

***RESPONSE TO THE PETITION OF THE DIVERSITYCANADA
FOUNDATION AND THE NATIONAL PENSIONERS FEDERATION TO
THE GOVERNOR IN COUNCIL ON 02 JUNE 2014 SEEKING VARIANCE
OF TELECOM DECISION CRTC 2014-101
REFERENCE NUMBER: DGTP-001-2014***



COMMENTS

OF

TELUS COMMUNICATIONS COMPANY

8 September 2014

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Introduction

1. TELUS Communications Company (“TELUS”) is pleased to provide comments in relation to a petition to the Governor in Council brought by the DiversityCanada Foundation (“DCF”) and the National Pensioners Federation (“NPF”) (collectively referred to as “the petitioners”) asking to vary the decision of the Canadian Radio-television and Telecommunications Commission (“CRTC” or “the Commission”) with regard to Telecom Decision CRTC 2014-101 - *Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards*¹ (“TD CRTC 2014-101” or the “Decision”). The petition by the DCF and NPF is filed pursuant to section 12 (1) of the *Telecommunications Act*² and was published in the *Canada Gazette*, Part I, on 9 August 2014 under the title *Petition to the Governor in Council to Vary Telecom Decision CRTC 2014-101 Wireless Code – Requested by DiversityCanada Foundation to Review and Vary Telecom Regulatory Policy 2013-271 Regarding Expiry of Prepaid Wireless Service Cards*, reference number DGTP-001-2014.
2. TELUS is a major provider of telecommunications services in Canada. In Alberta, British Columbia and eastern Quebec TELUS offers wireline services (encompassing landline phone, broadband and television), and is a national provider of mobile wireless telecommunications services. In the fiscal quarter ending in June 2014 TELUS had 7.9 million subscribers for its wireless services, including nearly 1 million prepaid retail wireless customers.
3. TELUS submits in its comments on the petition that the Governor in Council should reject the positions of the petitioners in their entirety. In many instances, the petitioners have violated their jurisdictional rights, as they seek an Order that does not deal with matters related to Telecom Decision CRTC 2014-101, and instead seek to quash sections of the Wireless Code. In addition, errors in law are also made within the petition itself as the DCF and NPF argue that decisions of the CRTC did not properly consider various

¹ CRTC, Telecom Decision CRTC 2014-101 - *Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards*, 5 March 2014. [TD CRTC 2014-101]

² *Telecommunications Act*, RSC 1993, c 38, s 12 (1) [*Telecommunications Act*]

tests under the *Telecommunications Act*³ when in fact these tests are not relevant to the application. Perhaps most significantly, as TELUS will show below, prepaid wireless services are used by a segment of the consumer market that appreciates the features of this service including flexible usage policies, fewer rolling contractual service obligations, and no credit checks for customers. Yet should expiry be eliminated, the business case for offering the service with its current features becomes vastly more difficult to justify, so that consumers may experience changes in service and higher rates as a result. Eliminating prepaid service expiry, then, would likely result in services contrary to the petitioners wishes and contrary to public interest provisions. Lastly, the government's support for the measures in the Wireless Code, has been made clear by the government's inclusion of the Wireless Code as one of its initiatives to promote choice, better service and lower prices for wireless consumers in Canada. Given that the Wireless Code is a key part of this policy approach to protect wireless consumers and increase competition in the wireless marketplace, the Governor in Council should refrain from making changes to Wireless Code because such changes could serve to upset the balance that the Commission had put in place to effect government wireless policy.

Overview of the Parties' Petition

4. The petition before the Governor in Council deals with the CRTC's decision on a Part 1 application made by the petitioners under the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*⁴ to review and vary the Commission's decision in Telecom Regulatory Policy CRTC 2013-271 – *The Wireless Code* (“ “Wireless Code” or “TRP 2013-271”). The Wireless Code created a mandatory code for retail wireless services, including Section J which deals with the expiry of prepaid wireless services. In the CRTC proceedings leading to the development of the Wireless Code TELUS fully participated as an intervener, providing comments to the Commission.
5. Specifically, the petitioners ask, at paragraph 11, that the Governor in Council issue an Order to vary TD CRTC 2014-101 so as to:

³ *Telecommunications Act*, s 27 (1) and (2).

⁴ *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277), at Part 1. [CRTC Rules of Practice]

- a. acknowledge errors in law inherent in TD CRTC 2014-101;
 - b. quash Section J of the Wireless Code; and
 - c. establish a new hearing to reconsider the prohibition of prepaid wireless balance expiry.⁵
6. The petitioners ask the Governor in Council to make this order because of alleged errors made by the CRTC in Telecom Decision CRTC 2014-101. These alleged errors include that: the CRTC failed to provide adequate reasons in their decision; the CRTC ignored evidence and arrived at unreasonable conclusions; the CRTC's decision failed to consider undue and unreasonable disadvantage; and the CRTC's determination is contrary to broader public policy goals on prepayment methods.⁶
7. TELUS submits that the Governor in Council should reject the requests made by the petitioners. TELUS finds substantial preliminary procedural, legal and policy grounds upon which to reject the arguments of DCF and NPF. Most crucially TELUS does not believe many of the items raised by the petitioners are within the scope of the Governor in Council to consider as the petitioners have asked for amendments to the Wireless Code, or new proceedings to reconsider aspects of the Wireless Code. This is for two related reasons: first, because the matter before the Governor in Council is review of TD CRTC 2014-101 and not the Wireless Code; and, second, because of a time limitation period placed upon petition applications to the Governor in Council in the *Telecommunications Act*.
8. For example, the petitioners ask that the Governor in Council to quash Section J of the Wireless Code. Yet, the Governor in Council must restrict their comments to the procedural issues raised by the petitioners related only to the proceeding at the heart of this petition, that is TD CRTC 2014-101, and not the prior Wireless Code decision (TRP CRTC 2013-271). TELUS maintains that any discussion of the expiration of prepaid services is not an appropriate ground upon which this petition may be based because of

⁵ The DiversityCanada Foundation and the National Pensioners Federation, Petition to the Governor in Council to Vary Telecom Decision CRTC 2014-101, 2 June 2014, at para 11. [The Petition]

⁶ The Petition, at paras 12-13.

the time limitation period for matters to be considered by the Governor in Council as outlined in section 12 (1) of the *Telecommunications Act*.

9. Despite these preliminary concerns, in the comments that follow, TELUS addresses each of the petitioners' arguments made to the Governor in Council. However, because of the above time and subject matter limitation, as well as concerns with legal matters discussed by the petitioners, TELUS asks that the Governor in Council carefully consider and reject arguments dealing with aspects of the Wireless Code, thereby allowing section J of the Wireless Code to remain as stipulated by the CRTC in its Wireless Code decision.
10. TELUS' commentary includes discussion of a number of related topics. First TELUS will address a jurisdictional issue as to what matters may be properly considered by the Governor in Council, arguing that matters dealing directly with the Wireless Code, such as that section J be quashed, are out-of-scope and out of time because this does not pertain directly to the determinations of the Commission in Telecom Decision CRTC 2014-101. Second TELUS reviews and clarifies three important aspects of the petitioners' remarks by describing the nature of the Wireless Code, prepaid wireless services and explaining why expiry must remain for prepaid wireless services. Lastly, TELUS discusses legal aspects of the petitioners' arguments discussing: the reviewing authority of the Governor in Council; the evidence considered and reasons provided by the CRTC in the Wireless Code; charges that the Commission reached unreasonable conclusions; alleged undue and unreasonable disadvantage claims; and public policy considerations.

Jurisdictional Issue: The *Telecommunications Act* Precludes the Governor in Council from Amending to the Wireless Code

11. Before discussing elements of the petition, TELUS raises a jurisdictional issue that is important to the determinations of the Governor in Council. The petitioners applied to the Governor in Council under the relevant section of the *Telecommunications Act*. Specifically section 12 (1) states:

Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council

within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.⁷ [Emphasis added]

This section of the *Act* both provides the power for the Governor in Council to reconsider decisions of the Commission, and limits the time frame in which petitions may be launched. Because of the time limits made on petitioners this section necessarily provides parameters about the correct subjects for petitions so that only those that fit within the prescribed 90 day period may be considered.

12. As noted above, the petitioners in the current matter describe their concerns about alleged errors in law by the CRTC in both TD 2014-101, and matters related to the decision of the CRTC on the expiry of prepaid cards in the Wireless Code decision. Because of the 90 day limitation period cast upon parties to petition the Governor in Council to vary any Commission decision, TELUS respectfully submits that only matters related to errors in TD CRTC 2014-101 may be considered by the Governor in Council. This is because the issue of the expiry of prepaid cards was included in the Wireless Code decision made by the Commission on 3 June 2013, meaning that the date of filing of this petition, 2 June 2014, falls significantly outside the prescribed 90 days allowed for petitions seeking variance by the Governor in Council.
13. The issue in TD CRTC 2014-101, published on 5 March 2014, was the Part 1 application to review and vary the decision of Commission on one particular aspect of the Wireless Code dealing with prepaid cards. In their application to the CRTC that resulted in decision TD CRTC 2014-101, the petitioners raised procedural issues with the Commission's determinations including: failing to provide adequate reasons, breaching its duty of procedural fairness, ignoring relevant facts and arriving at unreasonable conclusions and failing to consider the principle of unjust enrichment.⁸ Thus, as the issues raised are primarily procedural, and do not deal with the merits of the Wireless Code decision nor the Wireless Code itself, TELUS submits that the primary

⁷ *Telecommunications Act*, s 12 (1).

⁸ DiversityCanada and the National Pensioners Foundation, Part 1 Application to Review and Vary Section J of the Telecom Regulatory Policy CRTC 2013-271, 3 September 2013, at para 3.

consideration at the heart of this petition are the legal issues relating to the decision making procedure of the CRTC. Although policy issues related to the expiry of wireless services are mentioned by the petitioners, these are side issues to the primary objective of the petition which is to challenge the procedural manner in which the CRTC made its decision. It should be noted that the Commission in TD CRTC 2014-101 did not deal with the substance of prepaid wireless expiry, but focuses its determinations of the application based on the procedural manner in which its decisions in the Wireless Code were made.⁹

14. The petitioners acknowledge that they are petitioning TD CRTC 2014-101 but also argue that issues related to the prepaid expiry decision of the Commission in the Wireless Code are at stake. Clearly issues related to prepaid wireless services expiry are out of scope for consideration by the Governor in Council. Because of this matters related to the Wireless Code are not appropriate items for the Governor in Council to consider in this petition.
15. Furthermore, the current date is well beyond the one year period upon which the Governor in Council may vary the Wireless Code decision. That period ended on 3 June, 2014. As a result, there is no basis upon which the Governor in Council could vary the Wireless Code by, for example, quashing Section J. Based on the strict one year time limitation, the *Telecommunications Act* precludes the Governor in Council from varying the Wireless Code in any way as part of its determinations of this petition.
16. The above noted time limit means that the only issue before the Governor in Council should correctly be whether the legal issues related to Commission's decision in TD CRTC 2014-101 were appropriately considered. TELUS therefore requests that the Governor in Council restrict its decision to the alleged problems with the CRTC's review and vary procedures in TD CRTC 2014-101.
17. Notwithstanding the validity of the above noted procedural issue for consideration by the Governor in Council, TELUS will address both the legal and policy issues related to the

⁹ For example see section "Did the Commission err in fact or in law, as alleged by DiversityCanada, in its determinations concerning prepaid cards?" in TD CRTC 2014-101, paras 21 – 26.

expiry prepaid wireless cards discussed in the petition of DCF and the NPF in its comments that follow.

Aspects of the Wireless Service Industry: The Wireless Code and Prepaid Services

18. In the discussion of their Part 1 application to the CRTC, and in their petition to the Governor in Council, DCF and NPF attempt to describe certain aspects of wireless service industry. TELUS disagrees with some of these descriptions of service. In order to provide the Governor in Council with a full understanding of CRTC's proceedings that led to the petitioners' Part 1 application and this petition, TELUS will explain the development of the Wireless Code and relevant aspects of the wireless services industry.

The Wireless Code

19. To provide the appropriate context to the petition, TELUS will below describe the actions of the Commission that led to the creation of the Wireless Code. Beginning in October of 2012, the CRTC initiated a proceeding to create a mandatory code of conduct for telecommunications companies offering retail wireless mobile services to Canadians, in Telecom Notice of Consultation CRTC 2012-557 - *Proceeding to establish a mandatory code for mobile wireless services*.¹⁰ This process was created following the outcome of a previous CRTC decision, Telecom Decision CRTC 2012-556 - *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services* ("TD CRTC 2012-556"). In TD CRTC 2012-556 the Commission determined that in accordance with the principles of the *Telecommunications Act*,¹¹ and to assist consumers in acquiring information about competitive wireless services,¹² a mandatory code of conduct for retail wireless services must be established.

¹⁰ CRTC, Telecom Notice of Consultation CRTC 2012-557 - *Proceeding to establish a mandatory code for mobile wireless services*, 11 October 2012. [TNC CRTC 2012-557]

¹¹ CRTC, Telecom Decision CRTC 2012-556 - *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, 11 October 2012, at para. 27. [TD CRTC 2012-556]

¹² TD CRTC 2012-556, at para 23.

20. In the proceeding that led to the Wireless Code decision, the CRTC received the views of a wide variety individuals and groups. Stakeholders contributing to the proceeding included wireless service providers; consumer groups; industry groups and individual consumers. In soliciting these opinions the Commission considered issues related to the provision of wireless services generally, as well as those specific to prepaid or postpaid customers of retail wireless services. Notably, both DCF and TELUS were active participants in the proceeding initiated by TNC 2012-557, with both filing substantive submissions with the CRTC and appearing at the oral hearing.
21. The Wireless Code was created by the CRTC in TRP CRTC 2013-271. It provides Canadians with a comprehensive set of principles establishing baseline standards with which telecommunications companies must comply when selling retail mobile wireless services to consumers and small business customers. In describing the goals of the Wireless Code the Commission stated:

The Wireless Code establishes new requirements for wireless service providers (WSPs) to (i) ensure that consumers are empowered to make informed decisions about wireless services; and (ii) contribute to a more dynamic marketplace by making it easier for consumers to take advantage of competitive offers.¹³

22. TELUS observes that the government, through its current policies and communications, has embraced the vision and stipulations of the Wireless Code. The belief the government has in the protections that the Wireless Code may offer consumers is reflected in its support for enforcement measures and through the government's intention to amend the *Telecommunications Act* and *Radiocommunication Act* to allow the CRTC to impose monetary penalties on those violating the Code.¹⁴ Government communications about the protections it has created for consumers in the wireless sector also highlight aspects of the Wireless Code. For example the website *Canada's Wireless Policy – More choices. Lower prices. Better service* includes notation that government initiated changes to wireless policy “build on the new rules already in place to protect

¹³ CRTC, Telecom Regulatory Policy CRTC 2013-271 – *The Wireless Code*, 3 June 2013, at para 2. [The Wireless Code decision]

¹⁴ For example see: Industry Canada, News Release “Harper Government Taking Action to Stand Up for Consumer Choice and Affordable Prices in Canada's Wireless Sector,” 18 December, 2013.

consumers”¹⁵ which links to a CRTC website about the Wireless Code. On this same website the government further notes measures for unlocking phones and the lack of a penalty to cancel a wireless contract are key consumer protections available through the Wireless Code. The Wireless Code, therefore, has been positioned as a consumer friendly measure attracting government support and endorsement, and is consistent with public policy and the public interest.

23. Notably, the Commission made specific reference to prepaid wireless services in the Wireless Code. The CRTC took into account that the contracting process and arrangement between Wireless Services Providers (“WSPs”) and prepaid customers was very different than with postpaid customers, in that prepaid customers must pay for their services in advance. To address issues unique to prepaid services, the CRTC stated that it would :

...exempt prepaid services from the sections of the Wireless Code in which the requirements are not necessary to empower consumers of prepaid services. The Commission will also impose certain unique requirements related to prepaid services designed to achieve an appropriate balance between promoting the interests of Canadians who choose prepaid services and avoiding placing an undue burden on WSPs.¹⁶

24. The Wireless Code was therefore intended to have wide applicability in both the scope of issues dealt with, and in terms of the groups of consumers it served. The Commission also sought to “empower” consumers through the exclusions and inclusions provided in the Code for specific consumer groups, such as prepaid customers. Issues specific to some segments, such as prepaid wireless services, were also directly addressed by the Commission.
25. One issue specifically considered by the Commission is that of expiry for prepaid services, addressed in section J of the Wireless Code. As with other aspects of their decision, the CRTC considered a variety of opinions about the expiry of prepaid services. This included consideration by the Commission, upon submissions from the parties, “that

¹⁵ Industry Canada, *Canada’s Wireless Policy – More choices. Lower prices. Better service*, <
<http://www.ic.gc.ca/eic/site/icgc.nsf/eng/07389.html> >

¹⁶ Wireless Code decision, at para 31.

the Wireless Code should prohibit the expiration of prepaid cards (i.e. services not used within the timeframe allotted should roll over indefinitely)” which was a position supported by one of the petitioners, DCF.¹⁷

26. After hearing the opinions of interveners and analyzing the opinions submitted on the issue of prepaid services expiry, the Commission decided that WSPs should be permitted to set expiry dates for prepaid services. The Commission stated in the Wireless Code decision:

The Commission considers that the evidence on the record of the proceeding does not support consumers’ request for WSPs 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.¹⁸
[Emphasis added]

27. The Commission did provide new requirements for WSPs to give customers additional protection when their prepaid services had expired. In particular, the Commission stated that WSPs are required “to hold prepaid customers’ accounts open for at least seven days following the expiry of an activated card at no charge to give customers more time to “top up” their accounts and retain their prepaid balance.”¹⁹ Section J of the Wireless Code deals specifically with the expiry of prepaid cards in the retail wireless service industry.²⁰ Thus the Commission found sound public policy reasons to allow WSPs to maintain expiry for prepaid wireless customers in their final determinations, and created public protection measures for customers through Section J stipulations.
28. Following the issuance of the Wireless Code, DCF and the NPF used a Part 1 application²¹ to request that the Commission review and vary their determinations on the

¹⁷ Wireless Code decision, at para 341.

¹⁸ Wireless Code decision, at para 349.

¹⁹ Wireless Code decision, at para 350.

²⁰ Wireless Code decision, Section J. “(i) A service provider must keep open the accounts of customers with prepaid cards for at least seven calendar days following the expiration of an activated card, at no charge, to give the customer more time to “top up” their account and retain their prepaid balance.”

²¹ CRTC Rules of Practice, at s 4-5.

expiry of prepaid wireless services, asking that expiry be eliminated. The effect of their application would have been to rescind section J of the Wireless Code. DCF and NPF believed that section J should be reconsidered because it claimed the Commission failed to support its decision, ignored relevant facts leading to unreasonable conclusions, and failed to consider the principle of unjust enrichment.

29. In Telecom Decision CRTC 2014-101 -*Wireless Code – Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards* the Commission denied the request from the petitioners, finding that they “failed to demonstrate substantial doubt as to the Commission’s determinations in the Wireless Code Decision.”²² This conclusion was reached as the Commission found it did not “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.”²³

Defining Prepaid Services

30. TELUS wishes to assist the Governor in Council’s understanding the nature of prepaid services for customers by describing these services in detail. WSPs, including TELUS, generally offer two types of billing arrangements for retail wireless services customers: postpaid and prepaid services. Both types of service allow customers to use mobile devices for various forms of communication including voice calls, text messaging, multimedia service messaging and mobile data access.
31. The difference between postpaid and prepaid services is in the contractual and billing relationships between customers and WSPs. Postpaid customers contractually agree at the time of acquiring service to commit to a package of services which are billed and paid for on a rolling basis (usually monthly) following the acquisition and use of service by a subscriber.

²² TD CRTC 2014-101, at para 27.

²³ TD CRTC 2014-101, at para 26.

32. In contrast, prepaid customers instead pay *in advance* for access to the mobile network and associated services. This means that the major difference between prepaid and postpaid services is that prepaid services require upfront payment in order for the customer to have access to the wireless network and communications services. In addition, under prepaid service stipulations, the customer's access to services is limited to access within a specified period of time. Customers of prepaid services are limited, therefore, in both usage (based on how much is deposited into the customer's account) and in time, because the customer is paying for both access to the wireless network over a defined period of time plus a maximum amount of usage. Upon expiry²⁴ a customer is no longer permitted to use mobile services.
33. While the issue of expiry shall be discussed in more detail below, it should be noted that both prepaid and postpaid customers may have their accounts cancelled by WSPs. For prepaid customers this may happen where: they fail to pay in advance for access; they exceed their allotted use of services without adding additional funds to their account; or where they fail to make additional payments beyond expiry. In each of these instances, customers have their service cancelled as they have not paid in advance to access the wireless network, or have not followed other stipulations previously agreed to between the wireless provider and the customer.
34. Prepaid wireless services also do not require credit checks which are largely necessary for customers of postpaid wireless plans. For the customer this means prepaid services are easier to obtain than postpaid, and come without a set contractual term commitment. For this reason, prepaid services appeal to customers who either desire flexibility because there is no term commitment in their contract, or those that do not plan to extensively use wireless communication services. In addition, prepaid services appeal to customers with low incomes who might not qualify for postpaid services. For these customers prepaid wireless services offer an important alternative to enable their communication needs.

²⁴ Note that this expiry date is also subject to the Wireless Code's requirement that require WSPs to leave a customer's account open for an additional seven days to allow the customer to top-up an account, as discussed at paragraph 22 of this commentary.

35. WSPs activate customer accounts, providing access to the wireless network, based on a customer's prepayment for services. Terms of activation are provided by WSPs despite any actual customer usage of communications services; regardless of whether customers make phone calls, message communicate or use data, prepaid services provide access for set periods of time and are not based on actual usage.
36. There are generally two methods of service provision once customers pay in advance for services: 1) prepaid monthly plans and 2) prepaid "pay-as-you-go" services. Pre-paid monthly plans provide customers with 30 days of access to a pre-set package of services (including previously agreed to amounts of data, talk time and text messages) for a fee. Customers may have this prepaid fee debited from their bank accounts or may pay the WSP directly in cash in advance of their usage period.
37. Pay-as-you-go services are different from prepaid plans, in that once the service is activated, the customer has an active phone number for a period of time, and that number is available for usage at the customer's discretion, up to the allotted maximum usage. In the pay-as-you-go model, every time the customer uses wireless services, an amount for that usage is debited from the prepaid account. Prepaid services may vary in cost, which correspondingly varies the amount of time in which users have access to wireless services. For example, as shown in the exhibit below, TELUS pay-as-you-go customers may pay \$10 for 30 days of service, or \$100 for 365 days of service. Note that the greater the payment, the longer the time period of service.
38. TELUS disagrees with some aspects of the discussion provided by the petitioners in their description of prepaid services, and below wishes to clarify on some of the defining elements of the service. At paragraph 2 the petitioners describe the nature of prepaid payments made by customers as: "These funds are used on a *pay-per-use basis* to purchase a variety of goods and services including voice calls, texting, Internet browsing, ringtones, games, apps, etc."²⁵ [Emphasis original]. In reality, in the "pay-per-use" or pay-as-you-go model, a customer deposits money into account that allows the customer to draw upon it to pay for usage over a specified period of time. As shown in the below

²⁵ The Petition, at para 2.

exhibit, pay-as-you-go offers include stipulations about the price and the valid time period. There is no doubt about the time frame in which customers are paying for their access to wireless services.

Exhibit: Current TELUS Pay-as-you-go offers (as of 8 September 2014)

Top-up \$	\$10	\$25	\$50	\$100
Credit expiry (credits do not expire if you top up regularly)	30 days	60 days		365 days

Source: <http://mobility.telus.com/en/ON/prepaid/top-updetails.shtml?INTCMP=BetaPrepaidLearnMoreAboutTopup>

39. Because the customer is paying for access to the wireless network, accounts cannot be refunded where consumers fail to make use of services nor can balances be held without expiry. In the Wireless Code proceeding the CRTC also found that for both postpaid and prepaid services consumers are purchasing access to the wireless network for a pre-defined period of time, so that there is no justification for eliminating expiry: “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.”²⁶

Why Prepaid Wireless Services Must Be Permitted to Expire

40. Because of the manner in which customers purchase and use wireless services, the expiry of prepaid services must be permitted to continue in a manner consistent with the findings of the CRTC. Prepaid wireless customers obtain access once their account is activated. At that point, the WSP must provision network resources so that the prepaid customer can be served. As such, the WSP must plan for network usage based on the fact that it has an active prepaid subscriber, even if the prepaid subscriber does not use the entire usage allotment over a given period of time.

²⁶ Wireless Code decision, at para 349.

41. Therefore, the nature of prepaid services is that customers are purchasing the ability to access the wireless network in advance of using communications services (e.g., sending a text message, or making a phone call). Expiry of prepaid services is a necessary measure that wireless carriers must undertake because they need to provision network resources based on active subscribers, in order to manage network congestion. As a result, expiry of prepaid services is an important means to ensure that WSPs can create a viable business case to offer prepaid services to its customers.
42. The petitioners' state of expiry: "If consumers do not add more funds to their accounts by an arbitrarily stipulated date provided by the wireless service providers, their entire balance is seized by the wireless service providers." In reality, the date of expiry, as the petitioners acknowledge, is stipulated to customers upon purchase of prepaid services. These dates are not "arbitrary," but instead correspond with the time allotment of access based on the cash amount of the card. Where prepaid plans cost a lesser fee, this corresponds to a shorter period of time than those plans that cost a greater amount – such a system makes clear to customers the stipulations of service when making purchases.
43. Further, any remaining balances in a customer account following the seven-day time period after expiry are not "seized" by wireless carriers, but are in fact, payment for services already rendered. Customers pay a set amount for access to the wireless network over a prescribed period of time, up to a maximum allotment. Once the time period is up, they have obtained the full value of their service, because the prepaid amount is paid for both access to services and usage for a defined period of time.
44. Fundamental to understanding TELUS' point of view is comprehension of the date stipulated on the card and its relationship to service provision: the expiry date cannot be reached prior to the activation of service by the customer, so that expiry cannot occur without the customer taking steps to initiate service from the WSP. The CRTC also found that balances on prepaid accounts were not seized but that through prepayment customers were purchasing access to wireless services for a limited time period.²⁷ In its final determinations in the Wireless Code, the Commission "notes that wireless services,

²⁷ Wireless Code decision, at para 349.

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.”²⁸

45. Because of the need to balance and manage network services to all customers, TELUS must create expiry for prepaid plans so that a large number of consumers with prepaid wireless services are not accessing the wireless network for indefinite periods over time. Clearly understanding the date at which consumers may halt service, as is possible with expiry, allows WSPs to provision their networks and services based on a complete picture of consumer demand. By eliminating expiry WSPs would have to support customers for an unknown period of time making planning and prioritizing network services next to impossible. As TELUS stated during the Wireless Code proceeding:

The basic principle behind TELUS’ position on this important issue is that once redeemed, prepaid credits are no longer akin to a pre-paid card, are not a cash equivalent, and cannot be prohibited from expiring because of the unsupportable complications that such a rule would impose on the prepaid business model employed by many carriers, including those that solely provide pre-paid services.²⁹

This business issue, where a lack of expiry date for prepaid services would severely affect the ability of service providers to continue to provide prepaid plans, is not one faced by TELUS alone but instead is an industry wide concern due to the number of WSPs offering prepaid services.

46. For TELUS, eliminating expiry dates would also likely mean an increase in rates, particularly to new customers of wireless prepaid services, to balance the cost of service provision with consumer access. To account for the elimination of expiry, and the necessary indefinite period of access a customer would then be granted, it would be necessary to price prepaid plans differently than is currently done, resulting in likely cost increases to consumers. If consumer credits never expire, consumers would have a network access right of indeterminate duration, therefore creating a liability of indeterminate duration for the WSP. In order to make service provisions viable in this

²⁸ Wireless Code decision, at para 349.

²⁹ TELUS, Final Comments of TELUS Communications Company to the CRTC, Telecom Notice of Consultation CRTC 2012-557 - *Proceeding to establish a mandatory code for wireless services*, 1 March 2013, at para 54.

situation, it would be necessary to project network costs, and allocate risk, in determining the rates consumers are charged for wireless service under the assumption that inflationary and other associated costs are likely to rise. These projected increases in the cost for service would inform the retail rate which prepaid wireless customers pay to access communications services, and would necessitate a rise in the retail rate. TELUS anticipates that other WSPs that offer prepaid services will also have to increase their rates if expiration of prepaid services was eliminated.

47. The increase in prepaid rates, as well as the difficulty of managing network congestion, would likely have the opposite effect of what the petitioners wish. While the petitioners have argued that eliminating expiry would be a customer friendly measure, in reality the effects of this action would likely put customers of prepaid services in a more difficult situation than they currently experience due to the increase in the cost of acquiring service for a customer based on increased rates. It might also cause some wireless service providers to stop providing prepaid services, and instead focus entirely on postpaid services, because of the extra costs associated with managing prepaid customers who have an indefinite period of time to access their services. As a result, the petitioners position could have the effect of both increasing the prices of prepaid services and reducing the choices available to customers in the marketplace.

Prepaid Services are not Gift Cards

48. TELUS fundamentally disagrees with the assertion by the petitioner that prepaid services are like gift cards from a retailer. In their petition, DCF and the NPF clearly outline their goal with this petition: “**The Petitioners’ goal is to ensure that prepaid wireless accounts are given the same treatment as gift cards and prepaid credit cards.**”³⁰ [Emphasis original]. Here the petitioners have not only confused the purpose of their petition, which here incorrectly deals with the determinations of the CRTC in TD 2013-271 and not the correct matter of TD CRTC 2014-101, but they also offer for the Governor in Council an improper consumer service corollary by stating that prepaid cards are analogous to gift cards or prepaid credit cards. In fact prepaid wireless service cards

³⁰ The Petition, at para 5.

are dissimilar, in that by using a prepaid card a consumer is purchasing access to wireless services, so that once activated the service purchased through the card has been rendered.

49. Prepaid credit cards and gift cards instead allow customers to purchase goods at a future time of their choosing and are cash equivalents. These differences are highlighted when considering basic principles in contract law. Because gift cards may be used at a future date by a consumer for any variety of goods available at a retail location, the contractual purchase of goods is not completed until the gift card is turned over to a retailer. Instead with prepaid wireless, once a customer activates prepaid service through a plan or pay-as-you-go pass, the customer has immediate access to mobile services and has the capability to use the communications services available through the wireless network. As a result, the customer is immediately provided with a purchased service upon activation.
50. For prepaid customers wireless service expiry happens at a date outlined at the time of purchase, and following the activation of prepaid service by the customer. The provision of expiry for prepaid service is fundamentally different than prepaid credit and gift cards as there is no cash equivalent for wireless prepaid services. There is no residual value in prepaid services as the customers have paid only to use wireless services within the period of time described at the time of purchase.
51. From the above discussion it should be apparent that the concerns of DCF and NPF about prepaid expiry were first considered in the Wireless Code proceeding. In the Wireless Code decision of June 2013, the CRTC ruled that the concerns of DCF about prepaid expiry were unwarranted. In that proceeding the characterization of prepaid services by the petitioners was not accepted by the Commission. In this petition, the DCF and NPF have used similar characterizations and described prepaid services in a similar manner. TELUS submits that for the reasons issued by the Commission in the Wireless Code decision, and for the reasons provided in these comments, that the Governor in Council should reject the depiction of these services by the petitioners. As the Commission has accepted, and as TELUS reiterates here, expiry of prepaid services is a necessary business practice of the WSPs which is consistent with their provision of services to both prepaid and postpaid customers, as all customers must purchase access to wireless

services over a specified period of time whether they pay in advance for services (such as prepaid customers do) or not. If customers have not paid for continued service, access to communications facilities must necessarily end. TELUS' description of prepaid services makes clear the differences between gift card expiry and the expiration of these services, contrary to the allegations of the petitioners.

Legal Aspects of the Petition

52. In their petition, the petitioners' make a number of legal arguments as to both the validity of the decision by the Commission in TD CRTC 2014-101, and the Commission's prior decision with regard to the expiry of prepaid cards in the Wireless Code. TELUS is concerned that because the petitioners have mixed both legal questions with policy considerations about prepaid expiry and consumer welfare, the petition may seem to be largely about policy considerations, while the real issues upon which the petitioners may validly base their petition are legal requiring assessment of the CRTC's procedural determinations. As is outlined above, the only issues that are procedurally correct to be brought by DCF and NPF are whether the CRTC erred in its decision making in issuing TD CRTC 2014-101, and not greater policy considerations about the expiry of cards for prepaid wireless services, because those questions address decisions made by the CRTC in TRP 2013-271.
53. Despite these concerns TELUS will provide comments on the legal aspects of the petitioners' claims in the section that follows including: a review of the authority of the Governor in Council to consider the claims of the petitioner; the alleged errors in the Commission's consideration of evidence and provision of reasons in the Wireless Code; charges that the Commission reached unreasonable conclusions in its consideration of evidence; alleged undue and unreasonable disadvantage claims; and public policy considerations.

Authority of the Governor in Council to Review the Petition

54. TELUS recognizes that although it may be rare for the Governor in Council to consider matters of law, that there are no restrictions on the matters which may be properly put

before the Governor in Council.³¹ TELUS believes that if the Governor in Council is satisfied that the decision of the CRTC in TD CRTC 2014-101 significantly delineates from the objectives of telecommunications policy envisioned by the government, that alterations to the determination of the Commission may be made to this decision. However, such alterations are restrained by the measures found in the statute outlining the roles of the Governor in Council and the Federal Court of Appeal in reviewing decisions by the Commission. Under section 12 (1) of the *Telecommunications Act*, the Governor in Council is given the authority to review and revise decisions of the CRTC.³² The Act also grants the ability for review to the Federal Court of Appeal in section 64 “on matters of law or jurisdiction.”³³ In general, questions of law are better left to the Federal Court of Appeal a body with the institutional expertise to adjudicate on such matters. The Federal Court of Appeal is empowered to investigate legal and jurisdictional matters, and review the decisions of administrative bodies such as the Governor in Council.³⁴ The Supreme Court has also emphasized the importance of the Governor in Council to observe “the jurisdictional boundaries of s. 64 (1)”³⁵ meaning some legal matters are likely best left to courts.

55. Based on the above, TELUS suggests that the legal matters raised by the petitioners might be better put before the Federal Court of Appeal on judicial review. In their petition, the petitioners request that the Governor in Council vary the CRTC’s decision in TD 2014-101 due to “errors in law” made by the Commission.³⁶ The petitioners also state of that the role of the Governor in Council includes “upholding the rule of law”³⁷ ensuring “the legality, reasonableness and fairness of the CRTC’s administrative process outcomes.”³⁸ These issues raised by the petitioners, which form the basis of their

³¹ *Canadian National Railway Co v Canada (Attorney General)* 2014 SCC 40, at para 48-49.

³² *Telecommunications Act*, s 12 (1).

³³ *Telecommunications Act*, s 64 (1).

³⁴ *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 at para. 27. [*Globalive*] Also see: *Attorney General of Canada v Inuit Tapirisat et al.*, [1980] 2 SCR 735, at p. 756. [*Inuit Tapirisat*] In *Globalive Justice Sexton* notes that while the notion of jurisdictional errors used in *Inuit Tapirisat* has been since revised by the courts, constraint must still be exercised by the courts and the Governor in Council as guided by ss. 12 and 64 of the statute.

³⁵ *Inuit Tapirisat*, at p 756.

³⁶ The Petition, at para. 11 and at para 55.

³⁷ The Petition, at para 50.

³⁸ The Petition, at para 53.

petition, are primarily legal in nature and do not address larger public interest and policy issues. For this reason TELUS submits that the Governor in Council may not be best situated to review the merits of the petitioners' legal assertions about the CRTC's decision.

56. Nevertheless, should the Governor in Council find that they have the appropriate jurisdiction to consider the petition, TELUS will provide its response to each of the questions of law raised by the petitioners below, and will demonstrate why the Governor in Council should deny each of DCF's assertions.

Evidence Considered and Reasons Provided by the CRTC for their Decision

57. In their petition, the DCF and NPF claim that errors in law are made by the Commission in their review of the petitioners' Part 1 application. Among the errors in law alleged are claims that the CRTC failed to provide adequate reasons for their determinations on prepaid balance expiry.
58. In reply TELUS contends that the petitioners have not shown that the evidence considered by the CRTC was insufficient and that there were failings in the reasons for the decision. Prior judicial determinations show the importance of written explanations for decisions, particularly where "the decision has important significance for the individual."³⁹ Providing reasons in the decision making process may enhance the transparency of decisions, and may "reinforce public confidence in the judgment and fairness of administrative tribunals".⁴⁰ Reasons "must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal."⁴¹ However the length and breadth of decisions have not been dictated by the courts which have stated that reasons are "not intended to be exhaustive."⁴² The Supreme Court of Canada states: "A decision maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusions."⁴³ This

³⁹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 43.

⁴⁰ *Northwestern Utilities Ltd., and al. v. Edmonton*, [1979] 1 SCR 684, at p 706. [Northwestern Utilities]

⁴¹ *Northwestern Utilities*, at p 707.

⁴² *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489, at p 521.

⁴³ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at para 14.

means that written reasons might be summary or brief, but still sufficient, provided that it meets the requirements of “proper, adequate and intelligible” reasons.

59. In TD CRTC 2014-101, the Commission reviewed the adequacy of the reasons for its determinations on prepaid cards presented to the CRTC in paragraphs 9 to 19. In the TD CRTC 2014-101, the CRTC also outlined its determinations in paragraphs 21 to 26. The views and evidence presented by DCF are outlined in paragraphs 9 through 16 including information about the evidence tendered by the group during the Wireless Code proceeding on the expiry of prepaid cards.⁴⁴ In its analysis the CRTC notes its consideration of various aspects of the arguments made by DCF during the Wireless Code proceeding including issuing a draft Wireless Code which included DCF’s proposal to eliminate the expiry of prepaid cards.⁴⁵ The Commission stated:

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.⁴⁶

TELUS agrees with the Commission that the petitioners have been provided with sufficient reasons for the decision, and that ample evidence was considered. Going beyond the frame of reasoning provided by the Commission in TD CRTC 2014-101 would amount to the enumeration of finite reasoning for each aspect of the decision. The petitioners seem to seek explicit reasons on each of the topics they enumerated in the proceeding, which goes beyond the scope of reasons that an administrative body must provide. As a result, there is simply no basis for the Governor in Council to find that the CRTC has somehow erred in providing insufficient reasons about its findings regarding expiry of prepaid services.

⁴⁴ For example see TD CRTC 2014-101, at para 11.

⁴⁵ TD CRTC 2014-101, at para 22.

⁴⁶ TD CRTC 2014-101, at para 21.

Unreasonable Conclusions: Prepaid Expiry and Unjust Enrichment

60. In their argument the petitioners claim that the CRTC ignored evidence leading to unreasonable conclusions related to their determinations on prepaid card expiry, and unjust enrichment. The petitioners' claim that the CRTC failed to provide reasoning and the evidence upon which it relied in order to conclude that prepaid accounts are not subject to expiry dates. The DCF and NPF further claim that this failure by the CRTC led to an unreasonable conclusion that the claimed unjust enrichment was not within scope of the proceeding.
61. TELUS believes this claim by the petitioners is out of scope for the petition, as the CRTC clearly stated that it would continue to forbear from rate setting regulation in retail wireless services. The petitioners claim unjust enrichment by the WSPs in the post-expiry actions of wireless carriers where funds are "seized" by the service provider. This issue, as described in the Part 1 application by the petitioners to the CRTC, clearly deals with rates charged for wireless services.
62. In TD CRTC 2012-556, the Commission found "that there is no evidence that the conditions for forbearance have changed sufficiently to warrant Commission intervention with respect to mobile wireless service rates or competitiveness in the mobile wireless market." Because of this finding in an earlier, but related proceeding, the Commission did not deal with any aspects of rate making in the Wireless Code proceeding and excluded any evidence on this matter tendered by parties.
63. The petitioners' claim states that "DiversityCanada presented evidence in the form of the quoted section of the Act – Section 27 (1) – which demonstrates that the CRTC's enabling statute codified the principle of unjust enrichment."⁴⁷ Yet, section 27 (1) is one of the specific sections upon which the Commission forbears from regulation of retail wireless market rates.⁴⁸ Because of this finding in an earlier, but related proceeding, the Commission did not deal with any aspects of rate making in the Wireless Code proceeding.

⁴⁷ The Petition, at para 115.

⁴⁸ TD CRTC 2012-556, at paras 17-21.

64. The DCF and NPF also make arguments that the CRTC ignored evidence in coming to unreasonable conclusions. TELUS observes that many of the principles related to the need for administrative bodies to provide reasons in their decisions, discussed above, apply equally to the issues raised by the petitioners here about unreasonable conclusions: although administrative bodies are required to provide reasons for their findings, these need not be extensive. Also as noted above, the CRTC gave ample consideration to the evidence tendered by the petitioners in the TD CRTC 2014-101 decision.
65. For example, at paragraph 24 of TD CRTC 2014-101, the Commission noted that it required wireless carriers to provide sample contracts to the Commission during the Wireless Code proceeding and found that the “terms of those contracts clearly demonstrated that prepaid services are subject to both usage and time limits.”⁴⁹ Clearly the Commission gathered evidence from all parties, considered and analyzed how consumers might be affected by the terms of prepaid contracts and came to a reasonable conclusion that, despite the interests of the petitioners, the analysis of evidence bears the conclusion that prepaid services do have reasonable limits to which consumers must comply. As arguments about the reasonability of conclusions are not made out on these facts, it also appears that evidence does not support a finding of unjust enrichment as well. In their determination regarding the cost claims of the DCF and NPF associated with their TD CRTC 2014-101 application, the CRTC also noted that unjust enrichment allegations are matters for private law only, which “has little or no application to the regulatory context in which the Wireless Code arose.”⁵⁰
66. However should the Governor in Council find that these matters are within the scope of the Commission and the Wireless Code decision, it is necessary to assess whether an unjust enrichment of the WSPs took place. In order to do this the appropriate jurisdictional test is established in *Garland v Consumers Gas Co.*, which states that 3 elements must be considered: “The cause of action has three elements: (1) an enrichment

⁴⁹ TD CRTC 2014-101, at para 24.

⁵⁰ CRTC, Telecom Order CRTC 2014-220 - *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*, 8 May 2014, at para 19.

of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.”⁵¹

67. TELUS concedes that it gained revenue as a result of prepaid expiry, and that this caused a corresponding cost to the customers of prepaid wireless. However, when assessing whether a juristic reason exists for the enrichment, consistent with the ruling of the Supreme Court of Canada in *Garland*,⁵² TELUS believes that its clearly outlined contract provisions when customers purchase prepaid services, such as those that outline the cost and service period as shown in the above Exhibit, provide the parties with a reasonable expectation that the expiry of services means that any remaining funds of a customer will be retained by the WSP as the customer is paying only for access to the network over the stated time period and the use of associated communications services. As the stated in *Garland*, one juristic reason for finding that the enrichment was justified is the presence of a contract, as there is between WSPs and its customers.⁵³ Therefore, based on the above judicial test it appears no unjust enrichment can be found as customers receive the benefit of network access for which they have contractually agreed to pay.

Undue and Unreasonable Disadvantage

68. The petitioners also claim that the Commission failed to consider the principle of undue and unreasonable disadvantage based on the evidence tendered by Vaxination Informatique which alleged prepaid expiry practices result in the charging of indeterminate rates.
69. TELUS believes that the claim of the petitioners is not within the scope of the consideration by the Governor in Council in this petition. This claim of the petitioners is not supported with any substantial evidence either in this petition or in the proceeding that led to TD CRTC 2014-101. Notably, in making their claim that the evidence

⁵¹ *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, at para 30.

⁵² *Garland*, at para 46. “As part of the defendant’s attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established.”

⁵³ *Garland*, at para 44.

provided is a violation of section 27 (2) of the *Telecommunications Act*, DCF and NPF fail to undertake the necessary tests as described in law associated with a claim of unjust discrimination or undue or unreasonable disadvantage under this section of the *Act*.⁵⁴ As such the petitioners cannot advance their argument about the relevance of section 27 (2) to the determinations of the Commission. It is improper for the petitioners to claim that the Commission did not undertake examination of a claim when, in fact, the petitioners did not apply in a necessary legal test in an appropriate manner. As there is no evidence provided by the petitioners as to the applicability of section 27 (2) it is unclear as to how this section may be assessed in relation to the claim of indeterminate rates by the WSPs.

70. However should the Governor in Council find that section 27 (2) of the *Telecommunications Act* does apply when WSPs keep remaining funds in consumer balances after prepaid wireless services expire, TELUS maintains that as the entire class of prepaid customers are treated in the same manner that no undue or unreasonable disadvantage can be found. Using the valid test for 27 (2) claims, first requires that a preference or disadvantage be found between a person.⁵⁵ However as TELUS applies the expiry policy to all prepaid customers, and as in fact the CRTC found that expiry applies to both prepaid and postpaid consumers equally,⁵⁶ there can be no preference or disadvantage found between those in the class. Thus, the claim must fall at the first branch of the test.
71. In any event the Commission did consider the arguments of Vaxination Informatique related to indeterminate rates in their decision TD CRTC 2014-101 as it highlights at paragraph 16 of the decision. The Commission states:

Vaxination submitted that the Commission's determinations in the Wireless Code Decision (i) raise substantial doubt as to the correctness of

⁵⁴ Tests under section 27 (2) require a two part analysis as first developed in Telecom Decision CRTC 77-16, *Challenge Communications Ltd. v. Bell Canada* [CRTC], 23 December 1977, and upheld by the Federal Court of Appeal in *Bell Canada v Challenge Communications Ltd.*, [1979] 1 FC 857. This analysis includes examining "a) The Commission first determines whether the conduct in question constitutes a preference or a disadvantage to a person; and b) Where it so determines, it then decides whether the preference or disadvantage is undue or unreasonable" as noted recently in Telecom Decision CRTC 2013-40 - *Ice Wireless Inc. and Iristel Inc. – Request for a cease and desist order in Northwestel Inc.'s serving territory*, 1 February 2013, at para 14. [TD CRTC 2013-40]

⁵⁵ TD CRTC 2013-40, at para 14.

⁵⁶ The Wireless Code decision, at para 349.

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).⁵⁷

72. Further as the alleged failure of the Commission to consider evidence relates to the charging of indeterminate rates,⁵⁸ the petitioners argument relates to retail rate regulation. As described above, the Commission has forborne from rate regulation for wireless services⁵⁹ thus making the argument by the petitioners out of scope of the Commission's decision in TD CRTC 2014-101.

Public Policy Considerations

73. The petitioners' final claim is that the CRTC's decision on prepaid expiry is contrary to broader public policy on prepayment methods. In making this claim the petitioners' cite efforts of the federal government to regulate aspects of the prepayment industry through *Prepaid Payment Products Regulations*.⁶⁰
74. TELUS notes that in the *Prepaid Payment Products Regulations*, a prepaid payment product is defined as "a payment card, whether physical or electronic, that is — or can be — loaded with funds and that can be used by the card holder to make withdrawals or purchase goods or services."⁶¹ As is discussed above, the prepaid services offered by WSPs are fundamentally different than prepaid credit cards targeted in these regulations, in that payment is made by customers for access to wireless services upon activation. Thus, there are no withdrawals or purchasing of goods and services through such cards, as prepaid services do not hold value in and of themselves. TELUS also notes that these regulations were meant, and apply to, products from financial institutions and thus address issues unique to the provision of products from these organizations. The prepaid

⁵⁷ TD CRTC 2014-101, at para 16.

⁵⁸ The Petition, at para 123.

⁵⁹ TD CRTC 2012-556, at para 17.

⁶⁰ *Prepaid Payment Products Regulations*, SOR/2013-209. [Prepaid Payment Regulations]

⁶¹ Prepaid Payment Regulations, at s 1, "prepaid payment product."

products from banks and financial institutions are considerably different than prepaid services from WSPs and should be dealt with in a manner appropriate for the organizations rendering service to consumers.

75. Further, as TELUS has noted in the sections of its commentary dealing with Prepaid services maintaining expiry for prepaid services is consistent with a consumer friendly policy. As the Commission has previously recognized in the Wireless Code, the expiration of services is consistent for both prepaid and postpaid wireless customers.⁶² The current prepaid services business model allows WSPs to serve a portion of the market that may not otherwise be able to purchase wireless communications services because these customers may not pass credit checks, or may not have the need to use communications services extensively. By eliminating the expiry of prepaid services, WSPs would have to make modifications to current service provisions possibly including the elimination of prepaid services or raising the retail rate charged to consumers. In either case the effect of these measures would be the opposite of the intentions of the petitioners, and contrary to government policy, in that services would become more expensive and, potentially, less accessible for consumers. Further government support for the Wireless Code as exhibited in news releases, legislative measures and government communications, makes clear to consumers that the Wireless Code is an effective government policy supporting the public interest in wireless services.
76. TELUS believes, however, that important public policy goals are at stake in this petition. In *Globalive Wireless Management Corp. v. Public Mobile Inc.*,⁶³ the Federal Court of Appeal found that, as a polycentric body, the Governor in Council may be informed by the telecommunications policy objectives outlined in section 7 of the *Telecommunications Act*⁶⁴ in determining petitions. TELUS argues that various aspects of these objectives are relevant to illuminating the public interest in maintaining prepaid retail wireless services and prepaid service expiry. The relevant policy objectives in this proceeding include:

⁶² The Wireless Code decision, at para 349.

⁶³ *Globalive*, at paras 45-46.

⁶⁴ *Telecommunications Act*, s 7.

- a. Section 7 (a) - as TELUS and the petitioners acknowledge prepaid wireless services assist in meeting the communication needs of many Canadians, including those with low incomes, and the Commission's decision preserves the offering of this service while issuing consumer protections through section J of the Wireless Code;
- b. Section 7 (b) - prepaid services offer consumers affordability and access to wireless communications services not inherent in postpaid service provisions where contracts require credit checks of customers. This allows WSPs to offer alternative service offerings through both postpaid and prepaid services; and
- c. Section (f) - through prior decisions the Commission determined that regulation of expiry of prepaid cards, and the regulation of rates, was not required and market forces inherent in the system of access devised by the wireless carriers were reasonable in the market.

Because of these important policy considerations, the Governor in Council should reject the arguments made by the petitioners and retain the decision by the CRTC in TD 2014-101, including maintaining section J of the Wireless Code as decided by the Commission in the Wireless Code proceeding.

Conclusions

77. In its above comments TELUS Communications Company outlines its concerns about the petition to the Governor in Council. TELUS believes that for both policy and legal reasons, the arguments that arise in the petition should be dismissed by the Governor in Council allowing TD CRTC 2014-101 to remain, and retaining the decision of the CRTC on the expiry of prepaid cards under section J of the Wireless Code. In the above, TELUS presents serious questions about the appropriateness of the legal issues raised by the petitioners in this action. It has also challenged the legal basis upon which many of the claims by the petitioners are made. Lastly, the current policy objectives outlined under the *Telecommunications Act* make clear the consistency that maintaining the expiry of prepaid services for consumers is within the public interest.

78. Fair and just consideration of the petitioners' arguments were made by the CRTC in the Wireless Code proceeding, and in its assessment of the Part I application of the petitioners. In considering these arguments, alongside those of other parties, the Commission determined which conditions should be placed on wireless carriers in section J of the Wireless Code, and those conditions are part of an overall balanced approach in the Wireless Code that furthers the government's wireless policy of more choice, better service and lower prices. The failure of the petitioners get a result from the Commission that satisfies its own needs, should not be held to be an unreasonable determination for all Canadians on the issues outlined in the petition. In fact, the petitioners ask to remove expiry dates for prepaid services would make consumers worse off, given that WSPs would be forced to increase rates for prepaid services and possibly limit their prepaid offers, thereby restricting choice, in complete contradiction to the government's wireless policy intentions. Thus, TELUS asks that the Governor in Council reject the arguments made by the petitioners, maintaining the Wireless Code including section J which deals with the expiry of wireless prepaid cards.

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