



ICT Decision 2016-2 – cost recovery for the reattachment of Infinity Broadband Ltd.'s communication cables onto CUC's electricity poles

Grand Cayman, 30 September 2016

Table of Contents

ICT Decision 2016-2 – cost recovery for the reattachment of Infinity Broadband Ltd.’s communication cables onto CUC’s electricity poles

BACKGROUND	3
LEGAL FRAMEWORK	7
ICT CONSULTATION 2016-1	11
RESPONSES TO ICT CONSULTATION 2016-1.....	12
THE AUTHORITY’S ANALYSIS	14
THE AUTHORITY’S DECISION	18

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BACKGROUND

1. On **22 November 2005**, Infinity Broadband, Ltd. ('**Infinity**') and Caribbean Utilities Company, Ltd. ('**CUC**') entered into a Master Pole Joint Use Agreement, which allows Infinity to attach its communication cables to the electricity poles owned by CUC (the '**CUC-Infinity Pole Sharing Agreement**').¹
2. On **22 April 2011**, by amendment to section 23 of the Information and Communications Technology Authority Law (2011 revision) (the '**Law**'),² the "*Governor in Cabinet may [...] exempt a company from the requirement to obtain an ICT licence if the sole ICT network or ICT service that the company provides is the provision of ICT infrastructure to a wholly-owned subsidiary that is subject to [the Law].*"³
3. On **10 May 2011**, in exercise of the powers conferred by section 23 of the Law, the Governor in Cabinet issued a Gazette Notice (the '**Information and Communications Technology Authority (CUC – Datalink) Notice, 2011**') exempting CUC from "*the requirement to obtain an ICT licence with respect to its provision of ICT infrastructure to DataLink Limited*".⁴
4. On **20 March 2012**, CUC and Datalink, Ltd. ('**DataLink**') entered into a Master Pole Joint Use Agreement, which allows joint use of CUC's electricity poles for the purpose of maintaining or installing attachments of communication cables to CUC's electricity poles (the '**CUC-Datalink Pole Sharing Agreement**').
5. On **20 March 2012**, CUC and Infinity executed a Deed of Variation relating to the Master Pole Joint Use Agreement, dated 22 November 2005, which amended and supplemented the terms of the CUC-Infinity Agreement (the '**CUC-Infinity Deed of Variation**').⁵
6. On **28 March 2012**, the Information and Communications Technology Authority (the '**Authority**') issued an ICT Licence to DataLink, which authorised DataLink to supply certain ICT Services, including Type 11 ICT Service specified as "*the*

¹http://www.icta.ky/upimages/agreement_documents/1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf

²<http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

³<http://www.icta.ky/upimages/commonfiles/1417276774ICTAAmendmentLaw2011.pdf>

⁴<http://www.icta.ky/upimages/commonfiles/141727998220110517CUC-DatalinkNotice.pdf>

⁵http://www.icta.ky/upimages/agreement_documents/1417708388DeedofVariationCUCInfinityBroadband.pdf

provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.”⁶

7. On **7 May 2012**, Infinity, CUC and DataLink executed an agreement which novated and transferred all the rights and obligations under the CUC-Infinity Pole Sharing Agreement and the CUC-Infinity Deed of Variation, from CUC to DataLink (the ‘**Infinity-CUC-DataLink Novation Agreement**’).⁷
8. On **9 November 2012**, Cable and Wireless (Cayman Islands), Ltd. (‘**LIME**’), CUC and DataLink executed a Novation and Amendment Agreement (the ‘**LIME-CUC-DataLink Novation Agreement**’)⁸ which amended, and novated and/or transferred all of CUC’s rights and obligations under the Agreement for Licensed Occupancy of CUC Poles by LIME made on 5 November 1996 (the ‘**CUC-LIME Pole Sharing Agreement**’),⁹ to DataLink.
9. On **18 July 2013**, WestTel Limited T/A Logic (‘**Logic**’) and DataLink entered into a Master Pole Joint Use Agreement, which allows Logic to attach its communication cables to electricity poles owned by CUC (the ‘**DataLink-Logic Pole Sharing Agreement**’).¹⁰
10. In a letter to DataLink, dated **16 July 2014**, Infinity raised a number of contentious issues with DataLink in relation to the implementation of the **CUC-Infinity Pole Sharing Agreement** and the **CUC-Infinity Deed of Variation**, as novated through the **Infinity-CUC-DataLink Novation Agreement**, including, among other things, the initiative made by DataLink establishing a new form of agreement with Infinity to replace the existing agreements, which in Infinity’s view was “*biased in favour of DataLink*”, and the allegations made by DataLink that Infinity breached the existing agreements with certain unauthorised attachments to CUC’s electricity poles.
11. In a letter to the Authority, dated **5 August 2014**, Infinity expressed its concerns in relation to the decisions made by DataLink regarding the height above ground at which the various attaching parties must attach their communication cables to CUC’s electricity poles. Infinity requested that the Authority commence an investigation under Section 41 of the Law¹¹ to establish whether DataLink has infringed Section 36 or Section 40 prohibitions of the Law.
12. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the ‘**Dispute Regulations**’),¹² Infinity submitted a dispute determination request to the Authority (the ‘**Dispute Determination Request**’)¹³ contending that a dispute had arisen between Infinity and DataLink relating to the allocation of communications space

⁶http://www.icta.ky/upimages/licenseddocument/ViewLicencedocument_1417650665.pdf

⁷http://www.icta.ky/upimages/agreement_documents/NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED_1458325571.pdf

⁸http://www.icta.ky/upimages/agreement_documents/1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf

⁹http://www.icta.ky/upimages/agreement_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf

¹⁰http://www.icta.ky/upimages/agreement_documents/141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf

¹¹<http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

¹²<http://www.icta.ky/upimages/commonfiles/1417277080ICTA-DisputeResolutionRegulations.pdf>

¹³<http://www.icta.ky/upimages/commonfiles/141726659620140912C3DeterminationRequest.pdf>

- used by Infinity for attachment of its communication cables on CUC's electricity poles managed by DataLink (the '**Dispute**').
13. On **2 October 2014**, DataLink submitted its response to the Dispute Determination Request ('**Response to the Dispute Determination Request**')¹⁴.
 14. On **21 October 2014**, considering it appropriate to invite submissions from any interested parties on the issues addressed in each of the filings made by Infinity and DataLink, the Authority opened a public consultation relating to the Dispute.¹⁵ Interested parties were invited to present any such submissions by 5 November 2014. However, the Authority received no submissions to that public consultation. Indeed, CUC replied to the Authority on 5 November 2014 stating that "*CUC does not intend to provide submissions in respect of the pole attachment services dispute between Infinity and DataLink.*"
 15. On **26 June 2015**, upon consideration that the matter of the dispute between Infinity and DataLink may be relevant to other Licensees, the Authority sent requests for information to DataLink,¹⁶ Infinity,¹⁷ Logic,¹⁸ and LIME,¹⁹ with the intention to investigate in more detail the matter of the dispute.
 16. On **2 July 2015**, Infinity submitted its response to the Authority's request for information of 26 June 2015.²⁰
 17. On **7 July 2015**, Logic submitted its response to the Authority's request for information of 26 June 2015.²¹
 18. On **21 July 2015**, DataLink submitted its response to the Authority's request for information of 26 June 2015.²²
 19. On **31 July 2015**, LIME submitted its response to the Authority's request for information of 26 June 2015.²³
 20. On **26 August 2015**, as a follow-up to the submissions received in response to the Authority's request for information of 26 June 2015, the Authority sent additional requests for information in order to clarify certain responses provided by the Licensees, and to make further progress on the investigation of the Dispute.²⁴
 21. On **2 September 2015**, Infinity submitted its response to the Authority's additional request for information of 26 August 2015.²⁵

¹⁴<http://www.icta.ky/upimages/commonfiles/141726651120141002DataLinkResponse.pdf>

¹⁵<http://www.icta.ky/infinitydatalink-pole-attachment-dispute>

¹⁶<http://www.icta.ky/upimages/commonfiles/143836666320150626ICTAtoDataLinkrepoledispute.pdf>

¹⁷<http://www.icta.ky/upimages/commonfiles/143836669520150626ICTAtoInfinityrepoledispute.pdf>

¹⁸<http://www.icta.ky/upimages/commonfiles/143836676620150626ICTAtoLogicrepoledispute.pdf>

¹⁹<http://www.icta.ky/upimages/commonfiles/143836672520150626ICTAtoLIMErepoledispute.pdf>

²⁰<http://www.icta.ky/upimages/commonfiles/14595195658July2015InfinityresponsetoICTA.pdf>

²¹<http://www.icta.ky/upimages/commonfiles/145951962817July2015LogicresponsetoICTA.pdf>

²²<http://www.icta.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>

²³<http://www.icta.ky/upimages/commonfiles/145951959831July2015LIMeresponsetoICTA.pdf>

²⁴<http://www.icta.ky/upimages/commonfiles/145952021226August2015ICTAtoLogicfollow-up.pdf>

and <http://www.icta.ky/upimages/commonfiles/145952018126August2015ICTAtoLIMEfollow-up.pdf>

²⁵<http://www.icta.ky/upimages/commonfiles/14595202892September2015InfinityresponsetoICTA.pdf>

22. On **3 September 2015**, Logic submitted its response to the Authority's additional request for information of 26 August 2015.²⁶
23. On **11 September 2015**, the Authority received a letter from Ogier, a law firm acting on behalf of Infinity, urging the Authority to expedite the processing of the Dispute Determination Request.
24. On **16 September 2015**, DataLink submitted its response to the Authority's additional request for information of 26 August 2015.²⁷
25. On **22 September 2015**, LIME submitted its response to the Authority's additional request for information of 26 August 2015.²⁸
26. On **27 April 2016**, the Authority issued a decision ('**ICT Decision 2016-1**') relating to the Dispute, in which the Authority determined that the **CUC-Infinity Pole Sharing Agreement** shall be amended to define and reflect the allocation position for the attachment of communication cables by Infinity to be at the top of the Communication Space, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**.²⁹
27. Following from the determination made in ICT Decision 2016-1, the Authority issued a public consultation ('**ICT Consultation 2016-1**')³⁰ seeking views from interested parties on the relevant cost recovery principles relating to the reattachment of Infinity's communication cables to CUC's electricity poles, from the current height of 254 inches to the new height of 258 inches above the ground.

²⁶<http://www.icta.ky/upimages/commonfiles/14595203193September2015LogicresponsetoICTA.pdf>

²⁷<http://www.icta.ky/upimages/commonfiles/145952035118September2015DataLinkresponsetoICTA.pdf>

²⁸<http://www.icta.ky/upimages/commonfiles/145952038322September2015LIMeresponsetoICTA.pdf>

²⁹<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

³⁰<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

LEGAL FRAMEWORK

28. In making the decision regarding the relevant cost recovery principles relating to the reattachment of Infinity's communication cables onto CUC's electricity poles, from the current height of 254 inches to the new height of 258 inches above the ground, the Authority is guided by its statutory remit, in particular as set out in the Information and Communications Technology Authority Law (2011 revision) (the 'Law')³¹ and the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the 'Infrastructure Sharing Regulations').³²

In particular:

29. Section 9 (3) of the Law states, among other things, that:

[...] the principal functions of the Authority are -

(a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;

[...]

(e) to license and regulate ICT services and ICT networks as specified in this Law and the Electronic Transactions Law (2003 Revision);

[...]

(g) to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;

(h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure; [...]

30. Section 65 of the Law states, among other things, that:

(1) Subject to this section, a licensee that operates a public ICT network shall not refuse, obstruct or in any way impede another licensee in the making of any interconnection with its ICT network and shall, in accordance with this section, ensure that the interconnection provided is made at technically feasible physical points.

[...]

(5) Any interconnection provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to -

(a) any non-affiliated supplier;

³¹ <http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

³² <http://www.icta.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>

- (b) any subsidiary or affiliate of the licensee; or
- (c) any other part of the licensee's own business.
- (6) Without prejudice to subsection (5), the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnections will be determined.
31. Section 66 of the Law states, among other things, that:
- (5) Where parties cannot agree upon interconnection rates, the Authority may impose such rates.
32. Section 68 of the Law states, among other things, that:
- (1) The cost of making any interconnection to the ICT network of another licensee shall be borne by the licensee requesting the interconnection.
[...]
- (3) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.
33. Section 69 of the Law states, among other things, that:
- (1) Sections 65 to 68 shall, with necessary amendment, apply to such infrastructure sharing as the Governor in Cabinet may, after consultation with the Authority, prescribe.
- (2) The Authority, in order to promote an efficient, economic and harmonised utilisation of infrastructure, may-
- [...]
- (b) inquire into and require modification of any agreement or arrangements entered into between a licensee and another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.
34. The Information and Communications Technology Authority (Infrastructure Sharing) Notice, 2003³³ states that the provisions of sections 44 to 47 [being sections 65 to 68 of the Law (2011 revision)] inclusive of the Information and Communications Technology Authority Law, 2002:
- “shall apply to infrastructure sharing which has the following meaning-

³³<http://www.icta.ky/upimages/commonfiles/1417280230ICTA-InfrastructureSharingNoticeDefinition.pdf>

"infrastructure sharing" means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the utilisation of a public ICT network.

(2) *For the avoidance of doubt-*

(a) *tangibles include lines, cables or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, poles, landing stations, huts, lands, buildings or facilities..." [emphasis added]*

35. Regulation 6 of the Infrastructure Sharing Regulations states the following:

The following general principles and guidelines shall apply to the provision of interconnection and infrastructure sharing services –

(a) *Interconnection and infrastructure sharing services shall be provided by the responder to the requestor at reasonable rates, on terms and conditions which are no less favourable than those provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder and shall be of no less favourable quality than that provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder; [...]*

(h) *Interconnection and infrastructure sharing rates shall be cost-orientated and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder's fixed and common costs;*

36. Regulation 9 of the Infrastructure Sharing Regulations states the following:

The rates offered by the responder to the requestor shall clearly identify all charges for interconnection or infrastructure sharing.

37. Regulation 10 of the Infrastructure Sharing Regulations states the following:

(1) *A responder's charges for interconnection or infrastructure sharing shall be-*

(a) *determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;*

(b) *non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;*

...

(e) *such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and*

- (f) *based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.*

ICT CONSULTATION 2016-1

38. In the ICT Consultation 2016-1, the Authority considered that, based on relevant cost-recovery principles,³⁴ the cost of reattachment of Infinity's communication cables currently deployed on CUC's electricity poles, to the new height of 258 inches above the ground, should normally be borne by the party initiating the request for reattachment.
39. The Authority further considered that the request for the reattachment of Infinity's communication cables from the current height of 254 inches to 258 inches above the ground should be deemed to be a new amendment to the existing pole sharing arrangements between Infinity and DataLink, for which Infinity could legitimately seek to avoid the costs of implementation.
40. The Authority, however, noted that Infinity had made certain '**unauthorised attachments**' by attaching its communication cables on a significant number of CUC's electricity poles without having first received the appropriate pole attachment permits from DataLink.
41. The Authority proposed that, for any case where the reattachment of Infinity's communication cables to the new height of 258 inches above the ground would be required, DataLink should be held liable for the full recovery of the costs related to that reattachment but only where a pole attachment permit for the relevant pole had previously been issued by DataLink. This was referred to as "**Proposal A**".
42. On the other hand, for the poles to which Infinity had made *unauthorised attachments*, the Authority proposed that Infinity should be held liable for recovery of the costs related to the reattachments to the new height of 258 inches above the ground. The Authority also considered that, following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches above the ground on each relevant pole, DataLink should grant the relevant pole attachment permits under Article VI of the CUC-Infinity Pole Sharing Agreement. This was referred to as "**Proposal B**".
43. In that regard, the Authority proposed that, if there was any delay by DataLink of more than thirty (30) days for issuing the relevant pole attachment permits following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches, DataLink should then not be exempted from the liability for the cost-recovery related to the relevant reattachments, and it should therefore bear the costs related to any such reattachments. This was referred to as "**Proposal C**".
44. The Authority invited all interested parties to submit their comments on the questions relating to which party should pay the cost of the reattachment of Infinity's communication cables to CUC's electricity poles. Responses to the public consultation were due by 28 May 2016.

³⁴See paragraphs 143 to 146 in ICT Consultation 2016-1.

RESPONSES TO ICT CONSULTATION 2016-1

45. On 27 May 2016, the Authority received a submission from Infinity in response to ICT Consultation 2016-1.
46. No other submissions relating to the ICT Consultation 2016-1 were received by the Authority.

In relation to the questions considered in ICTA Consultation 2016-1:

QUESTION 1: Provide your view as to whether or not the proposed cost-recovery principles, and the relevant liabilities for the recovery of the costs related to the reattachment of Infinity's communication cables, as discussed above under Proposal A and Proposal B, are appropriate and why.

47. Infinity submitted that it is “*in broad agreement with Proposal A*” which stated that DataLink should be held liable for the full recovery of the costs related to the reattachment of Infinity’s communication cables to the new height of 258 inches above the ground for each such case where a pole attachment permit had previously been issued by DataLink.
48. Infinity further submitted that it is “*also in broad agreement with Proposal B, but subject to the introduction of the concept of a justified unauthorised attachment being deemed to be an authorised attachment*”. Infinity submitted that “*a justified unauthorised attachment should be treated as an authorised attachment for the purpose of determining financial liability for relocating the attachment*”, noting that an attachment should be deemed to be a “*justified unauthorised attachment*” in any such case “*where Infinity took every reasonable step to obtain a permit and DataLink, in breach of its obligations under the pole sharing agreement, failed to issue that permit.*”
49. In support of its submission above relating to the concept of a “*justified unauthorised attachment*”, Infinity claimed that “[h]ad DataLink complied with its own obligations under the pole sharing agreement a considerably higher number of Infinity’s attachments would have been authorised.”

QUESTION 2: Provide your view as to whether or not DataLink should grant the relevant pole attachment permit to Infinity under Article VI of the CUC-Infinity Pole Sharing Agreement at the same time as completion of the relevant reattachment.

50. Infinity submitted that it assumed “*that this point only applies to existing unauthorised attachments (with the permits in issue already being treated as though they were permits to attach at 258 inches, not 254 inches, once that reattachment actually takes place)*”, and it noted that “[i]f an unauthorised attachment is removed and re-attached at 258 inches, the only authority for that new attachment must be an issued permit, per VI.F”.
51. Infinity further proposed “*that DataLink issues the relevant re-attachment permits before the reattachment takes place and that there are strict timelines for the issue of those permits*”.

QUESTION 3: Provide your view on the proposed due date of thirty (30) days for issuing the relevant pole attachment permits following the completion of

the reattachment of Infinity's communication cables to the new height of 258 inches above the ground, after which DataLink would then be liable for the recovery of the costs related to the reattachments to the new height of 258 inches above the ground.

52. Infinity submitted that "since the permit amounts to the only permission to attach it seems that the permit must be issued at the same time as (or shortly prior) to the re-attachment".
53. Infinity further submitted that "DataLink are responsible for the costs of the re-attachment if the permit is not issued at the time of (or before) that reattachment", and it noted that "[t]he introduction of a 30-day period complicates this matter by making it possible for DataLink to delay the issue of permits to a period after re-attachment".

QUESTION 4: Provide your view on any other matters you consider relevant to this consultation.

54. Infinity submitted that "[g]iven the historic problems in the relationship between DataLink and Infinity", Infinity considers "it essential that (i) DataLink is obliged to issue the re-attachment permits within very tight time-scales (and without a formal request by Infinity); and (ii) where the permits are not issued within those time-limits without good reason (a) Infinity is deemed to have received the relevant permit; and (b) Infinity can perform the re-attachment work itself", noting that "[a]ny other outcome will result in further indefinite delays and escalating expense for Infinity."
55. Infinity further submitted that "[g]iven that there is currently an undertaking in place by which Infinity is prevented from accessing the poles without a permit in place [Infinity] also request[s] that DataLink (and CUC, to the extent possible) be required to cooperate with an application by Infinity to discharge that undertaking to allow Infinity to access the poles in a manner that is consistent with the pole sharing agreement as it stands following any actions by ICTA to amend the terms of the agreement."

THE AUTHORITY'S ANALYSIS

56. Infinity, in summary, submitted that:

1. DataLink should be required to bear the costs for the necessary reattachment of all of Infinity's authorised attachments, i.e. attachments for which pole attachment permits had previously been issued by DataLink, to the new height of 258 inches above the ground;
2. DataLink should also be required to bear the costs for the reattachment of Infinity's communication cables in any such case where Infinity made an unauthorised attachment which, according to Infinity, is deemed to be a "*justified unauthorised attachment*";
3. Infinity's pole attachment permits for the required reattachments should be issued at the same time or prior to the reattachment and, if this is not done, DataLink should be responsible for the costs of the reattachment, or in the alternative, Infinity is deemed to have received the relevant permit and Infinity can perform the re-attachment work itself; and
4. the Authority should require DataLink to in effect lift the injunction currently on Infinity which prevents Infinity from accessing the poles without a permit in place.

The Authority notes that no submissions were made by DataLink in this matter.

The Authority addresses each of Infinity's points in turn:

Treatment of Authorised Attachments

57. Infinity supports the Authority's proposal that DataLink should be held liable for the full recovery of the costs related to the reattachment of Infinity's communication cables to the new height of 258 inches above the ground, for each such case where a pole attachment permit had previously been issued by DataLink.
58. As noted in paragraph 38 above, the proposal relating to the treatment of cost recovery for authorised attachments is based on the cost-recovery principles that the Authority referenced in the ICT Consultation 2016-1: in particular, the *cost causation principle* which requires that costs are recovered from those whose actions cause the costs to be incurred at the margin.
59. This proposal is also consistent with the regulatory approaches adopted in other countries, such as the rules specified in the U.S. Code Section 224(i) relating to the costs of rearranging or replacing an attachment:³⁵
"An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."

³⁵ <https://www.law.cornell.edu/uscode/text/47/224>

60. Accordingly, the Authority considers that, for the reasons expressed in Consultation 2016-1 and discussed above, DataLink should bear the costs related to the reattachment of all of Infinity's authorised attachments, which for the avoidance of doubt includes the costs for any necessary Make-Ready Work, to the new height of 258 inches above the ground.

Treatment of Unauthorised Attachments

61. The Authority does not agree with Infinity's proposition that an attachment for which a pole attachment permit had previously not been issued by DataLink should be deemed to be a "*justified unauthorised attachment*" in any such case "*where Infinity took every reasonable step to obtain a permit and DataLink, in breach of its obligations under the pole sharing agreement, failed to issue that permit.*"
62. The Authority considers that, for the reasons set out at paragraphs 178 to 181 of ICT Consultation 2016-2, there has been uncertainty as to the time limits under the pole attachment agreements for the issuing of pole attachment permits by DataLink. Given that there is such uncertainty, the Authority does not consider it appropriate to introduce a principle of "*justified unauthorised attachment*" applicable to the existing pole sharing agreements, including the agreements between Infinity and DataLink/CUC.
63. The Authority further considers that an introduction of a regulatory concept of "*justified unauthorised attachments*" could incentivise licensees to bypass the important public safety steps that are required to be followed during the pole attachment process, whereby DataLink undertakes a safety assessment as to the possible impact of each attachment on the public safety and the structural integrity of the relevant CUC's electricity poles.
64. The Authority considers that it would be in the general public interest, as well as in the interest of the owner of electricity poles, that the structural integrity of the poles is not compromised and any attachments do not pose a public hazard.
65. Accordingly, the Authority does not accept Infinity's proposition that DataLink should bear the costs of the reattachment of Infinity's communication cables to the new height of 258 inches above the ground, for which a pole attachment permit had previously not been issued by DataLink.
66. Accordingly, the Authority considers that, for the reasons expressed in Consultation 2016-1 and discussed above, Infinity should bear the costs related to the reattachment of all of Infinity's unauthorised attachments, which for the avoidance of doubt includes the costs for any necessary Make-Ready Work, to the new height of 258 inches above the ground.

Issuing of Pole Attachment Permits

67. In Consultation 2016-1, the Authority proposed that, following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches above the ground on each relevant pole, DataLink should grant the relevant pole attachment permits under Article VI of the **CUC-Infinity Pole Sharing**

Agreement.³⁶ The Authority further proposed that, if there was any delay by DataLink of more than thirty (30) days for issuing the relevant pole attachment permits following the completion of the reattachment, DataLink should bear the costs related to the reattachments.

68. The Authority notes Infinity's response to the consultation "*that DataLink issues the relevant re-attachment permits before the reattachment takes place and that there are strict timelines for the issue of those permits.*"
69. Upon further reflection, the Authority considers that the reattachment of an unauthorised attachment prior to a safety assessment by DataLink would not be in the public interest nor in the interest of the owner of the electricity poles (see also paragraphs 63 and 64 above). Such a safety assessment is important to determine the possible impact of that reattachment on the structural integrity of the relevant CUC's electricity poles.
70. Accordingly, the Authority considers that DataLink should undertake its safety assessment of the proposed reattachments, as provided for under the **CUC-Infinity Pole Attachment Agreement**, before Infinity attempts to or does make any reattachment of its communication cables to the new height of 258 inches above the ground and, as such, there should be no provision allowed (or indeed a need) for such a safety assessment to be made after the reattachment.
71. Further, as to the timeliness of such safety assessments being made, the Authority considers that it is in DataLink's own interest to issue the pole attachment permits for the reattachment of unauthorised attachments in a timely and efficient manner, immediately following the completion of the appropriate safety assessment and any required Make-Ready Work on the relevant electricity poles.³⁷ The Authority notes in this regard that it is DataLink who has requested the reattachment of Infinity's communication cables to the new height. It would, in the Authority's consideration, appear unlikely in such circumstances that DataLink would delay issuing the relevant pole attachment permits for the reattachment of Infinity's unauthorised attachments.
72. With regard to Infinity's request that it should be allowed to perform the reattachments itself if the relevant permit is not issued within the allowed timeframe, as provided for above the Authority considers that in this context DataLink should be the one conducting the prior safety assessment as to the possible impact of Infinity's reattachments on the public safety and the structural integrity of the relevant CUC's electricity poles.
73. Further, in such circumstances Infinity is still able to provide its ICT services over the communication cables that are already attached onto CUC's electricity poles, notwithstanding the need to undertake the reattachment. In other words, Infinity is not waiting for DataLink to undertake the safety assessments before Infinity can provide its ICT services. In addition, where any Make-Ready Work is required,

³⁶ Page 33, paragraph 150.

³⁷ As specified in **CUC-Infinity Pole Sharing Agreement**, Make-Ready Work: means all work, as reasonably determined by Owner Utility after reasonable consultation with the Attaching Utility, required to accommodate Attaching Utility's Facilities and/or to comply with all Applicable Standards. Such work includes, but is not limited to, rearrangement and/or transfer of Owner Utility's Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes), pole replacement or construction as it relates to the express purpose of the Make-Ready Work.

such work can be undertaken in a way so as not to unduly interrupt Infinity's provision of ICT services. More generally, the Authority notes that the issue of appropriate timeframes for attachments to be actioned is being considered by the Authority in ICT Consultation 2016-2 (pages 39 to 48).³⁸

74. In addition, the Authority considers it appropriate for it to be informed of each party's progress in making the reattachments of both authorised and unauthorised attachments, noting that the entire reattachment process should be done on a timely basis and in an efficient manner. In this regard, the Authority has provided for each party to (1) provide a detailed reattachment schedule to the Authority within 30 days of this determination, and (2) submit a progress report as against this schedule on the first day of each month.

Lifting of the Injunction

75. With regard to Infinity's request that the Authority should require DataLink to, in effect, lift the injunction currently on Infinity which prevents Infinity from accessing the poles without a permit in place, the injunction has been issued by the Grand Court and is, therefore, a matter for the Grand Court not the Authority. The Authority notes that the relevant timing for issuing permits is to be considered as part of the questions raised in ICT Consultation 2016-2 part B, relating to the permit application process, including Make-Ready Work, for the attachment of communication cables onto CUC's electricity poles.
76. Accordingly, the Authority considers that such a request is not appropriate for consideration by the Authority for the purposes of determining the relevant principles for the cost-recovery relating to the reattachment of Infinity's communication cables onto CUC's electricity poles.

³⁸

<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

THE AUTHORITY'S DECISION

77. For the reasons set out above, the Authority determines that, for the poles to which Infinity had made:

1. **authorised attachments**, DataLink shall bear all costs, which for the avoidance of doubt includes the costs for any necessary Make-Ready Work, related to the reattachment of Infinity's communication cables to the new height of 258 inches above the ground;
2. **unauthorised attachments**, Infinity shall bear all costs, which for the avoidance of doubt includes the costs for any necessary Make-Ready Work, related to the reattachment of Infinity's communication cables to the new height of 258 inches above the ground;
3. **unauthorised attachments**, unless DataLink determines that it cannot accommodate Infinity's attachments pursuant to section VII.A. of the **CUC-Infinity Pole Attachment Agreement** without any necessary Make-Ready Work being performed,³⁹ DataLink shall grant the relevant pole attachment Permits to Infinity for each pole under Article VI, F of the **CUC-Infinity Pole Sharing Agreement** before Infinity's communication cables are reattached to the new height of 258 inches above the ground; and
4. **unauthorised attachments**, where DataLink determines that Make-Ready Work is required to accommodate the reattachment of Infinity's communication cables, such work shall be undertaken as provided for under the **CUC-Infinity Pole Sharing Agreement**, subject to:
 - a. Infinity's ICT services provided over the relevant cables not being unduly interrupted by such work; and
 - b. on completion of such work, and after the payment by Infinity for the costs related to such work, DataLink shall grant the relevant pole attachment Permits to Infinity for each pole under Article VI, F of the **CUC-Infinity Pole Sharing Agreement**, to allow Infinity to proceed with reattachment of its communication cables to the new height of 258 inches above the ground.

³⁹ Which states that: "*In the event Owner Utility determines that it cannot accommodate Attaching Utility's request for Attachment(s), including Overlashing of an existing Attachment, it will, upon request, advise Attaching Utility of any estimated Make-Ready Work charges necessary to accommodate the Attachment.*"

For the purposes of the above Decision:

"authorised attachments" are those attachments of Infinity's communication cables to CUC's electricity poles for which pole attachment Permits had previously been issued by DataLink; and

"unauthorised attachments" are those attachments of Infinity's communication cables to CUC's electricity poles for which pole attachment Permits had previously not been issued by DataLink.

78. Further, for the purposes of an efficient monitoring of the above determinations and entire process of reattachment of Infinity's communication cables to the new height of 258 inches above the ground, the Authority determines that:

1. Infinity shall provide to the Authority its detailed reattachment schedule within 30 days of this determination, and submit a progress report as against that schedule on the first day of each month; and
2. DataLink shall provide to the Authority its detailed reattachment schedule within 30 days of this determination, and submit a progress report as against that schedule on the first day of each month.