



## Telecom Decision CRTC 2015-338

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### **Shaw Cablesystems G.P. – Application to review and vary Telecom Order 2015-73 regarding interim rates for third-party Internet access service speeds**

*The Commission grants, in part, the relief requested by Shaw in its application to review and vary Telecom Order 2015-73. Specifically, the Commission revises the interim rate for Shaw’s Internet 30 megabits per second service. The Commission denies the remaining aspects of Shaw’s application.*

#### **Introduction**

1. In Telecom Order 2015-73, issued on 2 March 2015, the Commission approved, with changes and on an interim basis, the monthly rates for five new third-party Internet access (TPIA) service speeds being proposed by Shaw Cablesystems G.P. (Shaw).<sup>1</sup> These rates were made interim effective the date of the order.
2. Shaw filed a cost study in support of its application. However, for reasons articulated in Telecom Order 2015-73,<sup>2</sup> the Commission set the rates for Shaw’s new TPIA service speeds on an interim basis based on the rates of the company’s existing nearest lower-speed services. This rate-setting method is referred to in this decision as the “proxy approach.”

#### **Application**

3. The Commission received an application from Shaw, dated 23 March 2015, in which the company requested that the Commission review and vary Telecom Order 2015-73. Citing errors made by the Commission in setting interim rates for the proposed new TPIA service speeds, Shaw argued that there was substantial doubt as to the correctness of the Commission’s determinations in Telecom Order 2015-73.
4. Shaw alleged that, by setting interim rates based on the proxy approach, the Commission deviated from established rate-setting practice and demonstrated multiple errors of law. Further, Shaw argued that the Commission failed to (a)

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<sup>1</sup> Shaw’s application for proposed rates for its five new third-party Internet access service speeds was filed as Tariff Notice 22 on 6 January 2015. Shaw’s application was amended with the filing of Tariff Notice 22A on 19 February 2015.

<sup>2</sup> See paragraphs 12 to 19 of Telecom Order 2015-73.

consider the company's cost study and (b) provide the company with an opportunity to address any of the related deficiencies in the study referenced in Telecom Order 2015-73. As a result, Shaw claimed that it had been denied procedural fairness.

5. In addition, Shaw argued that the interim rates as approved in Telecom Order 2015-73 are not just and reasonable because they are based on the proxy approach rather than the cost information filed with its original application, and they have resulted in an anomalous rate structure where a higher-speed service has been priced below a lesser-speed offering.
6. Specifically, Shaw requested that the Commission vary Telecom Order 2015-73 by
  - substituting the interim rates approved in Telecom Order 2015-73 with the interim rates proposed by the company in its original application, which in its view were supported by Shaw's cost study;
  - making the effective date of the company's proposed interim rates 2 March 2015, i.e. the effective date set out in Telecom Order 2015-73; and
  - without limiting the other requests for relief, amend Telecom Order 2015-73 to set the interim rate for the company's new Internet 30 megabits per second (Mbps) service at the current final-approved rate for its High Speed 20 Mbps service.<sup>3</sup>
7. The Commission received interventions regarding Shaw's application from the Canadian Network Operators Consortium Inc. (CNO), Juce Communications Inc. (Juce), and Vaxination Informatique (Vaxination). The public record of this proceeding, which closed on 2 April 2015, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file number provided above.
8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it uses to assess review and vary applications that are filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to
  - an error in law or in fact;
  - a fundamental change in circumstances or facts since the decision;
  - a failure to consider a basic principle which had been raised in the original proceeding; or
  - a new principle which has arisen as a result of the decision.

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<sup>3</sup> Telecom Order 2015-73 set the interim wholesale rate for Shaw's proposed Internet 30 Mbps service at \$22.45 per month, which is the rate approved on a final basis for the company's existing Extreme Speed 25 Mbps service. The rate approved on a final basis for Shaw's existing High Speed 20 Mbps service is \$29.83.

9. The Commission has identified the following issues to be addressed in this decision:
- Did the Commission breach its duty of procedural fairness by failing to consider Shaw's costing evidence and other submissions in setting the interim rates?
  - Did the use of the proxy approach result in a denial of procedural fairness?
  - Did the use of the proxy approach result in interim rates that are not just and reasonable and would lead to irreparable harm?
  - Did the Commission misapply the proxy approach when setting the interim rate for the proposed Internet 30 Mbps service on the basis of the rate for the existing Extreme Speed 25 Mbps service?

**Did the Commission breach its duty of procedural fairness by failing to consider Shaw's costing evidence and other submissions in setting the interim rates?**

10. Shaw submitted that the cost study used to support its tariff application provides rigorous and irrefutable proof that the costs for wholesale high-speed access (HSA) services have increased very substantially owing to rapid growth in demand. The cost study meets all Commission criteria for an acceptable cost study. As a result, the Commission should not have disregarded the cost study when it set interim rates for the services in question.
11. Shaw also submitted that Telecom Order 2015-73 provided no indication that the additional cost information provided in confidence by the company two weeks prior to the issuance of the order was in fact considered by the Commission in reaching its decisions. Shaw argued that issuing Telecom Order 2015-73 without having considered all submitted information has denied the company its opportunity to be heard.
12. CNOc submitted that Shaw has confused the process required for the Commission to arrive at an interim rate determination in a proceeding with the process required to arrive at a final rate determination. The objective of the interim rate process is to give immediate effect to the Commission's speed-matching policy<sup>4</sup> while recognizing that the record of the proceeding is not complete. Any material prejudice arising from interim rates can be redressed once the record of the proceeding is complete. In CNOc's submission, this is precisely the circumstance envisioned by subsection 61(2) of the Act.
13. In reply, Shaw submitted that the requirement for procedural fairness applies equally to the interim and final rate-setting processes. As such, the Commission's failure to identify any specific deficiencies in Shaw's cost study that made it unsuitable for

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<sup>4</sup> See paragraph 12 of Telecom Order 2015-73.

determining interim rates, and its failure to provide Shaw the opportunity to address any such deficiencies, was procedurally unfair.

### **Commission's analysis and determinations**

14. In Telecom Order 2015-73, the Commission acknowledged the cost study provided by Shaw in its tariff application, and explained the reasons why the Commission considered the proxy approach to be a more appropriate basis for setting interim rates under the circumstances of that case. The mere fact that the Commission did not approve the rates as proposed in the cost study does not in and of itself constitute a disregard for the evidence submitted by the company. As indicated in Telecom Order 2015-73, the Commission considered the cost study but found that it contained an insufficient level of detail to satisfy it that the rates proposed therein were just and reasonable.
15. A cost study constitutes information intended to justify the basis upon which a party has calculated its costs for providing a proposed service. As with all evidence, the Commission must apply its expertise to determine whether the cost study, including its underlying assumptions, is a proper basis to support the proposed rates. In this instance, largely because of the unusual magnitude of the proposed rate increases, the Commission was unable to conclude that the cost study provided a reliable basis for the proposed rates without further analysis. Interim rates were therefore established on an alternative basis in order to facilitate timely competitor access to the proposed services.
16. Further, the supplementary information provided in response to Commission staff's letter was received after the close of record date of the proceeding. As a result, neither the Commission nor any interested parties would have had sufficient time or opportunity to review and comment prior to the determination of interim rates. However, the Commission will consider this information prior to the setting of final rates.
17. Based on the above, the Commission is not persuaded by Shaw's argument that it was in breach of its duty of procedural fairness by failing to consider Shaw's cost study and other submissions in setting the interim rates.

### **Did the use of the proxy approach result in a denial of procedural fairness?**

18. Shaw submitted that the Commission's use of final rates approved for existing service speeds to establish the interim rates for the proposed new service speeds was procedurally irregular and unfair. Having filed all of the information normally required by a cost study, past Commission practice has been to use the cost study as the basis for interim rates. In Shaw's view, the Commission's failure to approve the rates as proposed in the company's cost study subjects Shaw to differential treatment and gives rise to irreparable harm.
19. CNO and Vaxination submitted that the Commission's previous reliance on approved rates for existing service speeds to establish interim rates when an

incumbent has not provided a cost study does not make it wrong to rely on such rates when a cost study has been provided, particularly when the incumbent has made a request for the approval of significant rate changes before the Commission can complete its examination of the application. Further, CNOC and Juce submitted that the Commission would be unduly fettering its discretion in setting interim rates if it were to restrict itself to setting interim rates on the basis of a cost study as submitted, particularly a cost study that remains to be tested for its validity.

20. CNOC and Vaxination submitted that setting interim rates for the new service speeds on the basis of approved rates for existing speeds was appropriate in the circumstances. The application of this principle allows for a lower regulatory burden, and faster implementation of speed improvements to the benefit of incumbents, competitors, and consumers.

### **Commission's analysis and determinations**

21. The Commission has endorsed the use of the proxy approach in situations where there was uncertainty in determining the actual cost of providing the proposed service. Such situations typically arise when a cost study has not been filed. However, the Commission has never indicated that the proxy approach will only be employed where the uncertainty arises from the lack of a cost study, nor has the Commission ever indicated that the rates proposed by an incumbent will automatically be approved when accompanied by a cost study. Indeed, if this were true, the Commission would be fettering its discretion, which it cannot do in law.
22. In the proceeding that resulted in Telecom Order 2015-73, interveners argued in favour of the proxy approach, and Shaw exercised its opportunity to make submissions as to why the proxy approach should not be applied. Further, the rates approved in Telecom Order 2015-73 are interim, with final rates to be established on the basis of all relevant information, including Shaw's cost study.
23. The use of the proxy approach is not inconsistent with the Commission's policy of setting rates based on costs. The proxy approach determines interim rates according to cost information previously submitted and validated for the nearest lower-speed existing service. Rates for existing services have been reviewed and approved based on the evidence provided by the service provider. An interim rate set according to the proxy approach therefore takes into account costs that may reasonably be expected to reflect those associated with a similar service.
24. The determination of just and reasonable rates typically requires the careful analysis of information submitted in an applicant's cost study. Where additional time or process is required for the Commission to assess the validity of a submitted cost study, a potentially lengthy clarification process could result in undue delay to a competitor's ability to access the proposed services (which the incumbent will likely already be offering at the retail level). The use of the proxy approach is an interim measure intended to facilitate competitor access to an incumbent's new services at rates that have already been subject to Commission review. Where the Commission is

unable to determine the validity of a cost study as submitted, the approved rates for similar services may provide a more reliable indication of what is just and reasonable for the proposed interim rates.

25. Based on the above, the use of the proxy approach to set interim rates for the proposed services did not result in a denial of procedural fairness.

**Did the use of the proxy approach result in interim rates that are not just and reasonable and would lead to irreparable harm?**

26. Shaw submitted that the use of existing approved rates for wholesale HSA services as the basis for setting interim rates for proposed new wholesale HSA services results in rates that are not just and reasonable. Such rates do not enable Shaw to recover the costs incurred to provide the services, as demonstrated in the cost study filed with its application.
27. In addition, Shaw submitted that the interim rates approved in Telecom Order 2015-73 confer marketing advantages to competitors that use these wholesale services to provide retail Internet services. These advantages cannot be overcome by Shaw in the marketing of its own retail Internet services, nor can they be overcome if the final rates for these services are set at a higher level, and applied retroactively.
28. CNOC argued that Shaw's claim of irreparable harm if interim rates for the new service speeds are based on rates for existing service speeds is conjecture that is unsupported by the evidence.

**Commission's analysis and determinations**

29. As noted above, the cost study filed by Shaw raised questions that require investigation before a determination can be made regarding the reliability of the information contained within. While that investigation is ongoing, the Commission is unable to conclude that the cost study provides a reliable basis for determining just and reasonable rates.
30. Approved rates for existing service speeds have been determined to be just and reasonable on the basis of prior investigations of the costs to provide those services, and can provide a more reliable basis for setting rates for new service speeds, at least until the questions regarding the cost study have been completely researched.
31. The Commission is not persuaded that Shaw would suffer irreparable harm by setting interim rates based on the proxy approach. Shaw provided no evidence to substantiate its claim. Further, given Shaw's prominence in the retail broadband market in its territory, it would appear unlikely that the company would suffer permanent market loss to competitors, let alone financial loss, as a result of the interim rates having been set based on the proxy approach. Should the cost study submitted by Shaw in fact be found to demonstrate the validity of significantly higher costs in providing the proposed services, such cost increases will be reflected in the rates approved on a final basis. Further, by making the final rates effective back to the date they were

approved on an interim basis, to the extent that the interim rates are lower than the final rates, Shaw will be entitled to the difference. Conversely, the competitors will be required to make up the difference in rates.

32. Based on the above, the Commission finds that Shaw has failed to demonstrate that approval of rates on the basis of the proxy approach has resulted in rates that are not just and reasonable and would lead to irreparable harm.

**Did the Commission misapply the proxy approach when setting the interim rate for the proposed Internet 30 Mbps service on the basis of the rate for the existing Extreme Speed 25 Mbps service?**

33. Shaw submitted that the Commission's decision in Telecom Order 2015-73 to set the interim rate for its proposed Internet 30 Mbps service on the basis of the rate for the existing Extreme Speed 25 Mbps service was an error, because the rate for the existing service is based upon the costs incurred to provide a 15 Mbps service, not a 30 Mbps service. According to Shaw, while the 15 Mbps service that was originally used to set this rate was upgraded to a 25 Mbps service at no change in rate for Shaw's retail Internet service customers, that does not mean that the costs to provide the service at the higher speed are the same.
34. Shaw further submitted that the use of the Extreme Speed 25 Mbps service rate as a benchmark for the Internet 30 Mbps service demonstrates how the use of existing service rates as the basis for interim rates for new speeds can distort the market for these services, as it results in an obviously inappropriate outcome, i.e., a rate for the Internet 30 Mbps service that is 25% lower than the interim rate approved for the High Speed 20 Mbps service. Shaw claimed that the Extreme Speed 25 Mbps service is not offered to new customers in Shaw's retail market, and only remains in the wholesale tariff because there are existing customers for the wholesale service. Further, Shaw noted that the Commission acknowledged that the actual cost of providing Shaw's Extreme Speed 25 Mbps service was unclear when it approved the final rate for Shaw's High Speed 20 Mbps service in Telecom Order 2012-298.
35. Shaw submitted that if the Commission were, in this case, to use approved rates for existing service speeds as a benchmark for determining interim rates, the appropriate rate to have used is the rate for its High Speed 20 Mbps service (\$29.83), not the rate for the Extreme Speed 25 Mbps service (\$22.45).
36. CNOC and Vaxination argued that the rate relationships created by the Commission in Telecom Order 2015-73 are the product of the particular circumstances surrounding the tariffing of Shaw's wholesale HSA services, not an error in the application of the Commission's approach to setting interim rates for new service speeds on the basis of the rates for existing services. Vaxination submitted that the anomalous relationship between the rate for the High Speed 20 Mbps service and the rate for the Extreme Speed 25 Mbps service has been there for some time and Shaw has taken no action to address the anomaly.

37. In reply, Shaw submitted that setting the interim rate for the Internet 30 Mbps service on the basis of the Extreme Speed 25 Mbps service means the rate for the Internet 30 Mbps service does not reflect the actual costs of providing the service, particularly in an environment of dramatic growth in Internet traffic.

### **Commission's analysis and determinations**

38. Shaw's voluntary decision to upgrade the 15 Mbps service provided to its retail and wholesale customers to 25 Mbps with no change in rates suggests that the additional costs incurred by Shaw to upgrade these service speeds by more than 60% were not sufficient to cause the company to believe that its costs were not being recovered.
39. If the company believed that the rates applicable to the upgraded speeds were not recovering their associated costs, Shaw had several opportunities to address the issue, beginning with the proceeding that led to Telecom Regulatory Policy 2011-703, or in subsequent tariff applications. Shaw failed to do so.
40. In the proceeding that led to Telecom Order 2012-298, Shaw had indicated that one reason it had not addressed issues related to the costs for the Extreme Speed 25 Mbps service was its intention to destandardize the service. At the close of record for Shaw's present application (2 April 2015), Shaw had not filed such an application.<sup>5</sup>
41. In addition, destandardization of the Extreme Speed 25 Mbps service would not address the problem that the rate approved on a final basis for Shaw's High Speed 20 Mbps service (\$29.83) is significantly higher than the rate approved on a final basis for Shaw's Extreme Speed 25 Mbps service (\$22.45). Both of these rates were approved on the basis of cost evidence provided by Shaw, though the cost evidence used to support the High Speed 20 Mbps service is more recent than the evidence used to support the company's Extreme Speed 25 Mbps service.
42. Because the cost information used to support Shaw's High Speed 20 Mbps service rate of \$29.83 is more recent than the cost information used to establish Shaw's Extreme Speed 25 Mbps service rate, and because the High Speed 20 Mbps and the Internet 30 Mbps services could be considered similar or comparable, the Commission is persuaded that the High Speed 20 Mbps service rate is a more reliable proxy for establishing an interim rate for Shaw's Internet 30 Mbps service. Accordingly, the Commission finds that there is substantial doubt as to the correctness of the Commission's determination in Telecom Order 2015-73 with respect to the interim rate for the Internet 30 Mbps service.
43. In light of the above, the Commission **revises** the interim rate for Shaw's Internet 30 Mbps service approved in Telecom Order 2015-73 from \$22.45 (the rate for the Extreme Speed 25 Mbps service) to \$29.83 (the rate approved for the High Speed 20 Mbps service), effective the date of Telecom Order 2015-73.

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<sup>5</sup> An application to destandardize Shaw's Extreme Speed 25 Mbps service was subsequently filed by the company on 4 May 2015 (Tariff Notice 24).

44. Accordingly, the Commission **denies** Shaw's application and finds that there is no substantial doubt as to the correctness of Telecom Order 2015-73, except with respect to the interim rate for the Internet 30 Mbps service as discussed above.

Secretary General

### **Related documents**

- *Shaw Cablesystems G.P. – Introduction of five new third-party Internet access service speeds*, Telecom Order CRTC 2015-73, 2 March 2015
- *Shaw Cablesystems G.P. – Third party Internet access service*, Telecom Order CRTC 2012-298, 17 May 2012
- *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011, as amended by Telecom Regulatory Policy CRTC 2011-703-1, 22 December 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011