

Digicel (Trinidad and Tobago) Limited (**Digicel**)

Claimant

v.

Telecommunications Services of Trinidad and Tobago Limited (**TSTT**)

Respondent

Decision No. 1

Effective 31 March 2006

1. Background

On 19 January 2006, Digicel, a new entrant mobile operator in Trinidad and Tobago, served notice of dispute on TSTT, the existing fixed and mobile operator, with copy to the Telecommunications Authority of Trinidad and Tobago (the **Authority**). The Authority in turn served confirmation of dispute on 20 January 2006 on both parties.

Under the Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago (the **DR Procedures**), Digicel then served a Complaint, TSTT submitted a Response, and Digicel submitted its Reply. The Authority held a preliminary hearing with the parties on 10 February 2006 as required in the DR Procedures. TSTT had made some preliminary objections to the notice and confirmation of dispute but withdrew these at the preliminary hearing. The Authority referred the dispute to arbitration and appointed this panel as an arbitration panel.

On 14 March 2006, the Authority sent a Terms of Reference (**TOR**) to the panel, comprised of a letter informing the members that they had been appointed, attaching a List of Issues that had been agreed with the parties, as well as the pleadings.

The dispute concerns various clauses of the reference interconnection offer (RIO) that was being negotiated between the two companies on which they were failing to agree. These clauses concerned matters including reciprocal pricing of interconnection services, as well as access deficit charges (**ADCs**). Digicel also requested the setting of interim interconnection rates and in particular proposed a rate for termination of calls on its own network.

2. The application and the panel's decision

This Decision addresses an Application for Setting Interim Rates of 24 March 2006 made by Digicel to the panel. In its application, Digicel provided notice that it intended to apply to the panel on 31 March 2006 to set interim rates for the services that are required to permit interconnection between Digicel's network and TSTT's fixed and mobile networks. Digicel provided a table with the requested rates, which were clarified orally by Digicel's counsel in the hearing on 31 March 2006. Digicel also clarified that it was requesting the panel to set the interim rates on that day. Digicel submitted that it was ready in every other respect to commence service and that the only obstacle remaining was determining interim interconnection rates.

For the reasons set forth in this Decision, the panel does not grant Digicel's application but provides for an interim procedure by which the matter can be properly considered. An outline of this Decision was briefly presented orally to the parties on 31 March 2006.

References in this Decision to "interim rates" or "interim interconnection agreement" are to rates or an agreement that would apply until revised in accordance with the principles to be ruled on by the panel in the dispute (reciprocal pricing, ADCs and the other matters on the List of Issues enclosed with the TOR). References to **the Act** are to the Telecommunications Act of 2001, as amended in 2004.

In considering Digicel's application, the panel took into account the submissions of the parties, written and oral, and weighed two principal issues: on one hand, the manner in which materials have been put before the panel, as well as the adequacy of those materials, and on the other, the urgency of remedying the immediate problem.

2.1 The material before the panel

Without prejudice to its position on whether the panel has jurisdiction to make an interim order (see section 3 below), TSTT submitted that the material before the panel would be inadequate for making a decision. TSTT further submitted that making a decision on this basis would be arbitrary. For the reasons below, the panel is not convinced that it is appropriate in the circumstances to decide any interim rates on 31 March 2006. The panel agrees with TSTT that the material before the panel is inadequate, although in the panels' view not so inadequate that a decision based on it would be arbitrary.

There is a clear cost-based approach to interconnection pricing expressed in section 14 of Schedule H to the parties' Concessions. The application for interim rates presents vague, unsubstantiated claims about Digicel's price proposals being 20-40% below costs yet offers no information about its costs. There is no information before the panel about TSTT's costs either although TSTT claims to have what its consultant has advised is a "sophisticated cost model that reflects standard costing principles and methodologies and is generally consistent with international best practices" (NERA report of 10 February 2006 in section V). Neither this model, nor a description of it nor its assumptions has been put before the panel.

Benchmark information has been provided by both parties, but it is unclear why it should be viewed as based on costs, for example as is suggested without justification in Digicel's pleadings with respect to European mobile termination rates. It is not clear, further, that the benchmark information that has been swapped by the parties and their consultants was prepared for the purposes of a decision regarding any prices, or whether it was prepared as contextual background to the negotiations over Digicel's interim mobile termination rate. It is also not clear as a formal matter whether it was presented as expert evidence intended for a dispute resolution panel, or merely views of a consultant provided to a client.

Furthermore, the application for interim pricing itself appends a negotiating letter from Digicel to TSTT and a negotiating reply from TSTT. The application is simply a cut and paste of the former letter, complete with "absolute limit" positioning in the summary at the end. This panel does not intend to be hurried into decisions in this manner.

2.2 The urgency of the matter

Digicel's Complaint referred to delay as "extremely damaging to the people of Trinidad & Tobago and Digicel" (page 18). There are public policy concerns in ensuring that interconnection is established promptly. These are clear from the Act. However, it is difficult to see how a short delay of two or three weeks for a new mobile phone service would be "extremely damaging" to the population. There is no suggestion of ending the liberalisation process, closing the interconnection and abandoning competition.

Regarding damage to itself, Digicel has described in general terms that it has incurred and is incurring by the day substantial financing and operational costs, as set out in paragraph 16 of its Submissions on the Timing of Consideration of the Application to Set Interim Rates, submitted to the panel on 29 March 2006. The panel is aware of the realities of business, and that delay in starting a service on schedule can impose major costs on a company, not to mention potential loss of momentum in a marketing campaign and wasted investment.

Nevertheless, the application for interim pricing, while long on detail of the history of the interconnection negotiations, is short on detail of the harm to Digicel of some delay. Digicel may be ready at a network and operational level to offer services, but readiness alone does not provide sufficient indication of the level of urgency. While Digicel may consider this to be self evident, Digicel has not actually put before the panel any detail or scale of the damage that it faces due to delay.

2.3 Addressing urgency with sufficient due process

Nevertheless, the matter clearly has some urgency about it. Having considered all of the foregoing matters and all other points discussed between the parties and the panel on 31 March 2006, the panel concludes that a delay of about two weeks is appropriate to provide the parties the opportunity to formulate submissions and expert evidence for the specific purpose of addressing this application.

The interim procedure ordered at the end of this Decision provides for a rapid but reasonable procedure to accomplish this. The parties and their consultants have already done a large amount of work on this matter in their original Claim, Response and Reply. The procedure provided should put them in a position to meet the timetable contemplated.

In reviewing the parties' submissions, the panel will be interested in information about each of Digicel's and TSTT's costs, as well as statements by experts concerning the appropriateness of any assumptions and allocations used in modelling such costs. Naturally the panel will take into account the fact that none of the costs has been, so far as the panel is aware, determined in accordance with a costing methodology determined by the Authority (section 14.1 of Schedule H to the Concessions).

The panel will therefore also be interested in benchmarks based on costs, although the panel will also take into account the fact that no such benchmarks have been, so far as the panel is aware, determined by the Authority (section 14.2 of Schedule H). If there is a lack of benchmarks directly based on costs, the panel will be interested in benchmarks where there is reason to believe they approximate to or towards costs (e.g., due to competitive effects in the given market or some other reason). As has been recognized in the submissions, the more relevant the benchmarks are to the market and operator concerned, the more they may be given consideration.

The above indications are intended to follow the spirit of section 14 of Schedule H of the Concessions where compliance with the letter is simply not possible.

The panel will be interested in parties' submissions concerning what pricing elements are as a practical matter necessary to establish interim interconnection, enabling service on an effective commercial basis. In relation to this, the panel would be interested in the likelihood of whether, if only Digicel's interim mobile termination rate were determined, the failure to conclude an interim interconnection agreement enabling commercial operations to start will be resolved or is likely to persist. Lastly, the panel will also be interested in the level of urgency (or not) of setting interim interconnection rates at all.

Consensus between the parties on any interim rates, or ranges of such rates, is likely to assist the panel in reducing the potential breadth of reasonable interpretations it may make of the material put before it.

3. Power and jurisdiction

3.1 Submissions concerning jurisdiction

(a) TSTT's submissions

TSTT submitted that the panel does not have power or jurisdiction to make an interim order setting interconnection rates, or at least not for rates other than Digicel's interim mobile termination rate. In brief summary, TSTT's main arguments were:

- (i) The power to make (or to confer on others the power to make) interim orders is quite different from and much more than the mere establishing of procedures. Section 82 of the Act only gave the Authority power to do the latter. There is no rule of statutory interpretation or construction that says a power can be implied by silence.
- (ii) Even if the panel had powers to make interim orders, interconnection rates were not an issue in the dispute. It would be illegal to set rates in a dispute in which rates were not an issue, and the application was effectively a pre-emptive strike by Digicel.
- (iii) Even if the panel had powers to make interim orders, section 2.10.6 of the DR Procedures required any interim order to be "appropriate in the circumstances in accordance with the Telecommunications Act, any regulation or instrument made pursuant to the Telecommunications Act, or any other applicable law". Since no such Act, regulation, instrument or other applicable law existed providing for an interim order on interconnection rates or guiding on what it might address, no such interim order could be made.

(b) Digicel's submissions

Digicel submitted that:

- (i) The silence in section 82 of the Act did not prevent the Authority from exercising its discretion to establish a suitable dispute resolution process. In exercising its discretion, the Authority had established a process by which the panel had the power to make interim orders.
- (ii) Interconnection rates were indeed an issue in the dispute, as Digicel had requested interim interconnection rates.

- (iii) The preamble of the Act made it clear that the purpose was to oversee the sector's transformation from virtual monopoly to a competitive environment. The power to make interim orders was necessary to accomplish this as illustrated by Digicel's current situation.

(c) The panel's conclusion

The panel concludes that it has jurisdiction to hear Digicel's application. The panel's conclusion is based on consideration of the parties' representations and submissions in writing in these proceedings, and orally on 31 March 2006. The primary reasoning of the panel on jurisdictional matters is set out in the remainder of this section 3.

In summary, the Act provides for the Authority to establish a dispute resolution process in order to address a problem: the need for prompt resolution of failures to conclude interconnection agreements, and prompt resolution of disputes over them after they have been entered into. If the panel could not act on an interim basis, that purpose would be frustrated in situations of urgency.

3.2 The purpose of the DR Procedures

This dispute resolution panel has been constituted under the DR Procedures which were established by the Authority under section 82 of the Act. The panel notes that TSTT "reserves its position on whether the DR Procedures issued by the Authority is *intra vires*" (paragraph 24 of TSTT's Response).

Section 82(1) of the Act requires the Authority to:

establish a dispute resolution process to be utilized in the event of a complaint or dispute arising between parties in respect of any matter to which section ... 25(2)(h) applies ..., or in respect of any other matter that the Authority considers appropriate for dispute resolution.

Paragraph (h) of section 25(2) of the Act requires the Authority to require Concessionaires to:

submit to the Authority for prompt resolution, in accordance with such procedures as the Authority may adopt, any disputes that may arise between Concessionaires relating to any aspect of interconnection, including the failure to conclude an agreement made pursuant to paragraph (e), or disputes as to price and any technical or other term and condition for any element of interconnection.

Paragraph (e) of section 25(2) requires the Authority to require Concessionaires to:

promptly negotiate, upon the request of another Concessionaire...and endeavour to conclude, subject to paragraph (h), an agreement with regard to prices and the technical and other terms and conditions of the elements of interconnection;

Interconnection is defined in section 2(1) of the Act as:

the linking of public telecommunications networks and public telecommunications services, to allow the users of one provider of a public telecommunications service to communicate with the users of another provider of a public telecommunications service, and to access the services provided by such other provider.

The panel, taking account of the pleadings and the submissions of the parties at the hearing on 31 March 2006, determines certain relevant facts concerning interconnection as follows.

Customers of one network cannot call a customer of another network until the two networks are interconnected. Interconnection is particularly crucial for a new operator. A new operator needs to be able to sell its services to customers who, at least until the operator gains a substantial share of the market, will for the most part want to call or be called by the larger number of customers of the existing operator. Until this can happen, its business is not commercially viable.

Interconnection agreements concern the terms and conditions, including rates, governing the interconnection. Put very simply, the rates involved in interconnection include those charged by an operator to receive or transit calls and messages on its network originating from customers of another operator.

Interconnection rates typically constitute a large proportion of an operator's revenues and, when it is paying them to another operator, of its costs. They have therefore a major impact on the retail prices that the operator can set and its financial planning. Setting the interconnection rates is centrally important for commencing service to customers on an effective commercial basis. If all material network and operational aspects of interconnection are ready, the persisting absence of an interconnection agreement is a major obstacle to a new operator's ability to begin providing the service. The requirement to negotiate promptly in section 25(2)(e) and the dispute resolution provisions of sections 25(2)(h) and 82(1) appear to be intended to address this obstacle.

Further, section A49 of the Concessions of each of Digicel and TSTT provides that:

Any dispute on matters relating to the requirements of this Concession or the Act shall be referred to the Authority for determination in accordance with such dispute resolution process as established by the Authority under the Act. The Concessionaire expressly agrees and acknowledges that it shall, as set forth within the provisions of such dispute resolution process, be bound by any decision or award made in such process.

Addressing interconnection disputes specifically, section 29 of Schedule H to the Concession of each of Digicel and TSTT provides that:

all disputes regarding interconnection shall be submitted to the Authority for resolution in the manner specified within the dispute resolution process established by the Authority under section 82 of the Act.

In the panel's opinion, these provisions together with sections 82(1) and 25(2)(h) of the Act evidence an unambiguous intention to have the Authority establish a dispute resolution process which would be effective in ensuring prompt interconnection where operators have failed to conclude an agreement.

The Authority has established a dispute resolution process, and it is set forth in the DR Procedures.

3.3 Situations of urgency

Section 2.10.9 of the DR Procedures requires the resolution of interconnection disputes that are referred to the arbitration process within three months of the issuance of the TOR by the Authority. A three month deadline may generally seem to be relatively prompt, particularly given the complexity of matters often at stake in an interconnection dispute.

Nevertheless, according to the DR Procedures, the three month period only commences after consecutive periods during which the complainant issues a notice of dispute, the Authority issues a confirmation of dispute, the complainant presents its complaint, the respondent presents its response, the complainant presents a reply, the Authority holds a preliminary hearing, determines whether to refer to mediation or arbitration, and then it must still seek and engage arbitrators and send them the TOR. This amounts to a potential period of several weeks before the three month period commences. In the case before us it took less than 8 weeks.

Three months from the date of issuance of the TOR may be viewed as prompt in many cases. It is entirely possible, however, that an ongoing failure to conclude an interconnection agreement becomes such an urgent problem that it needs resolution earlier than the end of the three month period. Where the failure to conclude the interconnection agreement is preventing the commencement of services by an operator that has made large investments and is ready in all other material respects to get going – and is incurring significant losses by the day because of the delay – it is likely to be one such situation. There may be others.

Without the ability to make interim measures enabling interconnection, situations of urgency could not be addressed and the procedures would be ineffective precisely when they are most needed. The problem that is intended by the Act to be solved would not be solved.

Section 82 of the Act leaves it to the Authority to design the dispute resolution process (although of course in accordance with applicable law). After all, the role of the Authority expressed in the Act's preamble is "to guide the sector's transformation from virtual monopoly, in which Telecommunications Services of Trinidad and Tobago is the principal provider of telecommunications services, to a competitive environment."

The Authority has seen fit to establish the DR Procedures. In accordance with their obligations in section A49 of their Concessions, which were signed by the parties, the parties "shall, as set forth within the provisions of such dispute resolution process, be bound by any decision or award made in such process". The DR Procedures provide in section 2.10.6 that:

Subject to any applicable law, the arbitration panel shall have the power to make any interim or conservatory order as it deems appropriate in the circumstances in accordance with the Act, any regulation or instrument made pursuant to the Act, or any other applicable law. The arbitration panel shall give reasons in writing for the making of any such order. Such orders shall be binding on the parties.

The Act does not expressly provide for power to make interim orders. Nor in fact does it expressly provide for power to make final orders. The reasoning submitted by TSTT could only lead to the conclusion that no dispute resolution process before the panel could result in decisions binding the parties – even on a final basis. Since this would undermine the resolution of the disputes referred to in the Act, the silence on this issue would undermine the explicit purpose of "resolving" disputes.

The panel is of the view that it can make awards (i.e., findings or decisions upon submissions) in this arbitration. This view is fortified by the provisions of section 45(2) of the Interpretation Act Chapter 3:01 which states as follows:

Where a written law empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing.

This is further reflected in the preamble of the Act (“to establish a comprehensive and modern legal framework for an open telecommunications sector”) and is clearly the intention of the DR Procedures. The panel also observes that such provision is consistent with procedures in numerous other countries which have undertaken the liberalization of the telecommunications sector.

There are two further reasons why the panel is of the opinion that it has jurisdiction to hear Digicel’s application even if TSTT were correct and the panel had no powers derived from the Act to make interim orders.

First, the panel has been constituted under a dispute resolution process established by the Authority, one which appears to be contemplated by the Act. As mentioned above with respect to such a dispute resolution process, section A49 of the Concessions provides:

The Concessionaire expressly agrees and acknowledges that it shall, as set forth within the provisions of such dispute resolution process, be bound by any decision or award made in such process.

In its opinion, a decision of the panel, whether interim or final, would qualify as “any decision or award made in such process.” Thus even were the panel not to have direct power to bind the parties, the decisions resulting from its procedures have the effect of establishing for the parties binding obligations owed to the Minister of Public Administration and Information. Failure to comply with such obligations would be a breach of the Concessions and, were it considered “material”, would permit the Minister or Authority, whichever is appropriate under the relevant provisions of the Act, to exercise the remedies under section A25 of the Concession.

Second, and lastly, the panel has been established to resolve interconnection disputes. Under section 2.10.12 of the DR Procedures:

The arbitration panel may as part of its Decision or otherwise at its discretion, recommend to the Authority any action within the provisions of the Act.

The Authority has certain powers under section 30 of Schedule H to the Concessions with respect to interim measures:

The Authority may in relation to any dispute referred under this Schedule [i.e., interconnection disputes], direct that the parties shall implement such reasonable interim arrangement for interconnection as the Authority considers appropriate having regard to the nature of the dispute. Such arrangement may include prices and any other term or conditions for interconnection and the Authority shall be entitled to consider such submissions as may be made by the parties in the formulation of such arrangement, subject to such timeframes for submissions as the Authority shall in its sole discretion set. The arrangement shall be instituted by the parties within a reasonable period as set by the Authority and shall continue until such time as the dispute has been finally settled.

In the circumstances and in recognition of the Authority's powers referred to above, the panel may choose to confine itself to just making recommendations to the Authority rather than making an order or orders per se. There can be no dispute that the panel can make recommendations to the Authority though of course there can be no assurance that the Authority would follow such a recommendation.

For all of the reasons above in this section, the panel's interpretation of the Act, the Concessions and the DR Procedures leads it to the opinion that it has jurisdiction to hear Digicel's application, and make decisions and/or recommendations in respect of it.

3.4 Scope of the dispute

The panel's powers are limited to the dispute referred to it. The panel cannot pronounce on disputes that are not referred to it. The question, then, is what is the dispute that has been referred to the panel.

The suggestion that interconnection rates (other than Digicel's interim termination rate) are not a matter in this dispute relates to the TOR provided to the panel. The TOR include the pleadings.

The precise subject of disagreement in the pleadings is not entirely clear. In paragraphs 32 and 33 of its Reply, Digicel stated:

32. Digicel's termination rates are not in issue at this point in time. They are still the subject of negotiations with TSTT and they have not been submitted to the DRP and do not form part of this Complaint No. TATT 4/7/06/1...

33. The DRP Panel is not being asked at this time nor in this Complaint to establish interconnection rates in Trinidad and Tobago save for an interim mobile termination rate of US\$0.181 per minute for Digicel that may be adjusted retrospectively when the final rates have been agreed between Digicel and TSTT.

While the above appears to be compelling evidence that interconnection rates are not a matter in this dispute, the original paragraph headed "Tariff Schedule" in Digicel's Complaint, as subsequently repeated in the List of Issues, requested the setting of "interim interconnection rates" and then went on to refer "in particular" to a specific price for its own termination rate. This could be read to suggest that other interim interconnection rates required resolution and that Digicel had a specific proposal in respect of its own mobile termination rate.

The panel cannot comment on the fact that Digicel has apparently initiated a separate dispute process regarding TSTT's long term fixed termination rate because the panel has not seen the pleadings. Nevertheless, the filing of a separate dispute over long term fixed interconnection rates would not necessarily mean that TSTT's interim fixed termination rate is not one of the interim interconnection rates in respect of which Digicel requests resolution in the dispute before the panel.

What is missing in the detailed question about precisely which rates, if any, are in dispute is the wider perspective from the point of view of the Act. While the individual points between the parties are important, what matters is the nature of the failure to conclude an agreement before the panel and what is necessary to resolve that failure.

It is plain from the parties' submissions that what is fundamentally at stake here is the failure to conclude an interconnection agreement on interim rates to enable services to commence – and the consequent idleness of Digicel's network and investment. The paragraph headed "Tariff Schedule" in Digicel's Complaint claims that:

It would be extremely damaging to the people of Trinidad & Tobago and Digicel if there is further delay to interconnection and the liberalisation process due to any delay in establishing pricing for interconnection services. In order to ensure that the interconnection process is not delayed Digicel request that interim interconnect rates be put in place...

Where a dispute concerns an existing business and legal relationship and, for example, alleged breaches of contractual obligations, it is more feasible to identify all of the factual and legal allegations at stake. These can be stated clearly in pleadings, and a case can be restricted to only those points expressly articulated. Each can be treated in its turn on the merits.

A failure to conclude an agreement is a different form of dispute. It needs to be met with prompt resolution enabling interconnection to go ahead and services to be provided on an effective commercial basis. The issues not agreed may be a moving target, as appears to be the case here. At the time of Digicel's Complaint, the only price relating to the failure to conclude an interconnection agreement may have been Digicel's mobile termination rate, with the others appearing to be possible to negotiate. Yet it is also suggested in the pleadings that this rate – and the blockage over it – relates closely to TSTT's mobile and fixed termination rates.

It is not clear to the panel from the parties' submissions that interim interconnection can be achieved by addressing only one point of disagreement while other essential points are left outstanding. Even if it were clear that Digicel's interim termination rate were the only interim price the panel was requested to set at the outset of the dispute, it may not be the only matter that must be addressed to remedy the failure to conclude an interim interconnection agreement. Interconnection is not possible on an effective basis with one party's interim rate dangling out there alone.

Were Digicel's interim termination rate the only matter to be addressed while the parties continue to fail to agree on the other interim rates, it could be that there would be no interconnection agreement – not even an interim one – even after the panel rules on the reciprocal pricing, ADC and other questions in the main dispute. This would surely be an anomalous result that cannot have been intended by the Act or the DR Procedures.

None of this is to suggest that the panel is willing to allow the reopening of the TOR and extension to any new subject that a party raises on a whim. That would not even be a matter for the panel. It was for the Authority to set the TOR when it established the panel. What the panel is concerned about, however, are the elements necessary to achieve an interim interconnection agreement enabling a new entrant to provide services on a commercially effective basis. It is for that reason that the panel is interested, as mentioned in section 2.3, in whether setting only Digicel's termination rate will accomplish this, or whether the other rates also need to be established as asserted by Digicel in its application.

The purpose of carefully defining the scope of a dispute in a TOR for a dispute resolution panel concerns due process. It protects the parties from abuse of process and the drip-drip-drip of new issues disrupting that process. There is an "overriding need" to ensure that if the other interconnection rates are clearly still unresolved, whether on an interim basis or otherwise, both parties "are afforded adequate opportunity to present their position in a fair, objective and non-discriminatory manner, observing due process." (Section 2.10.3 of the DR Procedures.) The interim procedure provided for by this Decision, as explained above in section 2.3, is intended to ensure that due process is not compromised.

The panel reads the TOR as concerning a request for such interim interconnection rates as are necessary to achieve interconnection until the panel rules on the principles (reciprocal pricing, ADC and other matters) and the parties negotiate their own deal within that framework or initiate a separate, later proceeding to seek the setting of such rates on a longer term basis.

3.5 Lack of primary and secondary legislation

With respect to TSTT's third submission concerning the requirement in section 2.10.6 of the DR Procedures that any interim order be "in accordance with the Act, any regulation or instrument made pursuant to the Act, or any other applicable law", it will be clear by now from the previous sections that this panel has the necessary jurisdiction, including power to make findings, decisions and/or awards. Resolution of a failure to conclude an interconnection agreement promptly is the issue and the panel is of the view that the Act and the Concessions provide the necessary framework for the panel to hear the dispute.

4. Sender-keeps-all stop-gap measure

As noted above, from the panel's review of the pleadings and consideration of the oral submissions made on 31 March 2006, it appears urgent to enable Digicel to commence some form of interconnection as quickly as possible even if interim rates cannot be set as of 31 March 2006. Accordingly, a sender-keeps-all arrangement is provided for in the order below until interim rates are put in place.

A sender-keeps-all measure has inherent limitations – for both parties – on their ability to plan retail pricing strategy and other financial items since neither knows yet what its interconnection revenues and costs will be. Nevertheless, in this case, better something than nothing. Digicel has the option to proceed on the basis of sender-keeps-all for a short period but remains free to wait until the interim application is addressed before commencing commercial service.

Since prices cannot operate in a vacuum, terms and conditions would be necessary for this short period. While some fundamental points persist in the text of the reference interconnection offer (RIO), the parties are agreed on most of the text, which can be used in its latest form until revised by decision of the panel or agreement of the parties.

Findings and decisions of the panel
(briefly outlined orally to the parties on 31 March 2006)

For the reasons explained in the pages preceding and after considering the written submissions of the parties and their oral submissions on 31 March 2006, the panel makes the following findings and decisions pursuant to the dispute resolution process established by the Authority under the Act:

1. The Authority has established a dispute resolution process under the Act and as referred to in the Concessions, and it is set forth in the DR Procedures.
2. The panel has jurisdiction to hear Digicel's application under the DR Procedures.
3. The panel can make awards (i.e., findings or decisions upon submissions) in this arbitration.
4. The panel does not grant Digicel's application for interim rates dated 24 March 2006.
5. The following measures shall apply to enable immediate interconnection
 - a. Until otherwise agreed by the parties, decided by the panel or directed by the Authority, and subject to paragraph c below, the principle of sender-keeps-all shall apply to all services between the parties, which shall not be adjusted by retroactive effect of any decision made at the hearing addressing Digicel's application for interim interconnection rates.
 - b. With respect to terms and conditions, the most recent draft reference interconnection offer (RIO), including all of its appendices, annexes and the like, on the table between the parties shall apply while the sender-keeps-all principle applies. Unless a party notifies that a more recent version exists, this shall be the version emailed by Ms. Debra Bharath to the panel with copy to the parties on Friday 31 March 2006 according to the Chairman's electronic record of receipt.
 - c. To the extent that the parties have already reached consensus on prices for any interconnection services and agree that such prices shall apply to such services instead of a sender-keeps-all arrangement, such prices shall apply as agreed.
 - d. The parties are encouraged to meet on Monday 3 April 2006 or as soon thereafter as possible to seek to identify such prices.

The panel makes the following further procedural directions:

6. On or before 17:00hrs on Monday 10 April 2006, the parties shall exchange written submissions and witness statements (simultaneously provided to the panel) addressing:
 - a. what interconnection services require interim rates to enable each to provide services to customers on an effective commercial basis;
 - b. what those rates should be; and

- c. why those rates should or should not be set on an interim basis at this time instead of after the final hearing (agreed for 22-26 May 2006) of the other matters on the List of Issues.
7. During Tuesday 11 April 2006:
 - a. the expert witnesses shall meet (with or without the parties) to identify points of agreement and to narrow issues; and
 - b. the parties shall meet to endeavour to present the proposed interim rates in a format enabling the two positions to be compared one against the other, and to agree on any other points they can identify.
8. The parties shall ensure that the persons present at meetings referred to in paragraph 7 above shall have the authority necessary to negotiate changes to their positions. The parties shall record the names of the persons present and the duration of the meetings and provide this information to the panel by the end of the day, including any points agreed or concessions made.
9. On or before 17:00hrs Thursday 13 April 2006, the parties shall exchange responses to each's written submissions and expert witness responses to the expert witness statements (simultaneously provided to the panel).
10. A hearing on the application for interim rates will be held on Tuesday 18 April 2006 at 09:00hrs. The panel secretary shall inform the parties of the location.
11. The parties shall ensure that all of the materials submitted pursuant to this direction are presented in a form that is coherent and accessible to facilitate the understanding of the reader.
12. Panel expert
 - a. The panel may appoint an expert to assist it in assessing the parties' submissions.
 - b. If the panel appoints an expert, it will consult with the parties to ensure that there is no prior or existing relationship giving rise to a conflict of interest.
 - c. To facilitate and accelerate review by such an expert the parties are requested to email to the panel:
 - i. Digicel: electronic versions of its Complaint and Reply and consultant reports that were exhibited thereto; and
 - ii. TSTT: electronic versions of its Response and consultant report that was exhibited thereto.

- d. If parties or their consultants are concerned about exchanging data in electronic form that may allow its usage by a competitor, they may send such email to the panel without copying the other party. The panel will confirm receipt to both parties.



Rory Macmillan, Chairman



Dr. Ronald Ramkissoon



Dr. Shahid Hussain

Information about the panel

Mr. Rory Macmillan is a member of the New York Bar and a graduate of the University of Edinburgh and Yale Law School. He practiced law in New York and London with the international law firm Debevoise & Plimpton, before establishing his own practice. He now specializes in telecommunications law and dispute resolution, advising governments, regulatory authorities, incumbent operators, new entrants and investors. He is a member of the Chartered Institute of Arbitrators in London and a mediator accredited by the Centre for Effective Dispute Resolution.

Dr. Shahid Hussain is Professor and Head of the Centre for Information and Communications Technology program studies at The University of Trinidad and Tobago. He has 30 years of telecom industry experience as a senior executive in Canada, where he had extensive interactions with the Canadian regulator CRTC during Dr. Hussain's involvement with Telus Corporation and Bell Canada. He has been involved in the liberalization process of the Canadian telecom sector, and led many task forces, committees and panels involved in high-tech economic development and technology development in telecom industry. Dr. Hussain has a PhD in Electrical Engineering with major in Communications from University of British Columbia, Canada.

Dr. Ronald Ramkissoon graduated from the University of the West Indies with a BSc, MSc and Phd in Economics. He worked as an economist at the Central Bank of Trinidad and Tobago for 12 years. He is now Senior Economist and Manager, Economics Intelligence Unit, at Republic Bank, one of the Eastern Caribbean's largest commercial banks. He is also a Vice President of the Caribbean Association of Industry and Commerce.