Appendix E: Submissions in the proceeding that led to Telecom Decision CRTC 2015-131

i) Part I Application by DiversityCanada/NPF to Review and Vary Telecom Order 2014-220
   August 01, 2014

ii) Reply -- Part I Application by DiversityCanada/NPF to Review and Vary Telecom Order 2014-220
    September 15, 2014
BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF AN APPLICATION BY THE DIVERSITY CANADA FOUNDATION AND THE NATIONAL PENSIONERS FEDERATION (APPLICANTS)

PURSUANT TO PART I OF THE CRTC RULES OF PRACTICE AND PROCEDURE AND SECTION 62 OF THE TELECOMMUNICATIONS ACT

TO REVIEW AND VARY TELECOM COST ORDER 2014-220

01 AUGUST 2014
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1.0 Nature of the Application


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 May 8, 2014, the Canadian Radio-television and Telecommunications Commission (“the Commission”) issued the Decision denying DiversityCanada/NPF’s costs application on the grounds that it considered DiversityCanada/NPF's submissions in the proceeding on the substantive matter (File No. 8662-D53-201312321) “raised no genuine issue for the Commission’s consideration” and therefore DiversityCanada/NPF did not contribute to a better understanding of the issues under consideration, thereby rendering DiversityCanada/NPF ineligible for costs.

4. DiversityCanada/NPF submit that there is substantial doubt as to the correctness of the Decision on the grounds that
   -- it is contrary to the Commission's stated intention with respect to its costs awards procedure;
   -- it is contrary to the Court's ruling concerning the costs awards procedure before an administrative tribunal similar to the Commission; and
   -- it is based on erroneous findings.

5. DiversityCanada/NPF therefore request the Decision be varied so as to approve the application for costs for participating in the 8662-D53-201312321 proceeding.

6. DiversityCanada/NPF also request the Commission grant its costs for filing this Part I Application to review and vary the Decision.  

1 For the sake of simplicity, the consumer groups are referred to as “DiversityCanada/NPF” throughout this document, regardless of the style used in prior proceedings (except where such references are made in quoted statements).

2 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

2.1 Wireless Code Proceeding

7. On October 11, 2012, the Commission issued Telecom Notice of Consultation CRTC 2012-557, which established a proceeding to develop the Wireless Code (“the Wireless Code Proceeding”). The Commission asked for comments on the content of the Wireless Code; to whom the Wireless Code should apply; how the Wireless Code should be enforced and promoted; and how the Wireless Code’s effectiveness should be assessed and reviewed.

8. In the Notice, the Commission stated its preliminary views on a number of subjects, among them, the clarity of wireless contract terms and conditions. At paragraph 15, the Commission stated its view that the Wireless Code should address the clarity of advertised prices, “including a provision that service providers may not charge consumers for optional mobile wireless services they have not ordered”.

9. The Wireless Code Proceeding included a two-phase online consultation as well as a public hearing, which took place from February 11 to 15, 2013. Following the oral portion of the Wireless Code Proceeding, participants submitted Final Written Comments and Final Replies.

6. The Commission received comments from over 5,000 participants, including hundreds of individual Canadians, as part of the online consultation and interventions in the Wireless Code Proceeding.

7. Some two dozen wireless service providers (“WSPs”) participated, including Bell, Rogers, and TELUS, as well as the industry organization, the Canadian Wireless Telecommunications Association (CWTA). DiversityCanada and the Public Interest Advocacy Centre (“PIAC”) were among half a dozen consumer advocacy groups that participated.

8. During the proceeding, DiversityCanada presented arguments and evidence as it requested that the Commission prohibit WSPs from seizing the cash in the accounts of prepaid wireless customers on the pretext of balance expiry. One of DiversityCanada's submissions was that prepaid balance expiry amounted to WSPs charging consumers for wireless services that they had not ordered, and for which there was no agreement.

9. 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.

10. DiversityCanada made the distinction between the two types of prepaid wireless services offered (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.
11. 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.

12. 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 only as and when they use wireless services of their choice.

13. 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.

14. DiversityCanada argued that for prepaid, pay-per-use customers, the WSPs' claim that top-ups were consideration for “access to the 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 WSPs.

15. 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 purchase 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.

16. 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 Commission to prohibit prepaid wireless balance expiry in order to ensure prepaid wireless customers enjoyed the protections they were entitled to under provincial laws.
2.2 Wireless Code Decision

17. On June 03, 2013, the Commission released Telecom Regulatory Policy CRTC 2013-271, which presented the Wireless Code Decision (hereinafter referred to as such). In the Wireless Code Decision, the Commission did not address the range of arguments and evidence presented by DiversityCanada on the issue of the prohibition of prepaid wireless balance expiry.

18. The following paragraph from the Wireless Code Decision contains the Commission's summary of the issue of prepaid wireless balance expiry:

341. Some consumer groups and individuals submitted that the Wireless Code should prohibit the expiration of prepaid cards (i.e. services not used within the time frame allotted should roll over indefinitely).

19. The Commission's analysis and determination in the Wireless Code Decision are as follows:

Commission’s analysis

347. The Commission considers that consumers’ key requests related to prepaid cards are (i) for WSPs to carry over their account balances (which may be represented in terms of minutes, text messages, or other usage) indefinitely if unused; and (ii) for consumers to be able to “top up” their accounts a bit late.

348. The Commission considers that WSPs should hold prepaid card customers’ accounts open for seven days following expiry of an activated prepaid card to give customers more time to “top up” their accounts. The Commission considers that such a requirement would (i) not impose a significant burden on WSPs; (ii) improve clarity regarding prepaid service billing and policies; (iii) balance consumer interests with current market realities; and (iv) increase flexibility for frequent users of prepaid services.

349. 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.

Commission’s determinations

350. In light of the above, the Commission requires WSPs 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.
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20. Furthermore, Section J of the Wireless Code reads as follows:

Expiration of prepaid cards
1. General
   (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.

2.3 Part I Application to Review and Vary the Wireless Code Decision

21. On September 03, 2013, DiversityCanada filed a Part I Application – on its behalf and on behalf of the NPF (which at that time was called the National Pensioners and Senior Citizens Federation) – to review and vary Section J of the Wireless Code.

22. In the Part I Application, (File No. 8662-D53-201312321), DiversityCanada/NPF submitted that the Commission: a) failed to provide sufficient support (ie reasons to explain the findings of fact) in the Wireless Code Decision with respect to prepaid wireless balance expiry and, therefore, breached its duty of procedural fairness; b) ignored relevant facts and, therefore, arrived at an unreasonable conclusion that prepaid wireless accounts hold minutes, were subject to usage limits and, therefore, were not subject to expiry dates; and c) failed to consider the basic principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported “expired” top-ups.

23. DiversityCanada/NPF requested in the Part I Application that the Commission: i) rescind Section J of the Wireless Code; ii) hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless balances; iii) allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless balances; and iv) grant DiversityCanada/NPF’s reasonable costs with respect to the Application.

24. The Commission received interventions from the CWTA and Saskatchewan Telecommunications (in opposition to the application); and from Vaxination Informatique and Mr. Ben Klass (in support of the application).

2.4 Part I Application Decision


26. In its decision denying the review and vary application, the Commission noted that in the Wireless Code Proceeding it 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. The Commission stated that 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”.

27. The Commission then concluded that “in the circumstances of the proceeding, the Commission considers that it provided sufficient rationale for its determinations (i) to allow expiry dates on prepaid cards, and (ii) to require wireless service providers to give their customers seven days’ notice of that expiration in order to ensure that customers receive sufficient notice to top up their accounts if they so choose”.

28. The Commission also found that the terms of prepaid wireless services “are subject to both usage and time limits”.

29. Additionally, the Commission concluded that “to the extent that the issue of unjust enrichment is related to the reasonableness of the rates being charged by wireless service providers for the services provided, the Commission notes that it was not within the scope of the proceeding”.

2.5 Part I Application Costs Application and Decision


31. The Commission's determination was as follows:

20. The Commission considers that 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.

21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. This being the case, it is not necessary for the Commission to determine whether DiversityCanada has participated in the review and vary proceeding in a responsible way.
3.0 Grounds of the Application

3.1 A discretionary decision may be reversed if it is contrary to the purpose for which the discretion is exercised

32. An application for review and variance of a Commission decision may be brought when there is substantial doubt as to the correctness of the decision due to an error in law or fact.3

33. The Commission's decisions on costs awards are discretionary.4

34. A discretionary decision may be reversed if it is contrary to purpose for which the discretion is exercised. In its judgement in Canada (Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56 (CanLII), a case concerning a discretionary ministerial decision, the Federal Court of Appeal noted:

[100] One way of assessing whether a decision is reasonable – a “badge of reasonableness,” so to speak – is to assess whether it is consistent with the purposes of the provision authorizing the decision and the purposes of the overall legislation: see Montreal (City) v. Montreal Port Authority, 2010 SCC 14 (CanLII), 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42 and 47.

35. The relevant paragraphs in the Supreme Court of Canada's decision in Montreal, referred to above, state:

[42] The respondents’ position is also contrary to the objective of the PILT Act and the Regulations. Parliament intended Crown corporations and managers of federal property to make payments in lieu on the basis of the existing tax system in each municipality, to the extent possible as if they were required to pay tax as owners or occupants.

[47] The respondents’ decisions were consistent neither with the principles governing the application of the PILT Act and the Regulations nor with Parliament’s intention. The way they exercised their discretion led to an unreasonable outcome that justified the exercise of the Federal Court’s power of judicial review.

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4 Re Bell Canada (1983), 48 N.R. 197 (Fed. C.A.), para. 209: “An award of costs, whether in a judicial proceeding or before a regulatory or other tribunal and apart from some statute or rule to the contrary, is in the discretion of the Court or tribunal.”
36. Furthermore, in paragraph 33 of the Montreal judgement, the Court expanded on the principle that a discretionary decision must not be contrary to the purpose for which the discretion is exercise when it stated:

[33] However, in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.

37. In a recent judgement, the Supreme Court of Canada further emphasized this principle when it stated in Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395:

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion....

38. As outlined below, DiversityCanada/NPF respectfully submit that the Commission's Decision is contrary to the Commission's stated intention with respect to its costs awards procedure; and contrary to the Court's ruling concerning the costs awards procedure before an administrative tribunal similar to the Commission; and, therefore, should be varied.
3.2 The Decision is contrary to the Commission's stated intention with respect to its costs awards procedure

39. At paragraph 20 of the Decision, the Commission stated it considered that DiversityCanada/NPF “raised no genuine issue for the Commission's consideration”. The Commission then stated this was the basis on which it found that DiversityCanada/NPF “did not assist the Commission in developing a better understanding of the matters that were considered”, and therefore, were ineligible for an award of costs.

40. In stating that it considered that DiversityCanada/NPF “raised no genuine issue for the Commission's consideration”, the Commission expressed the fact that it did not agree with DiversityCanada/NPF’s submissions in the review and vary proceeding. This is merely another way of stating that the Commission did not decide in DiversityCanada/NPF’s favour in the review and vary application.

41. In other words, the Commission's finding that DiversityCanada/NPF were not entitled to an award of costs (i.e., that DiversityCanada/NPF did not meet the criterion of assisting the Commission in developing a better understanding of the matters that were considered) was based on the outcome (i.e., the fact that the Commission did not accept DiversityCanada/NPF’s submissions).

42. This is contrary to the stated intention of the Commission's cost awards procedure.

43. In *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190, the Supreme Court of Canada underscored the fact that the Commission's costs awards procedure is not strictly based on the principles of indemnification as found in the Court (where there are adversaries and awards are based on the outcome, with the winner being awarded costs), but, instead, is intended “to ensure effective participation in its hearings”. The Court further quoted from Telecom Decision CRTC 78-4 of May 23, 1978, in noting that the Commission stated that one of the objectives of its practices and procedures was to "increase the capacity of interveners to participate at public hearings in an informed way".

44. In the Decision itself, the Commission restated the principle that the outcome of the proceeding concerning the substantive matter should not be the basis on which to deny an application for costs for participating in that proceeding. At paragraph 12, the Commission stated:

Further, the Commission agrees with DiversityCanada that costs applications are treated on their merits, regardless of the outcome of the proceeding for which the costs are sought.

45. As DiversityCanada/NPF noted in its application for costs, in updating its costs awards procedure in the proceeding that led to Telecom Regulatory Policy CRTC 2010-963 (“TRP CRTC 2010-963”), the Commission considered the request by the industry that costs be denied when a claim is made in relation to an unsuccessful application brought forward by a costs

The Commission stated, at paragraph 26 of the decision that led to TRP CRTC 2010-963:

The Commission considers that automatically denying costs when a costs applicant’s application under Part VII of the Telecommunications Rules or Part 1 of the Rules of Procedure has not been successful could have a chilling effect on those who wish to raise issues of public interest. The Commission finds that its current approach of assessing each costs application on its merits remains appropriate.

46. The present Decision – that DiversityCanada/NPF are not entitled to costs because the Commission considered that DiversityCanada/NPF “raised no genuine issue for the Commission's consideration” – runs directly counter to the Commission's stated intention that it would not automatically deny costs when a Part I application has not been successful.

47. Furthermore, at paragraph 6 of TRP CRTC 2010-963, the Commission provided examples of criteria that would be used for ascertaining whether an applicant for costs contributed to a better understanding of the issues. The Commission stated:

In evaluating whether an applicant has contributed to a better understanding of the issues, the considerations that the Commission will generally take into account include:

(a) whether the applicant filed evidence;
(b) whether the contribution was focused and structured; and
(c) whether the contribution offered a distinct point of view.

48. DiversityCanada/NPF acknowledge that the Commission stated that the above list of considerations was not exhaustive and that the factors considered were entirely within the discretion of the Commission, depending on the circumstances of each case.

49. DiversityCanada/NPF submit, however, that read together, paragraph 26 of the decision that led to TRP CRTC 2010-963 and paragraph 6 of the policy itself indicate that the criteria to be considered when evaluating whether an applicant contributed to a better understanding of the issues relate to the manner in which the applicant presented submissions to the Commission and not to whether or not the Commission accepted the applicant's submissions.

50. DiversityCanada/NPF submit that there would indeed be a “chilling effect” if the Decision were to stand and the outcome of the substantive proceeding (ie whether the Commission accepted the applicant's submissions) were to be established as a criterion for evaluating whether an applicant for costs contributed to a better understanding of the issues.

51. This would thwart the purpose of the Commission's costs awards procedure, which, as indicated by paragraph 26 of TRP CRTC 2010-963 is to enable “those who wish to raise issues in the public interest” to do so.
52. DiversityCanada/NPF submit that since the Decision is contrary to the stated intention of the Commission's costs awards procedure, it should be varied to approve DiversityCanada/NPF's costs application.

3.3 The Decision is contrary to the Court's ruling concerning the costs awards procedure before an administrative tribunal similar to the Commission

53. The Commission's Decision denying DiversityCanada/NPF's costs is nearly identical to a 2010 decision by the Alberta Energy Resources Conservation Board (“the Board”), which was struck down by Court of Appeal of Alberta.

54. In Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19 (CanLII), the Court said it was not reasonable for the Board to use the fact that it did not accept the costs applicants' submissions in the substantive matter as the sole or even primary basis for denying their costs application.

55. In the matter that went before the Board, so-called “Kelly Interveners” were owners of lands in the vicinity of oil wells drilled by Grizzly Resources. The Board determined (in Re Grizzly Resources Ltd., Decision 2010-028) that the interveners had not demonstrated any risk to themselves from the wells, that the emergency response procedures in place were satisfactory, and that the wells could be operated without any additional conditions.

56. The interveners subsequently applied for an award of costs, pursuant to section 28 of the Energy Resources Conservation Act, RSA 2000, c. E-10 (“ERCA”), which states:

28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

(a) has an interest in, or

(b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

(2) On the claim of a local intervener or on the Board’s own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.
57. In its decision denying the interveners' costs application, the Board said:

The Board was satisfied that the evidence in the review hearing demonstrated no potential for effect on the Kelly Interveners from the approval of the Grizzly applications. Further, no evidence was presented at the review hearing or in this cost proceeding to demonstrate a potential for the Grizzly wells to directly and adversely affect lands that the Kelly Interveners have an interest in, occupy, or are entitled to occupy. It therefore follows that the second half of the local intervener test is not satisfied, and the Board finds that the Kelly Interveners are not local interveners as defined by Section 28(1) of the ERCA.

As the Kelly Interveners are not local interveners under Section 28 of the ERCA, the Majority hereby dismisses their application for an award of local intervener costs.

58. In striking down the Board's decision, the Court stated:

31. In normal civil litigation costs generally go to the “winner”. Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying “winners and losers”; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived “success” of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are “successful” when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself. [Emphasis in the original]

...
policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.

...

37. ... For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. Further, while the amount of costs to be awarded lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.

59. DiversityCanada/NPF submit that the Board's decision and the Commission's Decision are so nearly identical\(^5\) that the findings of the Court are directly applicable to this review and vary proceeding.

60. That fact that the *Kelly* decision has general applicability to administrative tribunals concerned with ascertaining the public interest is highlighted in a decision earlier this year by the Alberta Surface Rights Board (“ABSRB”).

61. While noting that *Kelly* involved a different tribunal, the ABSRB based its decision in *Canadian Natural Resources Limited v. Babb*, 2014 ABSRB 39 (CanLII) on the principles outlined in *Kelly*. In awarding costs to “unsuccessful” costs applicants, the ABSRB cited paragraph 31 of *Kelly*, and said:

> While it is true that [the ABSRB] Panel ultimately did not accept a number of the arguments presented on behalf of the Respondents, the Panel considers that the circumstances made presenting those arguments and the associated evidence a reasonable course of action.

62. Paragraphs 31 and 34 of *Kelly* emphasize that in administrative tribunals, such as the Commission, the holding of proceedings that allow public interest issues to be raised and allow people to be heard is an end unto itself.

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\(^5\) The Board's determination that the interveners presented no evidence that their lands would be adversely affected is akin to the Commission's determination that DiversityCanada/NPF raised no genuine issue for the Commission’s consideration. The Board's conclusion that its determination therefore meant the interveners did not meet the eligibility criteria for an award of costs mirrors the Commission's conclusion that its determination meant that DiversityCanada/NPF did not meet the eligibility criteria to be entitled to costs.
63. In the review and vary application, DiversityCanada/NPF raised an issue that affects some 3.6 million Canadians, among whom are some of the most vulnerable consumers, and sought to protect them from substantial collective financial loss, estimated at $138 million annually, as a result of practices which DiversityCanada/NPF submitted were not legitimate.

64. Without the Commission's costs awards procedure, DiversityCanada/NPF would not have the resources to raise this public interest issue.

65. In summary, DiversityCanada/NPF submit that the principles outlined in Kelly apply to Commission proceedings, and that the outcome of the review and vary proceeding in which the Commission did not accept DiversityCanada/NPF’s arguments does not of itself disentitle DiversityCanada/NPF to costs.

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6 See footnote 9 of the attached Petition (submitted as Appendix A to this Part I Application to Review and Vary Telecom Order 2014-220)
3.4 A discretionary decision may be reversed if it is based on an erroneous finding

66. A discretionary decision may be reversed if it is based on an erroneous finding.

67. In *R. v. Regan*, 2002 SCC 12, [2002] 1 SCR 297, the Supreme Court of Canada said:

117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: “an appellate court will be justified in intervening in a trial judge’s exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice” (*Tobiass*, supra, at para. 87; *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375). Furthermore, where a trial judge exercises her or his discretion, that decision cannot be replaced simply because the appellate court has a different assessment of the facts (*Stein v. The Ship “Kathy K”*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802; see also *R. v. Oickle*, 2000 SCC 38 (CanLII),[2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2S.C.R. 507).

118 This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the “trial judge made some palpable and overriding error which affected his assessment of the facts”, the decision based on these facts may be reversed (*Kathy K*, at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

68. In *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122, the Court stated that the exercise of discretion based on an error in fact-finding cannot stand:

[30] In the case before us, the factual error made by the Tribunal – the finding that the job in Abbotsford was a full-time one – is readily extricable from the discretionary decision – what damages were to be awarded. The factual issue, therefore, is to be reviewed on the standard set out in s. 59(2) of the *Administrative Tribunals Act*. The Tribunal’s finding of fact must be overturned, as there was no evidence to support it.

[31] An analysis under s. 59(2) does not end the matter. The impugned fact-finding is only important to the Tribunal’s decision in that it was a factor in the making of a discretionary order. Having identified the error in fact-finding, therefore, it is necessary...
to analyze the effect of that error on the exercise of discretion. This analysis must be performed under ss. 59(3) and (4) of the Act.

....

[33] In the case before us, the finding that the Abbotsford position was full-time appears to have been an important consideration for the Tribunal in fixing past wage loss – it is one of only two considerations that are singled out for mention. In the result, it seems to me that the error of fact was material to the award. The use of an erroneous finding of fact as a material factor in making the discretionary decision made the decision “arbitrary” as that word is used in s. 59(4)(a) of the Administrative Tribunals Act.

[34] In the result, the Tribunal’s assessment of damages for past wage loss cannot stand.

69. Similarly, as outlined below, DiversityCanada/NPF submit that the Commission's Decision is reversible as it is based on erroneous findings of fact.

3.5 The Decision is based on erroneous findings

70. In the Decision, the Commission stated that its decision to not award costs was based on its determination that DiversityCanada/NPF “raised no genuine issue for the Commission's consideration”. The Decision, therefore, is based on findings in the Telecom Decision CRTC 2014-101, as well as findings in the Wireless Code Decision.

71. DiversityCanada/NPF are contesting the Commission's findings in both those decisions and have submitted a Petition to the Governor in Council, pursuant to section 12 of the Telecommunications Act.

72. The Petition is attached to this Part I Application as Appendix A and presents DiversityCanada/NPF’s position that Telecom Decision CRTC 2014-101 and the Wireless Code Decision are based on erroneous findings.

73. In summary, DiversityCanada/NPF submit the Commission erred in finding: that it was under no obligation to provide reasons for its decision in the Wireless Code Proceeding; that prepaid wireless accounts hold minutes rather than cash, are subject to usage limits, and, therefore, are not subject to expiry dates; that unjust enrichment was outside the scope of the Wireless Code Proceeding.

74. DiversityCanada/NPF submit that the errors underpinning the Commission's Decision are of a
nature that renders the Decision reversable.

75. Therefore, DiversityCanada/NPF submit the Decision should be varied to approve DiversityCanada/NPF's costs application.

4.0 Nature of relief sought

76. DiversityCanada/NPF request that the Commission

i) vary Telecom Order CRTC 2014-220 so as to approve DiversityCanada/NPF's costs application for participating in the 8662-D53-201312321 proceeding;

ii) grant DiversityCanada/NPF's costs for filing this Part I Application.
5.0 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.
6.0 Service List

This Part I Application has been served on the following:

Canadian Wireless Telecommunications Association
TELUS Communications Company
Saskatchewan Telecommunications

****End of Document****
BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF AN APPLICATION BY THE DIVERSITY CANADA FOUNDATION AND THE NATIONAL PENSIONERS FEDERATION (APPLICANTS)

PURSUANT TO PART I OF THE CRTC RULES OF PRACTICE AND PROCEDURE AND SECTION 62 OF THE TELECOMMUNICATIONS ACT

TO REVIEW AND VARY TELECOM COST ORDER 2014-220

15 SEPTEMBER 2014
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1.0 Executive Summary

1. The DiversityCanada Foundation ("DiversityCanada") and the National Pensioners Federation ("NPF"); collectively "DiversityCanada/NPF") submit these Reply comments in response to Answers filed by the Canadian Wireless Telecommunications Association ("CWTA") and by TELUS Communications Company ("Telus") on September 05, 2014 in this proceeding initiated by DiversityCanada/NPF’s Part I Application to review and vary Telecom Order 2014-220 ("the Decision"). DiversityCanada/NPF submit that not addressing a party's submissions does not indicate agreement with that position.

2. DiversityCanada/NPF submit that the respondents filed Answers which contained a number of inaccuracies as to the nature and content of the Decision. This included the CWTA's and Telus' claim that the Commission denied DiversityCanada/NPF's costs because of a lack of evidence. Another inaccuracy was Telus' claim that one of the reasons the Commission denied costs was that it found DiversityCanada/NPF's application was premised on a misunderstanding of how Telecom Decision 2014-101 affected the Wireless Code.

3. Further inaccuracies include the respondents' claim that the Commission denied DiversityCanada/NPF's costs because it found that the organizations had acted irresponsibly, and that the Commission's findings in the Wireless Code and Telecom Decision 2014-101 played no part in the Commission's decision to deny DiversityCanada/NPF's costs.

4. DiversityCanada/NPF submit that the CWTA and Telus misrepresented the position presented by DiversityCanada/NPF in the Part I Application. The respondents incorrectly stated that DiversityCanada/NPF called for automatic awards of costs which would result in the fettering of the Commission's discretion. Furthermore, Telus obfuscated the specific reasoning behind DiversityCanada/NPF's argument that the Decision would have a chilling effect.

5. It is the submission of DiversityCanada/NPF that this Part I Application, calling for the reversal of the Decision, would support important policy considerations underpinning the Commission's costs awards procedure. These include facilitating public participation in the Commission's procedures; facilitating access to justice; and ensuring just costs awards decisions.

6. While DiversityCanada/NPF considered it necessary to place on the record of this proceeding the ground that the Decision was incorrect as it was based on erroneous findings, DiversityCanada/NPF neither intend nor expect the Commission to make a determination on that ground. DiversityCanada/NPF highlight the fact that this matter is before the Governor in Council as a result of a Petition filed by DiversityCanada/NPF under section 12 of the Telecommunications Act.

7. DiversityCanada/NPF submit that it met all the eligibility requirements for an award of costs in the proceeding that culminated in Telecom Decision 2014-101 and requests that the Commission reverse the Decision so as to grant the costs claimed.
2.0 Inaccuracies in the Answers concerning the Decision

2.1 Lack of evidence

8. The CWTA stated at paragraph 6 of its Answer that “DCF’s cost request was clearly denied because it did not present new evidence, not because its review and vary application was unsuccessful.”

9. The CWTA further intimated that the lack of new evidence was the reason costs were denied in the Decision when it stated in paragraph 7: “While automatically denying costs to unsuccessful applications could have a chilling effect, the complete opposite would encourage frivolous applications that present no new evidence and do not contribute to a better understanding of regulatory matters.”

10. Telus claimed at paragraph 12 of its Answer that “the Commission assessed DiversityCanada’s position and found that it raised issues that were based on no evidence and completely unfounded.”

11. To prove its point, Telus cited paragraph 16 of the Decision. However, that paragraph states: “Regarding the first area, the Commission notes that DiversityCanada essentially submitted that the Commission provided no reasons for its decision to establish Section J of the Wireless Code.”

12. As is evident, in the paragraph Telus relies on, the Commission does not state that one of its reasons for denying DiversityCanada/NPF's costs is that DiversityCanada/NPF did not provide evidence in its Part I Application. In fact, this issue makes no appearance in this paragraph.

13. What is true of paragraph 16 is true of the entire Decision. The Commission did not state or even imply anywhere in its Decision that it denied DiversityCanada/NPF’s costs on the grounds that DiversityCanada/NPF did not provide evidence, new or otherwise.

2.2 Misunderstanding how Telecom Decision 2014-101 affects the Wireless Code

14. Telus also claimed in paragraph 12 of its Answer that the Commission denied DiversityCanada/NPF’s costs because the Commission found that the Part I Application which initiated the proceeding was “ premised on a complete misunderstanding on how Decision 2014-101 affects the Wireless Code”.

15. Here, again, the passage from the Decision cited by Telus (paragraph 18), in fact, disproves Telus' claim.
16. Paragraph 18 of the Decision is best understood when read in conjunction with the one that precedes it:

17. Regarding the second and third areas, the Commission notes that DiversityCanada argued, in effect, that since the Commission failed to adopt DiversityCanada’s preferred conclusions in Section J of the Wireless Code, it must have failed to consider DiversityCanada’s evidence and arguments in this regard.

18. The Commission further notes that, as requested by DiversityCanada in the Wireless Code proceeding, the Wireless Code does apply to prepaid wireless services. Section J of the Wireless Code sets out the obligations of service providers regarding the accounts of customers with prepaid cards. Telecom Decision 2014-101, which sets out the Commission’s determinations regarding the review and vary proceeding, does not affect these obligations.

17. Here, the Commission merely notes certain things. The last of its observations is that it had not been persuaded by the proceeding which led to Telecom Decision 2014-101 to alter Section J of the Wireless Code.

18. As is obvious, contrary to Telus’ claim, in paragraph 18 the Commission does not state that it found DiversityCanada/NPF were not entitled to costs because DiversityCanada/NPF brought forward an application “premised on a complete misunderstanding on how Decision 2014-101 affects the Wireless Code”.

19. It is unreasonable to claim the Commission denied DiversityCanada/NPF’s costs on this basis.

20. Such a determination by the Commission is chronologically not plausible. Telecom Decision 2014-101 is the decision that came at the end of the proceeding initiated by DiversityCanada/NPF’s Part I Application. It is unreasonable to state the Commission found that DiversityCanada/NPF premised its application on a misunderstanding of the resulting decision, which, of course, would not have existed at the time the application was filed.
2.3 Failure to participate responsibly

21. In its Answer, Telus presented and discussed a further reason that did not appear in the Decision: the company claimed the Commission denied DiversityCanada/NPF’s costs on the grounds that DiversityCanada/NPF was found to have participated irresponsibly.

22. At paragraph 13 of its Answer, Telus stated that in its view “it is obvious that the costs claim failed not simply because the R&V Application was denied but because DiversityCanada had failed to participate responsibly by filing an application that was devoid of any meaningful issue and premised on a false understanding of the Wireless Code.”

23. Telus repeated this claim in paragraph 21 of its Answer:

“In any event, the Commission’s decision in Order 2014-220 was based on its assessment of the criteria for costs awards under the Rules. Alleged errors in the Wireless Code and Decision 2014-101 were not relevant to that determination. What was relevant is whether DiversityCanada participated in a responsible way and contributed to a better understanding of the issues raised in the R&V Application. On those criteria, the Commission made its assessment and found DiversityCanada’s participation wanting.” [Emphasis added]

24. However, in the Decision, the Commission stated:

20. The Commission considers that 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.

21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. This being the case, it is not necessary for the Commission to determine whether DiversityCanada has participated in the review and vary proceeding in a responsible way. [Emphasis added]

25. Telus thus repeated inaccurate claims that the decision to deny DiversityCanada/NPF’s costs was based on grounds which the Commission quite explicitly stated it did not even consider.

26. DiversityCanada/NPF submit that in injecting discussions on reasons that form no part of the Decision under review, the respondents have created and submitted inaccuracies concerning the Commission’s Decision which are not helpful to the Commission in this proceeding.
2.4 Decision not based on findings in Telecom Decision 2014-101 and the Wireless Code

27. While in the examples above the respondents imposed on the proceeding discussions of reasons that did not appear in the Decision, Telus also went the opposite route and attempted to convince the Commission that the sole reason actually given by the Commission did not appear in the Decision.

28. Telus claimed that DiversityCanada/NPF's third ground for review and variance in the present Part I Application was not legitimate, namely that Telecom Order 2014-220 was based on erroneous findings in the Wireless Code and Telecom Decision 2014-101.

29. Paragraph 21 of Telus' Answer states:

   In any event, the Commission’s decision in Order 2014-220 was based on its assessment of the criteria for costs awards under the Rules. Alleged errors in the Wireless Code and Decision 2014-101 were not relevant to that determination. What was relevant is whether DiversityCanada participated in a responsible way and contributed to a better understanding of the issues raised in the R&V Application. On those criteria, the Commission made its assessment and found DiversityCanada’s participation wanting. As such, there is no such error in manner the Commission exercised its discretion in Order 2014-220, and its decision was not based on any erroneous finding.
   [Emphasis added]

30. However, the Commission states in paragraphs 20 and 21 that the decision in Telecom Order 2014-220 is based precisely on its determinations in both the Wireless Code and Telecom Decision 2014-101 (which DiversityCanada/NPF are appealing before the Governor in Council on the basis that they are premised on erroneous findings). The relevant paragraphs state:

   20. The Commission considers that 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.

   21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. ...
   [Emphasis added]

31. The Commission's meaning here is clear. The Commission states that it held that its determinations in the Wireless Code proceeding were correct and, as such, it did not agree with DiversityCanada/NPF that there were grounds for quashing Section J of the Wireless Code.
32. Furthermore, the Commission provides this as the sole reason for denying DiversityCanada/NPF's costs.

33. DiversityCanada/NPF submit that in choosing to ignore the Commission's explicit statements and, instead presenting the inaccurate argument that “alleged errors in the Wireless Code and Decision 2014-101 were not relevant” to the decision to deny costs in Telecom Order 2014-202, Telus has again created and submitted inaccuracies concerning the Commission’s Decision which are not helpful to the Commission in this proceeding.

3.0 Inaccuracies in the Answers concerning the Application

3.1 Automatic costs awards

34. Telus and the CWTA misrepresented DiversityCanada/NPF's position as calling for interveners to automatically be awarded costs (and supposedly full costs at that) regardless of the nature of their participation in Commission proceedings.

35. Both respondents went on to suggest this would result in the Commission being inundated with frivolous interventions.

36. The CWTA stated at paragraph 7 of its Answer:

DCF/NPF appear to interpret the Commission’s consideration from TRP 2010-963 as an indication that costs should automatically be awarded to all applicants, regardless of the content or contribution. ... While automatically denying costs to unsuccessful applications could have a chilling effect, the complete opposite would encourage frivolous applications that present no new evidence and do not contribute to a better understanding of regulatory matters.

37. At paragraph 17 of its Answer, Telus stated:

The ultimate problem with DiversityCanada’s position is that it is, in essence, asking for an automatic right to costs, no matter the substance or merit of the intervention. Not only is that plainly wrong based on the Act and the judicial reasoning of Supreme Court of Canada, it would amount to the Commission fettering its discretion if all costs claims were automatic.

38. Telus added, in paragraph 18: “DiversityCanada’s position would cause frivolous and meaningless participation in proceedings, detracting the process and forcing parties and the Commission to deal with extraneous positions.”
39. These statements represent a distortion of DiversityCanada/NPF's submission.

40. In section 3.3 of the Part I Application, DiversityCanada/NPF presented the ruling in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 (CanLII), which, though not binding on the Commission, is instructive as it reinforces the premise on which the Commission established its own costs awards procedure.¹

41. This judgement did not state that all interveners must automatically be awarded (full) costs.

42. The Court sought to answer the following question: was it reasonable for the administrative tribunal to deny costs solely or primarily on some measure of perceived “success” of the intervention?

43. The Court found it was unreasonable to do so since the administrative tribunal's procedures were primarily directed at ascertaining and protecting the public interest (as will be discussed further in Section 4 below).

44. The Court went on to emphasize three points:

- a potential adverse impact is sufficient to trigger an entitlement to costs;
- the actual outcome of a proceeding, including one in which the tribunal determines there is no actual adverse effect, does not of itself disentitle an applicant to costs;
- the amount of costs to be awarded lies within the discretion of the tribunal.

45. As these points show, DiversityCanada/NPF's position (that the Commission should not deny costs on the basis that it did not agree with the submissions in the substantive matter) does not equate to a call for automatic (full) awards, and for the Commission's discretion to be fettered.

46. In fact, DiversityCanada/NPF's position is entirely consistent with the Supreme Court of Canada's assessment of the Commission's own costs awards procedures (as outlined in the Part I Application). And, as Telus noted (in paragraph 9 and footnote 6 of its Answer), the Commission, in fact, has been following this principle.

47. It is precisely because Telecom Order CRTC 2014-220 deviates from this established practice that DiversityCanada/NPF filed this review and vary application.

¹ See paragraphs 43 – 45, and 58 of the Part I Application.
3.2 Chilling effect of the Decision

48. In paragraphs 14 to 16 of its Answer, Telus sought to refute DiversityCanada/NPF's submission that Telecom Order 2014-220 could have a chilling effect on those who wish to raise issues of public interest.

49. Telus attempted to pin the Decision narrowly on the nature of DiversityCanada/NPF's submission in the substantive matter. In doing so, Telus obfuscated the essence of DiversityCanada/NPF's submission as to the potential adverse impact of Telecom Order 2014-220 on public interest interveners.

50. DiversityCanada/NPF's submission concerning the chilling effect was raised in a very specific context.

51. In paragraphs 47 to 50 of the Part I Application in this proceeding, DiversityCanada/NPF reviewed the examples of criteria the Commission stated\(^2\) it would use for ascertaining whether a costs applicant contributed to a better understanding of the issues. These included whether evidence was filed; whether the contribution was focused and structured; whether the contribution offered a distinct point of view.

52. DiversityCanada/NPF pointed out that the Commission's statement shows that considerations under this rubric relate to the manner in which the costs applicant presented submissions to the Commission and not to whether or not the Commission accepted the applicant's submissions.

53. Telecom Order 2014-220 deviates from the principles and practice established by TRP CRTC 2010-963.

54. DiversityCanada/NPF submit that it is not reasonable to place a determination on the merits of the substantive matter into the category under which the Commission considers whether the costs applicant contributed to a better understanding.

55. It is this specific precedent in the Decision that DiversityCanada/NPF submitted would have a chilling effect.

56. If Telecom Order 2014-220 were to stand, it would mean that an intervener could (as DiversityCanada/NPF have done in this instance) devote considerable time and effort to properly research an issue of significant public interest, prepare a structured and focused submission, and file evidence, all in an effort to establish what it genuinely believes is not only a prima facie case, but a convincing one, and have the entire good-faith effort dismissed as not having assisted the Commission with a better understanding of the issues – solely because the Commission did not agree with the intervener's submissions.

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\(^2\) The criteria were listed in Telecom Regulatory Policy CRTC 2010-963 (“TRP CRTC 2010-963”)
57. If the Decision were to stand, it would establish an unreasonable degree of uncertainty in the Commission's process. Public interest interveners would be put into a position of having to read the minds of the Commissioners prior to even drawing up a Part I application to be certain that they (the interveners) will not be denied costs.

58. Predicated as it is on the perceived lack of “success” of DiversityCanada/NPF's Part I Application, Telecom Order 2014-220 introduces for interveners wishing to raise public interest matters before the Commission the dilemma described by the Court in the *Kelly* ruling:

32. ...an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be. As this hearing demonstrated, all the evidence, and its full impact, are never completely known until the hearing is over. It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence “may” disclose an adverse effect....

59. As DiversityCanada/NPF submitted in paragraph 49 of the Part I Application, when it established TRP CRTC 2010-963, the Commission did not intend that interveners be put into this dilemma as the Commission's statements show that it did not intend for the outcome of the substantive matter to fall under the category of contributing to a better understanding of the issue.

60. Therefore, DiversityCanada/NPF respectfully request that the Commission reaffirm the principles and practice established by TRP CRTC 2010-963 by reversing Telecom Order 2014-220.

### 4.0 Policy considerations supported by the Application

61. Telus stated in paragraph 14 of its Answer that the Decision was “evidence of an effective costs procedure that benefits regulatory proceedings and public interveners”.

62. DiversityCanada/NPF submit, however, that in deviating from the Commission's established principles and practice, Telecom Order 2014-220 undermines important policy considerations that underpin the Commission's costs awards procedures.

63. In calling for the reversal of the Decision, this Part I Application supports these crucial policy considerations which ensure an effective costs procedure that benefits regulatory proceedings and public interveners.
4.1 Facilitating public participation

64. The principles of natural justice underline the importance of having and facilitating public participation.

65. As shown in paragraph 43 of the Part I Application, the Supreme Court of Canada underscored that the Commission itself stated one of the objectives of its costs practices and procedures was to “increase the capacity of interveners to participate at public hearings in an informed way”.

66. In the *Kelly* ruling, the Alberta Court of Appeal noted that an award of costs “may well be a practical necessity” if the tribunal (the Alberta Energy Resources Conservation Board) was to “discharge its mandate of providing a forum in which people can be heard”.

67. The purpose of costs awards procedures, therefore, is to facilitate public participation in the matters before the administrative tribunal.

68. The Alberta Energy Resources Conservation Board differs from the Commission in that it awards costs to individual interveners. While the Commission allows individuals who participate in Commission proceedings to recover disbursements, it does not award costs to applicants who represent solely their own interests in a proceeding.

69. The Commission allows costs only to applicants who represent a group or class of subscribers that have an interest in the proceeding, and requires proof of a mandate to do so.³

70. The Commission's costs awards procedure, therefore, is quite exclusive, and both individual subscribers and the Commission, itself, must largely rely on public interest groups if subscriber concerns are to be represented in Commission proceedings.

71. This makes it all the more important for the Commission to adhere to the principles set out in the *Kelly* ruling, which, in fact, simply reinforce the Commission's own policy as set out in TRP CRTC 2010-963.

72. Generally speaking, public interest groups are not large, well-funded organizations with the capacity to underwrite the cost of participating in Commission proceedings.

73. In the case of DiversityCanada/NPF, neither organization has a budget to fund participation in Commission proceedings, nor does either organization employ the lawyer or the consultant who prepare DiversityCanada/NPF's submissions to the Commission. These costs claimants bear the entire cost of representing the public interest before the Commission until they are compensated for this representation through an award of costs.

³ See Telecom Costs Order CRTC 2008-3, in which the Commission determined the applicant was an individual representing his own interests and, therefore, denied costs.
74. In paragraph 34 of the *Kelly* judgement, the Court noted that the tribunal may well be thwarted in discharging its mandate if the policy on costs is applied too restrictively, and added immediately after: “It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.”

75. DiversityCanada/NPF submit that the Commission would be thwarted in discharging its mandate if the policy on costs becomes too restrictive due to the precedent found in the Decision.

76. By calling for the reversal of Telecom Order 2014-220, this Part I Application seeks to ensure that the Commission remains a forum in which public interest interveners can participate in a fair and informed way.

### 4.2 Facilitating access to justice

77. The Alberta Surface Rights Board (ABSRB), the other tribunal referenced in the Part I Application, eloquently summed up why it is important that a tribunal not deny costs on the basis that it did not agree with the merits of the intervener's submissions.

78. The ABSRB stated that while it did not eventually accept the intervener's submissions, “the circumstances made presenting those arguments and the associated evidence a reasonable course of action”.

79. In other words, where there is a perceived grievance, it is necessary that the public be able to seek redress through the regulatory authority which has jurisdiction over the matter. A costs awards procedure, therefore, is necessary to allow the public to have access to justice.

80. As stated in the Part I Application, with such high stakes ($138 million lost annually by the most vulnerable consumers as a result of practices which DiversityCanada/NPF label as illegitimate), DiversityCanada/NPF submit that the circumstances made the filing and the consideration of the matter necessary, even if the Commission did not eventually agree with DiversityCanada/NPF's submissions.

81. It is therefore reasonable that the Commission allow costs in these circumstance.

82. In the *Kelly* case, where the tribunal's costs awards procedure is restricted to hearings on the adverse effects to land, the Court noted that the *possibility* that an intervener's lands could be affected by development triggers an entitlement to costs.

83. The situation before the Commission differs in that Part I applications may be raised by public interest groups on any number of telecom-related subjects. DiversityCanada/NPF submit that the corollary to the situation described by the Court is that the presentation of a *prima facie* case concerning a grievance triggers an entitlement to costs in proceedings initiated by public
interest interveners before the Commission.

84. When public interest groups file a Part I application, the Commission has the authority to not allow a proceeding to go forward if it determines that the application does not disclose a *prima facie* case. As recently as July 28, 2014, the Commission exercised this power when it closed the file on a Part I application by the Public Interest Advocacy Centre to review and vary Telecom Decision CRTC 2014-349.

85. In allowing a Part I proceeding to go forward, the Commission explores the possibility that the issues raised in the *prima facie* case are valid (just as the Board proceedings explores the possibility that lands will be actually be affected).

86. It is not reasonable for the Commission to allow a Part I proceeding to go forward, causing a public interest group to expend time and effort to advocate its position, and, at the end, to state that because the Commission did not agree that there are grounds for consideration, the public interest group's costs are denied.

87. Just as the Court said an eventual finding that there is no adverse affect to the land does not in itself disentitle an intervener to costs, so too, the Commission's finding, at the end of a Part I proceeding, that there are no genuine grounds for its consideration should not disentitle an applicant to costs.

88. In calling for the reversal of Telecom Order 2014-220, this Part I Application respectfully seeks to ensure that where public interest groups submit a case of subscriber grievances, the Commission's costs awards procedures enables access to its procedures so that the matters can be considered and subscribers may pursue relief.

### 4.3 Ensuring just costs awards decisions

89. Upholding the principle that costs are not to be denied on the grounds that a tribunal did not agree with the merits of an applicant's submissions also serves to ensure that costs awards decision are just.

90. With every decision, there is the possibility that the tribunal's determination in the substantive matter could be based on erroneous findings.

91. DiversityCanada/NPF submit that this is indeed the case with Telecom Order 2014-220.

92. In the Appendix to this Part I Application, DiversityCanada/NPF outlined the grounds on which we submit that Telecom Decision 2014-101 was based on erroneous findings. That decision which prompted the review and vary application for which costs were sought, is under appeal; in pursuing this course, DiversityCanada/NPF respectfully submit that that decision will be overturned.
93. It would be unjust for an applicant, which otherwise qualified for an award, to be denied its costs through no fault of its own, but based solely on a tribunal's error in the substantive matter.

94. Again, DiversityCanada/NPF respectfully submit that this is the case with Telecom Order 2014-220.

95. DiversityCanada/NPF submit that ensuring that the Commission's costs awards decisions are just is a policy consideration which makes it imperative that the Commission reverse Telecom Order 2014-220.

96. On a final note, while DiversityCanada/NPF believe that this is a ground upon which the Decision should be reversed and considered it important to place this submission on the public record as part of the Part I Application, DiversityCanada/NPF, nevertheless, neither intend nor expect that the Commission would make a determination on this ground.

97. DiversityCanada/NPF highlight that DiversityCanada/NPF's Petition on the subject was published in the Canada Gazette on August 09, 2014 and, therefore, this ground is under review by the Governor in Council, under section 12 of the Telecommunications Act.

5.0 Conclusion

98. DiversityCanada/NPF submit that all the criteria for an award of costs have been satisfied in the proceeding that led to Telecom Decision 2014-101.

99. As the Commission has already found, DiversityCanada/NPF represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding.

100. Furthermore, DiversityCanada/NPF submit that it assisted the Commission in developing a better understanding of the matters under consideration. DiversityCanada/NPF filed some 50 pages of submissions which were rigorously researched, and which were focused and structured. DiversityCanada/NPF acted responsibly throughout the proceeding. DiversityCanada/NPF submit that the costs claim represents costs necessarily and reasonably expended to enable the organizations to participate in the proceeding.

101. For all of the above reasons, DiversityCanada/NPF submit that the Commission should vary its decision so as to allow DiversityCanada/NPF's costs in the proceeding that led to Telecom Decision 2014-101.

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