



Telecom Order CRTC 2014-220

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Ottawa, 8 May 2014

Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding initiated by the Foundation's application to review and vary Telecom Regulatory Policy 2013-271

File numbers: 8662-D53-201312321 and 4754-431

1. By letter dated 2 December 2013, the DiversityCanada Foundation (DiversityCanada) applied for costs on its own behalf and on behalf of the National Pensioners Federation with respect to their participation in the proceeding initiated by DiversityCanada's application to review and vary Section J of the Wireless Code (the review and vary proceeding). The Wireless Code was established by the Commission as a result of the proceeding leading to Telecom Regulatory Policy 2013-271 (the Wireless Code proceeding). Section J of the Wireless Code addresses the expiration of prepaid wireless service cards.
2. On 11 December 2013, TELUS Communications Company (TCC) filed an intervention in response to DiversityCanada's application for costs. On 12 December 2013, the Canadian Wireless Telecommunications Association (CWTA) and Saskatchewan Telecommunications (SaskTel) each filed an intervention in response to DiversityCanada's application for costs. DiversityCanada filed a reply on 19 December 2013.
3. The Commission disposed of the review and vary proceeding and denied DiversityCanada's review and vary application in Telecom Decision 2014-101.

Application

4. In its application for costs, DiversityCanada noted that it filed the application with the Commission later than the deadline prescribed by section 65 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure). DiversityCanada submitted that it had no reason to believe that the delay in filing its application would adversely affect any interested parties, and requested that the Commission accept its application regardless of the delay.
5. DiversityCanada submitted, without rationale, that it had met the criteria for an award of costs set out in section 68 of the Rules of Procedure because it represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding, it had assisted the Commission in developing a better understanding of the matters that were considered, and it had participated in a responsible way.

6. DiversityCanada requested that the Commission fix its costs at \$32,680.73, consisting of \$8,333.75 for legal fees and \$24,346.98 for consultant fees. DiversityCanada's claim included the Ontario Harmonized Sales Tax (HST). DiversityCanada filed a bill of costs with its application.
7. DiversityCanada made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission.

Answer

8. In response to the application, the CWTA, SaskTel, and TCC (the answering parties) stated that DiversityCanada's submissions in the review and vary proceeding did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding, and that DiversityCanada did not participate in that proceeding in a responsible way. The CWTA, SaskTel, and TCC submitted that because DiversityCanada did not meet the criteria for an award of costs, its application for costs should be denied.
9. The CWTA submitted that in the alternative, if the Commission determines that DiversityCanada meets the criteria for an award of costs, the amount claimed should be reduced to reflect the limited assistance DiversityCanada provided to the Commission through its participation in the review and vary proceeding.
10. SaskTel and TCC argued that in the review and vary proceeding, DiversityCanada failed to identify any errors of fact or law made by the Commission in the Wireless Code proceeding. TCC argued that DiversityCanada provided no evidence to support its submissions and that, as a result, DiversityCanada's participation in the review and vary proceeding was frivolous. The CWTA and SaskTel argued that DiversityCanada's submissions contained numerous factual inaccuracies. The CWTA argued that parts of DiversityCanada's submissions related to issues that were beyond the scope of the Wireless Code proceeding. Additionally, the CWTA and TCC argued that, by awarding DiversityCanada costs for its participation in the review and vary proceeding, the Commission would encourage unhelpful participation in future proceedings.

Reply

11. In reply, DiversityCanada argued that its submissions in the review and vary proceeding (i) related exclusively to issues that were within the scope of the Wireless Code proceeding, and (ii) did not include factual inaccuracies. DiversityCanada further argued that the answering parties were of the view that the review and vary application was bound to fail. DiversityCanada submitted that it is Commission practice to assess every application for costs on its own merits and that the outcome of the initial application is immaterial to the application for costs.

Commission's analysis and determinations

12. The Commission considers that the late filing of the costs application did not prejudice any party and that, hence, it is appropriate to consider DiversityCanada's application. Further, the Commission agrees with DiversityCanada that costs applications are treated on their merits, regardless of the outcome of the proceeding for which the costs are sought.
13. For the reasons that follow, the Commission finds that DiversityCanada has not satisfied the criteria for an award of costs set out in section 68 of the Rules of Procedure. In summary, the Commission finds that, while DiversityCanada represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding, it did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding.
14. The Commission notes that no party contested whether DiversityCanada represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding. The Commission accepts DiversityCanada's position in this matter. The Commission finds that DiversityCanada represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding, including senior citizens who subscribe to prepaid wireless services.
15. The Commission notes that DiversityCanada's submissions in the review and vary proceeding can be understood as covering three broad areas: (i) whether the Commission provided sufficient reasons for its decision to establish Section J of the Wireless Code; (ii) whether, in the Wireless Code proceeding, the Commission properly considered the evidence before it; and (iii) whether, in the Wireless Code proceeding, the Commission considered the principle of unjust enrichment.
16. Regarding the first area, the Commission notes that DiversityCanada essentially submitted that the Commission provided no reasons for its decision to establish Section J of the Wireless Code.
17. Regarding the second and third areas, the Commission notes that DiversityCanada argued, in effect, that since the Commission failed to adopt DiversityCanada's preferred conclusions in Section J of the Wireless Code, it must have failed to consider DiversityCanada's evidence and arguments in this regard.
18. The Commission further notes that, as requested by DiversityCanada in the Wireless Code proceeding, the Wireless Code does apply to prepaid wireless services. Section J of the Wireless Code sets out the obligations of service providers regarding the accounts of customers with prepaid cards. Telecom Decision 2014-101, which sets out the Commission's determinations regarding the review and vary proceeding, does not affect these obligations.

19. Regarding the third area, as a preliminary matter, the Commission notes that unjust enrichment is a private law concept that, in terms of both the test to be met and the potential remedies available, has little or no application to the regulatory context in which the Wireless Code arose. More importantly, as the Commission noted in Telecom Decision 2014-101, to the extent that DiversityCanada used unjust enrichment as a proxy to argue that prepaid wireless card rates were not just and reasonable, the issue of rates was not within the scope of the Wireless Code proceeding.
20. The Commission considers that DiversityCanada's submissions in the review and vary proceeding, given the record and the reasons underpinning the Commission's disposition of the issues in the Wireless Code proceeding, raised no genuine issue for the Commission's consideration. Consequently, the Commission determines that DiversityCanada did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding.
21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. This being the case, it is not necessary for the Commission to determine whether DiversityCanada has participated in the review and vary proceeding in a responsible way.

Directions regarding costs

22. In light of all the above, the Commission **denies** the application by DiversityCanada for costs with respect to its participation in the review and vary proceeding.

Secretary General

Related documents

- *Wireless Code – Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards*, Telecom Decision 2014-101, 5 March 2014
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013