



Telecom Decision CRTC 2014-101

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Ottawa, 5 March 2014

Wireless Code – Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards

File number: 8662-D53-201312321

In this decision, the Commission denies the DiversityCanada Foundation's request to review and vary the Commission's determination in Telecom Regulatory Policy 2013-271 (the Wireless Code Decision) specifically related to the expiry of prepaid wireless service cards.

Background

1. The Commission established the Wireless Code, a mandatory code of conduct for wireless service providers, in Telecom Regulatory Policy 2013-271 (the Wireless Code Decision). The Wireless Code applies to all retail mobile wireless voice and data services (wireless services) provided to residential and small business customers in Canada.
2. The Wireless Code establishes new requirements for wireless service providers that will (a) ensure that consumers are empowered to make informed decisions about wireless services, and (b) contribute to a more dynamic marketplace by making it easier for consumers to take advantage of competitive offers.
3. In the Wireless Code Decision, among other things, the Commission found that the evidence presented by parties did not support the elimination of expiry dates for account balances on prepaid wireless service cards (prepaid cards). However, the Commission considered it reasonable for prepaid card users to have at least seven days to top up their accounts following the expiry of their balance. This provision is set out in Section J of the Wireless Code.
4. The Wireless Code came into effect on 2 December 2013.

The application

5. The Commission received an application dated 3 September 2013 from the DiversityCanada Foundation (DiversityCanada), on its own behalf and on behalf of the National Pensioners and Senior Citizens Federation, requesting that the Commission review and vary Section J of the Wireless Code regarding prepaid cards. DiversityCanada submitted that the Commission erred in fact and in law when it determined that prepaid card services provide access to a wireless service

provider's network, subject to both time and usage limitations, and that it would not be appropriate to prohibit service providers from applying time limits to prepaid card services.

6. Specifically, DiversityCanada submitted that the Commission erred in law and in fact by
 - failing to provide adequate support for its decision, thereby violating its duty of procedural fairness;
 - ignoring relevant facts, which in turn led it to arrive at an unreasonable conclusion; and
 - failing to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported "expired" balances.
7. DiversityCanada requested that the Commission
 - rescind Section J of the Wireless Code;
 - hold a new hearing, before a differently constituted panel, on the subject of the expiration of prepaid wireless account balances;
 - allow interventions by any interested persons 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; and
 - grant DiversityCanada's request for costs related to this application.
8. The Commission received interventions regarding DiversityCanada's application from the Canadian Wireless Telecommunications Association (CWTA), Saskatchewan Telecommunications (SaskTel), Vaxination Informatique (Vaxination), and one individual: Mr. Ben Klass. The public record of this proceeding, which closed on 17 October 2013, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Positions of parties

9. DiversityCanada submitted that in the Wireless Code Decision, the Commission provided no reasons for rejecting DiversityCanada's arguments and evidence regarding expiry dates on prepaid cards. In the Wireless Code proceeding, DiversityCanada argued that (i) the Commission should prohibit time limits on prepaid cards because wireless service providers do not inform customers that these services have time limits, focusing instead on usage limits; (ii) wireless service providers are unjustly enriching themselves by seizing customers' remaining usage balances when the time limit expires; and (iii) prepaid cards are the same as gift cards or prepaid purchase cards, and the Commission should be consistent with provincial legislation that prohibits the expiration of such cards.

10. DiversityCanada submitted that the only paragraph in the Wireless Code Decision that deals with the expiration of prepaid account balances is paragraph 349,¹ which contains only a conclusion, with no reasons for how or why the Commission reached that conclusion. DiversityCanada argued that, given the conflicting evidence presented by parties, the Commission was required to provide reasons for its decisions as part of its obligation to comply with the principles of natural justice and procedural fairness. DiversityCanada contended that the Commission's failure to provide reasons prevented it from giving informed consideration to grounds for appeal, and therefore constitutes an error in law.
11. DiversityCanada submitted that in the Wireless Code proceeding, it went to lengths to demonstrate that there was no evidence to support the wireless service providers' claim that prepaid wireless service agreements reflect that customers are paying for access to the network over a specified period of time. In addition, DiversityCanada argued that it demonstrated that top-ups are presented to customers as cash balances to be used to purchase goods and services offered by the wireless service providers over their networks.
12. DiversityCanada stated that the issue of evidence is also relevant to the question of whether the funds in customers' accounts are confiscated upon expiry of a prepaid card or are simply collected as payment for certain services at the end of a specified usage period. DiversityCanada stated that wireless service providers submitted in the proceeding that prepaid wireless service balances typically do not have an expiry date but rather a usage period that begins once the balance is activated. However, DiversityCanada noted that it had submitted documents in which wireless service providers used the terms "expiry" and "expiration."
13. DiversityCanada submitted that the Commission's determination not to prohibit expiry dates on prepaid cards is not reasonable because the Commission failed to consider the principle of unjust enrichment. DiversityCanada argued during the proceeding that unjust enrichment occurs when wireless service providers seize the remaining balances from customers' accounts. In addition, DiversityCanada submitted that prior accumulated balances are unrelated to the agreement between the customer and the wireless service provider concerning the most recent top-up, and therefore there is no legal basis for wireless service providers to enrich themselves by seizing such balances on the expiry date of the most recent top-up.
14. DiversityCanada argued that by finding that prepaid cards are payment for specific services for a specific time period, the Commission (i) rejected DiversityCanada's unjust enrichment argument related to the most recent top-up; and (ii) failed to

¹ Paragraph 349 reads as follows:

The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs [wireless service providers] 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.

consider the principle of unjust enrichment with respect to prior accumulated balances that are unrelated to the most recent top-up.

15. Vaxination and Mr. Klass supported DiversityCanada's application.
16. Vaxination submitted that the Commission's determinations in the Wireless Code Decision (i) raise substantial doubt as to the correctness of the decision; (ii) use incorrect terminology; (iii) do not comply with subsections 27(1) and (2) of the *Telecommunications Act* (the Act) regarding just and reasonable rates for telecommunications services; (iv) fail to consider the evidence presented by some parties; and (v) fail to consider evidence that the Commission could have acquired through a request for information (i.e. the Commission should have obtained information regarding the rates that wireless service providers charge for prepaid services to determine whether they are just and reasonable).
17. Mr. Klass submitted that he is concerned by the wireless service providers' practice of seizing unused funds when prepaid cards expire.
18. The CWTA and SaskTel opposed DiversityCanada's application.
19. The CWTA submitted that in the Wireless Code Decision, the Commission reasonably explained its determination regarding expiry dates for prepaid cards and based that determination on findings of fact drawn from clear and sufficient evidence. Further, the CWTA argued that the expiration of prepaid balances does not constitute a case of unjust enrichment, and that in any event, the issue of unjust enrichment was outside the scope of the proceeding. Finally, the CWTA submitted that the Commission should reject DiversityCanada's application for costs because the applicant does not meet the criteria for a costs award.
20. SaskTel supported the CWTA's position and submitted that DiversityCanada's application is without merit and should be dismissed.

Did the Commission err in fact or in law, as alleged by DiversityCanada, in its determinations concerning prepaid cards?

21. In the proceeding that led to the Wireless Code Decision, the Commission received submissions from over 5,000 individuals and organizations, and considered approximately 25 topics related to the content and clarity of retail wireless service contracts. Given the scope of the issues considered and the number of submissions received, the Commission could not reasonably be expected to address specifically in its decision every piece of evidence and argument put forward in the proceeding. In order to produce a concise Wireless Code Decision, the Commission necessarily summarized the positions, evidence, and arguments made by all parties.
22. Nevertheless, the Commission notes that it did consider DiversityCanada's position during the proceeding. In fact, in Telecom Notice of Consultation 2012-557-3, the Commission proposed, for discussion and comment, a draft Wireless Code, which contained DiversityCanada's proposal regarding the expiry of prepaid cards: "The

service provider may not apply an expiry date to credits purchased for the use of pre-paid service.” In addition, the Commission notes that it addressed DiversityCanada’s arguments in several places in the Wireless Code Decision (paragraphs 341 and 347 through 349).

23. Furthermore, in the circumstances of the proceeding, the Commission considers that it provided sufficient rationale for its determinations (i) to allow expiry dates on prepaid cards, and (ii) to require wireless service providers to give their customers seven days’ notice of that expiration in order to ensure that customers receive sufficient notice to top up their accounts if they so choose.
24. In any event, with regard to DiversityCanada’s submission disputing the Commission’s finding that prepaid services are subject to usage and time limits, the Commission notes that in addition to DiversityCanada, several parties, including the Public Interest Advocacy Centre (PIAC), submitted sample prepaid card contracts. The Commission also required all wireless service providers to submit copies of their contracts, including contracts for prepaid services. The terms of those contracts clearly demonstrated that prepaid services are subject to both usage and time limits. The Commission considers that the evidence on the record of the proceeding, including the prepaid contracts submitted by PIAC, clearly contradicted the arguments and evidence that DiversityCanada presented.
25. Finally, to the extent that the issue of unjust enrichment is related to the reasonableness of the rates being charged by wireless service providers for the services provided, the Commission notes that it was not within the scope of the proceeding.
26. In light of all the above, the Commission finds that it did not, as alleged by DiversityCanada, err in fact or in law by ignoring that party’s arguments and evidence and/or by failing to provide sufficient reasons within the Wireless Code Decision.

Conclusion

27. The Commission concludes that DiversityCanada has failed to demonstrate substantial doubt as to the Commission’s determinations in the Wireless Code Decision. The Commission therefore **denies** DiversityCanada’s application to review and vary Telecom Regulatory Policy 2013-271 pursuant to section 62 of the Act.

Application for costs

28. The Commission notes that on 2 December 2013, DiversityCanada filed a separate application for costs, including the amount claimed and supporting documentation. The Commission will therefore consider DiversityCanada’s request for a costs award separately, in the context of that application.

Secretary General

Related documents

- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Proceeding to establish a mandatory code for mobile wireless services*, Telecom Notice of Consultation CRTC 2012-557, 11 October 2012, as amended by Telecom Notices of Consultation CRTC 2012-557-1, 1 November 2012; 2012-557-2, 21 December 2012; 2012-557-3, 28 January 2013; 2012-557-4, 11 February 2013; and 2012-557-5, 13 March 2013