



## Telecom Order CRTC 2016-186

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Ottawa, 16 May 2016

*File numbers: 8662-D53-201509077 and 4754-511*

### **Determination of costs award with respect to the participation of the DiversityCanada Foundation and the National Pensioners Federation in the proceeding initiated by their application to review and vary Telecom Decision 2015-211**

#### **Application**

1. By letter dated 11 January 2016, the DiversityCanada Foundation (DiversityCanada), on its own behalf and on behalf of the National Pensioners Federation (NPF) [collectively, DiversityCanada/NPF or the applicants], applied for costs with respect to their participation in the proceeding initiated by their application to review and vary Telecom Decision 2015-211 (the proceeding).<sup>1</sup>
2. On 21 January 2016, TELUS Communications Company (TCC) filed an intervention in response to DiversityCanada/NPF's application. DiversityCanada/NPF filed a reply on 1 February 2016.
3. DiversityCanada/NPF submitted that they had met the criteria for an award of costs set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) because they represented a group or a class of subscribers that had an interest in the outcome of the proceeding, they had assisted the Commission in developing a better understanding of the matters that were considered, and they had participated in a responsible way.
4. In particular, DiversityCanada/NPF submitted that they represent the interests of disadvantaged Canadians who subscribe to telecommunications services, as well as 350 seniors' groups across Canada. DiversityCanada/NPF also briefly summarized the arguments they had made in the proceeding, for instance, their questioning of the validity of certain parts of the Commission's Wireless Code and the Commission's reliance on the Wireless Code in the circumstances. DiversityCanada/NPF submitted that these contributions helped the Commission to understand, from a consumer perspective, the issues under consideration in the proceeding. Finally, DiversityCanada/NPF submitted that they participated in a responsible way by, for

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<sup>1</sup> By letter dated 5 November 2015, DiversityCanada/NPF requested an extension of the deadline to file their costs application. They submitted that, in the circumstances, considerations of fairness made it appropriate to allow the extension and that no parties would be prejudiced.

example, having an outside consultant prepare most of their submissions rather than outside legal counsel, who could have claimed fees at a higher rate.

5. DiversityCanada/NPF requested that the Commission fix their costs at \$36,652.69, consisting of \$4,449.38 for external legal fees and \$32,203.31 for external consultant fees. DiversityCanada/NPF's claim included the Ontario Harmonized Sales Tax on fees. DiversityCanada/NPF filed a bill of costs with their application.
6. DiversityCanada/NPF claimed 15.75 hours at a rate of \$250 per hour for external legal fees and 126.66 hours at a rate of \$225 per hour for external consultant fees.
7. DiversityCanada/NPF submitted that TCC is the appropriate party to be required to pay any costs awarded by the Commission (the costs respondent).

### **Answer**

8. In response to the application, TCC submitted that the proceeding was the result of another in a series of meritless and frivolous applications by the applicants that have wasted Commission resources, and that the applicants did nothing to assist the Commission or further the interests of any group of subscribers. TCC requested that the application be denied or, in the alternative, that DiversityCanada/NPF be granted \$500 in costs, representing two hours of external legal fees.

### **Reply**

9. In reply, DiversityCanada/NPF denied everything alleged in TCC's submissions and reiterated that they had satisfied the test for an award of costs under section 68 of the Rules of Procedure.

### **Commission's analysis and determinations**

10. The Commission considers that DiversityCanada/NPF's late filing did not prejudice any party and notes that TCC was able to file an answer to the application. In the circumstances, it is appropriate to consider the costs application.
11. The criteria for an award of costs are set out in section 68 of the Rules of Procedure, which reads as follows:

68. The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:

(a) whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;

(b) the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and

(c) whether the applicant participated in the proceeding in a responsible way.

12. For the reasons that follow, the Commission finds that DiversityCanada/NPF have not satisfied these criteria through their participation in the proceeding. Specifically, the Commission finds that DiversityCanada/NPF did not assist it in developing a better understanding of the matters that were considered, and did not participate in the proceeding in a responsible way.
13. The applicants' submissions were severely deficient from a substantive viewpoint and highly repetitive. Given their lack of substance, the submissions were also overly long. The Commission does not consider that it was helped in understanding a legitimate consumer viewpoint on the matters that were considered.
14. In one example of the deficiency of DiversityCanada/NPF's submissions in the proceeding, the applicants argued that the Commission did not provide reasons for its determination that TCC had not contravened subsection 27(2) of the *Telecommunications Act*. In its answer to the application, TCC charitably framed this as an argument to which the Commission had provided inadequate reasons, and responded to it as such. In its reply, DiversityCanada/NPF re-emphasized that they were, in fact, arguing that the Commission provided *no* reasons. This is an unreasonable and untenable position. The presence of such reasons – quite apart from any question of their adequacy – is plainly obvious in Telecom Decision 2015-211.<sup>2</sup>
15. As TCC submitted in its intervention, and as the Commission found in Telecom Order 2016-185, in which it denied DiversityCanada/NPF's application for costs associated with their application to review and vary Telecom Order 2015-240, the applicants' submissions in the proceeding were exceptionally repetitive, in several senses.
16. Firstly, DiversityCanada/NPF's submissions in the proceeding reiterated, to a large extent, submissions they had made in the initial proceeding leading to Telecom Decision 2015-211. Secondly, the submissions attempted to re-argue issues that have been settled by the Commission in the recent past. Thirdly, DiversityCanada/NPF's reply in the proceeding was overly reliant on the restatement of positions already expressed in the application.
17. Given the lack of substance to DiversityCanada/NPF's application, their submissions were onerously lengthy. The Commission does not judge the quality of a party's submissions based on length.
18. Irrespective of the rate at which the individual who prepared the applicants' submission may claim fees, DiversityCanada/NPF did not participate responsibly. A key element of the applicants' review and vary application was a collateral challenge

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<sup>2</sup> See paragraphs 27 and 28 of that decision.

to Telecom Regulatory Policy 2013-271 (the Wireless Code policy). As DiversityCanada/NPF are aware, there are acceptable methods by which to challenge a Commission decision, including through an application to review and vary that decision. In fact, DiversityCanada/NPF did file an application to review and vary the Wireless Code policy. It was dismissed.<sup>3</sup>

19. The Wireless Code, which was published 3 June 2013, first took effect on 2 December 2013, and has applied to all retail contracts for wireless services since 3 June 2015. Since its initial publication, through a series of applications filed by the applicants, it has been made abundantly clear to the Commission that DiversityCanada/NPF disagree with the Commission's prepaid wireless balance policies. In particular, DiversityCanada/NPF are of the view that prepaid wireless balances should be treated like cash deposits. This underlying assumption has led the applicants to argue, in various proceedings, that such balances should not expire and that no contract should be extinguished as long as such balances remain in prepaid accounts.
20. DiversityCanada/NPF are, of course, entitled to their view. However, this view has already been presented to and ultimately rejected by the Commission in numerous instances, including in the original Wireless Code proceeding, and the proceeding to review and vary the Wireless Code policy initiated by DiversityCanada/NPF. To continue to file applications with the Commission that attempt to re-argue this point is a poor use of the applicants' time and an unacceptable use of the Commission's time. In any event, such an exercise is not eligible for costs.
21. The Commission's costs award mechanism is intended to ensure that telecommunications users and their legitimate representatives have a voice to raise and contest legitimate issues before the Commission. Awarding costs to the applicants in the circumstances of the proceeding would be entirely at odds with this goal.

### **Directions regarding costs**

22. The Commission **denies** the application by DiversityCanada/NPF for costs with respect to their participation in the proceeding.
23. While the present application was received before the institution of the new procedure announced in Telecom Decision 2016-183, the Commission reminds DiversityCanada/NPF that the Commission intends to summarily return any subsequent applications it receives ultimately relating to the appropriateness of the Commission's prepaid wireless balance policies.

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<sup>3</sup> See Telecom Decision 2014-101.

Secretary General

## **Related documents**

- *Determination of costs award with respect to the participation of the DiversityCanada Foundation and the National Pensioners Federation in the proceeding initiated by their application to review and vary Telecom Order 2015-240, Telecom Order CRTC 2016-185, 16 May 2016*
- *The DiversityCanada Foundation and the National Pensioners Federation – Application to review and vary Telecom Order 2015-240 with respect to costs for their participation in the proceeding leading to Telecom Decision 2015-211, Telecom Decision CRTC 2016-183, 13 May 2016*
- *The DiversityCanada Foundation and the National Pensioners Federation – Application seeking relief for wireless customers affected by TELUS Communications Company's Large Prepaid Balance Policy, Telecom Decision CRTC 2015-211, 21 May 2015*
- *Wireless Code – Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards, Telecom Decision CRTC 2014-101, 5 March 2014*
- *The Wireless Code, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013*