



Telecom Decision CRTC 2015-211

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The DiversityCanada Foundation and the National Pensioners Federation – Application seeking relief for wireless customers affected by TELUS Communications Company’s Large Prepaid Balance Policy

*The Commission **denies** the DiversityCanada Foundation and the National Pensioners Federation’s application that asserted that TCC made a material change to customer contracts without consent when applying its Large Prepaid Balance Policy (the policy); TCC subjected customers to duress when applying the policy; and the policy contravenes subsections 27(1) and 27(2) of the Telecommunications Act. Accordingly, the Commission is **denying** the applicants’ request that TCC should be required to exclude certain wireless customers from the application of the policy and to credit those customers certain amounts incurred under that policy.*

Application

1. The Commission received an application from the DiversityCanada Foundation (DiversityCanada) and the National Pensioners Federation (NPF) [collectively, DiversityCanada/NPF or the applicants], dated 17 July 2014, regarding TELUS Communication Company’s (TCC) prepaid wireless, pay-per-use Large Prepaid Balance Policy (the policy).
2. The policy, which came into effect on 20 October 2013, applies to all of TCC’s prepaid customers. Under the policy, a prepaid customer who has accumulated an account balance of \$300 or more is required to subscribe to a monthly prepaid rate plan or a monthly add-on plan. If such a customer does not subscribe to a monthly prepaid rate plan or a monthly add-on plan, TCC automatically adds the least expensive voice and messaging plan to the customer’s prepaid account; the cost of this plan is then deducted from the customer’s prepaid account balance every 30 days.
3. In their application, as amended in their reply submission dated 26 September 2014, DiversityCanada/NPF requested specific relief for TCC wireless customers affected by the policy. Namely, TCC should be directed to
 - refund, with interest, in the form of credits to customers’ accounts, all sums deducted for 30-day rate plans or 30-day add-on plans under the company’s policy from all customers who were existing prepaid wireless, pay-per-use customers prior to 20 October 2013;

- inform all customers who were existing prepaid wireless, pay-per-use customers prior to 20 October 2013 that the policy does not automatically apply to sums that were in their account prior to the introduction of the policy; and
 - inform all such customers that the policy applies to sums that accumulated after 20 October 2013, and that if their total balance (i.e. sums accumulated before 20 October 2013, plus sums accumulated after 20 October 2013) exceeds \$300, they may choose to draw down the balance by acquiring a 30-day rate play or a 30-day add-on plan under the company's policy.
4. The Commission received interventions regarding DiversityCanada/NPF's application from TCC and various individuals. The public record of this proceeding, which closed on 27 October 2014,¹ is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

5. The Commission has identified the following issues to be addressed in this decision:
- Did TCC make a material change to customer contracts without consent when it applied the policy to those customers?
 - Did TCC subject customers to duress in applying the policy, thus making the contract changes caused by the policy invalid?
 - Did TCC's policy contravene subsections 27(1) and 27 (2) of the *Telecommunications Act* (the Act)?

Did TCC make a material change to customer contracts without consent when it applied the policy to those customers?

6. DiversityCanada/NPF submitted that the policy represented a material change to the pre-existing agreement between TCC and its customers regarding prepaid wireless services, noting that the company had not received consent from these customers for such a change. In this regard, the applicants argued that section D1 of the Wireless Code (the Code)² requires a customer's informed and expressed consent before making changes to the key terms and conditions of a contract and that this section should apply to prepaid customers in the circumstances of this case.
7. The applicants argued that any balances accrued before the date of the policy's introduction, 20 October 2013, cannot be counted toward the \$300 account balance

¹ On 27 October 2014, TCC responded to a request for additional information from Commission staff dated 21 October 2014.

² The Code was established by the Commission in Telecom Regulatory Policy 2013-271 (the Wireless Code Policy).

limit set by the policy and that the contractual terms which existed prior to that date must remain in force unless a customer consents to a change.

8. TCC argued that the policy only affects prepaid contracts, and that section D1 of the Code does not apply to prepaid contracts. By providing 60-days' advance notice prior to the introduction of amendments to its prepaid terms of service, TCC asserted that its current policy is consistent with the expectations set out in the Code.
9. Further, TCC submitted that the introduction of the policy did not amend existing contracts as prepaid wireless service contracts expire after the defined expiry period elapses or once a customer actively chooses to "top-up" his or her prepaid account. By "topping-up" their prepaid account after the policy was introduced, customers accepted that the policy would apply to their prepaid wireless service contracts going forward, both to the "top-up" amount and to any amount already accumulated on their prepaid account.

Commission's analysis and determinations

10. The Code clearly states that all of the Code's sections apply to postpaid contracts, while only certain specified sections apply to prepaid services. Section D1 of the Code does not apply to contracts for prepaid services. As set out in the Wireless Code policy, the Commission is of the view that, when customers renew their prepaid accounts via "top-up" they are accepting the key terms and conditions of the contract offered by a wireless service provider (WSP). As such, the Commission did not find it necessary to prohibit changes to key contract terms and conditions for prepaid services. Instead, the Commission stated that it expected WSPs that provide prepaid wireless services to clearly publicize any change to their services.
11. The Code took effect on 2 December 2013 and therefore did not apply when TCC introduced the policy. The Code began to apply to all new or amended wireless service contracts from that day forward.
12. Furthermore, TCC provided affected customers with 60-days' advance notice of its policy's introduction, which publicized the upcoming changes to its service terms and was consistent with the expectations set out in the Code.

Did TCC subject customers to duress in applying the policy, thus making the contract changes caused by the policy invalid?

13. DiversityCanada/NPF submitted that TCC has greater bargaining power than the prepaid customers whose account balances it holds, arguing that a significant portion of these customers would have been unlikely to fully understand their rights when TCC introduced the policy or to have had legal representation to advise them. DiversityCanada/NPF argued that, when TCC applied the policy to its prepaid customers, TCC exploited this unequal bargaining power and subjected these customers to duress.
14. The applicants argued that TCC provided its prepaid customers with an account balance of at least \$300 with no alternative to being subscribed to a monthly plan.

Customers who objected to the policy could only protest by ending their relationship with TCC, which would also mean forfeiting their prepaid account balance.

15. TCC submitted that it had not abused its bargaining power in implementing the policy. TCC also submitted that economic duress requires one party to force a new or amended agreement on another through the application of illegitimate pressure that forecloses other options. TCC argued that the company had simply set an account ceiling for pay-per-use prepaid services. In its view, introduction of the policy has not caused, or has not threatened to cause, any economic harm to its customers, but rather, the policy creates new options for its prepaid customers to use the accumulated balance in their prepaid accounts.

Commission's analysis and determinations

16. TCC's introduction of the policy did not place affected customers under economic pressure. TCC's terms of service acknowledge the possibility of the WSP making changes to the terms of its prepaid contracts. Furthermore, TCC provided advance notice of the policy's introduction and only applied the policy to individual customers upon their first "top-up" after the 20 October 2013 introduction of the policy.
17. By providing 60-days' advance notice, TCC ensured that its prepaid customers could draw their account below \$300 before this policy was introduced if they did not wish to be affected. Customers with prepaid balances over \$300, who did not wish to cancel their contracts with TCC, also had the following options:
 - continue to "top-up" their accounts, and remain subject to the policy, and subscribe to a monthly prepaid rate plan;
 - stop "topping-up" their accounts, remain subject to the policy, and subscribe to a monthly prepaid rate plan for as long as their balance allowed (i.e. 30 months with a balance of \$300);³ or
 - stop "topping-up" their accounts and revert to purchasing services using existing credits on a pay-per-use basis at any point after the balance dropped below \$300.

Affected customers could also choose from the following account management options offered by TCC:

- transfer the credits to another prepaid customer; or
 - use the credits to acquire a new device.
18. TCC's policy is consistent with the determination set out in the Code that WSPs are not required to carry over wireless prepaid account balances indefinitely.
 19. In light of the above, TCC did not subject its customers to duress and therefore the terms of prepaid service contracts have not been made invalid for this reason.

³ TCC's default monthly prepaid rate plan for customers subject to the policy costs \$10. Subject to applicable taxes and 9-1-1 service fees, customers with a balance of \$300 could maintain their accounts without further top-up for 30 months.

Did TCC's policy contravene subsections 27(1) and 27(2) of the Act?

20. DiversityCanada/NPF submitted that the policy contravenes the Act, in particular subsection 27(1), which requires that every rate charged by a Canadian carrier be just and reasonable, and subsection 27(2), which prohibits unjust discrimination by Canadian carriers.
21. The applicants submitted that, if TCC subjected any of its customers to duress, the rates charged to those customers under the policy could not be just and reasonable and, as such, the policy contravenes subsection 27(1) of the Act. Further, DiversityCanada/NPF argued that if the Commission decided not to intervene under subsection 27(1) of the Act, it could still provide relief to affected customers under section 24 of the Act, which allows the Commission to impose conditions on the offering and provision of services by Canadian carriers.
22. The applicants submitted that affected customers are unduly and unreasonably disadvantaged by having to pay for a monthly plan that they did not request and are unlikely to make full use of. Therefore, TCC is giving itself an undue and unreasonable preference by forcing customers to expend funds that their prepaid wireless contracts did not require them to expend prior to the introduction of this policy. As such, the policy contravenes subsection 27(2) of the Act.
23. TCC submitted that its prepaid wireless services are offered in an environment where the Commission has forborne from rate regulation pursuant to subsection 27(1) of the Act.⁴
24. TCC further submitted that DiversityCanada/NPF had not established that the test for unjust discrimination or undue preference had been met. DiversityCanada/NPF did not identify two similarly situated entities or groups that were being treated differently by TCC. Furthermore, there is no unjust treatment of customers as TCC is permitted to change the nature of its prepaid service offering. The policy provides a reasonable way for customers to use large accumulated prepaid credits while maintaining their accounts.

Commission's analysis and determinations

25. With regard to subsection 27(1) of the Act, the Commission has repeatedly found that current retail markets are sufficiently competitive to ensure that the rates for wireless services are just and reasonable and has accordingly forborne from rate regulation in these markets. Therefore, the Commission considers that the policy has not contravened subsection 27(1) of the Act.
26. It would be inappropriate in the circumstances to grant DiversityCanada/NPF's request that the Commission do indirectly through section 24 of the Act what it has forborne from doing under subsection 27(1) of the Act.
27. The Commission's analysis of an allegation of undue preference or unreasonable disadvantage under subsection 27(2) of the Act is conducted in two phases:

⁴ TCC cites Telecom Decisions 98-18 and 2012-556 in support of its position that its policy does not contravene subsection 27(1) of the Act.

- it must first determine whether the conduct in question is discriminatory or constitutes a preference; and
- where it so determines, it must then decide whether the discrimination is unjust or the preference is undue.

28. The burden is on the applicant to demonstrate that the conduct is discriminatory or preferential. In establishing whether discrimination or preference exists, it is necessary to identify two comparable entities or groups which are being treated differently by a Canadian carrier. The applicants have not provided any evidence that customers affected by this policy are being treated any differently than any other group or entity in a comparable situation. Therefore, the Commission is unable to conclude that TCC has violated subsection 27(2) of the Act.

29. In light of all the above, the Commission **denies** DiversityCanada/NPF's application.

Secretary General

Related documents

- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, Telecom Decision CRTC 2012-556, 11 October 2012
- *NBTel Inc. – Forbearance from regulating cellular and personal communications services*, Telecom Decision CRTC 98-18, 2 October 1998