

REFERENCE NO: 4/7/06/3

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

BETWEEN

DIGICEL (TRINIDAD & TOBAGO) LIMITED

Complainant

and

**TELECOMMUNICATIONS SERVICES
OF TRINIDAD AND TOBAGO LIMITED**

Respondent

RULING

On the 1st February 2007, I gave directions to the parties to make written submissions on the issue of whether the following issue fell within the Terms of Reference of this Panel:

“Whether the equipment purchased by TSTT with the said sum of US\$1,494,091.00 or any part thereof for which Digicel is not entitled to be reimbursed must be used only for interconnection between Digicel and TSTT with use of any element of that equipment by other operators or for other services being strictly prohibited”

In compliance with my directions, the Complainant and the Respondent have lodged with the Secretary to the Panel written submissions on the 9th and 16th February 2007 respectively. Before I comment on these written submissions, I take this opportunity to highlight certain matters that are relevant to the determination of this issue.

PROCEDURE

1. Section 2.4.2 of the “Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago” (hereinafter referred to as “the Procedures”) expressly provides that the Notice of Dispute shall identify, inter alia, the nature of the dispute.
2. Section 2.5.1 imposes on the Complainant the obligation to serve on all parties to **the dispute** and the Authority, a document setting out the details of its submission in relation to **the dispute** (the Complaint), which shall be in the form of Schedule A hereto, and shall contain at a minimum:-
 - A concise list of the **issues that are in dispute**;
 - Details of **the dispute** including the relevant facts.....
 - A statement as to what remedies or decision the Complainant is seeking.(Emphasis mine)
3. Section 2.5.2 imposes on the Respondent the obligation to serve on all the parties to **the dispute** and the Authority its Response to the Complaint. This Response shall include its “*submissions in response to each allegation or submission made in the Complaint and details of any additional matters in dispute which the Respondent wishes to have taken into account in or resolved as part of the process.*”
4. Section 2.5.4 permits the Complainant to serve a Reply to the Response of the Respondent but expressly states that:

“A reply shall only address matters raised in the Response and shall not include any additional claims or allegations.”
5. Section 2.7.6 provides as follows:

“The Authority shall determine the Terms of Reference of the dispute resolution panel and shall serve a copy on each party. The Terms of Reference shall include, as a minimum, the submissions of the parties made under section 2.5 above, and shall identify the mechanism of resolution under section 2.6 above”

6. Section 2.10.5 provides that “subject to any applicable law, the arbitration panel shall have jurisdiction to determine any and all matters pertaining to the arbitration”

HISTORICAL FACTS

7. On the 15th December 2006 the Authority notified me that on the 8th December 2006 the parties to the dispute selected me to be the member of the single member Arbitration Panel to hear the dispute between Digicel and TSTT. The Authority also forwarded to me the following documents:

- (a) The Procedures for the resolution of Disputes in the Telecommunications and Broadcasting sectors in Trinidad and Tobago;
- (b) The CAT Reporting Transcript of the Preliminary Hearing held on the 8th December 2006;
- (c) Submissions:
 - (i) Digicel’s Notice of Dispute dated 12th October 2006;
 - (ii) Digicel’s Complaint dated 27th October 2006;
 - (iii) TSTT’s Response to Complaint dated 10th November 2006;
 - (iv) Digicel’s Reply to TSTT’s Response dated 17th November 2006.

The Authority also promised to forward to me the “agreed Terms of Reference once received from the parties.”

8. By letter dated 8th January 2007, received by me on the 10th January 2007, the Authority forwarded to me the Order made at the Preliminary Hearing on the 8th December 2006 together with the ‘List of Issues’. The Authority notified me that “these documents together with the attachments included in our letter of the 15th December 2006 hereby form the Terms of Reference for the Arbitration Panel in this dispute.”

9. The Order made at the Preliminary Hearing provided, under the caption “Terms of Reference”, as follows:

“The List of Issues, attached as the appendix hereto, which has been agreed by the parties, be submitted to the Dispute Resolution Panel, together with the submissions of the parties, as the Terms of Reference.”

10. The List of Issues attached to the Order identified the “Issues Agreed” and the “Issues Not Agreed”.

SUBMISSIONS

11. The Complainant in its submissions submits, firstly, that the issue set out at paragraph 2 thereof is already included in the Terms of Reference as determined by the Authority and the Arbitral Panel has no right to amend those Terms of Reference. Without prejudice to this contention, the Complainant also submits that the issue arises directly from the submissions of the parties and, in particular, the Complaint, Response and Reply and must be addressed by the Arbitral Panel.
12. The Respondent, in its submissions, submits the issue does not arise from the Notice of Dispute, the Complaint, the Response and the Reply. The Respondent also submits that it is neither proper nor necessary for the Arbitral Panel to make a determination on that issue and the issue is not relevant to the focus of the arbitration as currently defined.
13. It is clear from the submissions of both parties that they both accept that the Terms of Reference include the submissions of the parties. Accordingly, the Terms of Reference are not only to be gleaned from the List of Issues (Agreed and Not Agreed). Accordingly, I am entitled to consider whether, on the basis of the Complaint, the Response and the Reply, the issue as raised by the Complainant is included in the Terms of Reference. I also bear in mind that the Reply “shall only address matters raised in the Response and shall not include any additional claims or allegations”.
14. Article 2.4.3 provides that “dispute resolution proceedings shall be deemed to have commenced on the day that the [a] Notice of Dispute is received by the

Authority.” Article 2.4.2 imposed on the Complainant the responsibility to “identify the parties to the dispute and the nature of the dispute” When, therefore, Article 2.5 refers to the submission of a Complaint which shall include at a minimum “a concise list of the issues that are in dispute” and “details of the dispute”, there is a clear connection between “the dispute” as identified by the Complainant in its Notice of Dispute and the issues and details to be included in the Complaint. The issues in dispute are defined, therefore, by the Complainant, unless the Respondent raised some additional matters in dispute in its Response.

15. I have carefully considered the Complaint and the Response thereto and, in my opinion, “the Issue Not Agreed” has not been expressly raised in either of these submissions. It is also instructive that the Complainant, in its Submission has not directed my attention to any paragraph in its Complaint or its Reply or in the Response of the Respondent which raised this issue in clear and distinct terms.
16. The question remains, however, whether based on the arguments advanced by the Complainant this issue falls within the ambit of the issues to be determined by this Panel. The first argument put forward by the Complainant is that “the List of Issues submitted by the Authority clearly contemplated that the matters listed were issues for determination by the Panel.” Hence, the Complainant submits that the Arbitral Panel has no right to amend those Terms of Reference as determined by the Authority.
17. This submission is without merit since, as earlier stated, the List of Issues does not constitute the Terms of Reference and there is no question of my amending the List of Issues. What I am called upon to determine is whether the issue falls within the four corners of Terms of Reference, which include the Complaint, the Response and the Reply. Accordingly, I do not consider that I am obliged to consider this issue simply because it happened to included in the List of Issues submitted to me by the Authority.
18. The second ground relied upon by the Complainant is that the issue arises directly from the submissions of the parties. This submission is not supported by any reference by the Complainant to any specific paragraph of the Complaint, the Response or the Reply wherein the Complainant has raised this issue directly. In

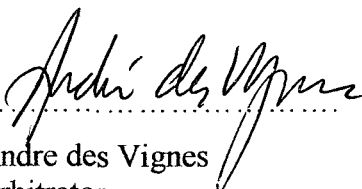
fact, if anything, the Complainant appears to be suggesting that the issue should be considered because it may arise if the Panel rules against the Complainant on the issues raised in its Complaint and Reply. This view is supported by paragraph 10 of the Complainant's Submissions. In other words, the Complainant suggests that since the issue is likely to arise if the ruling in this dispute goes against them, the Arbitral Panel should take the opportunity to address the issue in these proceedings because "it is necessary that all issues arising on the parties' submissions are resolved" and "it would be inappropriate to negate this procedure by failing to address the logical consequences of TSTT's arguments."

19. I am not persuaded by this argument either since, whether it may be a logical consequence of my adjudication in these proceedings or not, I am not entitled to take into account in this arbitration any matters which do not fall within the Terms of Reference. The parties, by their respective submissions, defined the Terms of Reference. It is my duty to consider the matters falling within the Terms of Reference and no other and, in my opinion, this issue has not been raised by the Complainant in its Complaint nor by the Respondent in its Response.
20. Accordingly, it is my ruling that the issue as stated in paragraph 2 of the Complainant's submissions is not within the Terms of Reference and I will only hear evidence and submissions on the following issue:

- (1) Whether Digicel is entitled to reimbursement from TSTT of the sum of US\$1,494,091.00 paid by Digicel to TSTT on 18th November 2005 or any part thereof;
- (2) Whether Digicel is entitled to interest on such sum and, if so, at what rate and for what period;
- (3) Alternatively, if, and to the extent that, Digicel is not entitled to reimbursement from TSTT of the said sum of US\$1,494,091.00 or any part thereof:
 - a. Whether Digicel is entitled to a detailed invoice with respect to prices and quantities

for each of the elements of the equipment purchased by TSTT with the said sum of US\$1,494,091.00 or any part thereof for which Digicel is not entitled to be reimbursed.

Dated the 9th day of March 2007


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Andre des Vignes
Arbitrator