THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2021-02135

BETWEEN

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Applicant/Claimant

AND

TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

Respondent/Defendant

Before the Honourable Madame Justice Quinlan-Williams

Date of Delivery: 26 May 2022

Appearances: Mr. Martin G. Daly S.C. leads Mr. Christopher Sieuchand instructed by Ms. Sashi Indarsingh for the Applicant/Claimant

Ms. Deborah Peake S.C. leads Mr. Ravi Heffes-Doon instructed by Ms. Savitri Sookraj-Beharry for the Respondent/Defendant

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DECISION ON THE APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

The Application

1. The applicant/claimant ("TSTT") is a limited liability company and is the country's largest provider of communications solutions to residential and commercial markets. TSTT holds five concessions issued by the

respondent/defendant ("TATT") which set out the terms upon which TSTT as a concessionaire, offers its various telecommunications services and provides access to and through its telecommunications network.

2. TATT is a body corporate established pursuant to section 4 of the Telecommunications Act ("the Act"). Section 18 of the Act, charges TATT with the functions of implementing and enforcing the provisions of the Act along with such policies and regulations made thereunder.

3. On or about the 16 March 2021, the respondent/defendant published the "Results of an Interconnection Benchmarking Study in the Telecommunications Sector of Trinidad and Tobago 2021" ("the 2021 IBS") and the Determination 2021/01 ("the Determination").

4. The Determination was produced as a result of the 2021 IBS along with two prior studies i.e. "Results of an Interconnection Benchmarking Study in the Telecommunications Sector of Trinidad and Tobago 2017" ("the 2017 IBS") and "Results of an Interconnection Benchmarking Study in the Telecommunications Sector of Trinidad and Tobago 2019" ("the 2019 IBS").

5. The Determination mandated that all concessionaires offer international termination rates for fixed and mobile interconnection services to other operators in Trinidad and Tobago having reference to maxima International Wholesale Fixed and Mobile Termination Rates as set by TATT. TSTT contends that TATT published the 2021 IBS and the Determination without consultation in breach of the Act, TATT's established practices and procedures and TSTT's right to be heard.

6. TATT based the Determination inter alia, on Regulation 15 of the Interconnection Regulations ("the Regulations"). In breach of the legislative context TATT purported to act (which permitted it to determine costing benchmarks that concessionaires could refer when setting interconnection rates), the Determination instead set rates and caps for wholesale international termination rates without having regard to costs. Moreover, TSTT alleges that TATT failed and/or refused to consider properly or at all, any of the comments received on the 2017 IBS or the 2019 IBS in the preparation of the Determination.

7. TSTT further contends that TATT relied on the Determination to intervene in negotiations between concessionaires to inter alia, negotiate interconnection rates by engaging in direct and indirect communications with them in response to regulatory concerns raised by TSTT only.

8. What is more is that in response to TSTT's pre-action correspondence, TATT for the first time purported to act under section 29(3) of the Act in characterizing the Determination as a pricing rule.

9. On the 6 July 2021, TSTT filed it application for leave for judicial review of the decision contained in the Determination along with an affidavit in support sworn by Ms. Lisa Agard ("TSTT's Principal Affidavit"). The reliefs TSTT propose to seek in its application for leave for judicial review are as follows:

    a. Pursuant to section 8(1)(b) of the Judicial Review Act Chapter 7:08 ("the JR Act"), a finding and/or declaration that the Determination is illegal, unlawful, irrational and/or ultra vires to TATT's powers;

b. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that the Determination undermines the policy of the Act;

c. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that the Determination is unfair and/or irrational;

d. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that TATT's failure to publish the 2021 IBS and/or draft of the Determination for consultation prior to the issue of the Determination breached TSTT's legitimate expectation to be so consulted;

e. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that TATT's failure to publish the 2021 IBS and/or draft of the Determination for consultation prior to the issue of the Determination denied TSTT of a legitimate opportunity to be heard in relation thereto prior to the issue of the Determination;

f. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that TATT impermissibly intervened in negotiations between concessionaires on the negotiation of rates;

g. Pursuant to section 8(1)(b) of the JR Act, a finding and/or declaration that, in failing to publish the 2021 IBS and/or draft of the Determination for consultation prior to the issue of the Determination and/or impermissibly intervening in negotiations between concessionaires on the negotiation of rates, TATT acted in bad faith;

h. Pursuant to section 8(1)(a) of the JR Act, an order of certiorari quashing the Determination;

i. Pursuant to section 8(1)(a) of the JR Act, an order of mandamus compelling TATT to publish the 2021 IBS and a draft of the Determination for consultation in accordance with TATT's published consultation procedures;

j. Pursuant to section 8(1)(c) of the JR Act, an injunction pursuant to section 18 of the JR Act restraining TATT from doing any act or taking any step which has the effect of intervening in negotiations between concessionaires in relation to interconnection rates save and except as provided in the Act;

k. Pursuant to section 8(1)(c) of the JR Act and part 17 of the Civil Proceedings Rules 1998 as amended ("CPR") restraining TATT from taking any enforcement action against TSTT for any alleged failure to comply with the Determination;

l. Pursuant to Part 17 of the CPR, an order prohibiting TATT from taking any enforcement action against TSTT for any alleged failure to comply with the Determination pending the determination of these proceedings;

m. Damages;

n. Costs; and/or

o. Such further and/or other reliefs as this Honourable Court considers just and appropriate in the circumstances of the Application for Judicial Review.

10. Additionally, TSTT sought an order pursuant to section 11(1) of the Judicial Review Act Chapter 7:08 and/or Part 26.1(1)(d) of the Civil Proceedings Rules 1998 as amended, extending the time for filing of the said application for leave.

11. The hearing of the leave application was fixed for the 26 August 2021. At the hearing, TATT's attorneys apprised the court of its intention to object to the leave application on the ground of delay and obtained directions for a "rolled-up" hearing of the leave application.

12. Since TATT did not file any evidence prior to the hearing of the leave application, the court directed TATT to file its affidavit in opposition on the 15 September 2021. TATT however, filed its affidavit in opposition sworn by Ms. Cynthia Reddock-Downes on the 16 September 2021 ("TATT's Affidavit") without applying for an extension of time to file same.

13. On the 8 October 2021, Ms. Lisa Agard on behalf of TSTT filed a further affidavit in reply ("TSTT's Affidavit in Reply"). Thereafter, TATT filed a notice of objection on the 3 November 2021 to strike out certain paragraphs of TSTT's affidavit in reply.

The Issues

14. The issues for the court's determination are whether:

    I. The timing for the leave application should be extended pursuant to section 11(1) of the JR Act and/or Part 26.1(1)(d) of the CPR;

    II. TATT acted illegally, ultra vires to the Act and/or the Regulations, unfairly and/or irrationally, and whether in those circumstances the Determination ought to be quashed;

III. TATT's failure to publish the 2021 IBS and the Determination in draft for prior consultation is in breach of TSTT's legitimate expectation to be consulted; and

IV. TATT acted in bad faith by copying other concessionaires in its correspondence to TSTT.

The Evidence

- Interconnection

15. TSTT holds several concessions with TATT. Pertinent to these proceedings, is Concession dated the 31 December 2015, whereby TSTT was authorized to operate a Public International Network and/or provide a Public International Telecommunications Service.[1]

16. There are two distinct types of telecommunications services: Domestic Interconnection Services and International Incoming Interconnection Services. The latter is the subject of the Determination and by extension these proceedings.

17. International Incoming Interconnection Services[2] otherwise called Wholesale International Termination Services relate to services where a customer outside of Trinidad and Tobago uses a foreign network (which is not the holder of a Concession in Trinidad and Tobago), to make an overseas call to a user in Trinidad and Tobago. To do so, the foreign caller's network must request that a concessionaire, such as TSTT, Digicel Open Telcom and Lisa Communications, deliver the call to a local network. The concessionaire that accepts the call will bring it into Trinidad and Tobago

[1] TATT's Affidavit at paragraphs 11 and 12
[2] TSTT's Affidavit in reply at paragraph 5

at a rate called the International Incoming Settlement Rate. This rate is not the subject of the Determination.

18. The accepting concessionaire may then transfer that overseas call to the receiver's network. However, the receiver's network will only agree to accept and deliver the call i.e. terminate the call to the receiver if the accepting concessionaire agrees to pay it a special rate called the (Wholesale) Incoming International Termination Rate. This rate is effectively composed of two sub-services: international carriage and domestic termination. Only domestic termination is an interconnection service as defined in the Regulations:

> ""interconnection service" means a service provided by an interconnection provider to an interconnecting concessionaire linking the public telecommunication networks or telecommunication services of both concessionaires to –
>
> (a) allow the users of the public telecommunications services of either concessionaire to communicate with the users of the public telecommunications services of the other; and
>
> (b) to access the services provided by the other concessionaire"

19. This interconnection eliminates the need for customers to subscribe to multiple networks to communicate with customers on those networks. [3]

20. The international termination market in Trinidad and Tobago, comprises six fixed providers: TSTT, Digicel, Columbus Communications Service Limited ("CCTL"), Amplia Communications Limited ("Amplia"), Lisa Communications Limited ("LISA") and Open Telecommunications Limited. As it relates to mobile operator providers, there are two: TSTT and Digicel.

[3] TATT's Affidavit at paragraphs 18 - 20

21. With respect to the termination of international calls to fixed and mobile networks in Trinidad and Tobago, smaller fixed and mobile operators (by measure of traffic terminated) must be able to route calls to customers of the larger fixed and mobile players in the market in order to offer a commercially viable retail service. Therefore, they must interconnect based on negotiated terms.

22. Over the last 15 years, TATT has observed an increase in international interconnection termination rates charged by local service providers in Trinidad and Tobago. In contrast, TATT has observed a downward trend in similar termination rates by regional jurisdictions over time. The average mobile termination rate worldwide dropped from US$0.07 per minute in 2010 to below US$0.02 in 2019. TATT asserts that this downward trend in termination rates is consistent with the expectation that operators ought to recover the cost of network buildout over time and the cost of the provision of interconnection service would be near negligible.

- Agreements/Decisions on Interconnection Rates

23. In 2004,[4] TATT opened up the public domestic mobile telecommunications market for competition, which had previously been dominated by TSTT. As a new entrant, Digicel needed to interconnect with TSTT. After a few meetings, Digicel complained to TATT that TSTT was impeding the progress of negotiations. In 2006, Digicel initiated the first four disputes against TSTT regarding several interconnection issues.

24. The fourth dispute was settled by the decision of an Arbitration Panel dated 7 March 2008. The decision required that interconnection rates would be fixed at TT$0.40 for mobile network termination and TT$0.07 for

[4] TATT's Affidavit at paragraphs 24 – 34

fixed network termination, which applied retroactively from 6 April 2006. Based on this decision, TSTT and Digicel entered into an Interconnection Agreement dated 8 March 2008 applying the rates determined by the Arbitration Panel for a period ending on the 6 April 2011.

25. From 2006 to 2012, the international termination call rates for fixed and mobile networks were identical to domestic termination rates.

26. In 2012, TSTT submitted new commercially negotiated Interconnection Agreements to TATT for a period of five years. The 2012 Agreements maintained the previous termination rates for fixed and mobile termination for domestic and international calls. However, unlike in 2006 to 2012 a new tariff termed "International Carriage Charge" was introduced which applied in addition to the Incoming International Call Termination Charge. Therefore, the charges for incoming international traffic was higher than that for domestic traffic.

27. In or about May 2017, following the expiration of the Interconnection Agreements, negotiations between TSTT and other service providers occurred. While TSTT and Digicel entered into an Interconnection Agreement, disputes arose between TSTT and LISA and TSTT and CCTL specifically on the rates proposed by TSTT for international termination in accordance with the terms that Digicel and TSTT had agreed. These disputes were referred for resolution by TATT for LISA and CCTL.

28. The Arbitration Panel issued its decision in relation to the said disputes on the 20 December 2019. The Panel decided inter alia, that the international mobile and fixed termination rates would remain as set out in the 2012 Agreements. The Panel further decided that the rates for fixed and mobile international termination access services shall remain in effect until:

"1. The Authority determined the cost of fixed and mobile international termination access services in accordance with its standard industry LRAIC 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 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."

- TSTT's Cost Model and Benchmarking Studies

29. TATT's position is that the Arbitration Panel acknowledged that while dominant concessionaires may use their own cost models to determine cost based rates, such data must be appropriately adjusted and approved by TATT. [5] The Panel went on to state that no evidence was provided by the parties to ascertain whether TSTT's cost model conforms with TATT's Long Run Average Incremental Cost ("LRAIC") methodology i.e. had received the approval of TATT. The Panel came to its decision based on the absence of any relevant costing information provided by any concessionaire for international termination access services or cost of international conveyance.

[5] TATT's Affidavit at paragraphs 35 - 38

30. In or around 2013, TATT in accordance with Regulation 15(3),[6] requested data from the concessionaires to determine whether interconnection rates being negotiated were in accordance with the Regulations. TSTT in response submitted some information on its costing by letter dated 17 April 2013. However, that information was insufficient to assist TATT in determining that the rates charged by TSTT were cost based and in conformance with the Regulations. By letter dated 21 May 2013, TATT requested clarification and further information from TSTT in relation to its submitted cost model.

31. By letter dated 21 August 2013, TATT requested six items of information. By letter dated 9 October 2013, TATT further informed TSTT that the information requested with respect to its cost model was still outstanding. In its letter dated the 21 November 2013, TATT again informed TSTT that its submission on its cost model was deficient as it did not demonstrate the implementation of a methodology or the actual determination of the interconnection rates based on identifiable points.

32. On the 20 January 2014, TSTT responded to TATT's November letter. However, TSTT failed to provide the relevant costing information necessary to demonstrate the actual determination of interconnection rates based on its cost model and provided no evidence of its cost model.

33. Despite TATT's repeated requests for sufficient information on TSTT's methodology for the rates contained in its cost model, TSTT failed to provide same. Therefore, TATT without the necessary data to establish cost based rates for interconnection between concessionaires coupled

[6] 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.

with the prolonged non-cooperation by operators in the submission of costing data for testing the LRAIC model, TATT was constrained to embark on the benchmarking study in accordance with Regulation 15(2) of the Regulations.

34. TSTT asserts that TATT's attempt to blame its abandonment of the development of an LRAIC model on TSTT is without merit. Operators were largely unanimous as to the inappropriateness and deficiency of TATT's LRAIC model. It was TATT's recognition of the merits of the feedback received from concessionaires, that caused it to go back to the drawing board on its LRAIC model and revert to concessionaires. TATT has to date, failed to rectify any of the issues with its model and therefore it is solely responsible for the abandonment of that process.[7]

35. TATT states that regulators in many jurisdictions such as Botswana and New Zealand have used benchmarking to set initial interconnection rates.[8] Where benchmarked rates allow competition to develop satisfactorily, rates based on benchmarking may be used for extended periods.

36. Therefore, in 2016 TATT retained the services of an experienced independent consultant, Sepulveda Consulting Inc. to assist with the preparation of the costing benchmarks in accordance with Regulation 15(2). On the 28 March 2017, TATT published the 2017 IBS in draft form. The Executive Summary of the 2017 IBS stated:

    a. The consultant firstly obtained benchmarking samples from 23 Caribbean jurisdictions to ensure comparability with Trinidad and

[7] TSTT's Affidavit in Reply at paragraphs 53 and 54
[8] TATT's Affidavit at paragraphs 41 - 44

Tobago and also obtained data from 36 European jurisdictions but for solely sensitivity and cross-check purposes;

b. The consultant then compiled the data into an extensive database of interconnection rates from Caribbean jurisdictions for a ten year period of 2008 to 2017;

c. The consultant then explained that they undertook a detailed analysis of the data which showed that the rates in a number of jurisdictions and that given the historical downward trend in interconnection rates observable in Caribbean and European jurisdictions, the current rates charged by the local service providers were overstated. The consultant then recommended that the current rates in Trinidad and Tobago should be reduced;

d. The data was then used to develop forward-looking recommendations to project end-point benchmark rates for Trinidad and Tobago using the Post 2012 and Cost-Based Sub-Samples. The consultant concluded that in the event termination rates were lowered, this would be in line with the obligation of concessionaires to ensure that rates were cost based;

e. The consultant in compiling the 2017 IBS engaged in a review and analysis of the data related to cost-based rates and stated that the second benchmark average is based on the subset of Post 2012 Sub-Sample jurisdictions that have cost-based interconnection rates (i.e. Pure LRIC, LRAIC or some other cost standard). Six jurisdictions have such rates in place: The Bahamas, Barbados, Cayman Islands, Guadeloupe and Martinique, St. Martin and St. Bartholomew and Jamaica. This group of six jurisdictions is referred to as the Cost-Based Sub-Sample.

37. On the 28 March 2017, TATT issued a Notice entitled “Request for Comments on the Consultative Document Results of an Interconnection

Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago". The Notice was published in accordance with paragraph 3 of TATT's Procedures on Consultation in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago, which provides that TATT ought to undergo a minimum of two rounds of consultations with respect to regulatory documents.

38. By letter dated 12 May 2017, TSTT submitted its comments on the 2017 IBS. Amongst other things, TSTT expressed disagreement with:

    a. The use of the 2017 IBS in the absence of an industry cost model to determine termination rates;
    b. The use of the results of the 2017 IBS as a regulatory maxima on the ground that those benchmarked rates were not premised on a cost model;
    c. The arbitrary linkage of benchmarked rates to unexplored operator costs;
    d. TATT's fixing of rate caps without invoking section 29(6) of the Act which TSTT expressly warned could be viewed as price-setting;
    e. TATT's approach to setting maxima rates by comparison which did not take into account cost-relevant factors applicable to the local telecommunications sector;
    f. The use of certain inappropriate jurisdictions as rate comparators; and
    g. The use of outdated data.[9]

39. TATT engaged the services of the consultant to provide feedback on the stakeholders' comments.[10] TATT then considered and ensured all TSTT's

[9] TSTT's Principal Affidavit at paragraph 15
[10] TATT's Affidavit at paragraphs 45 - 51

concerns were addressed in its Decision on Recommendations dated May 2019.

40. Based on the comments made by concessionaires including TSTT in relation to the 2017 IBS, TATT again retained the services of the consultant to make further amendments and inclusions to a revised Benchmarking Study which was published in May 2019 ("the 2019 IBS").

41. On the 13 September 2019, TSTT submitted its comments on the 2019 IBS and again TATT retained the consultant to address TSTT's comments and concerns. TATT's decisions on the comments were published in a second "Decision on Recommendations" in March 2021. Pursuant to the comments of TSTT and other concessionaires, TATT retained the consultant to perform further revisions on the 2019 IBS.

42. On the 16 March 2021, TATT published a third Benchmarking Study ("the 2021 IBS") along with the Determination. The main revision of the 2021 IBS was the expansion and updating of the data collected to the year 2020 enabling TATT to project costing benchmarks for the period 2021 – 2023.

43. TATT asserts that it issued the Determination pursuant to section 29(3) of the Act and in keeping with its mandate to establish conditions for an open market including conditions for fair competition and to promote access to telecommunications services to customers. Moreover, TATT engaged in two rounds of consultations with all concessionaires where TATT considered the feedback and provided feedback on their views and representations. Therefore, TSTT and other concessionaires had a very clear picture of TATT's reasoning and had repeated opportunities to correct, contradict and make representations on same.

44. The methodology was not altered in providing costing benchmarks contained in the 2021 IBS and having engaged in consultations for several years, TATT could not be under any obligation to embark on yet another round of consultations. Further, the Determination not being listed a "Regulatory Document"[11] within TATT's Consultations Procedures Document was not required to be consulted on with concessionaires prior to publication. The Determination was in fact the conclusive outcome of the consultation process.

45. By the Determination, TATT has published the pricing rule for international termination rates for fixed and mobile interconnection services in Trinidad and Tobago. The rates for 2021 to 2024 shall not exceed the rates set out in the Determination. TATT asserts that the pricing rule is fair, reasonable and non-discriminatory based on the Interconnection Benchmarking Study conducted and the decisions of the Arbitration Panel, which recommended that TATT determine the cost of fixed and mobile termination access services by benchmarks.[12]

- Pre-Action Protocol Correspondence

46. By letter dated the 19 March 2021, TSTT wrote to TATT identifying its concerns about issuing the Determination without consultation, TATT's use of the Determination to set maxima rates as opposed to determining costing benchmarks and the potential interference effects which the Determination was likely to have on negotiations between concessionaires on interconnection rates. [13]

[11] For the purposes of these Procedures, the term "regulatory documents" includes regulations, frameworks, guidelines, methodologies, procedures, plans amongst others that form the regulatory framework that guides the Authority in its operations and oversight of the telecommunications and broadcasting sectors."

[1212] TATT's Affidavit at paragraph 63

[13] TSTT's Principal Affidavit at paragraphs 23 – 32

47. On the 13 April 2021, TSTT again wrote to TATT reiterating the concerns already expressed and set out further concerns including but not limited to:

    a. The absence of any statutory authority for TATT setting maxima international fixed and mobile termination rates given the limited scope of the Panel's Decision and Report;
    b. TATT's ignorance of TSTT's approved Internal Cost Model; and
    c. The Determination's maxima rate falling below TSTT's costs of operations resulting in net losses to TSTT in a three-year period.

48. At a bilateral interconnection meeting between TSTT and CCTL (where TATT was represented as an observer) held on the 13 April 2021 to inter alia negotiate interconnection rates, it became clear that the Determination was being relied on by CCTL in the course of negotiating rates. Therein, CCTL expressed a willingness to negotiate a five-year term for interconnection, which went beyond the three-year limit the Determination was premised on. TSTT raised concerns about such reliance on the Determination and TATT's participation in the meeting.

49. On or about the 26 April 2021, TATT purported to respond to "statements regarding the Notice of Determination 2021/01" without directly responding to TSTT's letters of the 19 March 2021 or 13 April 2021. In that letter TATT indicated:

    a. Acceptance that the negotiated rates for international mobile and fixed termination would remain in effect until TATT determined the "cost by benchmarks" in accordance with the Panel's Decision and Report;

b. Acceptance that while the 2017 IBS and the 2019 IBS were issued for consultation, the 2021 IBS which included additional data was not;
c. The various versions of the IBS analyzed "cost-based" rates (as opposed to costs) from the benchmarking sample jurisdictions; and
d. TSTT's Cost Model was not approved by TATT.

50. On the 30 April 2021, TSTT responded to TATT's letter raising the following concerns:
    a. That TATT by its letter and its Determination was impermissibly intervening in interconnection negotiations between concessionaires;
    b. The Panel's Decision was limited to a period which ended on the 31 March 2021 and could not be relied upon as a basis for setting rate caps beyond that date or at all;
    c. TATT's selection of territories for the benchmarking sample was inconsistent with TATT's strategy and policy;
    d. The lack of consultation underpinning the Determination; and
    e. TATT's refusal to stand by its acceptance of TSTT's cost model as determined by previous TATT Arbitration Panels.

51. On the 7 May 2021, TSTT again wrote to TATT expressing its dissatisfaction with the Determination and its intention to adhere to its TATT approved cost model.

52. By letter dated the 14 May 2021, TATT responded to TSTT's letters. TATT's letter was also copied to four other concessionaires. By this letter TATT:

a. Maintained that even without the Panel's Decision and Report, it was empowered under Regulation 15(2) to employ the use of benchmarks;
b. Clarified that the maxima rates contained in the Determination were specific to International Wholesale Termination;
c. Further clarified that the Determination does not seek to set the rates for Domestic Wholesale Fixed and Mobile Termination;
d. Selectively reference comments made by TSTT in relation to the 2017 IBS and 2019 IBS;
e. Noted that the 2019 IBS was then updated to incorporate recent benchmarking data;
f. Sought to justify the inclusion of the French West Indies in the benchmarking sample in the IBS on the basis that it has a strong political, economic and above all, regulatory commonalities with Caribbean countries including Trinidad and Tobago; and
g. Referenced the Panel's acceptance that TSTT's cost model was approved but interpreted the Panel's statement as meaning that TSTT cost model could be used as a means of assessing cost-based rates for interconnection.

53. By letter dated 10 June 2021, TSTT's attorneys at law issued a pre-action letter to TATT giving notice of its intention to commence proceedings challenging the Determination.

54. TATT responded to the pre-action letter on the 15 June 2021. In that letter, TATT sought for the first time to characterize the Determination as a pricing rule made in accordance with section 29(3) of the Act. TATT failed to address TSTT's plain allegation that the Determination did not constitute a costing benchmark but rather a price-cap. TATT once again asserted that it did not approve TSTT's cost model notwithstanding the

findings of TATT's Panels and the fact that TSTT's cost model had been utilized to set interconnection rates that have been included in interconnection agreements for the past 13 years. In addition, TATT wrongfully asserted that no other operator challenged the legality of the determination despite Digicel's comments to TATT during the consultation on the 2019 IBS, specifically on TATT's intention to fix rates.

55. Upon receipt of TATT's letter, TSTT was required to carefully analyze TATT's new reference to section 29(3) of the Act as an alleged authority for the issue of the Determination. TSTT sought and obtained legal advice on this issue and because its efforts to resolve its concerns with the Determination without recourse to litigation was fruitless, TSTT felt compelled to pursue these proceedings.

I. Extension of time for filing of leave application

56. Part 26.1(1)(d) of the CPR permits the court, pursuant to its general powers of case management, to extend or shorten the time for compliance with any rule, practice direction or order or direction of the court.

57. Part 56.5 provides guidance to the court on the issue of delay in judicial review matters:

> "(1) The judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.
> (2) Where the application is for leave to make a claim for an order of *certiorari* the general rule is that the application must be made within three months of the proceedings to which it relates.
> (3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to—
>
> (a) cause substantial hardship to or substantially prejudice the rights of any person; or
> (b) be detrimental to good administration."

58. Section 11 of the JR Act also speaks to the promptness required when making an application for judicial review and further guides the court on the issue of delay:

> "11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
> (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.
> (4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."

59. In the case of *Devant Maharaj v National Energy Corporation* [2019] UKPC 5, the Privy Council considered the effect of section 11 of the JR Act agreeing with the dissenting judgment of Jamadar JA (as he then was):

> "[24] Jamadar JA, dissenting, emphasised that delay as a bar to judicial review must be considered against the background of the constitutional importance of judicial review as a means of vindicating the rule of law. In his view sub-s 11(3) provides further guidance in relation to both sub-ss 11(1) and 11(2) and is therefore relevant to both the time standards in relation to the granting of leave and to the finding of undue delay in relation to the refusal of leave. As a result, when considering promptitude, good reason and undue delay the court may have regard to such other matters as it considers relevant. (paras 39-42). Furthermore, the court has a duty under s 11(1) to consider whether there is good reason to extend time (not simply to consider whether there is a good explanation for the delay which has occurred). Reading s 11 as a whole, it must be that the duty to consider whether to extend time

includes a due consideration of the sub-s 11(2) as well as the sub-ss 11(3) factors to the extent that they may be relevant. In considering whether there are good reasons for extending time, a court must at least consider whether the delay has been undue and, depending on the circumstances of the case, whether the grant of leave or the grant of relief would cause prejudice or be detrimental. (paras 43-46)

> "Of significance in this analysis, is that this wholistic interpretation reveals that it is erroneous to treat the 'good reason' explanation in sub-s 11(1) as restricted to whether or not there is good reason for not meeting the statutory time standards or for any delay. A more purposive and expansive reading, driven by the constitutional values identified and the primary purpose and intention of judicial review in public law, permits an interpretation of 'good reason for extending the period' to include a broader range of considerations. Including but not limited to the sub-ss 11(2) and 11(3) factors, as well as matters such as the merits of the application, the egregiousness of any alleged flaws in the decision-making process, whether or not breaches of fundamental rights are implicated, and whether there are any compelling public interest and/or public policy considerations. Thus, while it is material to inquire whether there is good reason for the failure to file an application for leave within the prescribed time or for any delay, it would be wrong in principle to consider this, or even the issue of an extension of time per se, as a necessary threshold condition." (para 48)"

60. The question whether the time for the leave application should be extended pursuant to section 11(1) of the JR Act and/or Part 26.1(1)(d) of the CPR is a multi-faceted question. On the first issue whether the time for applying for judicial review of TATT's decision to rely on regulation 15(2) for the 2017 IBS was made by TATT in or about March 2017. The evidence established that TSTT knew of TATT's decision and actively participated in the process in arriving at the final decision rendered in 2021.

61. Further, the court does not consider that there is any good reason or reasons for extending the period within which the application shall be made for judicial review pursuant to section 11(1) of the JR Act on the above mentioned issue.

62. On the other issue, the Determination was published on the 16 March 2021. The application for leave to apply for judicial review was filed on the 6 July 2021, 20 days after the elapse of the three-month period prescribed by section 11(1) of the JR Act, which ended on the 16 June 2021. In its application, TSTT sought an extension for time for the filing of the leave application.

63. In deciding whether delay was a bar to judicial review, the court firstly considered the pre-action correspondence between the parties. In relying on the case of *R v Housing Benefits Review Board of Borough of Milton Keynes ex p Macklen*,[14] TSTT submitted that compliance with pre-action protocols, although not stopping time from running, is a material factor to be considered in determining whether there are good grounds for extending the time for making an application for leave:

> "I would like to take this opportunity of stressing, once again, the importance of writing a letter before action in judicial review proceedings, as such a course may very well result in a much speedier form of relief being granted to the Applicant. It is also likely to result, in a number of cases, in a much cheaper way of disposing of the matter. If adopting such a course turns out to be unsuccessful then there would surely be little danger of the application for judicial review being turned down on the grounds of delay, because the Applicant had followed the very desirable procedure of seeking to have the dispute resolved by other means."

[14] unreported April 30th 1996; [1996] Lexis Citation 1838 per Brooke J at page 10 of the Official Transcript

64. TSTT after careful consideration of the Determination published on the 16 March 2021 wrote to TATT three days later on the 19 March 2021,[15] setting out its concerns:
    a. TSTT was alarmed by TATT's publication of the finalized 2021 IBS containing new data without consultation in breach of its procedures;
    b. The publication of the Determination without any prior public consultation as required by section 18(4) of the Act and TATT's Consultation Procedures;
    c. That the Determination setting rates was unlawful and ultra vires to the Act and Regulations; and
    d. The potential impact of the Determination on negotiations among concessionaires.

65. Six days shy of one-month's elapse, TATT still did not respond to TSTT's letter. Therefore, by letter dated 13 April 2021,[16] TSTT was constrained to write to TATT again reiterating and setting out further concerns:
    a. That TATT's reliance on the decision of the Arbitration Panel established in 2018 to determine Wholesale International Termination Rates is inappropriate since its decision was binding for a finite term which expired on the 31 March 2021;
    b. Since TSTT has an internal cost model approved by TATT in accordance with Regulation 15(1), the conditions for the application of Regulation 15(2) has not yet arisen;
    c. That TATT's failure to complete its internal cost model was not limited by the lack of data submission by operator but was delayed by TATT's own failure to address deficiencies in the model;

[15] TSTT's Principal Affidavit at exhibit "LA14" page 783
[16] TSTT's Principal Affidavit at exhibit "LA 15" page 789

d. That the rates in the Determination are below the cost of the provision of service;
e. That the Determination had been a major impediment to the free and fair negotiations among concessionaires; and
f. That the Determination and the final version of the IBS ought to be withdrawn.

66. On the 26 April 2021, TATT issued a letter to TSTT copying four other concessionaires,[17] responding to "statements regarding the Notice of Determination 2021/01". TATT indicated:
    a. That the decision of the Panel issued in 2019 determined that international mobile and fixed termination rates as set out in the relevant parties 2012 interconnection agreement would remain in effect until, inter alia, TATT determines the cost by benchmarks;
    b. That the IBS comports with internationally accepted standards and in keeping with section 18(4) of the Act and TATT's consultation procedures, both reports were issued for consultation. The final 2021 IBS remained the same as that consulted on by stakeholders;
    c. The Determination is not a consulted document and is based on the consulted IBS and TATT's conclusion of the consultation process; and
    d. That although in 2013 TSTT submitted data related to its cost model, TSTT never responded to TATT's request dated 21 May 2013 to provide information on TSTT's cost model. Therefore, TATT is unaware of any approval of TSTT's cost model and invites TSTT to provide evidence of such approval.

[17] TSTT's Principal Affidavit at exhibit "LA 17" page 803

67. By letters dated the 30 April 2021 and 7 May 2021,[18] TSTT noted that TATT did not address its concerns in its 19 March 2021 letter, raised material concerns about TATT's correspondence having the effect of interfering in rate negotiations between the parties and responded to matters raised in TATT's 26 April 2021 letter.

68. On the 14 May 2021, TATT responded to TSTT indicating:

    a. That notwithstanding the Panel 2019 Decision, TATT is empowered under Regulation 15(2) to employ the use of benchmarks;
    b. TATT has always maintained that the parties are free to negotiate and settle on rates that are cost-based and the Determination does not seek to set the rates for domestic wholesale fixed and mobile termination as these can freely be negotiated;
    c. The historical context of the IBS and asserted that the 2021 IBS was the result of the consultation process;
    d. That the Determination applies to international wholesale termination rates; and
    e. That TATT accepted the Panel's decision stated that TATT accepted TSTT's cost model but such "acceptance" should not be interpreted to mean that TATT had "approved" TSTT's cost model.[19]

69. Over the next ten days, TSTT prepared a comprehensive brief and instructed its attorneys on the 24 May 2021. After considering all the matters related to these proceedings, which were affected by the restrictions in response to the COVID-19 pandemic, on the 10 June 2021, TSTT issued its formal pre-action protocol letter to TATT. Therein TSTT indicated:

[18] TSTT's Principal Affidavit at exhibits "LA 18" and "LA 19" page 809 - 818
[19] TSTT's Principal Affidavit at exhibits "LA 20" page 821

a. Its challenge to the Determination whereby TATT purported to mandate all concessionaires to offer international termination rates for fixed and mobile interconnection services to other operators by reference to a schedule of "Maxima Rates for International Termination Rates" on the ground that it is illegal and ultra vires to TATT's power;
b. That notwithstanding TATT's function to determine "costing benchmarks" it has wrongly exceeded its jurisdiction by purporting to cap rates through the Determination;
c. That TATT's letter of the 26 April 2021 was issued in bad faith as it was copied to four other concessionaires addressing TSTT's cost model, appeared calculated to embarrass TSTT among its peers and is likely to harm TSTT's ability to fairly negotiate rate agreements with other concessionaires; and
d. TSTT's legitimate expectation to be consulted in respect of the final IBS has been frustrated.

70. On the 15 June 2021, TATT responded to TSTT's pre-action protocol letter. TSTT asserted that therein:
    a. It was the first time TATT sought to characterize the Determination as a pricing rule made under section 29(3) of the Act;
    b. TATT failed to address the allegation that the Determination did not constitute a costing benchmark but rather a price cap;
    c. TATT emphasized that it did not approve TSTT's cost model;
    d. TATT maintained that the introduction of new data into the 2021 IBS did not require further consultation; and
    e. TATT indicated that no other operator challenged the legality of the Determination.

71. TSTT submitted that because of TATT's belated reliance on section 29(3) of the Act in the publication of the Determination required TSTT's attorneys to engage in consideration of an entirely different regime for price control. Accordingly, such consideration added to the delay in filing the leave application. TATT in this regard relied on the decision of Justice Sullivan in *R v Waveney District Council ex p Bell*[20]-

> "(14) It is pointed out that there is no explanation as to why the Form 86A in the present case was not prepared earlier than it was. In my judgment there was no obligation in the circumstances of this case to provide such an explanation. The resolution is dated 25 January. The grounds in the Form 86A are substantial. A significant number of documents had to be assembled and collated in appropriate form. Thus I simply do not accept the proposition that there was unacceptable delay, or that there is any evidence that the applicants simply sat back on their hands and waited for a while and then decided that it might be a good idea to apply for judicial review."

72. From the evidence of the pre-action correspondence, it can be gleaned that TSTT expediently wrote to TATT expressing its concerns about the Determination, a mere three days after it was published. TATT failed to respond to TSTT's letter and after almost one month had elapsed, TSTT was compelled to send another letter on the 13 April 2021 reiterating its position and further requesting that TATT withdraw the Determination and the 2021 IBS.

73. Eventually on the 26 April 2021, TATT responded. This delay amounting to approximately one month cannot be held against TSTT as they issued correspondence expressing its concerns and seeking relief from TATT soon after the cause of action arose. It was TATT's failure to respond in this instance, which set the delay train rolling.

[20] Unreported 24 August 2000; [2000] Lexis Citation 5611

74. Four days later TSTT issued its response to TATT on the 30 April 2021 and then a further letter on the 7 May 2021. Thus far, TSTT demonstrated expediency in its correspondence as it attempted to avoid litigation by expressing its concerns in hope that TATT would resolve them. However, in TATT's response dated the 14 May 2021 it maintained its position.

75. Since TATT was steadfast in its position, TSTT had no choice but to resort to litigation. Due to the vast bundles of paper work in these proceedings, time had to be taken to compile documents and information in order to brief its attorneys, which took place over the next 10 days. On the 24 May 2021 after considering all the matters in this case, 17 days later on the 10 June 2021, TSTT issued its pre-action protocol letter.

76. The court did not find that TSTT demonstrated any unreasonable delay. In line with *Waveney District Council* [supra], TSTT did not sit back on its hands and waited to commence legal action. There was a series of prompt correspondence (on the part of TSTT) between the parties in attempts to resolve the issues surrounding the Determination. However, when it proved unsuccessful TSTT was constrained to approach the courts.

77. While TSTT contends that it first became aware of TATT's reliance on section 29(3) of the Act characterizing the Determination as pricing rule pursuant to its reply letter dated the 15 June 2021, the court noted page 1 of the 2019 IBS,[21] which states:

> "The objective of this consultative process is to establish recommended interconnection costing benchmarks for the domestic mobile termination rate (MTR), the domestic fixed termination rate (FTR), the mobile international carriage charge (MICC) and the fixed international carriage charge (FICC). These costing benchmarks, once finalized, will serve as reference points that may be utilized by concessionaires when setting their

[21] TSTT's Principal Affidavit exhibit "LA 6" at page 377

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."

78. As well as paragraphs 9.4 and 11.18 of the Report and Decision of the Arbitration Panel delivered on the 20 December 2019[22] - In the Matter of an Arbitration between Columbus Communications Trinidad Limited and Telecommunications Services of Trinidad and Tobago:

> "9.4 … Further, TATT's intervention under Section 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.
> …
> 11.18 … It appears that the Benchmark Study seeks to set cap rates for call termination against which concessionaires negotiate. 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 …"

79. The Report and Decision of the Panel in December 2019 states that the Determination 2010/01 was based on TATT's intervention under section 29(3) of the Act. Therefore, it appears that it was not the first time TATT sought to rely on section 29(3) of the Act as a pricing rule as it had done so in the past. However, contained on the cover page of the said Determination it was entitled: "DETERMINATION 2010/01 UNDER SECTIONS 29(3) AND 29(4) OF THE TELECOMMUNICATIONS ACT 2001 –

[22] TSTT's Principal Affidavit exhibit "LA 11" at page 630 and TSTT's Principal Affidavit exhibit "LA 11" at page 645

TERMINATION OF INTERNATIONAL INCOMING TELECOMMUNICATIONS TRAFFIC ON DOMESTIC NETWORKS IN TRINIDAD AND TOBAGO".[23]

80. Accordingly, it was abundantly clear that the Determination 2010/01 was made pursuant to section 29(3) of the Act as it made direct reference to the said section.

81. The Determination 2021/01 explicitly sets out the legislative and regulatory framework that was considered i.e. section 25(2)(m) of the Act, Regulations 15(1), 15(2) and 5(1). Nowhere in the Determination, the 2017 IBS, 2019 IBS, 2021 IBS nor any other correspondence mentioned TATT's reliance on section 29(3) of the Act as a pricing rule. Therefore, because of TATT's belated reference to their reliance on same, it is reasonable that additional time was needed for TSTT's attorneys to consider TATT's delayed proposal to rely on section 29(3) of the Act before finally deciding to file the application for leave for to apply for judicial review.

82. Furthermore, the court also had regard to the fact that all the correspondence between the parties and the retaining and instructing of attorneys took place during the peak of the COVID-19 pandemic. There were many restrictions in place affecting places of work during that time. Undoubtedly, communication between not only the parties but also their attorneys would have been more challenging in those circumstances. The court therefore has no reservation that the pandemic would have also added to the delay in the progress of the matter.

83. Next, in deciding whether to extend the time for the filing of the leave application, the court considered the prejudice to good administration and

[23] TSTT's Affidavit in Reply exhibit "LA 26" page 39

other parties. In this regard, in the case of *R (Lichfield Securities Ltd) v Lichfield District Council* [2001] EWCA Civ 304, the UK Court of Appeal opined:

> "[39] The question of possible detriment to good administration arises under s.31(6) only if there has been undue delay. Mr Mole, for LDC, has laid understandable stress on this ground for denying relief which is otherwise called for. It is a relatively unexplored ground, if one may judge by its brief appearance in Fordham's encyclopaedic Judicial Review Handbook (2nd edition; para 26.9.3), no doubt partly for the reasons indicated in Lord Goff's speech in R v Dairy Produce Quota Tribunal, ex parte Caswell [1990] 2 AC 738, [1990] 2 All ER 434, 749-50 of the former report. Lord Goff was careful to avoid a formulaic approach, limiting himself to the specific effect in that case of a very long delay on the desirability of a regular flow of consistent decisions by the Tribunal in question. But a further reason for the relative infrequency of decisions based on good administration is in our view that it can come into play only (a) where undue delay has occurred, and (b) – in practice – where the consequent hardship or prejudice to others is insufficient by itself to cause relief to be refused. In such a situation it can rarely, if ever, be in the interests of good administration to leave an abuse of public power uncorrected. Indeed Fordham records the decision of May J in R v Mid-Warwickshire Licensing Justices, ex parte Patel [1994] COD 251 that, despite undue delay, the interests of good administration were served not by withholding but by granting relief."

84. The Determination took effect on the very date it was published. TSTT contends that it was therefore incapable of taking any steps to prevent the Determination from taking effect at all.

85. The court observed that from the initial stages of consultation in 2017, TSTT raised concerns about TATT's approach to declare a price as a regulatory maxima may be construed as price setting:

> "TATT would, acknowledging that as a public body established by statute which is bound to function in accordance with its procedures, recognize that the approach to declare a price – via benchmarks or otherwise – as a regulatory maxima, may be construed as price-setting. Which has been eschewed by TATT as

an inappropriate form of price regulation as outline in its Price Regulatory Framework."[24]

86. The issue whether TSTT and the other players in the telecommunication industry are bound by the Determination is critical to the good administration of justice. TATT contends that since April 2021, TSTT has failed to implement the Determination, which fixes maxima rates for international termination rates for fixed and mobile interconnection services for the period April 2021 to April 2024. In failing to give effect to the Determination, TSTT is charging rates in excess of the maxima, thus earning higher revenues to the prejudice and/or detriment to the other operators who are required to pay the higher rates.[25] Moreover, TSTT's failure to observe the Determination is causing a delay to the finalization of the Interconnection Agreements thereby prejudicing other concessionaires who are relying on the benefit of the Determination.[26]

87. Good administration of justice, in these circumstances dictate that although the application was made more than three months after the Determination was published, the applicant should be granted an extension of time to make the application.

II. Whether TATT acted illegally, ultra vires to the Act and/or the Regulations, unfairly and/or irrationally, and whether in those circumstances the Determination ought to be quashed

[24] TSTT's Principal Affidavit exhibit "LA 5" page 355
[25] TATT's Affidavit at paragraph 70
[26] TATT's Affidavit at paragraph 72

88. The Determination published on the 16 March 2021 made reference to certain statutory and regulatory provisions. Section 25(2)(m) of the Act provides:

> "In respect of a concessionaire's obligations pursuant to subsection (1), the Authority shall require a concessionaire to—
> …
> (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."

89. Regulation 15(1) and (2) of the Regulations state:

> "(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.
> (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."

90. In addition, the Determination referred to the Arbitration Panel's decision of December 2019 which stated:

> "The Panel further hold that these rates for fixed and mobile international termination access services shall remain in effect until – …
> (2) The Authority determines the cost of fixed and mobile international termination access services by Benchmarks, as per the interim regime;"

91. Firstly, TSTT contends that the condition precedent for producing costing benchmarks as required by Regulation 15(2) has not been satisfied. Regulation 15(2) permits costing benchmarks to be produced on the condition "where the relevant data for the establishment of the costing

methodologies, models or formulae are unavailable within a reasonable time." TSTT asserts that there is a TATT approved internal TSTT cost model that has been employed for about 13 years so therefore it is not true that the relevant data for the establishment of costing models are unavailable. Moreover, TATT has failed to rectify the issues with its own LRAIC cost model and it is solely responsible for the abandonment of that process.

92. The fact that TSTT asserts that there is a cost model, which is aged 13 years, should provide pause to TSTT.

93. The evidence demonstrates that during the period May 2009 to November 2015, TATT made attempts to develop its own LRAIC costs model. However, this process came to halt because according to TATT it did not possess enough data to pursue development of the LRAIC cost model. Contrarily, according to TSTT, it was because of the largely unanimous views of concessionaires that the said model was inappropriate and deficient. Whatever the reason may be, it stands that there is no costs methodology or model established by TATT to fulfill the requirements of Regulation 15(1).

94. TSTT maintains that TATT tacitly approved TSTT's costs model thereby obviating any need for costing benchmarks pursuant to Regulation 15(2). In asserting this position, TSTT relied on the 2019 decision of the Arbitration Panel which extensively referred to decisions of the TATT appointed Arbitration Panels in 2006 ("the first arbitration") and 2008 ("the fourth arbitration").

95. During the first arbitration, Digicel and TSTT submitted certain cost information to the panel which subsequently engaged a neutral expert, TERA Consulting, to assist in reviewing the cost information. Digicel and

TSTT's cost models were subject to intense scrutiny by the expert. At page 53 of the decision of the first arbitration, the panel found that the expert's evidence that TSTT's cost model is suitable for determining mobile termination costs of an efficient operator in a steady state market is consistent with the evidence submitted by TSTT and TSTT's expert.[27]

96. At page 55 of the decision of the fourth arbitration, the Panel stated:

> "In the first proceeding the First Panel concluded the following
>
> > The panel finds that the Panel Expert's evidence that TSTT's cost model is suitable for determining the mobile termination costs of an efficient operator in a steady state market is consistent with the evidence submitted by NERA and TSTT's claims. This evidence is also consistent with the Panel Expert's finding that Digicel's cost model, if used to calculate its unit cost of mobile termination operating at full capacity (i.e. static efficiency) actually produces a cost very close to TSTT's, even when using Digicel's higher cost of capital. The benchmark findings of the NZCC regarding average mobile termination costs are fairly aligned with these.
> >
> > Taking into account all of these factors, the panel finds that the cost of mobile termination of a typical efficient operator in Trinidad and Tobago in a steady state market is within a reasonable range comprised of TSTT's cost model result [45 TT cents], the NZCC Report's 75th percentile [53 TT cents] and the Panel Expert's finding of Digicel's cost at static efficiency [42 TT cents].
>
> As noted above, the First Panel determined that the "cost based" mobile termination rates fell within a range of 42 to 53 TT cents. In the absence of a TATT approved cost model, this Panel considers that the methodology used by the First Panel in arriving at this range to be sound…"

[27] TSTT's Affidavit in Reply at paragraph 31

97. Based on those comments of the Panel, TSTT was of the understanding that TATT tacitly approved its cost model. Moreover, at paragraph 11.17 of the 2019 decision, TATT's Panel indicated:

> "The Panel also agrees with TSTT that TATT, through its interim regime, implicitly accepted TSTT's cost model for assessing cost-based rates for interconnection services, inclusive of international termination services."[28]

98. The decision is clear, that TSTT and Digicel's cost models were acceptable in the interim. The interim was such period that TATT had not developed a cost model.

99. In its letter dated the 14 May 2021,[29] TATT explained its position as it related to TSTT's cost model. Therein TATT quoted paragraph 11.17 of the 2019 Decision and stated that the correct interpretation of that statement is that TATT accepted that TSTT's cost model could be used as a means of assessing cost-based rates for interconnection services. Bolstering its assertion, TATT relied on paragraph 11.10 of 2019 Decision:

> "…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."[30]

100. It then quoted paragraph 13.2 of the 2019 Decision:

[28] TSTT's Principal Affidavit exhibit "LA 11" page 644
[29] TSTT's Principal Affidavit Exhibit "LA 20" page 821
[30] TSTT's Principal Affidavit exhibit "LA 11" at page 640

> "… No evidence was provided to this Panel to suggest that TSTT's cost 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 LRAIC costing methodology."

101. As such, TATT asserted that this "acceptance" should not be interpreted to mean that TSTT received approval from TATT for that particular cost model for all time.

102. Based on the evidence adduced by the parties, it appears to the court that TATT's approval of TSTT's cost model was provisional. While the Panel in the 2019 Decision agreed that TATT implicitly accepted TSTT's cost model for assessing cost based rates for interconnection services, including international termination services, this was subject to concessionaires providing cost data in order for TATT to adjust it appropriately. The 2019 Decision goes on to state that TSTT failed to submit cost outputs from its cost model for TATT's assessment and adjustment to ensure that they adhered to TATT's LRAIC costing methodology.

103. Therefore, the court is of the view that since TSTT failed to provide the requisite costing information to TATT, the conditions for acceptance of TSTT's cost model by TATT were not fulfilled. As such, in accordance with Regulation 15(2), due to the unavailability of relevant data for TATT's establishment of costing methodologies, models or formulae, it was constrained to determine costing benchmarks. TATT's Benchmarking Study effected the costing benchmarks.

104. Secondly, TSTT contends that TATT did not, by the Determination produce costing benchmarks as required by Regulation 15(2) of the Regulations.

105. Regulation 15(2) specifically assigns a duty to TATT and a duty to concessionaires. Where relevant data is not available, TATT is under a duty to determine costing benchmarks that comport with internationally accepted standards for such benchmarks. Concessionaires are under a duty to set interconnection rates by reference to the costing benchmarks as determined by TATT.

106. TATT produced the 2017 IBS, 2019 IBS and the 2021 IBS. The latter two are revisions of the initial study based on feedback from the relevant concessionaires and the methodology employed for all versions of the IBS remained unchanged. The court had sight of the various versions of the IBS. The 2021 IBS is explicate that it complies with regulation 15(2) in that it comports with internationally accepted standards for such benchmarks.

107. The 2021 IBS identified different benchmarking methodologies. The first was the "all sample" which are jurisdictions with different methodologies to set interconnection rates. The second was the "cost-based sample" which are jurisdictions with cost-based methodologies for setting interconnection rates.[31] Costing benchmarks are essentially the standard or point of reference of the costs incurred by the provider of interconnection services. Regulation 15(2) envisions that such benchmarks set by TATT ought to reflect the costs incurred by other providers in comparator jurisdictions, which in the absence of local costing data, can

[31] Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago. Page 2

be used as a reference point or guide by concessionaires in Trinidad and Tobago to set their price.

108. The 2021 IBS projects that the all sample and the cost-based averages will converge over time. In those circumstances it was determined that considering both "ensure[d] the resulting benchmarks are reasonably cost oriented, i.e., closer to, but still above, average cost-based benchmarks rate level".[32]

109. The 2019 Decision of the Panel recognized that benchmarking required TATT to use the principle of cost causality i.e. cause and effect to determine the appropriate costs to be benchmarked.

110. TSTT expected that the cost incurred by the comparator jurisdictions would be compared to TSTT's cost model. However, Regulation 15(2) does not necessitate such a comparison between a local concessionaire's cost model and the cost models of foreign concessionaires. Regulation 15(2) requires a macro approach – a consideration of internationally accepted standards for such cost benchmarks in the industry. This is what was done by the 2017 IBS, 2019 IBS and the 2021 IBS.

111. Thirdly, TSTT contends that it was illegal and contrary to Regulation 15(2) for TATT to assign caps on the rates of international fixed and domestic termination rates.

112. An examination of Regulation 15(2) permits TATT to set costing benchmarks. TATT, in the Determination, set maxima rates that

[32] Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago. Page 18

concessionaires are not permitted to exceed when setting their rates. TSTT argues that TATT effectively fixed a benchmark of rates as opposed to costs, which they argue is not its function.

113. Regulation 15(2) requires TATT to set costing benchmarks – which benchmarks are the basis upon which the concessionaire may set interconnection rates. The interconnection rates, in dollars and cents, are the contractually agreed price between concessionaires. The interconnection rates must fit within the benchmark as ascribed by TATT.

114. While benchmark is not defined in the Act or the Regulations, in terms of Regulation 15(2) it clearly refers to the standard or reference from which the concessionaries can set their rates. If TSTT is correct that the benchmark should be a single point of reference using the cost-based average.

115. Instead, TATT issued the Determination following the 2021 IBS, which included a table detailing the termination rates for the tripatriate terms during the period April 2021 to March 2024. The 2017 IBS, 2019 IBS and the 2021 IBS all detailed the methodology employed that led to the cost-based averages. The 2021 IBS, includes a demonstrative as Figure 7 detailing the recommendations for termination rates.[33] Figure 7 is titled "Updated MICC and FICC Recommended Costing Benchmarks", the 2021 IBS provides all the details which culminated in this costing benchmarking study and which is published in the Determination.

116. This court is unable reject TATT's costing benchmark arrived at and published in the Determination. Further, Regulation 15(2) permits TATT to

[33] Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago 2021. Page 29

set what TSTT describes as "caps". The rates are set "with reference" to the costing benchmarks. The Regulations in fact permit TATT to determine the parameters of the reference that guides the concessionaries. TATT has determined that "with reference" means not more than a certain figure.

117. Fourthly, TSTT contends that TATT acted illegally when it attempted to characterize the Determination as a pricing rule under section 29(3) of the Act.

118. The evidence demonstrated that in response to TSTT's pre-action protocol letter, TATT for the first time sought to characterize the Determination as a pricing rule made pursuant to section 29(3) of the Act. This was so despite the fact that the Determination set out the statutory and regulatory framework upon which it was produced and nowhere therein made reference to section 29(3) of the Act as opposed to the Determination 2010/01 which made clear and unambiguous reference to such.

119. For the sake of discussion it is necessary to set out section 29(1), (3) to (6) of the Act:

> "29. (1) 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.
> (3) The Authority shall regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs by publishing pricing rules and principles.
> (4) 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.
> (5) In respect of any telecommunications services provided on an exclusive basis by a concessionaire, the Authority shall establish the maximum rate-of-return that the concessionaire may receive on its

investment or shall prescribe the use of any other measures for determining the concessionaires profitability, as it deems appropriate.

(6) For any public telecommunications service provided on a non-exclusive basis, the Authority may introduce a method for regulating the prices of a dominant provider of such telecommunications service by establishing caps and floors on such prices, or by such other methods as it may deem appropriate."

120. TATT submitted that section 29(3) of the Act, authorises it to regulate prices for public telecommunication services and international incoming settlement tariffs by "publishing pricing rules and principles". Pricing principles are general guides as to the determination of prices whereas pricing rules are specific directions as to prices of international settlement tariffs. Therefore, TATT asserts the Determination containing maxima rates is a pricing rule issuing specific directions for the regulation of prices of international incoming settlement tariffs.

121. Interconnection rates are regulated by the Act. Section 78(1) of the Act,[34] provides for regulations to be made for interconnection. Therefore, the principles of supply and demand do not determine the prices for interconnection rates. Rather, concessionaries must be guided by pricing regulations.

[34] Section 78(1) of the Telecommunications Act Chap. 47:31: "The Minister, on the recommendation of the Authority, shall make such Regulations, subject to negative resolution of Parliament, as may be required for the purposes of this Act, including regulations prescribing— (a) application procedures in relation to concessions and licences; (b) fees payable to the Authority for or in relation to applications, concessions, licences or the provision of services provided by the Authority to any person; (c) procedures for the management of the spectrum; (d) approvals and certification of terminal equipment; (e) price regulation; (f) interconnection; (g) universal service; (h) numbering; (i) quality of service standards; (j) procedures for investigating and resolving complaints by users with regard to public telecommunications services; and (k) procedures for investigating alleged breaches of any term or condition of a concession or licence or alleged violations of any provision of this Act or Regulations made pursuant thereto."

122. In interpreting pricing rules and regulations under section 29(3) of the Act, TATT relied on the case of *M'Creagh v Frearson* [1922] W.N. 37 to demonstrate that pricing rules are specific directions. *M'Creagh* [supra] was referenced in the decision of the Supreme Court of India *Consolidated Coffee Ltd. and Anor v Coffee Board Bangalore* [1980] 3 SCC 858 where at page 23, Justice Tulzapurkar stated:

> "Thirdly, a principle has been explained in Butterworths' Words and Phrases, Second Edition, Vol. 4 at page 177 thus:
>
> > "A 'principle' means a general guiding rule, and does not include specific directions, which vary according to the subject matter." (per Shearman J., in M' Creagh v. Frearson 1922 W.N. 37)
>
> Similarly in Words and Phrases, Permanent Edition, Vol. 33A at page 327 it is explained that "principle means a general law or rule adopted or professed as a guide to action". In other words, as opposed to any specific direction governing any particular or specific instance, transaction or situation a principle would be a guiding rule applicable generally to cases or class or cases."

123. The court acknowledges the distinction TATT is submitting that illustrates that the capped rates are a pricing rule and is therefore a specific direction to concessionaire when setting rates. The court is persuaded by *M'Creagh* (supra), agrees with TATT's submissions and finds that section 29(3) was meant to be construed in this way.

124. The question is whether it applies to the Determination. The Determination is made to satisfy the requirements of Regulation 15(2) to identify costing benchmarks, which concessionaires may use to set interconnection rates. Further, the interconnection rates are also subject to be regulated by the imposition of pricing rules and regulations pursuant to section 29(3) of the Act. Therefore, the court agrees that TATT is permitted to set maxima rates and rate caps.

125. The court agrees that by setting rate caps that concessionaires are bound by, TATT effectively fixed the rates of international fixed and domestic termination services. TATT is in fact permitted to regulate the rates for international fixed and domestic termination services. TSTT's submission is that the set rates are below their costs and would place them in a position where they operate at a loss and that if the Determination is applied, TSTT will be constrained to set its rate at the maxima. That might be the effect, on TSTT of the Determination. TSTT's reality however does not determine the legality of the Determination and that TATT can indeed set rate caps.

126. TSTT argues that Section 29(2) and (6) of the Act provides specific circumstances in which TATT are permitted to set prices and establish floors and caps on prices. They further argue that circumstances do not apply to the issue of international interconnection services rates and are thus not applicable. TSTT therefore submits that if Parliament intended section 29(3) to permit TATT to set prices and caps on rates, the section would have explicitly said so as in sections 29(2) and 29(6).

127. Section 29(3) permits TATT to set pricing rules and principles. There is no other interpretation that the court can give to TATT having the authority to setting rules and principles around pricing for settlement tariffs. This must include TATT, if they deem appropriate, being permitted to set caps and floors on rates.

128. The court once again notes that contained in the statutory and regulatory framework at the starting pages of the Determination, which TATT intended to rely on is silent as to section 29(3) of the Act. While not overtly stated as was done in the Determination 2010/01, the Act does permit TATT to act accordingly.

129. The court agrees that TATT gave one basis for the Determination as set out therein and when challenged by TSTT's pre-action protocol letter, provided another basis in high time especially since the parties were engaged in back and forth correspondence.[35]

130. Even if section 29(3) was not intended to be used as a foundation for the Determination, the court has already determined that the stated basis for the Determination, Regulation 15(2), does permit TATT to regulate in the manner identified in the Determination.

131. In all the circumstances therefore, the court is not satisfied that TATT acted illegally, ultra vires to the Act and/or the Regulations, unfairly and/or irrationally, and there are no circumstances that dictate that the Determination ought to be quashed.

III. Whether TATT's failure to publish the 2021 IBS and the Determination in draft for prior consultation is in breach of TSTT's legitimate expectation to be consulted.

132. TATT asserted that it complied with its Procedures on Consultation in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago (Procedures on Consultation).[36] This procedure applies to the drafting of frameworks, regulations, procedures and other documents relevant to the industry (together called "documents"). The procedures are intended to (a) afford interested parties and the public opportunities for consultation and (b) permit affected persons and the public an opportunity to make appropriate submissions to the authority.

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[35] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2008] QB 365

[36] TSTT's Principal Affidavit exhibit "LA 23"

133. The Procedures on Consultation detail an eight-stage process for the creation of documents. After the initiation of the consultation process, there is notification of the consultation. The documents are then published for consultation. Following this, there is the receiving and documenting of any comments received. After these steps, TATT follows this by having another round of consultation. Finally, there is a final review of the documents and TATT thereafter gives notification of the decisions made.[37]

134. The evidence demonstrates that after TATT produced the 2017 IBS, TATT sent out invitations to concessionaires to comment on the 2017 IBS. After considering the feedback from concessionaires, TATT produced the revised 2019 IBS. As such, in accordance with its procedures, TATT completed the first rounds of consultation.

135. After the 2019 IBS was produced, TATT invited concessionaires to make further comments on the revised IBS. After considering the concessionaires feedback, TATT produced the 2021 IBS. The production of the 2021 IBS was the completion of the second round of consultation.

136. In making a finding, the court considered that the Benchmarking Study comprised the 2017 IBS, the 2019 IBS and the 2021 IBS. The methodology remained consistent throughout and the revised versions were updated after consideration of the comments and feedback gathered during the consultation process. TATT's Procedures on Consultation mandated it to undergo a minimum of two rounds of consultations. TATT gave effect to its procedures when it consulted the concessionaires on two occasions and produced updated versions of the Benchmarking Study.

[37] TSTT's Principal Affidavit exhibit "LA 23"

137. TATT's adherence to its procedures resulted in the production of the 2021 IBS. TSTT's feedback that the Benchmarking Study required updated data to provide a longer projection of termination rates, was the reason new data was included in the 2021 IBS. In accordance with TATT's adherence to the Procedures on Consultation, TSTT was sufficiently consulted and its feedback was considered and reflected in the updated 2021 IBS. Therefore, as it relates to the 2021 IBS, the court is not of the view that TATT breached TSTT's legitimate expectation to be heard based on the Procedures on Consultation.

138. As it relates to the Determination, TATT asserts that it was not a regulatory document subject to consultation. The court is satisfied that the Determination is the notification of the decision made at the conclusion of the Procedures on Consultation – it is not disjointed from the Benchmarking Study. The Benchmarking Study, which was subject to consultation, was the basis upon which TATT made its final decision. It was the Benchmarking Studies that guided TATT in its operations and oversight of the telecommunications and broadcasting sectors by producing the Determination.

139. Accordingly, the court is of the opinion that TSTT had no legitimate expectation to be heard after the publication of the Determination. There was a legitimate expectation to be heard during the Procedures on Consultation, and this was not breached. TATT conducted two rounds of consultation with respect to the regulatory documents comprising the Benchmarking Studies in fulfilling its mandate under its Procedures on Consultation. The Determination was TATT's final decision after considering the feedback of concessionaires. There is no requirement for consultation after TATT gave notification of the decision. If TSTT is correct,

then TATT's Procedures on Consultation would be forever inconclusive and without a determination.

IV. Whether TATT acted in bad faith by copying other concessionaires in its correspondence to TSTT

140. TSTT avers that by the Determination and by disclosing correspondence with TSTT to other concessionaires, TATT has intervened in the negotiation of interconnection rates and is likely to manipulate the course of same. TSTT contends that TATT's targeted communications were in bad faith and prejudicial to TSTT. It has harmed or is likely to harm TSTT's ability to fairly negotiate with other concessionaires. Therefore, TATT is in breach of section 18(5) of the Act which states:

> "(5) At all times the Authority shall, in the performance of its functions and exercise of its powers, act in an objective, transparent and non-discriminatory manner."

141. In TATT's letter dated the 26 April 2021, copied to four other concessionaires, TATT conceded that its role in interconnection negotiation is limited to that of an observer. TSTT complains of TATT's comments under the rubric "TSTT's Cost Model" which states:

> "In early 2013 TSTT submitted data related to its cost model to the Authority however TSTT never responded to a subsequent request by the Authority dated 21st May 2013 to provide information regarding TSTT's cost model. The Authority is unaware of any approval of TSTT's cost model and invites TSTT to provide evidence of such approval."

142. TATT's role is an observer in the current negotiations among the concessionaires. However, that does not mean that TATT as a regulatory authority cannot correct and provide clarity on misrepresentations made therein. In this case, all the representations were directly related to TATT. TSTT was making representations to the effect that TATT approved its cost

model when in fact TATT did not share this view. TATT was entitled to correct TSTT's mistaken perception. However, this correction should have been directed to TSTT in response to the correspondence received from TSTT. TATT ought not to have copied other concessionaires.

143. TATT by correcting TSTT and copying the other concessionaires, might have intended that all concessionaries were on equal footing by being accurately informed of all relevant information during negotiations. The lead up to and the Determination were the appropriate manner of ensuring fair play.

144. In addition, TSTT has not adduced any evidence that their negotiations with other concessionaires have been adversely affected or that they suffered any harm by TATT's copying of their response to TSTT to other concessionaires.

145. Therefore, the court is not satisfied that TATT acted in bad faith. Rather, TATT was attempting, mistakenly, to act in accordance with the said section 18(5) in TATT's exercise of its functions in a transparent manner by including and informing all concessionaires of the status of TSTT's cost model.

Other issues

146. There are two other issues raised by TATT and TSTT which the court will address. Firstly, TATT filed its affidavit in opposition sworn by Ms. Cynthia Reddock-Downes on the 16 September 2021 ("TATT's Affidavit") without applying for an extension of time to file same. The affidavit was due to be filed on the 15 September 2021. Secondly, TATT's notice of objection filed on the 3 November 2021 to strike out certain paragraphs of TSTT's affidavit in reply.

147. On the first issue, the court considered that the overriding objective of the CPR, to treat with cases justly, was sufficient to permit the affidavit filed on the 16 September 2021, rather than the 15 September 2021 to stand as the affidavit in opposition. Under the court's general powers of case management, and acting without an application, the court extended the time for compliance with the direction to file the affidavit in opposition by one day. To do otherwise would be unjust. TSTT has not identified any prejudice that would befall them by such extension of time.

148. On the second issue, in arriving at a decision, the court considered all the evidence filed, including the evidence objected to by TATT filed on the 21 November 2021.

Disposition

149. On the issue whether the Determination is ultra vires to the Act and/or Regulations, the court grants the claimant's application to extend the time to apply for judicial review.

150. The court is not satisfied that TATT acted illegally, ultra vires to the Act and/or the Regulations, unfairly and/or irrationally and therefore refuses the application to quash the Determination.

151. The court is not satisfied that TSTT had a legitimate expectation to be consulted prior to the publication of the 2021 IBS and the Determination.

152. The court is not satisfied that TATT acted in bad faith towards TSTT by publishing the correspondence to other concessionaries.

153. While the court would have given leave to TSTT to apply for judicial review, the court is not satisfied that TSTT is entitled to any of the substantive reliefs sought. TSTT's claim for judicial review is hereby dismissed.

154. TSTT shall pay the defendant's costs to be assessed by the Registrar of the Supreme Court, in default of agreement.

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran