

TATT 4/07/07/5

**IN THE MATTER OF AN ARBITRATION
TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO
SECTION 82 OF THE TELECOMMUNICATIONS ACT CHAP. 47:31**

BETWEEN

COLUMBUS COMMUNICATIONS TRINIDAD LIMITED

Complainant

AND

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Respondent

Dated: 3rd May 2019

**RE: APPLICATION BY THE RESPONDENT DATED 1ST MARCH 2019 TO JOIN DIGICEL TRINIDAD
AND TOBAGO LIMITED AS AN INTERESTED PARTY**

RULING OF THE PANEL

By Notice Of Application dated 1st March 2019 and inclusive of its grounds stated therein, the Respondent - the Telecommunications Services of Trinidad and Tobago (hereinafter referred to as 'TSTT'), applies for a ruling of the Panel that Digicel Trinidad and Tobago Limited (hereinafter referred to as 'Digicel'), can be added as an interested party to these disputes.

In its application, TSTT has listed the grounds for making its application which the Panel has carefully considered in its deliberations.

By written submission dated 22nd March 2019, the Complainant - Columbus Communications Trinidad Limited (hereinafter referred to as 'CCTL'), objected to the

application that Digicel be added as an interested party, on the basis that there is no jurisdiction for the Panel of Arbitration to do so, either under:

- (a) The Procedure for Resolution of Disputes in the Telecommunication and Broadcasting Sectors of Trinidad and Tobago (hereinafter referred to as the “Dispute Resolution Procedures”
- (b) General arbitration law, and
- (c) The Arbitration Act Chapter 5:01.

By written submission dated 8th April, 2019, TSTT indicated that the Panel is vested with the authority to hear and determine the application and must do so in a manner that is fair, transparent and objective.

In view of the fact that the Dispute Resolution Procedures do not speak to the issue of joining of parties and or joining of a party as an interested party to an on-going dispute in detail, the Panel sought the requisite guidance in the Civil Procedure Rules and case law.

Thus the relevant test for the addition of a party to proceedings is set out in the Privy Council decision of **Pegang Mining Company Limited v Choong Sam** and Others, PC Appeal number 5 of 1968). At page 8, paragraph three, Lord Diplock stated in part that:

“It has been sometimes said as in Moser v Marsden (1892 1 Ch.487) and that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only will be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not sufficient ground to entitle him to be added as a party, they do not find the dichotomy between “legal” and “commercial” interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action.”

The relevant test in the instant case is whether Digicel’s rights or liabilities to any party to the actions in respect of wholesale international incoming termination rates for Lisa Communications Limited and CCTL will be directly affected by any order made by the Panel.

Additionally, it is usual that a party is not added to proceedings after the case management conference unless there is a change in circumstance that occurred after the case management conference.

TSTT in its submissions correctly asserted that Section 25(2)(g)(e) of the Telecommunications Act requires that a telecommunications provider offer interconnection on a non-discriminatory basis. However, it appears from the submissions tendered by TSTT, that TSTT is of the view that having negotiated and agreed upon a rate with Digicel, the same rate must be then applied to all other concessionaires.

According to the International Telecommunications Union Telecommunications Regulation handbook:

'interconnection arrangements may vary from one competitor to another without being unduly or unjustly discriminatory. Two competitors may have voluntarily agreed to different arrangements, for example to suit their differing operating conditions. The real test therefore should not be "discrimination in the sense of differences in interconnection arrangements. The test should be "unjust" "undue" or "unfair "discrimination in the sense that an interconnecting competitor is placed at a significant disadvantage as a result of less favourable interconnection arrangements.'

(https://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/3_Interconnection.pdf)

It is instructive to note that in determining the conditions for interconnection including the applicable rates, other principles apart from non-discrimination must be taken into consideration. As such Sections 29(3) and 29(4) of the Telecommunications Act speaks to ability of the Authority to regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs by publishing pricing rules and principles. Such rules and principles according to the Act shall be fair and reasonable and shall prohibit unreasonable discrimination among similarly situated persons, including the concessionaire.

The Panel notes that TSTT having negotiated an agreement with Digicel that touches and concerns the rate in dispute is in a position or may submit to the Panel the agreement

arrived at with Digicel as well as provide an explanation on the methodology utilized to arrive at the rate. Digicel does not have to be joined as a party to the proceedings for the agreement between TSTT and Digicel to be considered.

The Panel therefore rejects the assertion that the failure to join Digicel as a party would lead to a lack of consideration of the agreement with Digicel and therefore place TSTT in jeopardy of being in breach of the non-discrimination provisions of the Telecommunications Act.

The Panel is mindful that the test as to whether a party should be added to proceedings, it must examine the potential effect on the rights and liability of the party to be joined. The submissions of TSTT requesting joinder speak in large part to the harm that may be occasioned to TSTT and not Digicel.

The Panel also disagrees with the assertion that the failure to join Digicel would leave the Panel open to attack from Digicel for failure to provide procedural fairness. The Panel notes that TSTT in its submissions indicated that in or around June of 2018, after receiving notices of the dispute, TSTT communicated same to Digicel. TSTT again on the 27th February 2019 sent Digicel correspondence indicating TSTT's intention to have Digicel joined to the proceedings. The Panel to date, has yet to be made aware of any representation from Digicel requesting to join the proceedings even though Digicel by TSTT's admission was informed of the disputes since June 2018. The Panel notes that no Digicel representative attended any of the sittings of the Panel in these matters even though by TSTT's admission Digicel was informed of the dispute since 2018.

The Panel therefore finds it difficult to understand TSTT's assertion that failure to join Digicel as a party would open the panel up to attack for failure to provide procedural fairness. Digicel's steadfast absence, in the face of TSTT's notices informing Digicel of the disputes shows a lack of interest in TSTT's dispute with CCTL and Lisa Communications Limited. The Panel at this point wishes to remind TSTT that 1) a claim is sufficiently constituted if it asserts a single cause of action by a single claimant against a single defendant 2) generally a claim does not fail by virtue of the failure to add a person who should have been made a party.

The Panel also wishes to indicate that joinder of parties is usually not permitted after case management unless there is a change in circumstances. The Panel listened to and ruled on submissions on preliminary points, issued directions, received witness statements and set hearing dates and the hearing has progressed far beyond what can be regarded as the case management stage of these proceedings. TSTT's submissions requesting joinder do not set out any change in circumstance that would warrant the addition or joining of Digicel in the proceedings.

In view of the above TSTT's application to join Digicel to the proceedings is denied.

And the Panel so rules.

Ken Wright – Chairman

Dr. Lester Henry – Member

Philip Cross - Member