IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 152 of 2011

BETWEEN: DIGICEL (VANUATU) LIMITED
Claimant

AND: THE TELECOMMUNICATIONS AND RADIOCOMMUNICATIONS REGULATOR
Defendant

AND: TELECOM VANUATU LIMITED
First Interested Party

AND: ATTORNEY GENERAL
Second Interested Party

Before: ***Justice D. V. Fatiaki***

Counsel: *Garry Blake for the Claimant*
Eric Brown for the Defendant
Edward Nalyal with Stephen Rebikoff for the First Interested Party
Chris Tavoa for the Second Interested party

Date of Judgment: *6 June 2014*

JUDGMENT

1. This application for judicial review challenges two decisions of the defendant, the **Telecommunications and Radiocommunications Regulator** ("*the Regulator*") and for consequential orders prohibiting the Regulator from issuing a decision purporting to review its **Decision No. 01 of 2011** ("*Decision 1*") and quashing the Regulator's decision to issue **Draft Decision No. 02 of 2011** ("*Draft Decision 2*"). Both Decision 1 and Draft Decision 2 concern the applicable rates regulating the interconnection charges between two telecommunication service providers in Vanuatu, namely **Digicel (Vanuatu) Ltd** ("*Digicel*") and **Telecom Vanuatu Ltd** ("*TVL*").

2. Digicel commenced these proceedings on 9th August 2011, seeking urgent injunctive relief against the Regulator, substantially in the terms of the ultimate relief claimed in the application for judicial review.

3. A date for an *inter parties* hearing was fixed for 26th August 2011. Very extensive material by way of sworn statements and exhibits was filed by the parties and addressed in detail at the hearing. The Regulator opposed the application for injunctive relief. At the conclusion of the hearing I announced that I was satisfied that Digicel had established there was "*a serious question*" to be tried and that Digicel

would be severely disadvantaged if the injunction was not granted. An interlocutory injunction was therefore granted.

4. Following the making of the injunction, the Regulator filed its defence and conference dates were fixed for the purpose of the hearing required by **Rule 17.8** of the Civil Procedure Rules ("*CPR*"). Before the hearing took place, sworn statements were filed and the parties and TVL filed detailed submissions.

5. **Rule 17.8** provides:-

> *"17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.*
>
> *(2) At the conference, the judge must consider the matters in subrule (3).*
>
> *(3) The judge will not hear the claim unless he or she is satisfied that:*
> *(a) the claimant has an arguable case; and*
> *(b) the claimant is directly affected by the enactment or decision; and*
> *(c) there has been no undue delay in making the claim; and*
> *(d) there is no other remedy that resolves the matter fully and directly.*
>
> *(4) To be satisfied, the judge may at the conference:*
> *(a) consider the papers filed in the proceeding; and*
> *(b) hear argument from the parties.*
>
> *(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."*

6. Notwithstanding that at the interlocutory injunction hearing the Court had held that there was "*a serious question*" to be tried, the Regulator and TVL contended that Digicel had failed to establish "*an arguable case*" on any of the grounds it had put forward to support its claim. Further they contended Digicel was not "*directly affected*" by the actions of the Regulator that it sought to restrain and, in any event, there were other remedies open to Digicel.

7. Given the complex written submissions filed by the parties on the legal issues and the factual background which gave rise to them and the absence of any new or additional evidence, a defendant could normally have been expected to concede at the **Rule 17.8** issues hearing that the application for judicial review should proceed to final hearing. However in this case Digicel and TVL have proceeded to argue the **Rule 17.8** issues on the basis that they turn substantially on legal questions, and that in so far as factual considerations are concerned all necessary facts are common ground between the parties.

8. In my view pursuing a **Rule 17.8** hearing can be beneficial in several respects including, saving the Courts valuable time and reducing costs in unarguable cases and, in clarifying and limiting the legal and factual issues that may need to be tried.

Factual Introduction

9. Digicel holds a licence issued on 14th March 2008 under the former Telecommunications Act 1989 ("*the former Act*") for 15 years to provide telecommunication services to end-users in Vanuatu and international services to those end users and persons who are outside Vanuatu. TVL is also licensed for a similar period to provide similar services.

10. The former Act provided for the appointment of a Regulator, and when the **Telecommunications and Radiocommunications Regulation Act No. 30 of 2009** ("*the TRRA*") came into force on 27th November 2009, under its transitional provisions the Regulator under the former Act remained the Regulator until another was appointed under the TRRA. The present defendant holds his appointment under the TRRA with the general functions set out in **Section 7** and the specific function of determining interconnection charges under **Section 30** of the TRRA.

11. On 13th March 2008, Digicel and TVL signed an **Interim Interconnection Agreement** ("*ICA*") which obliged each party to connect calls from the other parties' network. According to its terms the ICA was to operate for four years from its launch date on 25th June 2008 and during that term charges set out in the ICA were fixed for an initial period of 24 months from 25th June 2008.

12. The TRRA came into force after the ICA was executed. **Section 30** of the TRRA provides:-

> *"30. Interconnection charges*
>
> *(1) If there is any dispute over prices for interconnection provided by access providers or where the Regulator is to determine these prices under section 27, the Regulator must determine the prices by benchmarking against cost-oriented prices for interconnection in other jurisdictions selected by the Regulator.*
>
> *(2) The Regulator may use any other method of calculation or determination of the prices, but only where the Regulator determines that it is unable to identify an appropriate selection of cost-oriented prices in other jurisdictions."*

13. The TRRA provides avenues for any person aggrieved by a decision of the Regulator to seek review. In particular, **Sections 52** and **53** provide:-

> *"52. Internal review*

(1) *Any person aggrieved by a decision of the Regulator may invite the Regulator to reconsider such decision.*

(2) *The Regulator is to reconsider a decision when invited under subsection (1) if the invitation is received within 30 days of the decision being notified or published, as the case may be.*

(3) *The Regulator may reconsider a decision when invited under subsection (1) if the invitation is received after 30 days of the decision being notified or published, as the case may be.*

(4) *An invitation under subsection (1) must be in writing and must contain all the material upon which the invitation is based.*

(5) *In reconsidering a decision the Regulator may:*
- *(a) Confirm the decision; or*
- *(b) Vary the decision; or*
- *(c) Revoke the decision; or*
- *(d) If the decision is revoked, make a new decision.*

(6) *The regulator must not reconsider any decision in respect to which a person has applied to the Supreme Court for judicial review.*

53. *Judicial Review*

(1) *A person aggrieved by a decision of the Regulator may seek judicial review of the decision in the Supreme Court.*

(2) *No application for judicial review must be brought after 3 months of the decision being notified or published, as the case may be.*

(3) *Judicial review must not be available in respect of:*

- *(a)* (not presently relevant)
- *(b)* " "
- *(c)* " "
- *(d) a decision under subsection 52(3) declining to reconsider a decision; or*
- *(e) a decision under subsection 52(5), except to the extent of any variance, revocation or new decision; or*
- *(f) any decision of the Regulator under section 54 or an expert appointed by the Regulator under subsection 54(7); or*

(g) *any advice given by the Regulator to the Minister; or*

(h) *a decision to commence or continue or not to commence or continue proceedings for a contravention of this Act.*

(4) Nothing in paragraphs (3)(d) or (e) limits the ability to review the original decision in respect of which internal review was sought except that there is no duplication of review in respect of the same matters."

Section 54 additionally provides for an external expert review at the request of a person is aggrieved by the decision of the Regulator on certain matters which include as to price, who has sought and obtained internal review under **section 52**, and remains aggrieved by the decision to the extent of any part thereof as was not revoked under **subsection 52 (5)**.

14. On 25th March 2010, after the TTRA had come into force, Digicel gave notice to TVL under **Clause 5.2(a)** of the ICA that it wished to renegotiate the interconnection charges set by the ICA in 2008 for the period 25th June 2010 to 25th June 2012. **Clause 5.2** of the ICA provides:-

"5.2 The pricing in clause 5.1 applies for a period of 24 months from the Launch Date.

(a) If any party wishes changes to be made to the pricing in clause 5.1, that would apply from the date that is 24 months from the Launch Date until the Expiry Date, they will notify the other party (with a copy to the Regulator).

(b) This notice may be given no earlier than 20 months from the Launch Date.

(c) The parties will then enter into negotiations in good faith with a view to reaching agreement on any such changes.

(d) The Regulator may attend any such negotiations and, if requested by the Regulator, will be copied by the parties on all correspondence related to the negotiations.

(e) If the parties have not reached agreement on any such changes within 20 Working Days of commencement of those negotiations, then either party may refer the dispute to the Regulator for determination.

(f) The parties must be given the opportunity to provide written submissions (and if required by the Regulator, oral submissions) on the dispute. The Regulator must use best endeavours to complete a draft determination within 20 Working Days of notice of the

dispute and provide that to the parties for comment. The parties will then have 5 Working Days to provide written comments on the draft determination.

(g) The Regulator shall use best endeavours to complete the determination within 40 Working Days of notice of the dispute.

(h) The Regulator must determine any changes to the prices based on benchmarking of countries that have applied cost-based pricing methodologies and the Regulator must include in his or her consideration countries that are comparable to Vanuatu that have applied such methodologies.

(i) However, clauses 5.3 to 5.5 shall not change and the price for the text message termination service will always be no charge (i.e., "bill and keep").

15. Digicel and TVL did not reach agreement on the interconnection charges which were the subject of Digicel's notice. Digicel then purported to refer the dispute about interconnection charges to the Regulator under **Clause 5.2** of the ICA. Communications and submissions passed between Digicel, TVL and the Regulator. On 4th June 2010 the Regulator issued a draft determination on which the parties provided comment. I say "*purported*" advisedly because by the time of the referral of the dispute to the Regulator and the issuance of his draft determination the TRRA had already come into force.

16. On 9th July 2010, the Regulator issued the TVL/Digicel Interconnection Dispute: Final Determination ("*the Final Determination*").

17. The Final Determination used a bench-marking process to arrive at estimates of the costs of providing each of the 5 types of interconnection services for the period 25th June 2010 to 25th June 2012. At **paragraph 136** of the Final Determination the Regulator said:

> *"There was general support at the hearing from both parties regarding the "comparability criteria-based" benchmark for the cost of mobile termination that was developed in the Draft Determination. Both parties agreed that the criteria used and the set of five countries that satisfy these criteria were generally comparable to Vanuatu and were appropriate to benchmark the cost of mobile call termination and origination."*

18. In the Final Determination the Regulator established stepped reductions or increases to particular charges in three month blocks described as the *"glide path".*

19. On 6th August 2010, Digicel wrote to the Regulator seeking an internal review under **Section 52** of the TRRA of four specific issues identified in the request. All related to the timing of implementation of the *"glide path"* of the costs estimates for certain mobile and non-mobile termination charges. Digicel gave reasons for contending that

these aspects of the Final Determination should be reviewed. The Regulator send a draft version on this review request to Digicel and TVL and both responded. On 31st January 2011, the Regulator issued his review of the Final Determination designated Decision 01 of 2011 – referred to in this judgment as "**Decision 1**". "**Decision 1**" was favourable to Digicel's position. Decision 1 provided for the Final Determination to be modified in certain specific respects in light of the Regulator's finding on the review issues.

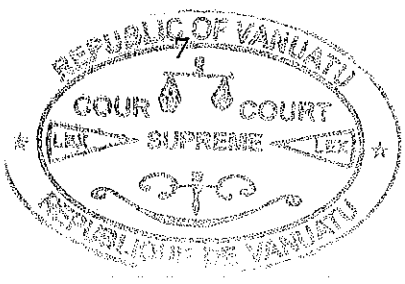
20. On about 7th March 2011, TVL wrote to the Regulator requesting a full review of interconnection rates and a reconsideration of **Decision 1**, TVL claimed that these charges were not *"cost-orientated"* pursuant to **Section 30** of the TRRA, and in particular, that the mobile termination charges were substantially above cost, and the fixed termination charges were substantially below cost. TVL supported its position by reference to new information, including a detailed cost model audited by an independent consultant chosen by the Regulator, and evidence of substantially discounted retail prices of Digicel that indicated the mobile termination charges in the Final Determination may not be valid. TVL also complained that the current mobile termination charges were adversely affecting competition between TVL and Digicel and made claims of anti-competitive conduct by Digicel.

21. On 7th July 2011, the Regulator issued Draft Decision 02 of 2011- referred to in this judgment as "**Draft Decision 2**". Draft Decision 2 effectively abandoned the *"comparability criteria-based"* bench marking basis of estimating the cost of providing interconnection services. The Regulator at **paragraph 4.7** of Draft Decision 2 observed that under Section 30 of the TRRA bench marking is not the only basis for determining interconnection charges, and at **paragraph 4.8** said:-

> *"TRR (the Regulator) now has audited the results of TVL's cost model and is confident that the rates of Vt 5.1 and Vt 4.9 represent the actual apportioned cost of terminating calls from Digicel on the TVL mobile and fixed networks, respectively. These rates are 50% lower that the benchmarked rates, which reflected costs in late 2009 and early 2010. It is difficult to believe that costs can have decreased so dramatically in one year in the countries that was (sic) the source of the benchmarked rates. This leads TRR to conclude that these countries are not comparable to Vanuatu and that TTR should choose an alternative method of determining cost-oriented interconnection prices."*

22. On 29th September 2011, Digicel wrote to the Regulator stating that the Regulator did not have the power to review **Decision 1**, and if he did have the power furthermore, the scope of the review proposed went beyond the matters in issue and was contrary to the expressed provisions of both the ICA and the TRRA. The Regulator did not agree to withdraw **Draft Decision 2** within a nominated timeframe, so Digicel commenced these proceedings and sought injunctive relief.

23. Digicel says that the Regulator has no power to conduct a review of **Decision 1** or to issue a final decision on the matters addressed in **Draft Decision 2** for four (4) distinct and separate reasons:



"(a) *the Regulator has no power to carry out an internal review of a prior internal review under s. 52 of the Telecommunications and Radiocommunications Regulation Act 2009 (the "TRRA");*

(b) *any internal review of a previous decision must be confined to the subject-matter of that previous decision. Here, the Regulator is purporting to inquire into issues that were not the subject of Decision 01 of 2011, which is the previous decision purportedly being reviewed;*

(c) *the Regulator's task under the interconnection agreement ("ICA") between Digicel and Telecom Vanuatu Ltd ("TVL") is to determine interconnection prices in the event of disagreement between Digicel and TVL, using a benchmarking methodology as agreed by Digicel and TVL. It is not open to the Regulator to use a different methodology based on cost modelling, as proposed in draft Decision 02 of 2011. To do so would be outside the scope of his price-setting role under the ICA;*

(d) *it would also be inconsistent with s. 30 of the TRRA for the Regulator to adopt any method of determining interconnection prices other than benchmarking, in this case."*

Each of these grounds constitute one of Digicel's "*causes of action*" pleaded in its application for judicial review. I take each of these in turn.

Ground 1 : The Regulator has no power to carry out any internal review of a prior internal review under Section 52.

24. The authority to request a review under **Section 52** is expressed in general and unrestricted terms. The word *"decision"* is widely defined in **Section 2** of the TRRA: *"... decision of the Regulator includes any decision of any kind to do or not to do anything in relation to which the Regulator is empowered by this Act."* There is nothing in the language of **Section 52** that suggests a limitation of the kind Digicel asserts, and to so limit the section is contrary to the presumptive operation of such a power as indicated by **Section 19** of the **Interpretation Act** [Cap 132] which provides:

> "*Where an Act of parliament confers any power or imposes any duty, the power may be exercised and the duty shall be performed from time to time as the occasion requires."*

25. Counsel for TVL has pointed out that the above provision is modelled on **Section 32(1)** of the **Interpretation Act 1889** (UK) which was introduced to overcome *"an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statutes was exhausted by its first exercise"*: *see*: **Minister of**

Immigration, Local Government and Ethic Affairs v. Kurtovic (1990) 92 ALR 93 at 112, quoting Halbury's **Laws of England**, (1st ed.) **Vol 27**, page 131.

26. Likewise **Section 15 (3)** of the **Interpretation Act** [CAP. 132] has a similar affect in this case. It provides "*A statutory order may at any time be amended by the authority by which it was made, or by any authority replacing that authority*". **Section 15 (3)** applies in this case because the Regulator's binding prior decisions concerning interconnection rates are within the definition of "*statutory orders*" in **Section 12** of the Interpretation Act.

27. Digicel argues that the power in **Section 52** should be limited to prevent repeated applications to review a decision – a *"flood gates"* argument, and because of the need for finality and certainty in commerce and regulation. That argument cannot itself provide a reason for reading down the words of a statute that are otherwise clear in their operation. Moreover in this case, other provisions of the TRRA can control the repeated use of **Section 52** by an aggrieved person and are intended to achieve finality at the end of a carefully regulated process.

28. For instance if the request for review is received more than 30 days after the decision complained of was notified the Regulator can simply decline to reconsider the decision, and that is the end of the matter: [*see:* **Sections 53 (3) (d) and 54 (1)(b)**]. If the decision is made within the 30 day period the request must be considered, but the Regulator may confirm the decision if he thinks the decision does not raise an issue of substance that warrants a variation or revocation of the decision under review: [**Section 52 (5)**]. In the event that the decision is confirmed that decision cannot be subject to Judicial Review: [**Section 53 (3)(e)**]. It may be subject to a request for "*external review*" under Section 54, but the request can be declined by the Regulator and if it is declined, that decision is not subject to judicial review [**Section 53 (3)(f)**], or to any further review right. The power of the Regulator to decline a request for external review is wide: [**Section 54 (5)**]. If a matter proceeds to external review the decision made is final: [**Sections 53 (3) (f)** and **54 (11)**]. It is always to be assumed that the Regulator will act responsibly in the performance of his powers and functions under the TRRA, and at a practical level the *"flood gates"* argument is not a persuasive one.

29. The role of the Regulator under the TRRA is an important one for the protection of the public from exploitation and anti-competitive conduct. To adopt the Digicel interpretation of Section 52 could severely limit the power of the Regulator to intervene when it is brought to his notice by an aggrieved participant in the market that a pricing structure fixed by a determination of the Regulator is or has become in need of review. In my view there are strong policy reasons inherent in the powers of the Regulator that militate against limiting the review power in Section 52 for which Digicel argues. The reasons set out by the Regulator in **paragraph 4.8** of **Draft Decision 2** illustrate a situation of the type that would warrant the Regulator intervening to conduct a review under Section 52.

30. Digicel argues that if an aggrieved person seeks review of a decision that reviews an earlier decision that must be done by judicial review under Section 53. This implies that judicial review is the exclusive avenue for challenging a decision which involves a

review of an earlier review. The TRRA does not support this implication as the judicial review provisions are permissive only and are not stated to exclude the review processes available under **Sections 52** and **54** *see also*: **Section 53 (4)**.

31. In my opinion the Regulator has power under **Section 52** of the TRRA to review a decision that has previously been made on a review under that section, and accordingly Digicel's first ground is not "*arguable*" within the meaning of **Rule 17.8 (3)(a)** of the CPR.

Ground 2: **Any internal review of a previous decision must be confined to the subject matter of the previous decision.**

32. The argument in support of this ground is premised on the proposition that the Regulator is purporting to inquire into issues that were not the subject of **Decision 1**. This is correct. The earlier review leading to **Decision 1** was confined to the *"glide path"* timing. The later request for review by TVL covers a wider field. The nature of the TVL request is also illustrated by **paragraph 4.8** of **Draft Decision 2** set out above (at para. 20).

33. There is no reason in my view why a review authorized by **Section 52** should be confined in the manner suggested. Nothing in the language of the section suggests any limitation in the scope of a review undertaken under it. Such a restriction on the power of a Regulator could severely limit, indeed frustrate, the Regulator's power to set or adjust a pricing regime in order to achieve the purposes of the TRRA. Furthermore information advanced by an aggrieved person or the Regulator's own research might indicate that an earlier decision has had unforeseen consequences in the market, or on other aspects of the earlier determination, that require a variation to aspects of the pricing structure presently in place, beyond the subject matter of the request.

34. I consider ground 2 is also not arguable.

Ground 3: **This ground is to the effect that in making Draft Decision 2 the Regulator was bound to apply the ICA rather than the TRRA.**

35. The particulars given of this ground are as follows:

"Particulars:

a) The parties to this interconnection dispute, Digicel and TVL, have already agreed in the ICA to resolve any disputes regarding interconnection charges based on benchmarking of countries that have applied cost-based pricing methodologies;

b) The ICA is still in force and governs this dispute;

c) *The role of the Regulator in determining this dispute is provided by the ICA;*

d) *The Regulator, in failing to apply provisions of the ICA, has failed;*

(i) *to make a decision that is effective to the purposes of the ICA; and*

(ii) *to take into account a mandatory relevant consideration in setting interconnection charges for the purposes of the ICA."*

36. I consider this ground is also unarguable.

37. The Regulator is not a party to the ICA and could not be required by its terms to apply **Clause 5.2(h)** to the exclusion of the primary statutory directive given to the Regulator in **Section 30** of the TRRA.

38. In my view the mere fact that the referral of the interconnection dispute occurred under **Clause 5.2** of the ICA does not mean that the Regulator is thereby precluded from exercising his powers under the TRRA. Likewise, the election or agreement of the parties to adopt benchmarking against costs-based pricing as the methodology in the ICA cannot prevent or constrain the Regulator from exercising his powers under **Section 30 (2)** to adopt "*... any other method of calculation or dertermination of the prices*" for interconnection charges.

39. The Regulator and TVL however, raise a more fundamental question. They contend the ICA became "*void*" when the TRRA came into force. **Section 29 (1) (a)** requires that an interconnection agreement "*must be consistent with*" the TRRA and **Section 32** provides: *"An interconnection agreement which is not in compliance with any provision of this Act or any license is void"*. The language of **Section 32** is not qualified by the addition of words like *"to the extent of any inconsistency"*. According to its terms, if there is any inconsistency with the provisions of the Act or any licence the interconnection agreement is "*void*".

40. In the ICA there is no saving clause to the effect that if there is any inconsistency between its terms and a statutory provision, the latter shall take precedence over the former which shall to the extent of the inconsistency no longer be of any effect.

41. The terms of **Clause 5.2(h)** of the ICA are undoubtedly in conflict with the requirements of **Section 30** in so far as the **Clause 5.2 (h)** formula would limit the more general powers of the Regulator under Section 30(2). It seems to me that **Clause 5.2(i)** must also be in conflict with the general statutory power of the Regulator to determine charges.

42. It therefore follows from my reading of **Sections 29** and **32** that the ICA is "*void*" and therefore cannot support ground 3. Having said that I do not consider this conclusion gives the TRRA retrospective operation. **Section 32** only operates to render the ICA void from the commencement of the TRRA. Up until then the ICA continued to operate.

43. Digicel argues that the Regulator is estopped from denying that it is bound by **Clause 5.2** of the ICA as it held in the Final Determination that the clause is consistent with **Section 30** of the TRRA and adopted the benchmarking approach mandated by it. More accurately, what the Regulator said is that **Clause 5.2** is *"broadly consistent"* with **Section 30**, not that there is no conflict. The reasons supporting the Final Determination certainly show that the Regulator was influenced by the requirement of **Clause 5.2(h)**. With the benefit of subsequent advice and this judgment it has transpired that the Regulator was mistaken to do so, but he cannot be estopped from asserting the correct position. Estoppel cannot operate to hinder the performance of a positive statutory duty, or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public: *see*: **Kurtovic**'s case (ibid) and **Ellis v. Attorney General** [1985] VUSC 9.

Ground 4: Inconsistency with Section 30 of the TRRA

44. I set out this ground including the particulars that have been given to support it:

> *"If the Regulator did have the power to conduct this review, to consider matters other than the review issues, and to set interconnection prices other than in accordance with Clause 5.2(h) of the ICA, it is inconsistent with s. 30 of the TRRA for the Regulator to adopt any method of determining interconnection prices other than benchmarking in this case.*
>
> *Particulars:*
>
> *a) Section 30(1) of the TRR requires the Regulator to determine interconnection charges by benchmarking against cost-orientated prices for interconnection in other jurisdictions selected by the Regulator.*
>
> *b) Section 30(2) provides that only where the Regulator is unable to identify an appropriate selection of cost-orientated prices may he use any other method of calculation.*
>
> *c) In Draft Decision 02 of 2011 the Regulator has purported to determine prices based on costs modelling, and not on benchmarking, without first investigating whether there are other suitable jurisdictions to benchmark against.*
>
> *d) In the Final Determination, the Regulator found that there were suitable jurisdictions which provided benchmarks for Vanuatu.*
>
> *e) The Regulator has therefore wrongly applied section 30 of the TRRA."*

45. In this claim the reference in para(b) above to *"an appropriate selection of cost-orientated prices in other jurisdictions"* is a reference to benchmarking. However, **Section 30(2)** provides that the Regulator may use a method other than benchmarking to determine interconnection prices *"where the Regulator determines*

that it is unable to identify an appropriate selection of cost-orientated prices in other jurisdictions."

46. In **paragraph 4.8** of **Draft Decision 2** (op.cit) the Regulator indicates that on the information before him it appears that there may not be an appropriate selection of cost-orientated prices in other jurisdictions, but **Draft Decision 2** is not in itself a decision of the Regulator that determines prices. It has no effect at all on charges earlier determined in the Final Determination and Decision 1.

47. Even if the allegation in particular(c) above that the Regulator has not yet investigated benchmark rates from other countries is correct, **Draft Decision 2** is still not a final determination. If and when a final determination following **Draft Decision 2** is made by the Regulator, he/she could, before publishing it, conduct further investigation, make the determination referred to in **Section 30 (2)** and, on that basis, use a method other than benchmarking. The Regulator has a discretion to take that course, and that discretion is not closed off by Draft Decision 2. It remains open to the Regulator to exercise that discretion, and if he does so he will be acting in accordance with his powers under the TRRA.

48. The allegation in particular(d) above seems, in substance, to repeat the estoppel argument considered in ground 3. The exercise of the Regulator's powers on a new review under **Section 52** cannot be restrained by reasoning adopted by the Regulator in an earlier determination, although it is reasonable to assume that the Regulator would not depart from earlier reasoning unless, owing to changed factual circumstances or other demonstrated need, there is good and sufficient reason for doing so.

49. I do not consider Ground 4 is arguable.

Conclusion

50. It follows from the foregoing that I am not satisfied that Digicel has an "*arguable case*" for Judicial Review. I therefore decline to hear the claim and strike out the proceedings pursuant to **Rule 17.8 (5)** of the CPR.

51. In these circumstances there is no need to consider the further arguments presented by the Regulator and TVL under **Rules 17.8(3) (b)** and **(d)**.

52. The interlocutory injunction made on **26 August 2011** is set aside. Costs should follow the event as between Digicel and the Regulator. TVL and the Attorney-General have appeared as interested parties at their own request. They are not, strictly, parties to the proceedings. They should bear their own costs.

Orders

1. The application for Judicial Review in **Civil Case 152 of 2011** is struck out, but without prejudice to any issues that may arise under the undertaking as to damages

given by the Digicel to support the grant of the interlocutory injunction made on 26 August 2011.

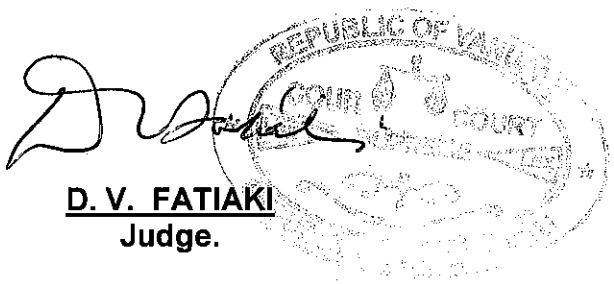
2. The said interlocutory injunction is set aside.

3. Digicel must pay the costs of the Regulator at the standard rate.

4. No order for costs for or against the interested parties.

Dated at Port Vila, this 6th day of June, 2014

BY THE COURT



D. V. FATIAKI
Judge.