



Telecom Decision CRTC 2016-183

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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

*The Commission **denies** an application from the DiversityCanada Foundation (DiversityCanada) and the National Pensioners Federation to review and vary Telecom Order 2015-240. The Commission considers that it did not err in applying or interpreting the eligibility criteria for an award of costs. Further, the Commission considers that the applicants have not demonstrated a breach of procedural fairness. Finally, the Commission considers it necessary to introduce additional procedural measures to address the multiplicity of proceedings initiated by DiversityCanada on a single, settled issue.*

Application

1. The Commission received an application from the DiversityCanada Foundation (DiversityCanada), on its own behalf and on behalf of the National Pensioners Federation (NPF) [collectively, DiversityCanada/NPF or the applicants], dated 2 September 2015, in which they requested that the Commission review and vary Telecom Order 2015-240 or, in the alternative, defer consideration of the application pending the outcome of related applications.
2. The Commission received an intervention regarding DiversityCanada/NPF's application from TELUS Communications Company (TCC). The public record of this proceeding, which closed on 5 October 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Background

3. In October 2012, the Commission launched a public proceeding to establish a mandatory code for mobile wireless services.
4. DiversityCanada intervened in the proceeding, and argued that the Commission should not allow balances remaining on the accounts of prepaid service customers to expire.

5. On 3 June 2013, the Commission released Telecom Regulatory Policy 2013-271 (the Wireless Code policy). In that decision, the Commission determined, among other things, that while prepaid wireless balances could expire, wireless service providers must keep prepaid customers' accounts open, at no charge, for at least seven days following the expiry of an activated card to enable the customer to top up the account and retain the prepaid balance.
6. After the Wireless Code policy was issued, DiversityCanada/NPF filed an application in which they requested that the Commission review and vary its determinations regarding prepaid wireless balances. The Commission denied DiversityCanada/NPF's application in Telecom Decision 2014-101, reiterating that the evidence on the record of the Wireless Code proceeding supported the ultimate determination of the Commission on this issue and finding that DiversityCanada/NPF had not demonstrated any error.
7. DiversityCanada/NPF subsequently filed a further application on the issue of prepaid wireless balances. In that case, the applicants challenged the legitimacy of TELUS Communications Company's (TCC) Large Prepaid Balance Policy for, among other things, contravening the Wireless Code and the *Telecommunications Act* (the Act). The Commission denied the application in Telecom Decision 2015-211, setting out the ways in which the applicants' arguments misunderstood or sought to misapply the Wireless Code and the Act.
8. In each of the proceedings noted above, DiversityCanada, either solely on its own behalf or otherwise, applied to the Commission for costs with respect to its participation. In the case of the Wireless Code proceeding, DiversityCanada was awarded costs, though the amount claimed was found to be excessive and was significantly reduced.
9. For the proceeding leading to Telecom Decision 2014-101, DiversityCanada/NPF were denied costs altogether.
10. DiversityCanada/NPF filed an application to review and vary this denial of costs, which was also denied. A separate application for costs related to the applicants' participation in the review and vary proceeding was subsequently denied.
11. In Telecom Order 2015-240, the order currently under review, the Commission denied DiversityCanada/NPF's application for costs in the proceeding leading to Telecom Decision 2015-211. The Commission determined that DiversityCanada/NPF had not assisted it in developing a better understanding of the matters that were considered, thereby failing to satisfy paragraph 68(b) of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure). As a result, the applicants were not eligible for an award of costs.

12. The Commission made clear that the applicants' submissions were based on a complete lack of understanding of the Commission's regulatory framework, particularly with respect to the applicants' assumption that prepaid wireless balances ought to be treated like cash deposits. The Commission also noted that by initiating multiple proceedings that were all ultimately related to the appropriateness of the Commission's prepaid wireless balance policies, DiversityCanada had undermined its credibility and impaired its ability to represent subscribers.

Review and vary criteria

13. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it uses to assess review and vary applications that are 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, for example due to

- an error in law or in fact;
- a fundamental change in circumstances or facts since the decision;
- a failure to consider a basic principle which had been raised in the original proceeding; or
- a new principle which has arisen as a result of the decision.

Issues

14. The Commission has identified the following issues to be addressed in this decision:

- Is there substantial doubt as to the correctness of Telecom Order 2015-240?
- Should the Commission defer consideration of the present application?
- Are further procedural measures necessary for the Commission to address the multiplicity of proceedings initiated by DiversityCanada on a single, settled issue?

Is there substantial doubt as to the correctness of Telecom Order 2015-240?

Interpretation and application of costs criterion

15. DiversityCanada/NPF argued that the Commission misinterpreted the costs criterion set out in paragraph 68(b) of the Rules of Procedure by equating the dismissal of their arguments in the proceeding regarding TCC's Large Prepaid Balance Policy with a failure to contribute to a better understanding of the matters under consideration.

16. The applicants further argued that the Commission's *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963, provide objective standards that the Commission must follow when determining an award of costs.

17. In addition, DiversityCanada/NPF submitted that the Commission had erred by misapplying the costs criterion – specifically, by unreasonably finding that the applicants’ arguments failed to assist the Commission in gaining a better understanding of the matters that were considered because they did not raise any genuine issue for the Commission’s consideration.

Commission’s analysis and determinations

18. Pursuant to section 56 of the Act, the Commission’s discretion in determining whether and how to award costs is broad. The Commission has enacted the Rules of Procedure to establish the criteria it will use to assess applications for costs awards. It has also published the Guidelines, which list certain factors that the Commission may take into consideration in applying the costs criteria, though the Guidelines themselves explicitly acknowledge that the list is neither binding nor exhaustive.

19. As noted in a previous decision to which DiversityCanada was a party, the Commission considers each costs application on its own merits, independent of the outcome of the substantive proceeding.¹ This approach was applied in the case under review.

20. Contrary to the applicants’ position, the Commission has not interpreted this criterion to mean that it must agree with an applicant’s submissions in the substantive proceeding.

21. Rather, the Commission took into account that it had considered and rejected DiversityCanada/NPF’s views on prepaid wireless balances in two previous decisions,² and that the additional submissions DiversityCanada/NPF made relating to prepaid wireless balances were clearly based on a serious misunderstanding of the relevant legal and regulatory framework. The Commission was not satisfied that these submissions, which had negligible legal and policy value, raised a genuine, novel issue. Accordingly, the Commission exercised its discretion to determine that the applicants had failed to assist the Commission in developing a better understanding of the matters that were considered.

22. Accordingly, DiversityCanada/NPF have not demonstrated that the Commission either misinterpreted or misapplied the costs criterion set out in paragraph 68(b) of the Rules of Procedure.

Duty of procedural fairness

23. DiversityCanada/NPF submitted that the Commission had breached its duty of procedural fairness by failing to give sufficient reasons for its denial of costs. In particular, the applicants argued that the Commission should have detailed every way in which they were ineligible for an award of costs, rather than only giving examples of ways in which they had failed to raise genuine issues.

¹ See Telecom Decision 2015-131.

² See Telecom Regulatory Policy 2013-271 and Telecom Decision 2014-101.

24. DiversityCanada/NPF also argued that, by making a general determination regarding their ability to represent subscribers, the Commission affected their eligibility for costs in future proceedings without notifying them or offering the opportunity to provide separate submissions. Additionally, the applicants argued that this determination amounted to a censure and caused reputational damage to them and to their legal counsel without adequate notice or opportunity to comment.

Commission's analysis and determinations

25. While the Commission must provide reasons for its determinations regarding costs awards, these reasons will be sufficient if they give a reviewing body, such as a court, the ability to determine whether a decision was properly made. Indeed, the applicants themselves recognized this principle in their submissions. The Commission provided reasons at paragraphs 8 to 13 of Telecom Order 2015-240 that adequately demonstrate the applicants' failure to qualify for an award of costs due to their failure to assist the Commission in developing a better understanding of the issues that were considered.

26. Regarding the applicants' eligibility for costs in future proceedings, the Commission did not purport to make a finding regarding whether the applicants represented a particular group or class of subscribers in the proceeding leading to Telecom Decision 2015-211, or whether they could do so in any future proceeding. Rather, the Commission indicated that asking it to reconsider the same issue with no new evidence or relevant submissions supported the perception that the applicants did not understand the regulatory framework they were seeking to change, thus undermining their credibility.

27. The applicants provided no evidence of reputational harm. To the extent they have suffered any such harm, it is the result of filing multiple applications on the same issue with negligible additional insight, after having been clearly told, on multiple occasions, that the issue was settled.

28. Accordingly, the Commission finds that DiversityCanada/NPF have not demonstrated a breach of the duty of procedural fairness.

Conclusion

29. In light of all the above, the Commission finds that there is no substantial doubt as to the correctness of Telecom Order 2015-240.

Should the Commission defer consideration of the present application?

30. DiversityCanada/NPF requested that, in the alternative, the Commission defer consideration of their application pending the consideration of related applications. The Commission has released its decision regarding DiversityCanada/NPF's application to review and vary Telecom Decision 2015-211 today. The applicants also filed two petitions to the Governor in Council, one of which had already been

dismissed as of the date of DiversityCanada/NPF's application.³ As of the date of this decision, the second petition has also been dismissed.⁴

Commission's analysis and determinations

31. While the related applications are superficially related to the present matter in that they involve DiversityCanada/NPF and costs, consideration of the present application is based on the application of the review and vary test to the particular circumstances of the case. Moreover, the petitions have now been dismissed.
32. As there is no basis upon which to defer the present application, the Commission **denies** DiversityCanada/NPF's request.

Are further procedural measures necessary for the Commission to address the multiplicity of proceedings initiated by DiversityCanada on a single, settled issue?

33. Despite clear and emphatic language in multiple decisions that have rejected the applicants' submissions in respect of prepaid wireless balances and the equally clear and emphatic language in corresponding costs award decisions, the applicants have continued to file applications that all ultimately question the Commission's prepaid wireless balance policies.
34. In Telecom Order 2015-132, the Commission cautioned the applicants that seeking a different result from the Commission on this issue constituted an unreasonable use of Commission resources. In Telecom Order 2015-240, the Commission reiterated this statement, while further advising the applicants of the impact the continuing flow of applications had on their credibility as interveners in Commission proceedings. Notwithstanding these observations, the applicants have since filed two additional review and vary applications, as well as related costs applications, in respect of the same issue.
35. In light of the above, if the Commission receives another application from DiversityCanada, either solely on its own behalf or otherwise, that ultimately relates to the appropriateness of the Commission's prepaid wireless balance policies, the Commission intends to summarily return the application to DiversityCanada. While the Commission intends to provide reasons to DiversityCanada for returning the application, the Commission does not intend to consider the merits of any such application.
36. This measure is necessary in order to curtail the continuous and unreasonable use of Commission resources caused by the multiplicity of proceedings initiated by DiversityCanada on this well-settled issue.

³ See Order in Council P.C. 2015-0248.

⁴ See Order in Council P.C. 2016-0200.

Conclusion

37. Given the Commission's finding that there is no substantial doubt as to the correctness of Telecom Order 2015-240, and that it would not be appropriate to defer consideration of the application, the Commission **denies** DiversityCanada/NPF's application to review and vary that order.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding regarding TELUS Communications Company's Large Prepaid Balance Policy*, Telecom Order CRTC 2015-240, 4 June 2015
- *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
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding leading to Telecom Decision 2015-131*, Telecom Order CRTC 2015-132, 9 April 2015
- *DiversityCanada Foundation – Application to review and vary Telecom Order 2014-220*, Telecom Decision CRTC 2015-131, 9 April 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
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010