

Register

Document

REFERENCE NO: 4/7/06/04

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

BETWEEN

DIGICEL (TRINIDAD AND TOBAGO) LIMITED
Complainant

AND

TELECOMMUNICATIONS SERVICES
OF TRINIDAD AND TOBAGO LIMITED
Respondent

**Report and Decision
of the Arbitration Panel**

Arbitration Panel:

Avory Sinanan S.C. (Chairman)
Robert C. Atkinson
Donald Bowles

March 7, 2008

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I. INTRODUCTION

A. History of This Proceeding

1. Previous Disputes

The wireless network of Digicel (Trinidad and Tobago) Limited ("Digicel") was interconnected to the wireless and fixed networks of Telecommunications Services of Trinidad & Tobago ("TSTT") on April 6, 2006, the date that effectively marked the beginning of telecommunications service competition in Trinidad and Tobago. However, this interconnection was not achieved without a series of bitter disputes between the two companies, the parties in this arbitration dispute. Indeed the arbitration conducted by this Panel is not the first dispute between these parties regarding the interconnection of their networks. Rather, this is the fourth interconnection-related dispute referred to the Telecommunications Authority of Trinidad and Tobago ("TATT" or "the Authority") for arbitration. In addition, there have been a number of judicial proceedings.

a. First Dispute (TATT 4/7/06)

The First Dispute was initiated by Digicel by Notice of Dispute to TATT on January 19, 2006. The arbitration panel for this dispute ("First Panel") was engaged by the Authority and was issued its Terms of Reference, including a List of Issues, on March 14, 2006. Unlike the List of Issues presented to this Panel where the questions to be addressed are clearly delineated, the First Panel's issues list was a cryptic summary of Digicel's Complaint, TSTT's Response and Digicel's Reply.¹

On March 24, 2006, Digicel gave notice that it intended to ask the First Panel to set interim rates at the Panel's first meeting that was scheduled for March 31, 2006. TSTT responded by claiming that the First Panel had no jurisdiction to set or impose interim rates².

¹ See, Exhibits in TSTT's Response to Complaint, Vol. 2, Exh. 4, at 206-210.

² TSTT v. First Panel, High Court of Justice, Gobin J, CV 2006-00899, May 5, 2006 at ¶¶6-9.

At its March 31 meeting, the First Panel made two decisions relevant to this dispute:

1. It decided that it did have jurisdiction to establish interim rates, a decision which was soon appealed by TSTT.
2. It established a sender-keep-all (or “bill and keep”) arrangement effective from March 31, 2006 so that interconnection could be established and competition could begin.

The parties exchanged and filed pleadings, witness statements and expert witness statements, reply witness statements, reply expert witness statements and pre-hearing submissions. The evidentiary hearing was held in Port of Spain, beginning on May 23, 2006 and concluding on May 26, 2006.

The parties submitted certain cost information to the First Panel. The Panel subsequently engaged a neutral expert, TERA Consulting, a French consulting firm (“TERA” or the “Panel Expert”) to assist in reviewing the cost information submitted by the parties. The Panel Expert’s terms of reference reflected the agreement of the parties that neither would have access to nor review of the other’s confidential cost model information.

On May 5, 2006, the High Court of Justice (Gobin, J) issued its decision concerning the First Panel’s jurisdiction to impose interim rates, holding:

... that the jurisdiction of the Authority to resolve disputes is limited to the resolution of the disputes, that is, a final resolution or such final agreement as may be arrived at the end of, or during the course of a dispute resolution process which puts an end to the dispute. There is no power to make substantive interim orders. More specifically, there is no jurisdiction to fix interim rates as claimed by Digicel.³

It should be noted that the parties have continued to this day to exchange traffic under the “bill and keep” arrangement established by the First Panel.

The First Panel issued its 122 page Report and Order⁴ on August 16, 2006 (Decision 2/2006, hereinafter “the First Decision”).

³ Id. at ¶55.

⁴ See e.g., Exhibit 5 to TSTT Response, pages 434 – 555

At this stage of the background, it is worth noting that a key decision by the First Panel was that the requirement of section 25(2)(m) of the Telecommunications Act (“the Act”) that interconnection rates be “cost based” does not preclude TSTT from insisting in its negotiations with Digicel that termination rates of TSTT and Digicel should be the same (“reciprocal” or “symmetric”⁵) and that the costs upon which the reciprocal rates are to be based are the costs of an efficient operator at a steady state in a competitive market.

b. Judicial Review of the First Dispute

On October 23, 2006, Digicel sought and obtained leave to apply for: 1) an order quashing the First Panel’s decision (i.e., that TSTT may insist on symmetric (reciprocal) rates in the negotiations); and, 2) a declaration that its interpretation of section 25(2)(m) is correct (i.e., that termination rates should be based on each operator’s own costs, potentially resulting in asymmetric rates).

The Supreme Court of Trinidad & Tobago (Justice J. Jones) determined that the First Panel’s decision merely permitted TSTT to maintain the negotiating position that it would only agree to reciprocal (symmetric) interconnection rates. The Court made it clear that the First Panel did not make a conclusive interpretation of section 25(2)(m):

“The relevant question for determination by the Panel was whether TSTT was entitled to insist in its negotiations with Digicel that any interconnection agreement with it contain terms that provide that the interconnection be reciprocal.”⁶

“...the effect of the [Panel’s] decision is to allow a party to mandatory negotiation to maintain a position of reciprocity in interconnection charges in that negotiation.”⁷

⁵ In this proceeding and in this Report and Decision, the terms “symmetric” and “reciprocal” are used interchangeably to mean that the same termination rate is charged by both parties to an interconnection agreement. In other jurisdictions, the term “reciprocal” simply means that each party charges the other some rate, but the rate might be different or “asymmetric.”

⁶ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9, 2007 at 17.

⁷ *Id.* at 25.

“...Given my finding that in its determination there was no conclusive interpretation of section 25(2)(m) by the Panel ...it is not open to this court on an application for judicial review to make the declaration sought by Digicel.”⁸

c. Second Dispute (TATT 4/7/06/2)

The second dispute between the parties was initiated by Notice of Dispute filed by Digicel on March 13, 2006. A complaint, response and reply were filed by the parties. After a preliminary hearing before the Authority regarding what is now this Fourth Dispute and on receipt of submissions by the parties, the Authority determined that most of the issues being raised in the Second Dispute would be addressed in the Fourth Dispute. Therefore, the Authority merged the Second Dispute with the Fourth Dispute now being arbitrated by this Panel. The ninth issue on this Panel's List of Issues (“Whether Digicel has conceded that TSTT is entitled to charge Digicel a transit rate of 3.5 cents?”) is a specific issue from the Second Dispute.

d. Third Dispute (TATT 4/7/06/3)⁹

The Third Dispute dealt with a payment of approximate US\$ 1.5 million paid by Digicel to TSTT on November 18, 2005 for the equipment TSTT purchased to facilitate the interconnection between the two companies. The arbitrator found that TSTT purchased the equipment before Digicel and TSTT received their concessions to operate and that TSTT was therefore under no legal obligation to interconnect at the time it purchased the equipment for Digicel's benefit.

The arbitrator also found that TSTT was entitled under Regulation 27 of the Telecommunications (Interconnection) Regulations 2006 to recover its costs from the interconnecting concessionaire. However, with respect to the proper amount of the costs, the arbitrator indicated that he required the Authority to appoint a technical expert to determine if any of the equipment purchased by TSTT was not necessary

⁸ Id. at 52. Digicel sought a declaration that “a true construction of section 25(2)(m) requires, *inter alia*, that each Concessionaire “establish prices for the individual elements of its own network on the basis of that Concessionaire's costs of providing those network elements (as disaggregated).” Id. at 4

⁹ Award, Digicel v. TSTT, TATT 4/7/06/3, July 16, 2007 (Panel Exhibit E)

and to analyze and review the invoices so as to verify the costs. Therefore, the arbitrator's most recent decision, dated July 16, 2007, stated that he hoped to make a final decision shortly after receiving the advice of the technical expert.

2. This Proceeding: The Fourth Dispute (4/7/06/4)

This brings us to the background of this dispute, the fourth arbitration between these parties.

Shortly after the First Panel issued its decision on August 16, 2006, the Authority asked the parties to resume their negotiations and from August 21 to September 22 the parties did so.¹⁰ TSTT took the position that the First Panel's decision mandated reciprocal rates and by September 22, as described by Justice Jones, "it was clear that the parties were at loggerheads over the effect of the decision of the Panel and negotiations were not resumed."¹¹ On October 10, the Authority directed the parties to submit for resolution by the Authority the dispute over their failure to conclude an interconnection agreement.

This proceeding was then initiated by Digicel's Complaint filed November 28, 2006. TSTT filed a response to the Complaint on December 12, 2006 and Digicel filed a Reply to TSTT's Response on December 21, 2006.

This Arbitration Panel was engaged by the Authority on May 16, 2007 and received its Terms of Reference, including the List of Issues agreed by the parties. The Authority's Dispute resolution procedures require that the arbitration be completed within 90 days following the appointment of the Panel¹², or by August 15, 2007.

A videoconference involving the Panel and the parties was held on June 28, 2007 to discuss procedural directions, other administrative matters and whether the parties would be prepared to commence the hearing on July 23. During the videoconference, the parties

¹⁰Digicel v. Rory Macmillan & Others, note 6 *supra*, at 18.

¹¹Id.

¹²See, Dispute Resolution Procedures at 2.10.9

indicated that they would not be prepared to begin the hearing on July 23. After discussion with the Panel, the parties proposed holding the hearing from December 3-10, 2007. The parties therefore sent a joint letter to the Authority on July 19, 2007 requesting an extension of the time in which the arbitration is to be completed, to December 10, 2007 or no more than one month after the conclusion of the hearing. The Authority approved the request at its December 17, 2007 meeting.

The Panel's Procedural Directions No.1 specifying the process, procedures and schedule for the arbitration, as proposed by the parties, was issued on August 2, 2007. On the following day, Digicel asked the Panel to adjust the schedule so that both parties could to take into account the expected delivery of a decision of the Supreme Court with respect to the appeal of the First Decision. On August 7, TSTT supported Digicel's request. The Supreme Court's decision was issued on August 9.

On August 10, 2007, the Chairman of the Panel sent a letter to the Chairman of the Authority noting that the parties' proposal to conclude the proceeding within one month after the conclusion of the hearing was unrealistic in view of the Christmas and New Year holidays and other commitments of the Panel members. The Panel Chairman proposed, instead, that an extension until January 31, 2008 would be more realistic.

In accordance with the schedule delineated in Procedural Directions No. 1 (as amended by the parties' letters of August 3 and 7), the parties exchanged and filed pleadings, witness statements and expert witness statements, reply witness statements, reply expert witness statements and pre-hearing submissions. The evidentiary hearing was held in Port of Spain, beginning on December 3, 2007 and concluding on December 9, 2007, including Saturday and Sunday sessions. Transcripts of the hearing were provided to the parties who had an opportunity to correct the transcripts. On December 28, 2007, both parties filed their Closing Submissions.

On January 31, 2008, the Chairman of the Panel wrote to the Authority requesting additional time for the Panel to reach and issue its decision. The Panel Chairman

proposed that the Panel would complete its work by March 7, 2008. The Authority granted the requested extension on February 8, 2008.

3. Procedural Directions

During the course of this proceeding, the Panel issued six Procedural Directions:

- **Procedural Direction No. 1** (August 2, 2007), prepared in consultation with the parties, providing the rules, procedures and schedule that would govern this arbitration proceeding. The document included rules regarding method of service, discovery, witnesses, evidence and proof, and the hearing schedule.
- **Procedural Direction No. 2** (October 5, 2007) establishing the process to determine whether TSTT's cost model and redacted portions of TSTT's expert witness testimony is commercially sensitive and ought not to be disclosed despite Digicel's request for access to the model and redacted testimony.
- **Procedural Direction No. 3** (October 5, 2007) directing TSTT to conform fully with Clause 5 (iii) of Procedural Directions No. 1
- **Procedural Direction No. 4** (November 12, 2007) ordering the parties to prepare and submit a "cross-reference index" that associates each party's documentary evidence with each of the questions in the agreed List of Issues being considered by the Panel.
- **Procedural Directions No. 5** (November 29, 2007) establishing the timetable and schedule for the hearing.
- **Procedural Directions No. 6** (December 11, 2007) specifying post-hearing procedures, including: a deadline for the correction of transcripts; the process for responding to requests from the Panel for further information; and, the process and schedule for Closing Submissions.

B. Mandate of This Panel: List of Issues

The Panel's Terms of Reference issued by the Authority on May 16, 2007 included the following Issues that had been agreed to by the parties:

ISSUES FROM DISPUTE NO. 4

1. *Subject to the impact, if any, of the issues raised by TSTT as set out in paragraphs 2 to 9 below, under the proposed five-year Interconnect Agreement ("the Interconnect Agreement") between Digicel and TSTT:*

(a) *What is the mobile termination rate to be paid by Digicel to TSTT for the term of the Interconnect Agreement?*

- (b) *What is the mobile termination rate to be paid by TSTT to Digicel for the term of the Interconnect Agreement?*
 - (c) *What is the fixed interconnection rate to be paid by Digicel to TSTT under the Interconnect Agreement?*
 - (d) *Subject to the issue outlined from Complaint #2 below, is TSTT entitled to charge Digicel a transit rate and, if so, what is the transit rate to be paid by Digicel to TSTT under the Interconnection Agreement?*
 - (e) *Should interconnection charges be charged in accordance with the same unit (e.g. per second or per minute) by which TSTT charges its customers?*
 - (f) *Should interconnect rates be payable from April 6, 2006, the date on which such interconnect services began to be supplied by Digicel to TSTT and by TSTT to Digicel? And, if not, from what date should such interconnect rates be payable?*
2. *Does the Complaint constitute an abuse of the Telecommunications Authority of Trinidad and Tobago's Dispute Resolution Process and an impermissible collateral attack, if not a direct attack, on the Decision in the First Dispute (4/706/01)?*
 3. *Is the Notice of Dispute and/or the Complaint ultra vires the Telecommunications Act and/or legally invalid?*
 4. *Is Digicel's purported referral of the said dispute frivolous and/or vexatious and/or an abuse of the Dispute Resolution Process?*
 5. *Is the process tainted with bias and/or bad faith against TSTT on the part of TATT and/or has the process been irrevocably undermined by such bias and/or bad faith and/or is it that TSTT cannot reasonably expect the process to be conducted fairly and/or free of prejudice against it?*
 6. *Is TATT obliged to await the results of the judicial review proceedings concerning the Decision in the First Dispute or, alternatively, must Digicel abandon the judicial review proceedings in order to allow TATT to adjudicate the matter?*
 7. *In relation to the mobile termination rates under Interconnect Agreement:*
 - (a) *Has the principle of reciprocity already been determined by the Decision in the First Dispute (4/7/06/01) such that this issue is Res Judicata or subject to issue estoppel?*
 - (b) *Have the issues relating to the establishment of mobile termination rates in Trinidad and Tobago, including the range of efficient costs for mobile*

termination, already been determined by the Decision in the First Dispute (4/7/06/01) such that these issues are Res Judicata or subject to issue estoppel?

(c) Without limiting the generality of (b), would obliging TSTT to adjust its Cost Model only for the initial period of liberalization undermine the Decision in the First Dispute (4/7/06/01)?

8. *Whether TATT has jurisdiction in this case to establish rates which are payable from April 6, 200 or from some other date prior to the Panel's decision in this Dispute? In the event that TATT has this jurisdiction, what rates should be established from such date?*

ISSUES FROM DISPUTE NO. 2

9. *Whether Digicel has conceded that TSTT is entitled to charge Digicel a transit rate of 3.5 cents?*

C. Relationship Between the First and Fourth Disputes

After reviewing the decision of the First Panel and some of the evidence presented to that Panel, this Panel has concluded that many of the findings of the First Panel are relevant to this proceeding. Of particular importance to this proceeding, the First Panel determined that:

- (1) It would not be unreasonable to mandate a single, reciprocal charge and the Telecommunications Act would permit and even promote such a system except in some certain exceptional circumstances¹³
- (2) Mobile termination rates should reflect the costs of an efficient mobile carrier operating at static efficiency¹⁴
- (3) The reasonable range of mobile termination rates is between 6.6 US cents and 8.5 US cents per minute¹⁵
- (4) Neither of the cost models presented by the parties conform to international best practices¹⁶
- (5) Reciprocal interconnection rates are generally desirable and should be implemented unless there are good reasons for adopting an alternative asymmetric rate structure¹⁷

¹³First Decision at 26.

¹⁴Id. at 29, 30-46.

¹⁵Id. at 53. The 6.6 cents rate results from the Panel Expert's revision and adjustment of Digicel's cost model, *id.* at Table 1 and explanatory text, the 8.5 cents rate is from a New Zealand Commerce Commission benchmark study, *id.* at 50. TSTT's cost model resulted in an intermediate rate of 7.2 cents, *id.* at Table 1 and accompanying text.

¹⁶Id. at 34.

¹⁷Id. at 29-30.

Some of the questions presented to this Panel concern the legal issue of whether and to what extent the principles of *res judicata* and issue estoppel require this Panel to abide by the conclusions, findings and orders of the First Panel?¹⁸ The evidence, witnesses and argument presented by the parties in this Fourth Dispute are remarkably similar and are often identical to those presented in the First Dispute. This Panel, after reviewing and carefully considering the evidence and argument presented in this dispute and comparing it to the evidence and argument presented in the First Dispute (as summarized in the decision of the First Panel), has concluded that much if not most of the analysis conducted by the First Panel is sound and, subject to consideration of the effect of any changes to the telecommunications environment, the conclusions drawn by the First Panel can be relied upon by this Panel. Therefore, even if this Panel is not bound to accept the analysis and findings of the First Panel, it may, in the exercise of its judgment, give substantial weight to the First Panel's analysis, conclusions and findings

II. LEGISLATIVE AND REGULATORY FRAMEWORK

A. Legislative Framework

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

- Section 3 of the Telecommunications Acts establishes the broad policies which the Act seeks to achieve. Specifically,

The objectives of the Act are to establish conditions for –

- (a) an open market for telecommunications services, including conditions for fair competition at the national and international level;
- (b) the facilitation of the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic wellbeing of the society;
- c) promoting and protecting the interests of the public by –

¹⁸ See, this Panel's decisions regarding Issues 7(a) and 7 (b), *infra*, which address whether the principle of reciprocity and the range of mobile termination rates determined by the First Panel are *res judicata* or subject to issue estoppel.

- (i) promoting access to telecommunications services;
- (ii) ensuring that services are provided to persons able to meet the financial and technical obligations of those services;
- (iii) providing for the protection of customers;
- (iv) promoting the interests of consumers, purchasers and other users in respect of the quality and variety of telecommunications services and equipment supplied;

- Section 25(m)(2) of the Act is the principal statutory basis of this dispute. Section 25(m)(2) requires TATT to ensure that concessionaires:

“Disaggregate the network and, on a cost basis, in such manner at 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.”

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

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

- Section 22 (1)(b) “Prohibit(s) anti-competitive pricing and other related practices.”¹⁹

Section 25(2)(b) directs the Authority to require each concessionaire to:

“... provide, upon request, points of interconnection in addition to those offered generally to other concessionaires, subject to rates that reflect the concessionaire’s total economic cost of constructing additional facilities necessary to satisfy such request.”

- Section 29 (2) provides that price regulation may be imposed where:

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

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

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

¹⁹Digicel and TSTT made various and sometimes strident claims about the other’s competitive practices and behavior throughout this proceeding. However, this Panel was not charged with determining whether the behavior of any party was “anti-competitive” or otherwise objectionable and it therefore takes no position with respect to any of the allegations.

B. Regulatory Framework

TATT implements the Act through Regulations²⁰ and Guidelines. For example, Sec. 25(m)(2), the key statutory provision implicated in this proceeding, is implemented through the following Regulation which, in addition to describing in more detail what a “cost basis” might be, also establishes “benchmarking” as a proxy for the results of models and formulae.

- Regulation 15, which states:

“(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.”

TATT has also initiated a number of proceedings that bear on the interconnection issues raised in this arbitration. While it has not finally adopted the proposals, the Authority’s proposals do reflect that expert agency’s informed latest thinking on complex issues. Accordingly, while not binding, the Panel has given due consideration to the proposals and found them to be appropriate to inform this decision. The following TATT proposals are relevant to this proceeding:

- **Recommendations for Interconnection and Access Policy (TATT 2/1/1/5)**

TATT published a final draft policy in September 2005 which laid out some broad principles regarding interconnection pricing that can be useful guideposts for this Panel:

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

...Whenever interconnection rates are set above efficient costs, the supplier has an

²⁰ Telecommunications (Interconnection) Regulations 2006.

injudicious advantage over competitors. When the rates are set below cost, there is minimal incentive, if any, for investment in new network rollout or expansion.

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

The fundamental difficulty in applying cost-efficient pricing to interconnection resources is arriving at an effective quantitative methodology (cost model) for estimating efficiency. A standard cost model approved by the Authority for use by all concessionaires can help to achieve this. Standard cost models go a long way in meeting the principles of equity, transparency and non-discrimination. It also reduces avenues for dispute consequent upon disagreement on cost-derivation methodologies.²¹

- **Proposed Price Regulation Framework for Telecommunications Services (TATT 2/13/13)**

The Authority has proposed an interconnection pricing policy which, significantly, is fully consistent with First Panel's decision. The Authority stated:

Cost-based Pricing for Interconnection

As interconnection services are the most important wholesale input to rivals' retail services, the Authority is particularly concerned to ensure that these services are reasonably and efficiently priced. The Act requires that all interconnection charges are cost-based. The Authority has published its proposals for achieving this requirement through the use of long run incremental costs in the policy document entitled: *Proposed Costing Methodology for Interconnection and Access in the Telecommunications Sector*.

The Authority recognizes that the application of the proposed costing methodology by different concessionaires may produce results that do not reflect the cost of an efficient operator. In such cases, the Authority proposes to set the interconnection rates based on the concessionaire having the same interconnection costs as those of an efficient operator in the relevant market. If the concessionaire wishes the Authority to adopt any other position, it must justify such approach on the basis of cost analysis and/or international cost-based benchmarks acceptable to the Authority.

Statement on Cost-based Interconnection Pricing:

The Authority proposes that the pricing of interconnection services shall be cost-based. The Authority proposes to set interconnection rates based on the concessionaire having the same interconnection costs as those of an efficient

²¹ Recommendations for an Interconnection and Access Policy, Final Draft, TATT 2/1/1/1/5, September 23, 2005 at 40. Available at [http://www.tatt.org.tt/ddocs/DraftInterconnectionPolicy_26Sept05%20\(2\).pdf](http://www.tatt.org.tt/ddocs/DraftInterconnectionPolicy_26Sept05%20(2).pdf)

*operator in the relevant market, unless the concessionaire provides evidence acceptable to the Authority that different rates are appropriate.*²²

- **Cost Methodology Proceeding**

The Authority issued a consultative document entitled "Proposed Costing Methodology for the Telecommunications Sector" on July 23, 2007 and modified some aspects on August 8, 2007. For this arbitration, the Authority's proposals on cost models and benchmarks are instructive:

The Authority proposes to develop a telecommunications sector top-down long run average incremental cost (LRAIC) model (with separate modules for fixed and mobile networks) within 18 months of the adoption of this Methodology. ... In the absence of such models, a benchmarking approach shall be used in the interim period.²³

Again, while the above statements are proposals at this time, the Panel has reviewed them and given them consideration in arriving at this decision.

III. ANALYTICAL FRAMEWORK

This dispute is fundamentally a disagreement between the parties over what the above-quoted statutes and regulations mean and what they require each party to do with respect to interconnection pricing and certain associated matters. In the following section of the decision, this Panel will outline the factors it had to evaluate, in applying the statutes and regulations, in coming to the decisions with respect to the List of Issues presented to it for determination.

A. Efficiency Goals of the Telecommunications Act

This Panel has been constituted pursuant to the provisions of the Telecommunications Act (The Act) and in making its decision has been guided by the objectives set out therein. Encouraging efficient telecommunications services in Trinidad and Tobago is one of the major objectives of the Act. For example, as the First Panel observed:

... the common theme underlying both the emphasis in the Act and Concessions on encouraging competition and the requirement of cost-based interconnection charging

²² Proposed Price Regulation Framework for Telecommunications Services in Trinidad & Tobago, TATT 2/3/13, December 6, 2006 at 18 (italics in original).

²³ Notice of Modification – Consultative Document on the Proposed Costing Methodology for the Telecommunications Sector, August 8, 2007 at 3.

is to be found in the economic principle of efficiency.²⁴

And TATT's proposed interconnection policy notes, "In order to encourage competition, it is essential that interconnection rates in the country be based on costs that are reflective of efficiency..."²⁵

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

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

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

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

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

²⁴ First Decision at 22.

²⁵ Recommendations for an Interconnection and Access Policy, Final Draft, TATT 2/1/1/5, September 23, 2005 at 40. Available at [http://www.tatt.org.tt/ddocs/DraftInterconnectionPolicy_26Sept05%20\(2\).pdf](http://www.tatt.org.tt/ddocs/DraftInterconnectionPolicy_26Sept05%20(2).pdf)

has a monopoly in the provision of fixed line services and both parties have monopolies on the termination of calls to their subscribers since access to those subscribers is achieved through bottlenecks controlled by each company. Accordingly, it is proper that the regulator establish and mandate the rates for interconnection between Digicel and TSTT for both mobile and fixed services where the parties cannot reach agreement on these rates.

As stated above, it is the role of the regulator to establish interconnection rates that promote the public's interest in the efficient provision of telecommunications services. In this regard, the Panel considers that interconnection rates should:

- encourage efficient provision of services or, at a minimum, not encourage the inefficient provision of services; and
- not introduce any market distortions or, at a minimum, reduce to the greatest extent possible any such market distortions.

B. Market Situation

The Panel is of the view that, in making its decisions in this proceeding, it must consider the market positions of the two parties since those market positions must be taken into account in determining the "efficient" outcome sought by the Act. Specifically, Digicel is a relatively recent entrant in the Trinidad and Tobago market offering only mobile services while TSTT is the long-standing incumbent providing both competitive mobile services as well as monopoly fixed services.

As a new entrant, Digicel faces certain challenges but also enjoys certain advantages. By way of disadvantages, Digicel must invest large sums of money to build its network and accordingly will incur significant fixed costs with relatively little revenue at start-up and in the period immediately thereafter. It also starts with no customers and must acquire most of its customers by winning them away from the incumbent.²⁶ Until it has gained a significant number of customers, its network will be operating at a low level of efficiency and its unit costs will be proportionately high. Yet, because it operates in a retail market

²⁶ Digicel's arrival in the Trinidad and Tobago market would also be expected to stimulate the size of the overall market. This means that a proportion of Digicel's will be first-time wireless telephone users rather than customers it had to win over from TSTT.

where prices are set by competition and to attract customers, Digicel cannot in the early stages charge retail rates that fully recover these high unit costs. Its business plan must therefore include a period of time where it incurs operating losses that must be sustained by investment money or revenues from other services (such as interconnection).

Digicel also has some considerable advantages, not the least of which is that it is not a neophyte in successfully taking on incumbent mobile operators in the Caribbean. Digicel first offered mobile services in Jamaica in April 2001 and, according to its website, "Digicel now has operations in 23 markets making the company not only the largest mobile operator in the Caribbean but also the fastest growing."²⁷ By January 2008, the overall Digicel group served more than six million customers.²⁸

Digicel therefore comes to Trinidad and Tobago with many characteristics of a large and experienced company, including experienced management, tested marketing programs and branding, long-standing relationships with suppliers that result in some scale economies, considerable legal and regulatory expertise, and investor confidence.²⁹ Compared to TSTT, Digicel also has the advantage of using only the latest and potentially lowest cost technology operated by a streamlined workforce and it arrives in the market with new ideas, fresh marketing approaches and, presumably, a business plan that is predicated on a belief that it has fundamental, long term advantages over TSTT.

The Panel notes that Digicel has now been in the Trinidad and Tobago market for nearly two years. In some markets, that length of time might not be considered a sufficient time to overcome some of the disadvantages associated with a new entrant. The Panel notes

²⁷ http://www.digicelgroup.com/group/the_story_so_far.php, January 16, 2008.

²⁸ http://www.digicelgroup.com/group/key_milestones.php, January 16, 2008.

²⁹ Digicel's website notes, "We recognise our staff and management team are largely responsible for our success to date. Digicel's unique culture is driven by an entrepreneurial style encapsulated by our Chairman, board of directors and management, all seasoned telecom executives and industry experts with vast experience in building, expanding and marketing mobile services both in the Caribbean and in other international markets. Currently, Digicel's staff is in excess of 3,700.

Digicel's investment in the region accounts for more than US\$1.9 billion. We are in a position of strength with a unique market opportunity, leading brand, and an excellent offering that is unmatched in the region."

http://www.digicelgroup.com/group/the_story_so_far.php, January 16, 2008.

however, that based on the market share information that has been submitted in this proceeding, Digicel has in fact acquired a significant customer base. Accordingly, considering the above factors, the Panel has concluded that Digicel has now moved beyond the "new entrant" phase of its development.

TSTT, the incumbent, has its own competitive advantages and disadvantages. It has the considerable advantage of having an established network, which would presumably be operating at an efficient level, and a large, established customer base. On the other hand, TSTT is likely to be affected by some of the disadvantages suffered by incumbents around the world facing competition for the first time including the use of older technology, a less flexible and probably more expensive labor force, and a less-than-loyal customer base.

While it is impossible to quantify to any degree of accuracy the relative significance of these advantages and disadvantages, the Panel considers that their combined effect would tend to equalize the market position of the two parties.

There is of course, one significant difference between the two parties, that being that TSTT is not only a mobile provider but it is also the monopoly provider of fixed line services. While the two services may be offered by different arms of TSTT, absent comprehensive structural separation or at least reliable and transparent cost separation accounting, the TSTT mobile services and TSTT fixed services for all practical purposes may be considered to be two offerings of the same company. This is a significant factor in the Panel's determinations. Accordingly, the Panel considers that one of its primary roles is to establish an interconnection regime that ensures that TSTT's monopoly position in the fixed line market cannot be used to unfairly advantage TSTT in the competitive market nor unduly disadvantage its monopoly subscribers as neither outcome would be in the public interest.

There are three general concerns with respect to the relationship between TSTT's fixed and mobile services. Firstly, TSTT could establish retail rate structures for the fixed line

market that give undue advantage to its mobile services. Secondly, it could apply excessive charges for fixed-to-mobile calling, inappropriately distorting the market to the disadvantage of both mobile carriers and the fixed line subscribers. These two retail rate concerns are, however, outside of the mandate of this Panel. TATT however does have jurisdiction with respect to fixed line rates and the Panel would encourage it to monitor activity in this area

The third area of concern is within the Panel's mandate. The concern is that TSTT has an incentive to establish fixed termination rates that are in excess of its costs. While this would notionally affect both mobile carriers equally, TSTT would in practice be indifferent to the level of that rate since in it would be paying itself. Digicel on the other hand would be disadvantaged by such an excessive rate since payments to TSTT's fixed line operation represents real cash outflows. Such pricing on the part of TSTT would harm the competitive market and would therefore not be in the public interest. The Panel will address this concern in its decision with respect to establishing fixed termination.

C. What Are "Cost-based Rates" Required by Section 25(2)(m)?

While it is clear from the Legislative Framework set out above that interconnection rates are to be based on costs, there is a wide divergence of views as to what, in practice, the phrase "based on costs" means and how to determine "cost-based" rates.

There are a number of factors that the Panel must take into account in determining what constitutes "cost based rates" in the context of the statute (particularly section 25(2)(m)) as discussed below.

Digicel has taken the position that "cost based rates" means that rates must be based on each operator's efficiently incurred costs. Digicel has claimed that this is the rate generated by its cost model for its own operation and argues that TSTT's interconnection rate should be equal to the costs identified in the TSTT cost model.

TSTT, on the other hand, has taken the position that “cost based rates” means that interconnection rates should be set on the basis of the costs of an efficient operator in a steady state market. TSTT claims that this is the rate generated by its cost model and that the resulting rate should be charged by both itself and Digicel.

Digicel contends that section 25(2)(m) requires each concessionaire:

- (a) To disaggregate its own network into its individual elements;
- (b) To establish prices for those elements of its own network on a cost basis; and,
- (c) To offer those individual elements of its network to the originating operator at such established prices.³⁰

The result according to Digicel is that its mobile termination rate (MTR) would be based on its costs of terminating a call on its mobile network while TSTT’s MTR would be based on TSTT’s costs.

In Digicel’s view, its interpretation is consistent with the plain meaning of the Act and submitted that:

“It would have been a simple matter for the legislature, if it had intended Section 25(2)(m) to refer to the costs of a notional operator, operating at some future steady state of the market to simply insert those words.”³¹

The Panel, however, finds this argument less than compelling and notes that if the legislature had meant that rates should be based on each operator’s actual costs it could have used those specific words, which it did not.

Digicel also submitted that its interpretation of section 25(2)(m) of the Act is consistent with other sections of the Act and other legislation. The Panel however disagrees with Digicel in this regard as discussed below.

- Digicel pointed out that the Act contemplates promoting competition in a market previously served on a monopoly basis.³² Digicel submits that in this regard:

³⁰ Closing Written Submissions on Behalf of the Complainant, December 28, 2007 at ¶ 50.

³¹ Id. at ¶ 53.

There is no interpretative cannon that permits the Panel to ignore the plain meaning of the Telecommunications Act in favour of the construction of the phrase “on a cost basis” in section 25(2)(m) which would compel Digicel (as TSTT suggests it should) to establish its prices for access to its network on the basis of TSTT’s claimed costs, or the costs of some notional efficient operator in a steady state market, and thereby make a loss. Indeed to do so would be to disregard significant economies of scale (driven by traffic volumes) thereby, penalizing Digicel as a new entrant, and rewarding TSTT for being the incumbent.³³

The Panel agrees with Digicel insofar as the level of the interconnection rates should not impede competition nor provide either party with an undue advantage. However, the Panel does not infer from the cited objectives of the Act that interconnection rates must be therefore based solely on an operator’s actual costs. As noted previously, the Panel is of the view that the Act requires that interconnection rates should be based on costs that reflect efficient provisioning of service. As described later in this decision, the Panel, in establishing the costs of an efficient provider has considered information drawn from both Digicel’s and TSTT’s cost models as well as other information including the market position of the two companies.

- Digicel argued that section 25(2)(m) must be construed in such a manner which is consistent with section 24(1)(c) which requires that concessionaires “refrain from using revenues or resource, from a telecommunications network or service, to cross subsidise any other telecommunications network or service, without prior written approval of the Authority”. Digicel argued that requiring it to charge a rate below its costs for interconnection would require that it cross subsidize its interconnection service in contravention of section 24(1)(c) of the Act.³⁴

As an initial matter, it is worth noting that this Decision by the Panel is the equivalent of a “written approval of the Authority.” Therefore, if the Panel’s

³² Id. at ¶¶ 56-61.

³³ Id. at ¶ 59.

³⁴ Id. at ¶¶ 62-64.

decision resulted in a "cross subsidy" of the sort envisioned by section 24(c)(1), the cross-subsidy would be in conformance with the statutory requirement.

It is the Panel's opinion that section 24(c)(1) deals with the classic "cross-subsidy" situation where a carrier charges below cost rates for one service and recovers the lost revenue by charging above cost rates for another service. In certain situations, such cross-subsidies are acceptable and desirable. For example, in order to promote social objectives such as universal service, regulators may establish explicit cross-subsidies between different services or market segments. These cross-subsidies may operate between monopoly markets or may use profits from all service providers in a competitive market to subsidize basic services.

In other areas, carriers operating in a fully competitive market will, for marketing reasons, establish pricing arrangements that effectively result in a cross-subsidy between various segments of the market. For example, mobile carriers will often subsidize the provision of handsets in order to stimulate subscribership. Evidence was submitted in this proceeding that there is strong market competition between Digicel and TSTT and it would not be surprising if some of the marketing programs used by both carriers involve some sort of "cross subsidy." Since the very purpose of the Telecommunications Act is to encourage this sort of vibrant marketplace competition, it would be inconsistent with the purpose of the Act to interpret section 24(c)(1) as requiring TATT approval of every marketing initiative.

The situation addressed by Digicel involves a potential subsidy within the mobile services market. As noted previously, both Digicel and TSTT have monopolies in the termination of calling to their subscribers. As such, there is a concern with the potential cross subsidy between the monopoly mobile termination service and the competitive retail portions of the mobile market. However, the Panel is of the view that with respect to this situation, section 24(1)(c) must be considered together with other sections of the Act that deal directly with interconnection between carriers such as those concerning competitive equity and the efficient provisioning of

services. In this regard, the Panel has substantial concerns that above-cost interconnection rates are likely to be anti-competitive and will promote inefficient market behavior.

In light of the above, the Panel does not consider that section 24(1)(c) can be applied in the manner submitted by Digicel, to the determination of mobile termination rates.

- Digicel submitted that its interpretation of section 25(2)(m) is consistent with the requirements of section 25(2)(b) which requires concessionaires to make available points of interconnection subject to rates that reflect the incurred costs.³⁵

Section 25(2)(b) states:

“[the Authority shall require a concessionaire to] provide, upon request, points of interconnection in addition to those offered generally to other concessionaires, subject to rates that reflect the concessionaire’s total economic cost of constructing additional facilities necessary to satisfy such a request”

With regard to Digicel’s arguments, the Panel notes that, in general, telecommunications costs may be divided into two categories. Certain costs are directly attributable to a specific service or a specific customer while other costs are associated with a variety of services and customers.

Costs in the first category include the costs for specific pieces of equipment or network modifications designed to meet the needs of specific customers. These costs are typically incurred at a specific point in time and are easily identifiable. The associated “cost-based” rate is simply the rate that recovers the total economic cost of the equipment or network modification. The determination of this rate is relatively straightforward. For reference purposes the Panel will refer to these types of costs as dedicated costs.

³⁵ Id. at ¶¶65-68.

Costs in the second category include network and common costs that cannot be directly attributed to a specific customer or service. These costs are typically incurred continuously but irregularly over time and are recovered from many services and many customers over an extended future time period. Given their nature, there is no direct relationship between a unit of current usage and the costs associated with that usage. It is these types of costs, which the Panel will refer to as shared costs, which are associated with the termination charges that are the subject of this dispute.

The Panel considers that section 25(2)(b) of the Act applies to the recovery of dedicated costs rather than shared costs and accordingly the Panel does not consider that this section supports Digicel's position.

- Digicel submitted that its interpretation of section 25(2)(m) is consistent with section 24(1)(h) of the Act which requires that concessionaires account for their costs and to keep such books of accounts and to do so in a manner prescribed by the Authority. Digicel argues that this requirement is consistent with its position that the rates must be set to reflect the specific costs of the individual concessionaire.³⁶

The Panel notes that there may be many reasons for the TATT to require concessionaires to account for their costs and the legislation is silent as to any specific reason. Accordingly, the Panel considers that there is no logical connection between this accounting requirement and Digicel's position.

- Digicel submitted that its interpretation of section 25(2)(m) is consistent with the Constitution of Trinidad and Tobago, which recognizes the fundamental right to enjoyment of property and the right not to be deprived thereof except by due process of law. Digicel argues that if it is required to make its network available to

³⁶ Id. at ¶¶ 69-70.

others at rates that are less than its costs, then this result would be in conflict with Digicel's fundamental right to the enjoyment of property.³⁷

Digicel entered the Trinidad and Tobago telecommunications market knowing that it required a concession from the Authority and that it would be subject to regulation by the Authority. The terms of a concession and regulation inevitably restrict the ability a property owner's ability to use or enjoy the property without limitation. Among other things, a regulated telecommunications concessionaire in Trinidad and Tobago accepts that its property must be used in a manner that serves the public's interest. As noted previously, the Panel considers that interconnection rates must be established in a manner that serves the public interest by being "efficient." To the extent that there is a conflict between the public interest and the private interests of an operator in fashioning an interconnection price, the public's interest should prevail.

Also given the nature, as discussed above, of the rates established for the recovery of shared costs, the Panel considers that no conclusion can be drawn as to whether a particular rate impedes an operator's ability to enjoy its property.

Notwithstanding the above, the Panel is of the view that the rates established in this decision are just, reasonable and do not confer an advantage on either party nor impede either party's right, as a regulated concessionaire, to enjoy its property.

In light of all of the above, the Panel does not agree with Digicel's position that the Act limits the Panel's ability to consider factors other than an operator's own costs in setting cost-based interconnection rates.

³⁷ Id. at ¶¶ 71-80.

D. What Sort of "Costs" Are Rates to Be Based Upon?

As distinct from dedicated costs discussed above, there is no universally accepted "correct" method to establish the rates to recover shared costs such as those associated with interconnection services that are provided largely over facilities shared with other services.³⁸ Economic theory, however, does provide some guidance. In this regard, the Panel considers that the role of the regulator, in this situation, is to attempt to simulate the rates that would be in effect in a fully competitive marketplace. In theory, those rates would be equal to the costs of an efficient operator.

While there is no single "perfect" method that reliably emulates the prices that would be produced by a competitive market, Dr. Hausman (Digicel's economic expert) noted that the approach that has been generally adopted in jurisdictions around the world is to use some form of forward looking long run incremental cost (LRIC) methodology.³⁹ Regardless of the specific method, however, it is unavoidable that the prices will be based on estimates and predictions of future costs and future traffic volumes. While both of these predictions can be based on current actual values, the resulting rate can only be considered an estimate that is *based* on costs but it unlikely to *equal* costs except by chance.

This issue was addressed by the First Panel as follows:

It would also be relevant to take into account the nature of long run cost modeling in specifying costing methodologies. According to the evidence before this Panel, LRIC and TELRIC models involve constructing a hypothetical, cost based on assumptions, for example about operating at network capacity. These assumptions may not prove to be correct predictions, and indeed they may never be expected to be fulfilled. They are a mechanism for leading the cost model result towards efficiency. Such a cost model does not pretend to produce actual costs of an individual operator, but the costs of a hypothetical operator operating at static efficiency. Optimal efficiency can be expected to be achieved when the market is at its most competitive and so in furtherance of the principle of economic efficiency, it

³⁸ To the extent that some transmission links and other facilities are dedicated solely to the interconnection (such as the trunks between Digicel and TSTT switches), the capital costs and some operating costs (such as labor costs of maintaining the trunks) can be readily determined from bills and records.

³⁹ See, e.g. Hausman Transcript of December 4 at 127 and 130.

*is reasonable to apply a cost model assuming the market has reached a steady and competitive state.*⁴⁰

TATT has also endorsed a forward looking incremental cost approach to setting rates in Trinidad and Tobago, proposing to base rates on a:

.... telecommunications sector top-down long run average incremental cost (LRAIC) model (with separate modules for fixed and mobile network...⁴¹

The appropriate cost basis for interconnection rates was also addressed at length by the First Panel⁴² As noted previously, this Panel has reviewed the analysis performed by the First Panel as well as the submissions in this proceeding and generally agrees with the conclusions of the First Panel. As stated in the First Decision:

*To construe the Act and Concessions as referring only to each individual operator's own costs alone to determine that operator's charges would distract from the underlying principle to be applied in the methodologies the Authority may specify. In the panel's view this underlying principle is the promotion of economic efficiency.*⁴³

*For these reasons, the panel finds that it would not be unreasonable, indeed it may often be eminently reasonable, for administrative purposes in a regulatory context to mandate a single, reciprocal charge for a given service for all operators which are providing the same service under similar conditions if that charge was reasonably believed to be based on costs of a typical, efficient operator.*⁴⁴

Therefore, the Panel is of the view that, in general, interconnection rates should be based on the forward looking estimates of the costs of a typical, efficient operator. The Panel would also agree with the First Panel that the legislative framework does not require that interconnection rates be based solely on each operator's actual costs.

It should be noted however that this conclusion does not necessarily mean that interconnection rates flowing from this decision must be symmetrical. This issue will be discussed below.

⁴⁰ First Decision at 26.

⁴¹ Notice of Modification – Consultative Document on the Proposed Costing Methodology for the Telecommunications Sector, August 8, 2007 at 3.

⁴² See section 2.2 c of the First Decision.

⁴³ First Decision at 24

⁴⁴ Id. at 26.

E. Precision of "Cost-Based" Rates

As noted in the preceding discussion, rates that are "based on costs" are unlikely to be rates that are *equal* to costs. Indeed, if rates are to be in effect for five years (as is the case in this proceeding) and the market is growing and changing, the rates would be equal to costs for an extremely short period of time, if at all. The Panel believes that the statutory phrase "based on costs" simply means that the rate-setting process undertaken by regulators should begin with reasonable estimates of the costs using the best available evidence. These estimates form the "base" upon which the rates will be determined. But upon this base, the regulator may make adjustments to accommodate other statutory directives and regulatory policies. The net result is that the regulator is not required to establish rates with perfect precision, and in fact, could not do so. Rather, the Panel believes that the resulting rates simply have to be a reasonable approximation⁴⁵ of the costs to satisfy sec. 25(2)(m) of the Act. To the extent that the regulator establishes a range of rates which are "based on costs" derived from the available evidence, a prescribed rate which falls anywhere within the range would logically satisfy the statute.

F. Termination Rate Symmetry or Asymmetry?

The issue of whether termination rates should be based on the individual costs of each operator or on the basis of a hypothetical efficient provider operating at a steady state (resulting in one "symmetric" or "reciprocal" rate) is at the heart of this dispute. Digicel argues for rates based on each operator's cost estimates. Since each operator costs are likely to be at least somewhat different, the likely result of Digicel's proposal is that the rates would be "asymmetric." By contrast, TSTT's proposal that rates should be based on the costs of a hypothetical efficient operator would result in "symmetric" (or reciprocal) rates.

⁴⁵ See for example, sec. 252(d)(2)(ii) of the United States' Communications Act [47 U.S.C. 252(d)(2)(ii)] which states that reciprocal rates for the termination of traffic shall not be just and reasonable unless:

"such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

A principal issue of the First Dispute was whether or not TSTT could insist in its negotiations with Digicel that an Interconnection Agreement must have symmetrical rates. Consequently, the First Panel devoted considerable effort to examining the legal basis and the policy pros and cons for symmetrical termination rates. The First Panel concluded that there are significant benefits to symmetrical (or “reciprocal”) rates. For example, it stated:

The Panel also considers that there are various benefits, not insignificant, that may be anticipated from reciprocal [i.e. symmetrical] charging. It puts the operators in a position of parity regarding the revenues they can earn from traffic their subscribers generate on their networks as recipients of calls. Reciprocal charging can simplify the process of regulation since modeling the interconnection costs of every individual concessionaire in Trinidad and Tobago can be expected to consume extensive regulatory resources in the years to come. Reciprocal charging also reduces the number of charges being negotiated between operators.⁴⁶

This Panel concurs with the First Panel that there are significant benefits from reciprocal termination rate and therefore agrees with the First Panel that reciprocal rates should be the default arrangement unless a party opposing symmetry—Digicel in this case—is able to satisfy one of the three exceptions outlined by the First Panel. The First Panel described the exceptions in the following fashion:

... the panel...finds that the Act and Concessions, properly construed, would permit and even promote reciprocal charging in interconnection agreements except in the following three circumstances:

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

Secondly,... it would not be appropriate for an interconnection agreement to require them to be applied reciprocally if the other operator is not providing the same service under similar conditions such that even in a state of static efficiency it cannot reasonably be expected to match the efficient costs of the first....

Thirdly, an interconnection agreement should not mandate reciprocal charging if it would frustrate the objects of the Act as they relate to the development of

⁴⁶ First Decision at 27.

*fair competition and encouragement of investment...*⁴⁷

The Telecommunication Authority of Trinidad and Tobago has, thus far, endorsed the First Panel's general approach by proposing

*... to set interconnection rates based on the concessionaire having the same interconnection costs as those of an efficient operator in the relevant market, unless the concessionaire provides evidence acceptable to the Authority that different rates are appropriate.*⁴⁸

The Panel agrees with the Authority's proposal and believes that satisfaction of any one of the First Panel's three exceptions would constitute the evidence required to justify basing rates on something other than an efficient operator's costs. This Panel will adopt the First Panel's methodology and therefore consider whether Digicel, the party proposing an approach that would likely lead to asymmetric rates, has satisfied at least one of the three exceptions to symmetrical rates outlined by the First Panel.

- **Exception 1: Rates Are Not Based on the Costs of an Efficient Operator in Trinidad and Tobago**

For this exception to be satisfied, the Panel would have to find that it couldn't determine the costs of an efficient provider operating at a steady state in Trinidad and Tobago. This Panel has at least three means for trying to determine such costs:

- 1) Evidence from the parties' cost models
- 2) Evidence from international benchmarks
- 3) Evidence of a reasonable range of efficient costs

This Panel has determined that it can determine a reasonable estimate of the costs of an efficient provider operating at a steady state in Trinidad and Tobago (see, this Panel's decision with respect to Issues 1(a) and (b), below.) Therefore, this exception to rate symmetry cannot be satisfied.

- **Exception 2: Are the Operators Providing the Same Service Under Similar Conditions?**

⁴⁷ First Decision at 29-30.

⁴⁸ Proposed Price Regulation Framework for Telecommunications Services in Trinidad & Tobago, TATT 2/3/13, December 6, 2006 at 18

With respect to this exception, the First Panel observed:

*The question addressed here is whether the operators are providing a service which is so different, or under such different conditions that even operating at static efficiency their costs cannot be expected to be the same.*⁴⁹

*...TSTT's cost model is forward looking in assuming TSTT's migration to GSM only is completed. Thus even if using different technologies for the same licensed service were a legitimate difference to consider (e.g., if the licensed frequencies imposed different technologies upon the parties), the same technology is used to determine costs.*⁵⁰

*On the evidence before the panel, the panel concludes that the parties' operating conditions are similar enough that reciprocal charging should not be prevented.*⁵¹

No evidence was submitted in this proceeding that causes this Panel to draw a conclusion different from the First Panel's. Therefore, this exception to rate symmetry has not been satisfied.

• **Exception 3: Would Reciprocal Charging Frustrate the Purposes of the Act?**

The First Panel considered its determination with respect to this exception to be "a close case," saying:

Considering the Act's overall purposes,... there may be circumstances in which the expeditious development of competition in a given market is an overarching goal meriting a departure from the use of a single reciprocal charge based on the costs of an efficient steady state operator.

It may be appropriate in such cases to employ non-reciprocal charges for different operators, with the new entrant's charge being based on the costs of an operator operating as efficiently as it can given its phase of network development and operation. A limited asymmetry for a temporary period may not be inappropriate in some cases.

*While the panel found it to be a close case, the panel does not on balance believe that the situation requires or justifies the development and use of separate "efficient" costs based on the stage of network buildout and customer acquisition. In the circumstances of this case, the panel does not consider that the purposes of the Act would be frustrated if reciprocal charging is mandated in the Interconnection Agreement.*⁵²

⁴⁹ First Decision at 53-54.

⁵⁰ Id. at 54.

⁵¹ Id. at 57.

⁵² First Decision at 73-74.

As discussed above⁵³, this Panel noted several areas where a new entrant would have advantages over the incumbent carrier as well as various disadvantages including the inefficiencies resulting from the low level of network usage in the early period of entry. A new entrant will always have a relatively low level of usage of its network when it begins operation and accordingly it cannot achieve the same economies of scale as an incumbent carrier during its start-up phase. As noted above, the Panel concluded that Digicel is no longer in the start-up phase of development. However, even if Digicel were still in the start-up phase, it is not a compelling reason for asymmetric rates. Any new entrant has to accept the fact that in the early period of entry, it will face certain costs and inefficiencies that would not be experienced by parties already in the market. These are factors that any sophisticated and experienced company like Digicel would take into account when entering the market.

On the other hand there are clear and significant problems that would result from asymmetric rates. First, the regulator would have to monitor the situation closely, to ensure that as the entrant became more efficient, the rate asymmetry would be reduced. Also, and most importantly, the asymmetric rates, especially at the high level proposed by Digicel, would provide significant incentive for market-distorting behavior, contrary to the Act's goal of encouraging efficient telecommunications in Trinidad and Tobago. For example, highly asymmetric rates of the degree proposed by Digicel (97 cents versus 39 cents, substantially more than double) may incent inefficient entry by inexperienced or naïve companies who might expect such beneficial asymmetry to be long lived. Entry by numerous start-ups might provide the illusion of competition for a period of time but, in the long run, artificially encouraging more entrants that the market can reasonably bear will result in the collapse of most new entrants, weak survivors and reluctance by investors to put new

⁵³ See, Section III. B "Market Situation," *supra*.

capital into the Trinidad and Tobago market.⁵⁴ None of those results will have long-term benefits for the public of Trinidad and Tobago.⁵⁵

In this proceeding, Dr Hausman, Digicel's expert economics witness, submitted that termination rates should be based on efficient long run incremental costs and that if these costs are different for each operator then the rates should be different. By the same token, Dr. Hausman was clear that if the efficient long run costs are relatively similar, termination rates should be the same. He testified that:

My approach in this proceeding is that interconnection rates should be based on the actual forward-looking costs to provide a service. So since TSTT and Digicel are different sizes...I conclude that the rate should be different."⁵⁶

All I am saying is which I think is indisputable is that Digicel is significantly smaller than TSTT at the current time so its costs would be higher. ... all I am saying is it is a matter of economics that if you are smaller, that holding other things equal, you will have higher costs even though you are an efficient operator.⁵⁷

If the principle is set correctly and in the future the companies still become approximately equal in size, then my economic principles will say the rate should be set equally.⁵⁸

Dr. Hausman further explained that the relevant size metric in this situation is traffic volumes.⁵⁹

In arriving at the above noted conclusions, Dr. Hausman did not have access to current volume data for Digicel and TSTT when he testified.⁶⁰ The Panel has the advantage of receiving, on a confidential basis, relatively recent volume data for both

⁵⁴ At least this is the expensive lesson learned in the United States (and perhaps other countries) from regulatory policies (such as the UNE-P unbundling in the USA) that artificially stimulated entry into the American local exchange market after the passage in the US of the Telecommunications Act of 1996.

⁵⁵ Constant competitive price, quality and innovation competition between healthy competitors have substantial public benefits. But competition between incumbents and weak new entrants can create the illusion of enough competition to justify substantial deregulation of the incumbent and then cause the collapse of the new entrants, leaving the public exposed to an unregulated or lightly regulated monopoly or to a tame duopoly.

⁵⁶ Transcript Day 2, at 125-126

⁵⁷ Id. at 129.

⁵⁸ Id. at 130.

⁵⁹ Id. at 131-133.

⁶⁰ Transcript, Tuesday December 4, 2007 at 150.

parties. Without revealing the confidential information, the Panel can state that the numbers are now significantly closer than Dr. Hausman expected. While there is no doubt that Digicel was significantly smaller than TSTT in the early stages of competitive entry, Digicel's traffic volumes have increased significantly over a short period of time. While the two companies are not yet equal in size, the Panel is of the view that both companies are of sufficient size that they can be expected to achieve comparable network efficiencies. Accordingly, even if the Panel were to agree with Digicel and its witness Dr. Hausman that there is a case for asymmetric rates based on the relative sizes of the two companies, such a rate differential would not, in the Panel's view, be now justified based on the current situation regarding the two companies. Rather, the Panel believes that it is fair to say that the companies are, to use Dr. Hausman's standard, "approximately equal in size" so that, as Dr. Hausman advises, "the rate should be set equally."

As noted above, the First Panel found this third exception to symmetrical rates to be a "close call". If this exception was a "close call" in August 2006, only six months after competition started and with very little firm data about Digicel's ability to capture market share, it is much less of a close call for this Panel. With evidence from nearly two years of competition between Digicel and TSTT, it is quite clear that Digicel has been able to survive, compete effectively and capture a substantial portion of the mobile business in Trinidad and Tobago.

Therefore, in the Panel's view, the third exception to symmetrical rates has not been satisfied in this proceeding.

Since none of the three exceptions to the default arrangement of symmetrical (or reciprocal) rates have been satisfied, this Panel has concluded in this case that mobile termination rates in Trinidad and Tobago should be symmetrical (reciprocal).

G. Mechanics of Establishing Cost-Based Rates: Cost Models and Benchmarks

The Authority has determined that cost-based rates should be established primarily from cost models and secondarily by reference to benchmarks taken from other jurisdiction where the rates are cost-based.⁶¹ Therefore, this Panel is obligated to first consider whether it can rely on the cost models proposed by the parties.

1. Cost Models

In this proceeding, both Digicel and TSTT have supported their positions with results from their respective cost models. These same models were the subject of much debate in the First Dispute. The First Panel engaged an independent consultant (TERA) to assess the cost models put forward by the parties. In its report, TERA provided its views as to the strength and weaknesses of the cost models and made some recommendations for improvements. This Panel has received submissions that TERA's suggested revisions have been carried out.⁶² With these revisions, the Panel considers that the analysis performed by TERA and the conclusions arrived at apply equally in this proceeding.

The general conclusion of TERA was that the Digicel and TSTT models were not directly comparable and nor did either of them conform to the best practices cost models normally adopted by regulators.⁶³ It is also noted in this regard that TATT has yet to specify a cost methodology standard that would apply in Trinidad and Tobago.

⁶¹ See Regulation 15, which states:

“(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 compost with internationally accepted standards for such benchmarks.”

⁶² See, Digicel Complaint, Nov. 28, 2006, section 6.2 and (for TSSTT) Witness Statement of Dr. Timothy J. Tardiff, Aug 24, 2007 at ¶7.

⁶³ Economic Assessment of Cost Models Used in the Context of the Interconnection Dispute between Digicel and TSTT, TERA Consultants, at ¶38. See, TSTT Bundle of Documents, Vol. 4 at 929-1005.

The Panel considers that two of the specific areas addressed by TERA are of particular significance in this proceeding.

- **Common (shared) costs**

TERA was unable to assess the appropriateness of the treatment of common costs in either model.⁶⁴ It was noted, however, that Digicel's model would assign a higher proportion of common costs to the interconnection service than a model conforming to international best practices would do.⁶⁵ As a result, Digicel's model will generate higher interconnection costs than a "best practices" model. With respect to TSTT's model, TERA determined that an assessment of TSTT's treatment of common costs would require an audit of TSTT's accounting systems.⁶⁶ As discussed previously, the Panel has specific concerns with respect to the allocation of costs between TSTT's fixed and mobile operations and absent the audit referred to by TERA, the Panel is not in a position to assess the appropriateness of TSTT's allocation between these services.

- **Volume sensitivities**

TERA observed that the unit termination costs produced by both models were highly sensitive to volumes of traffic.⁶⁷ The Panel understands that the models assume a fixed network and that the calculated termination rate will decline in direct proportion to increasing traffic volume until network capacity is reached. The Panel has concerns with this outcome since the results are totally dependent on the specific network that the parties have specified for the model and the traffic that they have forecast. Such a model approach will generate a wide range of unit interconnection costs depending on these two factors which are largely unverified and, to the extent they are forecasts, unverifiable. Also, the high sensitivity of the models to traffic volumes would suggest that neither model appropriately models an efficient operation that has realized the economies of scale available to operators of the scale of TSTT

⁶⁴Id. at ¶38, ¶75.

⁶⁵Id. at ¶75.

⁶⁶Id. at ¶76.

⁶⁷Id. at ¶80, ¶102.

and Digicel. As a result, neither model necessarily identifies the costs of a typically efficient operator.

In light of the above, the Panel has concerns with respect to the outputs of the two cost models. Accordingly, in arriving at its determination with respect to interconnection rates, the Panel will give consideration to the results of the two cost models but the weight given the results will be qualified.

2. Benchmarks

As noted in the Legislative and Regulatory Framework discussion above, the Panel may consider evidence of “cost-based” rates in other jurisdictions (that is, “benchmarks”) when reliable cost model evidence is not available. Indeed, in the absence of reliable cost models, setting rates based solely on rates for similar services in different jurisdictions is explicitly permitted under Interconnection Regulation 15(2), which states:

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.”

Most recently, the Authority added:

The Authority proposes to develop a telecommunications sector top-down long run average incremental cost (LRAIC) model (with separate modules for fixed and mobile networks) within 18 months of the adoption of this Methodology... In the absence of such models, a benchmarking approach will be used in the interim period....⁶⁸

The First Panel had a similar view of the role of benchmarks when it found:

... that benchmarks are ordinarily to serve as a secondary source of information after cost model information. As described above, evidence regarding cost model data has been submitted to the Panel although not pursuant to any methodology specified by the Authority. Benchmark evidence may, then, be a valid and valuable source of guidance relating to interconnection charging, including with

⁶⁸ Notice of Modification – Consultative Document on the Proposed Costing Methodology for the Telecommunications Sector, August 8, 2007, http://www.tatt.org.tt/ddocs/Cost_Method_modification_80807.pdf

respect to whether reciprocal charging is permissible.⁶⁹

Benchmarks can also be used as a “sanity check” to judge whether the results of a cost model are reasonable. As Digicel said with respect to its own cost model:

...Digicel recognizes and accepts that...its Cost Model (and more particularly its inputs) are not, and cannot be, as visible to the Panel as might be required for the Panel to have sufficient trust and confidence in the output from the Digicel Cost Model.

Accordingly, ...Digicel (unlike TSTT in relation to Mobile termination services) has sought to assist the Panel by providing benchmarks (from Europe and the Caribbean) to corroborate the findings of its own Cost Model. These benchmarks provide the Panel with a very useful and important cross-check on the output of the Digicel Cost Model.”⁷⁰

David Rogerson, Digicel’s expert witness, testified that “benchmarks are a very valid way of setting cost based mobile termination rates” noting that “benchmarks have been used more frequently than cost models in the determination of mobile termination rates.”⁷¹ Of relevance to the current situation in Trinidad and Tobago, the witness also explained that “they [benchmarks] continue to be used in many newly liberalizing markets as the best way of setting initial interconnection rates pending the development of cost models by the regulator.”⁷²

According to Mr. Rogerson, the use of benchmarks would be particularly suitable in this arbitration because of the difficulty of using either party’s cost model to establish cost-based mobile interconnection rates. He said:

“...given the vast number of assumptions that go into them, given the complexity of the models, given the incentives that parties have for pushing the credibility of those assumptions to their extreme levels, I think it is difficult to rely on such models in a case such as this.”⁷³

⁶⁹ First Decision at 46.

⁷⁰ Closing Written Submissions on Behalf of the Complainant, December 28, 2007 at ¶¶245-246.

⁷¹ Testimony of David Rogerson, Ovum Consulting, Transcript of December 5, at 151.

⁷² Id.

⁷³ Id. at 152.

But, he added, “Having said all that, I believe benchmarks are imperfect” because of the subjectivity in deciding which countries are similar enough to Trinidad and Tobago to include in the benchmark.⁷⁴

Mr. Rogerson also testified that the benchmark evidence put forward by both sides is “quite compelling.”⁷⁵ His central benchmark rate for mobile termination, based on the cost-based rates in eight European countries which he regarded as having relevant similarities to Trinidad and Tobago, is 13.6 US cents per minute, within a range of 10.9 to 15.3 US cents per minute.⁷⁶ If he accepts the various alternatives and adjustments proposed by TSTT’s expert, Dr. Tardiff, Mr. Rogerson calculated that the benchmark rates would be 13.6, 10.9, 15.3, 12.4, 12.3 and 15.5 US cents per minute results which he characterized as being:

“... all roughly in the same order of magnitude....the basic outcome is fairly clear, that something, give or take a couple of cents around 13 cents per minute, is a good benchmark of cost based rates for an operator in Digicel’s position.”⁷⁷

It is important to note that Mr. Rogerson’s benchmarks apply to carriers in what he regarded as Digicel’s position: a start-up or new entrant, not incumbents. Consequently Mr. Rogerson’s benchmarks would not be appropriate as a proxy for the proverbial “efficient provider operating in a steady state” that would be used for symmetrical, reciprocal termination rates. And, because the Panel has previously determined that Digicel is no longer in the “start-up” phase (based on data presumably not available to Mr. Rogerson), his benchmark evidence may not be representative of a post start-up operator such as Digicel.

Because it argues for symmetrical rates based on the costs of an efficient provider operating in a steady state, TSTT disagrees vehemently that the benchmark evidence presented by Digicel can be used by this Panel to establish termination rates. TSTT notes that Digicel’s benchmark evidence ignores the findings of the First Panel that:

- 1) European rates are not cost-based (because many rates are on a “glide path” to

⁷⁴Id. at 151.

⁷⁵Id.

⁷⁶Id.

⁷⁷Id.

cost-based rates, but have not reached the end of the glide path); 2) the Caribbean benchmarks are biased because they exclude Jamaica, which has the lowest rates in the region; and, 3) the New Zealand Commerce Commission's benchmark study was more useful than the European or Caribbean benchmarks.⁷⁸

TSTT also noted that the New Zealand study produced a mobile termination rate of about 53 TT cents or 8.5 US cents.⁷⁹ However, Digicel strongly attacked the credibility of the New Zealand benchmark study⁸⁰ and noted that TSTT's witness was no longer endorsing it.

TSTT noted that Digicel's expert had concluded that Hungary was the European country included in its benchmark list, which is "closest" to Trinidad and Tobago in relevant characteristics but TSTT argued;

"...Hungary and Trinidad and Tobago are not even remotely comparable according to the metrics Mr. Rogerson agreed were significant...Indeed the country that could possibly have been most comparable to Trinidad and Tobago – Cyprus – had the lowest rate of all of the benchmarked countries and was removed from the sensitivity analysis."⁸¹

To counter TSTT's challenge to the reasonableness of the European countries selected for its benchmarks, Digicel noted that cost-based mobile termination rates are fairly consistent, regardless of the geographic factors, population size of the country or socio-economic differences.⁸²

The recent weakness of the US dollar versus the Euro (and perhaps other currencies) introduces some substantial complexities to determining what is the "correct" benchmark rate for Trinidad and Tobago when Euro-denominated termination rates are converted to TT dollars via the US dollar. Not surprisingly, the parties have very

⁷⁸ Closing Submission on Behalf of the Respondent, December 28, 2007 at ¶ 57.

⁷⁹ Id. at ¶ 59 citing First Decision at 80.

⁸⁰ Id. at ¶¶ 89-94.

⁸¹ Id. at ¶ 60, citing Transcript, Day 3 at 181.

⁸² Id. at ¶ 251.

different suggestions as to how the Panel should treat exchange rate fluctuations in benchmarks.

On one hand, TSTT suggests:

“... that current exchange rates are at very high levels and will not necessarily remain so. Therefore, using the current exchange rates is likely to result in a benchmark that overstates the cost of mobile termination. An average over a longer period is likely to be more reliable during periods of substantial fluctuation. For example, the average exchange rate over the previous five years of 1.25 US\$ per Euro would likely produce a more representative benchmark.”⁸³

On the other hand, Digicel takes a completely different view, noting:

“... the best available knowledge regarding future trends will already be incorporated in the current exchange rates, as these reflect not just the current market situation but also the market’s best estimates of what is going to happen in the global economy...”

The best forward-looking benchmark will therefore be based on current exchange rates...”⁸⁴

The differences over the “correct” Euro-US dollar exchange rates illustrate the difficulty of using benchmarks to prescribe interconnection rates in this dispute.

- **European Benchmarks**

In an attempt to make better sense and use of the controversial benchmark information presented to it, after the hearing the Panel asked each of the parties to provide a table that provides benchmarks rates for three categories of termination for the eight European countries selected by Mr. Rogerson as reasonable benchmarks for Trinidad and Tobago:

1. Average termination rate charged by non-incumbent mobile operators (i.e., comparable to Digicel)
2. Termination rate charged by the incumbent mobile operator (i.e., comparable to TSTT)
3. Fixed Line Termination Rate

⁸³ Response on Behalf of TSTT to the Panel Exhibit K, December 14, 2007 at 2. At note 3, TSTT cites a forecast that the Euro-USD will fall from 1.47 to 1.27 by May 2008. TSTT’s responses in Panel Exhibit K used Euro = US\$ rates of 1.367 (the rate used in Dr. Tardiff’s report) as well as 1.25 to illustrate how different exchange rates affect the resulting benchmark

⁸⁴Id. at 2. Digicel used an exchange rate of one Euro = US \$ 1.4679 in its response to Panel Exhibit K.

The parties' responses are summarized in Table 1, on the next page, which shows the average of the 8-country information supplied by the parties.

Table 1

EUROPEAN BENCHMARK RATES

US cents/minute

(TT cents at 1US cent = 6.25 TT cents)

Source	Average Non-Incumbent Mobile Termination Rate (MTR)	Average Largest Incumbent MTR	Average Fixed Termination Rate
TSTT Table 1 (rates eff. Jan. 1, 2008; Euro=US\$ 1.367)	11.66 (TT 72.88)	10.51 (TT 65.69)	1.18 (TT 7.38)
TSTT Table 2 (end of glide path for Hungary and Spain; Euro=US\$ 1.367)	10.78 (TT 67.38)	9.74 (TT 60.89)	1.18 (TT 7.38)
TSTT Table 3 (Table 2 but at historic 5 year avg Euro=US\$ 1.25)	9.86 (TT 61.63)	8.90 (TT 55.63)	1.08 (TT 6.75)
^e Digicel (rates as of Sept. 30, 2007; Euro=US\$1.4679)	13.55 (TT 84.69)	12.01 (TT 75.06)	1.15 (TT 7.19)
^a NOTE: Compare to – Digicel Cost Model	15.52 (TT 97.0)		
TSTT Cost Model U		6.24 (TT 39.0)	1.92 (TT 12.0)

The dollar-Euro exchange rate assumptions used by the parties (1.25; 1.36; 1.47) can make a substantial differences in the European benchmarks and probably account for

most of the differences in the above rates submitted in the parties' response to Panel Exhibit K.

- **Caribbean Benchmarks**

Kevin Barrins, Digicel's primary cost expert, suggested that benchmarks from Barbados, Cayman Islands, St. Lucia, St. Vincent and Grenada would be appropriate.⁸⁵ Digicel's selection of proposed benchmark countries was strongly criticized by TSTT's expert, Lawrence McNaughton, for not including Jamaica which he claimed "is most comparable with Trinidad and Tobago" with respect to scale, given population, geographic size and topography, number of households, number of fixed lines and total number of mobile subscribers.⁸⁶ Mr. McNaughton also suggested that it would be appropriate to include Anguilla and the British Virgin Islands as additional source of benchmark rates for mobile termination. Finally, Mr. McNaughton suggested that the mobile termination rates quoted by Mr. Barrins cannot be used by the Panel because they are negotiated rates, not cost-based. Mr. McNaughton said that the cost model of the operator (C&W) produced rates on the order of \$US 0.137 per minute.⁸⁷ Dr. Tardiff, TSTT's cost and model expert, also provided benchmark data for fixed terminations in the Caribbean and Latin America.⁸⁸

The Panel attempted to reconcile the various and sometimes conflicting data provided by the witnesses by asking the parties go prepare a table summarizing the Barrins, McNaughton and Tardiff data and asking each party to update the table and comment upon it.⁸⁹ Table 2 consolidates the parties' inputs:

⁸⁵ Witness Statement of Kevin Barrins on Behalf of the Complainant, August 24, 2007 at ¶80.

⁸⁶ Witness Statement of Lawrence McNaughton In Reply to the Witness Statements of Kevin Barrins and Ian Strule, September 25, 2007, at ¶4.

⁸⁷ Witness Statement of Lawrence McNaughton in Reply to the Witness Statements of Kevin Barrins and Ian Strule, September 25, 2007 at ¶6.

⁸⁸ Witness Statement of Dr. Timothy J. Tardiff, August 24, 2007, Table 2 at 19.

⁸⁹ Exhibit Panel J.

Table 2: CARIBBEAN BENCHMARKS

US Cents per Minute

	Fixed to Mobile		Mobile to Mobile		Mobile to Fixed	
	TSTT	Digicel	TSTT	Digicel	TSTT	Digicel
Proposed by Digicel						
Barbados	0.225	0.147	0.150	0.147	0.027	0.014
Cayman Islands	0.224	0.222	0.225	0.222	0.027	0.017
St. Lucia	0.224	0.215	0.202	0.215	0.025	0.019
St. Vincent	0.224	0.215	0.202	0.215	0.022	0.018
Grenada	0.224	0.215	0.202	0.215	0.026	0.022
TSTT Additions						
Jamaica	0.076	0.113	0.118	0.113	0.020	0.019
Anguilla	0.130	0.215	0.130	0.215	0.019	0.020
British Virgin Islands	0.050	0.050	0.050	0.050	0.030	0.030
Guadeloupe/Martinique ⁹⁰	0.138	NA	0.138	N/A	N/A	N/A
AVERAGE	0.161	0.174	0.157	0.174	0.024	0.020
AVG w/out Martinique and Guadeloupe	0.172		0.160			
COMPARE TO COST MODEL (US\$=TT\$6.25)	0.0624	0.1552	0.0624	0.1552	0.0192	

It isn't clear how much of the difference between the rates submitted by the parties is attributable to using different currency exchange rates. (The exception to this observation is with respect to the rates provided for the French Departments of Martinique and Guadeloupe, which are denominated in Euros and therefore subject to the same currency translation issues identified above with respect to the European benchmarks.) In addition, the parties strongly disagree on a number of other factors which cast doubt on the credibility and utility of the Caribbean benchmarks:

- Per Minute or Per Second Billing: Digicel claimed that the 0.076 per minute submitted by TSTT for the Jamaica fixed-to-mobile termination rate it is billed on a per-minute basis (rather than per second) so that the effective rate (taking into account that termination of a one minute, one second call would be billed for two minutes) would be much higher.

⁹⁰ TSTT added the mobile termination rates of Orange Caribe which operates in the French dependent countries such as Guadeloupe and Martinique.

- Negotiated or Cost-Based Rates: TSTT claims that the Caribbean benchmarks proposed by Digicel are not the result of cost-based models but of “negotiated settlements replete with interventions and edicts by various governments in those jurisdictions.”⁹¹ As a result, TSTT claims, the negotiated rates simply cannot be used as proxies for rates based on validated cost models.

The parties to this proceeding have put a significant amount of information in front of the Panel concerning benchmarks. The Panel accepts that benchmarking is at best an inexact science. However, the information is often unclear or inconsistent and each party expended considerable effort discrediting the benchmarks of the opposing party. As a result, this Panel generally concurs with the findings of the First Panel which, after reviewing much of the same evidence and argument put forward in this dispute, drew the following conclusion about the benchmarking:

*Upon review of the benchmark evidence, the Panel finds that the Caribbean and European benchmark evidence presented lacks relevance and does not represent the sort of cost-based benchmarking approach that would be appropriate in the context of establishing cost-based interconnection charges in Trinidad and Tobago under the Act and Concessions.*⁹²

This Panel similarly concludes that the benchmark data and argument submitted in this proceeding are not adequate for the purpose of actually specifying the cost-based rates required by law. Notwithstanding that conclusion, the Panel considers that the benchmark evidence can be used as a “sanity check” (or “cross-check”) in the establishment of interconnection rates.

⁹¹ Closing Submission on Behalf of the Respondent, December 28, 2007 at ¶63, quoting Reply Witness Statement of Lawrence McNaughton, September 25, 2007 at ¶6.

⁹² First Decision at 51.

IV. RATE ISSUES REFERRED TO THIS ARBITRATION PANEL

A. Mobile Termination Rates: Issues 1(a) and (b)

Issue 1. Subject to the impact, if any, of the issues raised by TSTT as set out in paragraphs 2 to 9 below, under the proposed five-year Interconnect Agreement ("the Interconnect Agreement") between Digicel and TSTT;

(a) What is the mobile termination rate to be paid by Digicel to TSTT for the term of the Interconnect Agreement?

(b) What is the mobile termination rate to be paid by TSTT to Digicel for the term of the Interconnect Agreement?

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined that the rate for Mobile Termination shall be TTS 0.40 (40 cents) per minute billed on a per second basis, to be charged by each party to the other (i.e., symmetrically). This rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; or, b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective.

As set out above, the Panel has concluded that the interconnection rate should be symmetrical. Therefore, the Panel addressed Issues 1(a) and 1(b) together. With respect to the level of the rate, the Panel has taken a number of factors into consideration.

- **Traffic Balance**

To the extent that Digicel and TSTT attract subscribers with similar calling patterns, the flow of traffic between the two entities will be relatively balanced. That is, Digicel's traffic terminated by TSTT is roughly equal to TSTT's traffic terminated by Digicel. In fact, the information provided to the Panel does show that the traffic exchanged between the parties is generally within 10% of exact balance. In this situation, the level of the interconnection rates is almost irrelevant since in this situation the actual cash flows between the carriers would be relatively small regardless of the level of the interconnection rate as long as the rates are symmetrical. As a consequence the existing sender keep all regime could be appropriate. However, because of other factors, the

Panel does not consider that a zero interconnection rate (which is the effective result of a sender keep all regime) to be appropriate.

- **International Arbitrage**

The Panel notes that both companies terminate incoming international traffic to Trinidad and Tobago. International carriers sending calls to Trinidad and Tobago cannot generally determine which Trinidad and Tobago operating company actually serves a specific telephone number and accordingly they typically will route their traffic to the Trinidad and Tobago operator that offers the lowest termination rate. The Trinidad and Tobago company receiving the international call will terminate the traffic destined to its own customers and the remaining traffic destined to customers of other Trinidad and Tobago operators will be generally be passed to those other operators under the same arrangements that serve the interchange of domestic traffic. The level of interconnection rates can have a significant effect on how the Trinidad and Tobago operators deal with the international carriers. Where interconnection rates are significantly below cost (or zero as is currently the arrangement in Trinidad and Tobago) the Trinidad and Tobago carriers will have the incentive to compete with each other for international terminating traffic given that they can terminate traffic on the other carriers' networks at a low cost or, currently, no cost. If all Trinidad and Tobago carriers behave in this way, carriers can bid the rate to a level that is below the real cost of such termination. The Panel believes that the net affect of such behavior would be to the benefit of the international carriers and their customers but be to the detriment of telecommunications customers in Trinidad and Tobago since the operators will try to offset the below cost international termination service with higher domestic prices.

- **Excessively high termination rates**

The Panel is equally concerned with inappropriately high termination rates. It is important to remember that call termination is a monopoly service and can therefore be subject to the same sorts of abuses that often flow from monopolies. In this regard, it is important to remember that one of the principal purposes of introducing telecommunications competition in Trinidad and Tobago was to minimize the opportunity for monopoly power and the Panel is therefore very conscious of its duty to guard against monopoly abuse.

High termination rates could encourage behavior that is inconsistent with the public's interest in the efficient provision of services. For a worst case example, high termination rates in other countries have encouraged outright fraudulent behavior where a "carrier" uses a competitor's retail services to call itself all day, forcing the competitor to pay inordinate termination charges that exceed the retail rates. While not as fraudulent, high termination rates can distort the market by, for example, encouraging carriers to seek customers with high volumes of incoming calls (such as pizza parlours) so that the carrier enjoying a high termination rate can exploit its terminating monopoly to those customers. High termination rates can also induce uneconomic market entry if a new entrant believes that it will be able to charge monopoly rates indefinitely: it could virtually "give away" retail service in order to build a customer base and then charge other carriers extortionate termination rates to complete calls to its customers.

- **Benchmark data**

As noted above, while benchmark data is questionable, the Panel also considers that it provides some insight into the appropriate level for cost based rates and as well provides "sanity" check on the rates. In particular, the Panel notes the conclusions reached by the First Panel with respect to the New Zealand study, specifically that:

"...the findings of the NZCC do represent the best, indeed the only, evidence of benchmarks based on costs put before this panel in this proceeding and as such they have relevance here."⁹³

The NZCC benchmark study produced an average mobile cost estimate of 42 TT cents. The NZCC however chose to use the 75th percentile average instead "...due to risks attached to using a small number of available benchmarks."⁹⁴ Using the 75th percentile produced an estimate of termination costs of 53 TT cents. It was also noted that NZCC provided for step reductions in the mobile termination rate to 46 TT cents in 2009/2010.

- **Cost study results**

As noted previously, the Panel has certain reservations with respect to the results of the cost studies provided by TSTT and Digicel. However, the Panel is of the view that, with

⁹³ First Decision at 52.

⁹⁴ Id. at 50.

some modifications, the cost study results can provide a reasonable estimate of the costs of an efficient service provider in Trinidad and Tobago.

TSTT study results

In the first proceeding, TSTT indicated that its cost model produced a mobile interconnection cost of 45 TT cents. The Panel Expert expressed the view that:

“TSTT’s cost model evaluates mobile termination costs corresponding to the year when ‘static efficiency’ is reached. The network is operated efficiently because its maximum capacity corresponds exactly to a reasonable assessment of the market share to be expected by TSTT at the end of the initial phase of liberalization”⁹⁵

In this proceeding, TSTT updated its cost model by using more recent traffic volumes, from April 2006 to March 2007. The revised mobile termination cost produced by TSTT’s model is 38.7 TT cents. The Panel notes that the updated model results not only reflect higher traffic volumes but significant new capital expenditures as well. While, as noted previously, the Panel has concerns with certain aspects of TSTT’s cost model, it considers that the study methodology reasonably reflects the operations of a typically efficient operator.

Digicel study results

In the first proceeding, Digicel submitted that, based on its cost model, its costs of termination were \$TT1.15. The Panel Expert however noted that:

...Digicel’s cost model does not evaluate the mobile termination costs of an efficiently operated network, because the volumes in the cost model do not correspond to the capacity of the network installed.⁹⁶

The Panel Expert also noted that:

Digicel evaluates mobile termination cost at a significantly lower level of efficiency and hence calculates a higher termination cost. Digicel calculates an average rate over 15 quarter periods between the start of its activity and the end of fiscal year 2008/2009. The volumes used in the cost model are reasonable in relation to the plans that Digicel submitted to obtain its concession, but the traffic volume for 2008/2009 does not correspond to “static efficiency”, because the network is not operated at the maximum of its capacity.⁹⁷

⁹⁵ Id. at 36.

⁹⁶ Id. at 35.

⁹⁷ Id. at 36-37.

Finally, the Panel Expert noted that:

...Digicel's selection of a 15 quarter period is uneconomically short as the basis for determining Digicel's costs for the purposes of interconnection charges...It is clear, then, that the costs resulting from Digicel's cost model are higher than they would be had Digicel chosen a long run time period.⁹⁸

The Panel Expert attempted to estimate the costs that would be produced by Digicel's model under conditions of static efficiency and to compare it to equivalent results from TSTT's model. To compare the two models, the following changes were made to Digicel's model:⁹⁹

1. the calculation of average mobile termination costs over the 15 quarters period was changed to annual mobile termination costs in year 2008/2009;
2. the annual termination costs in year 2008/2009 were changed to the annual termination costs of an efficiently operated network in 2008/2009 by increasing traffic levels to reflect efficient network utilization; and,
3. a Weighted Average Cost of Capital (WACC) of 16.2% was used instead of 20.6%.

With these modifications, the Panel Expert estimated that Digicel's model would produce a termination cost of 42 TT cents per minute.

In its complaint that initiated this Proceeding, Digicel indicated that it had made significant changes to its cost model including using updated traffic volumes and a five year time period.¹⁰⁰ Digicel indicated that with these revisions, the termination costs calculated by its cost model were 97 TT cents. During the proceeding, Digicel made further revisions to take into account actual 2007 traffic volumes that resulted in a termination cost of 85 TT cents per minute.¹⁰¹ The Panel notes that, based on information filed in this proceeding, Digicel's traffic volumes have continued to grow and are now significantly higher than the levels used in Digicel's latest revision of its model. If these most recent traffic volumes were used, the panel is of the view that they would generate

⁹⁸ Id. at 43.

⁹⁹ First Decision at 39-40.

¹⁰⁰ Digicel Complaint, Nov. 28, 2006, section 6.2

¹⁰¹ Panel Exhibit B. The exhibit is confidential.

termination costs that are significantly lower than the \$TT.85 noted above and they would be comparable to the numbers generated by TSTT's cost model.

- **Appropriate level of MTR**

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.¹⁰²

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].¹⁰³

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. However, based on new and updated information made available in this Proceeding, the Panel considers that some modifications to this range are appropriate:

- First, TSTT's model using actual recent traffic volumes produces a mobile termination rate of 38.7 TT cents.
- Second, using the most recent traffic volumes, the Panel is of the view that Digicel's cost model would produce a mobile termination cost in line with TSTT's.
- Third, the panel notes that the NZCC report provided for a reduction in the termination rate to 46 TT cents.

¹⁰² Id. at 52.

¹⁰³ Id. at 53.

In light of the above, and taking into account the most current information, the Panel considers that the mobile termination costs for a typically efficient operator in Trinidad and Tobago is now within a range of 38 to 46 TT cents per minute.

In general, the Panel would consider the lower end of this range to be the appropriate level for the Mobile Termination Rate (MTR).¹⁰⁴ However, in arriving at a final MTR, the Panel has considered its concerns with respect two issues: international arbitrage encouraged by rates that are "too low" and the relationship between the mobile and fixed termination rates discussed above¹⁰⁵ and further discussed below. Because of these concerns, the Panel considers it prudent to set the mobile rate somewhat higher within the range (but still well below the mid-point) and, to offset the resulting higher mobile termination revenues with fixed termination rates that are somewhat lower. In light of all of the above, the panel finds that a mobile termination rate of 40 TT cents per minute billed per second to be appropriate. This rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; or, b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective.

B. Fixed Interconnection Rates: Issue1(c)

Issue 1.(c) What is the fixed interconnection rate to be paid by Digicel to TSTT under the Interconnect Agreement?

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined that the Fixed Interconnection Rate to be paid by Digicel to TSTT shall be 7.0 TT cents per minute, billed on a per second basis. This rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; or, b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective.

¹⁰⁴ The New Zealand study, which was strongly attacked by Digicel, establishes the high end of the reasonable range. Since the Panel has determined that the rate should be toward the lower end of this range, it is not necessary for the Panel to explore the strengths, weaknesses and credibility of the New Zealand study in detail.

¹⁰⁵ Sec. III. B "Market Situation", *supra*.

In its complaint, Digicel submitted that the Fixed Termination Rate (FTR) should be set at about 5 TT cents per minute as opposed to the 12 TT cents proposed by TSTT. Digicel argued that TSTT's cost model cannot be trusted in this regard and accordingly submitted that the only appropriate means of setting the Fixed Interconnection Rate is by reference to benchmarks. Digicel submitted benchmark data¹⁰⁶ that indicated an average peak rate of approximately 5.8 TT cents and an off-peak rate of approximately 4.0 TT cents per minute.

In its response to the Digicel Complaint, TSTT submitted that the FTR should be based on its cost model results noting that "...its cost model was not only favourably reviewed by its own expert, NERA, but also by the Panel Expert, [TERA] who had full access to it."¹⁰⁷

Notwithstanding that position, TSTT provided comments on benchmark data. TSTT noted that "...Digicel is connecting at the tandem level. So firstly, all of Digicel's benchmarks that relate to local level or intra-access area are simply not applicable."¹⁰⁸ TSTT also noted that Digicel had only referred to European rates and submitted that rates from the Caribbean and Latin America were more relevant and directly applicable to Trinidad and Tobago. In this regard, TSTT provided data from a number of such countries indicating an average fixed termination rate of 2.1 US cents that compared to their proposed 1.9 US cents.¹⁰⁹

In its final submission Digicel suggested a compromise, based on the parties' various benchmark data, of 1.78 US cents per minute.¹¹⁰

As discussed previously, the Panel has particular concerns with the fixed interconnection rate since it applies to TSTT's monopoly service. The Panel notes that TSTT's cost

¹⁰⁶ Digicel Complaint, November 28, 2006 at 36.

¹⁰⁷ TSTT Response to Complaint, December 12 2006 at 39.

¹⁰⁸ Id.

¹⁰⁹ Id. at 40.

¹¹⁰ Digicel Final Submission at ¶¶ 272-274.

model has not been subject to the level of scrutiny that would be required to assess the appropriateness of its allocation of costs to the various services and its allocation of common costs. Indeed, the TERA report specifically indicates that there is uncertainty about the treatment of common costs.¹¹¹ Accordingly, the Panel must consider other factors including benchmarks and rate relationships. In its finding with respect to Issues 1(a) and (b), above, the Panel found it prudent to establish a higher mobile termination rate and a lower fixed termination rate to address these concerns. Having considered all of the above, the Panel considers that a fixed interconnection rate of 7.0 TT cents to be appropriate. This rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; or, b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective.

C. Transit Rates: Issue 1(d)

Issue 1.(d) Subject to the issue outlined from Complaint #2 below, is TSTT entitled to charge Digicel a transit rate and, if so, what is the transit rate to be paid by Digicel to TSTT under the Interconnection Agreement?

THE PANEL'S DECISION

For the reasons explained below, the Panel has determined that the transit rate should be 0.4 TT cents per minute, billed on a per second basis. This rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective. The Panel has also determined that TSTT may not apply this charge to Digicel until Digicel has been offered the alternative for a typical direct connection to TSTT's mobile network,

In its response to Issue 9, below, the Panel finds that in the absence of a definitive written agreement regarding transit rates, Digicel has not waived its right to a cost-based transit rate by agreeing during uncompleted negotiations to a TT\$ 0.035 per minute rate. Therefore, the Panel will consider what the cost-based transit should be.

¹¹¹ TERA Report at 31.

In its Complaint, Digicel argued that it was forced to use TSTT's transit service because TSTT did not offer direct interconnection to its mobile network. Accordingly, Digicel was of the opinion that TSTT did not have the right to charge Digicel a transit charge.¹¹²

TSTT submitted that a transit charge was appropriate in the circumstances. TSTT submitted that Digicel requested interconnection at only one point in TSTT's network to terminate traffic to both TSTT's mobile and fixed networks.¹¹³

TSTT pointed out that its mobile network had not been designed to provide for direct interconnection and that if Digicel wished to connect directly to the mobile network, significant time and investment would be required to make the necessary network modifications. TSTT also pointed out that if such modifications had been pursued, Digicel's market entry would have been delayed.¹¹⁴

TSTT submitted that since it incurs a cost to carry Digicel's traffic through its fixed network to TSTT's mobile network, it is appropriate to charge Digicel for this service.

In its Final Submission, TSTT stated:

TSTT's position that the transit rate should be set at TT\$0.035 flows from the parties' agreement to this rate; to the extent that this Panel declines to uphold that agreement, TSTT submits the output from TSTT's cost model of TT\$ 0.004 would be the appropriate cost-based transit rate.¹¹⁵

The interconnection obligations of concessionaires are set out in section 25 of the Act and with regard to this issue, most specifically in sections 25(2)(d) and (m). In the Panel's view these obligations contemplate the interconnection of two mobile carriers by way of a direct connection between their respective networks. This arrangement is consistent with the overall objective of the efficient provisioning of services. This connection would typically consist of trunk groups jointly managed by both parties to ensure an appropriate grade of service and the costs of the trunk groups would be shared by the two parties.

¹¹² Digicel Complaint pages 38-41 and Digicel Closing Submission, 28 December 2007, ¶ 287

¹¹³ TSTT Response to Complaint at ¶45

¹¹⁴ TSTT Response to Complaint at ¶148.

¹¹⁵ Closing Submission on Behalf of the Respondent at ¶89.

Each party would be responsible for the provisioning of the trunk terminating equipment at their respective ends of the trunk group.¹¹⁶ Accordingly there would be no specific transport charges under this typical arrangement.

In the instant situation, however, TSTT has decided for its own quite legitimate reasons to use its fixed network tandem switch as Digicel's point of interconnection to both the TSTT fixed network and the TSTT mobile network. This of course is entirely an appropriate engineering choice for TSTT but the internal network engineering decisions of TSTT should in no way adversely affect a competitor. Specifically, the Panel's opinion is that TSTT has no justification in this circumstance for charging Digicel for the transport of traffic from the TSTT tandem switch to the TSTT mobile switch when Digicel would prefer to have direct trunks to a switch on the TSTT mobile network.

However, if TSTT were to offer Digicel the option of interconnecting at the TSTT mobile switch and if Digicel then decided for its own good engineering reasons that it wished to connect to both the TSTT mobile and fixed networks only at the TSTT tandem switch, then it would be appropriate for TSTT to apply what is effectively a transit rate to transport the traffic from the tandem to the mobile switch. As noted above, TSTT has produced evidence in this proceeding that the cost of this transport is 0.4 TT cents per minute and the Panel finds that this would be the appropriate rate for this transit function.

Accordingly, the Panel has determined that the appropriate rate for transit service is 0.4 TT cents. However, the Panel also finds that TSTT is not entitled to apply this charge to Digicel unless and until TSTT has offered Digicel a typical direct interconnection alternative of the sort described above (e.g., jointly provisioned trunk group with no further transport charges). The Panel considers that 30 days would provide adequate time for Digicel to analyse an offer from TSTT for a typical direct connection sought by Digicel and accordingly, in the event that Digicel chooses to continue using the tandem

¹¹⁶ As noted in the "History of This Proceeding," the Third Dispute between these parties was about whether Digicel was required to pay for the trunk terminating equipment at the TSTT end of the trunk group. The arbitration decision was that Digicel was liable for the costs because the equipment was put in place prior to their being an obligation to interconnect, implying that Digicel would not be liable for the costs after the obligation to interconnect attached.

connection after receiving a proposal for such a direct connection, the tandem transit rate shall apply from 30 days following the offer for direct connection. To the extent that Digicel uses the tandem interconnection after the activation of a direct interconnection (i.e., for overflow or an outage in the direct trunks), the transit rate shall be applied.

This transit rate shall be valid until the sooner of: a) the end of the term of the parties' Interconnection Agreement; b) the date upon which rates prescribed by the Authority, based on the cost models and cost separations it is developing, become effective.

D. Per Minute vs. Per Second Rates: Issue 1(e)

Issue 1. (e) Should interconnection charges be charged in accordance with the same unit (e.g. per second or per minute) by which TSTT charges its customers?

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined that interconnection rates should be applied on a per second (or fractional minute basis) regardless of the structure of the associated retail rates.

Digicel submitted that, with respect to the calling from TSTT's fixed network to Digicel, the interconnection rate should be applied on the same basis as the retail rate. Presumably, since the retail rate is applied on a per minute basis (rounded up to the next minute) then Digicel is arguing that the mobile termination rate for fixed to mobile calls should also be applied in this manner.¹¹⁷ Digicel argues that if the Mobile Termination Rate (MTR) were applied on a per second basis for these calls, it would:

“...lead to allocative inefficiency as too little of Digicel's good (mobile termination) is being purchased and utilised by customers because of the charging structure being operated [sic] by the upstream interconnecting party (TSTT landline). In short, volumes to Digicel's network would be severely depressed and so efficient recovery of costs is being disrupted by virtue of different charging structure i.e. TSTT would be significantly over recovering their costs while Digicel is under recovering its costs¹¹⁸

In support of its position Digicel cited a passage from an OECD document that stated:

¹¹⁷ Witness Statement of Kevin Barrins, Aug. 24, 2007 at ¶¶ 42-50

¹¹⁸ Id. at ¶43.

Economic theory suggests that when the downstream rival companies produce services which are close substitutes for the services of the incumbent, the relative structure of access prices and retail prices can matter a great deal. When the structure of access prices and retail prices are forced to differ, a conflict can arise between competition and efficient pricing.¹¹⁹

The Panel notes that Digicel is incurring costs on a per second basis for the calling in question and, accordingly, the application of the MTR on a per second (or fractional minute) basis leads to the proper recovery of those costs. In fact, the application of the MTR in the same manner as the retail rate (per minute rounded up the next minute) would lead to the over-recovery of Digicel's costs unless the MTR were adjusted to account for the distribution of call duration.

The Panel considers that the OECD passage cited above applies to those situations where the difference in rate structures gives rise to a preference in favour of the incumbent. The Panel however, does not consider that it applies to the situation being considered here. A retail rate structure rate for calls originated on the fixed network which is different from the structure of the MTR would have no competitive impact in the mobile market as long as TSTT charges its fixed line customers the same amount and in the same manner for calls to either the TSTT mobile network or to Digicel. Therefore, from the perspective of the mobile competitors, there is no reason to require that the fixed retail rate and the MTR need be applied on the same basis. As stated in the Panel's decision with respect to Issues 1(a) and (b), above, the Panel considers that the appropriate basis for the application of the MTR is on a per second basis.

However, the Panel would agree with Digicel that the retail rates for fixed line service can have an affect on the call volumes to the mobile networks and that an excessive charge could inappropriately distort the market by depressing the level of such calling. While this matter is beyond the mandate of this Panel, the Panel would recommend that the Telecommunications Authority review the fixed to mobile rate structure

¹¹⁹Digicel Final Submission at 72.

E. Retroactive Billing: Issue 1(f)

Issue 1. (f) Should interconnect rates be payable from April 6, 2006, the date on which such interconnect services began to be supplied by Digicel to TSST and by TSTT to Digicel? And, if not, from what date should such interconnect rates be payable?

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined that the interconnection charges established in this Decision shall be payable from April 6, 2006 and that the parties should update the necessary traffic data within 30 days from the release of this Decision, agree to payment calculations within 45 days and complete the net payments within 60 days from the release date.

The first question presented by this issue is whether the Panel has power to order the payment for services rendered during the period from April 6, 2006 to the date of this order? This is a matter of statutory interpretation. Issue 8 directly addresses this issue and the Panel has concluded the statute not only permits such an order but requires it.

The Panel has therefore determined that the final rates that it has set out in this decision are applicable from the date that Digicel entered the mobile market (April 6, 2006). The Panel directs that the calculation of the amounts payable should be based on the traffic data provided in the Reply Witness Statement of Mr. Ed Duke dated September 25, 2007, updated using the same data sources and methodology to the date of this Decision. For greater certainty, the rates that are to be applied to these traffic volumes are 40.0 TT cents per minute for mobile termination (reciprocally) and 7.0 TT cents per minute for fixed termination. For the reasons set out above, the 0.4 TT cents transit charge shall not be applicable. The Panel directs the parties to update the traffic data to the date of this Decision within 30 days of the release of this Decision, to agree on the necessary payment calculations within 45 days from the release date and to complete the net payment within 60 days of the release date.

V. NON-RATE ISSUES REFERRED TO THIS ARBITRATION PANEL

We now turn to the remaining issues presented to this Panel.

Two issues were effectively withdrawn by TSTT, the party proposing them. Issue 5¹²⁰ was withdrawn by TSTT in its Pre-Hearing Written Submission by stating that it will not address the issue “as it is no longer a live issue in this proceeding” and Digicel either supports this withdrawal or does not oppose it.¹²¹ With respect to Issue 6¹²² TSTT stated in its Pre-Hearing Written Submission that this issue “is moot” since the judicial review has been completed and Digicel either supports this conclusion or does not dispute it.¹²³ Therefore, the Panel has not addressed either of these issues.

A. Abuse of Process Issues: Issues 2, 3, 4, 7(a) and 7(b)

The following Issues may be conveniently grouped and dealt with together as they all belong to the same genus – the question of an abuse of process:

Issue 2. Does the Complaint constitute an abuse of the Telecommunications Authority of Trinidad and Tobago Dispute Resolution Process and an impermissible collateral attack, if not direct attack, on the decision in the First Dispute (4/7/06/01) ?

Issue 3. In the Notice of Dispute and/or the Complaint ultra vires the Telecommunication Act and/or legally invalid.

Issue 4. Is Digicel’s purported referral of the said dispute frivolous and/or vexatious and/or an abuse of the Dispute Resolution Process ?

Issue 7. In relation to mobile termination rates under Interconnect Agreement :

(a) Has the principle of reciprocity already been determined by the Decision in the First Dispute (4/7/06/01) such that this issue is Res Judicata or subject to issue estoppel ?

¹²⁰ *Issue 5:* Is the process tainted with bias and/or bad faith against TSTT on the part of TATT and/or has the process been irrevocably undermined by such bias and/or bad faith and/or is it that TSTT cannot reasonably expect the process to be conducted fairly and/or free of prejudice against it?

¹²¹ *See*, Pre-hearing Written Submissions Filed on Behalf of the Respondent, November 12, 2007, at footnote 1. Digicel supports or does not contest TSTT’s action. *See*, Closing Written Submission on Behalf of the Complainant, December 28, 2008, at ¶36.

¹²² *Issue 6:* Is TATT obliged to await the results of the judicial review proceedings concerning the Decision in the First Dispute or, alternatively, must Digicel abandon the judicial review proceedings in order to allow TATT to adjudicate the matter?

¹²³ *See* note 123, *supra*.

- (b) Have the issues relating to the establishment of mobile termination rates in Trinidad and Tobago including the range of efficient costs for mobile termination, already been determined by the Decision in the First Dispute (4/7/06/01) such that there issues are Res Judicata or subject to issue estoppel***

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined as follows:

Issue (2): The Complaint does not constitute an abuse of the Telecommunications Authority of Trinidad and Tobago Dispute Resolution Process nor is it an impermissible collateral attack or direct attack on the decision of the First Panel.

Issue (3): The Notice of Dispute is not *ultra vires* the Telecommunications Act or in any other way legally invalid.

Issue(4): Digicel's referral of the said Dispute is not frivolous or vexatious and/or an abuse of the D.R.P.

Issue (7): In relation to the mobile termination rates under Interconnect Agreement

- (a) the principle of reciprocity has not been determined by the Decision of the First Panel so as to give rise to res judicata;**
- (b) The issues relating to the establishment of mobile termination rates in Trinidad and Tobago including the range of efficient costs for mobile termination has not been already determined by the decision of the First Panel.**

1. The Case For TSTT

These Issues have been addressed by TSTT in its Response to Complaint dated December 12, 2006¹²⁴; Pre-Hearing Written Submissions dated November 12, 2007¹²⁵; and in its Closing Submissions dated December 28, 2007.¹²⁶

TSTT's position may be summarized as follows:

The mobile termination rate was the subject of the First Dispute and critical elements of that rate have already been determined by the First Panel in the First Dispute. Accordingly, in filing and pursuing this Complaint Digicel is seeking to re-litigate issues already determined in the First Dispute and therefore this constitutes an abuse of the

¹²⁴ TSTT Response to Complaint, December 12, 2006 at 17-26.

¹²⁵ TSTT Pre-Hearing Written Submission at 3-7.

¹²⁶ Closing Submission on Behalf of the Respondent (Executive Summary) at 32-40.

Authority's dispute resolution process and an impermissible collateral attack if not a direct attack on the Decision.¹²⁷

In seeking to impeach the Complaint *in limine* TSTT relies on the doctrine of *res judicata* and in particular issue estoppel. It is TSTT's contention that "regardless of the interpretation that is placed on the Decision in the First Dispute, the decision clearly established TSTT's entitlement, pursuant to the Act and its Concession to insist on reciprocal rates and an essential and fundamental step in the logic of the Decision was in fact that the reasonably efficient costs of mobile termination in Trinidad and Tobago fall within the range of 6.1 US cents and 8.5 US cents¹²⁸.

TSTT contends that in this dispute, Digicel is seeking to have the issue of the meaning of cost-based rates pursuant to the Act reopened when "as a fundamental element of the logic of its Decision upholding the principle of reciprocity, the Arbitration Panel in the Decision established that the correct basis for establishing interconnection rates is the statically efficient costs of the reasonably efficient mobile operator in Trinidad and Tobago".¹²⁹

Further, the decision established that the basis for setting these efficient costs required that costs be based on long run costs measured over the life of the assets employed. Furthermore, in order for the First Panel to find that reciprocity was not contrary to the Act or the Concessions, it was required to and went on to find the range of costs noted above.

It is these findings, TSTT argues, that Digicel now wants to re-open and re-litigate in this Dispute.

In its Pre-Hearing Submissions, TSTT essentially reiterated and buttressed the foregoing. The position of TSTT is encapsulated in these Submissions as follows:

¹²⁷TSTT's Response to Complaint at ¶62

¹²⁸Id. at ¶60.

¹²⁹Id. at ¶71.

17. Unsatisfied with the Decision, Digicel now seeks to re-litigate the very same issues that were the subject of an exhaustive investigation and reasoned determinations in the First Dispute. The principle of reciprocity, the principle that economic efficiency is determined by the reasonably efficient operator, and the range of efficient costs for MTRs in Trinidad and Tobago are three fundamental and necessary components of adjudicating any dispute over final MTRs to be charged by the parties to each other under an interconnection agreement. To raise them once again is frivolous, vexatious, an abuse of the Authority's dispute resolution process and an impermissible collateral attack, if not a direct attack on the Decision.

18. The focus of the doctrine of abuse of process is the integrity of the adjudicative function of the courts. The Authority's dispute resolution power pursuant to the Act is not served by permitting parties to perpetually re-litigate the same issues and, in the course of doing so, to attempt to continuously improve upon their evidence.

19. Pursuant to the Dispute Procedures, the Panel Decision is final and binding on both TSTT and Digicel. Accordingly, TSTT also submits these issues are subject to issue estoppel, a branch of the *res judicata* principle that arises where an issue has been litigated and decided and therefore cannot be re-tried in a subsequent suit between the same parties, even if the cause of action is different. Issue estoppel can apply to a variety of decision-making bodies which make decisions of a judicial nature, i.e. decisions based on findings of fact and the application of an objective legal standard on those facts. The pre-conditions for a finding of issue estoppel are, in brief, that the same question has been decided; that the decision which is said to have created the estoppel was final; and the parties to that decision were the same as those in the proceeding where estoppel is raised. With respect to the first criterion, issue estoppel may also apply where the matter involves a question of either fact alone, or mixed law in fact, which was decided in the earlier proceeding.

20. TSTT submits that the conditions for issue estoppel have been met in the instant case with respect to the findings of the First Panel cited in paragraph 16 above. Digicel has raised the same question as was determined in the Decision; the First Panel was exercising a judicial function; the parties are the same; and the Decision is final, pursuant to the Dispute Procedures of the Authority. TSTT notes that in her decision setting aside leave of the Decision, Justice Jones also stressed the importance of the finality of the Decision.¹³⁰ ”

¹³⁰ TSTT Pre Hearing Submissions at ¶17

TSTT submits that, even if this Panel should find issue estoppel does not apply, it should treat that decision as “highly persuasive” on the basis that it contains a thorough and extensive analysis of many of the central issues before this Panel. TSTT concludes by criticizing Digicel for “regulatory gamesmanship.”¹³¹

In its Closing Submissions TSTT essentially summarized and underscored its earlier Submissions on these Issues and the Panel does not consider anything new or further was added.¹³²

This Panel notes that TSTT has kept alive Issues 3 and 4 but has not addressed to the Panel specific or substantive submissions with respect to these Issues. In relation to Issue 3 in particular, TSTT has not addressed any specific submission to show how or in what way the Notice of Dispute is *ultra vires* the Telecommunications Act or legally invalid and the same may be said in relation to Issue 4 save the *en passant* references in the Submission.

In the circumstances, the Panel proposes to treat these issues as a sub-set of the larger issue of Abuse of Process. Thus, if the Panel came to the conclusion that *res judicata* applied and this Complaint was an attempt to re-litigate issues that had already been decided, then it could legitimately hold that the referral was indeed frivolous and vexatious and presumably the Notice of Dispute could be considered *ultra vires* the Act on the basis that the Act did not allow the Authority to entertain a Notice of Dispute seeking to invoke an adjudication of matters which had already been squarely decided.

2. Digicel's Response

These Issues have been dealt with by Digicel in its “Reply to TSTT Response dated 21st day of December, 2006¹³³, its Pre-Hearing Written Submissions¹³⁴ and its Closing Submissions¹³⁵

¹³¹ Id. at ¶21.

¹³² Closing Submission on Behalf of the Respondent, at 1-2 (Executive Summary) and 32-40.

¹³³ Digicel Reply to TSTT Response, December 21, 2006 at 2 (a-f), ¶5, ¶¶7-21.

The essence of Digicel's response is that the issue or issues posited by TSTT as giving rise to *res judicata* and ultimately to an abuse of process of the Authority's Dispute Resolution Procedure (DRP) were not the issues placed before the First Panel in the First Dispute.

According to Digicel, the genesis of the First Dispute lay in the intractable position adopted by TSTT in the negotiations for an Interconnection Agreement with respect to certain clauses in TSTT's Reference Interconnection Offer (RIO) that provided for reciprocal interconnection charges.

Paragraphs 2(e) and 2(f) of Digicel's Reply¹³⁶ Submissions encapsulate respectively what it says was the central issue before the First Panel and its decision thereon:

- e. The issue which was presented for decision by the Panel in the First Dispute was whether TSTT was prevented from insisting, in its negotiations with Digicel, on the inclusion of those clauses because, as contended by Digicel, reciprocal interconnect charges were contrary to the requirements of the Telecommunications Act, or the relevant regulations or the concessions; and
- f. The decision of the Panel in the First Dispute was that reciprocal interconnect charges were not contrary to the requirements of the Telecommunications Act, or the relevant regulations or the concessions and that TSTT was not prevented, in their negotiations with Digicel, from insisting on the inclusion of those clauses."

Furthermore, Digicel contends that the issue of final interconnection rates was not before the Panel in the First Dispute – hence the evidence presented was not intended to be used to establish final interconnection rates or even a range of such rates. Rather, the evidence presented to the First Panel was in relation to (a) the central issue identified above and (b) interim rates.¹³⁷

¹³⁴ Digicel Pre-Hearing Written Submission at ¶¶50-69.

¹³⁵ Closing Written Submissions on Behalf of the Complainant, December 28, 2007 at 50-97.

¹³⁶ Digicel Reply to TSTT Response, December 21, 2006 at 3.

¹³⁷ Id. at ¶9.

Digicel further makes the point that while the Panel in the First Dispute may have expressed views in respect of the ranges of final interconnection rates, it had no jurisdiction to decide upon the range of final interconnection rates and in any event did not purport to do so.¹³⁸

In its Pre-hearing Submissions Digicel essentially underscored its earlier submissions. Here however, they placed heavy reliance on the judgment of Justice Jones in the Judicial Review proceedings challenging the decision of the First Panel¹³⁹ which it contends supports its position as to what precisely was before the Panel in the First Dispute and what it had jurisdiction to decide and did decide.¹⁴⁰

In its Closing Submissions, Digicel sought to identify the legal principles and authorities which it deemed relevant to these issues and, applying these principles, Digicel submitted that its interpretation of the issue before the Panel and the Panel's decision is the correct one.¹⁴¹ Digicel noted:

The reference to TSTT being not prevented from insisting on including reciprocity clauses in the Interconnection Agreement meant no more than that TSTT were entitled to maintain a position of reciprocity in respect of interconnection charges during the interconnection negotiations with Digicel. The dispute before the Panel concerned what position TSTT was entitled to take in the negotiations under Section 25(l)(e) of the Telecommunications Act.^{142,}

Again, Digicel prayed in aid the judgment of Justice Jones which, it says, lends support to its submissions¹⁴³.

Digicel then concludes in essence that if the plea of *res judicata* fails them, TSTT's appeal to the doctrine of an abuse of process and collateral attack also fails. In this, the Panel understands Digicel to be arguing that the plea of *res judicata* underpins all the

¹³⁸ Id. at ¶10

¹³⁹ Digicel Pre-Hearing Submissions at 10-12

¹⁴⁰ It will be necessary to visit the judgment of Justice Jones, *infra*.

¹⁴¹ Closing Written Submissions on Behalf of the Complainant, December 28, 2007 at 88, 97.

¹⁴² Id. at ¶371.

¹⁴³ Id at 93.

issues raised by TSTT with respect to an abuse of process so that if that plea fails the satellite claims that feed off of it must of necessity also fall to the ground.

3. This Panel's Task

The Panel's task in relation to these Issues is to determine what were the Terms of Reference of the Panel in the First Dispute, what issues were before it, and what was its decision. This must be done in the context of the relevant legal principles.

a) The Relevant Law

There is a plethora of authority on the doctrine of *res judicata* and both parties have sought to assist the Panel by reference to it.. Although the Parties may not refer to the same authorities (there are some in common) nonetheless there is little, if no variance in their respective enunciation of the relevant principles.

The "core principles" may be summarized as follows:

Both cause of action and issue estoppel require the following elements to be established¹⁴⁴:

- The first decision was judicial in the relevant sense;
- The first decision was pronounced;
- The tribunal had jurisdiction over the parties and the subject matter;
- The decision was: 1) final; and, 2) on the merits.
- The decision determined the same question as that raised in the later litigation; and
- The parties to the later litigation were either parties to the earlier litigation or their privies or the earlier decision was in rem.

The Panel finds two authorities cited by TSTT particularly instructive.¹⁴⁵ The first is **Mc Intosh -v- Parent[1924] 55 O.L.R 552** where the Court at paragraph 13 dealt with issue estoppel in the following terms:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of

¹⁴⁴ See, Spencer Bower, Turner & Handley, *Res Judicata*, 3rd Edition at 10, ¶19.

¹⁴⁵ TSTT's Response to Complaint at 19.

recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

Then there is the authority of **Ganong Bros. Ltd. -v- Executive Director of Assessment (2004) 240 D.L. R. (4th Ed.) 687** where the Court explained the application of the doctrine:¹⁴⁶

Issue estoppel can arise in several contexts. An issue may have been litigated before an administrative tribunal and, subsequently, the issue is raised once again, only this time in court proceedings. Conversely, the issue may have been decided in court proceedings and now the issue is being re-litigated in an administrative forum. ...If an administrative tribunal can apply that doctrine in the context of a prior judicial decision...then that tribunal is equally entitled to consider the possible application of that doctrine in circumstances where the earlier decision was decided by the same administrative tribunal.

It is to be noted, as TSTT did, that “*the issue at hand need not be the central issue of the previous case, but it must have been fundamental*” to the previous decision”¹⁴⁷

b) The Substantive Issues before this Panel

Before visiting the First Panel’s Decision it is perhaps prudent at this juncture to have in focus *this* Panel’s Terms of Reference and the Substantive Issues which call for adjudication. The Terms of Reference issued by TATT simply provide that this dispute between the Parties relate to “Rates for Interconnection:”

- What is the mobile termination rate to be paid by Digicel to TSTT for the term of the Interconnect Agreement?
- What is the mobile termination rate to be paid by TSTT to Digicel for the term of the Interconnect Agreement?
- What is the fixed interconnection rate to be paid by Digicel to TSTT under the Interconnect Agreement?

¹⁴⁶ At ¶¶44-47.

¹⁴⁷ TSTT’s Response to Complaint at 20.

- Subject to the issue outlined from Complaint #2 below, is TSTT entitled to charge Digicel a transit rate and, if so, what is the transit rate to be paid by Digicel to TSTT under the Interconnect Agreement?
- Should interconnection charges be charged in accordance with the same unit (e.g. per second or per minute) by which TSTT charges its customers?
- Should interconnect rates be payable from April 6, 2006, the date on which such interconnect services began to be supplied by Digicel to TSTT and by TSTT to Digicel? And, if not, from what date should such interconnect rates be payable?
- Whether TATT has jurisdiction in this case to establish rates which are payable from April 6, 2006 or from some other date prior to the Panel's decision in this Dispute? In the event that TATT has this jurisdiction what rates should be established from such date?
- Whether Digicel has conceded that TSTT is entitled to charge Digicel transit rate of 3.5 cents?

It seems clear then, that what this Panel is called upon to resolve is a dispute which involves the settling of rates for interconnection between the parties.

- **The Terms of Reference of the Panel in the First Dispute, the Issues before it and its Decision**

The First Panel introduced its' decision by stating that the arbitration arose out of negotiations between TSTT and Digicel for an agreement regarding the interconnection of their networks and services¹⁴⁸. The First Panel then went on to clarify that the matter properly before it "is the dispute between the parties regarding their failure to enter into the Interconnection Agreement and not the Authority's position on TSTT's RIO"¹⁴⁹

The Panel referred to the basis of Digicel's request which showed the burden of its Complaint was TSTT insistence on including a provision in the proposed Interconnection Agreement which stipulated that charges for services covered by the Agreement should be reciprocal.

¹⁴⁸ First Decision at 1.

¹⁴⁹ Id. at 5-6.

The First Panel was very clear that its terms of reference did not include the settling of interconnection charges between the parties (which of course, are the precise Terms of Reference of this Panel)¹⁵⁰

Having earlier identified the Issue before it¹⁵¹ and after having the full assistance of the parties by way of evidence, arguments and submissions, the First Panel delivered its decision on the assertion of reciprocal terms charging:

“On the totality of the evidence and submissions, and the factors described in this decision, the panel finds that it is not contrary to the Telecommunications Act, Concessions, Interconnection Regulations or Interconnection Guidelines for the Interconnection Agreement to provide that charges shall be reciprocal. The panel does not consider that TSTT is prevented from insisting on including in the Interconnection Agreement clauses 9.2 and 9.3 as quoted above in section 2.1 (except that, in the spirit of reciprocity, the second sentence of clause 9.2 should be reciprocal). Digicel's request in this regard is denied.”¹⁵²

It seems clear to this Panel that not only was the question of settling interconnection charges not before the First Panel but neither in its discussion nor in its decision did it attempt the task of settling such charges .

Accordingly, in so far as the First Panel engaged in an examination and discussion on the range of mobile interconnection rates, its findings could not be said to be in relation to any issue before it nor was it *fundamental* to the decision on any issue before it.

Similarly, a proper interpretation of the First Panel's findings in relation to reciprocity meant no more than the charging of reciprocal rates did not offend any of the provisions of the Telecommunications Act, Concessions, Interconnection Regulations or Interconnection Guidelines and TSTT was not precluded from

¹⁵⁰ Id. at 30, 80 .

¹⁵¹ Id. at 7-8.

¹⁵² Id. at 79.

insisting the same be included in the Interconnection Agreement between the Parties. In other words, it was an option open to TSTT in the negotiating process. In reaching the above conclusion, this Panel finds itself in the august company of Justice Jones.

In her judgment in CV 2006-03320, which must rank as a model of clarity, the Learned Judge correctly identified the relevant question for determination by the Panel to be “...whether TSTT was entitled to insist in its negotiations with Digicel that any interconnection agreement with it contain terms that the interconnect rates be reciprocal.”¹⁵³

The Learned Judge then quoted the First Panel’s decision (referred to above) on this Issue¹⁵⁴ and went on to explain the effect of the same in these terms :-

*The application before me is for judicial review of a decision made by an expert body in which it determined that, in circumstances where parties are mandated to negotiate an agreement in an industry regulated by statute, neither the statute, the concessions under which the parties operated, the regulations or the published guidelines for such agreements prevent one party from insisting in the negotiations for the agreement that the rates charged be reciprocal. The effect of the decision is to allow a party to mandatory negotiation to maintain a position of reciprocity in interconnection charges in that negotiation.*¹⁵⁵

The Learned Judge elaborated on her view of the Panel’s decision at pages 26-27 of her judgment as follows:

This, in my view, is of particular relevance in this case not only with respect to the deliberations of the Panel but where, as we have seen, by section 25(2)(m) Parliament delegated to the Authority the responsibility of determining the appropriate cost basis for interconnection charges. Indeed in its decision the Panel at all material times acknowledged that, in the absence of any determination by the Authority in this regard, their role was merely to try to ascertain whether given the purport and intention

¹⁵³ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9, 2007 at 17.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 25.

of the Act reciprocal charges as a cost basis for setting interconnection charges was one of the options open to the Authority. In my opinion, given the wording of section 25(2)(m), this court must be particularly wary of intruding into an area of specialized expertise.

In my view it is clear that the Panel was not required to nor did it interpret nor did it seek to interpret section 25(2)(m) of the Act. Neither did the Panel find, as is submitted by Digicel, that "costs should be based... on the basis of the costs of some notional, or typical "efficient mobile operator" operating at static efficiency or an "efficient steady operator".'

In my view operative on the Panel's mind was not an interpretation of section 25(2)(m) but rather the manner in which the Act allowed the Authority to determine an appropriate cost basis. After examining the relevant documents the Panel concluded that, given its provisions, the Act mandated the Authority to determine the cost basis based on the principle of economic efficiency or promoting economic efficiency. In those circumstances it was of the view that, since it was possible that reciprocal charges could lead to economic efficiency, it was a cost basis that could be adopted by the Authority and accordingly it was not contrary to the Act and the other relevant regulatory provisions for an party to an interconnection agreement, in the absence of a determination by the Authority on the relevant cost basis, to negotiate a clause which provided that the interconnection charges be reciprocal.

The Learned Judge then concludes by stating;

As we have seen the decision challenged merely permits one party to maintain a negotiating position in ongoing mandatory negotiations. It neither mandates reciprocal rates for the interconnection agreements nor disallows it. In my opinion the decision has no legal consequences. This is particularly so where the Act allows the parties to report the failure to conclude an interconnection agreement as a dispute. In my opinion since the decision does not mandate reciprocal charges and merely allows TSTT to negotiate an agreement based on that position in the event that in negotiations neither TSTT nor Digicel change their position it is always open to either party to refer that dispute to the Authority for resolution pursuant to the terms of section 25(2)(h) as a dispute as to price or as a failure to conclude an agreement.

The effect of the decision is that the parties are in the same negotiating position as they were before the dispute"

It is clear to this Panel on the basis of the forgoing that one of the key facets or aspects necessary to support a plea of *res judicata* based on issue estoppel is absent. That is, that the decision of the First Panel determined the same issue as that raised in these proceedings. One does not have to go beyond this to see whether special circumstances exist. So in this Panel's view, the plea of *res judicata* goes by the board and with it the satellite claims of abuse of process.

B. Adjusting Cost Model: Issue 7(c)

Issue 7(c) Without limiting the generality of (b) would obliging TSTT to adjust its cost model only for the initial period of liberalisation undermine the decision in the First Dispute (4/7/06/01)

PANEL'S DECISION For the reasons explained below, the Panel has come to the conclusion that obliging TSTT to adjust its Cost Model only for the initial period of liberalisation would not undermine the Decision in the First Dispute.

As stated elsewhere in this Decision, the First Panel was not about fixing final interconnection rates. It was about determining whether TSTT could insist on reciprocal charges as a matter of negotiation. The First Panel's views about the various ranges of interconnection rates could not constitute a final decision on interconnection rates. This was not a matter within that Panel's jurisdiction, as indeed the First Panel itself appreciated¹⁵⁶.

What seems very clear is that notwithstanding its perambulation through various methodologies (Justice Jones may have attributed this to over zealotness¹⁵⁷) for the calculation of interconnect rates, the First Panel never lost sight of the mandate of legislation that interconnection charges should be cost-based and competition is to be encouraged on the economic principle of efficiency.¹⁵⁸

The First Panel catered for the fact that notwithstanding reciprocal charges may be one way in which the statutory requirement for interconnect charges to be cost-based

¹⁵⁶ First Decision at 30.

¹⁵⁷ Digicel v. Rory Macmillan & Others, Supreme Court of Trinidad & Tobago, Justice J. Jones, CV2006-03320, August 9, 2007 at 30.

¹⁵⁸ First Decision at 22.

may be accomplished, where other factors which the Authority is obliged to consider intrude, Cost Models may have to be adjusted accordingly.

Indeed the First Panel took on board the observation of its expert TERA that *"TSTT's Cost Model computes the annual termination costs of an efficient network after the initial phase of liberalization and would need to be adjusted in terms of actual traffic levels in order to correspond to the initial phase of liberalization."*¹⁵⁹

And the First Panel noted that this was not disputed by either of the Parties¹⁶⁰.

The First Panel then concluded that if the Authority came to the view that TSTT's Cost Model required adjustment, the appropriateness of a reciprocal charge determined by reference to it would have to be reviewed from the time such charge took effect.¹⁶¹

The bottom line then is if the reciprocal charge for interconnect service proposed by TSTT does not satisfy the requirement of being "cost-based" (with all that that connotes in the telecommunications context) and such cost-based charges can be achieved by adjusting TSTT's Cost Model in the liberalization phase (or for any other reason), then that is what the Authority (and arbitration panels appointed by the Authority) will have to do in order to carry out the statutory mandate. In the circumstances then, adjusting the TSTT cost model to conform to statutory and regulatory requirements does not undermine the Decision of the First Panel.

C. TATT Jurisdiction Regarding Retroactive Billing

Issue 8. Whether TATT has jurisdiction in this case to establish rates which are payable from April 6, 2006 or from some other date prior to the Panel's decision in this Dispute? In the event that TATT has this jurisdiction, what rates should be established from such date?

¹⁵⁹First Decision at 41-42.

¹⁶⁰Id.

¹⁶¹Id.

THE PANEL'S DECISION:

For the reasons explained below, the Panel has determined that TATT (and therefore the Panel) has the authority to order the payment of final interconnection rates from April 6, 2006.

1. Digicel's Contention

The submissions of Digicel on this Issue are contained in the Submissions forming part of or accompanying the Complaint dated November 28, 2006¹⁶², Digicel's Reply to TSTT's Response¹⁶³ dated 21st December, 2006, Digicel's Pre-hearing Submission¹⁶⁴ and Digicel's Closing Submissions.¹⁶⁵

Digicel's contention may be summarized in the following terms:

Digicel says that it should be paid at the appropriate cost-based price for interconnection services it has been supplying to TSTT from the date when it began to supply such services, April 6, 2006. If this is not done then it would mean that Digicel would be providing these services for "free" and this would amount to a cross-subsidization of its services in breach of its licence. It would also mean that TSTT would be involved in breaching its own Concession and engaging in cross-subsidization as well, and this is clearly contrary to the legal and regulatory framework of Trinidad and Tobago. There can be no cross-subsidization without the Authority's consent and neither Party has that consent. Digicel contends that because interconnect rates are statutorily required to be cost-based, zero cents interconnect rates cannot be considered cost-based and are therefore illegal. In its Closing Submissions, Digicel elaborates on its earlier Submissions and contends that given the objectives, scheme and provisions of the Telecommunications Act as well as the parties' Concessions, the Panel does have power to order charges for interconnect services to be paid from April 6th, 2006. To do otherwise would not only be inconsistent with legislative and regulatory framework, but would confer on TSTT a clear advantage. And this would be "illogical, unfair and inequitable".¹⁶⁶

2. TSTT's Response

¹⁶² Digicel Complaint, November 28, 2006 at 30, 33.

¹⁶³ Digicel reply to TSTT's Response, December 21, 2006 at 4, 7, 9.-20

¹⁶⁴ Digicel's Pre-hearing Submissions at 13-14

¹⁶⁵ Digicel's Closing Submissions at 76-88.

¹⁶⁶ Digicel Closing Submission at ¶316.

TSTT's position on this Issue is set out in its Response to the Complaint dated December 12, 2006¹⁶⁷, Pre-Hearing Submissions dated November 12, 2007¹⁶⁸, and Closing Submissions dated December 28, 2007¹⁶⁹.

TSTT argues as a matter of law, the Authority (and *a fortiori* this Panel) has no jurisdiction to set rates retroactively. The scheme of the Act is forward looking. Accordingly, in keeping with well-settled common law principles rates should only be set prospectively. There is one exception says TSTT and that is in the case of interim rates where the Authority has power to do so and has in fact done so it may revisit the same and alter it. It has been established by the judgment of Madam Justice Gobin that the Authority has no such power to set interim rates¹⁷⁰. TSTT buttresses its position by saying that in the absence of an interconnection agreement, the legislative and regulatory framework does not contemplate the charging of rates or even interconnection itself.

To set rates retroactively would be "to create new obligations in relation to past transactions". TSTT contends that they were under no obligation to interconnect, they did so voluntarily and this interconnection began on a "sender keeps all basis". TSTT says Digicel's appeals to fairness and equity and commercial hardship is illusory or in any event, Digicel by its delay in having final rates set, and doing other things (which may be compendiously referred to as "regulatory gamesmanship"), Digicel is the architect or author of its own misfortune and TSTT should not be called upon to indemnify it in this regard.

3. The Panel's Task

It seems to the Panel that its task in relation to this issue may be two fold:

- a) It must first of all decide whether the Authority (and by extension the Panel) has the power to order payments for interconnect charges to be made from the April 6, 2006 or some other date prior to the date of this Decision; and,
- b) If so, whether the facts, matters and circumstances in this case dictate the Panel should so order.

¹⁶⁷ TSTT Response to Complaint, December 12, 2006 at 17, 24.

¹⁶⁸ TSTT Pre-Hearing Submissions, November 12, 2007 at ¶¶55-57.

¹⁶⁹ TSTT Closing Submissions, December 28, 2007 at 10-11, 29-32

¹⁷⁰ See, note 2, *supra*, and accompanying text discussing the decision of the High Court finding that TATT has no power to set interim rates.

a) Does the Panel have power to order payment of interconnect charges retrospectively?

TSTT has offered the Panel by way of assistance the case of *Northwestern Utilities Ltd. v. Edmonton (City)* [1979] 1 SCR 684.

This was a case in which the appellant company on an application to the Alberta Public Utilities Board (PUB) for a determination and approval of rates and charges for natural gas sought to recover certain “losses” which it had suffered pursuant to a provision (Section 31) which permitted the PUB to make an Order “*giving effect to such part of any losses incurred...as may be due to any undue delay in the hearing and determining of the application*”. The Court found that the “losses” involved were in fact incurred **before** the date of the application and so could not be properly recovered pursuant to *that* provision. Moreover, the Court found that the kind of loss which the Appellant sought to recover was not within the contemplation of Section 31.

The Court appeared mindful of the fact (without actually articulating it) that the imposition of a rate to increase future revenues to indemnify the company for past losses may have the potential of working an injustice on future consumers because they are being asked in reality to subsidize the pre-application consumers who had the benefit of the service.

None of these considerations arise in the matter before this Panel. Justice Estey examined many of the provisions of the relevant statute and concluded:

“while the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective term...”¹⁷¹

Later in the judgment the Learned Judge elaborated on this:

The rate-fixing process was described before this Court by the Board as follows:

The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money

¹⁷¹ *Northwestern Utilities Ltd. v. Edmonton (City)* [1979] 1 SCR 684; page 5 of the Judgment.

which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

The statutory pattern is founded upon the concept of the establishment of rates in future for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of The Gas Utilities Act that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the Act which make this clear and I take but one example, found in s. 35, which provides:

- (1) No change in any existing rates...shall be made by a ... gas utility ... until such changed rates or new rates are approved by the Board.*
- (2) Upon approval, the changed rates ... come into force on a date to be fixed by the Board and the Board may either upon written complaint or upon its own initiative herein determine whether the imposed increases, changes or alterations are just and reasonable.*

Section 32 likewise refers to rates "to be imposed thereafter by a gas utility".

It seems clear then to the Panel that the Court was able to discern from the provisions of the statute the very clear and unequivocal underlying rationale that the rate-imposing function of the PUB was prospective or forward looking (save where it provided otherwise). Can the same be said of the Telecommunications Act or even the Regulations made thereunder and more specifically those provisions which govern the issue of interconnection charges ?

An objective consideration of the various provisions of the Act suggest the answer to this question is NO. Certainly TSTT has not identified any specific provision, or group of provisions which when read jointly, would impel one to that conclusion.

The Northwestern Utilities Case the is one which the Panel finds to have been decided on the clear and unambiguous provisions of the relevant statute and the underlying rationale manifest throughout the statute which denied the PUB the specific power to set rates to take account of losses sustained *prior* to an application in respect of rates being made. Accordingly, the Panel derives little or no assistance from this case.

This is not to say that TSTT is to be faulted for drawing attention to and relying upon the well-known presumption of statutory interpretation that legislative enactments, in the absence of express words to the contrary, are to have effect *in futuro* – one might add especially where such enactments seek to impose a charge or exact some monetary payment because then the question of deprivation of property may arise.

But this is only a presumption and would yield to a liberal and purposive approach to construction where it can be collected from the spirit and objects of a statute that by necessary implication it (or at any rate certain provisions) should be construed as having retrospective effect in order to address the mischief that gave rise to its birth and otherwise ensure that the objects of the statute are not otherwise frustrated.

It is in this context that the Panel finds the authority of *Grant .v. Allen [1981] 1Q.B 486* (cited by Digicel) to be particularly instructive.

This was a case that involved the interpretation and application of certain provisions of the Mobile Homes Act 1975. The Act sought to amend the law relating to mobile homes and residential caravan sites. The scheme of the Act as appeared from its main provisions was to bring into being written agreements between the owners of protected sites and occupants thereon. These written agreements were to contain all the terms and conditions of occupation and certain mandatory terms as prescribed by the Act were to be included.

Under the Act the parties were to negotiate and bring into being their agreements voluntarily, failing which upon application made by any one party the County Court could compulsorily effect such agreement through an Order of the Court. The Act further

provided that it was the duty of owners to offer to enter written agreements with their occupiers and supply them with drafts of the proposed agreements. To be included in the agreement was the obligation on the part of the occupier to pay the owner something known as a pitch fee.

In purported compliance with their obligation to offer these agreements to their occupiers, certain owners delivered certain draft agreements to their occupiers. These drafts were deficient in material respects principally, it made no mention of the date upon which the agreement was to come into effect nor the amount of the pitch fee and details with respect to its payment.

In an ensuing dispute, a Judge hearing the matter in *April 1977* ordered not only that the agreement was to take effect from the statutory date January 1, 1976 but that the pitch fees were payable from that date. Certain occupiers challenged this ruling on appeal on the basis that the fixing of a retrospective date of commencement of the agreement gave rise to certain inconsistencies with the Act and as such it should be regarded as impliedly prohibited by it and further that the Judge had no jurisdiction under the Act to determine that the pitch fee should be payable retrospectively from a date earlier than the date of his decision.

It was held by the Court of Appeal that the parties could have agreed that their agreement though not effected on the appointed date could have retrospective effect and the court could make an order to the same effect in its determination of a dispute or ordering the grant of an agreement. The appointed day was a reasonable one and the judge could so backdate the payment of the pitch fee to that date.

In a simple yet seminal judgment Brandon L.J. stated at page 497:

This timetable indicates that it was the intention of the legislature that agreements should be brought into being, either voluntarily or compulsorily, as soon as reasonably practicable after January 1, 1976. That being so, we do not see anything inconsistent with the Act in an agreement, though not brought into being on that date but only for practical reasons some months later, having that date as its date of commencement. It seems to us that there is no reason

why the parties themselves should not agree that the agreement, when entered into, should take effect retrospectively from that date; nor any reason why the court, when ordering the grant of an agreement on the application of either party, or determining a dispute about the date of commencement alone or along with other matters, should not make an order which produces the same result."

The Panel has cited the facts of this case at length because of the tremendous parallel it has with this case:

- (a) The Mobile Homes Act like the Telecommunications Act is regulatory in nature and seek to bring about a certain measure of parity between the contracting parties ;
- (b) Both Acts place a premium on certain things being accomplished with a measure of promptitude (*in this case interconnection being one of them*);
- (c) The persons who fell under both Acts are given the option to negotiate their agreements voluntary but in default an independent adjudicator intervenes;
- (d) Both Acts impose certain mandatory requirements about which there could be no contracting out; and,
- (e) Neither Act makes any express provision for retroactive payment.

Indeed, a feature of the *Grant and Allen Case* underscores perhaps an even stronger argument for retroactive payment in the instant case. In the *Grant and Allen Case* the pitch fees were payable on the basis of an agreement being entered into or so deemed by order of the Court. In other words, the Court could not have ordered pitch fees to be paid from January 1, 1976 unless it also order that agreement between the parties take effect from the same date.

Here, in this case on a proper reading of section 25(i) the statutory mandate to interconnect is not interdependent on *but rather independent of the statutory requirement to negotiate an interconnection agreement.*

If it were otherwise, that is to say the legislation contemplated or provided that interconnection could only be achieved within the context of an agreement, then the interconnection now enjoyed by the parties at worst would be unlawful or at the very least be improper and *ultra vires* the Act. Indeed it is not far fetched to suggest that the Act contemplates interconnection may take place *even before* the conclusion of any agreement in that regard

Having established that the Act confers no express power on the Authority to order retrospective payment of interconnect charges, the question immediately arises: does it have the implied power to do so? Or perhaps to borrow the language of the *Grant and Allen Case*, is it so inconsistent with the Telecommunications Act for such payment to be treated as impliedly prohibited by it ?

Given the scheme of the Act, its objects and underlying rationale and the commercial reality of interconnection, we think that a liberal and purposive interpretation of the provisions Act would admit of such power on the part of Authority to order payment for interconnection services retroactively and we so hold.

We test our view this way: *Would it be lawful for the parties in negotiating and concluding the agreement to make provisions for the payment by the parties for interconnect services retroactively?*

If the answer to the question is “yes” and it is legitimate for the parties to so contract (and we have no doubt it is) how then can the Authority, the Regulator created by the Act, who steps in to resolve disputes and fix rates leading ultimately to agreement between the parties be denied the jurisdiction to do?

b) Should this Panel now order that payment for interconnect charges be paid from a date prior to its decision?

TSTT has raised the question of delay in the determination of final rates as a factor that ought to be taken into account in determining whether the Panel should exercise its power to order payments retrospectively.¹⁷² They seek to lay the blame for this squarely Digicel’s doorstep. Without attempting to apportion blame this Panel is of the view on the evidence that both parties must share the responsibility for this delay. In any event having regard to the mandate of the Act with respect to interconnection and the rates therefore, this Panel is of the view

¹⁷² TSTT Closing Submissions at 30-31.

that delay in the context of all that has transpired between the parties would not afford a sound ground to pre-empt or debar retrospective payments for interconnection .

TSTT takes the position that they were under no obligation to interconnect and did so voluntarily in the absence of an interconnection agreement ¹⁷³. The nuance of altruism or magnanimity is inescapable. But in this Panel's view these parties were at arm's length commercially, perhaps belligerently so, and it could hardly be that, when it effected interconnection, TSTT was under any illusion that such interconnection would not spawn financial consequences. It would have been commercially unreal to think otherwise. TSTT must have expected to "pay the piper" some where down the road, and that road ends with this Panel and the fixing of final rates for interconnection.

Even if, as TSTT contends, that interconnection began on a "sender keeps all " basis ¹⁷⁴ they would have readily appreciated that statutorily and commercially that regime could not endure. For the overriding mantra of the Act in so far as interconnection rates were concerned was that such rates are to be "cost-based." There was no evidence then as there is no evidence now that the "sender keeps all" arrangement was or is cost-based. Accordingly not only was it foreseeable but it was to be expected that when final rates came to be set, as we are doing now, all else being equal, some adjustment would have to be made if there is going to be faithful adherence to the mandate of the Act.

Accordingly, it seems to us that when TSTT advanced the argument on the point of the Panel's power to order retroactive payment that the Act did not authorize the Authority "to create new obligations in respect of past transactions" they fell into error. Given the requirements of the Act when TSTT effected interconnection, the potential obligation to pay arose then: TSTT (and Digicel) came under a liability to pay for services received. Having availed itself of the use of Digicel's network to terminate TSTT-originated calls, that liability crystallized. Accordingly, in ordering payments to be made from that date, the Panel far from

¹⁷³ Id. at 30, ¶100.

¹⁷⁴ Id. at 30.

creating or imposing “new obligations” is simply engaged in the quantification of TSTT’s pre-existing liability.

Again there is no evidence before this Panel that an interconnect rate of zero dollars is cost-based. Accordingly the Panel finds much force in Digicel’s argument that to accept that rate would be in violation of sections 25(2) (m) and 24(1)(c).¹⁷⁵

Given the policy of the Act and the events as they pertain to interconnection between the parties leading up to this adjudication, we think it fair, just and equitable that both parties pay the rates as determined herein from April 6, 2006.

D. Was Transit Rate Agreed?: Issue 9 (From Dispute No. 2)

Issue 9: Whether Digicel has conceded that TSTT is entitled to charge Digicel a transit rate of 3.5 cents?

THE PANEL’S DECISION:

For the reasons explained below, the Panel has determined that Digicel has NOT conceded that TSTT is entitled to charge Digicel a transit rate of 3.5 cents.

TSTT claims that there is an existing agreement between Digicel and TSTT in which Digicel agreed to pay TT\$ 3.5 TT cents per minute.¹⁷⁶ Digicel acknowledges that it “... had provisionally agreed to a transit rate of 3.5 TT cents per minute (billed per second) previously because it could ‘live with’ the rate if the alternative was getting into protracted process...”¹⁷⁷.

While the parties disagree vigorously about how the “cost basis” of any interconnection rate should be determined, both parties have consistently taken the position throughout this proceeding (as they must because it is the law) that each party is entitled to charge the other only *cost based* rates. A voluntary and definitive written agreement between the parties agreeing to a particular rate would constitute an enforceable mutual waiver by

¹⁷⁵ Digicel’s Closing Submissions at 85-87.

¹⁷⁶ Closing Submission on Behalf of the Respondent, December 28, 2007 at ¶ 89

¹⁷⁷ Closing Written Submissions on Behalf of the Complainant, December 28, 2007 at ¶ 277.

each party of its statutory right to have rates set by a regulatory proceeding that *inter alia* determines the cost basis of the service. TSTT has not produced a writing evidencing such a voluntary and definitive written agreement with respect to transit rates. In the absence of such documentary evidence, the Panel will not infer that Digicel has waived its statutory right to a cost-based transit rate in what seems to be an incomplete and unfinished negotiation. Rather, Digicel—like TSTT—is entitled to what the law specifies: cost-based transit rates.

TSTT's latest Cost Model results indicate that its cost of a tandem transit service is 0.4 TT cents and TSTT has submitted that this would be an appropriate cost-based rate.¹⁷⁸ Whether or not it is permissible for TSTT to charge a transit rate and, if so, what that rate should be is addressed by the Panel in response to Issue 1(d) above.

VI. PANEL RECOMMENDATION'S TO THE AUTHORITY

The Authority's Dispute Procedures provide in section 2.10.12 that the Panel may recommend to the Authority any action within the provisions of the Act. During the course of this proceeding, the Panel has identified a number of areas where, in its opinion, action by the Authority or recommendations by the Authority for changes to the statutes by the Parliament would advance the objectives of the Act.

A. Interim Rates

In the judicial review of the First Decision, the court ruled that the Authority does not have the powers to establish interim rates. The Panel is of the view that the powers to establish interim rates would assist the Authority in a number of areas and especially in the resolution of disputes such as that being considered by this Panel. As the Authority is fully aware, the competitive market can give rise to many disputed issues and that resolving these issues can involve lengthy processes. This situation can give rise to two undesirable outcomes.

¹⁷⁸ Closing Submission on Behalf of the Respondent, December 28, 2007 at ¶ 89.

Firstly, during the time that disputes are being addressed, the Authority has no power to install a reasoned regulatory regime creating an environment of uncertainty that is not in the public interest. The current situation highlights this problem. Digicel entered the market in 2006 but because of the earlier disputes there was no agreement on interconnection rates. Interconnection did however go ahead and while the Authority had no jurisdiction to specify interim rates, a de facto interim rate regime was put in place, namely the "sender keeps all" regime. Because of the Authority's lack of jurisdiction in this area, the legal basis for this arrangement has been in doubt, a situation which is not in the public interest. As well, notwithstanding the merits of its case, Digicel has been forced to operate for nearly two years under a regime which it considers unfair. This is not in the interests of Digicel and it may accordingly be undermining the expected benefits of a competitive marketplace. This situation would be rectified to a certain extent if the Authority had the powers to establish interim rate regimes and the ancillary power to "true up" accounts after final rates are determined.

A second area of concern is the potential for regulatory "gaming". If one of the parties in a competitive environment considers that the uncertainty resulting from the lack an interim regime promotes its private interest, it will have the incentive to draw out the resolution process as long as possible. This behavior is unlikely to serve the public interest. Again, if the Authority has the power to establish interim regimes and "true up" after final rates are detrmind, the "damage" resulting from lengthy proceedings to establish a final interconnection regime can largely be avoided. As well, parties will be at least partially disciplined, knowing that, in the end, accounts will be revised to reflect final rates.

Accordingly, the Panel recommends that the Authority ask that the Parliament amend the Telecommunications Act to specifically include the power to establish interim regimes and the power to "true up" accounts once final rates are determined.

B. Cross-Subsidy

As noted in a number of places in this Decision, the Panel has concerns where a participant in a competitive market also has a monopoly in another adjacent market. In Trinidad and Tobago this applies to TSTT: it is in the competitive mobile business as well as having a monopoly in the fixed line business. This situation gives rise to an incentive to use profits from the monopoly business to subsidize the competitive operation. This is adverse to the public interest in that it means that monopoly subscribers are being charged an excessive rate and that competitors will not be able to compete on an equal footing. This will negatively affect the expected benefits from competition. The excessive rates charged to the monopoly subscribers may also distort the market by artificially reducing calling by the fixed line subscribers.

In order to guard against such behavior, regulators have adopted a number of mechanisms including structural separation of the monopoly and competitive operations, strong accounting separation of the two areas and detailed cost studies. None of these approaches are easy or a perfect way to minimize the potential for a problem. While this Panel was not mandated to investigate in this area, it would recommend that at a minimum, the Authority complete as quickly as possible its proceedings to establish a costing system and a cost-based model for determining rates. The Panel would also recommend that the Authority conduct a review of TSTT's tariff applicable to fixed line calling to the mobile networks. The Panel considers that such a tariff should reflect the mobile termination rate set out in this decision and not discriminate in any manner between calls to TSTT's mobile service or Digicel.

C. Number Portability

The Panel has received evidence in this proceeding that in Trinidad and Tobago there are a significant number of mobile customers that subscribe to the services of both carriers. The Panel considers that this does not represent an efficient use of resources and may indicate an underlying problem with the competitive environment. One possible deficiency in the current environment is the lack of number portability in the mobile market. Number portability would allow subscribers to keep their existing telephone

number when they change service providers and accordingly reduce the incentive to maintain service with both providers. The Panel considers that implementing number portability would be in the public interest, and recommends that the Authority commence a proceeding on this issue.

COSTS

Having delivered its decision herein the Panel hereby further directs that each of the parties provide the Panel with their respective submissions on the question of costs within 14 days of the date hereof.

CONCLUSION

The analysis and decisions contained within this document constitutes this Panel's final Report and Decision.

Respectfully submitted this 7th day of March 2008 by:

**Avory Sinanan,
Chair**

Robert Atkinson

Donald Bowles