BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

**IN THE MATTER OF AN APPLICATION BY
THE DIVERSITYCANADA FOUNDATION
AND THE NATIONAL PENSIONERS FEDERATION
(APPLICANTS)**

**PURSUANT TO PART I
OF THE CRTC RULES OF PRACTICE AND PROCEDURE
AND SECTIONS 24, 27 and 56
OF THE *TELECOMMUNICATIONS ACT***

**REGARDING A POLICY
WHEREBY PREPAID WIRELESS, PAY-PER-USE CUSTOMERS
ARE FORCED TO ACQUIRE MONTHLY SUBSCRIPTIONS**

**DIRECTED TO
TELUS TELECOMMUNICATIONS COMPANY
(RESPONDENT)**

17 JULY, 2014

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1.0 NATURE OF THE APPLICATION

1. The DiversityCanada Foundation ("DiversityCanada") and the National Pensioners Federation (the "NPF"; collectively "DiversityCanada/NPF"), file this Application pursuant to Part I of the Canadian Radio-television and Telecommunications Commission *Rules of Practice and Procedure* (SOR/2010-277) to stop TELUS Communications Company ("Telus") from forcing consumers who were prepaid wireless, pay-per-use customers prior to October 20, 2013 to acquire 30-day rate plans or 30-day add-ons.

2. Established in 1945 and incorporated in 1954, the NPF (formerly the National Pensioners and Senior Citizens Federation) is a non-partisan, non-sectarian organization composed of 350 seniors chapters and clubs across Canada. It has a collective membership of 1,000,000 seniors and retired workers. The mission of the NPF is to stimulate public interest in the welfare of aging Canadians and its goal is to help seniors and retirees have a life of dignity, independence and financial security. Established in 2004, DiversityCanada is a federally-registered not-for-profit organization based in Elliot Lake, Ontario. DiversityCanada works to protect the rights and promote the interests of the disadvantaged, the vulnerable, and the marginalized.

3. On October 20, 2013, TELUS Communications Company ("Telus") established a new policy whereby the company made it mandatory for prepaid wireless consumers who have accumulated a balance of over $300 to acquire a 30-day rate plan or a 30-day add-on. Customers who did not select a 30-day add-on were placed on a 30-day rate plan which cost $10 per month and provided 50 local minutes and 50 Canadian texts.

4. Telus applied this policy to consumers who were customers prior to October 20, 2013. Even though this represented a material change to their agreement with Telus for prepaid wireless services, Telus made no effort to obtain their consent, gave them no opportunity to refuse the change, and provided no reasonable opportunity for them to annul the new agreements.

5. DiversityCanada/NPF submit that Telus breached the basic contract principle whereby the consent of the contracting party is required in order to make a material change to a contract; Telus abused its unequal bargaining power and placed prepaid wireless, pay-per-use customers under duress, thus rendering any such-formed contract invalid; the duress persists, and allows no reasonable opportunity for consumers to annul the contracts for 30-day rate plans or 30-day add-ons, thus rendering any such contract void; Telus' policy contravenes s. 27(1) of the *Telecommunications Act*; and Telus' policy contravenes s. 27(2) of the Act.

6. DiversityCanada/NPF have been made aware that Telus is of the position that its policy is customer-friendly; that it relieves many customers from the need to top up their accounts, saving them the monthly top-up payment; and that it has received some positive feedback from an unspecified number of customers.

7. DiversityCanada/NPF submit that while some customers may welcome a switch from a pay-per-use arrangement to a monthly subscription, this cannot justify the manner in which Telus implemented this policy for all of its customers: Telus denied all prepaid customers their right to accept or refuse paying for wireless services under a monthly subscription. DiversityCanada/NPF submit that it is not in the public interest that a telecommunications carrier should be allowed to retain profits gained from unilaterally changing a consumer agreement or from placing consumers under duress to accept an agreement for services.

8. For all of the above reasons, DiversityCanada/NPF request that the Commission direct Telus to:

i) refund, with interest, all sums deducted for 30-day rate plans or 30-day add-ons under this policy from all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013;

ii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that, henceforth, acquiring a 30-day rate plan or a 30-day-add-on is entirely optional;

iii) inform all customers who were existing prepaid wireless, pay-per-use customers prior to October 20, 2013 that they may choose to continue to acquire wireless services under the prior arrangements; and

iv) pay DiversityCanada/NPF's costs for filing this Part I Application.[1]

1 DiversityCanada/NPF propose to submit an application for costs within 30 days of the completion of this Part I proceeding, pursuant to s.66 of the *CRTC Rules of Practice and Procedure*.

2.0 THE FACTS

2. (a) Pay-per-use agreements and monthly plans

9. Telus offers prepaid wireless services which enable consumers to pay certain sums in advance in order use services such as voice calls, text messaging, picture messaging, video messaging, and web browsing.

10. Telus offers two entirely distinct contractual agreements that allow consumers to prepay for wireless services. One is the pay-per-use arrangement and the other is the monthly plan.

11. Under a pay-per-use agreement, customers acquire so-called "top-ups" which allow them to place funds into their prepaid wireless accounts. Pay-per-use customers have full discretion over which services they use and the volume of each service they use. They pay for each service as and when they use the service.

12. Consequently, a customer who has no need to make any calls, send any messages, or use any data in a given month can choose to not to use any of these services. If the customer also does not receive any calls or messages, the customer will not have incurred any cost for use of the wireless service for that month.[2]

13. Conversely, under a monthly plan Telus designates a suite of services that are available to prepaid customers within a given month. With monthly plans, Telus determines which services would be available and what volume of each service would be available to the customers who

2 While the pay-per-use customer would not have incurred any cost for *use of services*, the customer would still have had to acquire a top-up. Telus applies an expiry date to each top-up and requires pay-per-use customers to acquire additional top-ups every month before the designated expiry date in order to avoid the company seizing all the funds in their account and claiming the balance had expired.

pay a predetermined fee for the allowed usage.

14. Monthly plan customers pay the fee for the suite of services even if they do not actually make use of the range or volume of services allowed under their monthly plan.

2. (b) Telus forces pay-per-use customers with balances over $300 to subscribe to monthly plans

15. As of October 20, 2013, Telus introduced a policy making it mandatory for prepaid customers with a balance of $300 or more to subscribe to a 30-day rate plan or a 30-day add-on[3]. For pay-per-use customers thus affected, Telus also removed the requirement that top-ups be acquired to avoid balance expiry.

16. This policy was not restricted only to consumers who became prepaid wireless subscribers after its introduction. Customers who acquired prepaid services under a pay-per-use arrangement prior to October 20, 2013 are also subject to this policy.

17. The policy, included as Appendix A, says in part:

> If you have a balance of $300 or more you are required to have a 30-day rate plan or add-on on your account. If you don't already have a 30-day rate plan or add-on, we will automatically add our least expensive voice and messaging plan – Talk + Messaging 10 – to your account when you reach a balance of $300 or more. For just $10 per month, it gives you 50 minutes of local talk time and 50 Canadian text messages - a 75% discount on our pay-per-use rates. So you can use your phone more often with greater cost certainty. You can stop topping up and the $10 will be deducted from your account balance every 30 days.

3 Telus states that a "rate plan" includes a variety of services, eg voice minutes, texts and video messages, whereas an "add-on" is a single service.

> As long as you have a 30-day rate plan (like Talk + Messaging 10) or a 30-day add-on on your account, you will no longer need to top up. The rate plan on your account will ensure that your remaining balance does not expire. You can use your existing balance to cover the cost of the monthly rate plan. This means that customers who have the Talk + Messaging 10 plan or any other 30-day rate plan added to their account no longer need to top-up until their balance reaches $0.

18. In a footnote in the notice about the new policy, Telus reminds customers that "TELUS Prepaid balances are non-refundable as per the Service Terms."

19. Under this policy, therefore, Telus switches the agreements of pay-per-use customers to monthly plans. Pay-per-use customers have no escape from this unilateral action, even if they have no need to make or receive 50 minutes worth of local calls or send or receive 50 Canadian text messages per month.

2. (c) Telus has failed to address this matter

20. On June 13, 2014, DiversityCanada's legal counsel wrote to Telus on this issue and requested the company provide the relief to consumers which is being sought through this Part I Application. DiversityCanada requested that Telus address the issue, failing which, a Part I Application would be filed.

21. On June 27, 2014, Telus responded with a letter marked "Confidential" in which the company outlined its position on the matter.

22. DiversityCanada/NPF have received no indication from Telus that it intends to provide the relief sought. As such, DiversityCanada/NPF submit that Telus has not adequately addressed this matter.

3.0 GROUNDS FOR THE APPLICATION

3. (a) Telus breached the basic contract principle whereby the consent of the contracting party is required in order to make a material change to a contract

23. DiversityCanada/NPF have been made aware that Telus' position is that at the time the new policy was implemented, there was no existing agreement for pay-per-use services that was altered. According to this position, prepaid, pay-per-use services were acquired with an expiry date, and upon the expiry date, the contract for services extinguished.

24. Such an argument is invalid since Telus still holds the sums paid by consumers (eg $300-plus in accumulated prepaid balances). Accordingly, such pre-paid, pay-per-use services have not "run their course".

25. Furthermore, the agreement for prepaid, pay-per-use services could be extinguished only if i) consumers used all of the funds in their account and, thus, no longer had any funds associated with a prior pay-per-use agreement; or ii) Telus refunded the accumulated prepaid balances so as to no longer be under the obligation to provide services on a pay-per-use basis, as agreed at the time when consumers acquired the top-ups.

26. DiversityCanada/NPF submit that "an existing contract" did in fact NOT run its course. Instead, Telus took the decision to not refund the $300-plus in accumulated prepaid balances *and* to not honour the agreement under which it collected those sums from consumers, but, instead, to unilaterally change the terms under which service would be provided.

27. Accordingly, DiversityCanada/NPF submit that Telus requires the customer's consent when making a material change to an existing contract that has NOT run its course.

28. Also, DiversityCanada/NPF submit that Section D 1 of the Wireless Code should apply. It states:

> **D. Changes to contracts and related documents**
>
> 1. Changes to key contract terms and conditions
>
> (i) A service provider must not change the key contract terms and conditions of a postpaid wireless contract during the commitment period without the customer's informed and express consent.
>
> (ii) When a service provider notifies a customer that it intends to change a key contract term or condition during the commitment period, the customer may refuse the change.
>
> (iii) As an exception, a service provider may only change a key contract term or condition during the commitment period without the customer's express consent if it clearly benefits the customer by either
>
> a. reducing the rate for a single service; or
>
> b. increasing the customer's usage allowance for a single service.

29. DiversityCanada/NPF submit that this basic contract principle applies, as well, to agreements for prepaid wireless services. Telus should be required to obtain the informed and express consent of customers who acquired prepaid services under a pay-per-use arrangement prior to October 20, 2013 in order to legitimately change their service to a 30-day rate plan.[4]

30. Furthermore, DiversityCanada/NPF submit that Telus' breach of this basic contract principle renders material changes introduced under this policy invalid.

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4 DiversityCanada/NPF submit that Telus' policy does not meet the criteria for the exception outlined in section D. 1 (iii) of the Wireless Code. The change Telus introduced was not a reduction of the rate for a single service, nor an increase of customers' usage allowance for a single service. Instead, Telus changed the entire nature of the prepaid agreement for the range of wireless services.

3. (b) Telus abused its unequal bargaining power and placed prepaid wireless, pay-per-use customers under duress, thus rendering any such-formed contract invalid

31. DiversityCanada/NPF submit that there is inequality of bargaining power between Telus and individual prepaid wireless, pay-per-use customers.

32. The inequality of each party's position is compounded by the nature of prepaid wireless, pay-per-use services and the market segment to which it caters. Prepaid wireless, pay-per-use services are ostensibly the cheapest means to acquire wireless services. Additionally, since such services can be obtained with cash, it is the only option for individuals with a poor credit history who may not have a credit card or even a bank account. Consequently, the prepaid wireless, pay-per-use market is made up of a significant number of vulnerable and disadvantaged consumers, such as pensioners, minimum-wage workers, youth, persons on income support and newcomers to Canada.

33. Vulnerable and disadvantaged consumers are less likely than others to understand their rights. First, many prepaid wireless customers have the mistaken impression that no contract exists between them and their wireless service provider. Thus, many of Telus' prepaid wireless, pay-per-use customers are likely to be unaware that Telus' terms of service for prepaid wireless, pay-per-use services prior to October 20, 2013 formed a binding agreement. Furthermore, vulnerable and disadvantage consumers in Telus' prepaid wireless, pay-per-use customer base are not likely to have known they had a right to protest Telus' move to force them to switch their contract from a pay-per-use arrangement to a monthly plan.

34. DiversityCanada/NPF submit that even if the Commission were to determine that there was no existing contract to be altered (according to what DiversityCanada/NPF understand is Telus' position), the Commission, nevertheless, must find that consumers were placed under duress by Telus to enter into the agreement to acquire 30-day rate plans or 30-day add-ons.

35. At the time the contract for such monthly subscriptions was entered into, these vulnerable consumers, among regular consumers affected, would not have had any legal representation to advise them of their right to refuse the contract for 30-day rate plans or 30-day add-ons.

36. Additionally, as the transcript of an exchange with a Telus customer service representative indicates[5], it would have been futile for a prepaid wireless, pay-per-use customer to approach the company on the subject. The customer service representative revealed that the company's directive was that the policy was to be inflexible; no employee or manager could use any discretion to enable any customer to avoid being placed on a monthly subscription.

37. Furthermore, DiversityCanada/NPF submit that Telus subjected its pay-per-use customers to duress in that it provided them with no realistic alternative to being placed on a monthly subscription, immediately, (in the case of customers who already had a balance of over $300) or at some possible future point (in the case of existing customers who had a balance of any size under $300). Any customer who objected to being placed on a monthly subscription could not protest by ending the relationship with Telus: that would have meant forfeiting their balance as Telus reiterated that it would not refund top-ups that had been previously acquired.

38. It is DiversityCanada/NPF’s submission, therefore, that there was a clear coercion of the will so as to vitiate consent.[6]

39. In Telecom Decision CRTC 2003-82, the Commission recognized that duress could render a contract invalid.

5 See Appendix B
6 Byle v. Byle, 65 DLR (4th) 641; 46 BLR 292

40. In the decision, the Commission stated:

> 52. ... the Commission does not accept the contention put forward by the municipalities that a signed MAA is definitive proof that a Canadian carrier has obtained, on terms acceptable to it, the consent of the municipality to construct a transmission line. The Commission notes that the law has consistently recognized circumstances under which a written agreement may not validly represent one or both parties' acceptance of its terms. These circumstances include, but are not limited to, cases of mistake, duress, and inequality of bargaining power.

41. While Telecom Decision CRTC 2003-82 considered the terms and conditions of existing agreements for access to municipal rights-of-way, there is no legitimate reason why the Commission's determination in this decision should not also apply to a wireless service provider's terms of service for the provision of service to consumers.

3. (c) The duress persists, and allows no reasonable opportunity for consumers to annul the contracts for 30-day rate plans or 30-day add-ons, thus rendering any such contract void

42. There is no way to ascertain whether prepaid wireless, pay-per-use customers ratified or affirmed the contracts for the monthly plan because the duress persists even after the contracts for a monthly plan has been entered into.

43. According to the policy, if a customer's balance fell below $300, the $10 monthly plan would cease to be mandatory. However, if the customer were to demonstrate her objection to being placed on a monthly plan by ending the monthly plan and purchasing top-ups to use on a pay-per-use basis, based on her historical usage pattern, the customer would very likely soon be back above $300 and, again, be subject to the monthly plan.

44. To illustrate: a customer can only show disagreement with the contract for a monthly subscription that Telus has forced upon her when her account balance falls to $299 and below. If this customer reverts to the pay-per-use model, she would have to purchase a top-up, the minimum of which is valued at $10, valid for 30 days. In the very likely scenario that she does not use any or all of that top-up, her new balance (of just over $300) causes her to again be subject to Telus' policy after the expiry date of the top-up.

45. In other words, even if a prepaid wireless, pay-per-use customer were to become aware that duress made the contract for services under a monthly plan voidable (and there is no evidence that consumers in this prepaid wireless market segment generally had or have such knowledge[7]), Telus provides no realistic opportunity for such a customer to annul or void the contract for services under a monthly plan.

46. Accordingly, since the contracts for monthly plans were voidable because prepaid wireless, pay-per-use customers entered them under duress, and since these customers cannot be said to have affirmed the contracts in light of the fact that the duress persists, DiversityCanada/NPF submit that the Commission must find that the contracts for 30-day rate plans or 30-day add-ons are void.[8]

3. (d) Telus' policy contravenes s. 27(1) of the *Telecommunications Act*

47. Section 27(2) of the *Telecommunications Act* ("the *Act*") states:

> Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

7 As Appendix C shows, some consumers expressed alarm about Telus' policy, but did not demonstrate any clear knowledge of their legal rights in the circumstances.
8 Byle v. Byle, 65 DLR (4th) 641; 46 BLR 292

48. DiversityCanada/NPF submit that to the extent that the agreements for services under 30-day rate plans and 30-day add-ons under Telus' policy are void, the rates Telus has charged customers who had agreements for prepaid wireless services prior to October 20, 2013 are not just and reasonable.

49. DiversityCanada/NPF, therefore, submit that it is necessary for the Commission to order that Telus refund, with interest, all amounts thus charged to ensure that Telus' rates are at all times just and reasonable and in compliance with the *Act*.

3. (e) Telus' policy contravenes s. 27(2) of the *Act*

50. Section 27(2) of the *Act* states:

> No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

51. DiversityCanada/NPF submit that Telus' policy subjects consumers to an undue or unreasonable disadvantage, and gives the company an undue or unreasonable preference.

52. By virtue of accumulating balances of over $300, prepaid wireless, pay-per-use customers targeted by Telus' policy have demonstrated i) they infrequently use wireless services and are unlikely to have occasion to use 50 minutes of local calls or 50 Canadian texts every month; and ii) that they do not wish to acquire services through any monthly rate plan.

53. By changing the service of these consumers to monthly rate plans or making it mandatory for them to acquire a 30-day add-on, Telus forces these consumers to pay for services they have not indicated they need and which they are unlikely to use. These consumers suffer the undue and unreasonable disadvantage of having to pay for services they never requested and are unlikely to use.

54. The corollary to this is that Telus gives itself the undue and unreasonable preference of profiting by forcing consumers to expend sums that the agreement they entered into with Telus prior to October 20, 2013 did not require them to expend.

55. DiversityCanada/NPF further note that in its policy, Telus suggested that the change is advantageous to consumers, when it stated: “We recognize that customers top up each month to ensure their balance does not expire. These changes help to ensure that customers can use their existing balance without having to worry about topping up.” (Footnote marker removed)

56. The removal of the regime whereby top-ups preserved a consumer's accumulated balance is not necessarily an advantage to consumers. The issue of the legitimacy of prepaid wireless balance expiry is the subject of a petition submitted to the Governor in Council, and, therefore, is open to determination.

57. Should it be determined that balance expiry is not legitimate, Telus customers with balances above $300 would have those funds to use at their discretion in the future without the requirement to top up. By making it mandatory that these consumers acquire monthly rate plans, Telus forces them to expend these sums and, therefore, denies consumers the possibility of future use of their accumulated balances.

58. Telus, therefore, places the affected customers at the undue and unreasonable disadvantage of losing access to any benefit from the outcome of the process to determine the legality of prepaid wireless balance expiry. Telus also gives itself the undue and unreasonable preference of escaping the consequences of the outcome of the process to determine the legality of prepaid wireless balance expiry.

3. (f) It is not in the public interest to allow a carrier to unilaterally change an agreement with consumers or to place consumers under duress and retain the profits from so-doing

59. DiversityCanada/NPF have been made aware that Telus is of the position that its policy is "customer friendly"; that it has received some positive feedback from its prepaid customers; that many customers indicated that they did not recognize that their prepaid balances had grown to such an amount, and have made adjustments to their top-ups and usage of services; and that the policy relieves many customers from the need to top up their accounts, saving them the monthly top-up payment.

60. DiversityCanada/NPF have been made aware that Telus is of the position that this justifies the manner in which the policy was implemented.

61. DiversityCanada/NPF submit, however, that Telus' policy is not necessarily customer friendly or a positive for consumers, but, instead, is against the public interest.

62. As stated above, in section 3. e), the loss of the ability to top up is not necessarily a benefit to consumers. The legitimacy of prepaid wireless balance expiry is, as yet, subject to determination. By denying the consumers who are subject to this policy the ability to continue to top up, Telus is also denying these consumers the possibility of fully enjoying the benefit of of any decision that may be rendered in their favour in this matter.

63. It is not in the public interest that a carrier (which is adverse in interest in a matter that is subject to deliberation) be allowed to force consumers to enter into agreements that, in effect, would foreclose on their ability to benefit from due process.

64. Furthermore, DiversityCanada/NPF submit that while some consumers may welcome the switch from a pay-per-use agreement to a monthly subscription, this cannot justify the manner in which Telus implemented its policy, by denying all customers the ability to accept or refuse an agreement to pay for services under a 30-day rate plan.

65. DiversityCanada/NPF submit that a policy which denies a customer the ability to exercise her choice to either accept or refuse a change to the agreement she paid funds to enter into with Telus, is not friendly to the customer; a policy that **forces** consumers to enter into an agreement (in this case for a 30-day rate plan or a 30-day add-on) is not a positive for customers.

66. DiversityCanada/NPF have brought forward this Part I Application as a matter of public interest. We request that the Commission issue a directive to ensure Telus does not retain profits from unilaterally changing its agreements with consumers or from placing consumers under duress to acquire services under 30-day subscriptions. It is against the public interest that any carrier be allowed to retain profits garnered from such conduct. By granting the relief sought, the Commission would deter other carriers from similarly seeking to abuse their unequal bargaining power, and would protect the interests of consumers.

4.0 RELIEF SOUGHT

67. DiversityCanada/NPF therefore request that the Commission issue an order requiring Telus to:

i) refund, with interest, all sums deducted for 30-day rate plans or 30-day add-ons under this policy from all customers who were existing prepaid, pay-per-use wireless customers prior to October 20, 2013;

ii) inform all customers who were existing prepaid, pay-per-use wireless customers prior to October 20, 2013 that, henceforth, acquiring a 30-day rate plan or a 30-day-add-on is entirely optional;

iii) inform all customers who were existing prepaid, pay-per-use wireless customers prior to October 20, 2013 that they may choose to continue to acquire wireless services under the prior arrangements; and

iv) pay DiversityCanada/NPF's costs for filing this Part I Application.

Notice

This application is made by Ray Kindiak, legal counsel, c/o DiversityCanada Foundation, 95 Hutchison Avenue, Elliot Lake, ON P5A 1W9 [Email: telecom_policy@diversitycanada.org].

A copy of this application may be obtained by sending a request to:
telecom_policy@diversitycanada.org

TAKE NOTICE that pursuant to section 25, and, as applicable section 26 of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, any respondent or intervener is required to mail or deliver or transmit by electronic mail its answer to this application to the Secretary General of the Canadian Radio-television and Telecommunications Commission (“Commission”), Central Building, 1 Promenade du Portage, Gatineau (Québec) J8X 4B1, and to serve a copy of the answer on the applicant within 30 days of the date that this application is posted on the Commission’s website or by such other date as the Commission may specify.

Service of the copy of the answer on the applicant may be effected by personal delivery, by electronic mail, or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.

If a respondent does not file or serve its answer within the time limit prescribed, the application may be disposed of without further notice to it.

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