

**BEFORE THE CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY SHAW  
CABLESYSTEMS G.P. TO REVIEW AND VARY TELECOM  
ORDER CRTC 2015-73 – INTRODUCTION OF FIVE NEW  
THIRD-PARTY INTERNET ACCESS SERVICE SPEEDS**

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**REPLY OF  
SHAW CABLESYSTEMS G.P.**

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**2 April 2015**

## **Introduction**

1. Pursuant to section 27 of the *CRTC Rules of Practice and Procedure* and in accordance with the Commission's letter dated 9 March 2015, Shaw Cablesystems G.P. ("Shaw") herein provides its reply comments to interveners in Shaw's application (the "Application") to review and vary Telecom Order CRTC 2015-73,<sup>1</sup> *Shaw Cablesystems G.P. – Introduction of five new third-party Internet access service speeds* (the "Order"), which Shaw filed pursuant to section 62 of the *Telecommunications Act* (the "Act") and section 22 of the *CRTC Rules of Practice and Procedure*.
2. Shaw is in receipt of interventions by Canadian Network Operators Consortium Inc. ("CNO"), Juce Communications Inc. ("Juce") and Vaxination Informatique ("Vaxination") (collectively, the "Intervenors"). In accordance with the Commission's 9 March letter, Shaw has served copies of its reply on the Intervenors.
3. In its Application, Shaw identified the following errors of fact and law in the Order:
  - By disregarding rigorous costing evidence in favour of adopting rates for lesser services, the determinations in the Order failed to consider the fundamental principle that rates (including interim rates) must be set to permit cost recovery. This also resulted in rates that are not just and reasonable, in contravention of the Act.
  - The Commission misapplied the proxy approach to the Internet 30 service by incorrectly basing the interim rate on a service that was tariffed and costed as a 15 Mbps service, rather than the correct next lower service speed.
  - The Commission provided no explanation as to why or which elements of the Shaw cost study were insufficient, denying Shaw procedural fairness. Shaw was subjected to an additional, yet unarticulated evidentiary burden that it could not meet. If there were concerns that Shaw's filings did not meet the Commission's specified requirements for cost studies (which, as noted in the Application and in this reply, was not the case), the Commission should have provided Shaw with the opportunity to correct the record.
4. Having reviewed the submissions of the Intervenors, Shaw submits that they do not refute the grounds for the relief requested in the Application.

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<sup>1</sup> Shaw Cablesystems G.P – Review and Vary Telecom Order CRTC 2015-73 – *Introduction of Five New Third-Party Internet Access Service Speeds*, 23 March 2015.

5. Failure by Shaw to address any specific request, position or argument of an Intervener should not be interpreted as agreement with such request, position or argument.

**Shaw filed detailed evidence that must be taken into account in determining interim rates**

6. In its intervention, CNOC submits that Shaw's Application does not meet the criteria for review and variance. As the key premise for its arguments, CNOC mischaracterizes Shaw's cost study filed in Tariff Notice 22 ("TN 22") as perfunctory,<sup>2</sup> partial<sup>3</sup> and lacking in sufficient information to the point where it was "tantamount to not having filed one at all."<sup>4</sup>
7. These descriptions of Shaw's cost study are unreasonable and do not stand up to scrutiny of the facts. As noted in Shaw's Application, the cost study filed with TN 22 conformed fully to the costing determinations in Telecom Regulatory Policy 2011-703, as well as the "Detailed Cost Information Requirements" established for inclusion in the regulatory economic study report filed by TPIA incumbents in support of their wholesale service tariff applications.<sup>5</sup>
8. The cost information filed by Shaw met all the applicable requirements:<sup>6</sup>
  - it identified and described the major capital items, including the name of the manufacturer and the model/part numbers, and, for each major component, it identified sub-components, quantities, supplier price information, capacity driver, capacity and unit cost per capacity;<sup>7</sup>
  - it provided the capital unit cost and associated incremental cost driver demand forecast used to estimate the capital cash flow, associated PWAC and \$ per billing unit, as well as methodologies and assumptions, with supporting rationale, used to estimate incremental cost driver demand forecasts;<sup>8</sup>
  - it provided the PWAC and \$ per billing unit that were derived using Structure/Technology cost factors;<sup>9</sup> and

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<sup>2</sup> See intervention filed by CNOC, dated 30 March 2015, paragraph 8 [*CNOC Intervention*].

<sup>3</sup> CNOC Intervention, paragraph 26.

<sup>4</sup> CNOC Intervention, paragraph 16. See also CNOC Intervention, paragraph 10.

<sup>5</sup> See Commission letter to incumbent local exchange carriers and cable carriers dated 12 July 2013 (as amended by letter dated 13 September 2013). See also Shaw's Application, paragraph 24.

<sup>6</sup> The requirements that follow apply for each cost category equal to or greater than 20 percent of the total service cost and cost categories classified as "Other" with greater than 10 percent of the total service cost.

<sup>7</sup> Section A1 of Table 6b, Shaw Costing Study supplemented by response to Shaw(CRTC)3Feb15-2a).

<sup>8</sup> Section A of Table 6b and Page 12 of Shaw's Costing Study supplemented by response to Shaw(CRTC)3Feb15-2b) and c) as well as Shaw(CRTC)3Feb15-1 page 16-17.

<sup>9</sup> Section D, Table 6b, and Page 11 of Shaw Costing Study.

- it provided life estimates for each asset class used, capital increase factors (“CIFs”), productivity improvement factors (“PIFs”), retrospective CIFs and PIFs used to restate costs to the first year of the study period and Structure/Technology factors.<sup>10</sup>
9. As Shaw explained in its Application, the cost study filed with TN 22 was consistent in scope and detail with all cost studies filed by other carriers in recent proceedings. There have been several recent wholesale services tariff filings for which the Commission approved interim rates based on the cost study provided.<sup>11</sup> Shaw has reviewed cost studies filed for similar wholesale services within the last three years,<sup>12</sup> which the Commission found to be sufficient to set interim rates. Compared to those cases, the cost study filed with TN 22 provides the same or more detailed information.
10. The Order did not identify any specific informational gap in the TN 22 cost study, as compared to the costing evidence filed by other carriers that have had interim rates approved on the basis of costing evidence.

#### **The Application does not depend on “slavish” adherence to precedent**

11. Based on a false premise regarding the rigour of Shaw’s cost study, CNOC argues that in “focusing very narrowly on the distinction between having filed and not filed a [cost] study, Shaw is merely appealing, formalistically, to precedent.”<sup>13</sup> In particular, CNOC asserts that Shaw is “pointing to the 2012 and 2013 decisions [with respect to the treatment of cost studies] as binding precedent,” which would inappropriately fetter the Commission’s jurisdiction.<sup>14</sup>
12. CNOC has not accurately described the grounds for Shaw’s Application. Shaw is not suggesting that the Commission must fetter its discretion and blindly approve interim rates just because a costing study has been filed. Shaw agrees with CNOC that “the mere

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<sup>10</sup> Sections C, D and E, Table 6c, Shaw Costing Study.

<sup>11</sup> Shaw’s Application, paragraph 26.

<sup>12</sup> Cogeco TN 50 – Introduction of new service speeds, 25 February 2015; Cogeco TN 47 – Revised monthly capacity rate, 20 June 2014; Bell Canada TN 7433 & Bell Aliant TN 485 – Introduction of new AHSSPI, 27 May 2014; MTS TN 757 – Revised rates for legacy services, 30 April 2014; Rogers TN 36 – Introduction of four new service speeds, 10 April 2014; Rogers TN 34 – Introduction of new service speed; 4 December 2013; Telus TN 457 – Revised NNI rates, 30 April 2013; Bell Canada TN 7386 & Bell Aliant Atlantic TN 449 & Bell Aliant Central TN 440 – Revised AHSSPI rates, 12 April 2013; and Telus TN 445 – Introduction of two new service speeds, 26 September 2012.

<sup>13</sup> CNOC Intervention, paragraph 9.

<sup>14</sup> CNOC Intervention, paragraph 16, which refers to *Rogers Communications Partnership – Introduction of four new wholesale Third Party Internet Access service speeds*, Telecom Order CRTC 2012-706, 21 December 2012; *Canadian Network Operators Consortium Inc. - Application requesting enforcement of matching speed requirements with respect to third-party Internet access services provided by Rogers Communications Partnership*, Telecom Decision CRTC 2013-36, 31 January 2013.

provision of a [costing] document does not make it a meaningful document.”<sup>15</sup> Shaw also agrees that it would be inappropriate for the Commission to approve cost-based interim rates if a tariff applicant did not adhere to the above-noted minimum requirements for costing information.

13. Contrary to CNOC’s characterization, the actual ground for Shaw’s Application is that there is no reasonable basis for finding that, nor does the Order explain how, Shaw’s cost study in TN 22 was not – to use CNOC’s phrase – a “meaningful document.” If the cost study was so deficient that the Commission had to disregard it, it is reasonable to expect that the Commission would have ceased its review and sent the cost study back to Shaw. That did not happen.
14. Instead, the proceeding progressed much like any other tariff notice process for similar services. On February 3<sup>rd</sup>, the Commission issued information requests to Shaw. However, this letter did not indicate that Shaw’s cost study contained an “insufficient level of detail.”<sup>16</sup> These information requests are part of the standard process for these tariff filings.
15. The fact that the process continued in line with other standard tariff processes in which a cost study was filed supports the reasonableness of Shaw’s conclusion that its cost study was substantially consistent with the cost studies filed by other carriers, who had their interim rates set in accordance with their proposed rates. There was no discernible basis for the Order to adopt a different interim rate approach than that afforded to other carriers who have filed comparable, or even less, evidence.<sup>17</sup>
16. This differential treatment has not been explained and results in interim rates that are not just and reasonable. Shaw is not arguing that the Commission must blindly apply the precedents of Telecom Order 2012-706 and Telecom Decision 2013-36 to TN 22. However, Shaw notes that, in addition to considering the circumstances of each case, administrative law both permits and encourages the Commission to strive for continuity, consistency and a degree of predictability.<sup>18</sup>

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<sup>15</sup> CNOC Intervention, paragraph 16.

<sup>16</sup> Telecom Commission Letter Addressed to Paul Cowling (Shaw Communications Inc.) dated 3 February 2015.

<sup>17</sup> Shaw’s Application, paragraph 26.

<sup>18</sup> *Domtar Inc. c. Québec (Commission d’appel en matière de lésions professionnelles)* [1993] 2 S.C.R. 756, where the Supreme Court of Canada noted in reference to administrative tribunals, that, “the requirement of consistency is...an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law” (paragraphs 59-60).

**The rates must permit cost recovery in order to be just and reasonable**

17. CNOC cites the Order's reference to the "significant increases in the proposed rates."<sup>19</sup> CNOC and Juce both argue that the proxy approach is warranted because Shaw's proposed rates are *prima facie* not just and reasonable.<sup>20</sup>
18. Shaw respectfully submits that, just as the Commission cannot accept Shaw's cost study without assessing compliance with Commission requirements (which TN 22 adhered to), it similarly cannot accept unsubstantiated *ex ante* assessments of interim rates. As an evidence-based decision-maker, the Commission has developed an approach to setting just and reasonable interim rates, namely to support proposed rates with costing information that complies with well-developed, widely accepted practices and explicit and transparent requirements. Shaw provided such information and enhanced it further through our responses to the Commission's information requests (the "RFI").
19. When assessed in light of the substantial evidence that Shaw has put on the record, Shaw's rates are just and reasonable. In addition, as Shaw respectfully submitted in the Application, the Commission must take into account the fact that Shaw has adopted the Flat-Rate billing model, not the Capacity-Based billing model. Although Shaw's proposed rates may be perceived as high when compared to Capacity-Based rates, they provide certainty to wholesale customers with respect to a variable cost that is a substantial driver of Shaw's overall costs. In order to recover those costs, Shaw must be assured of just and reasonable wholesale rates that take them into account.
20. Disregarding those costs (and the evidence supporting them) without any justification departs from the fundamental principle that rates must be set to permit cost recovery and the requirement in the Act that rates be just and reasonable. This prejudices Shaw's position in the market and distorts the competitiveness of the market as a whole.
21. CNOC alleges that Shaw's concern for "competitive distortions" is "unsupported by any evidence and must be rejected as a vague assertion."<sup>21</sup> On the contrary, Shaw explained and supported the specific concern in the Application. The concern arises in view of the significant time periods governing the tariff approval process. Although the rates in the Order are only interim in nature, they will likely be in place for an indeterminate, potentially lengthy, period of time. In that regard, several applications to the Commission

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<sup>19</sup> CNOC Intervention, paragraph 13.

<sup>20</sup> See intervention filed by Juce, 29 March 2015, paragraph 9 [*Juce Intervention*].

<sup>21</sup> CNOC Intervention, paragraph 17.

for final rate determinations have been outstanding for a year or more, with one application suspended in the interim approval stage for over 17 months.<sup>22</sup>

22. Shaw respectfully submits that the Order confers a significant competitive advantage on Shaw's TPIA service customers during the potentially lengthy interim period. Uneconomic rates that favour certain competitors over others distort the market. This is also contrary to the Policy Direction. Even if such rates are redressed in the context of a final rate decision, the competitive market distortions during the interim period cannot be reversed.
23. Turning to the Vaxination Intervention, it states that the proxy approach is beneficial to incumbents, interested parties and consumers because it lowers the regulatory burden and results in rapid approval of new wholesale offerings.<sup>23</sup> Shaw agrees that the proxy approach can be of benefit in specific situations, namely, when the carrier must introduce a new wholesale service but a costing study is unavailable. However, when a carrier has tabled the relevant costing evidence in compliance with the requirements and practices of the Commission, the Commission must take this costing evidence into consideration when setting interim rates. This follows from the Commission's mandate as an evidence-based decision maker.
24. If the Commission were to abandon the requirement for a tariff with an accompanying costing study upon the introduction of increased speeds, as Vaxination suggests,<sup>24</sup> it would undermine the Commission's ability to determine just and reasonable rates as required under the Act. Indeed, in Telecom Regulatory Policy 2010-632, the Commission required all rates for new wholesale services to be based on cost plus an appropriate mark-up.<sup>25</sup>
25. Vaxination also suggests that Shaw's proposed effective date for TN 22 resulted in the Commission's use of the proxy approach because the proposed date did not allow parties to fully participate in the process.<sup>26</sup> Shaw disputes this. When submitting TN 22, Shaw followed the Commission's guideline for setting effective dates for new tariffs set out in Telecom Information Bulletin CRTC 2010-455.<sup>27</sup>

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<sup>22</sup> RCP TN 36 filed 10 April 2014; RCP TN 33 filed 7 November 2013; RCP TN 34 filed 4 December 2013; Videotron G.P. TN 34 filed 30 May 2014, Cogeco TN 37 filed 21 January 2014; and Cogeco TN 42 filed 30 April 2014.

<sup>23</sup> See intervention filed by Vaxination, 30 March 2015, paragraph 8 [*Vaxination Intervention*].

<sup>24</sup> Vaxination Intervention, paragraph 9.

<sup>25</sup> Telecom Regulatory Policy CRTC 2010-632, *Wholesale high-speed access services proceeding*, 30 August 2010.

<sup>26</sup> Vaxination Intervention, paragraph 15.

<sup>27</sup> Telecom Information Bulletin CRTC 2010-455, *Approval process for tariff applications and intercarrier agreements*, 5 July 2010.

## **Procedural Fairness**

26. CNOc states that the Order was “clear that immediate regulatory action was needed to give effect to the Commission’s speed matching policy.”<sup>28</sup> Shaw does not dispute the need to give effect to the speed-matching requirement. However, as Shaw submitted in the Application,<sup>29</sup> achieving this regulatory objective should not have been at the expense of procedural fairness.
27. Shaw has not, as CNOc alleges, confused the processes for interim and final approvals.<sup>30</sup> The Application speaks to the interim rate process that culminated in the Order, including the fact that TN 22 has been treated differently from recent tariff notice filings. Shaw has no notice of the deficiencies in the TN 22 cost study that distinguish it from those filed in other tariff proceedings where proposed rates have been adopted on an interim basis. The Order’s statement that the “cost study, as filed, contains an insufficient level of detail” does not explain to Shaw the evidentiary burden it was required to meet, and allegedly failed to meet, in order to avoid the prejudicial impact of the Order. Shaw’s TN 22 filing appears to be subject to a higher evidentiary standard than other tariff processes. However, Shaw does not know what that standard is or how to meet it. Procedural fairness requires that Shaw be given a reasonable opportunity to make its case before the Commission.
28. Furthermore, as Shaw explained in the Application, there was no justification for the departure from the Commission’s established and long-standing costing methodology and interim rate setting practices. Shaw filed rigorous costing information in its TN 22 application, as supplemented by its RFI responses which were before the Commission prior to the issuance of the Order.
29. The Commission’s February 3<sup>rd</sup> letter indicated that the responses to the RFIs would be used by the Commission staff to understand the assumptions and costing methodologies used in Shaw’s costing study.<sup>31</sup> Yet, the Order does not refer to Shaw’s RFI responses or any outstanding deficiencies. Instead, the Order refers to the cost study “as filed.”
30. CNOc’s assertion that it would be “premature to reference Shaw’s RFI responses in the Order,”<sup>32</sup> does not answer Shaw’s concerns that it has not received notice of the additional evidentiary burden it is required to meet or that its cost study is being treated

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<sup>28</sup> CNOc Intervention, paragraph 22.

<sup>29</sup> Shaw’s Application, paragraph 51.

<sup>30</sup> CNOc Intervention, paragraph 22.

<sup>31</sup> See Commission letter to Paul Cowling, 3 February 2015, page 1.

<sup>32</sup> CNOc Intervention, paragraph 22.



differently than those in similar proceedings in recent years. Shaw filed its RFI responses a full two weeks prior to the Commission's determinations in the Order. Regardless of whether the RFI responses were considered or not, Shaw still does not know what the deficiencies are with respect to its costing information for purposes of determining interim rates. In the absence of knowing the evidentiary burden, Shaw does not have, and never had, any recourse to address concerns in a way that could alter the outcome of the Order.

31. Shaw acknowledges that the final tariff approval process has not run its course and that the Commission continues to review and analyze Shaw's costing evidence, while parties have had an opportunity to file comments with respect to that evidence. That is all consistent with other Commission tariff processes for final approval.
32. However, Shaw's concerns underlying the Application do not relate to the process governing the final decision on TN 22. Rather, it was the interim rate process leading up to and including the Order which Shaw submits was inconsistent with the Commission's long-standing practices. This is the basis of our Application. Shaw was subjected to procedural unfairness, and hence prejudice, at the interim phase without justification or explanation. Shaw respectfully submits that the process for determining interim rates should be no less fair than that for determining final rates, particularly since interim rates could be in place for several months.
33. For these reasons, CNOC is incorrect that "Shaw's procedural rights remain intact."<sup>33</sup> It is CNOC that is blurring the lines between the interim and final reviews, by ignoring the fact that these processes are distinct elements which are both subject to procedural fairness.

### **Retroactive rate adjustments**

34. Shaw agrees with CNOC that the Commission "has both the authority and duty to vary the rates retroactively in accordance with Section 27 and subsection 61(2) of the Act."<sup>34</sup>
35. While retroactive rates that are favourable to Shaw will be welcome, they will not be a complete remedy for the impact of the Order. As explained in the Application,<sup>35</sup> the disruption to the market that arises from conferring competitive advantages through rates that are not cost-based cannot be remedied through retroactive rates. This concern is

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<sup>33</sup> CNOC Intervention, paragraph 23.

<sup>34</sup> CNOC Intervention, paragraph 23.

<sup>35</sup> Shaw's Application, paragraphs 10-11; 18; 54-55.

particularly acute as the rates in the Order, although interim, could be in place for a lengthy period of time.<sup>36</sup>

36. In that regard, the Juce Intervention raises the issue of certainty. Shaw recognizes that Juce does not support Shaw's Application, and Juce cautions against the use of retroactive adjustments, which Shaw disputes.<sup>37</sup> However, the concerns Juce expresses about the potential instability between interim and final rates<sup>38</sup> reinforce Shaw's argument that interim rate setting processes should be guided by the need for a reasonable degree of certainty and predictability. The arbitrariness of the Order's approach to Shaw's interim rates – a marked departure from established rate-setting practice – has created uncertainty for all parties, including independent ISPs. As Shaw respectfully explained in its Application, the best way for the Commission to restore certainty is to base the rates on the evidence.

### **The Internet 30 Rate**

37. The interim rate for Shaw's Internet 30 service provides an instructive example of how inappropriate reliance on the proxy approach can result in distortive outcomes. Under the proxy approach, rates are benchmarked against different or outdated offerings with their own traffic profiles. They therefore do not reflect the actual costs of providing the new service, particularly in today's environment of dramatic growth in Internet traffic.
38. CNOC has recognized "that there may be a basis for setting the interim rate for Shaw's new Internet 30 service on the rate of the nearest lower service speed, the Internet 20 service."<sup>39</sup>
39. Vaxination, on the other hand, appears to have confused this issue. In its intervention, Vaxination states that Shaw confirmed the rate of \$22.45 for its Extreme Speed service in Tariff Notices 20 and 21 filed in 2014 and, therefore, the Commission correctly applied the proxy approach to Shaw's new Internet 30 service. Vaxination further states that if

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<sup>36</sup> See the current process timelines for other various applications to the Commission for final rate determinations which remain outstanding as noted above.

<sup>37</sup> Juce points out that if the final rates turn out to be much higher and are retroactively adjusted back to the effective date of interim rates, it would not be able to absorb the retroactive cost adjustment (in the absence of passing on the retroactive cost adjustment to consumers). Shaw disputes the accuracy of Juce's assertion that "none of the independent ISPs in Shaw territory is offering any of the new service speeds" due to the prospect of retroactive adjustments. To the contrary, Shaw confirms that it has had orders from independent ISPs for the new service speed offerings. In any case, Shaw does not understand how Juce could be in a position to confirm the extent of service speed offerings by its competitors in the independent ISP community.

<sup>38</sup> Juce Intervention, paragraph 5.

<sup>39</sup> CNOC Intervention, paragraph 5.

Shaw was unhappy with the rate for the Extreme Speed, it should have updated the rate when filing Tariff Notices 20 and 21.

40. However, the Tariff Notices that Vaxination refers to did not address, and have no relation to, the Extreme Speed or its rates. Those Tariff Notices were filed to withdraw certain TPIA services that Shaw had discontinued in the retail market.
41. In the Application, Shaw provided background on the Extreme Speed service rate and explained in detail why it is inappropriate to use this service as a proxy for the new Internet 30 rate. Tariff Notices 20 and 21 are unrelated to this issue and, contrary to the arguments put forth by Vaxination, do not confirm Shaw's acceptance of the rate set for the Extreme Speed service.

### **Conclusion**

42. As outlined above, the comments of Interveners opposing Shaw's Application are without merit and fail to refute the grounds for relief in Shaw's Application. The approach in the Order is arbitrary, discriminatory and internally inconsistent. It deviates from established interim rate setting practice in a way that undermines the consistency and predictability of the process to the ultimate detriment of all parties. This resulted in errors giving rise to significant doubt as to the reasonableness of the determinations made in the Order.
43. For all the foregoing reasons, Shaw respectfully asks the Commission to review the Decision and make the following variations requested in the Application:
  - substituting the rates set in the Order with the five interim rates proposed in TN22 and supported by Shaw's Phase II cost study;
  - making the effective date of the interim rates established by the Commission's variance of the Order retroactive to 2 March 2015, the effective date of the rates in the Order; and
  - without limiting the other requests for relief in this Application, amending paragraph 20 of the Order to set the interim rate for the Internet 30 service as \$29.83, the same rate as the correct next lower service speed, in recognition of the fact that the interim rate for the Internet 30 service set out in the Order is incorrect.

All of which is respectfully submitted.

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