining the reasons for the Commission's Decision. DiversityCanada's fullest arguments as to the nature of prepaid wireless contracts as well as the arguments concerning unjust enrichment with respect to prior accumulated balances, for example, were presented in written comments after the hearing, and the Commission's only role at that stage of the proceeding was to receive these written submissions. The Commission did not comment in any meaningful way on the arguments submitted by DiversityCanada during the hearing.
39. The requirement to provide reasons, particularly where the record is incapable of showing how the Commission came to its decision, was addressed in *R. v. R. (D.)*⁵, in which Major J, delivering the majority opinion, stated at paragraph 54 to 55:

54 It is my view that the trial judge erred in law by failing to address the confusing

4 2002 SCC 26, [2002] 1 SCR 869
5 1996 2 SCR 291

evidence, and failing to separate fact from fiction. In *Burns, supra*⁶, McLachlin J., writing for the Court, stated, at p. 665:

This statement should not be read as placing on trial judges a positive duty to demonstrate in their reasons that they have completely appreciated each aspect of relevant evidence. The statement does not refer to the case where the trial judge has failed to allude to difficulties in the evidence, but rather to the case where the trial judge's reasons demonstrate that he or she has failed to grasp an important point or has chosen to disregard it, leading to the conclusion that the verdict was not one which the trier of fact could reasonably have reached.

55 McLachlin J. clearly set out the law regarding the requirement of trial judges to give reasons in *Burns*. However, it should be remembered that *Burns* dealt with a situation where the Court of Appeal agreed the trial judge had evidence before him to support the conclusion he reached, but overturned the verdict due to lack of reasons. The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial.

40. As in the above result, in *Clifford*, the decision of the Tribunal was quashed and the matter was remitted to the Tribunal for a new hearing, before a differently constituted panel. DiversityCanada submits that Section J of the Wireless Code be rescinded and a new hearing before a differently constituted panel be held on the subject of the expiration of prepaid wireless account balances, as outlined in paragraph 4 (Section 1.0) of this submission herein.

6 R. v. Burns, 1994 (SCC), [1994] 1 S.C.R. 656

4.0 (b) Evidence Ignored

41. DiversityCanada also submits that in making its Decision, the Commission ignored evidence.
42. In *Flores v. Canada (Citizenship and Immigration)*, the court stated: “It is trite law that decision makers are presumed to have considered all the evidence before them, absent strong indications to the contrary.” DiversityCanada submits that the Commission did not consider all the evidence before it.
43. Presenting its conclusion, the Commission stated in paragraph 349 of the Decision that it “considers that the evidence on the record of the proceeding does not support consumers’ request for WSPs to carry over their prepaid unused minutes indefinitely”, and that it “notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service”. The Commission further stated that it “considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate”.
44. Thus, it would appear that the Commission came to the conclusion that the service agreement related to prepaid cards was one for access to the network for specific usage over a specified period, and, therefore, pay-per-use consumers did not have discretion over what the funds in their account could be applied to. Furthermore, the implication is that the Commission found that there is no expiry date and that WSPs do not confiscate the remaining funds in the accounts of prepaid wireless customers on the purported expiry date of the last top up; instead, the Commission appears to have concluded that when the usage period for access to the network (related to the last top up) ended, WSPs simply collected payment for that usage period by taking all of the funds remaining in a consumer's account.
45. DiversityCanada submits that the Commission erroneously came to that finding based on the evidence that was before it.
46. While the WSPs and the CWTA argued throughout the Proceeding that prepaid

wireless top ups constituted payment for network access for specified services for a limited time period, they put no evidence before the Commission to support this position. There is no evidence on the record of the Proceeding that WSPs present to consumers an offer for pay-per-use wireless services which specifies that consumers will pay all of the balance remaining on their account as consideration for "access to the network" after a set time period. The WSPs failed to produce such evidence despite the fact that as providers of the services, the WSPs generate all materials that establish the agreements for the provision of prepaid wireless services.

47. By contrast, the consumer interests groups, PIAC and DiversityCanada, placed evidence on the record⁸, such as top up cards issued by the WSPs; pages from websites operated by WSPs that present prepaid offerings to the public; and a transcript of a customer service representative of one WSP explaining the prepaid wireless offering. In particular, DiversityCanada quoted a statement from Virgin Mobile Canada, which it said was typical of the manner in which WSPs promote prepaid wireless services to consumers: "Topping up is how you add cash to your Virgin Mobile prepaid account. When you have a prepaid phone, use your cash to make phone calls, buy ringtones, send text messages, download games... it's up to you."
48. At the hearing and in the written filings that followed, DiversityCanada maintained this evidence clearly demonstrated that top ups for pay-per-use prepaid wireless services were cash balances over which customers had discretion to purchase goods and services offered by the WSPs over their network. DiversityCanada argued that "access to the network", as described by the WSPs, was a commodity in and of itself, which, therefore, would also be subject to purchase at the consumer's discretion; and that a pay-per-use agreement which gave customers discretion over their funds could not be reconciled with the WSPs' assertion that the agreement was, in fact, one whereby all funds in the customer's account constituted payment for access to the network for specified services over a specified time.
49. DiversityCanada went to lengths to highlight to the Commission the very fact that there was no evidence to support the WSPs' claim that pay-per-use prepaid wireless consumers were offered a service agreement for access to the network for specified usage over a specified time period. In DiversityCanada's Final Written Comments in the Proceedings, DiversityCanada's consumer-spokesperson, Ms. Celia Sankar, told the

8 Appendix D of PIAC's December 04, 2012 submission; Exhibits 1 and 3 of DiversityCanada's Presentation at the Hearing on February 13, 2013

Commission:

I am or have been a wireless consumer with Telus, Bell and Rogers, either under their brands or flanker brands and have never been made the offer described by the industry. I have surveyed the current offerings and have not come across it either. 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 his or her top up payment. ...

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 she does not even know is being offered.

No offer. No acceptance. Therefore, balance expiry can not be justified as payment of consideration for access to the service provider's system. The Commission must prohibit this practice.

50. The issue of the evidence before the Commission is also important on the question of whether the funds in consumers' accounts were confiscated on an expiry date, or whether these funds were simply collected as payment for specified services at the end of a specified usage period. Although it did not put it in such terms, the fact that the Commission came to the conclusion that prepaid cards were payment for specified services over a specified time period means that the Commission found that there was no expiry date applied to prepaid wireless services. DiversityCanada submits that this was not a reasonable finding based on the evidence before the Commission.
51. The CTWA claimed prepaid wireless service balances “typically do not have an ‘expiry date’; rather they have a usage period that begins once the balance is activated”. However, the CWTA offered no evidence to support that position. Conversely, DiversityCanada, directed the Commission's attention to the evidence put on the public record by PIAC and DiversityCanada in which several providers use precisely these terms: “Balance Expiry Date”; “Expires”; “unused funds will expire”; “expired amounts”; and “Funds expire”. These terms appear on the top up cards themselves.
52. DiversityCanada argued that a recurring theme throughout the Proceeding had been that WSPs must not charge a consumer for anything unless they had first received express approval from the consumer for such a charge, and that the practice of applying expiry dates to prepaid wireless cards violated this principle.

DiversityCanada asserted that balance expiry was outright confiscation of consumers' funds and called on the Commission to protect consumers from having their funds taken without their consent by prohibiting the practice of balance expiry.

53. Did the Commission take into consideration the evidence put before it by PIAC and DiversityCanada which showed the exact nature of the WSPs' prepaid wireless offerings? Did the Commission give weight to evidence that top ups were presented to consumers as cash balances to be used at consumers' discretion? And, as for the issue of balance expiry, did the Commission consider the evidence that the top up cards themselves explicitly stated the remaining funds or balances would expire on a purported expiry date?
54. DiversityCanada submits that there are strong indications that the Commission did not.
55. First, this evidence is absent from the Decision. The omission of any reference to the evidence and to DiversityCanada's related arguments in the Decision would suggest that the Commission ignored this evidence and the associated arguments.
56. Second, the Commission's conclusion that the prepaid wireless cards amount to payments for access to the network for specific services for a specified period is contrary to the evidence it had before it to consider.
57. DiversityCanada submits that the Commission's conclusion agreeing with the WSPs' assertions was made without regard to the entire evidence of DiversityCanada and the consumer interest groups.
58. Therefore, DiversityCanada respectfully submits that Section J of the Decision be rescinded as outlined in paragraph 4 of section 1.0 herein.

4.0 (c) Did Not Consider the Principle of Unjust Enrichment

59. DiversityCanada submits that the Decision was not reasonable because the Commission failed to consider the principle of unjust enrichment raised by DiversityCanada in the Proceeding. DiversityCanada argued that unjust enrichment occurs when WSPs seize the remaining balances from consumers' accounts and that the Commission should prohibit the practice of applying expiry dates to prepaid wireless services in order to end this injustice.
60. With respect to unjust enrichment, the court stated in *Rathwell v. Rathwell*:
- ...for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.
61. During the Proceeding, DiversityCanada described in detail the prepaid wireless pay-per-use business model and the process whereby WSPs seize the remaining balances in consumers' accounts on the purported expiry dates. This seizure of the remaining balance in consumers' accounts satisfies two of the elements of unjust enrichment: the enrichment and the corresponding deprivation.
62. DiversityCanada argued that unjust enrichment occurs because there is no juristic reason for the enrichment of the WSPs and that unjust enrichment could be identified on two levels. The first involved the remaining balances of the last top up, and the second involved the balances accumulated prior to the last top up.
63. With respect to the remaining balances of the last top up, DiversityCanada argued that since the top ups represented a means for consumers to add to a cash balance over which they had discretion, then there was no justification for seizure of the remaining balance as “payment for specified services for a specified time period” as no such offer was made and none had been accepted by the consumer.
64. With respect to the balances accumulated prior to the last top up, DiversityCanada submitted to the Commission that the case for unjust enrichment was clear. Prior accumulated balances were totally unrelated to the agreement between the consumer and the WSP concerning the last top up. Therefore, there was no juristic reason for

WSPs to enrich themselves by seizing the prior accumulated balances in consumers' accounts that were unrelated to the last top up on the purported expiry date of the last top up.

65. The Commission came to the finding that prepaid wireless cards were payment for specified services for a specific time period, thereby rejecting DiversityCanada's argument with respect to unjust enrichment related to the last top up.
66. However, this finding still left the principle of unjust enrichment with respect to prior accumulated balances that are unrelated to the last top up to be addressed. The Decision omits any reference to this unjust enrichment. DiversityCanada submits that the Commission failed to consider this basic principle.
67. The unjust enrichment described by DiversityCanada during the Proceeding contravenes the *Telecommunications Act*, which states:

“27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.”
68. Given that the sector of the market which relies on prepaid wireless services includes some of the most vulnerable consumers (including pensioners, youth, the unemployed, minimum-wage workers, persons on disability benefits, and newcomers to Canada), DiversityCanada submits that it is in the public interest that this unjust enrichment not be allowed to continue.
69. In conclusion, DiversityCanada respectfully submits that it is unreasonable for the Commission to leave intact a situation whereby WSPs unjustly enrich themselves at the expense of prepaid wireless consumers. Therefore, as per paragraph 4 of section 1.0 herein, Section J of the Decision should be rescinded.

5.0 - Conclusions

70. In summary, DiversityCanada submits that the Commission erred in law and in fact in not providing reasons for rejecting the evidence and arguments presented by DiversityCanada, and in not properly considering DiversityCanada's 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.

71. In particular, DiversityCanada submits that the Commission:

i) failed to provide adequate support for in its Decision and, therefore, breached its duty of procedural fairness;

ii) ignored relevant facts and, therefore, arrived at an unreasonable conclusion; and

iii) failed to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported "expired" top ups.

72. DiversityCanada therefore respectfully requests that the Commission:

i) Rescind Section J of the Decision;

ii) Hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless account balances;

iii) Allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless account balances;

iv) Grant DiversityCanada's reasonable costs related to this application.

73. All of which is respectfully submitted this 3rd day of September, 2013.

6.0 - Parties Served

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7.0 - 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.

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