Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2016-170

PDF version

Ottawa, 5 May 2016

File number: 8665-T66-201507667

TELUS Communications Company – Prohibition of 30-day cancellation policies – Application regarding liquidated damages

The Commission ***denies*** *a request by TELUS Communications Company (TCC) to direct Shaw Communications Inc. to cease requiring the payment of liquidated damages when small business customers cancel retail local voice or Internet services before service installation work has begun. Since this issue may affect all customers of all service providers, TCC's focus on a single service provider makes the scope of its application too narrow.*

The Commission reminds all service providers, however, that liquidated damages should be reasonable and commensurate with the actual loss incurred, and that clear contract terms are essential to empowering consumers to make informed decisions about their services.

Background

1. In Telecom Regulatory Policy 2013-271, the Commission set out the Wireless Code, a mandatory code of conduct for providers of retail mobile wireless voice and data services (wireless services). In the Wireless Code, the Commission prohibited policies that require consumers to provide at least 30 days' notice to their wireless service providers prior to cancelling postpaid wireless services.[1] Consumers can thus cancel their service at any time by notifying their wireless service provider. Further, cancellation takes effect on the date on which the wireless service provider receives the notice.

2. In Broadcasting and Telecom Regulatory Policy 2014-576 (the 30-day cancellation policy), the Commission, in response to an application by Bragg Communications Incorporated, operating as Eastlink, similarly prohibited 30-day cancellation policies for retail local voice services (including voice over Internet Protocol [VoIP] services), Internet services, and broadcasting distribution services (i.e., cable and satellite television services). Customers of such services can thus cancel their contracts at any time by notifying their service provider, with cancellation taking effect on the day that the service provider receives notice of the cancellation.

[1] In the Wireless Code, the Commission defined postpaid services as wireless services that are paid for after use, usually upon receipt of a monthly bill, whereas it defined prepaid services as wireless services that are purchased in advance of use (for example, prepaid cards and pay-as-you-go services). It did not consider the effective cancellation date to be a significant issue for prepaid services, since customers for those services must actively choose to renew their services and can cancel them at any time.

Canada

Application

3. The Commission received an application from TELUS Communications Company (TCC), dated 24 July 2015, in which TCC requested that the Commission direct Shaw Communications Inc. (Shaw) to cease requiring the payment of liquidated damages[2] when small business customers cancel retail local voice and Internet services before service installation work has begun.

4. According to TCC, Shaw was advising small business customers that they would be required to pay a pre-determined amount of money in the form of liquidated damages should they cancel a service, even though the provision of that service, and in some cases the related service installation work, had not yet begun. TCC submitted that this situation has occurred frequently enough to warrant the present application.

5. TCC stated that in cases where service installation work has not begun, Shaw has yet to incur any costs associated with the installation and actual provision of service, including equipment costs. TCC argued that requiring the payment of liquidated damages equates to a penalty on the consumer since the charges are not reflective of costs actually incurred. It further argued that costs relating to the customer acquisition process are basic costs of doing business and should not be imposed on customers.

6. TCC submitted that the practice of requiring the payment of liquidated damages before service installation work has begun creates a barrier to switching service providers and hampers consumer choice. As an example, it noted that on several occasions, small business customers were not able to take advantage of retention offers it had made to them. Those customers expressed the view that the liquidated damages that Shaw could assess to cancel their contracts prior to installation were a barrier to taking advantage of the competitive offer. TCC submitted the main objective of the 30-day cancellation policy is to make it easier for consumers to take advantage of competitive offers, including counter-offers. It argued that the practice of requiring the payment of liquidated damages before service installation work has begun therefore defeats the purpose of that policy and removes any advantage that consumers may have gained from the application of that policy. In TCC's view, a requirement to pay liquidated damages under such circumstances could be even more detrimental to market dynamism than a requirement to provide 30 days' cancellation notice.

7. TCC noted that it was not claiming that Shaw's practices are in non-compliance with the 30-day cancellation policy, but that such practices run counter to the spirit of that policy. It concluded by stating that approval of its application would provide continued predictability regarding the Commission's policy objective of promoting end-user choice, by sending consistent signals to all service providers.

---

[2] "Liquidated damages" refers to the monetary amount that a party to a contract agrees to pay the other party should the contract be breached, and is based on an estimate of actual damages that would most likely ensue from the breach.

8. The Commission received interventions regarding TCC's application from the Canadian Network Operators Consortium Inc. (CNOC), the Consumers Association of Canada and the Public Interest Advocacy Centre (collectively, CAC/PIAC), and Shaw. TCC replied to the interventions. The public record of this proceeding, which closed on 8 September 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Should the Commission direct Shaw to cease requiring the payment of liquidated damages when small business customers cancel retail local voice and Internet services before installation work has begun?

Positions of parties

9. CNOC agreed with TCC that the practice of requiring the payment of liquidated damages before service installation work has begun should be prohibited. In its view, liquidated damages must be fair estimates of incurred costs, and should not include customer acquisition costs. CNOC added that clauses such as those relating to liquidated damages hamper the dynamism of the marketplace and create unnecessary barriers to switching. It considered that such clauses would become commonplace should the requested relief not be granted.

10. CAC/PIAC submitted that imposing punitive charges (such as excessive cancellation charges that bear no relationship with the costs associated with the cancellation of a service) is contrary to subsection 27(2) of the *Telecommunications Act*. They argued that such practices are not in the public interest as they are inconsistent with the social and economic requirements of users of telecommunications services. CAC/PIAC added that attempting to devise mechanisms that ensure cancellation charges more accurately reflect actual costs incurred by a "new" provider could result in potentially more complex, difficult-to-understand and opaque contractual provisions. They proposed instead that consumers should never be required to pay fees that were not expressly agreed upon at the time of the contract, and that any cancellation fees applied prior to the services being transferred to the new provider should be nominal.

11. CAC/PIAC also expressed concerns, however, over the effectiveness and efficiency of the relief proposed by TCC. They considered that TCC's request was ambiguous, lacking any specific suggestion regarding the manner in which early cancellation charges should be set in the specified circumstances. They added that TCC failed to address how any requested intervention would be consistent with the objectives of the Policy Direction.[3]

12. Shaw requested that TCC's application be dismissed. Noting that the 30-day cancellation policy does not address early termination fees or a service provider's ability to recover damages, it argued that the policy does not provide a basis for the application. Shaw explained that its standard contract for business customers has

[3] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

been misinterpreted by TCC. Shaw stated that it only requires the payment of liquidated damages once service installation work has begun, which it submitted generally occurs as soon as the contract is signed. It also noted that TCC recognized that liquidated damages are reasonable in situations where service installation work has begun.

13. In reply, TCC acknowledged that the 30-day cancellation policy does not address the matter of liquidated damages. It argued, however, that requiring the payment of liquidated damages before service installation work has begun undermines the considerations underpinning that policy. Further, TCC disagreed with Shaw as to what constitutes installation work, arguing that many of Shaw's described steps should be considered part of the customer acquisition process.

Commission's analysis and determinations

14. The record of this proceeding is insufficient to support the creation of a new policy to regulate liquidated damages clauses for retail local voice and Internet services. Further, the relief requested by TCC focuses exclusively on wording within Shaw's small business retail contracts. It would be neither appropriate, nor consistent with the Policy Direction, for the Commission to impose asymmetrically on a single service provider, for a single type of service, a regulatory requirement that may be equally applicable to the circumstances of other service providers. Consequently, the Commission **denies** TCC's application.

15. The practice of requiring the payment of liquidated damages, whether before or after service installation work has begun, does not violate the 30-day cancellation policy. Further, the practice of assessing liquidated damages is a valid business practice. The Commission reminds service providers, however, that liquidated damages should be reasonable and commensurate with the actual loss incurred, and that clear contract terms are essential to empowering consumers to make informed choices about their services.

Secretary General

Related documents

- *Prohibition of 30-day cancellation policies*, Broadcasting and Telecom Regulatory Policy CRTC 2014-576, 6 November 2014
- *The Wireless Code,* Telecom Regulatory Policy CRTC 2013-271, 3 June 2013