

**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**

**REPLY COMMENTS BY  
THE DIVERSITYCANADA FOUNDATION**

**17 OCTOBER 2013**

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## 1.0 Introduction

1. The DiversityCanada Foundation (“DiversityCanada”), on its own behalf and on behalf of the National Pensioners and Senior Citizens Federation, by its counsel, files these comments pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277)* (the “Rules”) in reply to Answers of the respondents and to an Intervention in DiversityCanada's Part 1 Application to Review and Vary Section J of Telecom Regulatory Policy CRTC 2013-271 (the “Decision”).
2. DiversityCanada based its Application on the grounds 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.
3. DiversityCanada requested 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.
4. In these Reply Comments, DiversityCanada addresses aspects of the two respondents' Answers and of one Intervention which refute DiversityCanada's position or raise new issues. DiversityCanada respectfully submits that not addressing a party's submissions does not indicate agreement with that position.

## 2.0 Absence of Reasons

### 2.0 a) Standard of Review

5. In its submission, the Canadian Wireless Telecommunications Association (CWTA) mischaracterized the first basis upon which DiversityCanada filed its review and variance Application, and then continued off-topic, instead of addressing the issue actually raised by DiversityCanada.
6. DiversityCanada's Application submitted that the Commission failed to provide “adequate support” for its Decision. The CWTA inappropriately suggested this was a claim by DiversityCanada that the Commission did not provide “adequate reasons” or “sufficient reasons” for the Decision. DiversityCanada submits that its Application was clear and consistent in asserting that there was an absence of reasons in the Decision. The Application noted that the Decision presented conclusions not supported by reasons. DiversityCanada respectfully submits that “adequate support”, therefore, should consist of conclusions which are accompanied and explained by reasons.
7. The CWTA said:

DiversityCanada’s primary ground in support of its Application is the Commission’s purported failure to provide *sufficient reasons* for not adopting DiversityCanada’s proposal to ban Wireless Service Providers (WSPs) from applying expiry dates to pre-paid service payments. [Emphasis added]
8. The CWTA then cited passages from *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*<sup>1</sup> in an attempt to refute DiversityCanada's assertion that the Decision was not correct because of an absence of reasons.
9. DiversityCanada submits that *Newfoundland* is entirely unhelpful to the CWTA; in fact, while the case itself does not address the issue raised by DiversityCanada, comments made by the Supreme Court in this decision actually bolster DiversityCanada's position.

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1 2011 3 SCR 708 (“*Newfoundland*”)

10. *Newfoundland* involved a case in which, as the court specifically noted, “Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here.”<sup>2</sup> The Supreme Court went on to state: “It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review.”<sup>3</sup>
11. As stated in the passage quoted by the CWTA in paragraph 8 of its submission, the *Newfoundland* ruling concerns judicial reviews of the “adequacy” of reasons; furthermore, such reviews fall “under a reasonableness analysis”.
12. DiversityCanada's assertion was not that the Commission's Decision was unreasonable because reasons presented were somehow deficient. Rather, DiversityCanada argued that the Decision was not correct because of the absence of reasons.
13. In *Dunsmuir v. New Brunswick*,<sup>4</sup> the Supreme Court of Canada made it clear that correctness and reasonableness are distinct standards of review, by stating:

There ought to be only two standards of review: correctness and reasonableness.

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

14. *Dunsmuir* further states: “The standard of correctness should also apply to the requirements of 'procedural fairness'.... ”

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2 Ibid., para. 20

3 Ibid., para. 22

4 2008 1 SCR 190 (“*Dunsmuir*”)

15. In paragraph 27 of its Application, DiversityCanada submitted 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”.
16. DiversityCanada noted that a) section 64 (1) of the *Telecommunications Act* grants a right of appeal from decisions of the Commission to the Federal Court of Appeal; and that b) the Supreme Court established in *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>5</sup> that where there is a statutory right of appeal “the duty of procedural fairness will require the provision of a written explanation for a decision”.
17. In summary, DiversityCanada's position (as validated by *Newfoundland*) is that the absence of reasons in the Decision is a breach of procedural fairness and an error in law, and, as such, the appropriate standard of review with respect to this ground for review is not reasonableness, but correctness.

## 2.0 b) Distinction between Reasons and Conclusions

18. The first ground for DiversityCanada's Application turns on the question of whether paragraph 349 of the Decision presents reasons or conclusions.
19. Bringing forward the *Newfoundland* case law, the CWTA made an attempt to give the 88 words of that paragraph the quality of reasons. However, even the CWTA itself could not escape the true nature of that passage of the Decision.
20. At paragraph 11 of its submission, the CWTA quoted from the passage in question and then immediately went on state, quite pointedly:  
  
“*This is a clear finding of fact....*” [Emphasis added]
21. Indeed it is.

22. DiversityCanada submits that all of paragraph 349 presents findings of fact. This paragraph contains three conclusions, none of which serves as reasons for the other or for the outcome itself, according to the guidance given by the bench as to the elements and qualities that comprise a reason.

23. As cited in DiversityCanada's Application, the courts have made it clear that reasons and conclusions are two distinct concepts:

Reasons are required; not merely conclusions....<sup>6</sup>

Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. ... Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions.<sup>7</sup>

24. As the second quote suggests, a reason is an explanation of how and why a decision-maker settled on a certain conclusion, or finding of fact. In *R. v. Sheppard*<sup>8</sup> the Supreme Court described this as showing “the path taken by the trial judge through confused or conflicting evidence”.

25. *Clifford* quoted an earlier decision which further specified elements that make up a reason:

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.*<sup>9</sup> [Emphasis added]

26. In its submission, the CWTA referred to paragraph 349 of the Decision as both a reason and a conclusion. A closer examination of this paragraph should help to clarify the difference between conclusions and reasons.

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<sup>6</sup> *Clifford v. Ontario (Attorney General)* 2008 90 O.R. (3d) 742 (“*Clifford*”); para. 33 of the Application

<sup>7</sup> *R. v. R. (D.)* 1996 2 SCR 291; para. 39 of the Application

<sup>8</sup> 1996 2 SCR 291; para. 36 of the Application

<sup>9</sup> Para. 33 of the Application

27. Paragraph 349 begins: “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.”
28. This sentence presents the key finding that prepaid wireless accounts contain unused minutes – rather than cash balances – and that these unused minutes could not be carried over indefinitely.
29. The record shows that the WSPs presented no evidence to prove that account balances present a record of unused minutes. The WSPs merely provided testimony on this issue, and conflicting testimony at that.
30. At the Hearing, for example, TELUS made the following claim:

1999. Once you've activated, the reason the minutes have to expire is because you've used it to now top up your account, add minutes to the account. The only reason -- like, as long as you do something that ensures that that account is staying active, like add more minutes to it or utilize the device and draw down the minutes, then we'll keep, you know, the minutes alive, right, we'll keep topping it up and we have customers with, you know, very high balances because they, you know, kept it active with top-ups every single month for many years.<sup>10</sup>

31. However, in an exchange<sup>11</sup> in which one Commissioner sought an explanation as to how prepaid wireless pay-per-use accounts work, WIND Mobile repeatedly made it explicit that the account is a record of cash balances, stating at one point:

9882 ... You put money in the account and every time you make an outgoing call it's \$0.20 a minute, there is no charge for incoming calls, and when you send a text for Canada or U.S. you pay \$0.15 a call. So you can't do any of those actions unless there is money in the account.

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<sup>10</sup> TNC CRTC 2012-557 Transcript of Proceeding, Volume 1, 11 February 2013. This testimony by TELUS that topping up equates adding minutes directly conflicts with the evidence referred to in footnote 12, in which a TELUS prepaid wireless card states “Once deposited into your account, card value is valid for 60 days”; the value on the card is expressed in monetary terms (i.e. “50 dollars”). In other words, in the real world, TELUS tells customers that by topping up, what they are adding to their accounts is cash, rather than minutes, as TELUS suggested in its testimony before the Commission.

<sup>11</sup> Ibid. Volume 5, 15 February 2013; 9871 to 9915



32. Furthermore, the record shows that consumer interest groups provided evidence (promotional materials as well as screenshots of account balance information transmitted to account holders via the phone)<sup>12</sup> which demonstrated that WSPs told customers that prepaid wireless accounts held “funds” or “cash” or a monetary value, such as “\$114.00”.
33. The evidence included the promotional statement from Virgin Mobile Canada, which read: “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.”
34. Additionally, DiversityCanada argued<sup>13</sup>:

It has to be pointed out that some in the wireless industry are either trying to mislead the Commission or have not grasped that the wireless industry has rapidly evolved over the last few years and you can now do more with a cell phone than simply make voice calls. When speaking of activating a top up, some industry representatives referred to this as “buying minutes”, and spoke of account balances as having a certain number of “minutes left”.

Today, activating a top up is not equivalent to “buying minutes”. If this were so, then the entire top up would have to be use solely for making calls. The consumer would not be able to use \$15 already spent on the purchase of minutes to also send texts, buy wallpapers, buy ringtones, buy music, etc. But as seen in the Virgin Mobile Canada quote, this is precisely what the wireless providers tell consumers they can do with their top ups – use it to select from the variety of goods and services offered by the service provider.

So what is going on here?

It would seem that while the industry is trying to win customers by telling them “top ups are credits which you can use to purchase a variety of goods and services at any time”, it is also trying to influence Commissioners to permit balance expiry by telling them “top up activation equates buying minutes for a time-limited period”.

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12 TNC CRTC 2012-557 Appendix D of the December 04, 2012 submission by the Public Interest Advocacy Centre (PIAC); Exhibits 1 and 3 of DiversityCanada's Presentation at the Hearing on February 13, 2013

13 TNC CRTC 2012-557, DiversityCanada Foundation Final Written Comments, written by Celia Sankar, pg 06 - 07

These statements can not both be true at the same time.

From the evidence I presented at the hearing and from other information available to Commissioners on the offerings from wireless providers, it should be abundantly clear that the activation of top ups can by no means be described as “buying minutes”.

35. As indicated in the previously-cited passages from decisions of the Supreme Court, the Commission was required to not just present its finding of fact, but reasons, that is to say, statements that showed the path it took through the conflicting evidence to come to the conclusion that prepaid wireless accounts do not hold cash balances, but, instead, hold unused minutes. This would have required that the principal evidence upon which that finding was based would be outlined. The reasons would have had to address the major points in issue. The reasoning process followed by the Commission would have had to be set out, and would have had to reflect consideration of the main relevant factors.
36. However, nothing in paragraph 349 or anywhere else in the Decision explains how or why the Commission concluded that prepaid wireless accounts hold unused minutes, rather than cash balances. There is an absence of reasons to explain this crucial finding of fact.
37. The second sentence of paragraph 349 states: “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.”
38. This, too, is a conclusion. Curiously, in this instance, the Decision presents a finding of fact which is based partially on an issue that was not in contention, and which is only vaguely related the real issue that was in dispute.
39. The CWTA elaborated on the second sentence of paragraph 349, stating: “This is a clear finding of fact, that all wireless services including pre-paid services provide on-going access to the WSPs’ networks while a customer’s account is open and valid.”

40. A scrupulous review of the record would show that there was no attempt by any consumer interest group to refute the fact that users of prepaid wireless services have access to the network after activating a top up.
41. However, what *was* contested was whether a prepaid wireless pay-per-use top up was:
- i) consideration for this access to the network, for specific usage during a specified period of time; or
  - ii) a deposit of cash, which would be used to purchase goods and services available *via the network*, and, thus, which should not be subject to an expiry date, since cash should not expire.
42. Again, using the aforementioned case law, the finding of fact in the second sentence of paragraph 349 should have been supported by statements showing the path taken through the conflicting evidence to come to this conclusion; a discussion of the principal evidence upon which this finding was based; statements that addressed the major points in issue; and a demonstration of the reasoning process followed by the Commission reflecting consideration of the main relevant factors.
43. It is submitted that the Decision could not present such information because there was no dispute during the Proceeding on the subject of whether prepaid services provide on-going access to the WSPs' networks while a customer's account is open and valid.
44. Furthermore, the second sentence of paragraph 349 is problematic because it presents a conclusion that quite likely cannot be reconciled with the one contained in the first sentence of paragraph 349. If prepaid wireless account hold "unused minutes", then what "specific usage limitations" are being referred to in the second sentence? Is the Decision suggesting that prepaid wireless top ups can only be used to make voice calls? Voice calls are charged by the minute. However, other services, such as text messages, for example, have a set fee. Additionally, unused minutes certainly cannot be used to purchase goods, such as ringtones, wallpapers, or games.
45. DiversityCanada is constrained to submit only that these two statements "quite likely" cannot be reconciled because the Decision does not provide an explanation (i.e. reasons) for these findings of fact that would clarify the matter.

46. The final sentence of paragraph 349 says: “The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate.”
47. Here again is a conclusion that invites conjecture on a number of issues. First, there is no explanation as to what service agreements the Decision is referring to. In its Final Written Comments<sup>14</sup>, DiversityCanada pointed out that prepaid wireless customers have an overarching agreement with the WSP by virtue of the WSP's terms of service, and, additionally, each top up payment creates a new agreement for that particular top up. Secondly, there is no explanation as to exactly what limitations are being referenced.
48. Presumably, the word “limitations” refers to the expiry dates. However, this conclusion by itself does not clarify how or why the Commission came to determine those expiry dates are valid and that it was, therefore, inappropriate to impose a requirement that services be provided beyond them.
49. There is nothing, for instance, to show how DiversityCanada's arguments about the illegality of the expiry dates had been weighed. In paragraphs 12 and 19 of its Final Reply, DiversityCanada said:

Defining characteristics of the pay-per-use arrangement are that customers pay for “usage” of the network or “access to the system” via the higher rates charged (as will be discussed later), and, they are not bound by any “usage period” (other than the illegal expiry dates that wireless providers purport their balances are subject to).

...

Furthermore, all provinces have banned the application of expiry dates to prepaid purchase cards, gift cards, vouchers, devices, electronic credits or other medium of exchange whereby customers pay an amount, up front, in order to later select from a variety of goods and services offered by the supplier – which precisely describes prepaid wireless top up purchases. All purported expiry dates on prepaid wireless top ups, therefore, are illegal.

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14 At pages 3 and 6

50. If the Commission dismissed DiversityCanada's argument that expiry dates were illegal contractual terms that were therefore void, then on what basis did it do so? What evidence provided proof that the expiry dates on prepaid wireless account balances are legitimate? While the Decision asserted paramountcy over provincial law,<sup>15</sup> what was the rationale for denying prepaid wireless consumers the protections they are entitled to under provincial law?
51. Reasons would have provided these answers.
52. In summary, DiversityCanada submits that there is an absence of reasons in the Decision, which raises substantial doubt as to the correctness of the Decision.

### 3.0 Evidence Ignored

#### 3.0 a) Standard of Review

53. It is when discussing whether or not evidence has been ignored that an examination of the reasonableness of the Decision becomes relevant. As *Dunsmuir* states at paragraph 51: “questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness....”
54. *Dunsmuir* further specifies at paragraph 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[Emphasis added]

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<sup>15</sup> Para. 26 of the Decision. The legitimacy of this position was disputed by the Government of Quebec (as noted at para. 19 of the Decision) and, arguably, is subject to confirmation by the court.

### 3.0 b) Reasonableness of the Decision

55. DiversityCanada submits that the Decision is not reasonable since, as the following discussion shows, the outcome is essentially without foundation in the evidence.

56. In its Application, DiversityCanada asserted:

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.

57. The CWTA sought to refute this assertion. Yet the CWTA could only come up with three contractual terms, from Bell, NorthernTel, and Rogers, which do not address the issue DiversityCanada raised.

58. As quoted by the CWTA, in its 15 March 2013 Reply, Bell said:

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

“You must maintain a positive balance of funds in your Virgin Mobile account in order to use the Services. To add credit to your account you must "Top Up." If your account carries a zero dollar (\$0) credit balance for more than one hundred and twenty (120) consecutive days from the expiry of your last "Top Up" it will be closed and your telephone number will be reassigned. All Top Ups ... have specified active periods and an expiry date. The active period starts on the date you place the Top Up on your account. Any Top Up balance left on your account after the expiry date is forfeited and non-refundable. If you Top Up your account before your existing credit expires or is used up, then your existing credit is added to the New Top Up value and the active period of the earlier Top Up is extended so that the later expiry date of the two Top Ups is valid for the entire amount.”

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

59. Bell's own introduction and commentary, and the quoted term of service itself indicate that this is evidence of very limited scope. It merely shows that Bell has a contractual term that purports to place expiry dates on prepaid wireless account balances, which DiversityCanada referred to as illegal.<sup>16</sup> Thus, this evidence is no different from the top up cards and screen shots of phones that PIAC and DiversityCanada placed on the record, which show WSPs purport to place expiry dates on prepaid wireless account balances.
60. No part of the above-quoted passage supports the CWTA's suggestion that WSPs make offers to consumers whereby the cash balance remaining in their account is to be deemed as consideration for "access to the network".
61. In its introduction to the quote from NorthernTel's terms of service<sup>17</sup>, the CWTA acknowledged the narrow scope of its usefulness. The CWTA said: "Additionally, a discussion of the time-limited nature of top ups is found in the service agreement filed by NorthernTel..." A "discussion of the time-limited nature of top ups" does not qualify as proof that customers are explicitly informed that any remaining balance in the account on the purported expiry date will constitute a fee for accessing the network.
62. The CWTA went on, in footnote 5 of its Answer, to cite a number of other documents submitted by WSPs, as if to suggest they contained evidence that WSPs make an offer to consumers which explains that their unused cash balance will constitute payment for access to the network on the expiry date.
63. However, with one exception, all the references were to mere testimony, not evidence in the form of contracts or promotional material.

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16 TNC CRTC 2012-557, DiversityCanada Foundation Final Reply, para. 12

17 Included in TNC CRTC 2012-557 November 20, 2012 Response from KMTS, NorthernTel and Télébec

64. The only contract referred to in the footnote was the one presented by Rogers in its 10 December Response, which says:

The following additional terms apply to prepaid Rogers wireless services:

- deposits into your account for prepaid Rogers wireless services are non-refundable;
- if you are entitled to a credit to your account, the credit will be valid only for a certain specified period following the initial activation of your Equipment to prepaid Rogers wireless services;
- we will deduct a 9-1-1 Emergency Access Fee for the provision of access to 9-1-1 service and any applicable 9-1-1 provincial government fee, once per month from your account (there is no airtime charge for calls made from your wireless device to 9-1-1); and
- if your account balance remains at 0 for 6 consecutive months or if required payments towards your account are not made or are returned, for any reason, your wireless identifier (e.g., telephone number or PIN number) will be deactivated.

65. As can be seen, this does not support that Rogers makes an offer to its prepaid pay-per-use customers stating that the remaining balance on a purported expiry date will constitute payment of a fee for access to the network.

66. It must be noted that neither the CWTA, nor DiversityCanada, nor any reviewing tribunal can state, as the CWTA seems to imply, that the Commission did indeed rely on the above-mentioned evidence from the WSPs. This again points to the absence of reasons in the Decision. Reasons would have noted what evidence the Commission relied upon to come to its finding of fact; the Decision, however, is bereft of any such information.

67. In attempting to refute DiversityCanada's assertion that the Decision ignores evidence, the CWTA highlights evidence that nevertheless demonstrates: i) that the WSPs refer to accounts holding funds, or dollar amounts, or deposits<sup>18</sup>, and ii) purport to apply expiry dates to top up payments. When the cash balances, funds, deposits or electronic credits “expire”, the amount is confiscated by the WSP. This evidence contradicts any suggestion that there is any agreement between the WSP and the prepaid pay-per-use customer that the customer will pay whatever amount remains in the account on a certain date as a fee for access to the network.

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<sup>18</sup> Use of the word “deposits” in the Rogers terms of service serves as further evidence that prepaid wireless accounts hold cash, rather than unused minutes. Customers can only deposit what they possess: they have cash to deposit into their accounts; they cannot deposit minutes into their account.



68. In summary, the record contains extensive evidence that prepaid wireless accounts are referred to by WSPs as holding cash balances, rather than unused minutes. Ample evidence was provided that WSPs tell consumers that their top ups are cash balances over which they have discretion; the significance of this being that for any funds to be legitimately deducted from an account balance, a customer would have to be made an offer for services or goods and would have to expressly accept such an offer. There is overwhelming evidence that WSPs purport to place expiry dates on these cash balances, which are confiscated on the purported expiry date; conversely, there is no evidence on the record that WSPs make any offer that states the remaining cash balance constitutes a fee for access to the network.
69. Cash should not expire; thus the present outcome (which allows for the expiry of cash balances in prepaid wireless accounts) is not defensible in respect of the facts presented during the Proceeding, and law.
70. DiversityCanada submits that any reviewing tribunal or court would find the Decision to be unreasonable on the basis of the evidence that was before the Commission.

## **4.0 Unjust Enrichment**

### **4.0 a) Scope of the Proceeding**

71. The CWTA submitted that DiversityCanada's third ground for its review and variance Application was without merit. The CWTA stated at paragraph 18 of its submission:

DiversityCanada's third argument is that the Commission committed an error of law by failing to consider DiversityCanada's unjust enrichment claims. This assertion is also incorrect. Furthermore, this issue was not among the issues on which the Commission requested comments. As the Commission stated in Telecom Notice of Consultation 2012-557, the purpose of the Wireless Code consultation was to determine the content of a wireless code, to whom it should apply, how it should be enforced, and how to assess the Code's effectiveness. As such, the issue of unjust enrichment was outside the scope of the proceeding.

72. DiversityCanada submits, however, that TNC 2012-557 quite explicitly placed unjust enrichment within the scope of the proceeding. Paragraph 15 of the Notice stated:

The Commission is of the preliminary view that the Wireless Code should address... (4) clarity of advertised prices, ... as set out in more detail below.

...

Clarity of advertised price

\* a provision that addresses clarity of advertised prices of services included in a contract, such as monthly and one-time charges for mobile wireless services, including optional services, devices, data and roaming, and any associated fees.

*\* a provision that service providers may not charge consumers for optional mobile wireless services they have not ordered.*

[Emphasis added]

73. As pointed out in DiversityCanada's Application at paragraph 60, unjust enrichment occurs when there is “an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment”. Charging for services that have not been ordered meets the definition of unjust enrichment.

74. On page 9 of its Final Written Comments, DiversityCanada stated:

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 any service provider were to make the offer the industry described in its defence of balance expiry, this would be a curious package, indeed. What the industry has described in its defence is an “empty” access package. It is access with no services included. It is not a time-plus-usage package; the commodity described is strictly time on the wireless network. One wonders how many consumers in the economy-minded prepaid sector would actually accept such an offer when it could mean that, like Customer C, they would pay as much as \$15 for access with no usage included.

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.

...

The industry's argument is particularly of concern for the pay-per-use consumers, who are told by the industry from day one 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. 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.

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.

75. Then, on page 10 of its Final Written Comments, DiversityCanada raised the issue of unjust enrichment with respect to prior accumulated balances:

Service providers use balance expiry as a pretext to stretch their hands deep into consumers' accounts to confiscate funds that have nothing to do with the transaction bearing the expiry date.

In the example of Customer C, the expiry date relates to the \$15 top up purchased on January 1. On January 31, the entire balance of \$315 is seized. According to the industry's argument, the service provider claims \$15 for access to the system for the month. But what about the other \$300 in accumulated top up balances that was in Customer C's account? Is the industry claiming this sum is also consideration for access to the system during the month of January? Was there ever an offer of “empty” access to the wireless network for \$315 for a 30-day period, which the customer accepted?

76. DiversityCanada submits that this matter falls squarely within the framework of paragraph 15 of Telecom Notice of Consultation 2012-557.

#### 4.0 b) Unjust and Unreasonable Rates

77. The Intervention by Vaxination Informatique (“Vaxination”) to DiversityCanada's Part I Application extends the argument that Section J allows unjust enrichment by putting the discussion in the context of the *Telecommunications Act*. DiversityCanada agrees with Vaxination's position that by allowing WSPs to charge indeterminate fees for services, Section J condones a breach of section 27 (1) of the *Act*. As Vaxination's examples show, the practice results in unjust and unreasonable rates, which can be \$100, or \$1,000, or any number.

78. During the Proceeding, DiversityCanada challenged the notion that WSPs incurred any significant cost for maintaining a wireless customer's account (that is, providing access to the network). At page 2 of its Intervention to TNC CRTC 2012-557, Appendix A: Interview with Dr. Keshav, DiversityCanada presented the following comment from its expert witness:

...there's absolutely no reason why a telecom provider couldn't keep these accounts at essentially no cost forever. The cost to maintain an account is too small to be measured. It would be a millionth of a cent, or something like that.

So any idea that is being put out that the providers, that it costs them something to maintain an account is, is ridiculous, you know. It flies against the face of everything we know in computer science, which is that costs are low and dropping fast, very, very fast, by a factor of about a hundred every two years.

79. Furthermore, DiversityCanada's Final Reply stated:

44. ... The truth is that wireless providers recover the cost for access to the system through the higher rates they charge prepaid, pay-per-use customers.

45. As seen in my Final Written Comments, Virgin's prepaid, pay-per-use customers are charged 35 cents per minute for calls. A Virgin customer on a prepaid monthly plan (who has unlimited evening and weekend and incoming calls) would have to be on the phone for **24 *days, non-stop*** to rack up the 35-cent charge a pay-per-use customer would incur in one minute.

46. The effective rate for the monthly plan customer is a hundredth of a cent per minute for voice calls, and the phone company is still able to make a profit. This example corroborates the arguments of the DiversityCanada Foundation's expert witness, Dr Srinivasan Keshav, Professor of Computer Science at the University of Waterloo and Holder of a Canada Research Chair in Tetherless Computing. Professor Keshav contended that the cost of keeping a prepaid customer on the wireless system was minuscule and, therefore, could not be used to justify balance expiry.

80. Thus, the seizing of prepaid wireless account balances that are significantly in excess of the actual cost to maintain an account would constitute an unjust and unreasonable charge that contravenes section 27 (1).
81. DiversityCanada supports the call Vaxination issued in paragraph 33 of its Intervention to this Application for the Commission to “use interrogatory powers to obtain from carriers revenues derived from the confiscation of pre-paid balances as well as the true cost of maintaining an inactive account”.

## **5.0 Undue and Unreasonable Disadvantage**

82. Vaxination also raised the point that the charging of indeterminate fees results in an undue and unreasonable disadvantage to some consumers. Vaxination's examples illustrate the problem:

24. Consider the case of 2 users, one with a \$100.00 balance and the other with a \$5.00 balance. They are inactive, and the carrier confiscates their balance after one month to pay for account maintenance and closure. In one case, the user is charged \$100 while another user is charged \$5 despite both users having identical costs and handling by the carrier.

....

28. Taken to extreme, a customer who keeps a phone for emergency use only and diligently contributes to his pre-paid account every month for a few years may have accumulated a balance of \$1000 which would be confiscated if the customer misses just one month of payment. Meanwhile, a customer with a \$1 balance, gets no fee/confiscation he if adds \$10 to his balance.

83. As Vaxination rightly pointed out, this scenario contravenes section 27 (2) of the *Act*, which states that no Canadian carrier should subject any person to undue or unreasonable disadvantage.
84. DiversityCanada further notes that the undue and unreasonable disadvantage prepaid wireless pay-per-use customers are subjected to is not only in comparison to each other, but also with respect to customers who have prepaid wireless monthly plans. Such plans cost in the region of \$30 per month and allow consumers access to the network with unlimited or specified usage (100 voice minutes; 25 texts, for example). By contrast, according to their argument, through balance expiry, WSPs can charge prepaid wireless pay-per-use customers an unlimited dollar amount for simply accessing the network (that is to say, the fee would be for strictly time on the network, and not for any usage of specified services).
85. DiversityCanada submits there is no justification for charging varying fees to different customers in this situation. This requires that Section J of the Decision be reviewed and rescinded.

## 6.0 Expiry of Prepaid Wireless Cards

86. In its Answer to DiversityCanada's Application, at paragraphs 6 and 10, Sasktel claimed that its prepaid cards do not expire.<sup>19</sup> However, Vaxination provides a comprehensive rebuttal to this line of argument.
87. In paragraphs 6 to 18 of its Intervention to this Part I Application, Vaxination expanded on a point alluded to by DiversityCanada at the Hearing:<sup>20</sup> that it is not the rectangular pieces of plastic known as prepaid wireless cards that are at issue, but, rather, the electronic credits held in prepaid wireless accounts that are of concern.

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<sup>19</sup> DiversityCanada notes that Sasktel's claims that it does not employ expiry dates, while not entirely relevant to this Part I Application, are interesting. First, the \$8.00 per month plan Sasktel referred to falls under a different business model to the one whereby WSPs apply an expiry date to account balances. Sasktel's plan has a minimum monthly spend, a system DiversityCanada objected to at paragraph 48 of its Final Reply in the Proceeding. Second, for its 60-day plan, Sasktel does not use the word "expiry" but its conduct is the same as that of every other WSP which explicitly states it applies expiry dates to account balances, i.e. Sasktel seizes the customer's unused funds on a certain date. Sasktel tells its customers: "If you fail to top-up your account every 60 days, you will lose any money currently in your account."

<sup>20</sup> TNC CRTC 2012-557 Transcript of Proceeding, Volume 3, 13 February 2013, at 5585

88. DiversityCanada fully agrees with Vaxination's position that, by referring to prepaid wireless cards, Section J is imprecisely worded and falls short of providing the protection the Commission intended, leaving out, as it does, consumers who top up online without a prepaid card.
89. Vaxination states that “the wording of section J cannot stand unchanged and ~~should~~ must be corrected to use proper terminology to correctly, precisely and accurately depict the protections the Commission intends to provide”.
90. DiversityCanada, however, maintains that Section J should be rescinded because it leaves intact a system that allows for expiry dates to be applied to the cash balances in prepaid wireless consumers' accounts.

## 7.0 Eligibility for Costs

91. In paragraphs 20 and 21 of its submission, the CWTA outlined its objections to DiversityCanada's request for a cost award:

DiversityCanada has submitted that the Commission: “Grant DiversityCanada's reasonable costs related to this application.” As this request does not follow the Commission's established processes for the awarding of either interim or final costs, as set out in sections 60-69 of the CRTC Rules of Practice and Procedure, and contains none of the supporting documentation that must accompany such a request, the CWTA submits that this request cannot be entertained.

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

92. SaskTel indicated it was of the same mind as the CWTA.

93. First, to reply to the CWTA's comment on the absence of “supporting documentation that must accompany such a request”, DiversityCanada states simply that such documents were not required at the time of filing the review and vary application. DiversityCanada's final costs for participating in this proceeding cannot be known until the proceeding has finished. According to section 65 of the *Rules*, an application for final costs must be filed “no later than 30 days after the day fixed by the Commission for the filing of final representations with it”. DiversityCanada intends to comply with these rules and submit its application for costs, along with the required documentation, at the appropriate time.
94. Second, to address the contention that this review and variance Application does not meet the criteria for an award of costs, DiversityCanada would like to refer the CWTA to precedents that confirm the validity of DiversityCanada's costs application.
95. As far back as February 2001, the Commission stated in Costs Order CRTC 2001-2 that it “considers that it has the power, pursuant to section 56 of the *Telecommunications Act*, to award costs not only to interveners in its proceedings (initiated by the Commission or otherwise), but also to an applicant”.
96. More to the point is Costs Order CRTC 2001-7, in which the Commission dealt with an application for costs by Action Réseau Consommateur (ARC) and the Association Coopérative d'économie familiale des Bois-Francs (ACEF-BF). At paragraph 5, the Commission stated:
- Typically, costs applications are filed by interveners to the proceeding. In this case, the Commission notes that the proceeding for which costs are sought was initiated by the applicant. Pursuant to section 56 of the *Telecommunications Act*, the Commission may award costs not only to interveners in its proceedings, but also to an applicant, such as ARC/ACEF-BF. In the circumstances, the general criteria and procedures in section 44(1) of the *Rules* remain appropriate.
97. The application in question filed by ARC/ACEF-BF was an “Application to review and vary Order CRTC 2000-531: Télébec ltée – Rate restructuring”.
98. This position was further confirmed in January of 2004 with Telecom Costs Order CRTC 2004-2, which stated in paragraph 21:



The Commission considers that the power under section 56 of the Act gives it wide discretion to award costs: (i) in relation to any proceeding before it, which includes Part VII proceedings and adversarial proceedings; and (ii) to be paid to persons other than interveners, which includes parties who initiate Part VII proceedings. The Commission has in the past awarded costs to an applicant who initiated a Part VII proceeding, pursuant to section 56 of the Act.

[Footnote marker omitted]

99. With the coming into force of *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277)*, review and variance applications that used to be filed as Part VII are processed as Part 1 applications. And since there has been neither a revision of section 56 of the *Telecommunications Act*, nor a new decision by the Commission overturning the above-mentioned costs orders, then it still stands that costs may be awarded to the initiator of a proceeding to review and vary a decision by the Commission.

100. DiversityCanada submits that the CWTA has not substantiated its case to the Commission in its objection to costs for DiversityCanada's submitted position.

## 8.0 Conclusions

101. DiversityCanada submits that nothing in the Answers submitted by the respondents diminishes any aspect of DiversityCanada's Part 1 Application. DiversityCanada respectfully submits that quite the contrary is true: the case law cited and the evidence the respondents referenced pointed to the validity of DiversityCanada's assertions.

102. Furthermore, the Intervention by Vaxination presented further cogent arguments that strengthen the position that Section J should not stand.

103. Throughout the Proceeding, DiversityCanada sought to bring attention to the fact that prepaid wireless account balance expiry harms the most vulnerable in society, including pensioners, persons receiving disability benefits, youth, minimum-wage workers, the unemployed, and newcomers to Canada. These are individuals who can least afford to have their already limited funds taken from them, or have their wireless service cut off. On behalf of these individuals, DiversityCanada respectfully urges the Commission to grant the requests contained in its Part 1 Application.

## 9.0 List of Parties Served

K. Eby, CWTA <keby@cwta.ca>  
Regulatory Affairs, Sasktel <document.control@sasktel.com>  
J-F. Mezei, Vaxination Informatique <jfmezei@vaxination.ca>  
L. Roy, CRTC <lynda.roy@crtc.gc.ca>  
C. Millay, CRTC <celia.millay@crtc.gc.ca>  
B. Motzney, CRTC <barbara.motzney@crtc.gc.ca>  
S. Harroun, CRTC <steven.harroun@crtc.gc.ca>

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