



ICT CONSULTATION 2016-2

- A. Pole attachment reservation fees.
- B. Permits application process.
- C. Charging principles.

A: POLE ATTACHMENT RESERVATION FEES - CONSULTATION ON THE APPROPRIATENESS OF THE RESERVATION FEES RELATED TO THE ATTACHMENT OF COMMUNICATIONS CABLES TO CUC'S ELECTRICITY POLES

Introductory

1. The Authority has made proposals:
 - (1) To amend contracts between DataLink, Ltd (**DataLink**) and Infinity Broadband, Ltd (**Infinity**) and DataLink and WestTel t/a Logic (**Logic**) to remove DataLink's right to payments:
 - (a) for reserved space; and
 - (b) of minimum annual sums.
 - (2) To require DataLink to rebate any payments already made for reserved space and of minimum annual sums.
2. DataLink notes that the Authority has reached conclusions:
 - (1) that these charges are "*likely to be discriminatory*" [36/162];
 - (2) that "*...earning the revenue based on guaranteed payments irrespective of actual activities being carried out by DataLink ... creates a disincentive to act efficiently ...*" [36/164] ;
 - (3) as an initial view, that the operation of reserved space payments and minimum annual payments "*... limits the promotion of competition ...*" [36/164]; and
 - (4) that minimum annual payments "*... may also have the effect of restricting the ability of Infinity and Logic to roll out their fibre networks in a timely manner ...*";without first receiving observations from DataLink.
3. DataLink also notes that views have been expressed, albeit those views are expressed to be subject to consultation, that:
 - (1) "*... the Authority does not consider there to be any objective reasons to explain the difference between the Attachers ...* ", [36/162]; and
 - (2) that minimum annual payments in excess of pole rental fees should be refunded by DataLink [37/166];without first receiving observations from DataLink.



4. DataLink also notes that consultations B and C also contain conclusions reached and views expressed subject to consultation without first hearing from DataLink. DataLink does not propose to extract the specific passages giving rise to concern in those consultations. There are material points on which the Authority has not had the benefit of input from DataLink before coming to its conclusions and views. Those are dealt with below. DataLink requests the Authority to take note of DataLink's concern that conclusions and views reached by the Authority are in certain cases the starting point of Consultation 2016-2 rather than its end product.
5. The requirement to pay for reserved space was introduced in 2012 after a general review of capacity, prompted by a request from the Authority that space be made for additional attaching utilities to attach the communication space on the poles owned and utilized by Caribbean Utilities Company, Ltd (**CUC**) prior to the grant of an ICT Licence to DataLink in March 2012. That review determined that the existing pole structure may be able to accommodate a maximum of four attaching utilities (after the assessment and performance of any necessary make-ready to create sufficient space on each pole).
6. At this time there were two existing contracts for attachment between CUC and third party attaching utilities, namely Cable and Wireless (Cayman Islands), Ltd. t/as Lime (now trading as Flow) (**FLOW**) and Infinity and there were a number of other attaching utilities who were interested in securing an agreement for attachment to the infrastructure. Formal requests for pole attachment agreements were received from three additional attaching utilities although there was only one attachment position remaining for assignment within the communications space. The other three positions had been allotted to FLOW, Infinity and DataLink (which had by this time executed its agreements with CUC and received its ICTA licence). Demand for space outstripped supply and it was therefore in the interest of "*an efficient, economic ... utilisation of infrastructure*"¹ to ensure that those who had the right to apply for permits for attach did not leave space on the poles lying unused.
7. This was not an empty concern at the time given the history with Infinity, which has had an ICT Licence from 2003 initially requiring island wide roll out within 18 months (as varied to 31 December 2014 by the Authority in 2011) and had possessed a contract for pole attachment from 22 November 2005, with a contract term of fifteen years.
8. At the time DataLink received its ICT licence the sole attaching utility with any existing network attachments to the infrastructure was FLOW. Infinity had not begun rolling out of its network in its allocated space although it had the right to apply for permits to attach. CUC and later DataLink believed the practice of allowing an attaching utility to hold an agreement for attachment without

¹ As required by section 69(2) of the Law



making provision for any consideration for the reservation of its space or ensuring that the attaching utility followed the procedure to apply to make attachments and proactively roll out its network in the space could potentially be interpreted as supporting anticompetitive practices by an attaching utility that held an agreement but made no attempt to utilize the space, i.e. effectively blocking the competition. The allocation of the space ensured that no other company was able to attach in that location.

9. The introduction of the reservation fees for a specific space for attachment on every pole were beneficial in that:
 - (1) the fees provided an incentive for the attaching utilities to communicate their actual requirements for roll out during the roll out period, potentially revealing areas that could then be released from reservation and have space available for another company to attach, e.g. in areas where space was deemed not required by the contract holder. This was achieved by allowing attaching utilities to cease paying reservation fees on areas they expressly did not require to stay reserved for them. (Logic Agreement Appendix C);
 - (2) the fees provided an incentive to the contract holder to sign the contract for true need as opposed to holding an agreement for the space in all areas for an extended period of time and preventing provision of space to their competition while also inhibiting earning opportunity for DataLink;
 - (3) the arrangement promoted an efficient, economic and harmonised use of the pole infrastructure by Infinity and Logic rather than having an arrangement where attachment rights were granted on a first come first served basis to any one of a number of licencees (of which there were seven at the time).

10. The fees were payments in return for a benefit conferred by DataLink, namely exclusivity rights to attach at the prescribed position within the communication space on all CUC poles for the attaching utility. That was an integral part of the package that was negotiated with Infinity and later Logic. At the time both entities wanted to secure a package that would allow them to roll out across the entire service area. Presumably their business plan involved being able to (or at least having the option to) roll out a network to the full extent of the CUC pole network. The ICT licences for both companies required an Island wide roll out by certain dates and the alternative to pole attachments was trenching, which was not seen as practical or cost-effective for an Island wide roll out. It is not surprising that the two companies were willing to pay for the privilege of reserved space on the poles and it is not surprising that DataLink, having only a limited number of spaces should expect to receive payment for reserving space for future use for a length of time corresponding to the roll out requirements of each attaching utility as stipulated under its ICT Licence.



11. DataLink wishes to remind the authority that these provisions are contained in commercial agreements negotiated at arm's length between parties with access to legal advice. The agreements about reserved space were made in 2012 and 2013 when the Information and Communications Technology Law 2011 revision (**ICTA Law**) and the Infrastructure and Communications Technology Authority (Interconnection and Infrastructure Sharing Regulations) 2003 (**ISS regulations**) were in force. At that time under section 67 of the ICTA Law Infinity and Logic had the right under section 67(1) to refer to the Authority any proposed contractual term to which it objected and the right to have the Authority determine whether or not that term should be included. The terms that the Authority proposes to amend are therefore not only terms freely agreed between commercial parties with the benefit of legal advice, they are terms negotiated by parties who knew that if either was dissatisfied with a proposed term it could, instead of agreeing the term, appeal to the Authority to resolve disagreement over it. In the circumstances, DataLink has a legitimate expectation that the terms of the agreements negotiated in good faith will be upheld and performed.

12. It is correct that the agreement with FLOW did not in 2012 add a requirement for payment for reserved space on a go forward basis. The position with FLOW was completely different to the position with Logic and Infinity. FLOW was not at the beginning of its roll out activities nor did it have any ascribed requirement in its ICT Licence at the time for a specific roll-out period. The ICT Licence for FLOW varies significantly from those issued to other ICT Licensees as the long established incumbent. At the time FLOW had a mature network in place for which it was already paying attachment fees. The purpose of reserved fees was to stimulate the roll out of networks that did not exist at the point where the agreement was signed. Furthermore any charge would have required a significant amendment to the agreement. The Authority is referred to what is said below regarding FLOW's resistance to amendments and to the replacement of its 1996 agreement. Any suggestion that some alteration should have been made would almost certainly have been resisted.

13. DataLink, is in a unique position compared to the other attaching utilities in regard to the communications space. As the company was created specifically to manage the communications space on CUC infrastructure, with both ERA and ICTA approval and required licences it is the authorised "owner" for the entire communications space. As such DataLink does not have a contract with itself for pole attachment. DataLink's contracts are with CUC for the entire space and not just the specific point of attachment assigned to attachment of its own fiber network. It is assumed that this is a similar position to other telecommunication companies and their use of their own services for the company's specific business requirements. DataLink therefore does not pay itself for reserved space. The communications space is infrastructure that is shared by DataLink with other providers. It is inherent with shared infrastructure that the company who shares charges those with whom it shares but would not charge itself.



14. DataLink believes it is important to clarify its precise position as an ICT Licensee. The ICT Licence granted in March 2012 listed the Licensed ICT Services as including Service 11 – Provision of ICT Infrastructure to 3rd Parties and Service 11 A – Provision of Infrastructure – dark fibre. DataLink has a Licenced ICT Network D1 – Fiber optic cable – Domestic. It appears clear that the ICT Infrastructure DataLink is licensed for is 1) the Communications Space on CUC Poles and 2) dark fiber optic capacity; and the ICT Network that DataLink is licensed for is the domestic fiber optic cable that it leases from CUC and its own roll-out that is to be attached at its own point of attachment in the communications space.
15. CUC is not an ICT Licensee so the agreements with the attaching utilities are with DataLink and not with CUC. CUC does have agreements with DataLink by necessity as they establish the arrangements for DataLink’s provision of the communications space to third parties through sub-licenses including details for pole attachments generally. DataLink in turn provides agreements that address the attachment processes with third parties. Since CUC does not have agreements with the third parties (although it did historically) CUC is not providing terms and conditions to the attaching utilities and is therefore not offering any other utility different terms and conditions than it is offering DataLink.
16. DataLink as the licensed provider of the communications space infrastructure has and should have an agreement in form and substance that clearly expresses its unique position. This position is expressed in the Master Pole Joint Use Agreement and DataLink believes that this is appropriate. The third party Attaching utilities require arrangements for pole attachment only with DataLink as they have no role in the provision or management of the communications space nor do they have their own pole networks for joint use. Although in the case of Logic and Infinity the agreements have been titled “Master Pole Joint Use Agreements”, DataLink believes that this title is an inaccurate reflection of the actual arrangements between the parties and therefore proposes that the agreements with the third party attaching utilities should all be entitled “Pole Attachment Agreements”.

The legal framework

17. The Authority proposes to secure the removal of reserved space and minimum charges and to secure the rebate of past payments under these provisions by use of its power under section 68(9)(b) of the Law. As a preliminary matter, DataLink observes that this section does not confer a statutory power to order rebates of payments. DataLink therefore does not accept that the Authority has the power to oblige it to rebate payments.
18. DataLink notes that the Authority is proposing to impose an obligation to rebate sums already paid by using its power to require modification of agreements in place by imposing a term requiring a



rebate to be made or credit given. This entails modification of the contract with retrospective effect. It entails consequential rebates that reverse accrued rights and which would operate (by way of prospective credit) to transfer sums that accrued due and (for the most part) have been paid and received in good faith in the course of performing the contract. DataLink does not accept that section 68 confers power on the Authority to do this as a matter of its true construction.

19. Further, the Authority's power under section 69(2), can be used (and can only be used) "*in order to promote an efficient, economic and harmonised use of infrastructure*". The proposed reversal of accrued rights and the proposed transfer of money from DataLink to Logic and Infinity by rebates or credits is a retrospective measure. It addresses what happened in the past. Retrospective measures do nothing to promote *an efficient, economic and harmonised use of infrastructure*. The only aspect of these measures that is prospective is the suggested transfer of cash resources from DataLink to Logic and Infinity. The only way in which that might conceivably promote *an efficient, economic and harmonised use of infrastructure* is by way of subsidising future costs of two attaching utilities. It is not the purpose of section 69(2) to enable the authority to require DataLink to subsidise attaching utilities.
20. DataLink's submission is that the use of section 69(2) to compel rebates would be unlawful. The proposal to remove the provisions relating to reserved space and minimum payments going forward is based on the Authority's conclusion that the provisions are discriminatory because there is no objective reason for differing terms. It is suggested that in the light of the points made above, it is not correct that the provisions are discriminatory because there is no objective reason for them.
21. If the provisions are considered to be discriminatory because they are absent from some contracts, then they should be introduced into those contracts and not removed from the contracts with Logic and Infinity.

RESPONSES TO CONSULTATION QUESTIONS

QUESTION A1: Provide your view as to whether or not the reservation fees, being the Quarterly Reserved Space Payment, are appropriate as part of DataLink's relevant charging principles relating to the attachment by Licensees of communication cables to CUC's electricity poles.

22. They are appropriate.

QUESTION A2: If the reservation fees, being the Quarterly Reserved Space Payment, are appropriate as part of DataLink's relevant charging principles relating to the attachment



by Licensees of communication cables to CUC's electricity poles, provide your view as to whether such charges should apply to all the Attaching utilities of communication cables.

23. DataLink's view is that it is appropriate for reservation fees to apply to interconnecting attaching utilities that have an agreement for pole attachment with a schedule for roll-out as part of an ICTA issued licence and do not have a mature network in place.

QUESTION A3: If your view is that the reservation fees, being the Quarterly Reserved Space Payment, should not apply to all the Attaching utilities, provide the reason and justification for not applying such charges to all the Attaching utilities.

24. FLOW has an established network and no apparent ICT Licence imposed requirement for a continued roll-out period. DataLink is of the opinion that FLOW has completed its roll out in terms of pole attachment to the infrastructure necessary to achieve island wide coverage and thus believes that there is no need to introduce reservation fees for their specific point of attachment, although it acknowledges that FLOW may improve its existing network over time (FLOW adding connections here and there to a mature network is, obviously, completely different to a roll out from scratch, which was the case with Infinity and Logic). In addition under its existing agreement FLOW pays a fee for additional height for each new pole installed to accommodate space for it to attach. DataLink is of the opinion that this new pole fee is fair in addition to the attachment fee in lieu of a reservation fee for the incumbent ICT Licensee. DataLink proposes that a fee of this type may be beneficial to be added to all contracts on a go forward basis for all new poles installed. Such a fee could significantly reduce the impact of make ready work required on newly installed infrastructure by preparing the communications space on a proactive basis while ensuring that CUC remains in compliance with the conditions of its T&D Licence issued by the ERA. This proposal is discussed in greater detail in section C7.
25. An owner of infrastructure should not have to charge itself for interconnection to its own services (if indeed it is possible for a company to charge itself). By necessity, operation of law and applicable licences Datalink provides infrastructure services in regard to the communications space.

QUESTION A4: If your view is that the reservation fees, being the Quarterly Reserved Space Payment, are appropriate as part of relevant charging principles relating to the attachment of communication cables to CUC's electricity poles, provide your view as to what appropriate pricing formula should apply for such charges, including reasons as to why such proposed pricing formula is appropriate.

26. As stated DataLink believes Reservation fees are appropriate and should apply until an attaching utility's roll out is considered complete. Reservation fees are charged to attaching utilities based on a percentage of the pole attachment fee. This fee is appropriate to be charged on a per pole basis for all poles that the attaching utility is not attached to. Reservation fees represent a portion



of the opportunity cost to DataLink in holding the space for a single attaching utility and adds an incentive for an attacher to utilise the contracted space as intended. They are appropriate to be charged to the attaching utility until such time as one of the below conditions is met.

- (1) The attaching utility has a substantially complete network i.e. it is in compliance with its roll-out requirements under its licence with the Authority (by pole attachment or otherwise).
- (2) The attaching utility relinquishes its right to attach to any poles to which it is not already attached.

QUESTION A5: Provide your view on any other issues relating to the operation of the "Reserved Space" and the "Quarterly Reserved Space Payment" in the pole sharing agreements, including, but not limited to, the reference to the "Total Minimum Annual Payments".

27. The reservation fees were based on the expectations and calculations of the contract holders as expressed to DataLink at the time of the execution of the relevant agreements, within the parameters of the roll out schedule required by the Authority in each attaching utility's ICT Licence.
28. Infinity has not been charged for reservation fees since the expiry of this roll-out period as specified in the ICT Licence that it held at the time of the novation of its agreement with CUC to DataLink, i.e. 31 December 2014. While the Authority has since extended the period for Infinity to roll-out its network, Infinity has not negotiated a related extension to the reservation period for its position of attachment within the communications space.
29. The concept of Minimum Annual Payments was designed to ensure that the minimum number of poles as set out by the attaching utility in their relevant agreement with DataLink are subject to permit applications for attachment to as part of an organized roll-out plan. The intention was to reinforce the proactive roll-out of the network by the attaching utility and to discourage potential anticompetitive actions such as holding an agreement for attachment to the infrastructure without utilizing the space.
30. DataLink does not accept that the total minimum annual payments are a disincentive to its efficient processing of permit applications. The reasoning for the minimum payments was to ensure that sufficient permit requests were made to engage the resources provided for the make-ready process and to encourage the attaching utilities to continue their roll-out in accordance with planned minimums. Had the affected attaching utilities submitted permit applications to support their roll out in an organized and timely manner, the minimum annual payments would have at the very least been less. Datalink credited back to the attaching utilities the fees related to the attachment applications that were received by Datalink but not completed. DataLink acknowledges that a failure in the process arose through the unanticipated volume of applications put in over a



very short period and delays were exacerbated by the failure of the attaching utilities to pay for the make-ready work once it was completed.

31. The below table illustrates permit requests submitted by the three attaching utilities in the last three years and best demonstrates the above discussion:

Month/ Year	Requests Received: LOGIC	Requests Received: INFINITY	Requests Received: FLOW	TOTAL Requests Received
Q2 2013 Totals	74	0	0	74
Q3 2013 Totals	475	722	0	1197
Q4 2013 Totals	275	0	3	278
2013 Totals	824	722	3	1549
Q1 2014 Totals	894	0	7	901
Q2 2014 Totals	995	24	18	1037
Q3 2014 Totals	1229	2001	12	3242
Q4 2014 Totals	50	200	21	271
2014 Totals	3168	2225	58	5451
Q1 2015 Totals	108	1200	2	1310
Q2 2015 Totals	355	500	1	856
Q3 2015 Totals	48	1000	469	1517
Q4 2015 Totals	0	0	540	540
2015 Totals	511	2700	1012	4223

32. While the concept is in the view of DataLink appropriate, it does acknowledge that historically there have been challenges in providing sufficient resources to keep up with the necessary make-ready work required by the demand for large volumes of permits submitted over short periods by the attaching utilities and by the resources consumed by the extra work caused by repeated breaches of the procedures set out in the agreements.

In an effort to address the difficulty in a fair manner, DataLink has in each instance credited the reservation fees of each company for requests submitted that were not actioned in the year of the request.

QUESTION A6: Provide your view on the appropriate approach to the possible reimbursements by DataLink of the payments made by Infinity and Logic in relation to the "Total Minimum Annual Payments", as discussed in paragraph 166 above.

33. Paragraph 166 contains a proposal to rebate all sums paid in excess of what would be due by reference solely to quarterly pole rental fees. It would retrospectively deprive DataLink of sums



that were payable both for reserved space and in respect of minimum payments. There was a proper basis for agreeing both these charges as set out above and DataLink contends, independently, that a direction requiring payments to be rebated would be unlawful for the reasons given above.

QUESTION A7: Provide your view on any other matters you consider relevant to this consultation.

34. DataLink has, from the grant of its ICT Licence, sought to bring all attaching utilities on to an agreement with materially the same terms and conditions and has attempted to do so. DataLink supports the use of the same charging principles for all, where relevant. DataLink developed an agreement that it, in good faith, deemed most fair to all parties. This format is the one used for Logic. Despite DataLink's best efforts there has been significant resistance by the two pre-existing attaching utilities to the negotiation of new agreements. The FLOW agreement will reach its final expiry date in November 2016 and as such FLOW must negotiate a new agreement prior to that date or remove its attachments. However, Infinity holds an agreement that does not expire for 15 years from its initial execution. DataLink attempted to vary the contracts while they remained valid as an act of good faith and to encourage the roll out of ICT networks. However, despite good faith based efforts the existing agreements do not possess identical terms. FLOW's agreement specifically contains terms the most significantly dissimilar when compared to the other attaching utilities.

B: PERMITS APPLICATION PROCESS - CONSULTATION ON THE PERMIT APPLICATION PROCESS INCLUDING MAKE READY WORK, FOR THE ATTACHMENT OF COMMUNICATION CABLES TO CUC'S ELECTRICITY POLES

- A. Proposal for common timetable**
- B. Proposal for third party contractors**
- C. Proposal to harmonise make ready work provisions**

Introductory

35. DataLink supports the standardisation of agreements with attaching utilities. DataLink considers that the form of agreement negotiated with Logic together with a Memorandum of Understanding regarding permit applications represents a template that is fair to all. Before explaining the Memorandum of Understanding, DataLink will address the Authority's reference to and apparent acceptance of evidence tendered by Logic (from Ms Byron) in connection with an interim injunction



application and more generally with the issue of matching resources to potential demand for permits. DataLink will address Ms Byron's evidence first.

36. DataLink draws to the attention of the Authority that Ms Byron's evidence was tendered on an interim application and not a trial of factual issues. The allegations made in the evidence tendered were contested. The nature of the application was such that it was not possible to tender evidence in opposition without a substantial delay to the application and therefore none was tendered. The evidence was not tested by the court because of the nature of the application and there was no judicial determination that DataLink was in breach of its obligations under its contract or under the ICTA law in respect of permit applications. Moreover, the Court's interim decision to refuse to make an order restraining unauthorised attachments was itself the subject of an appeal and the appeal itself was compromised under the terms of a Memorandum of Understanding entered into by DataLink and Logic, as part of which an undertaking not to make further unauthorised attachments was given by Logic.
37. In so far as there are lessons to be learned from the history of permit applications with Logic, DataLink asks the authority to bear in mind that because the process of permitting requires evaluation of the need for make ready work and advance payment for make ready work before a permit can be granted, failure to settle invoices for make ready work in respect of permit applications will result in permits not being granted and delay in settling those invoices will result in permits delayed. A significant number of the applications identified in Logic's evidence as delayed or outstanding were instances where payment for make ready work was sought and not pre-paid for, with the inevitable consequence that no permit was given. Any proposal for improving matters in the future has to recognise and deal with this requirement.
38. DataLink accepts that not all of the Logic backlog of permit applications related to failure to pay for make ready work. The remainder of the backlog was the result of two things (1) an imbalance between demand for permits and the level of resources that was available to deal with the demand and (2) the responses of Infinity and Logic to this problem, which was to make unauthorised attachments, leading to further issues that put more strain on resources that were already badly stretched, leading to an even greater backlog. Any proposal for handling applications going forward must take account of the facts (1) that resources for processing permits and performing make ready work are and will always be finite and (2) there is a backlog caused by the need to deal with unauthorised attachments and applications that remain outstanding for all the reasons set out above.
39. The finite resources have to be funded by DataLink. DataLink notes that the authority considers that it "... *should make all reasonable efforts to commit its resources in performing the tasks required for process the pole attachment permit applications in an efficient and timely manner.*"



[40/175]. DataLink does not disagree that it should use its best efforts to use its available resources to process applications in a timely manner. DataLink has always done this. There have, however, been occasions in the past on which its available resources have been overwhelmed by permit requests submitted on a massive scale. The difficulties and delays that inevitably resulted from this were only aggravated by other matters outside DataLink's control, namely:

- (1) failure by attaching utilities requesting permits to establish and adhere to priorities for processing permits; and
- (2) failure to pay for make ready work; and
- (3) diversion of resources to deal with unauthorised attachments, leading to the system for permitting breaking down.

40. DataLink's response to finding its resources overwhelmed was to increase its resources for permitting and make ready work. The Authority was made aware of this as it was taking place, as were attaching utilities.

Proposal A – Common Timetable for Processing Permits

41. DataLink supports the application of a common timetable for processing permits. That timetable must, however, reflect the real world of finite resources. It must also reflect that the parties to this process are involved in infrastructure sharing on a commercial basis as businesses carried on with a view to profit. In establishing resources for processing, DataLink is entitled to, indeed must, make commercial assessments of the likely demand for permits and commercial decisions about the resource to put in place to accommodate that demand.
42. In the case of Logic DataLink has had a dialogue with Logic over these issues, which are understood and accepted by both parties and has reached an agreement with Logic based on an the commercial needs of both parties, which features:
 - (1) Limits on the number of permit applications that can be submitted in any given month.
 - (2) Processes to follow in the cases (a) where no make ready work is required and (b) where make ready work is required.
 - (3) Time frames within which processes are to be completed.
 - (4) Processes to deal with unauthorised attachments.
 - (5) Processes to deal with currently outstanding permit applications.
 - (6) Clarity about the nature of DataLink's processing obligation.
43. DataLink and Logic have agreed that DataLink shall be contractually obliged to use its best efforts to process an agreed quantity of permit applications in any calendar month. The best efforts agreement reflects the Authority's statement that DataLink "... *should make all reasonable efforts to commit its resources in performing the tasks required for processing the pole attachment permit applications in an efficiently and timely manner.*" The parties' agreement is contained in a



Memorandum of Understanding, a copy of which is enclosed with this response. It differs in a number of respects from the Authority's proposal. The Authority's proposal was made without prior input from DataLink and the Authority was therefore not aware of what was under discussion with Logic. DataLink's submission is that it would not be appropriate to impose on DataLink and Logic terms that differ from what they have agreed.

44. As was made clear at the outset of this part of the response, DataLink supports a harmonised process for permit applications. DataLink therefore proposes that the framework contained in the Memorandum of Understanding be used as the basis for harmonisation. DataLink has already expressed its view that the Logic agreement is the fairest to all and asks the Authority to use that as the source of common terms wherever there is perceived to be a need to harmonise terms.

Proposal B – use of third party contractors to perform work

45. This proposal is based on an FCC proposal. The FCC proposal did not contemplate any contractor engaged by attaching utilities except "*contractors that are approved and certified by the utility*" [189]. DataLink notes that the Authority proposes to require a term to be inserted into agreements that provides for any contractor chosen by the attaching utility to perform work and does not contain any requirement for that contractor to be approved and certified by DataLink even though DataLink has such contractual obligations to CUC. DataLink is opposed to proposal B.
46. The attaching utilities are not certified utility employees and have not been trained to meet the standards that are required by CUC, the ERA and NESC. The risk to public and employee safety is too great to allow the planning of or modification to the Transmission & Distribution infrastructure belonging to CUC by individuals who have not been evaluated, and supervised by the qualified individuals at CUC.

Proposal C – amendments to harmonise pole sharing agreements for make ready and installation work

47. The proposed amendments are aimed at harmonising provisions for make ready and installation work. DataLink supports the principle of harmonisation of these provisions. As regards the specific modifications proposed the by the Authority at paragraph 194 (before it had the benefit of specific explanation or input from DataLink), DataLink propose the following.

"Estimate for Make-Ready Work", to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;

48. DataLink respectfully disagrees that the wording from the CUC-DataLink Pole Sharing Agreement is appropriate as DataLink is in a unique position (as discussed above in point 13) and proposes



that the wording of the Logic contract is appropriate to be utilized for all attaching utilities. The DataLink contract assumes that the entire communications space will be prepared in any event as DataLink manages the entire space. In addition, the original contracts were not drafted to consider multiple attaching utilities sharing the cost of make ready work, this clause was amended in the most recent version of the standard contract to reflect that costs should be shared where multiple attaching utilities choose to attach to the same pole. If only one attacher chooses to attach to a pole and make ready is required it becomes necessary for that attacher to bear the entire costs initially. In the view of DataLink it is not appropriate for that one attaching utility who may attach first to, in effect, finance the work required for all others to roll-out. The reimbursement provided for in the Logic agreement makes the burden of make-ready more equitable for all.

"Payment of Make-Ready Work", to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;

49. DataLink suggests that it is more appropriate for the wording of the Logic contract be utilized for all. The original contracts were not drafted to consider multiple attaching utilities sharing the cost of make ready work, this clause was amended in the most recent version of the contract to reflect that costs will be shared where multiple attaching utilities choose to attach to the same pole. This clause was added to ensure fairness for all attaching utilities and that no company would then strategically choose to follow the path of another contract holder after that company has solely borne the costs for make ready.

"Required Timing of Make-Ready Work", to be based on the existing wording used in the **FLOW-CUC-DataLink Novation Agreement (Article XVI)**;

50. DataLink would suggest that the wording of the Logic Memorandum of Understanding (MOU) be utilized for all to clarify the timing of make-ready work. The original contracts were not drafted to consider multiple attaching utilities attempting an island wide roll out within a very short period of time and with limited resources available to handle mass applications and the necessary planning and make-ready. The MoU ensures that requests are reasonable and responses to those requests are reasonable and represents the most practical approach to the issues presented with the limited resources available on the Island.

"Who May Perform Make-Ready Work", to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;

51. This is the same in the Logic agreement. DataLink agrees the suggestion.

"Scheduling of Make-Ready Work", to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;

52. This is the same in the Logic agreement. DataLink agrees the suggestion.



"Attaching Utility's Installation/Removal/Maintenance Work", to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;

53. These requirements have been included, updated and made more detailed in the Logic agreement, by adding requirements such as protective equipment, in section IV and XI. It is DataLink's suggestion that these clauses be utilized in all agreements for safety reasons.

"Time is of the Essence", to be based on the existing wording used in the **FLOW-CUC-DataLink Novation Agreement (Article XVI)**;

54. DataLink opposes the insertion of a provision making time of the essence of its obligation to perform make ready work. The reason for this proposal is not explained. The proposal is coupled with reference to a provision in an agreement between FLOW and DataLink, but that agreement and the relevant provision do not make time of the essence for the performance of make ready work by DataLink. It applies purely to the work done by FLOW in moving its attachments, etc and not to make-ready in general, not to DataLink's obligations.

55. DataLink submit that it is inappropriate to declare time to be of the essence, regard being had to the well-known consequences of doing so: *"the effect of declaring time to be of the essence is to elevate the term to the status of a 'condition' with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that it has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')* (from the leading practitioners textbook on the law of contract, Chitty on Contracts (paragraph 21-015).

56. The arrangements for make ready work agreed with Logic and proposed by DataLink create obligations to use best efforts to process permits at an agreed rate. This recognises explicitly that there may be occasions on which, even using best endeavours, processing targets cannot be met. It is unreasonable to attempt to make DataLink liable for failing to achieve targets that it is unable to achieve using best efforts. It is even more unreasonable to declare time to be of the essence of the target times because it means that the entire contract could be ended with profound consequences if for any reason, including reasons wholly beyond its control, DataLink is as little as one hour late in meeting a target.

"Refund of Make-Ready costs", to be based on the existing wording used in the **DataLink-Logic Pole Sharing Agreement (Article VII)**.



57. DataLink agrees the suggestion.

RESPONSES TO CONSULTATION QUESTIONS

QUESTION B1: Provide your view on what is the relevant process for issuing permits for the attachment of communication cables to CUC's electricity poles, including what do you consider to be a reasonable time period in which an entity such as DataLink should process the permit applications.

58. The FCC has issued a timeline for make ready as displayed below for a maximum total of 148 days. DataLink has proposed a complete timeline of 100 days (not inclusive of the timelines of the attacher) within a recently signed MOU with Logic. DataLink recommends that this process be adopted by all attaching utilities. Given what has been recommended by the FCC, as illustrated below, for utility companies that are significantly larger and that are not subject to resources constraints typical in a small island environment (such as limited local trained personnel, work permit requirements and importation timelines), DataLink believes the MOU format represents a fair and reasonable approach. The MOU considers that some poles may not require make ready, such poles have been assigned a shorter timeline, the attacher has also been asked to bear the responsibility of limiting attachment requests to reasonable figures and to communicate a clear plan of attachment priority areas to DataLink to allow for the efficient planning and deployment of resources. The MOU encourages communication and facilitates good relations and is attached for the authority's reference.

QUESTION B2: Provide your view on whether or not the proposed amendments to the permit application process as set out at paragraph 182 above are appropriate for issuing permits for the attachment of communication cables to CUC's electricity poles.

59. DataLink disagrees with the proposed timing as the timing in the Logic MoU is fair and reasonable.

QUESTION B3: Provide your view on whether or not the Attaching Utilities should be allowed to perform relevant tasks relating to the Pre-Permit Survey and Make-Ready Work, in cases where timelines in the pole attachment process are not met by DataLink.

60. The attaching utilities are not certified utility employees and have not been trained to meet the standards that are required by CUC, the ERA and NESC. The risk to public and employee safety is too great to allow the planning of or modification to the Transmission & Distribution infrastructure belonging to CUC by individuals who have not been evaluated, and supervised by the qualified individuals at CUC.



QUESTION B4: Provide your view on whether or not the Attaching Utilities should be allowed to use qualified contractors for Pre-Permit Survey and Make-Ready Work, in cases where timelines in the pole attachment process are not met by DataLink, and if so, provide detailed specification of the relevant process for the use of such qualified contractors.

61. DataLink proposes to set reasonable Service Level Agreements with respect to timing of make ready work as described in the Logic MOU. Adherence to the expectations in this MOU will allow all attaching utilities to make appropriate and reasonable plans for their roll out and avoid the need for third party contractors. Furthermore as make ready work often involves the moving of electrical infrastructure, all work must be reviewed, designed, approved and executed by the electric utility who is the sole party that can certify employees or a contractor to work on CUC's electrical infrastructure. Accordingly, DataLink does not see any benefit in additional third party contractors being brought in by a communications provider as these parties would only be able to work under CUC's direction. Additionally, if CUC were to have to review and work with multiple contractors without having contractual relationships with them, this would add the need for additional oversight and control by CUC which would add cost, potentially decrease quality and safety levels, which is an unacceptable situation for both DataLink and CUC.

QUESTION B5: Provide your view on whether or not the principles governing the permit application process, including any relevant Make-Ready Work, as noted and discussed in paragraphs 178 to 195 above, should be standardised and applied across all the existing, and future, pole sharing agreements.

62. The principles governing the permit application process, including any relevant Make-Ready Work, as noted and discussed should be standardized and applied across all the existing, and future, pole sharing agreements. In the opinion of DataLink, however, consideration should be given to FLOW for the inherent built in cost for Make-Ready within the existing agreement that has already been applied to all poles as of the date of any potential new agreement.

QUESTION B6: Provide your view on whether or not the relevant sections in the article referring to Make Ready Work/Installation, as specified in the existing pole sharing agreements, need to be amended and, if so, provide your view on the proposed amendments in the relevant article referring to Make Ready Work/Installation for each of the existing pole sharing agreements, as discussed in paragraphs 191 to 195 above.

63. DataLink does not think an exercise of picking sections from the various contracts is helpful or fair. The Logic agreement with the MOU is the most up to date and fair to all parties and is in line with FCC guidelines.

QUESTION B7: Provide your view on any other matters you consider relevant to this consultation.



64. DataLink proposes that the make ready process should be the same for all attaching utilities. DataLink's most recent pole attachment agreement is with Logic which has since been clarified by the DataLink-Logic MOU dated 24 June 2016. DataLink maintains that this agreement and the MOU achieve the goals of the Authority with respect to fair competition, transparency of process and efficiency of roll out of network for all providers. DataLink has been attempting to negotiate this same standard pole attachment agreement with Infinity and FLOW without success to date.
65. DataLink wishes to highlight to the Authority certain unacceptable consequence of the practice of making unauthorised attachments and invites the Authority to make clear that the practice is unacceptable. As noted in the ICT Consultation, the existing attaching utilities with agreements with DataLink have historically all made attachments to the communications space without authorisation in the form of a permit. As previously stated, unauthorised attachments present an unacceptable risk to the infrastructure, to the health and safety of the workers and the public and are in contravention of the agreements and the undertakings that each attaching utility has made to DataLink and to CUC. For these reasons alone, unauthorised attachments harm the efficient use of the infrastructure.
66. DataLink also believes that the practice of any attaching utility in making such unauthorised attachments is anti-competitive as it places those who follow due process (and Infinity is bound to do so as part of a formal undertaking to the Grand Court) at an unfair competitive disadvantage both in the timing of attachments made, the position of the attachment and, as seen in many cases, the presumption to make multiple attachments (thus over-crowding the infrastructure and reducing capacity available in the communications space). The permit process ensures that each pole is made ready, has an established communications space and safety zone, and can structurally support the proposed installation of attachments. The permit process supports the promotion of an efficient, economic and harmonised use of infrastructure. DataLink is pleased that the Authority has clarified the point of attachment for each attaching utility, however, it remains concerned that the Authority clearly address the practice of unauthorised attachment as unacceptable and anti-competitive.

C: CONSULTATION ON CHARGING PRINCIPLES RELATING TO THE ATTACHMENT OF COMMUNICATION CABLES TO CUC'S ELECTRICITY POLES.

RESPONSE TO CONSULTATION QUESTIONS

QUESTION C1: Provide your view on whether or not the current pricing formula for calculation of the "Annual Attachment Fee" is appropriate, in particular whether it leads to



cost-oriented rates for pole rental services and whether it is in compliance with the FAC costing methodology.

67. The formulas and methodologies for calculation of the Annual Attachment Fee for Logic, Infinity and FLOW are each appropriate in terms of the following:
- The calculation is based on a fair allocation of actual costs.
 - The calculation is transparent.
 - The calculation complies with the respective agreement with CUC or DataLink.

However, the agreements with FLOW, Infinity and Logic were executed in 1996, 2005 and 2013, respectively, and refinements in the formula and methodology over that time frame has led to differences between these calculations. These differences, to the extent that they effect the competitiveness between the attaching utilities, are not considered appropriate. As noted by the Authority, DataLink has attempted to negotiate new agreements with FLOW and Infinity to bring the terms of those agreements to material similarity with the Logic agreement. Even then, unless changed by agreement, the anniversary date of each agreement would differ and therefore the Annual Attachment Fee would not be the same for all the attaching utilities all the time.

68. Therefore, DataLink would request that the Authority require FLOW, Infinity and Logic to each execute an amendment to their respective agreements with CUC/DataLink to incorporate the same formula, methodology and annual adjustment date for the Annual Attachment Fee, ensuring that the Annual Attachment Fee, described in more detail in Response C2 below, would be the same for all attaching utilities at all times.

QUESTION C2: Provide your view on whether each of the relevant components of the pricing formula for calculation of the "Annual Attachment Fee", including but not limited to:

- **"Net Cost of Bare Pole"** - defined as "the net book value of poles as of the most recent annual financial statements of the Owner Utility divided by the number of poles as of the most recent fiscal year end",
- **"Space Factor"** - defined as an "allocation of the total pole height based on the actual space used by the Attachment plus an allocated portion of the unusable space on the pole", including the following parameters which are used for calculation of the relevant "Space Factor":
 - "Unusable space on the pole",
 - "Space occupied by the Attachment",
 - "Number of Attaching utilities"; and,
 - "Weighted average height of all poles" or "Weighted average height of wood poles"



- **“Annual Carrying Charge Rate” or “20 year Levelized Fixed Charge Rate”**, is appropriately specified or determined in the relevant pole sharing agreements.

69. As noted in the Response to C1 above, DataLink would propose that the Annual Attachment Fee for FLOW, Infinity and Logic be the same at all times. The quarterly billing amount would be based on the Annual Attachment Fee times the number of respective attachments applicable for the quarter. Amendments to all three agreements would be required to implement the proposed methodology and formula. As part of the methodology proposed by DataLink herein, the Annual Attachment fee would be recalculated annually based on updated values for the various variables in the formula. Specifically, the Annual Attachment Fee would be adjusted each July 1 based on the recalculated formula using values as appropriate as of the most recent calendar year or yearend. Each of the agreements has a provision for such an annual update but they each have different anniversary dates for the updated Annual Attachment Fee to take effect. The elements are all appropriate however suggested modifications or continued use for consistent application are listed below.

70. The proposed Annual Attachment Fee formula for FLOW and Infinity would be modified to be consistent with the following formula applicable to Logic:

Net Cost of a Bare Pole *times*

Space Factor *times*

Annual Carrying Charge Rate *times*

(1 + Inflation Adjustment) *times*

(1 + Management & Overhead Allowance) *equals*

Annual Pole Attachment Fee

The Net Cost of a Bare Pole represents the net book value of all poles divided by the number of poles as of the most recent calendar yearend, consistent with the Logic agreement. The Infinity agreement uses a similar variable but it is based on wood poles only. The FLOW agreement uses a different formula but it considers all pole types in the 30 to 50 foot range. Attachments are allowed for all types and sizes of CUC poles, therefore, all types and sizes of poles should be included in the calculation.

For the gross pole investment, the FCC rules require that U.S. electric utilities use gross investment in poles as recorded in Account 364 of the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission (FERC). This account definition includes the costs associated with the bare pole as well as the investment in cross arms and other non-pole investments. An adjustment factor is used by U.S. Electric Utilities to remove these costs to approximate the gross



cost of the bare poles. CUC utilises the installed cost of the pole not inclusive of these items as is required by the FCC.

In paragraph 219 the Authority opened for consultation whether the values determined for the Net Cost of a Bare Pole are cost oriented, DataLink is confident that the values are in fact cost-oriented.

71. The cost of the bare pole excludes all equipment and attachments required by CUC for electric service but includes the cost of the raw materials, labor, equipment and overheads necessary to erect the bare pole. For aluminum poles this would include the cost to build the foundation on which the pole is bolted.
72. The proposed Space Factor formula would be consistent with the Logic and Infinity agreements and incorporates the following variables:
 - Number of Attaching utilities
 - Space Occupied
 - Pole Height
 - Unusable Space

Consistent with the Logic agreement, the proposed Number of Attaching utilities would be four, consisting of Logic, Infinity, FLOW and DataLink. This implies that no new telecommunications providers would be allowed to attach to CUC poles.

73. For the Space Occupied by the attachment, DataLink would propose to use 9.0 inches, derived from the total communication space of 36.0 inches divided by the four attaching utilities. This change would require an amendment to all existing contracts. The Pole Height variable represents a weighted average of all CUC poles as of the most recent calendar year end. The weighted average Pole Height should be based on the same poles as of the same date as the calculation of the average Net Cost of a Bare Pole above. No suggested change is being put forward for this calculation. The Unusable Space has been set at 24.5 feet in the Space Factor formula in the Logic and Infinity agreements. The Unusable Space on the pole represents the ground clearance and the amount of pole below ground. The 24.5 feet allowance is based on the typical ground clearance of 18.5 feet and 6.0 feet of pole below ground. While the ground clearance requirement applies to all poles of all heights, the amount of pole below ground depends on the overall size of the pole, except for aluminum poles that do not extend below ground. Therefore, the proposed formula for Space Factor would include a weighted average allowance for unusable space determined by the weighted average height of the pole rather than the fixed amount of 24.5 feet.
74. The proposed weighted average Unusable Space would be calculated based on the same poles as of the same date as the calculations of the average Net Cost of a Bare Pole and the weighted



average Pole Height, as discussed above. For concrete, fiberglass and wood poles, the Unusable Space would be the ground clearance of 18.5 feet plus the portion below ground using the following formula: 2.0 feet plus 10% of the overall pole height. For aluminum poles, the Unusable Space would be only the ground clearance of 18.5 feet. The estimated weighted average Unusable Space for all CUC poles as of yearend 2015 is 24.2 feet.

75. The remaining factor in the Space Factor formula is $\frac{2}{3}$, which is multiplied times the amount of Unusable Space per Attacher. This is a fixed value that assigns one-third of the cost responsibility for Unusable Space to CUC.
76. The proposed Annual Carrying Charge Rate in the Annual Pole Attachment Fee calculation would be consistent with the Logic agreement. The Infinity agreement uses the same calculation methodology but the result is slightly different because only wood poles are considered in the depreciation component.
77. The proposed Inflation Adjustment in the Annual Pole Attachment Fee calculation would be consistent with the Logic agreement. Under the proposed methodology, historical costs for a calendar year form the basis for the Annual Pole Attachment Fee that would apply for the period from six months to 18 months following the end of that calendar year. Therefore, an inflation adjustment to escalate those costs by one year is reasonable. To improve transparency and accountability, the proposed Inflation Adjustment would be specified to be the same as the inflation calculation reported by CUC to the Electricity Regulatory Authority. The CUC inflation calculation is used in determining rate adjustments effective June 1 and is based on the most recent calendar year.
78. The proposed Management & Overhead allowance would be 20%, consistent with the Logic agreement.

QUESTION C3: Provide your view on what charging principles should be implemented in order to ensure that the costs relating to "Make-Ready Work" are cost-oriented and in compliance with the FAC costing methodology.

79. The Make Ready costs provided by DataLink are 100% cost based and in compliance with Fully Allocated Cost (FAC) methodology. In response to communication from the attaching utilities ~~regarding requests for greater~~ transparency, a very detailed method for the provision of estimates and actuals was developed by DataLink and sent to the attaching companies for comment prior to implementation.



80. The current format provides a diagram, a listing of expected equipment to be used, estimated labour hours and anticipated inventory requirements. Each pole is listed by number and shown on the diagram. DataLink adds no profit mark-up to these costs and adds only the license & regulatory fee component charged by the Authority to ensure DataLink is not incurring a loss in providing this service (see specimen attached).
81. A cost component that may be reviewed is the cost of planning and providing an estimate. Some attaching utilities request multiple estimates and choose to not attach. DataLink suggests a fixed fee per pole for the cost to assess, design and calculate estimated costs associated with accommodating a telecommunication attachment. Such practices are commonly accepted in other jurisdictions.

QUESTION C4: Provide your view on whether or not pole attachments charges relating to attaching and maintenance costs should take into account any necessary adjustments based on the relevant position of each Attacher in the Communication Space, and if so, what charging principles should be adopted.

82. DataLink does not agree that fees, make-ready charges or maintenance costs should vary between attaching utilities dependant on position of attachment on the pole. DataLink has seen no evidence (as opposed to assertion by Infinity) that position of attachment has any material impact on an attaching utility's costs.

QUESTION C5: Provide your view on any other issues relating to the appropriate charges for and charging principles applied to the attachment of communication cables to CUC's electricity poles.

83. DataLink would ask the authority to consider not charging License & Regulatory fees as it relates to Make Ready transactions. DataLink charges make-ready at cost, however, the additional charge to cover these fees has been found to be cost prohibitive by the attaching utilities. Since it is not income to DataLink but only a pass through at cost, it would not be fair for DataLink to cover the regulatory fee without receipt of those additional costs.

QUESTION C6: Provide your view on whether or not DataLink should be subject to the same terms and conditions relating to the pole sharing arrangements for attachment of its communication cables to CUC's electricity poles, including the relevant charging principles, as they apply to all the other Attaching utilities.

84. DataLink's position is not the same as the Attaching utilities and it should not be subject to an identical regime. DataLink is effectively in the position of an owner utility in regard to the communications space, which means that it is not appropriate to require it pay itself or CUC identical charges to those levied on the Attaching utilities



QUESTION C7: Provide your view on any other matters you consider relevant to this consultation.

Datalink proposes a new fee to be added to all Attaching Utility's agreements. This fee existed in the DataLink-Cable & Wireless agreement but does not exist in the DataLink Infinity or DataLink-Logic agreements. The new fee would address the incremental cost of CUC planting a new pole with the make ready already done in anticipation of pole attachment requests in the future. DataLink has been advised from CUC that installing new poles with the communications space already in place is more costly than installing a pole without the communication space provided. However this incremental cost is substantially less than make ready costs if this make ready work is completed after the pole is put into service for electrical use. DataLink proposes that this Make Ready - New Pole fee will save make ready costs in the long run and allows attaching utilities to expand their networks into new neighborhoods with a much smoother attachment permit process as there will be little no make ready work to be done.

85. The calculation of this fee should reflect the proportionate costs of the additional height for each future pole with proportionate sharing of installation costs and full cost allocation of any additional strengthening required to accommodate the communication space. This would in effect perform the role of a reservation fee for future as yet unplanned roll-outs and minimise the financial impact incurred with retroactive make-ready. Such a cost structure would require input from consultants and an in-depth review by all parties involved. Please note a similar cost methodology is in place with FLOW.
86. Furthermore, DataLink proposes that on a go forward basis that all Attaching utilities are charged the same fees. DataLink's most recent pole attachment agreement is with Logic which has since been clarified by the DataLink-Logic MOU. DataLink maintains that this agreement along with the MOU achieve the goals of the Authority with respect to fair competition, transparency of process and efficiency of roll out of network for all providers. DataLink has been attempting to negotiate this same standard pole attachment agreement with Infinity and FLOW without success. DataLink agrees with the authority on the benefit of harmonised terms and invites the authority to make a determination in principle that terms should be harmonised for FLOW, Infinity and Logic and determinations as to the content of those terms as discussed above.
87. DataLink notes the Authority's observation that FLOW pay an "Attachment Rental", and propose that it should be removed by harmonising contracts as noted above.
88. DataLink notes that the Authority expresses a concern that the present charging structure provides an incentive to licencees to erect their own poles. DataLink does not consider that such an



incentive is present. The cost of providing ICT facilities by attaching to existing poles is a small fraction of the cost of doing so by installing another pole network.

89. DataLink also notes that the Authority also expresses concern that make ready work as a one off cost is being charged under recurring payments (quarterly attachment fees). and this is not appropriate. DataLink agree that it would not be appropriate, but it is not in fact happening. DataLink is concerned that there may be misunderstanding about the nature of make-ready work. As accurately expressed by the Authority it involves both strengthening and safety make-ready. Make-ready does not include any work to perform the actual attachment of an attaching utility's network.
90. DataLink has no objection to utility workers or contractors performing this work once the relevant permits have been issued. DataLink does not accept that the make-ready charges are in any way bundled so that any particular attaching utility is paying for components that it does not need. The establishment of the communications space, the safety space and pole strengthening is required for all attaching utilities regardless of the position they have been assigned within the communications space. Make-ready does not include the provision of attachment bolts or connection points for the attaching utility to utilize, each utility performs their own connection work personally or through authorised contractors.
91. Make-Ready costs are not included in the quarterly attachment fees nor does DataLink "bundle" fees as is suggested at paragraph 222 of the Consultation. DataLink's services are (1) Make-ready. Cost based charge on actual expenses with no mark up. The costs to change the infrastructure are unnecessary to the electric utility but desired by the attaching telecom and as such they must absorb the costs. In addition, CUC is prohibited from upgrading its electrical infrastructure purely to accommodate the attaching utilities by the conditions of its own licence, which is why the work is carried out and charged for by Datalink. (2) Attachment / Rental Fees. DataLink's structure for costs is quite similar as that seen in the western hemisphere. The attachment fee represents the ongoing cost to use a portion of the asset which increases maintenance and administrative costs for the utility. Any future changes to a pole with communication attachments requires a significant coordination effort. Engineering standards have to be revisited to accommodate additional loading and consistent review has to be performed to ensure the telecoms are in compliance with the utility's requirements. DataLink does not accept that its fees are "bundled" in a similar way that telecom utilities may bundle internet, phone and tv charges to require customers to pay for unnecessary/undesired elements. This is not an appropriate description of DataLink's charges.
92. DataLink notes the Authority's view that DataLink should be subject to all the same charges as the Attaching Utilities. This suggestion does not reflect the unique position of DataLink as outlined



above. DataLink pays management and other charges to CUC and it pays a set fee for every attachment made to the pole regardless of whether that attachment is its own or is placed by an Attaching utility. It is for practical purposes the “owner” of the communication space which it is sharing with the attaching utilities and as such it is not appropriate that it should in effect charge itself for its own use of shared infrastructure.

93. The authority noted in paragraph 208 that “it appears the annual attachment fee did not vary over time”; DataLink submits invoices quarterly to the regulator for review per the required regulatory reporting. The content of those invoices clearly illustrates a change in the attachment fees.