



Telecom Decision CRTC 2012-436

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Ottawa, 9 August 2012

Mr. Ed Barna, carrying on business as Byo Steem – Application to review and vary Telecom Decision 2012-75 regarding violations of the Unsolicited Telecommunications Rules

File number: 8662-B82-201205542

In this decision, the Commission determines that Mr. Ed Barna, carrying on business as Byo Steem (Byo Steem), has failed to demonstrate that there is substantial doubt as to the correctness of Telecom Decision 2012-75. Accordingly, the Commission denies Byo Steem's application to review and vary Telecom Decision 2012-75, and maintains the administrative monetary penalty of \$8,000 imposed on Byo Steem in that decision.

1. The Commission received an application by Mr. Ed Barna, carrying on business as Byo Steem (Byo Steem), dated 7 May 2012, requesting that the Commission review and vary Telecom Decision 2012-75. In that decision, the Commission imposed an administrative monetary penalty (AMP) totalling \$8,000 on Byo Steem for violations of the Unsolicited Telecommunications Rules (the Rules).
2. In its application, Byo Steem requested that the total AMP amount be annulled. It submitted that the witness statements that were relied upon as evidence were insufficient to make a finding on a balance of probabilities that Byo Steem had used or displayed the alleged telephone numbers because the witness statements relied upon as evidence were unsworn, witnesses had not been bound to the veracity of their statements and, aside from the witness statements, there was no other evidence that a violation occurred.

Background

3. On 10 August 2011, a Notice of Violation was issued to Byo Steem pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Byo Steem that it had initiated
 - four telemarketing telecommunications to consumers whose numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4 of the Rules;¹ and

¹ Part II, section 4 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

- four telemarketing telecommunications without having paid all applicable subscription fees to the National DNCL operator, in violation of Part II, section 6 of the Rules.²
4. Byo Steem was given until 12 September 2011 to either pay the AMP set out in the Notice of Violation or make representations to the Commission with respect to the violations. The Commission received representations from Byo Steem dated 18 September 2011.
 5. After considering the evidence and the representations before it in Telecom Decision 2012-75, the Commission found that Byo Steem had violated the Rules as stipulated in the Notice of Violation and imposed an AMP totalling \$8,000.

Criteria to review and rescind, or vary Commission Telecom decisions

6. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would apply in considering whether to review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: 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.
7. The Commission interprets Byo Steem's review and vary application as an assertion that there were errors in fact or in law in Telecom Decision 2012-75 resulting from the Commission's reliance on unsworn witness statements to make a finding on a balance of probabilities that Byo Steem had used or displayed the alleged telephone numbers.

Did the Commission err by relying on unsworn witness statements to conclude that the burden of proof was met in relation to Byo Steem's alleged violations?

8. The Commission notes that, in Telecom Decision 2011-628, in circumstances similar to those of the present case, it stated that unsworn witness statements are admissible as proof in determining whether a violation was committed:
 22. The Commission notes again that it is not bound by the strict judicial rules of evidence such as would apply in a criminal case, unless a statutory provision specifically states otherwise. In addition, sworn witness statements or affidavits are not, as a rule, necessarily required in order for the Commission to obtain the information it needs to make a determination on a balance of probabilities. In the context of ensuring compliance with the Rules, the use of witness statements is a standard and acceptable practice.

² Part II, section 6 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator.

9. The Commission also notes that, although Byo Steem could have refuted the information contained in the witness statements, it did not do so. The Commission considers that, if the information is not refuted, it is reasonable to conclude that the information contained in the witness statements is sufficient for the Commission to make a determination on a balance of probabilities.
10. Accordingly, the Commission finds that it did not err by relying on unsworn witness statements to conclude that the burden of proof was met in relation to Byo Steem's alleged violations.

Conclusion

11. In light of the above, the Commission finds that Byo Steem has failed to demonstrate that there is substantial doubt as to the correctness of Telecom Decision 2012-75. Accordingly, the Commission **denies** Byo Steem's application.

Other matters

12. The Commission notes that the AMP of \$8,000 imposed on Byo Steem in Telecom Decision 2012-75 continues to accumulate interest, calculated and compounded monthly at the average bank rate plus three percent from **7 March 2012**. The total amount payable includes the AMP plus the interest, which has accrued during the period beginning on **7 March 2012** and will end on the day before the date on which payment is received.
13. If payment of the debt has not been received within 30 days of the date of this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

Related documents

- *Mr. Ed Barna, carrying on business as Byo Steem – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2012-75, 7 February 2012
- *Green Shield Windows and Doors Ltd. – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2011-628, 28 September 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011