

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE MATTER OF AN ARBITRATION

PURSUANT TO SECTION 82 OF THE TELECOMMUNICATIONS ACT 2001

AND HELD AT

THE TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

Ref No 0095-033-2018

Between

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Complainant

and

TRICO INDUSTRIES LIMITED

Respondent

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DECISION

PANEL: Mr. Frederick Gilkes

APPEARANCES: Mr. Justin Junkere for the Complainant
Mr. Derrick Redman for the Respondent

DATE OF DELIVERY: May 21, 2019

THE DISPUTE

1. On April 24, 2018 Telecommunications Services of Trinidad and Tobago ("TSTT") referred to the Telecommunications Authority of Trinidad and Tobago

(“*the Authority*”) for resolution, a dispute regarding its claim against TRICO Industries Limited (“*TRICO*”) in which it sought the following relief:

- (a) a determination on TRICO’s status as a concessionaire to whom TSTT’s wholesale services pricing mechanisms rightly applied;
 - (b) a determination on TRICO’s status as a concessionaire to whom TSTT’s pole sharing fees for access to facilities rightly applied; and
 - (c) a determination in support of TRICO’s full payment of the sums invoiced by TSTT for services rendered to date¹.
2. As regards the sums claimed, TSTT sought payment of the sum of \$7,446,157.84² of which:
- (a) the sum of \$6,263,832.64 represents rates alleged to be due by TRICO in respect of Wholesale Domestic Circuits (“*WDCs*”) that TSTT says it provided to TRICO during the period April 1, 2011 to June 30, 2017 and;
 - (b) \$1,182,325.20 represents fees billed by TSTT to TRICO in respect of pole rental and for the co-location of TRICO’s equipment on TSTT’s premises during the said period³.
3. TRICO is a company that provides a cable television service in the island of Tobago. Sometime prior to March 2004, TSTT began allowing TRICO access to

¹ See page 8 of the complaint submitted on April 24, 2018.

² This is the sum demanded in TSTT’s letter to TRICO dated July 5, 2017, document 9 in the Agreed Bundle.

³ In paragraph 12 of the witness statement off Martin Young, TSTT’s Manager, Carrier Services, these figures are updated to September 30, 2018: \$7,698,936.64 on account of the WDC service and \$1,414,795.20 on account of the pole rental.

its (TSTT's) fibre link from Scarborough to Roxborough and environs. On May 25, 2004⁴, TSTT wrote to TRICO indicating the fee that it was charging for the use of the said fibre link up to March 2004. It also set out in that letter the fee that it would thereafter charge for the use of the fibre link, namely, a fee of \$30 per month for every customer on TRICO's network. The arrangement was to expire on March 31, 2006 but continued to apply after that date.

4. On September 1, 2006⁵ TRICO was granted a concession to provide a broadcasting service⁶ but TSTT continued to charge the fee prescribed in 2004⁷ until early 2011 when it gave notice of its intention to change those arrangements.
5. By letter dated February 15, 2011⁸ TSTT wrote to TRICO giving notice of its intention to review rates. In June 2011 TSTT advised TRICO of the results of the said review. In its complaint to the Authority, TSTT averred as follows:

*"By letter dated **24 June 2011** (attached as **Exhibit A**), TSTT wrote to Trico to inform it of the adjustment to the nature of the commercial relationship of the parties upon Trico's new acquisition of Concession. TSTT dutifully advised Trico that the provisions of the Act and the Concession bound it [to]*

⁴ Document 1 in the Agreed Bundle.

⁵ See page 4 of TSTT's complaint, third paragraph and the third page of TRICO's Response, first paragraph. This was also the evidence of Mr. Claude Benoit, TRICO's Managing Director, given in cross-examination on November 16, 2018.

⁶ The concession was granted in accordance with section 21 of the Telecommunications Act, Chap. 47:31 of the Laws of the Republic of Trinidad and Tobago.

⁷ See TSTT's said letter dated May 25, 2004.

⁸ A copy of that letter is annexed to the witness statement of Mr. Martin Young, a witness for TSTT, and marked "M.Y.1"

*‘...treat fairly and in a non-discriminatory manner with the Concessionaires’
in its application of its pricing mechanisms.”⁹*

6. TSTT goes on to state as follows in its Complaint:

*“By letter dated **4 November 2011** (attached as **Exhibit B**), TSTT informed Trico of the conclusion of its Joint Pole Audit, (conducted by both parties) wherein it was discerned that as at 14 July 2011, Trico was utilising 984 of TSTT’s vertical telephone poles to facilitate Trico’s CTV services. Again, in a manner consistent with the provisions of the Act and the Concession, TSTT dutifully informed Trico of the standard monthly rate applicable for the provision of access to its Pole Facilities as \$14.00 per pole (exclusive of V.A.T.) which was payable by all concessionaires. TSTT also informed Trico of the effective date of billing- 1 April 2011 and informed them of the transfer of internal responsibility for the management of the account by TSTT’s Carrier Services Department.”*

7. Under the new billing arrangements, TSTT billed TRICO on a monthly basis as follows:

- (a) TRICO was billed for four WDCs (40 Mbit/s Metro-e links) at the monthly rate of \$21,260.80 plus VAT for each WDC¹⁰. That billing covered the use of TSTT’s fibre link, which TRICO was allowed to continue to use to broadcast its content.

⁹ This statement appears at page 4 of the complaint, fifth paragraph. It should be noted however that according to Mr. Martin Young, TSTT’s Manager of Carrier Services, the said arrangements were reviewed and new billing arrangements were implemented by TSTT with effect from April 1, 2011. See paragraph 10 of the said witness statement of Martin Young.

¹⁰ See copy of invoice dated May 26, 2011 annexed to the witness statement of Martin Young and marked “M.Y.2”.

- (b) TRICO was also billed for the use of 984 TSTT poles¹¹. TRICO was billed for the use of TSTT's poles at the rate of \$14.00 plus VAT per month per pole. The number of TSTT poles being used by TRICO was determined by a joint audit that was completed by the parties sometime in July 2011.
8. TRICO never paid the new rates billed by TSTT. In December 2013 it paid to TSTT the sum of \$100,644.00 on account of charges due under the 2004 arrangements. That sum covered services rendered up to March 2011, that is, before TSTT began charging its new rates¹². As regards the rates that TSTT charged on account of services rendered from April 1, 2011 onwards, TRICO has paid only a portion of the rates billed¹³.
9. TRICO's Response to TSTT's Complaint was submitted on May 21, 2018. In it, TRICO contended that:
- (a) at all material times, TRICO took a "*dark fibre*" service from TSTT but was billed, from April 2011 for a WDC service (40 Mbit/s Metro-e links), which was a service that TRICO never requested, and one that TSTT never provided;
- (b) as regards TSTT's pole rental charges, the rate of \$14.00 plus VAT per month per pole that TSTT charged was a unilateral decision that TSTT made; TRICO also questioned how TSTT determined that rate; and

¹¹ In its pleaded case and in its evidence, TSTT spoke of having billed for co-location of TRICO's plant/equipment but it does not appear that a separate charge was applied for this item.

¹² See page 6 of TSTT's Complaint. This was acknowledged by Mr. Benoit, TRICO's Managing Director, in his Witness Statement at paragraph L.

¹³ At paragraph 13 of the witness statement of Martin Young, that figure is put at \$1,035,000.00. That sum was paid between November 2012 and December 2013.

- (c) TRICO never agreed the effective date from which TSTT implemented its new rates (that is, from April 1, 2011) and that the said date was arbitrarily set by TSTT.

10. In its Reply submitted on June 21, 2018 TSTT did the following:

- (a) It accepted that at all material times it provided TRICO with a “*dark fibre*” service. It also accepted that that service was different from its WDC service, but it contended that within its suite of services, the WDC service most aptly described the nature and scope of service that it provided to TRICO for the transmission of its cable TV service¹⁴.
- (b) It contended that because it was required to treat TRICO in a non-discriminatory manner, TRICO was liable for the standard rates for pole rental which it applied to all other operators, that rate being \$14.00 plus VAT per month per pole¹⁵.
- (c) It further contended that TRICO never took issue, until the present proceedings, with the date from which TSTT implemented its new rates¹⁶.

THE DISPUTE RESOLUTION PROCESS

11. Paragraph 8.2.1 of the Authority’s Procedures for the Resolution of Disputes confers on the dispute resolution panel, jurisdiction, subject to any applicable law, to determine any and all matters pertaining to a dispute that has been referred to the Authority. Those procedures were established in furtherance of

¹⁴ See paragraph D on page 3 of TSTT’s Reply.

¹⁵ See paragraph F on page 5 of TSTT’s Reply.

¹⁶ See paragraph G on page 6 of TSTT’s Reply.

the mandate contained in section 82 (1) of the Telecommunications Act¹⁷, which provides as follows:

“The Authority shall establish a dispute resolution process to be utilised in the event of a complaint or dispute arising between parties in respect of any matter to which section 18(1)(m) or 25(2)(h) applies, or where a negotiated settlement, as required under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution.” [Emphasis added]

12. Section 26 of the Telecommunications Act provides as follows:

- (1) “Subject to the provisions of this section, it shall be a further condition of a concession for a public telecommunications network and broadcasting service that the concessionaire be required to provide other concessionaires with access to the facilities that it owns or controls, such access not to be unreasonably withheld.”*
- (2) Access to facilities shall be negotiated between concessionaires on a non-discriminatory and equitable basis and, at the request of either party, the Authority may assist in negotiating a settlement between such parties.*
- (3) A concessionaire may deny access only where it demonstrates that there is insufficient capacity in the facility, taking into account its reasonably anticipated requirements and its obligations pursuant to section 27, or, for reasons of safety, security, reliability or difficulty of a technical or engineering nature.*

¹⁷ Chap. 47:31 of the Revised Laws of Trinidad and Tobago.

(4) *The Authority may regulate the rates, terms and conditions for access to any facility, such rates, terms and conditions to be just and reasonable and it may adopt procedures necessary and appropriate to facilitate, by such means as the Authority deems appropriate, the determination of complaints concerning such rates, terms and conditions.*

(5) *For purposes of this section, access to facilities does not include interconnection.” [Emphasis added]*

13. The parties, having failed to agree rates at which TRICO would have access to TSTT’s facilities, have elected to refer the current dispute for determination by the panel.

THE ISSUES

14. Despite the manner in which TSTT framed the issues that it referred for determination by the panel, it does not appear that TRICO’s status as a concessionaire is a matter that is in dispute. Both parties accepted that TRICO became a concessionaire on September 1, 2006. What TSTT has asked the panel to determine is whether, as a concessionaire, TRICO is obliged to pay for the use of TSTT’s fibre link, the rate that TSTT charged for WDCs and to pay for the use of TSTT’s poles, the rate that TSTT says it normally charged other concessionaires.
15. It is also not in dispute that the fibre link service that TSTT provided to TRICO remained unchanged from the inception of the service in 2004, through TRICO obtaining its concession in September 2006 and after TSTT increased its rates in April 2011. At all material times, TSTT provided TRICO with what both parties described as “*dark fibre*”, meaning that TRICO was afforded access to TSTT’s fibre network and that TRICO utilised its own equipment to “*light*” the fibre or to generate the data/content that was broadcasted on the network.

16. At issue, as stated above, is whether TSTT is entitled to recover the rates that it charged from April 1, 2011 for the “*dark fibre*” service that it provided and for pole rentals. TRICO is contending that TSTT was only entitled to charge the rates that were implemented under the 2004 arrangements.
17. There is one other issue that TRICO raised that may be disposed of at this juncture. TRICO sought to raise an issue at the hearing of the dispute (when it submitted its list of issues) as to whether portions of TSTT’s claim were barred by the provisions of the Limitation of Certain Actions Act¹⁸. Section 3 (1) of that Act provides as follows:

“The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:

- (a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;*
- (b) actions to enforce the award of an arbitrator given under an arbitration agreement (other than an agreement made by deed); or*
- (c) actions to recover any sum recoverable by virtue of any enactment.*

18. The panel raised, at the hearing of the dispute, the question whether a party to a dispute referred to the Authority for determination, may avail itself of the provisions of the Limitation of Certain Actions Act. Section 2 of the Limitation of Certain Actions Act, in defining the actions that it bars, refers to “*civil*

¹⁸ Chap. 7:09 of the Laws of the Republic of Trinidad and Tobago.

proceedings in a Court of law other than those relating to real property". A "court" is defined in section 78 of the Interpretation Act¹⁹ as referring to "*any Court of Trinidad and Tobago of competent jurisdiction*". Black's Law Dictionary²⁰ defines a court of competent jurisdiction as one "*that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy*".

19. The assumption is therefore that limitation can be raised in the present proceedings. The panel has formed the view however, that TRICO ought not to be allowed to do so in the instant case for the following reasons:

(a) The practice in a Court of law is that the defence of limitation must be raised in a party's pleadings. If it is not so raised, as was the case here, the party seeking to rely on limitation should not be allowed to avail itself of the defence at a hearing of the merits of the case. See in that regard: **First Citizens Bank Limited v. Shepboys Limited and Anor**²¹.

(b) Further, the Authority's own Procedures for the Resolution of Disputes also required TRICO, in making its initial submissions to the Authority, to "*raise all relevant issues in dispute and submit all such information as is necessary to support its position*". The issue of limitation was not raised in TRICO's initial submissions to the Authority.

20. Returning to the issues for consideration by the panel, since TSTT is the party that reported the dispute and is seeking to recover charges billed for services rendered since April 2011, the burden is on TSTT to establish its claim.

¹⁹ Chap. 3:01 of the Laws of the Republic of Trinidad and Tobago.

²⁰ Ninth Edition (2009).

²¹ CV2010-03518 (P231 of 2011).

Accordingly, it is appropriate to start with a review of the evidence that was presented by TSTT.

TSTT's EVIDENCE

21. Witness statements were submitted in the names of Mr. Kurt Salandy, TSTT's Manager, Network and Support Services-Tobago Operations, Mr. Martin Young, TSTT's Manager, Carrier Services, Mrs. Oona George-Roberts, TSTT's Section Manager, Plant Operations, Tobago Operations and Mr. Charles Carter, a Consultant at TSTT, who was also, at times material to this dispute, TSTT's Head Legal and Regulatory, Executive Vice President.

MR. KURT SALANDY

22. Mr. Salandy held the position of Section Manager, Network and Support Services at TSTT from 2005 to the date of the hearing. He was responsible for the overall technical maintenance of network and cell sites in Tobago.
23. Mr. Salandy's evidence was that TSTT, at all material times, had different cable facilities provided to its business customers, most of which involved TSTT providing fibre as well as the means to transmit data over the fibre. Mr Salandy explained that in the case of TRICO, what TSTT provided was "*dark fibre*", meaning that it was TRICO who provided the means to transmit data over the fibre or to "*light up*" the core of the fibre²².
24. Mr. Salandy also gave the following evidence:

²² This explanation was given in the course of cross-examination.

- (a) He indicated that what TRICO received with the “*dark fibre*” service was an uncapped bandwidth and that TSTT also facilitated the co-location of TRICO’s equipment. He further indicated that the service provided to TRICO was not one that was ordinarily provided to other business customers. In cross-examination he indicated that the service was customized to TRICO’s needs.
- (b) He also indicated that while WDCs were provided to other concessionaires, they were not actually provided to TRICO. He accepted that TRICO provided its own equipment, which it used to generate the data that it transmitted over TSTT’s fibre network. He was of the view however, that the service most closely aligned to that which was provided to TRICO was the WDC service.
- (c) He further explained in cross-examination that usually when TSTT provided the WDC service, everything was provided by TSTT and TSTT would have control over how much bandwidth was provided to the customer. He explained that the WDC (metro-ethernet link) was a service that TSTT provided to business customers for internet purposes as part of the WDC configuration. TSTT, as the provider of the WDC service was able to quantify what was being delivered and was in a position to address complaints from customers. TSTT also owned the equipment used in providing the WDC service.
- (d) In respect of the “*dark fibre*” service, he explained that TSTT would not have control over the bandwidth being delivered, as that would be determined by TRICO whose equipment would be used to generate the data being delivered on the fibre. He also explained that the volume of bandwidth required was related to the content being transmitted. For example, a video signal required more bandwidth than a voice signal.

- (e) He expressed the view that TRICO's equipment needed a physical location to be housed to protect it from the elements, as well as a DC power supply and a temperature-controlled environment. In cross-examination however, he was shown photographs of transceivers located in Moriah that were seemingly exposed to the elements, which seemingly undermined his suggestion that TSTT's equipment required protection from the elements.
- (f) With respect to the cooling of the equipment, he stated that TSTT's equipment needed to operate within a temperature range that was cool in order to prevent the breakdown of the equipment. While he suspected that TRICO's equipment also required cooling, he did not know what range of temperature was required for TRICO's equipment. When challenged with the pictures referenced above, he explained that TSTT did not provide cooling for the Moriah unit.
- (g) On the question of TSTT's maintenance of TRICO's equipment, he admitted in cross-examination that TSTT did not, at any material time, maintain TRICO's equipment or its transceivers. Transceivers transmit signals from the fibre optic cable. He stated that TSTT gave access to TRICO's technicians if equipment had to be upgraded, tested and so on but that TSTT did not engage in the maintenance of TRICO's equipment. Where there was any damage to the physical cable, TSTT was obliged to repair the cable and if one core on the cable that transferred TRICO's data was damaged then that core was repaired.

MR. MARTIN YOUNG

- 25. Mr. Young was the Manager of Carrier Services at the time of the hearing. At that time, he had been with the organisation for 36 years, working primarily in

finance related areas. He moved to the Carrier Services Department in or about 2003 and was appointed Manager of International Carrier Accounts in 2008.

26. Carrier Services Operations were set up to treat with concessionaires and the wholesale arm of sales. Mr. Young, as indicated above, worked primarily in finance related areas at TSTT for many years and had been responsible for determining billing. His evidence was that that when TRICO received its concession in September 2006, regulatory requirements dictated that TSTT treat TRICO differently from how it had been treated before.
27. Once a concessionaire fell within the province of Carrier Services, TSTT could only provide it with services that existed within the portfolio of Carrier Services. There was no standard billing for "*dark fibre*" alone however, as TSTT was not in the business of offering that service. That service therefore had to be aligned with existing services. The only similar service was the WDC service.
28. Mr. Young also gave the following evidence:
 - (a) He indicated that by letter dated February 15, 2011²³ under the hand of the former Head of Carrier Services, Ms Natasha De Coteau-Subero, TSTT informed TRICO that the services that it was receiving were being treated as wholesale services and were being managed by Carrier Services at TSTT. The letter also sought to confirm the services utilised by TRICO and the number of TSTT poles on which TRICO affixed its cables, all with a view to entering into a formal agreement.
 - (b) Pricing for the use of TSTT's fibre service was determined in accordance with the rules governing TSTT's WDC service, which cost \$26,576.00 per

²³ Exhibited to the witness statement of Martin Young and marked "MY1".

month per circuit for 40 mbs, subject to a 20% discount²⁴. The new pricing regime was articulated to TRICO by letter dated April 11, 2011²⁵ and the new rates were to be applied from that month onwards. TRICO continued to utilize TSTT's fibre and infrastructure after being notified of the new rates.

- (c) In cross-examination, Mr. Young accepted that the nature of the services provided to TRICO was access to "*dark fibre*" for the provision of services related to cable TV and that that service did not change in terms of how it was delivered. TSTT charged for WDCs with bandwidths of 40 mbs but did not actually provide those services to TRICO.
- (d) The "*dark fibre*" service being provided to TRICO was unique. It involved the transmission of TRICO's data on the backbone of TSTT's fibre infrastructure. TRICO received unlimited bandwidth as opposed to what TSTT usually provided, which was, under its most costly WDC package, a capped bandwidth of 40 mbs. Apart from TRICO being afforded access to uncapped bandwidth, TSTT still applied a 20% bulk discount in order to make the new pricing arrangement more cost-effective for TRICO²⁶.
- (e) At paragraph 6 of his witness statement, Mr. Young gave the following evidence:

"The comparison between WDC services and the services offered to Trico was actually advantageous to Trico, since the value of the

²⁴ See paragraph 9 of his witness statement.

²⁵ The said letter was not exhibited to Mr Young's witness statement.

²⁶ See paragraph 7 of his witness statement.

*auxiliary services being offered to TRICO to sustain its own equipment which was located, housed, powered, cooled and maintained entirely by TSTT far exceeded the cost of rental of TSTT's own equipment under a traditional WDC/Leased Circuit agreement.*²⁷

It is not clear that this evidence was supported by the evidence given later at paragraph 14 of Mr. Young's witness statement. That evidence is dealt with below.

- (f) In cross-examination, Mr. Young stated that Carrier Services' rates were determined by applying a cost model for each of the services, primarily using the activity-based costing (ABC) method. He accepted that TSTT could have used the ABC method to assess the cost of installing and depreciating the "*dark fibre*".
- (g) Mr. Young also gave evidence, at paragraph 14 of his witness statement, to the effect that if a cost basis were applied, employing a pricing regime based on the formula of fibre costing plus co-location costs plus operation and maintenance costs, TSTT would have been entitled to charge TRICO the sum of \$8,014,275.80 during the period April 2011 to September 2018²⁸. Particulars of how that sum was derived are set out in the document marked "**M.Y.7**" which is annexed to Mr. Young's witness statement. Document "**M.Y.7**" indicated the following:

²⁷ See paragraph 6 of his witness statement.

²⁸ See paragraph 14 of his witness statement and also the table exhibited as MY7 for comparative analysis.

1. Co-location Costing

According to the document “*M.Y.7*”, this costing was based on enterprise pricing for rack utilization at the various exchanges. TRICO’s equipment at the Scarborough Exchange was said to have been installed on a full rack measuring 6 feet by 4 feet. TRICO’s equipment at the Roxborough Exchange however was said to have utilized less than 25% of the rack space while TRICO’s equipment at Moriah, Speyside and Charlotteville was apparently not mounted on a rack but each utilized an equivalent of less than 25% of the rack space at the other sites. Based on the above estimates, TRICO’s equipment accordingly utilized approximately 2 racks per month.

The unit cost per rack was given as US\$2,700.00 after applying a 10% reduction of the enterprise pricing of US\$3,000.00 for a full rack. Two racks therefore amounted to US\$5,400.00 (US\$2,700.00 x 2). Applying a conversion rate of TTD6.7 to USD1, the monthly estimated cost for two racks amounted to TT\$36,180.00 (US\$5,400.00 x 6.7).

The estimated cost based on this formula for the period April 2011 to September 2018 amounted to \$3,715,686.00 VAT inclusive;

2. The cost of the fibre

This cost was estimated at \$30,104.17 plus VAT per month. During the period April 2011 to September 2018, the total cost of fibre was estimated at and totalled \$3,091,697.92 VAT inclusive. (It is not clear how Mr. Young derived this monthly cost for the fibre).

3. **The cost of operation and maintenance of the fibre**

This cost was calculated at 15% of the \$30,104.17 estimated monthly cost of the fibre, that is, \$4515.63 plus VAT. The estimated cost of operating and maintaining the fibre during the period April 2011 to September 2018 totalled \$463,754.69 VAT inclusive. Mr. Young considered that that cost included upgrades to TSTT's fibre and equipment, the benefits of which TRICO would have enjoyed.

4. **The cost of operation and maintenance associated with the co-location of TRICO's equipment**

This cost was calculated at a rate of 20% of the monthly co-location cost mentioned above of \$36,180.00 plus VAT. The estimated cost totalled \$743,137.20 for the period April 2011 to September 2018. Mr. Young considered that the 20% cost catered for TSTT personnel overseeing TRICO's onsite visits, utilization of AC power, cooling for TRICO's equipment and access to a back-up power generator.

- (h) The information contained in document "**M.Y.7**" was not challenged in cross-examination.
- (i) Mr. Young was also of the view that TRICO's analogue equipment was reliant on TSTT for physical location, storage and protection from the elements and maintenance for its operation.
- (j) As regards the pole rental charges, Mr. Young gave evidence that a pole audit was concluded on July 14, 2011, which revealed that TRICO used 984 of TSTT's poles. TRICO was billed at a rate of \$14.00 plus VAT per pole per month effective April 1, 2011. That rate was consistent with the rates

applied to other concessionaires²⁹. His evidence was that ***that*** was the rate that was billed to Columbus Communications³⁰.

It should be noted that among the agreed documents provided to the panel, was a copy of an agreement dated December 15, 2016 made between TSTT and Massy Communications Ltd in which TSTT charged Massy the sum of \$14.00 plus VAT per pole per month³¹.

(k) Mr. Young also stated that TRICO attempted to make payments on the basis of the expired 2004 agreement and that between November 2012 and December 2013, it paid a total sum of \$1,035,000.00, which was applied to the sum due on its WDC account.

29. Mr. Young also indicated that as at September 30, 2018, the total amount due on account of the WDC service, after applying the sum of \$1,035,000.00 paid as aforesaid, amounted to \$7,698,936.64.

30. Mr. Young's evidence was that the debt due, as at September 30, 2018 on account of pole sharing charges, was \$1,414,795.20.

MRS. OONA GEORGE-ROBERTS

31. Mrs. George-Roberts was the Section Manager of Plant Operations in Tobago from 2015 to the date of the hearing. Previous to that appointment, she worked in the Repair Service Bureau from 2001.

32. Mrs. George-Roberts' evidence was that there was a pole sharing arrangement between TSTT and TRICO, that TRICO's equipment was located at five of TSTT's

²⁹ See paragraph 11 of his witness statement.

³⁰ See annexure "***M.Y.4***".

³¹ See item 15 of the Agreed Bundle.

exchanges, that TRICO had cables affixed to TSTT's poles and that TSTT conducted remedial works to its fibre. She also indicated that the rates at which pole sharing agreements were set were largely governed by the Access to Facilities Regulations, in order to encourage parity in the marketplace.

33. In cross-examination Counsel for TRICO sought to put to Mrs. George-Roberts that the number of cables strung by TSTT on the Trinidad and Tobago Electricity Commission's (TTEC) poles were far greater than the number strung by TRICO on TSTT's poles. The line of questioning suggested that TSTT was paying the same rate for use of TTEC poles that TRICO was being charged for the use of TSTT's poles but strung a much larger number of attachments than TRICO did. Mrs. George-Roberts would only admit seeing two TSTT attachments on TTEC poles.

MR. CHARLES CARTER

34. Mr. Carter was, at the time of the hearing, a Consultant at TSTT. Prior to that, he was TSTT's Head of Legal and Regulatory and its Executive Vice President.
35. Mr. Carter's evidence was that after TRICO became a concessionaire in 2006, TSTT had to treat TRICO like other concessionaires. He agreed that TSTT provided a service to TRICO that was incorrectly described as a WDC service and that TRICO never actually received the WDC service. He accepted that TRICO only received "*dark fibre*", and that it was TRICO who energized the fibre. According to Mr. Carter, the WDC package was the closest existing service that was being provided by TSTT.
36. Mr. Carter also gave the following evidence as to the history of the commercial relationship between the parties:

- (a) In March 2004 TSTT entered into a two-year contract with TRICO for use of TSTT's "*dark fibre*" so as to facilitate TRICO's cable television broadcasting services in Tobago³². Following the expiration of the contract in 2006, the provision of services continued but there was no new agreement executed between the parties³³. TRICO also affixed its cables to 984 of TSTT's poles along the length of TRICO's transmission route and co-located its transmission equipment in TSTT's various exchanges³⁴.
- (b) When TRICO became a concessionaire on September 1, 2006, pursuant to the Telecommunications Act, this meant that TRICO's relationship with TSTT would also change in accordance with the Act and in compliance with the concession³⁵.
- (c) By letter dated June 24, 2011, TSTT wrote to TRICO concerning the transfer of the internal management of the account to TSTT's Carrier Services Department and an adjustment to the nature of the commercial relationship between the parties following TRICO becoming a concessionaire. At the date of that letter, TSTT provided TRICO with four links namely, Scarborough to Moriah, Scarborough to Roxborough, Roxborough to Speyside and Speyside to Charlotteville. The letter also addressed the proposed establishment of a fifth link, covering Roxborough to Pembroke, which TSTT would have priced on a similar basis as the other links³⁶.

³² See paragraph 6 of his witness statement.

³³ See paragraph 8 of his witness statement.

³⁴ See paragraph 7 of his witness statement.

³⁵ See paragraph 9 of his witness statement.

³⁶ See paragraphs 11 and 12 of his witness statement.

- (d) By letter dated November 4, 2011, TSTT informed TRICO of the conclusion of the joint pole audit, which revealed that as at July 14, 2011 TRICO was using 984 of TSTT's telephone poles to facilitate TRICO's cable television services. TSTT informed TRICO that it would be charged \$14.00 per pole effective April 1, 2011³⁷.
- (e) A series of meetings and correspondence ensued between the parties from October 4, 2012 to October 2, 2013 to discuss the way forward in terms of payment of the outstanding sums owed to TSTT³⁸. By letter dated October 2, 2013, TSTT wrote to TRICO confirming an agreement which involved TRICO discontinuing its CTV service between Scarborough and Charlotteville and agreeing to settle all debts prior to April 1, 2011 on the basis of the old rate, such sum amounting to \$100,644.00. TRICO made that payment of \$100,644.00 in December 2013³⁹.
- (f) On May 10, 2017 TSTT decided that unless TRICO settled the outstanding invoices, the services would be suspended immediately⁴⁰. Mr. Carter stated that the parties met again on July 6, 2017 and that at that meeting Mr. Benoit, TRICO's Managing Director, indicated that TRICO was prepared to pay to TSTT the sum of \$800,000.00 representing the sum that TRICO considered to be due, if charges were calculated in accordance with the rate set in the 2004 Agreement⁴¹.

³⁷ See paragraph 13 of his witness statement.

³⁸ See paragraphs 14 to 18 of his witness statement.

³⁹ See paragraph 19 of his witness statement.

⁴⁰ See paragraph 21 of his witness statement.

⁴¹ See paragraphs 22 and 23 of his witness statement.

- (g) TSTT eventually served TRICO with a notice of termination dated July 5, 2017⁴² and on July 10, 2017 TRICO wrote to make proposals for the liquidation of the debt. TSTT rejected TRICO's proposal and confirmed its earlier decision to terminate the services. By letter dated July 13, 2017, TRICO threatened to seek injunctive relief to prevent disconnection of the services⁴³.

37. In cross-examination, the following evidence was given:

- (a) Mr. Carter accepted that TRICO did not receive WDC services as defined by TSTT but rather TRICO received a "*dark fibre*" service. The "*dark fibre*" was lit using TRICO's equipment. He insisted that the WDC service was the closest to what was being offered to TRICO and he admitted that TSTT provided a service to TRICO that was incorrectly described as a WDC service. He stated that TSTT provided TRICO with unlimited access and capacity on its "*dark fibre*" and that it billed TRICO at the rate of 40 megabits per second.
- (b) Mr. Carter also accepted in cross-examination that in TSTT's Reply, TSTT took a different approach to what was articulated in its initial Complaint. He accepted that TRICO's Attorney-at-Law, Mr. Saunders, by letter dated July 13, 2017⁴⁴, took issue with the contention that TRICO received a WDC service. He also accepted that in the face of that letter, TSTT in its Complaint still made a claim for charges for the provision of a WDC service. Mr. Carter did not accept that the difference in the way TSTT's claim was expressed in the Complaint and the way it was expressed in the Reply had to do with his belated discovery that what TSTT was in fact

⁴² See paragraph 26 of his witness statement.

⁴³ See paragraph 13 of his witness statement.

⁴⁴ See exhibit **T1** to TRICO's Response submitted on May 21, 2018.

providing was a “*dark fibre*” service that was lit by TRICO and not a WDC service.

- (c) Mr. Carter explained to the panel that during negotiations, it was agreed between the parties that TRICO was using five circuits and that as an act of good faith, TSTT would bill for four circuits at 40 mbs. He accepted that it was recognised by both parties that TSTT had no way of determining the bandwidth actually used by TRICO.
- (d) Mr. Carter’s evidence was that Mr. Benoit, in the course of negotiations, had countered and suggested that instead of billing TRICO for four circuits, TRICO should be billed for two. Mr. Benoit’s argument was that given the few households in certain areas of Tobago, any other pricing would have been beyond TRICO’s means. The discussions with TRICO continued along the lines of how much TSTT should bill in terms of number of circuits.
- (e) Mr. Carter was referred to TSTT’s letter dated October 2, 2013 under the hand of its Head of Legal, which stated that TSTT provided TRICO with five WDC circuits. He explained that given the series of negotiations, TSTT ended up using the terms interchangeably. TRICO was not receiving any of the established wholesale services that TSTT provided but it was billed at the lower end of those services.
- (f) With respect to the pole sharing facilities, Mr Carter stated that TTEC owned the bulk of poles and sets the rates. As at 2014, the TTEC rate was \$18.77 per pole with one attachment with increases every year and with each additional attachment costing \$6.25. He also stated that the rate of \$14.00 that was charged to TRICO was 10 to 12 years old and was certainly not the current rate that TSTT was paying.

TRICO'S EVIDENCE

MR. CLAUDE BENOIT

38. Mr. Benoit was at all material times TRICO's Managing Director. TRICO was in the business of providing cable television services and also generated some content. Mr. Benoit confirmed in his witness statement that TRICO did not receive WDCs but had access to "*dark fibre*" and that TRICO affixed its cables to TSTT's poles.
39. Mr. Benoit did not dispute that the 2004 agreement expired on March 31, 2006 and that TSTT continued to provide the same service following the expiration of the agreement. Even after TRICO became a concessionaire on September 1, 2006 within the meaning of the Telecommunications Act, TRICO continued to receive the same service.
40. Mr. Benoit also gave the following evidence:
- (a) He stated that TRICO's attempts to pay for the "*dark fibre*" service have been rejected by TSTT and that TRICO was willing to pay for pole use once TSTT initiated a fair process by which cost-based rates for same were established⁴⁵.
 - (b) He denied that TSTT ever provided TRICO with 40 mbs or metro e-links. He also complained that following the joint audit TSTT made its sole decision to charge \$14.00 per pole and TRICO was not a part of any process that determined the rate nor was TRICO aware if TSTT provided the same rate for other users. TRICO was also not aware as to how the

⁴⁵ See paragraph 7 of his witness statement.

effective billing date was determined, and contended that it was arbitrary⁴⁶.

- (c) He further denied agreeing to the pole rate of \$14.00 and maintained that TTEC was charging much less than TSTT because Tobago is a special market, which was one of the critical factors that TRICO considered when it first entered into the 2004 agreement⁴⁷.
- (d) He also stated that TRICO could not agree to execute any agreement, as the parties were still very far apart on what could be fair and just pricing⁴⁸. He further stated that TRICO settled its debt in the sum of \$100,644.00 and held the position that it would pay its just debts and that it did pay for "*dark fibre*" consistent with the terms and conditions of the initial contract since TSTT never changed what it provided to TRICO⁴⁹.

41. In cross-examination, Mr. Benoit gave the following evidence:

- (a) He confirmed that TRICO had its own equipment to light the fibre, and that electricity was required to operate that equipment. The equipment was located at TSTT's premises, which Mr. Benoit believed were secured from general public access. Mr. Benoit also accepted that TRICO had various connections attached to TSTT's poles and that it had not paid TSTT in respect of any of those connections.
- (b) He accepted that in 2011 TSTT informed TRICO of the transfer of responsibility for its account and new billing for services. He also accepted

⁴⁶ See paragraph 10E of his witness statement.

⁴⁷ See paragraph 10E of his witness statement.

⁴⁸ See paragraph 10K of his witness statement.

⁴⁹ See paragraph 10L of his witness statement.

that from 2011 to the date of hearing, TRICO continued to use the “*dark fibre*” service that TSTT provided. From 2011, TRICO was aware that the price for the services had changed and that up to the date of hearing, TRICO had not sought to terminate the provision of those services by TSTT. In addition, Mr. Benoit accepted that TRICO had affixed cables to TSTT’s poles, had not paid for the use of the said poles and that TRICO was still indebted to TSTT for use of its poles. He also accepted that TRICO was indebted to TSTT for “*dark fibre*”.

- (c) He admitted that in his letter dated June 16, 2011, he did not object to the words “*domestic circuits*” and that he continually used those words to describe the service that TRICO received from TSTT. Mr Benoit also accepted that in the said letter, he acknowledged that there was an expectation that there ought to be an increase in the charges. He stated that his willingness to sign a Wholesale Carrier Agreement was in the context of what he had said earlier in the letter and whether TSTT was prepared to consider what he had said.
- (d) With respect to the pole rates, Mr. Benoit indicated that TTEC charged a rate in Tobago that was half the rate that was charged in Trinidad. He believed that the rate that TTEC charged in Trinidad in 2012 was \$12.00 and that in Tobago TTEC charged \$6.00. According to Mr. Benoit, despite TTEC charging less for pole rental, it was not an option for TRICO to move to TTEC’s poles. He could not recall when last TRICO made a payment to TSTT.

DISPOSITION

- 42. Insofar as TSTT’s claim sounds in contract, in order to establish its claim, TSTT must establish that TRICO accepted or agreed to pay the rates that it charged for its services from April 1, 2011. TRICO did, in turn, suggest that the 2004

payment arrangements continued to apply after April 1, 2011⁵⁰. That proposition too requires the application of certain general principles of the law of contract.

THE APPLICATION OF THE 2004 AGREEMENT

43. It is convenient to start with TRICO's contention first. The panel has considered the proposition that the 2004 agreement is what continued to apply after April 2011 but has reached the conclusion that *that* proposition is not supported by the evidence. The following principles of the law of contract were considered in arriving at that conclusion:

- (a) An agreement may always be lawfully terminated in accordance with its terms. An agreement that is made for a fixed term would usually run for the duration of that term, but may be terminated during such term if the agreement contains a provision to that effect.
- (b) If, after the expiry of an agreement, the parties thereto choose to continue their relationship, a new agreement of no fixed duration may be thereby created. The new agreement would, however, likely be terminable upon giving reasonable notice, as the law does not countenance obligations that are required to be performed in perpetuity.
- (c) Where an agreement contains no provision for its termination, the law usually implies a term that such agreement may be terminated with

⁵⁰ In its Complaint, TSTT claimed the payment of charges billed during the period April 2011 to June 2017. It should be noted however that Mr. Martin Young in his witness statement provided an update of TSTT's charges to September 2018. See paragraph 12 of his witness statement.

reasonable notice⁵¹. As explained in **Staffordshire Area Health Authority v. South Staffordshire Waterworks Co:**

*"...when a person agrees to supply goods or services continuously over an unlimited period of time in return for a fixed monthly or yearly payment, the courts shrink from holding it to be an agreement in perpetuity. The reason is because it is so unequal. The cost of supply of goods and services goes up with inflation through the rooftops: and the fixed payment goes down to the bottom of the well so that it is worth little or nothing. Rather than tolerate such inequality, the courts will construe the contract so as to hold that it is determinable by reasonable notice. They do this by reference to the modern rule of construction. They say that in the circumstances as they have developed, which the parties never had in mind, the contract ceases to bind the parties forever. It can be determined on reasonable notice."*⁵²

44. As was intimated above, it is the panel's view that the evidence does not support the contention that the 2004 arrangements continued to apply after April 1, 2011. In the panel's view, it was TSTT's clear intention in 2011 to bring the 2004 arrangements to an end. The correspondence that passed between TSTT and TRICO in 2011, starting with TSTT's letter dated February 15, 2011 made that abundantly clear. By April 2011, TSTT and TRICO had met and discussed new billing arrangements and by June 2011, TRICO appears to have accepted that the 2004 arrangements were at an end. Indeed, it sought to engage TSTT on the question of the formula being employed in calculating the new rates.

⁵¹ See Chitty on Contracts, 30th edn, para 13-027

⁵² [1978] 3 All ER 769 at 775, Denning MR

45. In his letter to TSTT dated June 16, 2011,⁵³ TRICO's Managing Director, Mr. Claude Benoit, wrote to TSTT in the following terms:

"The purpose of this letter is to attempt to resolve all the matters that are outstanding between Trico Industries Ltd. and Carrier Services of TSTT.

The first matter to be resolved is the cost or charges for the Domestic Circuits.

In our original agreement with TSTT Trico Industries paid, based on the number of subscribers using the system. This was done like this because these rural communities would never have the population to justify any other forms of payment.

Carrier Service is suggesting that the new arrangement will be based on the Bandwidth and Circuits used. *In our system (according to Carrier Service calculation) we will now have a total of Five Circuits. (On your list you have left out Roxborough to Pembroke).*

At this time we have approximately 950 customers using the system, and we pay TSTT approximately \$28,500.00 per month. To increase this amount to \$159,456.00 per month for five circuits would not be economical.

In order to solve this problem, I suggest that Carrier Services treat with the entire system as two special circuits and allowing Trico to pay a total of \$38,000.00 per month. This amounts to a 33% increase in our payment to TSTT at this time. The circuits will be Scarborough to Charlotteville and Scarborough to Moriah. I must indicate that Trico has only 162 customers on the Scarborough to Moriah circuit.

⁵³ A copy of the letter is annexed to TSTT's Reply submitted on June 21, 2018 and marked "B".

The other matter to deal with is the charge for removing our equipment from TSTT premises.

It is to be noted that Trico has all that is required to move the equipment from the buildings. We can supply the cable and we can do the splicing of the fibre. Because of this we believe that \$40,000 is too high a price to pay for this move. We are asking that we be given the opportunity to effect the move ourselves.

We are still awaiting staff from TSTT to conclude the pole audit. We agree to sign the Wholesale Carrier Agreement when you or your team visit Tobago.

[Emphasis added]

46. In the panel's view, TRICO was well aware that the 2004 arrangements were not going to govern the arrangements from 2011 onwards. Mr. Benoit, TRICO's Managing Director, also appeared to accept in cross-examination that the issue, moving forward, was the price that TRICO was going to pay for the services being rendered. That also was the tone that he took in his said letter to TSTT dated June 16, 2011 (quoted *in extenso* above).
47. In the course of its correspondence with TSTT in relation to the new payment arrangements, it does not appear that TRICO ever took issue with the length of notice that TSTT gave of its intention to terminate the 2004 arrangements. That issue was only raised when this dispute was referred to the Authority for resolution. In any event, at the hearing of the dispute, TRICO did not suggest a date, as an alternative to April 1, 2011, from which the new rates ought to have taken effect. The sole issue appeared to be, what rates TSTT was going to bill for its "*dark fibre*" service and for the use of its poles under the new arrangements.
48. TSTT produced in evidence, a copy of the invoice in respect of the "*dark fibre*"

service provided during the month of April 2011⁵⁴. That invoice indicated that TSTT's charges were being calculated by reference to the number of WDCs/Metro-e links being used by TRICO. TRICO suggested at the hearing of the dispute that this form of billing, that is, billing by reference to circuits, demonstrated that TSTT was confused as to the type of service that it was offering to TRICO and that it was labouring under the misapprehension that the service had changed from "*dark*" to "*lit*" fibre, with TSTT's circuits being used to light the fibre. The panel does not, however, believe that there was any such confusion or misapprehension on TSTT's part.

49. Both TSTT and TRICO, in the panel's view, always understood that TRICO never in fact used WDCs. Both were well aware of the fact that what TSTT provided was "*dark fibre*" and both knew that TRICO was using its own equipment to "*light*" the fibre. The panel therefore accepts TSTT's explanation that what it sought to do was match the "*dark fibre*" service that it was offering to TRICO (which was unlike any service that it offered to any of its other customers) to existing packages. It elected to bill TRICO for WDCs because the WDC package was the one that most closely matched the type of service that it was offering to TRICO.
50. It is apparent from TRICO's said letter dated June 16, 2011 that TRICO understood from the inception that TSTT's billing for circuits was merely the mechanism that would be employed moving forward. TRICO, in that letter, proposed that it be billed for two circuits instead of four, at a rate of \$19,000.00 per month per circuit. TRICO's rationale was that it could not afford to pay for four circuits. It also made the point that the billing should, in any event, be for five circuits, if the Roxborough to Pembroke link were included.
51. Ultimately, what is clear to the panel, is that TRICO cannot sustain the

⁵⁴ A copy of the invoice is annexed to the witness statement of Mr. Martin Young and marked "M.Y.2".

proposition that it was the intention of the parties that the 2004 arrangements continued to apply after April 1, 2011. TRICO always understood that the basis of the charges had changed and also what the new basis of charging was. What TRICO sought to do, was advance a case for TSTT adjusting that basis to something that TRICO felt it could better afford.

52. What must now be considered is whether TSTT can sustain *its* proposition that TRICO had, by word or deed, agreed to pay the rates that TSTT charged for the “dark fibre” service that it provided from April 1, 2011.

**WAS THERE AN AGREEMENT BETWEEN THE PARTIES
FOR TRICO TO PAY THE RATES BILLED BY TSTT?**

53. On the question whether agreement was reached between TSTT and TRICO regarding the rates to be paid for TSTT’s “dark fibre” service and for the use of its poles, the panel considered the relevant legal principles to be the following:
- (a) In order to establish that a contract exists, there must be an offer, and an acceptance of that offer.
 - (b) An offer is an expression of willingness to contract on specific terms. That expression of willingness must be made with the intention that it is to become binding as soon as such offer is accepted by the person to whom it is made⁵⁵.
 - (c) An acceptance of an offer must be in terms of a final, unqualified and unconditional expression of assent to the terms of the offer. Once there is an unqualified acceptance of a definitive offer, a binding agreement is

⁵⁵ See Chitty on Contracts, 30th Edn., para 2-003.

concluded.

- (d) If, in response to a definitive offer, the offeree attempts to introduce new terms for consideration, he would, in effect be making an offer of his own or a counter-offer, which would then have to be accepted by the other party before contractual relations can be said to be established.

54. If an offer to sell 1200 tons of iron is met with a reply asking for 800 tons, that reply would amount to a counter-offer to buy 800 tons and effectively, a rejection of the original offer to sell 1200 tons. Similarly, if an offer to provide a service at a certain rate is met with a counter-offer to pay another rate for the service, that counter-offer ought to operate as a rejection of the original offer. The test is whether the reply to an offer would, to the reasonable observer, be regarded as *“as introducing a new term into the bargain and not as a clear acceptance of the offer.”*⁵⁶

55. It is clear to the panel, from reviewing the correspondence that passed between the parties, that they never reached a consensus as to what rates would be charged and paid for the *“dark fibre”* service or for TRICO’s use of TSTT’s poles. TSTT was clear in articulating its position that it would bill for the dark fibre service by reference to circuits, consistent with the billing that it would normally apply for its WDC service. It also consistently indicated that its pole rental rate was \$14.00 plus VAT per pole per month. In response however, there was no unequivocal indication from TRICO that it accepted TSTT’s terms.

56. TSTT’s letter to TRICO dated February 15, 2011⁵⁷ stated as follows:

“...From our records, service to TRICO has been based upon a letter of

⁵⁶ Chitty on Contracts, para. 2-032.

⁵⁷ Marked **“MY 1”** in the Witness Statement of Martin Young.

agreement dated May 25, 2004 for a period of two years.

It is to be noted, that the arrangement between TSTT and TRICO was entered into prior to the liberalization of the telecommunications sector. With the advent of competition, however, the services that you have been taking from TSTT are now managed as wholesale services by our Carrier Services Department.

Representatives from Carrier Services would therefore appreciate preliminary discussions with you to better understand the services that you have been taking from TSTT under the arrangement of 2004 and going forward, any additional services that you may require, for the purpose of securing a formal contract between TRICO and TSTT..."

57. TRICO's letter to TSTT dated June 16, 2011⁵⁸ addressed to Natasha De Coteau-Subero, Head of Carrier Services read as follows:

"The purpose of this letter is to attempt to resolve all the matters that are outstanding between Trico Industries Ltd. and Carrier Services of TSTT.

The first matter to be resolved is the cost or charges for the Domestic Circuits. In our original agreement with TSTT, Trico Industries paid, based on the number of subscribers using the system. This was done like this because these rural communities would never have the population to justify any other forms of payment.

Carrier Services is suggesting that the new arrangement will be based on the Bandwidth and Circuits used. In our system (according to Carrier Service Calculation) we will now have a total of Five Circuits (On your list you have

⁵⁸ Tab 19 of the Agreed Bundle.

left out Roxborough to Pembroke).

At this time we have approximately 950 customers using the system, and we pay TSTT approximately \$28,500.00 per month. To increase this amount to \$159,456.00 per month for five circuits would not be economical.

In order to solve this problem, I suggest that Carrier Services treat with the entire system as two special circuits and allowing Trico to pay a total of \$38,000.00 per month. This amounts to a 33% increase in our payment to TSTT at this time. The Circuits will be Scarborough to Charlotteville and Scarborough to Moriah. I must indicate that Trico has only 162 customers on the Scarborough to Moriah Circuit.

The other matter to deal with is the charge for removing our equipment from TSTT premises.

It is to be noted that Trico has all that is required to move that equipment from the building. We can supply the cable and we can do the splicing of the fibre. Because of this we believe that \$40,000 is too high a price to pay for this move. We are asking that we be given the opportunity to effect the move ourselves.

We are still awaiting staff from TSTT to conclude the pole audit. We agree to sign the Wholesale Carrier Agreement when you or your team visit Tobago.”
[Emphasis added]

58. In response, TSTT’s letter to TRICO dated June 24, 2011⁵⁹ stated as follows:

“...TSTT recognizes Trico Industries Limited as a Concessionaire for the

⁵⁹ Tab 2 of the Agreed Bundle and Marked “CC 1” in the Witness Statement of Charles Carter.

Operation of Public Telecommunications Network and/or provision of Public Telecommunications and/or broadcasting services (issued 1 September, 2006). In that regard therefore, as a concessionaire, requiring TSTT Wholesale Services, your requirements fall under of the ambit of TSTT Carrier Services, and are subject to the Legal and Regulatory frameworks occasioning such. Any arrangements Trico Industries Limited might have held with TSTT in the past are now no longer applicable. TSTT Carrier Services, in the conduct of its obligations, is also required to treat fairly and in a non-discriminatory manner with Concessionaires. Its pricing mechanisms are thus universally applied..."

59. TSTT's letter to TRICO dated November 4, 2011⁶⁰ in turn stated as follows:

"...Use of space on TSTT's poles is billed at a rate of \$14.00 plus VAT per pole, per month. This rate is the standard rate applied to all concessionaires for this service. Billing for this service shall be applied retroactively to April 1, 2011; that being the effective date on which the Carrier Services Department took responsibility for all wholesale arrangements with TRICO.

TSTT Carrier Services, therefore, will issue invoices for Pole Sharing to TRICO subsequent to the release of this letter retroactive to April 1, 2011..."

60. There is nothing in those exchanges between the parties that suggested that TRICO ever accepted the rates that TSTT was charging either for its "dark fibre" service or for pole rentals. What is clear is that TRICO accepted that there would be some sort of increase. The extent of that increase was, however, never settled.

61. In the ensuing years, the parties continued to discuss rates but no consensus

⁶⁰ Marked "MY 3" in the Witness Statement of Martin Young and "CC 2" in the Witness Statement of Charles Carter.

was ever reached.

- (a) By letter dated October 8, 2012⁶¹, TSTT wrote to TRICO referencing discussions that had previously taken place between the parties and calling upon TRICO to submit reasonable proposals regarding the rates that it believed it should pay.
 - (b) By letter dated July 3, 2013⁶², TRICO wrote to TSTT referencing discussions that it had had with the Ministry of Tobago Development in relation to the dispute between the parties and offering to pay the sum of \$336,000.00.
 - (c) TSTT responded to that letter on August 29, 2013⁶³ proposing a deadline of September 2, 2013 for TRICO to provide proposals as a prelude to a further meeting.
 - (d) By letter dated October 2, 2013⁶⁴, TSTT again wrote to TRICO referencing an earlier meeting and proposing terms for agreement.
62. The panel was not provided with evidence of what discussions took place in the years 2014 to 2016 but the panel was provided with a copy of a letter dated July 10, 2017 which TRICO wrote to TSTT stating the following:

“ the following proposals in respect of the settlement of the payment of pole rental and wholesale domestic circuits.

⁶¹ See Tab 5 of the Agreed Bundle.

⁶² See Tab 6 of the Agreed Bundle.

⁶³ See Tab 7 of the Agreed Bundle.

⁶⁴ See Tab 8 of the Agreed Bundle.

Pole Rentals:

Initial Payment of \$200,000.00 by Friday 14th, 2017.

Enter into payment agreement of remaining outstanding balance over a 24 month period.

Begin payment of monthly pole rental billing in August 2017.

Wholesale Domestic Circuits:

Initial payment of \$500,000.00 by July 31st, 2017.

Since one of the disputed issues with the WDC is the number of circuits used, we would like to invite a third party (TATT) to determine this matter within 60 days.

Upon determination TRICO is prepared to work along with TSTT to finalize payment arrangements.

...We truly hope that the Board will accept our proposals and give us the opportunity to settle this debt."

63. What is clear from TRICO's said letter dated July 10, 2017 is that, as at that date, there was as yet no agreement between the parties relating to rates. The panel understands the letter to be a further acknowledgment of on-going negotiations that were taking place and that the letter was an attempt by TRICO to show good faith by offering to make payments towards the accumulating debt.
64. The panel is unable to derive from the said letter, any unequivocal acceptance by TRICO that it would pay the rates billed by TSTT. There undoubtedly existed an agreement between the parties under which TSTT provided TRICO with a "dark fibre" service and permitted it to use its poles. The panel is however unable to find that there was an agreement between the parties regarding the rate to be charged for either service.

WHAT RATES ARE TSTT ENTITLED TO RECOVER?

65. As a matter of general principle, where there is no agreement between parties on a material term such as the price of services which have been requested, performed and accepted, the law implies a promise to pay a reasonable fee for those services⁶⁵. In ***Taylor v Bhail***⁶⁶ Lord Millet gave the following statement of the law that applies in circumstances such as those that obtain in the instant dispute:

“A claim in quantum meruit lies in restitution or, as it was formerly called, in quasi-contract. It arises whenever one party supplies goods or services to another in expectation of payment but no enforceable contract for payment has been entered into. In the absence of such a contract, the court enforces the implied promise of the recipient of the goods or services to pay a reasonable sum (quasi-contract) or orders restitution to prevent his unjust enrichment. But the existence of a valid contract for payment is a bar to the remedy. If there is no contract at all, or if there is a contract which is void for a reason other than illegality, a claim in quantum meruit will lie.”

66. The panel considers that the fact that no concluded agreement regarding rates was ever reached does not preclude TSTT from recovering a reasonable rate for its services. The question to be addressed is, what should guide the panel in determining what a reasonable rate would be.
67. It should be noted that sub-section 26 (1) of the Telecommunications Act requires TSTT “to provide other concessionaires with access to the facilities that it owns or controls, such access not to be unreasonably withheld”. Sub-section 26

⁶⁵ ***Henry v. Tobago Plantations*** (2009) (Claim No. CV2007-03427) per Kokaram J at paragraph 4.3

⁶⁶ [1995] 50 Con LR 70 at 77

(2) provides for such access is to be negotiated “*on a non-discriminatory and equitable basis*”.

TSTT’s POLE RENTAL CHARGES

68. In the panel’s view, a good starting point is the Telecommunications Act itself as well as the Access to Facilities Regulations that were made in pursuance of the Act.

69. It has already been pointed out that sub-section 26 (2) prescribes that access to facilities be negotiated “*on a non-discriminatory and equitable basis*”. It should be noted further that regulation 5(1) of the Telecommunications (Access to Facilities) Regulations⁶⁷ provides as follows:

5. (1) A concessionaire shall provide access under the same terms and conditions and of the same quality as it provides for its own networks and services, the networks and services of its subsidiaries and partners or the networks and services of any other concessionaire to which it provides access [Emphasis mine].

70. The evidence of Mr. Martin Young was to the effect that TSTT’s pole rentals rate was the same rate that it applied to its other concessionaires. In support of that assertion which he made at paragraph 11 of his witness statement, was a copy of an invoice to Columbus Communications Trinidad Limited in which the rate of \$14.00 plus VAT per pole was billed on a monthly basis. The Agreed Bundle also included a copy of an agreement made between TSTT and Massy Communications Ltd dated December 15, 2016 in which the same rate was charged⁶⁸.

⁶⁷ LN 180 of 2006.

⁶⁸ See document 15 in the Agreed Bundle.

71. Mr. Benoit, in cross-examination, asserted that TTEC was billing a rate of \$6.00 per pole per month for users in Tobago. Apart from the fact that no evidence was produced to corroborate that assertion, it does not appear to the panel that rates charged by TTEC could absolve TSTT of the obligation to act in accordance with regulation 5 (1) cited above, in fixing rates that it is to charge to its concessionaires.
72. On the face of regulation 5 (1), whose language is mandatory in tone, TSTT was obliged to charge TRICO the same rate that it charged its other concessionaires, that rate being \$14.00 plus VAT per pole per month. There was no challenge to TSTT's evidence that *that* was the rate that it charged to its other concessionaires for the use of its poles.
73. It is the panel's view therefore, that in the face of the evidence adduced by TSTT as to what it charged other concessionaires for pole rentals, TSTT was bound by the provisions of the Act and the Telecommunications (Access to Facilities) Regulations, to bill TRICO at the rate of \$14.00 plus VAT for the use of its poles. There is no basis for the panel concluding that TSTT ought properly to bill at any other rate.

TSTT'S "DARK FIBRE" SERVICE

74. As regards TSTT's "dark fibre" service, the position is a bit more complicated. The panel does not consider that regulation 5 (1) referred to above, which requires the non-discriminatory treatment of concessionaires, affords a proper resolution as to what rate TSTT ought reasonably to recover for its "dark fibre" service as the incontrovertible evidence was that TSTT did not provide a like service to any other concessionaire.

75. What TSTT sought to do was to bill TRICO for WDCs, on the basis that *that* was the service that most closely approximated the “dark fibre” service that it was providing to TRICO. It was TSTT’s evidence that in recognition of the fact that the WDC service was, in fact, different from the “dark fibre”, it discounted its charges by 20% to account for the difference. It is not clear to the panel however, that *that* was the approach that the Telecommunications Act required TSTT to take in the instant case.
76. The legislative regime makes provision for the Authority to regulate rates for access to facilities⁶⁹ while at the same time encouraging concessionaires to arrive at such rates by consensus. Sub-section 26 (4) of the Act empowers the Authority to “*regulate the rates, terms and conditions for access to any facility*” but it does not appear that the Authority has done so in this case. The parties have also failed to reach consensus on such rates. It seems to the panel that in the circumstances, the rate to be charged for TSTT’s “dark fibre” service must, as a matter of law, be determined by the Authority.
77. Regulation 18 of the Telecommunications (Access to Facilities) Regulations provides as follows:

“18. (1) A concessionaire shall set access rates based on its 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 access rates with reference to such costing

⁶⁹ See section 26 of the Telecommunications Act Chap. 47:31 of the Revised Laws of Trinidad and Tobago.

benchmarks, as determined by the Authority, that comport with internationally accepted standards for such benchmarks.

(3) A concessionaire shall within twenty-eight days of a written request from the Authority, unless this period is expressly extended by the Authority in writing, supply to the Authority such data as the Authority may require, for the purpose of determining that its access rates are in accordance with this regulation.”

78. In the panel’s view, the rates that TSTT is entitled to charge in respect of its “dark fibre” service must be determined by reference to its costs, in accordance with regulation 18. Those costs, in turn, must be determined in accordance with costing methodologies, models or formulae established by the Authority or by benchmarks determined by the Authority.
79. The panel has adverted, at some length, to the evidence adduced by Mr. Martin Young⁷⁰, detailing his assessment of the cost of TSTT’s “dark fibre” service. The panel is, however, unable simply to adopt that evidence, without more. It must be satisfied that the cost methodologies, models or formulae used in determining those costs, were established by the Authority pursuant to regulation 18 (1). If they were not, then the panel must be satisfied that the costing benchmarks employed by TSTT, were determined by the Authority in pursuance of regulation 18 (2), which further requires that those benchmarks comport with internationally accepted standards.
80. For the panel to do otherwise, it would be usurping the powers of the Authority and it would be acting in defiance of the intention of Parliament when it reposed in the Authority, the power to regulate rates (section 26 of the

⁷⁰ See sub-paragraph 27 (g) hereof.

Act) and to set the methodologies, models, formulae or benchmarks by which TSTT would, itself, determine those rates (regulation 18).

CONCLUSION

81. In the premises, the decision of the panel is as follows:

- (a) That in respect of the use of TSTT's poles, TRICO must pay to TSTT the rate that TSTT has billed since April 1, 2011, that is, the rate of \$14.00 plus VAT per pole per month for the 984 poles on which TRICO has mounted its attachments; and
- (b) That in respect of TSTT's "*dark fibre*" service, TRICO must pay a rate determined by reference to its costs, which in turn must be calculated by reference to such costing methodologies, models or formulae as the Authority may have determined in accordance with regulation 18 (1) of the Telecommunications (Access to Facilities) Regulations or such benchmarks as the Authority may determine in accordance with regulation 18 (2).


Frederick Gilkes
Panel Chairman