

PETITION TO THE GOVERNOR IN COUNCIL TO VARY

TELECOM DECISION CRTC 2014-101

**APPENDIX C:
SUMMARY OF
THE DIVERSITYCANADA FOUNDATION'S SUBMISSIONS
DURING THE WIRELESS CODE PROCEEDING**

Summary of the DiversityCanada Foundation's submissions during the Wireless Code Proceeding

- 1) During the Wireless Code Proceeding, DiversityCanada called for a ban on the practice whereby wireless service providers (“WSPs”) place expiry dates on prepaid wireless top-ups.
- 2) DiversityCanada disputed the claim made by WSPs that the business model for prepaid wireless services was universally one whereby top-ups are consideration (ie payment) for access to the wireless network for specific services to be used during a specified period of time.
- 3) DiversityCanada made the distinction between the two types of prepaid wireless services (*ie* monthly plans *vs* pay-per-use services), and pointed out that it was only with monthly plans that customers do indeed pay for access to the wireless network for a specific suite of services to be used during a specified time period.
- 4) DiversityCanada presented evidence of WSPs' promotional materials which advertised prepaid wireless pay-per-use account balances as cash balances that are to be used by customers – at the customers' discretion – to make purchases from among a variety of goods and services available via the wireless networks.
- 5) DiversityCanada submitted, therefore, that when consumers acquire top-ups, they do not purchase anything at that point (*ie* they do not hand over consideration for access to the wireless network for specified services over a specific period of time), but, instead, are depositing cash into their account to be used to pay for services and goods only as and when they use wireless services of their choice and acquire goods of their choosing.
- 6) DiversityCanada also noted that customers with prepaid monthly plans also have pay-per-use cash balances (*ie* customers who pay their monthly service fee and further add top-ups in order to purchase extra services) and that these pay-per-use cash balances are also seized by the WSPs

under the pretext of balance expiry.

- 7) DiversityCanada argued that for prepaid pay-per-use customers, the WSPs' claim that top-ups were consideration for “access to system for specified services during a specific time period” could not be inferred because: i) the WSPs' promotional material showed there was no offer of the nature claimed by the WSPs, and, therefore, ii) there was no acceptance by consumers of any offer of the nature claimed by the wireless providers.
- 8) Furthermore, DiversityCanada argued that because of the nature of the offer actually presented (*ie*, top-up are cash balances for use by consumers at their discretion to buy goods or services offered by the WSPs) the assertion that remaining balances are taken as consideration for access to the network:
 - * represented either false advertising as to the nature of top-ups; or
 - * represented unilateral changes to material terms of the agreement;
 - * was unfair to customers with monthly plans who already paid the sum agreed to for network access;
 - * resulted in unjust enrichment of wireless service providers who confiscate the remaining balances of the most recent top-up;
 - * resulted in a more egregious form of unjust enrichment when the accumulated balances from prior top-ups that are unrelated to the most recent top-ups are confiscated as payment for “access for a specified time” associated with the most recent top-up.
- 9) Additionally, DiversityCanada argued that because top-ups are advertised/offered to the public as cash balances, they were future performance agreements akin to gift cards or prepaid purchase cards, and that all provinces had banned the application of expiry dates to such payments. DiversityCanada called on the CRTC to prohibit prepaid wireless balance expiry in order to ensure prepaid wireless customers enjoyed the protections they were entitled to under provincial laws.
- 10) During the Wireless Code Proceeding, WSPs argued that they applied expiry dates to the funds in the accounts of prepaid wireless customers in order to “re-harvest” phone numbers that had not been used within a three-month span and were, therefore, considered abandoned. WSPs argued

that because phone numbers were a limited and valuable resource, abandoned numbers had to be taken away from inactive customers and put back into circulation.

- 11) During the Wireless Code Proceeding, DiversityCanada submitted to the CRTC that the application of expiry dates to funds in consumers' prepaid wireless accounts and the re-harvesting of phone numbers were not inextricably-linked activities.
- 12) DiversityCanada submitted that not only was it entirely possible for WSPs to re-harvest abandoned phone numbers without seizing funds in consumers' accounts, but the practice of re-harvesting phone numbers while leaving intact the funds in consumers' accounts was extant in Canada.
- 13) DiversityCanada pointed the CRTC to the testimony of the representatives of Mobilicity, one of the new entrants in the Canadian wireless market. Mobilicity revealed during the Wireless Code Proceeding that it never applied expiry dates to the unused funds in its customers' accounts. This practice in no way hindered its routine practice of re-harvesting phone numbers from customers who had not used the number for three months (even if they had funds in their account) and re-assigning that number. A customer whose number was reassigned could return and get a new phone number and could then continue to use whatever funds remained in the account to purchase further wireless services.
- 14) Thus, DiversityCanada submitted, the need to re-harvest phone numbers could not legitimately be put forward as justification for applying expiry dates to the cash funds in the accounts of prepaid wireless customers.
