

REFERENCE NO: TATT 04/07/06/06

**IN THE MATTER OF AN ARBITRATION
TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO
SECTION 82 OF THE TELECOMMUNICATIONS ACT 2001**

BETWEEN

LISA COMMUNICATIONS LIMITED

Complainant

AND

**TELECOMMUNICATIONS SERVICES OF
TRINIDAD AND TOBAGO LIMITED**

Respondent

**Report and Decision
of the Arbitration Panel**

Arbitration Panel:

Ken W Wright (Chairman)
Dr Lester Henry
Phillip Cross

20th December, 2019

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PART I

INTRODUCTION

1. Before this Arbitration Panel for its consideration is the Claimants' application for arbitration of a dispute between Lisa Communications Limited (LISA) and Telecommunications Services of Trinidad and Tobago (TSTT).
 - 1.1 The arbitration arose out of inconclusive negotiations between TSTT and LISA regarding the rate to terminate inbound international calls on the domestic networks of each concessionaire's network. Several issues have been raised, including whether the rate to be charged should be reciprocal, whether the rate should be negotiated and not set ex ante, whether the service under dispute is an interconnection service and the basis upon which the rate should be set.
 - 1.2 The proceedings were initiated by Lisa Communications Limited by Notice of Dispute **on April 27th 2018** under the "Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago" revised March 29th, 2010. On **April 10th 2017** the Authority issued a Confirmation of Dispute under the Dispute **Resolution** Procedures. **The Complainant was confirmed as LISA Communications Limited and the Respondent was the Telecommunications Services of Trinidad and Tobago.**
 - 1.3 In accordance with Section 7.4.1 of the Proceedings for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago (2010), the Authority established a Dispute Resolution Panel comprising: Mr. Ken Wright (Chairman), Dr. Lester Henry and Mr. Philip Cross. All members were required to sign a

Statement of Independence, indicating that they had no personal or professional connection, directly or indirectly with either of the disputants.

- 1.4 The Authority issued a Notice of Hearing and a preliminary hearing was held with the parties. Pursuant to that hearing, the panel was engaged by the Authority and was issued the Terms of Reference for this arbitration. The Authority issued an Order formally appointing the panel, referring the dispute to arbitration.
- 1.5 The Panel held a procedural hearing with the parties and directions were given for the parties to state agreed facts and issues, exchange pleadings, witness statements and expert witness statements as well as reply to witness statements and reply to expert witness statements. The evidential hearings were held on June 12th 2019. The parties submitted responses to concerns and testimonies presented at the evidential hearings.
- 1.6 The panel was aware that its decisions should be in a manner that demonstrate reasonableness, rationality and candor. The decisions of the Panel must be properly explained as to make pellucid the rationale adopted and the relevant criteria which was considered.

2. JURISDICTION OF THE PANEL

- 2.1 In this part, the Panel sets out its jurisdiction to determine the outcomes of this dispute. This, in the Panel's view removes any ambiguity in the mind of the Parties as to its powers to bring resolution to this dispute.
- 2.2 This Panel therefore gave consideration to those relevant parts of the Primary and Subsidiary¹ Legislations that empower it to resolve this

¹ Updated to December 31, 2009. As on the Ministry of Legal Affairs Database.

dispute. The Panel noted that Section 25(1) (h) and (i), mandates TATT to
"require a concessionaire to –

25. (1) (h) "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 dispute as to price and any technical or other term and condition for any element of interconnection.

25. (1)(i) Submit to any decision rendered by the Authority made pursuant to paragraph (h)"

2.3 Section 82 of the Act mandates TATT to establish a dispute resolution process to settle disputes between concessionaires –

"82. (1) The Authority shall establish a dispute resolution process to be utilised in the event of a complaint or dispute arising between parties in respect of any matter to which section 18(1) (m) or 25(2) (h) applies, or where a negotiated settlement, as required under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution.

(2) The Authority shall not be a party to any dispute resolution process."

2.4 The TATT Telecommunications (Interconnection Regulations), 2009 Regulations 31-34 set out the regulatory guidelines for Dispute Resolution as follows:

"31. Where a dispute arises between concessionaires with respect to interconnection, the matter may be referred to the Authority for consultation and guidance, on the agreement of both parties, prior to either party submitting the matter to the Authority as a dispute.

32. Save as provided in regulation 31, every dispute regarding interconnection shall be submitted to the Authority for resolution in accordance with the dispute resolution process established by the Authority under section 82 of the Act.

33. (1) *The Authority may, in relation to any dispute referred to under these Regulations, direct that the parties implement such interim arrangement for interconnection as the Authority considers appropriate having regard to the nature of the dispute.*

(2) An interim arrangement may speak to prices and include any other terms or conditions for interconnection, whether or not the Authority considers submissions made by the parties, subject to such times for submissions as the Authority shall, in its sole discretion determine.

(3) An interim arrangement shall be instituted by the parties within a period determined by the Authority and shall remain in force until the dispute has been resolved.

34. *The final resolution of a dispute in respect of which an interim arrangement was implemented shall— (a) be effective on the date on which the interim arrangement was effected; and (b) include provisions for compensation to any party that has suffered any loss and damage as a result of the arrangement.”*

- 2.5 In its “Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago (Revised)”², TATT states at Part 3: **“Negotiation in Good Faith”**

“3.1 In respect of any conflict or disagreement arising out of the operation of any telecommunications network or the provision of any telecommunications service or any broadcasting service authorised by the Telecommunications Act, 2001 (“the Act”), or of any matter otherwise arising under the Act, any regulations made under the Act, any concession or licence granted under the Act, the parties shall, at all times, negotiate in good faith to arrive at an amicable resolution of any such conflict or disagreement”.

² TATT 2/1/3/15. dd. March 29, 2010.

2.6 Part 8 **"Procedure for Dispute Resolution"** TATT states-

"8.2 Determination of Issues"

8.2.1 Subject to any applicable law, the dispute resolution panel shall have jurisdiction to determine any and all matters pertaining to the arbitration.

8.2.2 Subject to any applicable law, the dispute resolution 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 and shall give reasons in writing for the making of any such order, which shall be binding on the parties."

"8.3 Decision-Making"

8.3.3 The dispute resolution panel may render the Decision orally in the first instance, at a hearing called for that purpose, of which no less than three (3) days' notice was given to all parties and to the Authority. However, within fourteen (14) days of the date on which the Decision was rendered orally, the dispute resolution panel shall give the Decision in writing to all parties and to the Authority which shall contain reasons for the conclusions reached therein and which shall be signed by all members of the dispute resolution panel.

8.3.4 The Decision shall be binding on the parties and shall take effect within fourteen (14) days after the date of the written Decision, or otherwise as expressly stated in the Decision, provided that no appeal has been lodged by any party under Section 83 of the Act or otherwise.

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

8.3.7 in the event that the parties arrive at a settlement during the proceedings, the settlement may, upon application by the parties to the dispute resolution panel and at the sole discretion of the panel, constitute the Decision."

2.9 This Panel notes Section 82(2) and Regulation 31 and makes no assessment as to the adherence of the latter to the former. The Panel however feels compelled to address Regulations (33) and (34) and those Parts at 8.2 ("Determination of Issues"). The Panel noted from the proceedings in the Matter before the High Court in 2006, TSTT v. First Panel and Digicel³ that the substantive issue revolved around that Panel Decision of 31st March 2006, to entertain Digicel's application⁴ and to set interim interconnection rates. In considering the submissions by the parities, Justice Gobin J, stated –

*"The obvious starting point is a recognition that the Act does not expressly confer a jurisdiction to make interim orders. The omission however is not necessarily conclusive of Parliament's intention to exclude the jurisdiction. I must consider whether it arises by implication in one of several ways."*⁵

*"In respect of interim rates however, there is nothing in the subject matter of the Act which gives rise to an inference that Parliament intended to confer that jurisdiction."*⁶

*"I am mindful of the modern approach to statutory construction and I bear in mind the objectives of the Act. But these do not permit me to ignore that Parliament in its wisdom anticipated and provided for the obvious need for promptness in resolving interconnection disputes..."*⁷

*"In granting the wide jurisdiction to resolve disputes consistently with this philosophy which Parliament espoused, it left the machinery of dispute resolution entirely to the Authority, subject to its requirement for promptness in interconnection disputes."*⁸

³ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006.

⁴ Digicel by letter 24th March 2006, gave notice to the Panel and TSTT of its intentions to ask the Panel to set interim rates.

⁵ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 23. pp. 8.

⁶ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 26. pp. 9.

⁷ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 31. pp. 11.

⁸ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 37. pp. 14.

*"A ruling that the jurisdiction to settle disputes also includes the power to make substantive interim orders would further restrict the use of the process of mediation and all its attendant advantages, unless parties can agree to interim terms. This would defeat the very flexibility which the Act seeks to promote. Moreover, it would be entirely inconsistent with the approach to dispute resolution which underlies the Act. Indeed, given the fierceness of the commercial rivalry that ought to have been expected, one may well say with hindsight, that the Authority ought to have been given the power to effectively compel competing concessionaires to do all things necessary to achieve the objectives of the Act, but this is not what Parliament intended."*⁹

*The inclusion of the statutory requirement for promptness does not make it unreasonable to infer that Parliament did not intend the Authority to be burdened and bogged down with substantive interim applications which could only adversely affect the prompt resolution of disputes. It may be that the former experience (common to all of us) of inordinate delays in formal court procedure which allowed for satellite litigation, has not been lost on Parliament."*¹⁰

Justice (Gobin, J) held:

*...that the jurisdiction of the Authority to resolve disputes is limited to the resolution of the disputes, that is, a final resolution or such final agreement as may be arrived at the end of, or during the course of a dispute resolution process which puts an end to the dispute. There is no power to make substantive interim orders. More specifically, there is no jurisdiction to fix rates as claimed by Digicel."*¹¹

2.10 The Decision of the High Court of Justice (Gobin J), has not been subjected to an appeal. This Panel therefore finds that Regulations (33) and (34) and Parts

⁹ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 40. pp. 15.

¹⁰ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 53. pp. 19.

¹¹ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 55. pp. 19.

8.2.1 and 8.2.2 appear-not to be in conformity with the Judgement of the High Court as it pertains to interim arrangement and interim rates or conservatory order. The Panel shall be guided however by the decision of the High Court in the matter of dispute resolution as decided in the matter of TSTT v. The First Panel and Digicel (CV 2006-00899).

- 2.11 The Panel is also duly cognizant of Justice J. Jones, CV2006-03320, who stated at page 10:

*"It cannot be disputed that, in the context of the Act, the decision of the Panel is a decision of the Authority."*¹²

The Decisions of this Panel are therefore final and binding on all parties to this dispute. This Panel's view is similarly expressed by the Second Arbitration Panel of 2008 which stated that *"Pursuant to the Dispute Procedures, the Panel Decision is final and binding on both Digicel and TSTT."*¹³

3. MANDATE OF THIS PANEL AND ISSUES

- 3.1 The issues presented by the parties to this Panel for its determination are as follows:
- I. Whether TATT has the power to intervene regarding the fixing of the rate for international incoming Call Termination to PSTN and PLMN Services and the extent of same.
 - II. What is the most appropriate guide to be employed in agreeing the rate for international Incoming Call Termination to PSTN Services and PLMN Services?
 - III. The margin between the International Settlement Rate and Termination Rate for International Incoming Calls in relation to maintaining a Service Provider's competitiveness in offering its service.

¹² Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007. pp. 10.

¹³ Second Panel, 2008. para. 19. pp 67.

- IV. Whether or not the services in this matter (international call termination to fixed networks and international call termination to mobile networks) are "interconnection services" subject to the statutory mandate of Section 25 of the Act and the Interconnection Regulations.
- V. Whether the incoming settlement rate can be determined by parties to this dispute without regard to the international incoming termination rates settled and agreed by other authorized concessionaires.
- VI. Whether the determination of incoming termination rates and settlement rates should be influenced by macro-economic, policy and trade considerations so as to mitigate the 'dumping' of minutes into Trinidad and Tobago.
- VII. Whether the Parties negotiated in good faith.

3.2 After due consideration of these issues, the Panel consolidated them into the following:

- 1. Whether the rates proposed by TSTT for International Incoming Call Termination to PSTN networks and PLMN networks are reasonable and are in accordance with the Legislative and Regulatory Framework for governance of the Domestic Termination access services.
- 2. Whether the determination of incoming termination rates and settlement rates should be influenced by macro-economic, policy and trade considerations so as to mitigate the 'dumping' of minutes into Trinidad and Tobago.
- 3. Whether the incoming settlement rate can be determined by parties to this dispute without regard to the international incoming termination rates settled and agreed by other authorized concessionaires.
- 4. Whether the parties negotiated in good faith.

5. Whether the Panel can determine the rate for International Incoming Termination and the margin between the International Settlement Rate and Termination Rate.

PART II

4. LEGISLATIVE AND REGULATORY FRAMEWORK

- 4.1 The legislative framework applicable to this proceeding is set out in the Telecommunications Act ("the Act") of which the following sections are of specific relevance:

- 4.2 Legislative Provisions

Section 3 of the Act sets out the broad policies which it seeks to achieve. Specifically, the objectives of the Act are to establish conditions for –

"(a) an open market for telecommunications services, including conditions for fair competition, at the national and international levels;

(b) the facilitation of the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic well-being of the society;

(c) promoting and protecting the interests of the public by—

(i) promoting access to telecommunications services;

(ii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;

(iii) providing for the protection of customers;

(iv) promoting the interests of customers, purchasers and other users in respect of the quality and variety of telecommunications services and equipment supplied;

(d) promoting universal access to telecommunications services for all persons in Trinidad and Tobago, to the extent that is reasonably practicable to provide such access; (e) facilitating the achievement of the objects referred to in paragraphs (a) and (b) in a manner consistent with Trinidad and Tobago's international commitments in relation to the liberalisation of telecommunications;

(f) promoting the telecommunications industry in Trinidad and Tobago by encouraging investment in, and the use of, infrastructure to provide telecommunications services; and (g) to regulate broadcasting services consistently with the existing constitutional rights and freedoms contained in sections 4 and 5 of the Constitution."

- 4.3 **Section 25 (2)** is the principal statutory basis upon which this dispute turns. Specifically, Compliance with guidelines and standards are established in Regulations:-

"(a) comply with guidelines and standards established by the Authority to facilitate interconnection;

(b) publish, in such manner as the Authority may prescribe, the prices and the technical and other terms and conditions pertaining to its offer for the elements of interconnection;"

- 4.4 Compliance with the principle of non-discrimination-

"(d) provide the elements of interconnection, to other concessionaires of public telecommunications networks and public telecommunications services, in a manner that is at least equal in both quality and rates to that provided by the concessionaire to a subsidiary, affiliate or any other party to which the concessionaire provides interconnection;"

- 4.5 Framework for Negotiation and Dispute Resolution of Interconnection -

"(e) promptly negotiate, upon the request of another concessionaire of a public telecommunications network or a public telecommunications service, and endeavour to conclude, subject to paragraph (h), an agreement with regard to the prices and the technical and other terms and conditions for the elements of interconnection;

(f) deposit with the Authority a copy of any agreement concluded pursuant to paragraph (e) within twenty-eight days of its making;

4.6 Compliance with the principle of non-discrimination-

(g) offer the terms and conditions of an agreement concluded pursuant to paragraph (e) to any other concessionaire of a public telecommunications network or public telecommunications service on a non-discriminatory basis;

(h) 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;

(i) submit to any decision rendered by the Authority made pursuant to paragraph (h);"

4.7 Basis upon which cost of Interconnection is to be determined-

"(m) disaggregate the network and, on a cost basis, in such manner as the Authority may prescribe, establish prices for its individual elements and offer the elements at the established prices to other concessionaires of public telecommunications networks and public telecommunications services."

4.8 Section 24(1) (c) requires operators to-

*"Refrain from using revenues or resources, from a telecommunications network or service, to cross subsidise any other telecommunications network or service, without prior written approval of the Authority."*¹⁴

¹⁴ Various claims about anti-competitive practices and behavior have been submitted by concessionaires. However, this Panel was not charged with determining whether the behavior of any party was "anti-

4.9 Section 22 (1) (b) *"Prohibit(s) anti-competitive pricing and other related practices."*

4.10 Section 29(1) forms the basis upon which prices are to be determined-

"Prices for telecommunications services, except those regulated by the Authority in accordance with this section, shall be determined by providers in accordance with the principles of supply and demand in the market."

4.11 Section 29(2) provides that regulation regimes may be imposed by TATT, in any case where-

"(a) there is only one concessionaire operating a public telecommunications network or providing a public telecommunications service, or where one concessionaire has a dominant position in the relevant market;

(b) a concessionaire operating a public telecommunications network or providing a public telecommunications service cross-subsidises another telecommunications service provided by such concessionaire; or

(c) the Authority detects anti-competitive pricing or acts of unfair competition."

4.12 Section 29(3) and (4) forms the basis of TATT's Determination 2010/01 and provides for -

"The Authority shall regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs by publishing pricing rules and principles and

"Such rules and principles, made pursuant to subsection (3), shall require rates to be fair and reasonable and shall prohibit unreasonable discrimination among similarly situated persons, including the concessionaire."

4.12 Section 78 which requires TATT to make regulations and apply the principle of non-discrimination -

competitive" or otherwise objectionable and it therefore takes no position with respect to any of the allegations

(3) Regulations made pursuant to this Act shall apply equally to all similarly situated persons.

5. REGULATORY FRAMEWORK

- 5.1 TATT implements the Act through (1) Regulations, (2) its Directives, (3) Proceedings of the Authority ("Guidelines") and (4) Decisions of previous Arbitration Panels. The sections of the regulatory framework as shaped by TATT and which are relevant to this dispute, include –

Regulations

The Telecommunications (Interconnection) Regulations, 2009 (herein "Interconnection Regulations"). These Regulations as per Section 25(2) (a) are obligatory on all concessionaires and compliance is not optional.

- 5.2 Section 5 of the Interconnection Regulations reinforces the principle of non-discrimination as set out at Section 25(2)(d) of the Act -

"5. (1) A concessionaire shall provide interconnection under the same terms and conditions and of the same quality as it provides for its own networks and services, the networks and services of its subsidiaries and partners, or the networks and services of any other concessionaire to which it provides interconnection.

(2) Where a concessionaire fails to comply with subregulation (1), it shall upon request from the Authority prove to the satisfaction of the Authority that it is not technically feasible to replicate the level of quality of the interconnection or to provide interconnection under the same terms and conditions as it provides for its own use."

- 5.3 Section 13 sets out the timelines for negotiation of Interconnection Agreement as required under Section 25(1)(e) and the time at which a dispute commences and is

to be referred for resolution by TATT in accordance with such procedures as TATT may adopt ((Section 25(2)(h))) and states:-

"13. (1) A concessionaire shall use its best endeavours to conclude an interconnection agreement as soon as possible following its receipt of an interconnection request, but in any event shall conclude the agreement no later than—

(a) six weeks after its receipt of the request from an interconnecting concessionaire, where either the interconnection provider or interconnecting concessionaire has published a RIO pursuant to regulation 19; or

(b) ten weeks after its receipt of the interconnection request in all other circumstances, except that where the request was made under regulation 12, the request shall be deemed to have been received by the interconnection provider on the date of the grant of the concession.

(2) Failure by a concessionaire to comply with this regulation shall constitute a dispute referable to the Authority under regulation 32."

- 5.4 Further, Section 15 sets out the key statutory provision of Section 25(2)(m), describing in more detail what "cost basis" might be and the use of "benchmarking" as a proxy where the results of models and formulae are unavailable, and for review of compliance by TATT -

"15. (1) A concessionaire shall set interconnection rates based on costs determined in accordance with such costing methodologies, models or formulae as the Authority may, from time to time, establish."

"15. (2) Where the relevant data for the establishment of the costing methodologies, models or formulae are unavailable within a reasonable time, the concessionaire may set interconnection rates with reference to such costing benchmarks, as determined by the Authority, that comport with internationally accepted standards for such benchmarks."

"(3) A concessionaire shall within twenty-eight days of a written request from the Authority, unless this period is expressly extended by the Authority in writing, supply to the Authority such data as the Authority may require, for the purpose of determining that its interconnection rates are in accordance with this regulation."

- 5.5 Also, Section 16 gives life to Section 25(2)(g) of the Act, whereby terms and conditions are to be offered on a non-discriminatory basis -

"16. (1) The terms and conditions for interconnection contained in the most recent interconnection agreement under which the concessionaire is the interconnection provider shall be made available to any other concessionaire requesting interconnection."

- 5.6 Section 17 (1) requires that TATT be notified of every meeting between concessionaires-negotiating interconnection agreements-

"17. (1) Every interconnection provider and interconnecting concessionaire shall notify the Authority in a timely manner of every meeting scheduled for the purpose of negotiating interconnection."

"17. (2) The Authority may, upon the giving of twenty-four hours prior written notice to the relevant concessionaires, attend any meeting referred to in subregulation (1) in the capacity of observer only."

- 5.7 Section 19 sets out the requirement of concessionaires to provide a Reference Interconnection Offer (RIO) and the basis upon which a RIO is required-

"19. (1) Upon a request by the Authority, a concessionaire shall prepare, publish and maintain a RIO substantially in the form published by the Authority on its website or in such other manner as the Authority may determine."

(2) The basis for a request by the Authority shall be—

(a) the extent to which the concessionaire will be required by other concessionaires to provide interconnection;

*(b) the concessionaire's control over essential interconnection resources;
and*

*(c) the extent to which the concessionaire has failed to promptly
negotiate interconnection or has unjustifiably denied interconnection in
the past*

6. DIRECTIVE OF THE AUTHORITY

- 6.1 (a) Determination 2010/01 Under Section 29(3) and 29(4) of the Telecommunications Act – Termination of International Incoming Telecommunications Traffic on Domestic Networks in Trinidad and Tobago. TATT 2/15/1 dated 3 February 2010.

(b) Pricing Rules and Principles for the Termination of International Incoming Traffic on Domestic Networks in Trinidad and Tobago (as set out in Determination 2010/01 and amended pursuant to Notice 2013/01). TATT 2/15/1 dated February 18, 2013.

- 6.2 Determination 2010/01 as Amended by Determination 2013/01, provides the pricing rules and principles for the termination of international incoming telecommunications traffic to any domestic network -

"Pursuant to Section 29(3) of the Act, the Authority hereby establishes the following pricing rules and principles for the termination of international incoming telecommunications traffic on any domestic telecommunications network in Trinidad and Tobago:

- 1. The rate charged by a concessionaire for the termination of incoming international telecommunications traffic on a domestic telecommunications network shall not be less than the sum of:*

- a. *the cost of termination of the international traffic on the relevant domestic network (herein referred to as the domestic termination rate); and*
 - b. *any relevant cost incurred in terminating the international traffic.*
- 2. *The relevant costs incurred in terminating the international telecommunications traffic, referred to in 1b above, are the same as those associated with the operation of an efficient international network. Thus, this cost shall include:*
 - a. *the efficient port charges or its equivalent (if applicable) at the relevant international Network Access Point (NAP);*
 - b. *the efficient backhaul cost from the relevant international NAP to the relevant international Cable Head;*
 - c. *the efficient international connectivity cost from the international Cable Head to the Cable Head in Trinidad and Tobago;*
 - d. *the efficient backhaul cost from the Cable Head in Trinidad and Tobago, to the point of interconnection on the relevant domestic network in Trinidad and Tobago;*
 - e. *the efficient domestic switching and aggregation cost;*
 - f. *the relevant interconnect facilities cost to access the domestic networks; and,*
 - g. *the relevant Administrative costs to operate an efficient international telecommunications network.*
- 3. *These rules and principles shall be applied in a fair, equitable and nondiscriminatory basis, and in particular, any assessment of the minimum rates shall be based on assumptions and data which represent efficiencies reasonably available to all concessionaires operating in the relevant market."*

7. PROPOSED REGULATORY FRAMEWORK PROCEEDINGS (GUIDELINES)

7.1 TATT has initiated a number of proceedings that bear on the issues raised in the arbitration before the Panel. With the exception of Recommendations of an Interconnection and Access Policy which are now in the form of Regulations, the Panel noted that TATT has not finally adopted these proposals. However, the Panel is of the view that they do reflect that agency's informed latest thinking on complex issues, like the one before this Panel. Accordingly, the Panel has given due consideration to these proposals and found them to be appropriate guidelines in informing this Panel's decision. The following TATT Guidelines are relevant to this proceeding:

- Recommendations of an Interconnection and Access Policy – TATT 2/1/15 dated 23 September 2005.¹⁵

7.2 TATT sets out some broad principles regarding (a) non-discrimination in interconnection arrangements and (b) interconnection pricing that can be useful guideposts to this Panel:

"Avoidance of discrimination is central to this Policy. ...

The most difficult forms of discrimination to identify and manage are interconnection arrangements between parent firms and their affiliates. Occurrences of discriminatory practices where incumbents or dominant service providers supply insufficient network capacity to competing interconnecting operators while providing adequate capacity for their affiliates are well documented.

Whatever the circumstance, the standard for unjust, undue or unfair discrimination is that an interconnecting competitor should not be

¹⁵

https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=209&PortalId=0&TabId=222

disadvantaged as a result of different or less favourable interconnection arrangements.”¹⁶

“In order to encourage competition, it is essential that interconnection rates in the country be based on costs that are reflective of efficiency so as to minimize overcharging for services, either by excessive mark-ups or transfer of network inefficiencies.

...Whenever interconnection rates are set above efficient costs, the supplier has an injudicious advantage over competitors. When the rates are set below cost, there is minimal incentive, if any, for investment in new network rollout or expansion.

In order to encourage parity between prices and costs, the Authority should mandate that the interconnection charges of any interconnection provider should reflect the efficient costs of supply.

The fundamental difficulty in applying cost-efficient pricing to interconnection resources is arriving at an effective quantitative methodology (cost model) for estimating efficiency. A standard cost model approved by the Authority for use by all concessionaires can help to achieve this. Standard cost models go a long way in meeting the principles of equity, transparency and non-discrimination. It also reduces avenues for dispute consequent upon disagreement on cost-derivation methodologies.”¹⁷

7.4 Draft Revised Price Regulation Framework for Telecommunications Service in Trinidad and Tobago – TATT 2/3/13, dated July 9, 2015.¹⁸

¹⁶ Recommendations of an Interconnection and Access Policy. Section 9. pp.37.

¹⁷ Recommendations of an Interconnection and Access Policy. Section 11. Pp.40.

¹⁸

https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=510&PortalId=0&TabId=222

In setting out its consideration for an *a priori*-determination of the relevant market, TATT states:

"Markets are usually defined by taking into account demand-side and supply-side substitutability with consideration given to the parameters of the relevant products or services; and the geographic extent of the market.

The Authority proposes that retail and wholesale markets may be firstly defined by taking into consideration the types of concessions and other authorisations that are granted in the Trinidad and Tobago market, as this would be consistent with the types of retail services that are eventually provided to end-users, and consistent with the types of wholesale services that are eventually provided to service-based authorised operators by network-based authorised operators."

"In concluding this a priori approach, the Authority proposes to distill an array of markets based on existing authorizations and expected developments that can be used where it is determined that price regulation may be necessary as follows:"

7.5 TATT thereafter sets out the following markets relevant to this dispute: International Wholesale Service

- a. International Fixed Termination (termination of international traffic on a domestic fixed network)
- b. International Mobile Termination (termination of international traffic on a domestic mobile network).

7.6 In its Draft revised Pricing Framework, TATT addressed the concept of essential facilities and expressly stated that as per the Interconnection Regulations it shall impose cost-based pricing for essential facilities. -

"Occasionally, anti-competitive pricing may involve prices being set excessively above cost. This might, for instance, occur with wholesale services that are essential inputs to a rival operator's retail business. Essential facilities (also known as bottleneck facilities) are typically regarded as having all of the

following characteristics: 1. They are exclusively or predominantly provided by a single or a limited number of suppliers 2. They are required by competitors in order to compete in the relevant markets 3. They cannot practically be duplicated or substituted by competitors for technical or economic reasons.

A telecommunications operator that controls an essential facility has both the incentive and the means to limit access of the facility to its competitors. It becomes a matter of public interest to ensure that essential facilities are available to competitors on reasonable terms. Without such access, competition will suffer and the sector will not develop. Hence, essential facilities are regulated in most countries, whereby the regulator has a role in setting the prices for access to essential facilities.

The Authority considers that supplying to competing authorised operators essential network elements at prices above or significantly below the prices offered by the supplying authorised operator for providing the retail services utilizing such essential network elements as anti-competitive. Thus and pursuant to the Telecommunication (Interconnection Regulations), 2006 and Telecommunications (Access to Facilities) Regulations 2006 the Authority shall impose cost-based pricing for essential facilities.”¹⁹

7.7 Specific to international termination rates TATT, expressly states: -

“Predatory pricing has also been a concern in some jurisdictions in respect of international termination (settlement) rates. This may occur where domestic operators who also own and operate international facilities negotiate termination rates that are lower than the cost of terminating a call on their domestic networks. This sort of conduct could have the effect of driving other international operators, who do not operate domestic networks, out of business, and therefore can be harmful to competition in the international market. The

¹⁹ Draft Revised Price Regulation Framework for Telecommunications Service in Trinidad and Tobago. Section 6.3. pp.21-21.

Authority may therefore use price floors to regulate international termination rates, where it considers it to be necessary.”²⁰

7.8 The Costing Methodology for the Telecommunications Sector - TATT 2/3/15 dated May 29, 2008.²¹

In setting out the costing methodology to be utilized by concessionaires, TATT expressly states that:

“The requirement for cost-based pricing is clear in the Act in respect of interconnection services. Further, the need to adopt a single cost methodology for the telecommunications sector became even clearer to the Authority during the first interconnection dispute between TSTT and Digicel on interconnection rates. The Arbitration Panel which deliberated and ruled on that dispute, in its decision, recommended that:

“the Authority consider developing a sector specific cost model for the purposes of considering whether proposed charges comply with the regulatory framework, or for setting charges if so required”.”

7.9 TATT further states:

- *“Current cost accounting (CCA) and long run average incremental cost (LRAIC) should be implemented by dominant concessionaires. “*
- *“A top-down methodology should be preferred as it is the most suited method, given the state of the telecommunications sector that accurately reflects the costs of operating a network in Trinidad and Tobago.”*
- *“The Authority will develop telecommunications sector top-down long run average incremental cost (LRAIC) models for fixed and mobile networks within 36 months of the adoption of this Methodology. The Authority shall require dominant concessionaires who provide telecommunications and subscription*

²⁰ Draft Revised Price Regulation Framework for Telecommunications Service in Trinidad and Tobago. Section 7.5. pp. 46.

²¹

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broadcasting services over telecommunications networks to adopt the Authority's top down LRAIC models after they have been completed."

- *"Until such time as the top-down LRAIC models are available, dominant concessionaires may use their own cost models or concessionaires that currently do not use a cost model may use benchmarks developed by the Authority. This approach is preferred as it will quickly and effectively provide a reasonable proxy for cost-based pricing."*
- *"Benchmarking, either against retail prices and/or against wholesale charges in other countries, ensures that wholesale charges are low enough to be competitive but high enough to ensure that there are adequate incentives for network investment."*

7.10 As a footnote to this part, TATT states that *"a concessionaire that provides interconnection service shall be considered dominant in providing termination services on its network."* This statement is replicated in the body of TATT's Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers, which is detailed below.

7.11 During the period of time that TATT takes to develop its cost model, it proposed the following interim regime: -

"... dominant concessionaires may use their own cost models to determine cost-based rates for telecommunications and broadcasting services. Concessionaires that currently do not have a cost model may use benchmarks developed by the Authority to determine cost-based rates. This approach is preferred as it will quickly and effectively provide a reasonable proxy for cost-based pricing. In order to achieve this objective in an efficient manner, the cost data for dominant concessionaires will be appropriately adjusted by the Authority. That is, the Authority will use the principle of cost causality to determine the appropriate costs to be included in the concessionaire's cost model. Costs that do not follow this principle will not be included in the concessionaire's cost model."

*"...due to the additional regulatory burden that this interim regime may cause with respect to the determination of cost-based interconnection rates, the Authority will allow dominant concessionaires to be guided by the decision of the second arbitration panel during the interim period. The Authority believes that the work conducted by the second arbitration panel with respect to interconnection services is similar to the interim regime identified above. That is, the cost models of dominant concessionaires and benchmarks were utilized in determining interconnection rates. Therefore, dominant concessionaires will be guided by the second arbitration panel decision when negotiating interconnection rates during the interim period. If a dispute is referred to the Authority on interconnection rates during the interim period, consideration will also be given to the work conducted by the second arbitration panel."*²²

7.12 Draft Revised top down Long Run Average Incremental (LARIC) Specification Paper – TATT 3/5/3/2 dated May 31, 2016.²³

In its Specification Paper for the development of the TD-LARIC Model TATT sets out its definition of -

"Incremental cost refers to the change in cost resulting from adding or subtracting increments of demand for a product/service, where a company produces a multitude of products/services.

As a result, only those costs that would be incurred (avoided) if an increment of demand for a product or service was added (subtracted) are included in the incremental cost estimate for that increment. Costs that are fixed or common across increments do not form part of the cost of that increment.

In the LRAIC calculation, incremental cost is measured over the long run. This signifies that estimates of incremental cost should include both costs that may

²² The Costing Methodology for the Telecommunications Sector. Section 6. Pp.40-41.

²³

https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=802&PortalId=0&TabId=222

vary in the short run, such as operating expenditure, and also costs which vary in the long run such as capital costs.

Under a LRAIC approach, as set out in the Costing Methodology, incremental cost are estimated for increments of demand which relate to individual network elements rather than end to end services. The costs of end to end services are estimated through a combination of the LRAIC cost of the elements, service volumes and routing factors.”²⁴

- 7.13 TATT further went on to state that when addressing *ex ante* regulatory requirements, specifically call termination markets as defined in the Draft Pricing Framework and the international call termination market -

“As the relevant markets for call termination is defined as call termination on an individual operator’s network, then all concessionaires offering voice services including call termination shall be dominant in at least that market and thus must produce LRAIC service costs.”²⁵

- 7.14 Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers – TATT 2/4/2/2 dated August 2014.²⁶

In setting out the rationale for its Indicative Reference Interconnection Offers (RIO) framework, TATT states that through the RIO -

“... the Authority seeks to establish a framework through which interconnection prices are regulated. The Authority does recognize that the Interconnection Agreement are to be subject to the negotiation of the parties, and as such, does not propose the imposition of specific interconnection rates ex ante for implementation by all concessionaires. Instead, the Authority will seek to

²⁴ Draft Revised Top Down Long Run Average Incremental (LARIC) Specification Paper. Section 2.1. pp.16.

²⁵ Draft Revised Top Down Long Run Average Incremental (LARIC) Specification Paper Section 3.1. pp.20.

²⁶

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establish a range of acceptable interconnection rates for particular services in accordance with its price control powers under the Act.”²⁷

- 7.15 In defining the interconnection services within the RIO, TATT used the classification of service types in the Interconnection and Access Policy Framework (2005), specifically, and of importance to this dispute, joining, data and/or voice services (Type 1 Interconnection Service). In defining this service classification, TATT states:

“These are those interconnection services that are based on the connection of physical networks. It also includes all services related to the routing of traffic necessary to functionally effect interconnection. These services include Traffic Termination and Transit Traffic services for both voice and data.”

- 7.16 TATT included PSTN (Public Switched Telephone Networks) Terminating Access Service and PLMN (Public Land Mobile Network) Terminating Access Service as services that are to be classified as Type 1 (Joining, data and/or voice) Interconnection Services. In setting out its position on “Interconnection Charges”, TATT states that -

“International best practice is clear that interconnection charges should be cost-based. This principle is reflected in the domestic regulatory framework in the form of Interconnection Regulation 15, which requires that concessionaires set interconnection rates in accordance with the Authority’s ‘Costing Methodologies, models or formulae at the Authority may from time to time establish for the Telecommunications Sector’. Given the delay in the implementation of the LRAIC model, all interconnection charges outlined in the RIO should be derived in accordance with the Authority’s Costing Methodology. Furthermore, concessionaires must be able to demonstrate compliance with this requirement, particularly when asked to do so by the Authority pursuant to a request under Interconnection Regulation 15(3).

²⁷ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 1.3, pp.5.

In this regard, the Authority does not intend to provide any guidance on the principle of symmetry or asymmetry in rates between interconnecting parties, as this should be subject to commercial negotiations."

Notwithstanding the above, it may be necessary depending on prevailing market conditions, the Authority may need to intervene with price controls in interconnection markets. Such intervention would be based on Section 29(2) of the Act, which allow for the Authority to implement price regulation regimes where a concessionaire has a dominant position in the relevant market. The proposed mechanism for such intervention would be a combination of price caps and floors, which together form a regulated range for termination rates, in accordance with Section 29 (6) of the Act."

"This approach is to be adopted under the premise that although interconnection services may be supplied on a non-exclusive basis in the relevant markets, each concessionaire is dominant in relation to the interconnection termination service on its own domestic network. This dominance is derived from the fact termination on one operator's network is not an economic substitute for termination on another operator's network."

"The Authority's intervention with price regulation regimes shall be limited in application to Type 1 Interconnection Services."²⁸

- 7.17 In classifying the types of networks used by an Interconnection Service Provider to agree to accept traffic onto its network, TATT utilized the three classifications of (1) Fixed Telecommunications Network; (2) Mobile Telecommunications Networks; and (3) International Telecommunication Network detailed in its Authorization Framework. TATT sets out its view that each RIO should specify the network unto which the interconnecting service provider is proposing to accept traffic and states -

"It should be noted that, where an interconnection service provider is a concessionaire for the operation of more than one such network types, each

²⁸ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 6. pp. 19. 20.

*network is seen as distinct for the case of interconnection. Accordingly, in conformance to Section 25 (2)(d) of the Act, a interconnection service provider's RIO must reflect parity in terms, conditions, tariffs and Pol's as the concessionaire offers to its own associated or subsidiary networks, unless the Authority grants a written waiver of same in accordance with the Regulations."*²⁹

7.18 TATT concludes in its RIO Framework -

*"Concessionaires must hence ensure that interconnection charges, both as proposed in the RIO and as set out in any executed Interconnection Agreement, are based on cost and are compliant with the Authority's Costing Methodology. However, despite recognizing its critical role in ensuring that interconnection charges do not reflect market inefficiencies and distortion, the Authority also acknowledges the principle that the final tariffs enshrined in the Agreement should, like most other considerations within the Interconnection Agreement, be subject to the deliberations of the parties during negotiations."*³⁰

7.19 TATT proposed that a RIO framework serves the dual function of (1) providing a transparent mechanism by which standard conditions of service are made available to other parties, and (2) providing a tool through which the Authority can ensure compliance to the standards and guidelines. In assessing it's function of reviewing a concessionaire's RIO TATT states -

"... The Authority may also, with reasons, require the concessionaires to effect changes to their RIO prior to the Authority's grant of approval of same. This requirement is constrained only, that the changes shall not be in respect of any matter which the concessionaire is entitled to negotiate or determine under Section 25 of the Act.

²⁹ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 4.2. pp. 14.

³⁰ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 6. pp. 21.

It is proposed that the effectiveness of this function has been limited without the further elaboration of particular areas of technical requirements of the interconnection service, which has in effect left the determination of such matters to the cut and thrust of commercial negotiations between carriers. While this "soft-touch" or "hands-off" approach may have been sufficient in facilitating physical interconnection between the relatively larger participants in the sector, this approach has not had the same result with respect to other interconnection services..."³¹

- 7.20 With the exception of the "Recommendations of an Interconnection and Access Policy", Framework the above statements as contained in the various proceedings are proposals at this time. The Panel has reviewed said statements and will give consideration to same in arriving at its decision.

8. DECISIONS OF PREVIOUS ARBITRATION PANELS

- 8.1 TATT explicitly states in its Costing Methodology for the Telecommunications Sector, that dominant concessionaires were to be guided by the decision of the second arbitration panel during the interim period of the development of its LARIC model. TATT further states that where a dispute is referred to the Authority on interconnection rates during said period, consideration will be given to deliberations of the second arbitration panel. In reviewing the Second Arbitration Panel decision, this Panel noted that it relied, to some degree, on the deliberations of the First Arbitration Panel. The Second Arbitration Panel stated-

"After reviewing the decision of the First Panel and some of the evidence presented to that Panel, this Panel has concluded that many of the findings of the First Panel are relevant to this proceeding ..."

"The evidence, witnesses and argument presented by the parties in this Fourth Dispute are remarkably similar and are often identical to those presented in the

³¹ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 1. pp. 1.

First Dispute. This Panel, after reviewing and carefully considering the evidence and argument presented in this dispute and comparing it to the evidence and argument presented in the First Dispute (as summarized in the decision of the First Panel), has concluded that much if not most of the analysis conducted by the First Panel is sound and, subject to consideration of the effect of any changes to the telecommunications environment, the conclusions drawn by the First Panel can be relied upon by this Panel. Therefore, even if this Panel is not bound to accept the analysis and findings of the First Panel, it may, in the exercise of its judgment, give substantial weight to the First Panel's analysis, conclusions and findings".³²

- 8.2 This Panel also finds the evidence and arguments presented by the parties to this dispute similar to those in the First and Fourth Disputes and has similarly concluded that much if not all of the analysis conducted by both Panels ~~are~~ is relevant to this dispute. In light of TATT's statements to dominant concessionaires that the deliberations of the arbitration panels would be used as guidepost in any dispute on interconnection rates, this Panel, may, in the exercise of its judgment, give substantial weight to both Panel's analysis, conclusions and findings.

9. DECISIONS OF THE HIGH COURT OF TRINIDAD AND TOBAGO

- 9.1 Decisions of the High Court of Trinidad and Tobago provide regulatory certainty and regulatory credibility to the all stakeholders with the telecommunications sector in Trinidad and Tobago. The relevant Decisions to this dispute are:
- (1) TSTT v. The First Panel. High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006.
 - (2) Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007.

³² Report and Decision of the Arbitration Panel. 2008. pp. 13. 14.

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(3) Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, March 29th, 2007.

10. ANALYTICAL FRAMEWORK

The dispute before this Panel is fundamentally a disagreement between the parties over the interpretation of the above cited statutes, regulations and Directives of the Authority, as to what they require each party to do with respect to international calls terminating on a domestic network. In the following section of the decision, this Panel will outline the factors it had to evaluate, in applying the statutes, regulations and Directives, in coming to the decisions with respect to the Issues presented to it for determination.

11. SYMMETRICAL REGULATORY FRAMEWORK

11.1 The Panel's review of the Legislative, Regulations and Directive quoted above establish a general provision of a symmetrical regulatory framework with exceptions clearly identified. The panel has formed this conclusion on the understanding that the 2004 amendments to the Act removed the provision of dominance at Sections 25 and 24³³ and relocated it to a new Section 29 (8). It follows therefore that the obligations contained at Section 25, *inter alia*, to interconnect directly or indirectly, to negotiate, to disaggregate their networks on a cost basis and establish prices for individual elements, are imposed on all concessionaires. This understanding by this Panel is also reinforced by the Interconnection Regulations, which impose the same general provisions of interconnection on concessionaires except where it distinguishes between an interconnection provider and interconnecting concessionaire.³⁴ This general provision appears to be accepted by TATT in its formulation of it proposed "Draft Standards and Guidelines for Interconnection and the Development of

³³ Specifically Sections 25(2)(j)(k)(l) and (m) were applicable to a dominant provider, while Sections 24(1)(c) and (k) were similarly applicable to a dominant provider.

³⁴ The obligations on an interconnection provider is symmetrically imposed on all interconnection providers.

Reference Interconnection Offers”, wherein TATT sets out the general requirement to which interconnection providers RIO’s are to adhere with.

- 11.2 The Panel notes that the existence of an interconnection agreement between CCTL and Digicel attests to this general provision of a symmetrical framework. The obligation to offer direct interconnection, at Sec. 25(1)(a) and Regulation (3)(a) is imposed on all concessionaires. As it currently exist in the domestic telecommunications market, TSTT is not the only interconnection provider.³⁵ The panel notes the Digicel/CCTL interconnection agreement is available on TATT’s website, and its precursory review of same suggests that the terms and conditions have been negotiated between the parties in accordance with the obligations set out in the Act and Interconnection Regulations, specifically Section 25(m) of the Act and Regulation 13 of the Interconnection Regulations.
- 11.3 Similarly, the obligations at Section 29 are applicable symmetrically to all concessionaires except in the instances where a concessionaire has a network monopoly or service monopoly or is dominant (29(2)(a)), or where a concessionaire cross-subsidies (29(2)(b)), conditioned by Section 24(1)(c), or TATT detects acts of anti-competitive pricing or acts of unfair competition (29(2)(c)). Further, TATT’s intervention under Sec.29(3) and (4) and the subsequent Determination 2010/01 is symmetrically applicable to all concessionaires possessed of an International Telecommunications Network Concession detailed by TATT in its Authorization Framework.³⁶ In fact, the Pricing Rules and Principles for the Termination of Incoming Traffic on Domestic Networks in Trinidad and Tobago³⁷, specifically states
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³⁵ The panel notes the Digicel/CCTL interconnection agreement is available on TATT’s website. However, there are no rates for interconnection provided therein. For the avoidance of doubt, those rates are not the subject of this dispute.

³⁶ Draft Revised Authorization Framework for the Telecommunications and Broadcasting Sectors of Trinidad and Tobago. TATT 2/1/1/13, dated May 2014.

³⁷ Pricing Rules and Principles for the Termination of Incoming Traffic on Domestic Networks in Trinidad and Tobago. TATT 2/15/1. pp.1.

"These rules apply to any person who has been granted a concession for the operation of an international telecommunications network or a concession for the provision of international telecommunications services..."

12. INBOUND INTERNATIONAL CALL TERMINATION SERVICE

- 12.1 The Telecommunications Services to which this dispute applies is that of inbound international calls terminating on a fixed or mobile domestic telecommunications network.
- 12.2 In its submission, TSTT argued that the inbound international call termination service is not an interconnection service and therefore is not a service subject to Section 25 of the Act and as such should not be costs based. The Panel noted that during the renewal process of the 2012 Interconnection Agreement between TSTT and Lisa Communications, the inbound international call service was included as an interconnection service in the Interconnection Agreement.
- 12.3 The Panel sought an understanding and guidance on this service from the proceedings of TATT as these proceedings were consulted on with industry stakeholders and would have set a reasonable understanding by concessionaires of the definition of the service.
- 12.4 As set out in its Draft Revised Price Regulation Framework for Telecommunications Service in Trinidad and Tobago, TATT proposed to define markets in accordance with the type of authorization granted to a concessionaire. The markets defined by TATT in said Price Regulation Framework, and which are relevant to this dispute are the International Wholesale Service³⁸ of:
- (a) International Fixed Termination (termination of international traffic on a domestic fixed network)

³⁸ As per TATT's Draft Revised Price Regulation Framework for Trinidad and Tobago, wholesale services are provided to service-based authorized operators by network based authorized operators. Retail services are services offered to end users.

(b) International Mobile Termination (termination of international traffic on a domestic mobile network).

- 12.5 The Panel notes that when defining the interconnection services within the Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers, TATT used the classification of service types as detailed in the Interconnection and Access Policy Framework (2005), specifically, and of importance to this dispute, joining, data and/or voice services (Type 1 Interconnection Service). In defining this service classification, TATT included Traffic Termination and Transit Traffic services for both voice and data as interconnection services. These included Terminating Access Service on fixed networks and Terminating Access Service on Mobile. In setting out its position TATT gave consideration to the type of authorization granted to an Interconnection Service Provider to accept traffic onto its network, namely (1) Fixed Telecommunications Network; (2) Mobile Telecommunications Networks; and (3) International Telecommunication Network. TATT recognized that in accordance with the Authority's Authorization Framework, the interconnection service provider may be a concessionaire for the operations of *only* one network (international Telecommunications Network) or more than one network type concession and that each network is seen as distinct for the case of interconnection.
- 12.6 The separation of networks by the Authority is also reflective in TATT's Directives of 2010 and 2013, where it assessed the elements of an international concessionaire's network from that of its domestic network. However, the Directives implicitly recognized that inbound international traffic, via the international concessionaire's international network must obtain domestic interconnection terminating access services from the interconnection provider to terminate the inbound international call. Interconnection access is therefore a necessary condition for international inbound call termination on domestic fixed and mobile networks. Control of termination access services on these networks generally conforms to the doctrine of an essential facility. TATT addressed this concept in its Draft revised Pricing

Framework and specified the remedy in its Costing Methodology for the Telecommunications Sector respectively:

"A telecommunications operator that controls an essential facility has both the incentive and the means to limit access of the facility to its competitors. It becomes a matter of public interest to ensure that essential facilities are available to competitors on reasonable terms. Without such access, competition will suffer and the sector will not develop."

"a concessionaire that provides interconnection service shall be considered dominant in providing termination services on its network."

- 12.7 The concept of essential facility and the proposed remedy was also vented in the deliberations of the First and Second Arbitration Panels. The First Arbitration Panel, in its deliberations stated *"... in the context of calling-party-pays (CPP) regimes, such as currently obtains in Trinidad and Tobago, the terminating mobile operator has an effective monopoly over the market in termination of calls to its subscribers. Put simply, calls terminating to a mobile operator's subscriber must be terminated by that operator. Indeed, unlike the approach to price regulations in section 29 of the Act, there is no reference to "dominance" when it comes to interconnection, presumably because ... operators are expected to be effectively dominant in the termination market."*³⁹

- 12.8 This position was also articulated by the 2008 Arbitration Panel which stated that:

"... the public interest is best served when competitive entities are generally allowed to operate freely in the market guided by market forces rather than government regulations. However, because of the nature of telecommunications services, there are certain areas where market forces cannot be relied upon to ensure the efficient provision of telecommunications services."

Specifically, market forces cannot operate effectively where a party has a monopoly or is in a position to exercise market power, or where a party controls a "bottleneck" facility (i.e. an essential component of a competitive service which

³⁹ First Arbitration Panel. 2006. pp.22.

provides access to customers and that cannot be practically replicated by the competitor). In the case at hand, TSTT has a monopoly in the provision of fixed line services and both parties have monopolies on the termination of calls to their subscribers since access to those subscribers is achieved through bottlenecks controlled by each company.⁴⁰

12.9 TATT, in its Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers states that *"although interconnection services may be supplied on a non-exclusive basis in the relevant markets, each concessionaire is dominant in relation to the interconnection termination service on its own domestic network. This dominance is derived from the fact termination on one operator's network is not an economic substitute for termination on another operator's network."*

12.10 While in the Draft Pricing Framework and specific to the international call termination market, TATT states -

"As the relevant markets for call termination is defined as call termination on an individual operator's network, then all concessionaires offering voice services including call termination shall be dominant in at least that market..."

12.11 In light of the guidance provided by TATT in its proposed regulatory proceeding, this Panel has determined that the Services under dispute are those of International Fixed Termination and International Mobile Termination. These services are Wholesale Services as they are offered by network based authorized domestic concessionaires, to service and network-based authorized international concessionaires. These defined interconnection services therefore require domestic termination access services from a domestic network interconnection provider. Further and due to the doctrine of essential facilities, concessionaires that provide International Fixed Termination and International Mobile Termination are deemed to be dominant in the provision of these services and these services are therefore subject to Section 25 of the Act. Finally, Section 25 is one of the **only** two Sections of the Act that mandates

⁴⁰ Second Arbitration Panel. 2008. pp. 19-20

negotiation (Section 26, "Access to Facilities" is the other Section). Given that this is a dispute for international termination access services and not for "Access to Facilities"⁴¹ the requirement to negotiations the rate for international termination access, impliedly means that this service is an interconnection service.

13. NEGOTIATIONS OR *EX ANTE* RATE SETTING OF INTERNATIONAL TERMINATION RATES

- 13.1 In its submissions TSTT argued that the Rates for International Termination Services are to be negotiated between concessionaires and not determined *ex ante*. The Panel notes that TSTT presented this said position before the First Arbitration Panel.
- 13.2 Lisa Communications agrees with the general principle of rates being commercially negotiated. However, it argues that negotiations should not contravene the provisions of the Interconnection Regulations.
- 13.3 The Panel accepts that Section 25(2) (e) requires concessionaires to negotiate the terms and conditions, inclusive of rates, of the Interconnection Agreement. This is not in dispute, as appears to be also accepted by TATT, which states when setting out the rationale for its Indicative Reference Interconnection Offers (RIO) Framework, "*The Authority does recognize that Interconnection Agreements are to be subject to the negotiation of the parties, and as such, does not propose the imposition of specific interconnection rates ex ante for implementation by all concessionaires.*"⁴² However, TATT also recognized the constraints of negotiations-

"... While this "soft-touch" or "hands-off" approach may have been sufficient in facilitating physical interconnection between the relatively larger participants

⁴¹ Section 26(5) explicitly states that for the "Purposes of this section, access to facilities does not include interconnection".

⁴² Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 1.3. pp.5.

in the sector, this approach has not had the same result with respect to other interconnection services..."⁴³

13.4 This constraint was also recognized by the First Arbitration Panel which stated-

"... in the panel's opinion, section 25 and the overall framework of the Act indicate a general preference for operators to reach their agreements and find solutions to their problems through commercial negotiation with one another. The Act intervenes in the case of interconnection, ..., to ensure that operators have assured access on reasonable terms and conditions to each other's networks and services. This purpose is all the more important where there are reasons to think in advance that such negotiations may involve such unbalance bargaining strength that intervention is necessary to ensure that fair terms are assured on a sufficiently prompt basis. The underlying object is to ensure that operators interconnect to enable them to provide services to their users on a basis that advances competition.

Where there are reasonable prospects that commercial negotiations can achieve interconnection promptly on terms and condition that are fair, it might be appropriate to apply the provisions of the Act light-handedly. This would be all the more likely to the extent that one operator's position in the market and another's dependence on the agreement do not create a significant disequilibrium in bargaining strength.

TSTT's argument that the parties should be left to negotiate outside the interconnection framework might have some force if here were reasons on balance to think that commercial negotiations would be fair and succeed.

If it were so straightforward for the parties to negotiate commercial terms and conditions for these services, it is unlikely that we would be where we are today.

⁴³ Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. Section 1. pp. 1.

The submissions are replete with evidence of the difficulty the parties have experienced in negotiating.”⁴⁴

13.5 The Second Panel further reinforce this position when it stated that -

“.. the public interest is best served when competitive entities are generally allowed to operate freely in the market guided by market forces rather than government regulations. However, because of the nature of telecommunications services, there are certain areas where market forces cannot be relied upon to ensure the efficient provision of telecommunications services.”

Specifically, market forces cannot operate effectively where a party has a monopoly or is in a position to exercise market power, or where a party controls a “bottleneck” facility (i.e. an essential component of a competitive service which provides access to customers and that cannot be practically replicated by the competitor). In the case at hand, TSTT has a monopoly in the provision of fixed line services and both parties have monopolies on the termination of calls to their subscribers since access to those subscribers is achieved through bottlenecks controlled by each company.⁴⁵

13.6 This Panel finds that the reasoning put forward by the 2006 Panel is still relevant given that this is the third dispute on matters related to Services in the Interconnection Agreement. The Panel is therefore of the view that negotiations by itself cannot deliver the desired outcomes expected under Section 25 of the Act.

13.7 The Panel accepts that under a symmetrical regulatory framework, the obligation to negotiate applies to all concessionaires. However, that obligation as specified at Section 25(2) (e) of the Act, cannot operate in a vacuum but must be conducted against the provisions detailed at Part III of the Interconnection Regulations, (Negotiating Interconnection Agreements), whereby providers of domestic termination access services, set interconnection rates based on costs as per

⁴⁴ First Arbitration Panel. 2006. pp 100-101.

⁴⁵ Second Panel. 2008. pp. 19-20.

Regulation 15 of said Regulations. To do otherwise may engender regulatory uncertainty as disputes becomes the norm when negotiating Interconnection Agreements.

- 13.8 In considering TSTT's argument that the rates for domestic termination access services are not to be *ex ante* determined, the Panel referenced the First Panel deliberations. The First Panel stated: -

"With respect to interconnection charges... the Telecommunications Act's guidance on charging for disaggregation by operator of their networks and offering of their elements to other operators simply provide that this must be "on a cost basis in such a manner as the Authority may prescribe (section 25(2)(m))." ... "In the panel's view, this emphasis on an approach to regulating charging for interconnection based on costs must be understood in light of the structure and functioning of the interconnection market, and in this case the... termination market."

Considering ... termination as a monopoly market, the panel interprets the approach to cost-based in the Act.. as originating from the expectation that there is likely to be such a lack of competitive effects on interconnection charges that it is necessary to mandate by law and regulation that they be based on costs, set pursuant to methodologies prescribed by the regulatory. ⁴⁶

- 13.9 In assessing the terms based on cost, the Second Panel stated that-

*"rates "based on costs" are unlikely to be rates equal to costs." ... "The Panel believes that the statutory phrase "based on cost" simply means that the rate-setting process undertaken by regulators should begin with reasonable estimates of the costs using the best available evidence. These estimates form the "base" upon which the rates will be determined.... the panel believe that the resulting rates simply have to be a reasonable approximation of the costs to satisfy sec. 25(2)(m) of the Act".*⁴⁷ The 2008 Arbitration Panel was also in

⁴⁶ First Arbitration Panel. 2006. pp 20. 21.

⁴⁷ Second Panel. 2008. pp 32.

general agreement conclusion of the 2006 Arbitration Panel and stated “...the Panel is of the view that. In general, interconnection rates should be based on the forward looking estimates of the costs of a typical, efficient operator.”

13.10 The methodology for setting termination access service based on cost is set out by TATT in a number of its proceedings. In its Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers TATT states that the principle of cost-based interconnection charges, as reflective at Section 15 of the Interconnection Regulations, requires that concessionaires set interconnection rates in accordance with the Authority’s costing methodologies, model or formulae. That costing methodology as set out in the Costing Methodology for the Telecommunications Sector, is that of Long Run Average Incremental Cost (LARIC). It is important to note that in its Draft Revised top down Long Run Average Incremental (LARIC) Specification Paper, TATT, when addressing *ex ante* regulatory requirements, specifically for the call termination markets, required that said concessionaires operating in said markets, produce LARIC service costs. TATT’s position is based on concessionaires being deemed dominant in that market. It follows therefore that all concessionaires providing call termination access service (international or domestic) are required to produce LARIC service costs for calls terminating on their network. This is consistent with the “forward looking estimates of the costs of a typical, efficient operator” as set out by the Second Panel.

13.11 In setting out its rationale for the adoption of such cost methodology, TATT states that the requirement for cost-based pricing was clear in the Act in respect of interconnection services and that the need to adopt a single cost methodology became even clearer during the First Interconnection Dispute. In the view of TATT and as contained in its Recommendations of an Interconnection and Access Policy, interconnection rates based on cost are essential to competition as they are reflective of economic efficiency. TATT proposed to develop a standard industry cost model to address any difficulty in applying cost-efficiency pricing to interconnection resources. In TATT’s view “A standard cost model approved by the Authority for use by all concessionaires can help to achieve this. Standard cost models go a long way in meeting

the principles of equity, transparency and non-discrimination. It also reduces avenues for dispute consequent upon disagreement on cost-derivation methodologies."

- 13.12 That standard industry LARIC model has not been finalized to date. However, TATT provided guidance to the industry on the manner by which costs for termination services are to be determined, during the period of time it takes to develop the standard cost model-

"... dominant concessionaires may use their own cost models to determine cost-based rates for telecommunications and broadcasting services. Concessionaires that currently do not have a cost model may use benchmarks developed by the Authority to determine cost-based rates. This approach is preferred as it will quickly and effectively provide a reasonable proxy for cost-based pricing. In order to achieve this objective in an efficient manner, the cost data for dominant concessionaires will be appropriately adjusted by the Authority. That is, the Authority will use the principle of cost causality to determine the appropriate costs to be included in the concessionaire's cost model. Costs that do not follow this principle will not be included in the concessionaire's cost model."

- 13.13 The absence of a standard industry model has also engendered the use by TATT of a Component Price Model in its intervention in 2010 under Section 29 (3) and 29(4) of the Act. In its Determination 2010/01, TATT states that its Component Price Model was consistent with ITU-T Recommendation D.140, which incidentally was set out in TATT's Pricing Framework as an approach to determining international inbound termination rates. TATT further stated that its Component Price Model was also consistent with that adopted by the Federal Communications Commission (FCC) 1997 Benchmark Order. TATT went on to argue that –

"The Authority refers to the statement in the Order that any demanded rate increases should be justified to ensure recovery of long-run incremental costs (LRIC). The Authority is therefore of the view that the "cost-oriented" position of the FCC is consistent with a LRIC approach. In this context the Authority is

*satisfied that a floor price for inbound international termination derived from its TD-LRAIC model would be consistent with the FCC's position."*⁴⁸

13.14 In essence, TATT is stating that its Component Price Model equates that of its proposed LARIC model for the determination of rates for inbound international calls. That model is premised on a specific costing methodology which requires inbound international termination to domestic networks to be the summation of -

- a. the cost of termination of the international traffic on the relevant domestic network (herein referred to as the domestic termination rate); and*
- b. any relevant cost incurred in terminating the international traffic.*

The relevant costs incurred in terminating the international telecommunications traffic, referred to in ... (b) above, are the same as those associated with the operation of an efficient international network. Thus, this cost shall include:

- a. the efficient port charges or its equivalent (if applicable) at the relevant international Network Access Point (NAP);*
- b. the efficient backhaul cost from the relevant international NAP to the relevant international Cable Head;*
- c. the efficient international connectivity cost from the international Cable Head to the Cable Head in Trinidad and Tobago;*
- d. the efficient backhaul cost from the Cable Head in Trinidad and Tobago, to the point of interconnection on the relevant domestic network in Trinidad and Tobago;*
- e. the efficient domestic switching and aggregation cost;*
- f. the relevant interconnect facilities cost to access the domestic networks; and,*

⁴⁸ Determination 2010/01 Under Section 29(3) and 29(4) of the Telecommunications Act – Termination of International Incoming Telecommunications Traffic on Domestic Networks In Trinidad and Tobago. TATT 2/15/1 dated 3 February 2010. pp. 19.

*g. the relevant Administrative costs to operate an efficient international telecommunications network.*⁴⁹

- 13.15 It is important to restate that included in the *"the cost of termination of the international traffic on the relevant domestic network (herein referred to as the domestic termination rate)"* is the same domestic termination access services provided by a domestic network interconnection provider, discussed earlier by this Panel. Further, the *"relevant cost incurred in terminating the international traffic"* is required to be those of an efficient operator. Therefore, it follows that the costs of components identified in the 2013 Pricing Rules are required to comply with the principle of efficiency as set out in TATT's Pricing Framework and that those Rules establishes a costing methodology in accordance with Regulation 15 of the Interconnection Regulations.
- 13.16 Based on the above and under the symmetrical framework of the Act and Regulations, all concessionaires that provide international termination services (fixed or mobile) are required to use the LARIC costing methodology as set out by TATT. In the absence of a standard industry model, TATT has directed all concessionaires that provide domestic termination access service to use their own cost model or benchmarks developed by TATT, where the concessionaire does not have a cost model, to determine the cost-rate for termination access services. TATT also requires that where concessionaires use their own cost model, TATT will use the principle of cost causality to determine the appropriate cost to be included and will make appropriate adjustments to costs.
- 13.17 The Panel however feels compelled to resolve what may be perceived as an inconsistency between its position and that of the Second Panel which stated *"that the legislative framework does not require that interconnection rates be based solely on each operator's actual cost."*⁵⁰ In resolving this perceived inconsistency, this Panel

⁴⁹ Pricing Rules and Principles for the Termination of International Incoming Traffic on Domestic Networks in Trinidad and Tobago (as set out in Determination 2010/01 and amended pursuant to Notice 2013/01). TATT 2/15/1 dated February 18, 2013. pp. 1.

⁵⁰ Second Panel. 2008. pp 31.

reminds the parties that at the time of the First and Second dispute, TATT had not finalized its Costing Methodology for the Telecommunications Sector nor had it developed the various proceedings detailed at the Regulatory Framework above. These proceedings have subsequently been provided to the Sector, TATT's expert guidance on the overarching Legislative and Regulatory Frameworks that govern the Telecommunications Sector in Trinidad and Tobago.

- 13.18 The Panel, notwithstanding the aforementioned paragraph, agrees with TSTT that all concessionaires providing (1) domestic termination access services and (2) providing international telecommunications over their respective international telecommunications network must determine their own costs for each individual service ((1) or (2)) or the entire service (sum of (1) and (2)). This will be conditioned by the type of Authorization issued by TATT to the concessionaire. Further, all concessionaires utilizing their own cost models are required to submit to TATT the cost of those services for TATT's assessment and appropriate cost adjustments as applicable. This approach by TATT is consistent with the Second Panel assessment of the *statutory phrase "based on cost" which simply means that the rate-setting process undertaken by regulators should begin with reasonable estimates of the costs using the best available evidence.*"
- 13.19 The Panel also finds that through its interim regime, TATT implicitly accepted TSTT's cost model for assessing cost-based rates for interconnection services, inclusive of international termination services.
- 13.20 The Panel opines that TATT is very explicit in its guidance as it stated that concessionaires without a cost model *"may use benchmarks developed by the Authority to determine cost-based rates"* as it sees these rates as a reasonable proxy for cost-based pricing. TATT's approach is consistent with Section 15(2), where the relevant data for the establishment of the costing methodologies, models or formulae are available. The Panel notes that TATT has consulted and published its "Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago 2019". In that document TATT stated that the objective of its

Benchmarking Study was to establish *“recommended interconnection costing benchmarks for the domestic mobile and fixed termination rates.... These costing benchmarks, once finalized will serve as reference points that may be utilized by concessionaires when setting their interconnection rates when “the relevant data for the establishment of the costing methodologies, models or formulae are unavailable within a reasonable time”. These benchmarks are rate maxima, meaning that operators are free to set interconnection rates that are lower.”*⁵¹

13.21 The Panel notes that TATT does not propose to set *ex ante* rates for termination on the domestic fixed and mobile networks as derived from its Benchmark Study. It appears that the Benchmark Study seeks to set cap rates for call termination against which concessionaires negotiate.

13.22 The rates derived during the interim regime, be it via concessionaires’ own cost models (cost adjusted by TATT where appropriate) or TATT’s benchmarks appears to form the basis upon which negotiations are to be conducted. The Panel has formed this position based upon TATT’s explicit statement in its aforementioned Benchmark Study and its RIO Framework which states -

*“Concessionaires must hence ensure that interconnection charges, both as proposed in the RIO and as set out in any executed Interconnection Agreement, are based on cost and are compliant with the Authority’s Costing Methodology. However, despite recognizing its critical role in ensuring that interconnection charges do not reflect market inefficiencies and distortion, the Authority also acknowledges the principle that the final tariffs enshrined in the Agreement should, like most other considerations within the Interconnection Agreement, be subject to the deliberations of the parties during negotiations.”*⁵²

13.23 The Panel therefore accepts TSTT’s argument that, during the interim regime, that rates be negotiated and not set *ex ante*. The Panel must re-state however, that rates

⁵¹ Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago 2019. pp. 1.

⁵² Draft Standards and Guidelines for Interconnection and the Development of Reference Interconnection Offers. pp.21.

are to be negotiated against the backdrop of rates determined in accordance with the interim regime set out in the previous paragraphs. The Panel therefore agrees with Lisa Communications that rates must conform to the provisions of the Interconnections Regulations.

- 13.24 To set rates *ex ante* requires, in this Panel's opinion, a regulatory intervention by TATT (which has not occurred to date). The Panel notes that TATT has acknowledge this in its RIO Framework -

"... it may be necessary depending on prevailing market conditions, the Authority may need to intervene with price controls in interconnection markets. Such intervention would be based on Section 29(2) of the Act, which allow for the Authority to implement price regulation regimes where a concessionaire has a dominant position in the relevant market. The proposed mechanism for such intervention would be a combination of price caps and floors, which together form a regulated range for termination rates, in accordance with Section 29 (6) of the Act."

- 13.25 The Panel notes however, TATT's consultation document on "Dominance in Termination Markets."⁵³ In that document TATT sets out it's legislative and regulatory frameworks for assessing dominance in call termination markets and reaffirms its position that concessionaires authorized to provide domestic fixed and mobile termination access services are dominant in these service. The Panel notes however, that the proposed framework does not specifically address how remedies for dominance in call termination markets are to be determined. While the Panel accepts that TATT has stated in its RIO Framework that TATT would intervene under Section 29(2) of the Act and set a combination of price caps and floors, in accordance with Section 29(6), TATT has not established its costing methodologies for price caps, or finalized its standard LARIC model for termination rates.

⁵³ Dominance in Termination Markets.

https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=1091&PortalId=0&TabId=222

13.26 It is unclear to this Panel, going forward, whether TATT intends to set a single rate for those rates as a remedy for dominance in termination markets when (1) it finalizes its LARIC cost model or (2) through its Benchmarking study. It is also unclear to this Panel whether the rates set out in the Benchmarking study equate with a costing methodology for setting the price cap rates as stated by TATT in its RIO for intervention under Section 29(6) of the Act. The Panel however finds it strange that an intervention under Sections 29(2) or 25 in the instance of dominance does not lead to a specific regulatory remedy or a specific price point. To intervene where all concessionaires are deemed dominant in call termination services and to allow parties to negotiate may not provide the regulatory certainty required in the said market. The Panel came to this position from (1) the 2010 intervention under 29(3) and (4) of the Act and (2) the decision of the First Panel of 2006. The 2010 intervention and Determination 2010/01 and the subsequent Pricing Rules and Guidelines, set out at Rules 7 and 8 requirement that no concessionaires "shall offer, negotiate on the basis of, or charge a rate which is less than the sum of the cost components..." defined at Rule 2. This suggests a minimum floor rate but left the rate for international termination access services to be commercially agreed between the parties. The Panel noted the decision of the First Panel of 2006, which determined that the "cost based" mobile termination access services rates fell within a range of TT\$0.42 to TT\$0.53. This Panel further noted that regulatory certainty was not achieved until the decision of the Second Panel which set call termination access rates at TT\$0.40 and TT\$0.07 for mobile and fixed services respectively. This Panel finds that *If it were so straightforward for the parties to negotiate commercial terms and conditions for these services, it is unlikely that we would be where we are today. The submissions are replete with evidence of the difficulty the parties have experienced in negotiating.*

14 RECIPROCITY AND NON-DISCRIMINATION

- 14.1 TSTT argued in its submissions that the dispute before this Panel is about reciprocal rates for the International Fixed Termination and International Mobile Termination services. TSTT further argues that the parties are proposing to exchange traffic between their networks at reciprocal rates and that such exchange of traffic conforms to the principle of non-discrimination contained in the legislation and regulations. TSTT argues further that non-discrimination is the bedrock of the regulatory framework in Trinidad and Tobago and that reciprocal rates and non-discrimination provide the appropriate conditions for competition.
- 14.2 It is not in dispute that the principle of non-discrimination is enshrined in the Act and that terms and conditions, inclusive of prices for interconnection services must be provided by a concessionaire on a non-discriminatory basis. Section 25(2) (d) mandates concessionaires to offer the elements of interconnection in a manner that is at least equal in both quality and rates to that provided by the concessionaire to a subsidiary, affiliate or any other party to which the concessionaire provides interconnection. Section 25(2) (g) mandates concessionaires to offer the terms and conditions of an agreement concluded pursuant to negotiations to any other concessionaire on a non-discriminatory basis. The mandatory provision of non-discrimination is also required under the Interconnection Regulations. Section 5(1) of the Interconnection Regulations reinforces the principle of non-discrimination as set out at Section 25(2) (d) and (g) of the Act, while Section 5 (2) requires concessionaires to prove to the satisfaction of TATT the reason why they are unable to comply with the principle of non-discrimination. In its Determination 2010/01 and its Pricing Rules, 2013, TATT mandated that its costing methodology adhered with the principle of non-discrimination.
- 14.3 In this Panel's view, non-discrimination is the default proviso of the Legislative and Regulatory Framework and exceptions to that proviso necessitate justification to the satisfaction of TATT. The Panel therefore agrees with TSTT that non-discrimination is the bedrock of the regulatory framework in Trinidad and Tobago.

- 14.4 The Panel next turned its attention to the application of reciprocal rates and whether it was obligatory within the existing regulatory framework in Trinidad and Tobago. The Panel repeats its earlier discourse on cost-based rates and the requirement that each concessionaire, deemed to be dominant in call termination markets, must determine its cost of providing terminating access service to its network. Within that framework those rates for terminating access services must be offered by the concessionaire on a non-discriminatory basis to all other concessionaires. These rates need not be reciprocal unless the termination rate derived from each concessionaire's cost model is the same. However, once the termination access service rate determined by the concessionaire's cost model is offered to other concessionaires, there is compliance with the principle of non-discrimination. The panel notes that the 2006 panel came to a similar conclusion when it stated, *"It is perfectly arguable that non-reciprocal charges are not discriminatory so long as an operator is charging its own termination at the same charge to all other operators."*
- 14.5 The panel noted however, that in the 2012 and 2017 Interconnection Agreements all concessionaires agreed to the domestic Termination Access Services Rate for Fixed and the domestic Termination Access Services Rate for mobile. The Panel notes that these negotiated rates for both Fixed and Mobile Termination Access Services are reciprocal. In the mind of this Panel, all concessionaires have implicitly stated that their respective costs for domestic termination are similar, if not the same. This panel's position is consistent with the 2006 Panel which set out its deliberation on reciprocal rates -

"...in a competitive market among operators offering the same service under similar conditions, prices can be expected to converge towards a common level bearing relation to the costs of increasing efficient operator. ... the panel finds that it would not be unreasonable, indeed it may be eminently reasonable, for administrative purposes in a regulatory context to mandate a single, reciprocal charge for a given service for all operators which are providing the same service under similar conditions if that charge was reasonably believed to be based on costs of a typical, efficient operator. The panel finds that it would also not be

unreasonable for an interconnection agreement between operators acting under similar conditions to require each operator to charge the same rate so long as it was indeed a charge based on the costs of an efficient operator.” ... “the panel also considers that there are various benefits, not insignificant, that may be anticipated from reciprocal charging. It puts the operators in a position of parity regarding the revenues they can earn from the traffic their subscribers generate on their network as recipients of calls. Reciprocal charging can simplify the process of regulation, since modelling the interconnection costs of every individual concessionaire in Trinidad and Tobago can be expected to consume extensive regulatory resources in the years to come. Reciprocal charging also reduces the number of charges being negotiated between operators.” “The panel finds that there are good reasons to adopt reciprocal charging, but this is not to say that it may be automatically mandated in all situations.” The panel went on to state that it found “...the Act and the Concessions, properly construed, would permit and even promote reciprocal charging in interconnection agreements except in the following three circumstances:

First, an operator should not be permitted to mandate reciprocal charging if the charges are not based on the costs of an efficient operator in a steady state of the market in the first place. If they are too high, they may perpetuate inefficiency; if too low, they may have anti-competitive effects...

Second, even if the charges contemplated by an interconnection agreement are based on efficient costs, it would not be appropriate for an interconnection agreement to require them to be applied reciprocally if the operators is not providing the same service under similar conditions such that even in a state of static efficiency it cannot reasonably be expected to match the efficient costs of the first....

Thirdly, an interconnection agreement should not mandate reciprocal charging if it would frustrate the object of the Act as they relate to the development of fair competition and encourage investment...”⁵⁴

14.6 The Arbitration Panel of 2008, which used the terms “symmetrical” and “reciprocal” synonymously, concurred *“with the First Panel that there are significant benefits from reciprocal termination rate and therefore agrees with the First Panel that reciprocal rates should be the default arrangement unless a party opposing symmetry ... is able to satisfy the three exceptions outlined by the First Panel.”*⁵⁵

14.7 This panel is similarly like-minded and accepts, for the purposes of this dispute that rates (cost based) for termination access services should be reciprocal and more so as no evidence was provided by any party to this dispute to be considered as an exception detailed by the First Panel. This does not mean that non-reciprocal rates may not arise in the future under TATT’s standard industry cost model. TATT appears to acknowledge this possibility when it stated in its RIO Framework -

“... the Authority does not intend to provide any guidance on the principle of symmetry or asymmetry in rates between interconnecting parties, as this should be subject to commercial negotiations.”

14.8 Specific to Determination 2010/01 and the Pricing Rules and Principles, 2013, the Panel noted that TATT’s assessment of the *“relevant cost incurred in terminating the international traffic”*, in both its initial Assessment of November 17th, 2009⁵⁶ and its Determination 2010/01,⁵⁷ derived rates that were (1) applied symmetrically, (2) adhered with the principle of non-discrimination and (3) were reciprocal between concessionaires.

⁵⁴ 2006 Arbitration Panel Decision, pp 25, 26, 27, 28, 29, 30.

⁵⁵ 2008 Arbitration Panel, pp. 33.

⁵⁶ Draft Assessment of the Minimum Rates for Incoming International Termination by Application of the Applicable Rules and Principles Established by the Authority Pursuant to Section 29(3) of the Telecommunications Act. Determination under Section 29(3) of the Telecommunications Act, pp. 12. November 17, 2009.

⁵⁷ Determination 2010/01 Under Section 29(3) and 29(4) of the Telecommunications Act – Termination of International Incoming Telecommunications Traffic on Domestic Networks In Trinidad and Tobago. TATT 2/15/1 dated 3 February 2010.

14.9 The Panel also noted deliberations of Justice J. Jones, 2007⁵⁸ who stated -

"The application before me is for judicial review of a decision made by an expert body in which it determined that, in circumstances where parties are mandated to negotiate an agreement in an industry regulated by statute, neither the statute, the concessions under which the parties operated, the regulations or the published guidelines for such agreements prevent one party from insisting in the negotiations for the agreement that the rates charged be reciprocal. The effect of the decision is to allow a party to mandatory negotiation to maintain a position of reciprocity in interconnection charges in that negotiation."

14.10 This Panel is therefore of the view that nothing prevents any party to the negotiations for international termination access services to maintain a position of reciprocal rates for said services. However, in the interest of regulatory certainty, the Panel is of the view that the default position should be that of reciprocal rates (cost-based) for the exchange traffic between the parties should apply for International Fixed Termination and International Mobile Termination services, unless a party opposing reciprocal rates is able to satisfy the three exceptions outlined by the First Panel.

15. ISSUES REFERRED TO THIS ARBITRATION PANEL

15.1 Whether the rates proposed by TSTT for International Incoming Call Termination to PSTN Services and PLMN Services are reasonable and are in accordance with the Legislative and Regulatory Framework for governance of the Domestic Termination access services?

15.2 It is important before considering this issue to restate some of the decision and findings of this Panel that are relevant to this issue. The Panel has determined that call termination access services to Fixed and Mobile networks are interconnection services and are subject to the provisions at Section 25 of the Act. The Panel has

⁵⁸ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007. pp. 24-25.

already set out above that call termination access services adhere to the concept of an essential service and *all* providers of fixed and mobile domestic call termination access services are dominant in that market and are to be regulated by TATT in accordance with the regulatory framework established for these services. The cost methodology for the determination of these services costs, is that of LARIC as set out in the Authority's Costing Framework. TATT has proposed to establish a standard industry LARIC model, which is to be adopted by all concessionaires upon its completion. However, until the finalization of that model, TATT has proposed an interim regime which applies symmetrically to all providers of domestic termination access services.

- 15.3 The rates for domestic termination access services ("herein referred to as the 'Domestic Termination Rate'") during this interim regime, as determined by each concessionaire in accordance with its own cost model are to be offered to all concessionaire on a non-discriminatory basis. Rates need not necessarily be reciprocal unless the termination rate derived from each concessionaire's cost model is the same. This Panel notes that only TSTT assessed its termination access service cost to its fixed and mobile networks. No evidence was provided to this Panel to ascertain whether TSTT's cost model conforms to TATT's LARIC costing methodology. This Panel noted however, that the First Arbitration Panel, stated that the evidence provided before it, "described a fully allocated cost (FAC) model based on historical cost accounting convention which allocates all of TSTT's costs and revenues to products and services using the principles of activity-based costing."⁵⁹ No evidence was provided to suggest that this FAC model was **not** used by TSTT to derive its cost of termination access services to domestic fixed and mobile networks. No evidence was provided to this Panel to suggest that TSTT's costs outputs from its cost model for domestic termination access services were submitted to TATT for its assessment and appropriate adjustments, where necessary, to ensure that they adhere to TATT's LARIC costing methodology.

⁵⁹ First Panel. 2006. pp. 32.

- 15.4 This panel notes however, that **all** concessionaires agreed to the rate for domestic termination access services for both fixed and mobile service under the 2012 and 2017 interconnection agreements. This Panel further notes that these agreed rates WERE symmetrical, non-discriminatory and reciprocal, between and amongst all concessionaires operating in the domestic call termination access service market. In the opinion of this Panel, **all** concessionaires have implicitly stated that their respective costs for domestic termination are similar, if not the same.
- 15.5 The Panel assessed the Rates proposed and agreed between the parties to this dispute for domestic (fixed and mobile) Termination Access Service against those derived by TATT in its Benchmark study. This assessment becomes important in light of TATT's proviso that *"Concessionaires that currently do not have a cost model may use benchmarks developed by the Authority to determine cost-based rates.* Based on the information at Table 1 below, it is evident to this Panel that TATT needs to assess TSTT's costs of termination service, more specifically that of the fixed service, in order to assess TSTT's adherence to the requirements set out by TATT during the period of the interim regime.

Table 1. Comparison between TSTT's & TATT's Domestic Termination Access Services Charges (TT\$).

Rate	2008 Arbitration (April 2006-March 2011)	April 2012-March 2013	April 2013 - March 2014	April 2014-March 2017	April 2018-March 2019	April 2019-March 2020	April 2020 - March 2021
TSTT's Mobile Termination Access Service Charge (Domestic)	0.40	0.31	0.29	0.27	0.25	0.23	0.20
TATT's Benchmark Mobile Termination Access Service Charge (Domestic)	0.40			0.27	0.226	0.177	0.129
TSTT's Fixed Termination Access Service	0.07	0.06	0.05	0.05	0.07	0.08	0.09

Charge (Domestic)							
TATT's Benchmark Fixed Termination Access Service Charge (Domestic)	0.07			0.05	0.05	0.042	0.035

Sources: TSTT's Witness Statement. Tardiff, T. February 25th 2019. pp. 5. TATT's Benchmarking Study, 2019. pp. 21.

15.6 The Panel now turns its attention to the cost incurred by concessionaires to convey international inbound traffic on its network. The Panel's separating of international and domestic networks is informed by TATT's Authorization Framework which authorizes some concessionaires to operate an international telecommunications network (only). Further, in TATT's RIO Framework, the Authority stated that an *interconnection service provider is a concessionaire for the operation of more than one ... network types*⁶⁰ and that *"each network is seen as distinct for the case of interconnection."* In the context of a symmetrical regulatory framework, the requirements of non-discrimination mandates that the terms and conditions between an international service provider's domestic and international network are the same as those between its domestic network and that of another international service provider's international network or a provider of an international network concession (only).

15.7 The Panel accepts, and for the reasons presented above, that the Authority's Component Pricing Model approximates the costs of LARIC and should be used to assess the conveyance cost for international inbound traffic, in the absence of a standard industry LARIC model. The cost components for that model are set out at Part (2): (a) – (g), of the Authority's 2013, Pricing Rules and Principles. These Rules and Principles apply equally to all concessionaires operating an international telecommunications network and each concessionaire is required to determine its own conveyance cost for international inbound traffic. The Panel accepts that each

⁶⁰ This network types being ((1) Fixed Telecommunications Network; (2) Mobile Telecommunications Networks; and (3) International Telecommunication Network.

concessionaire may likely derive a different cost for conveyance cost for international inbound traffic, given the variance in configuration used by international network concessionaires.⁶¹ Notwithstanding, the variances to the International Network configuration, the Panel noted that the cost for conveyance of an international inbound call over a concessionaire's international network should be the same for a call that terminates on a domestic fixed or mobile Network. The Panel therefore does not accept separate different conveyance costs for international inbound traffic to domestic fixed or mobile networks and more so where concessionaires use the same international network for inbound calls to domestic fixed and mobile networks. The Panel noted that in the Authority's Draft Assessment⁶² and First Assessment of 3 February, 2010,⁶³ TATT had derived a singular cost for the cost of conveyance of inbound international traffic.

15.8 The Panel noted that TSTT's proposed cost of conveyance of inbound International traffic is significantly different for termination on a fixed and mobile network. The Panel also notes that the cost of conveyance of inbound International traffic on a domestic fixed and mobile network is similarly significantly different in TATT's Benchmarking Study.⁶⁴ The Panel is therefore finds it difficult to accept TSTT's costs for conveyance of international inbound traffic and TATT's Benchmark costs for conveyance of international inbound traffic.

15.9 The Panel again noted that **only** TSTT provided its conveyance cost for international inbound traffic. The Panel could not ascertain however, whether TATT assessed

⁶¹ Gleaned from TATT's Draft Assessment of the Minimum Rates for Incoming International Termination by Application of the Applicable Rules and Principles Established by the Authority Pursuant to Section 29(3) of the Telecommunications Act. Determination under Section 29(3) of the Telecommunications Act, pp. 12. November 17, 2009. pp.9.

⁶² Draft Assessment of the Minimum Rates for Incoming International Termination by Application of the Applicable Rules and Principles Established by the Authority Pursuant to Section 29(3) of the Telecommunications Act. Determination under Section 29(3) of the Telecommunications Act, pp. 12. November 17, 2009.

⁶³ Assessment of the Minimum Rates for Termination of Incoming International Traffic, Made Under Determination 2010/01 dated 3rd February 2010.

⁶⁴ Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago 2019. Table 4. pp. 31.

TSTT's or any other concessionaires' costs for conveyance of international inbound traffic as required at Part (5) of the Pricing Rules and Principles –

*"Each concessionaire shall produce to the Authority such information as the Authority may reasonably require to assess the costs of those routs which the Authority selects as appropriate for assessment, applicable to the period from 1 January to 31 December in each year. Such information shall be produced within 30 days of the end of the period to which this information relates, or of the receipt of details of the information required from the Authority, whichever is first."*⁶⁵

15.10 The Panel notes Lisa Communications argument in its submission of 18th February, 2019 at para 25, that TSTT unilaterally introduced in the Second Interconnection Agreement, of 2012, the concept of an "International Carriage Charge" to cover its increased charge for international call termination. The panel notes that Lisa Communication's statement questioned the validity of the ICC and implicitly the basis of the cost upon which the rate was based. The Panel noted that the concept of the ICC used by TSTT is essentially the same as that of the cost of conveyance of an international call used by TATT in its Determination of 2010 and in the Pricing Rules 2013. That cost of conveyance of an international call is now obligatory and symmetrically imposed on all international concessionaires. The cost upon which that rate was s based was contained in TATT's First Assessment dated February 3rd 2010 and TATT's Second Assessment dated March 28th, 2011. Going forward, the basis on which that cost is to be determined is set out at Rule 2 of the Pricing Rules and Principles, 2013. The panel therefore considers it prudent and for ease of reference to adopt the terminology of, "International Carriage Charge (ICC)" in this decision to refer to *an efficient operator conveyance cost for international inbound traffic*.

15.11 The Panel now focuses on TSTT's proposed rates for international termination access service ("International Termination Rate") and the reasonableness of those rates. The cost of International Termination access service, as set out in the Pricing Rules and

⁶⁵ Pricing Rules and Principles for the Termination of International Incoming Traffic on Domestic Networks in Trinidad and Tobago (as set out in Determination 2010/01 and amended pursuant to Notice 2013/01). TATT 2/15/1 dated February 18, 2013. pp. 2.

Principles is the sum of domestic termination access services ("herein referred to as the 'Domestic Termination Rate'" and the cost of conveyance on an international network (ICC). That total cost must adhere to the principle of non-discrimination and must be applied symmetrically to all concessionaires providing inbound international calls.

15.12 The reasonableness of the international termination access service costs, pivots on the reasonableness of the costs that underlie TSTT's proposed ICC and the application of the obligation of a price floor as stipulated in the Pricing Rules and Principles, 2013. In assessing the reasonableness of TSTT's proposed rates for international termination access services, the Panel, considers it necessary to understand the process used to conclude the 2012 Interconnection Agreement given the argument by TSTT that it adopted the same process in the negotiation for the 2017 Interconnection Agreement and that this said process led to an agreement on the rate for domestic fixed and mobile termination access service, by all the parties to this dispute.

15.13 The evidential information before this Panel on the negotiation process is as follows:

- On November 20th 2009, the Authority published its Draft Determination under Section 29(3) of the Telecommunications Act.⁶⁶ On the same date the Authority published for comments, its Draft Assessment of the Minimum Rates for Incoming International Termination by Application of the Applicable Rules and Principles Established by the Authority Pursuant to Section 29(3) of the Telecommunications Act. Determination under Section 29(3) of the Telecommunications Act. In its Draft Assessment TATT assessed the ICC as:

⁶⁶ Draft Determination under Section 29(3) of the Telecommunications Act. TATT 2/15/1. November 20th 2009.

*".... determined from the application of its model that the maximum per minute rate for international call termination, both to fixed and mobile, should be no more than US\$0.0123."*⁶⁷

15.14 And the rate for International Termination access services (mobile and fixed) as -

*"... the price charged for the termination of international incoming telecommunications traffic on a domestic network in Trinidad and Tobago should be no less than US\$0.0758 per minute for termination on a domestic mobile telecommunications network and US\$0.0234 per minute for termination on a domestic fixed telecommunications network."*⁶⁸

15.15 The domestic Termination access service rates were those determined by the Second Panel and were US\$0.0635 (TT\$0.40) for mobile and US\$0.0111 (TT\$0.07) for fixed.

- On February 3rd 2010 the Authority published its Determination 2010/01 and Assessment of the Minimum Rates for Termination of International Incoming Traffic⁶⁹. In its Assessment, TATT, based on representation from the industry revised its ICC upwards to US\$0.0142 (TT\$0.0895). The prices to be charged by a concessionaire for International Termination access services were US\$0.0893 and US\$0.0291 for mobile and Fixed respectively. The domestic Termination access service rates were those determined by the Second Panel and were US\$0.0635 (TT\$0.40) for mobile and US\$0.0111 (TT\$0.07) for fixed.
- On March 28th 2011, TATT published its Report on "Investigation into Compliance with Determination 2010/01"⁷⁰ and it's "Assessment of Minimum Termination Rates for Incoming International Traffic".⁷¹ In this Second Assessment, TATT

⁶⁷ Draft Assessment of the Minimum Rates for Incoming International Termination by Application of the Applicable Rules and Principles Established by the Authority Pursuant to Section 29(3) of the Telecommunications Act. Determination under Section 29(3) of the Telecommunications Act, pp. 12. November 17, 2009, pp. 12.

⁶⁸ Determination 2010/01 Under Section 29(3) and 29(4) of the Telecommunications Act 2001- Termination of International Incoming Telecommunications Traffic on Domestic Networks in Trinidad and Tobago, pp 4.

⁶⁹ Assessment of the Minimum Rates for Termination of Incoming International Traffic, Made Under Determination 2010/01 dated 3rd February 2010.

⁷⁰ TATT 2/15/1. Dated 28th March 2011.

⁷¹ TATT 2/15/1. Dated 28th March 2011.

stated that it had not noted any changes in the wholesale international telecommunications market or any other element impacting upon the cost of providing international telecommunications services. TATT held that the rates for International Termination access services in the initial Assessment of February 2010 (US\$0.0893 and US\$0.0291 for mobile and Fixed respectively) *"shall continue to hold until February 3rd 2012, or such time that evidence arises to deem such a revision as necessary"*⁷².

- On March 30th 2012, the Interconnection Agreement between TSTT and Lisa Communications was filed with TATT. The rates are redacted in this document.
- On the February 18th 2013, TATT issued (1) Notice 2013/01, "Amendment to Determination 2010/01", (2) Notice 2013/02 "Repeal of the Second Assessment Pursuant to Determination 2010/01 and (3) Pricing Rules and Principles for the Termination of International Incoming Traffic on Domestic Networks in Trinidad and Tobago (as set out in Determination 2010/01 and amended pursuant to Notice 2013/01). In its Notice 2013/02, TATT repealed the minimum termination rates set out in the initial Assessment and Second with effect March 1st, 2013. Notice 2013/01 amended Determination 2010/01 and included a new Rule 8 which stated that where the Authority has not conducted an assessment, as per the Rules or where the last assessment has expired, "no concessionaires shall offer, negotiate on the basis of, or charge a rate which is less than the components" of the domestic termination access service and the cost of conveyance of international incoming traffic, "in relations to its own costs". Rule 5 states *"Each concessionaire shall produce to the Authority such information as the Authority may reasonably require to assess the costs of those routes which the Authority selects as appropriate for assessment, applicable to the periods from 1 January to 31 December in each year."*
- The submission of the parties to this dispute set out the rates agreed between the parties for international termination access services (fixed and mobile), and the

⁷² Assessment of Minimum Termination Rates for Incoming International Traffic. (Second Assessment). March 28th 2011. pp. 1.

Domestic International Termination access service in the 2012 Agreement. These said submissions also detailed the proposed rates for the International Termination access service (Fixed and Mobile) and the agreed Domestic International Termination access service in the 2019 Agreement (Table 2)

Table 2: Domestic and International Termination Rates a in Trinidad and Tobago (TT\$)

Rate	2008 Arbitration (April 2006-March 2011)	April 2012-March 2013	April 2013 - March 2014	April 2014-March 2017	April 2018-March 2019	April 2019-March 2020	April 2020 - March 2021
Mobile Termination Charge (MTR) Domestic	0.40	0.31	0.29	0.27	0.25	0.23	0.20
Fixed Termination Charge (FTR) Domestic	0.07	0.06	0.05	0.05	0.07	0.08	0.09
International Carriage Charge (ICC) Mobile	NA	0.45	0.47	0.49	0.89	0.93	0.94
ICC Fixed	NA	0.12	0.12	0.12	1.07	1.06	1.05
International MTR	0.40	0.76	0.76	0.76	1.14	1.15	1.14
International FTR	0.07	0.18	0.17	0.17	1.14	1.14	1.14
Source: 2008 Arbitration: Arbitration Decision pp 50 and 56; Middle block:2012 TSTT/CCTL Interconnection Agreement, Schedule 6, pp 5-6; right hand block: CCTL's Notice o Dispute Letter, April 13, 2018, Exhibit A, Annex 1.							

Source: Tardiff. T. Submission dd. February 25th, 2019. pp. 5.

- In its Submission of February 25th 2019, TSTT's expert witness Dr. Tardiff, at Part B. "Symmetric Above-Cost International Termination Rates Do Not Distort Competition among Trinidad and Tobago's Carriers", stated "the fundamental

component of the economic principle of competitive parity is that the prices and other terms associated with essential inputs be available on a non-discriminatory basis. Quite simply, symmetrical rates satisfy this requirement and asymmetrical rates do not. Kahn and Taylor⁷³ also observe that if the non-discrimination requirement is satisfied, the level of the prices of the essential inputs is irrelevant to the ability of rival to compete.⁷⁴

- In its Submission of February 25th 2019 TSTT argued that if international termination rates were relatively high, competition for wireless customers (and between wireless and wireline networks) would result in lower end-user domestic prices. This waterbed effect arises where firms, in response to competition and receiving revenues from multiple sources reduce some prices in response to increases in revenues from other sources.

15.16 In assessing the evidential information above, the Panel noted the following in relation to the 2012 Interconnection Agreement:

- I. The 2012 Interconnection Agreement was negotiated against (a) a minimum International Termination access services Rates of TT\$0.563 (US\$0.0893) and TT\$0.183 (US\$0.0291) for mobile and fixed respectively;⁷⁵ (b) Domestic Termination access services rates of US\$0.0635 (TT\$0.40) for mobile and US\$0.0111 (TT\$0.07) respectively; and the cost of an efficient international network providing international conveyance at TT\$0.0894 (US\$0.0142). The Panel has come to this informed position given that the Second Assessment of 28th March 2011, held that it had not noted any changes in the wholesale international telecommunications market or any other element impacting upon the cost of providing international telecommunications services. TATT's statement is instructive as it had not noted any changes to any element that impacted upon the cost of international termination access cost. The Panel concluded that the other

⁷³ Alfred E. Kahn & William E. Taylor, *The Pricing of inputs Sold to Competitors: A Comment*, 11 Yale Journal on Regulation. 225 (1994).

⁷⁴ Tardiff T. Dr. Submission dd. 25th February 2019. Para. 23, pp. 9.

⁷⁵ The nominal exchange rate of US\$1.00 to TT\$6.30 was used as per TATT's statement in Determination 2010/01. pp.9.

cost elements referred to by TATT are the domestic termination access cost and the cost of international conveyance. No information was provided to this Panel or available on the Authority's website to suggest that an Assessment was undertaken by TATT on or before February 3rd, 2012. The Panel therefore holds that as at the time of the conclusion of the 2012 Interconnection Agreement the rates for domestic termination access services of DTR, Mobile TT\$0.40 (US\$0.0635) and Fixed TT\$0.07 (US\$0.0111) and ICC TT\$0.0894 (US\$0.0142) remained in effect.

- II. The rates commercially agreed by all concessionaires in the 2012 Interconnection Agreement were those of TT\$0.76 (US\$0.11) and TT\$0.18 (US\$0.025) for mobile and fixed respectively and against domestic termination access services rates of TT\$0.31 (US\$0.04) and TT\$0.06 (US\$0.008) for mobile and fixed respectively (Table 2). Given that the Authority held that the cost of conveyance of an efficient international network (ICC of TT\$0.0894 (US\$0.0142)) remained in effect, the differences presented at Table 2 for the ICC do not reflect the rates assessed by TATT but are rather more reflective of profit margins. Further given that at the time of the conclusion of the 2012 Interconnection Agreement, the minimum rate for international termination access to a fixed network, as per TATT's Second Assessment of March 28th 2011, was US\$0.0291; while that agreed between the parties was US\$0.025 and suggest predatory pricing. The basis for the Panel's conclusions are:-

- i. TATT's Determination 2010/01 included a reasonable rate of return of 15% to the International termination access rates for both fixed and mobile.
- ii. The differences between the International termination access rates for (fixed and mobile) in the 2012 Interconnection Agreement and the International termination access services rates (fixed and mobile) in Determination 2012 were as follows TT\$0.197 (TT\$0.76 *minus* TT\$0.56.3) and TT\$-0.003 (TT\$0.018 *minus* TT\$0.0183) for mobile and fixed respectively. The issue of the predatory pricing for fixed international

termination access will be discussed under the second Issue referred to this Panel.⁷⁶

- iii. The efficiencies achieved in the domestic termination access services rates which trended downward during the five year period. These efficiency gains were initially TT\$0.09 (TT\$0.40 minus TT\$0.31) for mobile and TT\$0.01 (TT\$0.07 minus TT\$0.06). The efficiency gained over the five year period for domestic termination access services would increase incrementally going forward.
 - iv. The sum effect of efficiencies in the domestic access services (mobile and fixed); higher international termination rates as per the 2012 Interconnection Agreement; and constant efficiency in the cost of international conveyance is margins of TT\$0.206 (TT\$0.196 plus TT\$0.09) and TT\$0.007 (TT\$0.01 plus TT\$ -0.003) for mobile and fixed respectively.
- III. All parties, utilizing the Authority's Determination 2010/01 minimum international termination rates for fixed and mobile as a reference point were able to commercially negotiate a rate for the international termination access service for both fixed and mobile in the 2012.
- IV. The minimum rate in the Second Assessment was repealed in 2013 (Notice 2013/02), one year after the 2012 Interconnection Agreement was signed and filed with the Authority.

15.17 The Panel now sets out the following as it relates to the negotiations for the 2017 Interconnection Agreement -

- I. In accordance with Rule 5 of the Pricing Rules and Guidelines, 2013 each concessionaire is required to provide on an annual basis to the Authority relevant costing information for assessment *"of those routes which the*

⁷⁶ Whether the determination of incoming termination rates and settlement rates should be influenced by macro-economic, policy and trade considerations so as to mitigate the 'dumping' of minutes into Trinidad and Tobago

Authority selects as appropriate for assessment." In the context of the Pricing Rules and Principles, 2013 those costs must be related to the cost of conveyance of international inbound traffic. No evidence was available to suggest that concessionaires provided this information annually or that the Authority assessed the cost of international conveyance annually.

- II. In accordance with Rule 8 of the Pricing Rules and Guidelines, where the Authority has not conducted and published *an assessment on the price of International termination*, or where the effective term of the most recent assessment has expired, no concessionaire shall offer, ***negotiate on the basis of, or charge a rate*** which is less than the sum of the ***cost components*** defined at Rule 2 in relation to ***its own network***. The Panel noted that the Second Assessment of 2011 was the last Assessment and this was repealed by Notice 2013/02. This notwithstanding, there is an implied requirement by the Authority that concessionaires assess the cost component at Rule 2. To not assess those efficient costs exposes concessionaires to the possibility of settling at a rate below its termination cost. No evidence was provided by TSTT to demonstrate that it assessed the ***cost components*** defined at Rule 2 in relation to ***its own network***.
- III. TSTT proposed the same international termination access services rate of TT\$1.14 for fixed and mobile networks. This is against a descending glide path for mobile, commencing at TT\$0.25 (US\$0.037) and an inclining glide path for fixed commencing at TT\$0.07 (US\$0.0114). The ICCs computed by TSTT are those of TT\$0.89 (US\$0.132) mobile and TT\$1.07 (US\$0.15). The Panel is hard-pressed to accept that the rates for international conveyance as detailed at Table 2, for fixed and mobile are those of an efficient operator as required at Rule 2. In the opinion of this Panel, cost-based rates are a central tenet of the Act. The Panel reminds the parties that the Second Panel explicitly stated that "Encouraging efficient telecommunications services in Trinidad and Tobago is one of the major objectives of the Act. Additionally, the First Panel observed: ...

"the common theme underlying both the emphasis in the Act and Concessions on encouraging competition and the requirement of cost-based interconnection charging is to be found in the economic principle of efficiency."

15.18 Furthermore, TATT's proposed interconnection policy notes, "In order to encourage competition, it is essential that interconnection rates in the country be based on costs that are reflective of efficiency...".⁷⁷

- IV. No concessionaire provided evidence that it assessed the **cost components** defined at Rule 2 in relation to **its own network**. This efficient network cost formed the basis against which concessionaires were to negotiate the rate for International termination access services during the interim regime.
- V. The Authority had not capped the rate for international termination access services. This appears to be inconsistent with its statement in its RIO Framework that its intervention in call termination markets would be a combination of price caps and floors, which together form a regulated range for termination rates. Concessionaires were to then negotiate against that range of termination access services rates. Such a strategy, as adopted by TATT in its Pricing Rules and Principles, 2013 and the First Panel, failed to create the regulatory certainty much required in call termination access markets. If it were so straightforward for the parties to negotiate commercial terms and conditions for these services, it is unlikely that we would be where we are today. Further, to not set a rate arising from dominance gives rise to the possibility of regulatory "gaming". The Second Panel noted that *"If one of the parties in a competitive environment considers that the uncertainty resulting from the lack an interim regime promotes its private interest, it will have the incentive to draw out the resolution process as long as possible. This behavior is unlikely to serve the public interest."*⁷⁸

⁷⁷ Second Panel. 2008. pp 53-54.

⁷⁸ Second Panel. 2008. pp.90

- 15.19 The Panel now turns its attention towards two concepts that are central to TSTT's argument of above-cost international termination rates (1) "Competitive Parity and (the "Waterbed" Effect.
- 15.20 The Panel's review of Kahn and Taylor⁷⁹ reveals that their construct of competitive parity, is a reformulation of Baumol and Sidak (1994),⁸⁰ Efficient Component Pricing Rule (ECPR), which states that the price of access be set equal to the direct incremental costs of providing the upstream access service plus the net contribution forgone (opportunity costs) in not providing the downstream service. As stated by Kahn and Taylor (1994), the purpose and effect of the principles of comparative parity is to ensure that competition between the provider of the essential facility (interconnection services) and actual and potential rivals is efficient. "That is to say, rules framed in accordance with those principles should produce a distribution of responsibility for performing the contested function among several rivals on the basis of their respective costs and so minimize the total costs of supplying the contested service. There are two requirements if this condition is to be met. First, there must be no discrimination, overt or implicit, between the division or affiliate of the company supplying the essential input for which we will take as ... interconnection ... and the rivals requiring access to it. Second, the margin between the monopolist's wholesale charge, which its rivals must pay and its retail price, against which those rivals must compete, must reflect the former's economic costs of performing the function for which it and others are competing." Kahn and Taylor reduce these requirements to two specific rules, (1) the incumbent must be subject to the same interconnection charge as its rivals (2) the incumbent must recover that interconnection charge and the incremental costs of its own operations. Kahn and Taylor (1994) further argue that the absolute levels of the interconnection charge (high or low) is irrelevant for rivals to compete but what was more relevant to facilitates efficient competition is the margins between the interconnection charge

⁷⁹ Alfred E. Kahn & William E. Taylor, *The Pricing of inputs Sold to Competitors: A Comment*, 11 Yale Journal on Regulation. 225 (1994).

⁸⁰ William E. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale Journal of Regulation. 171. (1994).

and the retail prices. In their critique of the ECPR, Kahn and Taylor (1994) noted that, by itself, the ECPM rule, which requires an interconnection providers to supplied interconnection at its incremental (marginal) cost, including its incremental (marginal) opportunity cost, if imposed without supplementary safeguards, allow the interconnection provider to include in its price monopoly profits. In their response to Kahn and Taylor (1994), Baumol and Sidak (1995) emphasized the second economic efficient requirement, in addition to the ECPR, that being, the final product price must be subjected to market forces or regulation so as to preclude monopoly profits. Baumol and Sidak (1995) stated “We have explicitly emphasized that the one rule, without the other, does not guarantee results that serve the public interest.” While the Panel noted that the arguments advance by Kahn and Taylor and Baumol and Sidak related to the margins between the cost of termination access services and the retail price for those services, the arguments do not in any way negate the efficiency requirements set out in the Act and TATT’s LARIC Costing Methodology. The Panel finds that the concept of “ECPR” necessitates that the cost of domestic and international termination access services be that of an efficient operator. The Panel therefore agrees with Kahn and Taylor (1994) that if an interconnection provider (TSTT in this instance) supplied an interconnection service at its incremental (marginal) cost, including its incremental (marginal) opportunity cost, without the imposition of supplementary safeguards, the interconnection provider (TSTT) can include in its price monopoly profits. The Panel therefore finds that TSTT’s proposal of TT\$1.14 (US\$0.17), in the absence of its assessment of its cost of international conveyance appears to include monopoly profits.

- 15.21 The Panel therefore holds that the concept of “Competitive Parity”, as argued by TSTT - Symmetric Above-Cost International Termination Rates Do Not Distort Competition among Trinidad and Tobago’s Carriers) is not applicable within the legislative and regulatory framework for the Telecommunications Sector in Trinidad and Tobago, which requires that the termination access service cost be based on cost.
- 15.22 The Panel now assesses TSTT’s argument of the “waterbed effect”. The panel’s review of TSTT’s Submissions, the evidence available from the 2012 Interconnection

Agreement and the information available on TATT's website, specifically its Annual Market Report, found no evidence of the existence of the "waterbed" effect as advanced by TSTT. This "effect", within the context of this dispute and as argued by TSTT, alleges that higher rates of international termination access services and higher corresponding settlement rates paid by foreign carriers to terminate calls in Trinidad and Tobago can benefit domestic carriers and their customers through lower domestic rates. The panel's review of the literature on the "waterbed" effect", reveals when a carrier considers its overall pricing policy, it generally takes termination rates into consideration given the bottleneck in call termination. As such the higher the call termination revenues, the lower the prices the carrier will charge *its customers*. It follows also, where regulations reduce termination rates and hence revenues, carriers will raise their prices to their subscribers. In that context, where concessionaires operating in the Trinidad and Tobago market set the rate for international termination access services, in accordance with the cost set out at Rule 2 of the Pricing Rules and Principles, or TATT's LARIC cost methodology, those concessionaires cannot (1) influence the prices for calls originating outside of Trinidad and Tobago (2) increase/decrease the retail price for domestically originated calls outbound international calls as international call origination is a separate market⁸¹ (3) use the revenues derived from the international market to subsidize the domestic market, without the prior approval from the Authority. This is clearly evident at Section 24(c) of the Act, which requires concessionaires to:

"refrain from using revenues or resources, from a telecommunications network or service to cross-subsidize any other telecommunications network or service, without the prior written approval of the Authority"

- 15.23 The Panel is therefore hard press to accept the impact of the "waterbed" effect between the international call termination market/network and the domestic market/network.

⁸¹ Draft Revised Price Regulations Framework for Telecommunications Services in Trinidad and Tobago. 2015. pp. 8.

15.24 Based upon the above, this Panel finds that the rates proposed by TSTT for International Termination access services for both fixed and mobile networks are non-compliant with the Authority's costing methodologies for LARIC. This is equally applicable to the Authority's Component Price Model which adheres to TATT's LARIC costing methodology. While the Panel accepts that concessionaires can commercially negotiate the rate for international call termination, that rate must be based upon the cost determined for international termination access services as per Rule 2 of the Authority's Pricing Rules and Guidelines. The Panel has therefore determined that TSTT has not complied with these Rules and finds that the TT\$1.14 proposed is not based on cost methodology as set out by TATT.

15.25 Whether the determination of incoming termination rates and settlement rates should be influenced by macro-economic, policy and trade considerations so as to mitigate the 'dumping' of minutes into Trinidad and Tobago?

15.26 In considering the arguments that the termination access services rates should be reflective of macroeconomic policy and trade considerations, the Panel considered overarching regulatory framework governing the telecommunications sector in Trinidad and Tobago. The Panel's review of the Authority's proceeding demonstrated a clear proclivity toward economic efficiency. The Authority's proposed standard industry cost model and the Component Price Model are both premised upon efficiency. For completeness, the Panel reminds the parties that the Authority's proposed standard industry cost model addresses any difficulty in applying cost-efficiency pricing to interconnection resources. Further, ~~the~~ Rule 2 of the Pricing Rules and Principles requires the "*relevant cost incurred in terminating the international traffic*" to be those of an efficient operator. The First Panel also identified efficiency as central to the Act "*the common theme underlying both the emphasis in the Act and Concessions on encouraging competition and the requirement of cost-based interconnection charging is to be found in the economic principle of efficiency.*"⁸² The Second Panel similarly stated that "*Encouraging efficient*

⁸² First Panel. 2006.pp. 22.

telecommunications services in Trinidad and Tobago is one of the major objectives of the Act.”⁸³ That Panel further stated-

“... this Panel considers that the key principle guiding its deliberations is that its decision should promote the efficient provision of telecommunications services to the people of Trinidad and Tobago.

Conversely, the Panel does not consider that its role is to promote the private interests of the parties except where those private interests promote the public’s interest in high quality, low cost, modern telecommunications services.

It is generally considered that the competitive supply of telecommunications is in the public interest because competition encourages the efficiency and innovation that benefit the public. This is specifically set out as a key objective of the Act in section 3 ...

Further, the public interest is best served when competitive entities are generally allowed to operate freely in the market guided by market forces rather than government regulation. However, because of the nature of telecommunications services, there are certain areas where market forces cannot be relied upon to ensure the efficient provision of telecommunications services.

Specifically, market forces cannot operate effectively where a party has a monopoly or is in a position to exercise market power, or where a party controls a “bottleneck” facility (i.e., an essential component of a competitive service which provides access to customers and that cannot be practically replicated by the competitor).”⁸⁴

15.28 In the dispute before this Panel all concessionaires are dominant in termination access services markets (domestic and international). This Panel therefore finds it prudent that the Authority must establish interconnection termination access

⁸³ Second Panel. 2008. pp 19.

⁸⁴ Second Panel. 2008. pp 19.

services rates that promote the public's interest in the efficient provision of telecommunications services. This Panel therefore holds that the international termination access services rates must be reflective *only* of the cost an efficient operator. The Panel further holds that considerations for the International termination access services rates to be reflective of macro-economic conditions and trade considerations or of foreign currency earning are not a requirement of the provisions of the Act as it relates to termination access services. In the absence of any policy objective by the Government of the Republic of Trinidad and Tobago (GORTT), as in the instance of Jamaica and Haiti, where the international access services rates include a Universal Service charge, the international termination access services rates shall be reflective *only* of the cost of an efficient operator in that market.

15.29 The Panel now considers acts of "dumping" of international traffic into Trinidad and Tobago as a condition for setting international termination access services rates. The Panel, in its deliberations, accepted TSTT's argument that the rate for international termination access services and the settlement rates function as a package. The Panel also accepts arguments that (1) high Settlement Rates can exist without high international termination access services and (2) low Settlement Rates cannot exist with high rates for international termination access services. In the Panel's view, any Settlement Rate that is below the rate for international termination access services clearly suggests the presence of predatory pricing and is at variance with Section 29(2)(c) of the Act. The panel therefore considers statements that suggest the possibility of dumping of incoming international minutes in Trinidad and Tobago as being indicative of possible predatory pricing behavior and warrants investigation by TATT. However, the price at which these rates settle must depend on competition in the market as required at S.29(1) of the Act.

15.30 The Panel therefore holds that TSTT's alleged statement of the "dumping" of international minutes in Trinidad and Tobago should be investigated in accordance with Section 29(2) of the Act. The Panel also holds that the Settlement Rates for inbound international traffic **must** settle at a rate above the rate for international

termination access. That Settlement Rate **must** be derived from competition in the market as required at S.29 (1) of the Act.

15.31 Whether the incoming settlement rate can be determined by parties to this dispute without regard to the international incoming termination rates settled and agreed by other authorised concessionaires.

15.32 In considering this issue, the Panel finds it necessary to restate some of its conclusions arrived at during its deliberations thus: -

- a. The Symmetrical regulatory framework governing the Telecommunications Sector in Trinidad and Tobago;
- b. The principle of non-discrimination as a bedrock for the Act;
- c. Rate for International Termination Access Services must comply with the *forward looking estimates of the costs of a typical, efficient operator* (LARIC cost methodology);
- d. The Component Price Model complies with the Authority's LARIC cost methodology principles;
- e. Rates for Termination Access Services must be symmetrically offered but need not be reciprocal unless costs are similar, if not the same;
- f. Rates for Termination Access Services are to be commercially negotiated but against the cost-based rates of each concessionaire; and
- g. Each concessionaire is required to assess its cost of international conveyance on its **own** network.

15.33 As previously stated, the Panel is aware that information is available on the Authority's website regarding an Interconnection Agreement between CCTL and Digicel, signed sometime in 2013 and filed with the Authority. There is no evidence before this Panel as to the rates between Digicel and CCTL for domestic and international termination access services.

There is a requirement at Rule 8 of the Pricing Rules and Principles, 2013, for each concessionaire to assess its own cost of international conveyance on its own network.

There is no evidence before this Panel to suggest that Digicel did or did not conduct such an assessment of its own cost of international conveyance.

15.34 This Panel accepts that the cost of domestic termination access services on a fixed and mobile network have been assessed and the rates for these services have been commercially negotiated between all concessionaires, inclusive of between TSTT and Digicel. Those rates are presented at Table 1 above. There is no evidence before this Panel to suggest that Digicel's costs of International access services are at or approximate the rates agreed between Digicel and TSTT or that its costs for international conveyance were efficient or inefficient. For the Panel to extend its arguments and conclusions made herein to Digicel costs will be purely conjectural and speculative to say the least.

15.35 The evidence before this Panel is that TSTT initially proposed an increase to the 2012 rate for mobile and fixed international termination access services. The proposal was for the rate for mobile international termination access to increase from US\$0.117 to US\$0.15, while that for fixed international termination access was to move from US\$0.028 to US\$0.01. When considered against existing rates international termination access rates, the proposed rates may be construed as an attempt to have the Settlement Rates agreed by the parties in the 2012 wholesale agreement become the new rate for international termination.

Table 3: Rates for Domestic & International Termination and Settlement for the period 2010-17

	TATT 2010 Determination ITR US\$	TATT 2010 Determination DTR US\$	Concessionaires 2012 ITR US\$	Concessionaires 2012 DTR US\$	Concessionaires 2012 Settlement Rates*	Proposed ITR (US\$)
Mobile	0.0893	0.0635	0.110	0.040	0.155	0.15
Fixed	0.0291	0.0111	0.025	0.008	0.055	0.01
*TATT did not set a settlement rate						

15.36 The Panel is however mindful that a concessionaire's rates for its own international termination access services must be offered on a symmetrical basis to all concessionaires. Those rates need not necessarily be reciprocal. As the First Panel

concluded, non- reciprocal termination rates do not defy the principle of non-discrimination if a concessionaire offers its own cost of termination symmetrically to all other concessionaires. Further concessionaires may agree to reciprocal rates if their costs are similar, if not the same. It is therefore reasonable for Digicel and TSTT to agree to the same rates for international call termination access services if their costs for said services are similar or the same. It is also perfectly reasonable for TSTT to offer the rate for international call termination access services agreed with Digicel to all other concessionaires, if its rates were based on the Authority's *forward-looking estimates of the costs of a typical, efficient operator* (LARIC cost methodology. It is also perfectly acceptable for TSTT to negotiate for reciprocal rates if those rates adhered with the Authority's costing methodology. As the rate for domestic termination access services were already agreed between all parties, it was necessary that TSTT demonstrated that it's agreed rates with Digicel included the cost for international conveyance related to that of operating an efficient international network. This Panel has found that TSTT has not demonstrated that it's cost of international conveyance complied with Rule 2 of the Pricing Rules and Principles, 2013. The Panel therefore finds it perfectly acceptable for concessionaires to not accept a rate for international termination access services that is non-compliant with the Act and the regulatory framework created thereto.

- 15.37 This Panel is duly cognizant that during its deliberations to join Digicel to the dispute, it stated that Digicel does not have to be joined as a party to the proceedings for the agreement between TSTT and Digicel to be considered. The Panel has now given consideration to this matter and expressly states that TSTT's cost of international conveyance does not conform with the methodology set out by TATT, which is that of an efficient international network.

All parties are however required to assess their own cost for international conveyance and to determine their own rate for international termination access. Therefore, it is perfectly reasonable for the rates between TSTT and each of the parties to this dispute to be different from those agreed between TSTT and Digicel. It

is also perfectly reasonable for the rates between TSTT and other parties to this dispute to be reciprocal if those rates are based on the cost of an efficient international network. The Panel therefore holds that the international termination access services rate can be determined by the parties to this dispute without regard to that agreed between TSTT and Digicel, provided that each party determines its own cost of international termination access services. The Panel further holds that the incoming settlement rates are to be determined by parties in accordance with the principles of supply and demand in the market as mandated at Section 29(1) of the Act.

- 15.38 The Panel noted Lisa Communications' statement that the rate set by the TSTT/Digicel agreement can be deemed to be indicative of price-fixing and or anti-competitive practices. No evidential information was provided to substantiate this statement. The Panel therefore takes no position as to the intent or the effect of the TSTT/Digicel agreed rates, other than that which is stated under this part. However, the Panel advises that such allegation should be referred to TATT for its consideration.

The Panel feels compelled to remind the parties to this dispute that TSTT's "Application" to join Digicel as an interested party to this dispute was denied. The Panel's position was set out in its Decision of 3rd March 2019, which was given to each party to this dispute.

15.39 Whether the parties negotiated in good faith?

At sub Part 3.1 of the Authority's "Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago (Revised)"⁸⁵, TATT states that in respect of any conflict or disagreement arising between concessionaires in respect of interconnection the parties shall, at all times, negotiate in good faith to arrive at an amicable resolution of any such conflict or disagreement.

⁸⁵ TATT 2/1/3/15. dd. March 29, 2010.

15.40 The Panel in its deliberations considered the 2014 case of **Greenclose Ltd v National Westminster Bank Plc**⁸⁶ Andrews J. who stated that: "*there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length. Leggatt J's judgment in Yam Seng Pte Ltd v International Trade Corp Ltd [2013]1 All ER (Comm) 1321, on which Greenclose heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognised in that judgment (at [147]), the implication of an obligation of good faith is heavily dependent on the context. Thus in some situations where a contracting party is given a discretion, the court will more readily imply an obligation that the discretion should not be exercised in bad faith or in an arbitrary or capricious manner, but the context is vital. A discretion given to the board of directors of a company to award bonuses to its employees may be more readily susceptible to such implied restrictions on its exercise than a discretion given to a commercial party to act in its own commercial interests.*"⁸⁷

⁸⁶ [2014] EWHC 1156 (Ch)

⁸⁷ Leggatt J's judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013]1 All ER (Comm) 1321 also stated;

"In refusing, however, if indeed it does refuse, to recognize any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the *Interfoto Picture Library* case, a general principle of good faith (derived from Roman law) is recognized by most civil law systems—including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the *Unfair Terms in Consumer Contracts Regulations 1999*, SI 1999/2083, which give effect to a European directive, contain a requirement of good faith."

"It would be a mistake, moreover, to suppose that willingness to recognize a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gain said by the fact that such a doctrine has long been recognized in the United States. The New York Court of Appeals said in 1918: 'Every contract implies good faith and fair dealing between the parties to it': see *Wigand v Bachmann-Bechtel Brewing Co* (1918) 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many states, provides in section 1-203 that '[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'. Similarly, the Restatement (Second) of Contracts states in section 205 that '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'

15.41 The Panel also considered **Walford and Ors v Miles and Anor**⁸⁸, where Lord Ackner, in his judgment, stated:

"....the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.....How is a court to police such an "agreement?" A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason...."

15.42 The Panel therefore accepts that all parties were entitled to pursue their own individual interest during negotiations. As such Lisa Communications was entitled to adopt a negotiating position that best suited its market position. TSTT was also entitled to negotiate with one or all parties during negotiation. The Panel therefore accepts that by choosing when to participate in negotiations can be considered a negotiating strategy. It is also perfectly reasonable for a party to adopt a strategy of regulatory "gaming". However, adopting any of these strategies in a symmetrical regulatory framework where multi-party negotiating exist can make such a strategy ineffective. It is therefore incumbent on all concessionaire to negotiate competitively to bring closure to the agreed terms and conditions of interconnection, inclusive of rates, in a timely manner. In fact, the Authority has prescribed a time limit within

In the light of these points, I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.

⁸⁸ [1992] 2 A.C. 128

which negotiations are to be completed. That time period is set out at Regulation 13(1) (a) and (b).

15.43 In its deliberations the Panel considered the case of **Yam Seng Pte Ltd v International Trade Corporation Ltd** which states -

“There are instances where a party would attempt to imply an obligation of good faith into a contract or into negotiations before contract. One such case is **Yam Seng Pte Ltd v International Trade Corporation Ltd**.⁸⁹ In **Yam Seng**, the Court confirmed that the duty of good faith was not implied by default and decided that the test of good faith is objective. It was held that good faith is dependent not on whether the other party perceived the particular conduct as improper, but on whether *“in the particular context the conduct would have been regarded as commercially unacceptable by reasonable and honest people”*.

15.44 In this Panel’s view the test of good faith, as it pertains to this dispute, turns on whether the negotiating parties acted in a manner consistent with the legal and regulatory framework.

The Panel has found no evidence that Lisa Communications assessed the-cost of international conveyance on its own network. The Panel noted that Lisa Communications adopted a passive negotiating position. The Panel found that Lisa did not participate neither in the negotiations regarding the rates for domestic termination access nor that for international termination access.

15.45 The Panel has previously determined that TSTT did not comply with the requirements of the legal and regulatory framework nor with the requirement during the interim period. The Panel finds that TSTT may have misrepresented it’s costs for international termination access services.

15.46 The Panel therefore holds that the doctrine of good faith is contextual and in the case of the domestic telecommunications sector conditional on adherence to the

⁸⁹ [2013] EWHC 111 (QB)

legislative and regulatory framework. The Panel also holds that none of the parties negotiated in accordance with the requirements set out by the Authority in relation to the cost of international termination access services. In that regards, the Panel holds that none of the parties negotiated in good faith.

15.47 Whether the Panel can determine the Rate for International Incoming Termination and the Margin between the International Settlement Rate and Termination Rate?

15.48 The Panel was not provided with any information as to the cost for international termination access by any of the parties to this dispute. The Panel was similarly not provided with any cost as it relates to the cost of international conveyance for international traffic as per Rule 2 of the Authority's Pricing Rules and Principles. The Panel has ruled that TSTT's cost did not comply with the regulatory guidelines or Rules and Principles as set out by the Authority. The Panel did not consider the Benchmark rates derived by the Authority in its Benchmark Study of May 2019. The Panel's position is based upon the fact that the Authority's Benchmark Study only derived the rates for domestic termination access services for both fixed and mobile (these rates are already agreed between the parties) and the rates for international conveyance for fixed and mobile. TATT's Benchmark Study did not derive the rates for international termination services for fixed and mobile. Further, TATT did not derive the rates for international conveyance as set out at Rule 2 of its Pricing Rules and Principles, 2013 but rather implicit international conveyance rates that were different for mobile and fixed networks.

15.49 In the view of this Panel the requirement to determine the cost for international termination access services resides upon each concessionaire or the Benchmarks set out by the Authority during the interim regime. The Panel therefore cannot ascribe unto itself a role that is not given unto it by the Act. As Justice J. Jones stated on her deliberations of the First Panel-

*"This, in my view, is of particular relevance in this case not only with respect to the deliberations of the Panel but where, as we have seen, by section 25(2)(m) Parliament delegated to the Authority the responsibility of determining the appropriate cost basis for interconnection charges."*⁹⁰

15.50 The Panel in considering this issue is also mindful of Justice (Gobin, J) decision in TSTT v First Panel, CV 2006-00899, where Justice Gobin, J hold:

*...that the jurisdiction of the Authority to resolve disputes is limited to the resolution of the disputes, that is, a final resolution or such final agreement as may be arrived at the end of, or during the course of a dispute resolution process which puts an end to the dispute. There is no power to make substantive interim orders. More specifically, there is no jurisdiction to fix rates as claimed by Digicel."*⁹¹

15.51 The Panel is also duly cognizant of Justice J. Jones, CV2006-03320, who stated at page 10:

*"It cannot be disputed that, in the context of the Act, the decision of the Panel is a decision of the Authority."*⁹²

15.52 The Panel also noted Section 83 of the Act and Justice J. Jones comments on same respectively:

"83. A person aggrieved by a decision of the Minister or Authority may request that such decision be reconsidered based upon information not previously considered, and the Minister or the Authority, as the case may be, shall consider the new information submitted and decide accordingly."

⁹⁰ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007. pp. 26.

⁹¹ TSTT v. First Panel and Digicel, High Court of Justice, Gobin J, CV 2006-00899, May 5th 2006. Para. 55. pp. 19.

⁹² Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007. pp. 10.

Justice J. Jones, CV2006-03320 August 9th, 2007 stated parties to a dispute under Section 82(1) of the Act are -

"... not without a remedy in this regard, by Section 83 of the Act a person "aggrieved by a decision of the Authority may request that such decision be reconsidered based upon information not previously considered, and... the Authority, shall consider the new information submitted and decide accordingly."93

PART III

16. DECISION

The Panel therefore holds that in the absence of any relevant and appropriate costing information, provided by any concessionaire for international termination access services or cost of international conveyance it is beyond its remit to set a cost for the services in dispute. The Panel however recognizes that there is a need for the Decision of this Panel to provide a measure of regulatory certainty to all Stakeholders, inclusive of concessionaires.

In considering this need for regulatory certainty, the Panel is duly cognizant that the in the five years Interconnection Agreement of 2012 all parties to this dispute collectively agreed to set the rates for international termination access services at *"US\$0.11 and US\$0.025 for mobile and fixed"*.

The Panel therefore hold that the rates for international termination access for fixed and mobile, as at the period of April 2014 to March 2017, in the 2012 Interconnection Agreement remain in effect. For the avoidance of doubt those rates shall be **"US\$0.11 and US\$0.025 for mobile and fixed respectively (alternatively TT\$0.76 and TT\$0.17 for mobile and fixed respectively).**

⁹³ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9th, 2007. pp. 10.

17. RECOMMENDATIONS

17.1 The Panel further holds that these rates for fixed and mobile international termination access services shall remain in effect until –

1. The Authority determines the cost of fixed and mobile international termination access services in accordance with its standard industry LARIC cost model;
2. The Authority determines the cost of fixed and mobile international termination access services by Benchmarks, as per the interim regime;
3. The Authority determines the cost to convey international traffic over an efficient international network;
4. The Authority determines the cost for fixed and mobile international termination access services, that are the output from a concessionaire's cost model, as per the requirement during the interim regime;
5. Concessionaires assess their own costs for international conveyance on their own network as set out at Rules (2) and (7) of the Pricing Rules and Principles; or
6. The Authority intervenes under Section 29 or any other Parts of the Act as it pertains to dominance and prescribes appropriate remedies for termination access markets.

17.2 The Panel shall not ascribe unto itself a power not conferred unto it for determining the margin between the International Settlement Rate and the rate for international Termination access. The Panel holds firm to its position that the Margin between the International Settlement Rate and the rate for international Termination access must be derived in accordance with Section 29(1) of the Act.

17.3 This Panel feels compel to advise all parties that in accordance with the Part 8.3.4 of the "Procedures for the Resolution of Disputes in the Telecommunications and

Broadcasting Sectors of Trinidad and Tobago (Revised)" that the Decision of this Panel shall be binding on the parties and shall take effect within fourteen (14) days after the date of the written Decision, provided that no appeal has been lodged by any party under Section 83 of the Act ..". The Panel further advises all parties of the statement of Justice J. Jones (CV2006-03320),

"The decision of the arbitration panel is binding on the parties 14 days after the decision unless an application for a review of the decision pursuant to section 83 is made or of the matter is otherwise appealed. The Act however provides for no other form of appeal. A party to the dispute may within 28 days from the date of the decision to apply to the Authority for an interpretation of the decision."

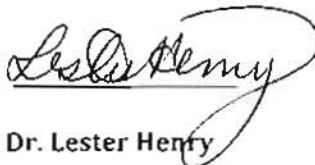
17.4 Further, the Panel states that the above Decision does not preclude the parties from engaging in any negotiated settlement for rates in accordance with the Act.

The Analysis and Decision contained in this document constitutes this Panels final report and Decision. Further, the Panel would like to thank all parties for their assistance during this matter.

Respectfully submitted this 20th December, 2019 by



Ken Wright
Chairman



Dr. Lester Henry
Member



Philip Cross
Member

