December 21, 2015

Janice Charette
Clerk of the Privy Council and Secretary to the Cabinet
Langevin Block
80 Wellington Street
Ottawa, Ontario K1A 0A3

Dear Ms. Charette,


1. The Canadian Wireless Telecommunications Association is the authority on wireless issues, developments and trends in Canada. It represents wireless service providers as well as companies that develop and produce products and services for the industry, including handset and equipment manufacturers, content and application creators and business-to-business service providers. CWTA is filing these comments on behalf of its members in response to the above-noted petition to the Governor in Council filed by DiversityCanada Foundation (DCF) and the National Pensioners Federation (NPF, together DCF/NPF).

2. This petition, while it relates directly to two CRTC proceedings that were initiated by DCF/NPF, is part of a longer chain of proceedings dating back to the release of the CRTC’s Wireless Code in June 2013. This chain includes five previous applications from DCF/NPF (four to the Commission and one to the Governor in Council), all of which were denied. CWTA was a party in all of these proceedings.

3. In each case where the Commission considered an application from DCF/NPF, it delivered clear, reasonable and evidenced-based determinations with supporting reasons. In particular, the Commission has clearly treated the cost applications on their merits in finding that they did not contribute to a better understanding of the matters that were considered, and therefore DCF/NPF did not meet the eligibility criteria for cost award.

4. DCF/NPF, however, have consistently and increasingly forwarded arguments that ignore the Commission’s findings and its reasons, and either misstate or distort the evidence on record. The same is true in the case of this petition. Rather than providing substantive evidence or argument for the Governor in Council to consider, DCF/NPF have again misinterpreted the record of proceeding to draw false conclusions that support their case.

5. Accordingly, CWTA respectfully submits that DCF/NPF’s petition should be rejected by the Governor in Council. We are pleased to further clarify our position below.
Background

6. As mentioned above, this petition is part of a chain of related proceedings that began with the CRTC’s Wireless Code Proceeding. This chain is summarized for clarity as follows:

- **Application – September 3, 2013**: DCF, on behalf of itself and NPF, filed a Part 1 Application with the CRTC to review and vary Section J of The Wireless Code;
- **Application – December 2, 2013**: DCF, on behalf of itself and NPF, applied to the CRTC for an award of costs with respect to its participation in the proceeding related to its application to review and vary Section J of The Wireless Code;
- **Decision – March 5, 2014**: the CRTC issued Telecom Decision 2014-101, in which it **denied** DCF’s request to review and vary The Wireless Code;
- **Decision – May 8, 2014**: the CRTC issued Telecom Order CRTC 2014-220, in which it **denied** the application by DCF for costs with respect to its participation in the review and vary proceeding;
- **Application – June 2, 2014**: DCF/NPF petitioned the Governor in Council to vary TD 2014-101;
- **Application – August 1, 2014**: DCF/NPF filed a Part 1 Application with the CRTC to review and vary TO 2014-220;
- **Application – October 14, 2014**: DCF/NPF applied to the CRTC for an award of costs with respect to its participation in the proceeding related to its application to review and vary TO 2014-220;
- **Decision – February 26, 2015**: The Governor in Council **declined** to vary or rescind TD 2014-101, or to refer it back to the Commission for reconsideration.
- **Decision – April 9, 2015**: the CRTC issued TD 2015-131, in which it **denied** the application from DCF/NPF to review and vary TO 2014-220; and
- **Decision – April 9, 2015**: the CRTC issued TO CRTC 2015-132, in which it **denied** the application by DCF/NPF for costs with respect to its participation in the review and vary proceeding.

7. These applications and decisions provide a record, now more than two years long, of the meritless arguments forwarded by DCF/NPF that have served no purpose other than to needlessly occupy the Commission’s time and resources. The Commission has sufficiently summarized the nature of these proceedings through its decisions. It first identified DCF/NPF’s preferred line of argument when it noted in TO 2014-220 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.”

8. Two years later, in denying DCF/NPF’s application to review and vary TO 2014-220, the Commission further considered that “the erroneous findings of fact alleged by DiversityCanada are based to a large extent on its misinterpretation of the Wireless Code decision.” And finally, in denying DCF/NPF’s cost application in TO 2015-132, the Commission considered “that DiversityCanada’s initiation of multiple proceedings that essentially relate to the same issues has resulted in an unreasonable use of Commission resources.”

9. The contents of this most recent petition continue the same pattern. In the petition DCF/NPF allege that the Commission erred because it did not accept their position. The arguments are based on a misrepresentation of the Commission’s rulings and rationale. And the process further occupies government and industry resources.

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1 Telecom Order CRTC 2014-220, paragraph 17.
2 Telecom Decision CRTC 2015-131, paragraph 19.
3 Telecom Order CRTC 2015-132, paragraph 25.
DCF/NPF’s petition is based on a false interpretation of the Commission’s rulings

10. DCF/NPF’s petition is based primarily on its contention that the Commission has denied its cost applications solely because it did not find in favour of DCF/NPF in the related proceedings. DCF/NPF note in their petition that “the CRTC based its decision on a measure of perceived success of the Petitioners’ submissions.” This contention is untrue, and is based on a misinterpretation, or misrepresentation, of the Commission’s rationale for denying the cost applications.

11. The Commission was clear in its decision that costs were denied because DCF/NPF’s application to review and vary The Wireless Code “did not provide any argument of merit to support its position....[and therefore] did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration.” That is, each application was assessed on its merits. DCF/NPF provide no evidence to the contrary.

12. In fact, the Commission provided clear reasons why DCF/NPF’s evidence did not help contribute to a better understanding of the issues when it reasoned in TO 2015-132 that it “considered the legal precedents that DiversityCanada cited in the review and vary proceeding and dismissed them since they were based on a separate legislative framework.”

13. Cost applications are directly linked to the applicant’s contributions to the proceeding for which they are applying for costs. If an application or intervention clearly raises pertinent issues worth considering, an award of costs will be self-evident. DCF/NPF further misrepresent the Commission’s rationale by stating in Section 6 of their petition that the CRTC process requires a cost applicant “in its costs application to re-litigate the substantive matter and convince the CRTC of the merits of the arguments and evidence presented in the original procedure.” In actuality, DCF/NPF themselves have attempted to re-litigate their cost application by frivolously applying for a review and vary of the decision denying their original cost application.

14. While the Commission may have denied DCF/NPF’s review and vary application and cost application for the same reason – namely, that the review and vary application did not raise any genuine issues for the Commission to consider – that does not automatically mean that costs were denied because the review and vary was unsuccessful. If that logic was sound, the only alternative approach would be for the Commission to automatically award costs to the parties that raise any unsuccessful application.

15. Of course, the Commission is obligated under TRP 2010-963 to assess each costs application on its own merits – rather than on the success of the party’s arguments – to ensure there is not a chilling effect on those who wish raise issues of public interest. However, while denying costs to all unsuccessful applications could have a chilling effect, awarding costs to all applicants regardless of substance would encourage frivolous applications that present no new evidence and do not contribute to a better understanding of regulatory matters.

Conclusion

16. It is clear from TD 2015-131 and TO 2015-132, as well as the other past CRTC decisions leading up to these proceedings, that DCF/NPF’s applications were both reviewed on their merits and denied for their lack

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6 Paragraph 139.
7 2015-131, paragraph 17.
8 2015-132, paragraph 24.
9 Paragraph 157.
thereof. DCF/NPF’s current petition continues a well-established pattern, recognized by the Commission, of misinterpreting and distorting the evidence and the Commission’s findings. It in no way identifies or establishes fault or error on behalf of the Commission.

17. CWTA therefore respectfully submits that DCF/NPF’s petition should be rejected by the Governor in Council. We appreciate the opportunity to provide these comments.

Yours truly,

Kurt Eby
Director, Regulatory Affairs and Government Relations

cc:
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