

September 8, 2014

Wayne G. Wouters
Clerk of the Privy Council and Secretary to the Cabinet
Langevin Block
80 Wellington Street
Ottawa, Ontario K1A 0A3

Dear Mr. Wouters,

Re: Canada Gazette, Part I, Saturday, August 9, 2014, Petition to the Governor in Council concerning Telecom Decision CRTC 2014-101 (DGTP-001-2014)

1. The Canadian Wireless Telecommunications Association (CWTA) is the recognized authority on wireless issues, developments and trends in Canada. It represents wireless service providers as well as companies that develop and produce products and services for the industry, including handset and equipment manufacturers, content and application creators and business-to-business service providers.
2. CWTA is filing these comments on behalf of its members in response to the above-noted petition to the Governor in Council filed by DiversityCanada Foundation (DCF) and the National Pensioners Federation (NPF, together DCF/NPF). CWTA was a party in both CRTC proceedings that gave rise to this petition. As we demonstrate below, in both of the CRTC decisions raised in this petition the Commission delivered clear, reasonable, and evidence-based determinations with supporting reasons. Indeed, many of the grounds raised by DCF/NPF in support of this petition misstate or distort the evidence, the Commission's findings and its reasons.
3. There was more than sufficient evidence to support the CRTC's key finding, namely that it would be wrong to force pre-paid wireless service providers to keep pre-paid wireless accounts open indefinitely without being topped up within seven days after their expiry. The Commission has twice refused the petitioners' requests to adopt a rule forcing pre-paid accounts to be left open indefinitely. This is because the CRTC concluded, based on clear evidence, that the crux of the bargain between a pre-paid wireless service provider and their customer is the provision of a live wireless telephone number and 24-7 access to a wireless network for the relevant time period. Network access is provided regardless of whether the subscriber makes or receives any voice calls or otherwise consumes their data allotment in the relevant time period.
4. The Commission reviewed samples of pre-paid wireless contracts as part of the record and found that this bargain was made clear to subscribers. In this way, pre-paid wireless service is fundamentally different from an ordinary retail gift card. In the retail gift card situation, the retailer does not provide value until the card is redeemed for merchandise. In sharp contrast, in the pre-paid wireless phone service situation, the on-going value is the network connectivity that occurs when the balance from a card is applied to the wireless service account. The Commission's ruling is grounded on clear evidence and provided with clear supporting reasons. It is incorrect for the petitioners to claim otherwise.

5. If implemented, DCF's position would fundamentally alter the economics of pre-paid service, forcing carriers to seriously consider whether to continue making such services available. If pre-paid wireless service providers were to stop offering this type of service it would result in a loss of an attractive service option for many consumers for whom post-paid services are not a viable option.
6. Accordingly, CWTA submits that DCF/NPF's petition should be denied on the following bases, namely, that contrary to DCF/NPF's claims:
 - (i) The CRTC has adequately explained its decisions with reasons, so it is highly inaccurate and incorrect to claim that the CRTC tried to excuse an alleged failure to provide reasons due to the voluminous record or the large number of submissions;
 - (ii) The CRTC similarly did not ignore evidence or base its decisions on no evidence;
 - (iii) The CRTC properly determined that DCF's "unjust enrichment" argument was out of scope;
 - (iv) The issue of unjust discrimination was similarly out of scope; and
 - (v) The CRTC's decision is consistent with, not contrary to, broader public policy on prepayment methods as pre-paid wireless service is not subject to any provincial gift card legislation.

Background

7. This petition relates to two separate CRTC telecommunications proceedings. Both involve the regulation of pre-paid wireless services. The first was initiated by Telecom Notice of Consultation CRTC 2012-557 (TNC 2012-557), in which the Commission called for comments in establishing a mandatory code for mobile wireless services, which is now known as the Wireless Code. CWTA and DCF were among hundreds of entities that made multiple rounds of submissions to the CRTC in that consultation, which culminated in the Commission's 78-page, 401-paragraph Wireless Code decision (Telecom Regulatory Policy 2013-271 or TRP 2013-271).
8. Pre-paid wireless service models are based on access to the network (e.g. the ability to receive or send calls, texts or data) as well as stated usage volumes (e.g. a set number of minutes, texts or megabytes; or unlimited usage for a fixed duration). Pre-paid 'cards' have a usage period that begins once the service balance is activated. This distinction between a pre-paid service card and a pre-paid service balance is important. Buying a pre-paid service card pre-pays for a cash equivalent to put towards wireless service. The agreed-to service (time and usage) does not expire if the card is not activated. The service is only deemed in use once the card and the phone/data service is activated on a wireless account. Many pre-paid services allow customers to carry over an unused balance to a new usage period as long as the customer refreshes or tops up the account before the end of the active term.
9. It is incorrect to compare pre-paid wireless cards to gift cards, as DCF has done. Once activated, pre-paid wireless services are live – a phone number is active and connected to the network. The user's location is continually communicated to network towers, and voice and data services are actively available for the end user. The more appropriate comparison is between pre-paid wireless service and postpaid wireless service. Most post-paid plans provide an allowance of a number of minutes, texts or data megabytes per month. It is commonly accepted that post-paid subscribers do not get to redeem any minutes, texts or data megabytes they did not use each month. Where pre-paid differs from postpaid is its flexibility of offerings (e.g. unlimited use for 30 days, or time and usage for 30, 90 or 365 day periods). For example, based on offers currently in the market, a consumer could acquire one year of network access for \$100, which could provide an emergency phone for the equivalent of \$8.33/month, but with the added flexibility of using the \$100 of voice, text or data services when needed. Pre-paid service can also be acquired almost immediately at a variety of locations, and subscribers can cancel by simply not topping up their account at the end of the usage term.

10. Prohibiting the time and usage business model for pre-paid wireless would fundamentally alter the nature of pre-paid wireless service, and would be impossible for many service providers to comply with. Service would entail indefinite network access, and maintaining dormant accounts would result in a never-ending increase of unused telephone numbers. These unused numbers would also technically count as wireless subscribers as carriers could never be certain if five people held five numbers, or if one person held all five. And the subsequent over-reporting of subscriber bases would run Canada's publicly-trade service providers afoul of securities regulations.
11. Finally, CWTA is not aware of a single jurisdiction in the world where the time and usage business model runs afoul of telecommunications or consumer regulation. If it was prohibited, pre-paid service as currently offered could in all likelihood cease to exist, removing many convenient and cost-effective options from the market. CWTA and many other interveners provided this explanation – along with supporting evidence – of the pre-paid wireless business model during the Wireless Code proceeding. The Commission determined the evidence supported maintaining the practice of time and usage pre-paid wireless service.
12. DCF made three main submissions in TNC 2012-557. In general terms, the Commission fully accepted one and adopted another one in part; the Commission agreed with DCF's recommendation that the Wireless Code should apply to and protect consumers of pre-paid wireless services.¹ The CRTC also agreed in part with DCF's view that wireless service providers should be prohibited from deactivating pre-paid balances immediately after their expiry date. Rather than require wireless service providers to leave open pre-paid accounts indefinitely, as proposed by DCF, the CRTC instead decided that such accounts must be left open for top up for at least seven days following their expiry date to provide customers with the opportunity to top-up and carry over existing balances.²
13. The CRTC did not, however, accept DCF's third submission, that wireless service providers should be prohibited from expiring pre-paid balances that are not topped up within seven days after the end of their expiry date.³ The Commission found it would be inappropriate to allow pre-paid balances to be left open indefinitely because pre-paid users obtain wireless network access regardless of whether they make or receive wireless calls or otherwise use their phones.
14. DCF/NPF disagreed with the Commission's latter determination and filed a "review and vary" application, dated 3 September 2013, asking the Commission to reconsider and issue a new ruling on this issue. The DCF/NPF review and vary application is thus the second CRTC proceeding addressed in this petition. The Commission denied the review and vary application in Telecom Decision CRTC 2014-101 (TD 2014-101), finding that it made no errors in law or in fact in TRP 2013-271.
15. While not directly at issue here, a third CRTC proceeding provides important context in Cabinet's consideration of this petition. Approximately three months after filing their review and vary application, DCF applied to the CRTC to recover their and NPF's costs in filing their review and vary application.⁴ The Commission denied their cost claim in Telecom Order CRTC 2014-220 (TO 2014-220). This third CRTC ruling is

¹ See, for example, The Wireless Code, Appendix 1 to TRP 2013-271, section B2. The CRTC's discussion of the evidence on this point is at paragraphs 20 to 22 and its reasons at paragraphs 28 and 29.

² See: The Wireless Code, Appendix 1 to TRP 2013-271, section J1.

³ See: TRP 2013-271, paragraph 349. The CRTC's discussion, rulings and reasons relating to the second and third DCF issues is found in the 12 paragraphs at paragraphs 339 to 350.

⁴ See: Part 4 of the CRTC *Rules of Practice and Procedure*, section 66.

notable for two reasons. First, the Commission seldom, if ever, declines cost award applications from interested parties, like DCF/NPF. Second, in declining this particular cost award, the Commission decided that DCF/NPF failed to satisfy one of the well-established cost eligibility criteria. The key findings on the merits of DCF/NPF's review and vary arguments are set out in paragraphs 13 and 20 of TO 2014-220 and are worth reprinting here:

...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.

...

... 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.⁵ [emphasis added]

16. This finding is relevant because DCF/NPF are making the very same arguments in this petition that they raised unsuccessfully in the review and vary application already rejected by the Commission in TD 2014-101. This further undermines the credibility of these arguments.
17. We next comment on the specific arguments raised by DCF/NPF in order to demonstrate that each is without merit and should be rejected by the Governor in Council.

The CRTC fully explained its rulings with reasons

18. DCF/NPF's first argument attacks the sufficiency of the Commission's reasons. They assert that it was wrong for the Commission to try to justify not providing reasons because of the volume of the record and large number of parties who made submissions to TNC 2012-557. This claim should be rejected for at least two reasons: (i) it completely mischaracterizes what the CRTC actually said about the extensive record and number of parties who filed submissions in TD 2014-101; and (ii) the CRTC actually did issue reasons to justify its determinations in TD 2013-271.
19. DCF/NPF's submission mischaracterizes the CRTC's finding in paragraph 21 from TD 2014-101, which states as follows:

"In the proceeding that led to the Wireless Code Decision, the Commission received submissions from over 5,000 individuals and organizations, and considered approximately 25 topics related to the content and clarity of retail wireless service contracts. Given the scope of the issues considered and the number of submissions received, the Commission could not reasonably be expected to address specifically in its decision every piece of evidence and argument put forward in the proceeding. In order to produce a concise Wireless Code Decision, the Commission necessarily summarized the positions, evidence, and arguments made by all parties."

⁵ Telecom Order 2014-220, paragraphs 13 and 20.

20. This is not an attempt by the CRTC to justify ignoring its legal duty to provide reasons, as DCF/NPF claim. This statement actually has nothing whatsoever to do with the Commission's reasons, and instead relates to the detail the Commission could reasonably be expected to provide in summarizing the evidence on the record of TNC 2012-557.
21. DCF/NPF next claims that the Commission either failed to give reasons in TRP 2013-271, or wrongly believed that simply summarizing the evidence followed with a conclusion constituted adequate reasons. These claims are also inaccurate. The CRTC actually provided reasons, which can be found in TRP 2013-271 at paragraph 349:

“The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs to carry over their pre-paid unused minutes indefinitely. In this regard, the Commission notes that wireless services, including pre-paid 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.”

22. This rationale and the review of the evidence on the record which precedes it and on which it is based more than satisfies the applicable legal test⁶ by demonstrating that the Commission's conclusion on this point “falls within a reasonable range of outcomes” based on the underlying evidence. The CRTC's stated reasons fully satisfy its legal obligation to provide reasons in support of its determination not to prohibit the deactivation of pre-paid accounts.

The CRTC did not ignore evidence or base its rulings on no evidence

23. DCF/NPF next argues that the Commission ignored evidence, had no evidence before it or failed to identify the evidence it relied on in deciding that pre-paid cards hold minutes rather than cash, are subject to usage limits and are not subject to expiry dates. This argument is incorrect and should be rejected for at least two reasons: (i) the Commission never made such a finding, and (ii) there was ample evidence to support the Commission's actual finding, namely that pre-paid services do provide access to the network for a specific period of time with specific usage limitations.
24. To the first point, the Commission never concluded that pre-paid wireless accounts “hold minutes instead of cash” or “are not subject to expiry dates.” Rather, the Commission determined that:

“the wireless services, including pre-paid 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.”⁷

25. As CWTA noted during the Wireless Code proceeding, pre-paid wireless cards do not expire, but are subject to a stated usage period that commences once the card is activated. As such, pre-paid wireless service, which provides for access to the network, expires once the usage period ends, unless topped up in accordance with the terms of the contract. The Wireless Code specifically acknowledges this, and notes at paragraph 350: “the Commission requires WSPs to hold pre-paid customers' accounts open for at least seven days following the

⁶ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708 at paragraph 14.

⁷ Telecom Regulatory Policy CRTC 2013-271, paragraph 349.

expiry of an activated card.”⁸ The Commission also considered (at paragraph 347) that pre-paid account balances: “may be represented in terms of minutes, text messages, or other usage.”

26. DCF/NPF’s other claim, that there was no evidence to support the CRTC’s finding that pre-paid card services provide access to the network for a specified time period with usage limitations, is also incorrect as is their claim that there were no service contracts on the record to support this finding. Bell, for example specifically addressed this point in its 15 March 2013 Reply Comments. Virgin Mobile’s customer contract was cited, which states in part “you must maintain a positive balance of funds in your Virgin Mobile account in order to use the Services. To add credit to your account you must “Top Up.” If your account carries a zero dollar (\$0) credit balance for more than one hundred and twenty (120) consecutive days from the expiry of your last “Top Up” it will be closed and your telephone number will be reassigned.” The CRTC noted, in paragraph 24 of TD 2014-101, that several parties, including the Public Interest Advocacy Centre (PIAC), submitted sample pre-paid customer service contracts that reinforced this point.
27. DNC/NPF’s attempts to mischaracterize the evidentiary record and the Commission’s findings should be rejected by the Governor in Council.

The CRTC correctly concluded that DCF’s unjust enrichment argument was out of scope

28. DCF/NPF’s third argument is that the Commission made an error in law by concluding in TD 2014-101 that DCF/NPF’s “unjust enrichment” argument was out of scope. DCF/NPF’s argument seems to be that allowing WSPs to expire outstanding pre-paid balances results in these customers paying rates that are not “just and reasonable”, as required under section 27(1) of the *Telecommunications Act*. Further, because the *Telecommunications Act* is the CRTC’s “enabling” or governing statute, the Commission was required to consider this argument. There are two reasons why this argument is incorrect and should also be dismissed: (i) section 27(1) was irrelevant because that power is and was forborne during the Wireless Code proceeding; and (ii) “just and reasonable rates” was not identified by the CRTC as an issue within scope of TNC 2012-557.
29. First, it is legally incorrect to assert that section 27(1) was relevant. Contrary to DCF/NPF’s claim, the issue of whether or not pre-paid wireless rates charged to consumers are “just and reasonable” would only have been relevant during the TNC 2012-557 proceeding if the Commission exercised its section 27(1) powers over wireless service rates at the time of that proceeding. However, the CRTC has continuously forborne from exercising its “just and reasonable rates” power in respect of wireless services, including pre-paid services, dating back to the 1990s.⁹ As recently as October 2012,¹⁰ the Commission reconfirmed its long-standing finding that competition continues to protect the interests of users of wireless services and thus reaffirmed its decision to forbear from exercising its section 27(1) just and reasonable rates powers. In other words, the Commission would have first needed to issue a determination to “unforbear” and reassert its section 27(1) powers to make rulings on the reasonableness of pre-paid rates as requested by DCF/NPF. Indeed, it would have been a jurisdictional and legal error for the Commission to have made rulings on DCF/NPF’s just and

⁸ Emphasis added.

⁹ See for example, the Commission’s forbearance framework for retail mobile wireless services in Telecom Decision [94-15](#), Telecom Decision [96-14](#), Telecom Decision [98-19](#), Telecom Order [99-991](#), Order [2001-501](#), and Telecom Decision [2004-84](#). Under its existing wireless forbearance framework, the Commission has forborne from its tariff approval power in section 25 and its just and reasonable rate oversight powers in section 27(1) of the *Act*.

¹⁰ See: 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, paragraph 21.

reasonable rates submissions without first having determined to unforbear under section 34(3) of the *Telecommunications Act*.

30. Second, the Commission set out a comprehensive list of all of the issues it was calling for comments upon in TNC 2012-557. These can be found in paragraphs 14 through 19. Nowhere does the Commission request comment on whether pre-paid wireless service rates are “just and reasonable” or result in “unjust enrichment.” There is no error in the Commission’s conclusion that these arguments were out of scope.
31. In any event, CWTA denies that the time and usage prepaid wireless service model is a case of unjust enrichment. This wireless business model ensures a variety of cost-effective, flexible offerings are in the market, and consumers are given a diversity of choices to maintain an active account and the associated network connectivity.

The Commission was not required to consider the issue of undue and unreasonable disadvantage because it too was out of scope

32. DCF/NPF also argues that the Commission’s failure to consider the issue of “undue or unjust preference” under section 27(2) of the *Telecommunications Act* in TD 2014-101 was also an error of law. This too is incorrect.
33. The critical point for the purposes of this petition is that, like DCF/NPF’s just and reasonable rates/unjust enrichment argument, the issue of undue and unreasonable preference was also not included in the list of issues on which the Commission requested comments in TNC 2012-557. The fact that one intervener raised it in their comments to DCF/NPF’s review and vary application proceeding does not alter this fact. As a quasi-judicial administrative body, the Commission must be quite careful in identifying the issues on which it seeks comments to ensure all parties’ rights to natural justice and procedural fairness are respected. There was no error in law in the Commission’s determination not to address the undue preference issue because the central objective of TNC 2012-557 was to produce a wireless code, not to make findings of undue preference.

The CRTC’s decision is consistent with, not contrary to, broader public policy on prepayment methods

34. DCF/NPF has also argued that: “The CRTC’s decision is contrary to broader public policy on prepayment methods”. In raising this argument, DCF/NPF refers to and relies upon provincial legislation relating to the expiry of gift cards. This point is also irrelevant. Pre-paid wireless service balances are not subject to provincial prepayment – or gift card – legislation as each province has recognized that pre-paid wireless services are distinctly different from gift cards. The decision by the CRTC was therefore entirely consistent with, not contrary to, the current legislation in every part of the country.

Conclusion

35. This is the fourth proceeding in which DCF/NPF has attempted to advance their position in attempt to amend the Wireless Code and include a rule prohibiting the deactivation of pre-paid wireless cards.
36. The crux of the issue is, as found by the Commission, regardless of whether a pre-paid wireless card customer makes or receives calls or otherwise consumes no data, they receive a benefit in the form of a “live” wireless

phone number and 24-7 access to their wireless network during the period in which they have activated their service. In this respect, pre-paid wireless service is not materially different from post-paid wireless service or landline telephone service. In other words, no one would seriously suggest that a landline telephone customer should be excused from making a monthly payment to their service provider in a month when they received and initiated zero telephone calls. So too with pre-paid wireless service where the ongoing benefit, regardless of consumption, is network connectivity.

37. DCF/NPF's attempts to distort or misstate the evidence, the CRTC's findings and its reasons do not alter this fact.
38. For all of the above-stated reasons, CWTA respectfully submits that DCF/NPF's petition should be rejected by the Governor in Council. We appreciate the opportunity to provide these comments.

Yours truly,



Kurt Eby
Director, Regulatory Affairs

cc.: Pamela Miller, Director General, Telecommunications Policy Branch, Industry Canada, telecom@ic.gc.ca