

## Consultation Questions Arising from Infinity / C3 ICTA Determination Request

### Consultation 2 - ICT Consultation 2016-2

#### Part A

**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.**

Infinity shares the ICTA's provisional view that the Quarterly Reserved Space Payment and the Total Minimum Annual Payments are discriminatory as they are not also charged to Lime or DataLink. Furthermore, such payments encourage inactivity on the part of DataLink as they are able to receive a guaranteed minimum amount without the need to process Permits / allow attachments. This is entirely at odds with ICTA's desire to encourage competition in the sector and to aid the roll out of competitor networks.

Infinity agrees with ICTA that there is no objective justification for charging these fees to some attaching utilities and not to others and that the impact of this uneven treatment of attaching utilities is likely to limit the promotion of competition between those attaching utilities.

We are entirely supportive of the removal of the references to "Reserved Space", "Quarterly Reserved Space Payments" and "Total Minimum Annual Payments" from the Infinity [and Logic] agreements. We also support the proposal of re-calculating historic payment obligations based upon the removal of these concepts from the Infinity agreement, as suggested in the consultation document.

We invite ICTA to consider allowing Infinity to claim a cash refund of any overpaid amounts, rather than simply allowing a credit against future payments. The amounts involved may be significant and this dispute has been damaging for Infinity's financial position. Competition is not aided if an aggressive position taken by those having a right to permit attachment to the Poles results in the failure of a competitor business due to cash-flow problems.

In further support of notion that the Quarterly Reserved Space Payment and the Total Minimum Annual Payments are inappropriate, we make the point that DataLink does not actually have a "right" to consider the space reserved in any meaningful way: when Infinity submits an attachment request, DataLink applies to CUC for a corresponding permit. Only if CUC grants that Permit can DataLink allow Infinity to attach. In other words, a payment is requested to reserve a space that DataLink is legally unable to reserve.

**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 Attachers of communication cables.**

As set out above, Infinity does not support the continued charging of these fees. However, if such fees do survive the consultation process we are firmly of the view that all Attaching Utilities should be

required to make similar payments. Infinity cannot continue to be at a competitive disadvantage to other Attaching Utilities if ICTA wishes to see real competition in this sector.

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

N/A – as set out above, Infinity takes the view (in this order of preference) that: (i) the Quarterly Reserved Space Payment should not apply to any Attaching Utilities; or (ii) that the Quarterly Reserved Space Payment should apply equally to all Attaching Utilities.

**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.**

As set out above, Infinity does not support the continued charging of these fees.

ICTA require each licensee to submit a Rollout Plan. The Rollout Plan requires all providers to make their services available *island wide*. As such, Infinity's business plan is based on getting access to the entire pole network. The concept of a reservation fee suggests that without such a reservation, someone else might take over that space, but this would require that ICTA grants a licence to another provider. If ICTA took this step it would prevent Infinity from fulfilling the commitments made in its Rollout Plan – some other licensee would have access to the poles, at the same height as Infinity, in some parts of the Island. If permitted, this approach would encourage licensees to cherry-pick the areas in which they expected to get the greatest financial return and to neglect the less populated areas. In other words, an unintended consequence of the notion that space needs to be "reserved", for fear of it being offered to someone else, is that an Island-wide roll-out becomes problematic.

**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".**

The primary purpose of the Poles is to provide electrical services to residents, island wide. Attaching Utilities rent a very small space on the Poles. Infinity's goal is to deploy its services as quickly as possible, something that the present problems have prevented.

As an Attaching Utility we should not be required to guarantee revenue to a company (DataLink) that was not ready to process attachment requests in a timely manner. The removal of this unfair, unreasonable and discriminatory payment will remove the possibility of DataLink benefiting from their own delay and incompetence of administration.

**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.**

Infinity wholly supports the notion of a refund of historic amounts paid in respect of fees and charges which ICTA determines to be discriminatory. Whilst the idea of a “credit” would ultimately work out as an improvement of Infinity’s financial position (compared to the present position), Infinity urges ICTA to introduce an immediate cash refund system. If these payments are discriminatory and if they have acted to distort competition in this regulated space (which Infinity believes to be the case), Infinity has been punished as a result. Only a cash-refund system would be sufficient to start repairing the damage that these fees have had on Infinity’s business.

Some requested fees and charges are currently unpaid by Infinity. This is because they are disputed. If ICTA (i) determines that the Total Minimum Annual Payments is discriminatory and should be removed; and (ii) introduces only a credit system, Infinity’s concern is that DataLink will continue to pursue them for the “unpaid” amounts, even though the payment of those amounts will result in an increased credit for Infinity with DataLink. In other words, the credit system would still result in a financial imbalance between Infinity and DataLink. An alternative may be to make it clear in the determination that if an amount is due from Infinity in respect of a payment type declared by ICTA to be discriminatory and that amount is unpaid at the date of the determination, DataLink has no right / ability to continue to pursue the payment of that amount. It seems to be an absurd result that ICTA could strike down a payment, introducing the “credit” system, and Infinity could still be pursued by DataLink for those historic payments, with the effect of increasing Infinity’s credit with DataLink. Whatever the solution it is essential that this does not happen.

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

When Infinity agreed to these payments, the sector was more lightly regulated – CUC was not an ICTA licensee (and is still not an ICTA licensee). These payments were seen as commercially necessary to gain access to the Poles in a situation where Infinity had little negotiating power. As matters moved forwards and DataLink became responsible for the Communications Space on the Poles, ICTA took on a more prominent role and it became clear that there would only be 4 providers of these services on Island. As a result of ICTA’s requirement for Island-wide roll-out and for competition on a level playing field, these payments have to be removed. Infinity is at a significant competitive disadvantage to other providers and this is harmful for the end-users of those services.

## Part B

**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.**

Infinity takes the view that the following process should apply:

- **Permit Application:** Infinity submits requests to attach to DataLink, in batches of 25 Poles. This process starts the application “clock” (**Start Date**);
- 10 days after the Start Date, DataLink should provide:
  - a list of Poles in respect of which no make-ready is required in order to allow Infinity’s attachment;
  - a detailed list of the make-ready required to allow the attachment on any Poles requiring pre-attachment work; Attaching Utilities should also be able to get their own estimates for the agreed make-ready from other licenced contractors or, if the Attaching Utility has employees certified to do certain types of make-ready, that Attaching Utility should be allowed to do the make-ready work itself;
  - an estimated cost-per-pole for the pre-attachment work required in order to allow Infinity to attach. This make-ready should not include any work to upgrade CUC’s pole infrastructure or to fix historic issues: those costs should be borne by CUC, not the Attaching Utilities. For example, if an existing weatherhead is installed below the level set out in NESC guidelines, Attaching Utilities should not be responsible for fixing that issue – A NESC guideline infraction should be fixed at the cost of the Owner Utility as it represents a problem that should not be present on the Poles, which is not the responsibility of the Attaching Utilities;
- **Meeting:** Within 15 days of the Start Date, DataLink should meet with the Attaching Utility to discuss and review the make-ready work and confirm the price, in light of any agreed changes to the nature / extent of the required make-ready work;
- **Approval and Payment:** The Attaching Utility then has to agree the work and make payment for it. Within 10 days of payment by the Attaching Utility, DataLink must (i) complete the work required; and (ii) notify Infinity that the attachments can be made;
- **Defaults by DataLink:** Where Infinity makes prompt payment under the immediately preceding heading (within 5 days of the meeting with DataLink), Permits should be issued by DataLink within 25 days from the Start Date for all Poles. For any Poles for which Permits are not issued within that period, DataLink shall cover the entire cost of the make-ready work and Infinity shall be allowed to complete the work itself, with DataLink being required to cover the cost of that work.

Ultimately it is essential that Infinity has clarity and certainty over the start-to-finish time for getting each Permit. DataLink is taking unfair advantage of what it suggests is an ambiguity in the present agreement – it is acknowledging application requests and then taking as long as it sees fit to take the next steps. This is a further abuse of its dominant market position and something that cannot be permitted under the revised agreement as it directly impacts on competition.

Where DataLink fails in its obligations, for any reason, Infinity needs to be able to take control of matters and either to carry out the work itself or to appoint someone else to carry out that work.

Turning to ICTA's suggestions in the Consultation, Infinity welcomes ICTA's suggested "deeming" process (within the wording proposed at paragraph 182), whereby Infinity can take a lack of reply by DataLink (within the required time-frame) as confirmation that all is in order and the next step of the process can be taken. When we move into the suggested wording in 182, paragraph C, it is important to clarify that this paragraph also applies to a Permit Application that was *deemed* to be completed under B and not just to a Permit Application that was actually completed.

Moving to ICTA's designation of "Minor" and "Major" Permit requests, one of the significant problems that Infinity has encountered with DataLink is their interpretation of what it means to "review and respond" (as addressed in the Consultation document): DataLink has taken this to amount to nothing more than a standard email acknowledgement, then allowing them to take an indefinite amount of time to take any subsequent steps. We need clarity and certainty over what it means to "review and respond" and the time-scales attaching to any subsequent steps: Infinity cannot be required to involve the Courts or ICTA each time DataLink claims there is some ambiguity in the agreement which entitles it to simply refuse to issue Permits.

Where no make-ready is required on a given Pole (and this should be a Pole by Pole assessment) DataLink should be required to actually issue the Permit within the 10 (Minor request) / 15 (Major request) day period – if no make-ready work is required then it seems perfectly reasonable to expect the Permit in a short period of time after that decision is made. Infinity should also be able to take a lack of response within those periods as confirmation that no make-ready is required, entitling Infinity to then request a Permit for all relevant Poles.

Where make-ready work is required the currently proposed wording is inadequate. A requirement for DataLink to "review and respond" and to "discuss any issues" is insufficiently precise to ensure that (i) the make-ready work is carried out as quickly as is reasonably practicable; and (ii) Infinity has some certainty over when that might be. Infinity strongly urges ICTA to include defined time-periods and where those periods are not met, either (i) a given response should be deemed to have been made; or (ii) Infinity should be able to perform the work itself, or to arrange for a third party contractor to perform the work.

**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.**

On the whole, Infinity are broadly supportive of these well-considered and positive suggested changes to the process.

The Permit Review / Pre-permit Survey should be treated as parts of the same process. They should be completed in no more than 7 days from the Start Date – and ideally within 5 days of the Start Date.

We see no justifiable reason why it should take DataLink 5 days to review the Permit Application and then another 15 days to complete the Pre-permit survey. A Permit "review" is a very simple

administrative matter: the Attaching Utility completes the application solely for the purpose of wanting to attach to the Poles stated within the application.

As soon as DataLink receives the Permit Application it should take this as a trigger to start the Pole Survey, rather than waiting until its “review” is complete – even if there are defects in an application, it is clear that Infinity wants to attach to the Poles stated in the application and this process should be based on working in good faith, not looking for ways to frustrate Infinity’s clear intention of getting its attachments on to as many Poles as possible, as quickly and cost-effectively as possible.

To prevent abuse by DataLink, once the survey is completed DataLink should allow all approved contractors to provide an estimate on the work order. Once all parties have provided their quote, the Attaching Utility should be allowed to choose the contractor to complete the work. This would allow a move away from inflated costs for labour and the use, by DataLink, of equipment owned by its parent company at what appear to be inflated costs. The opaque nature of how DataLink charges for this work, particularly how it charges for its own labour and machinery owned by CUC need to be addressed by ICTA.

**QUESTION B3: Provide your view on whether or not the Attachers 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.**

Infinity considers that this is essential to developing a workable process. As things stand DataLink has an incentive to prevent other Attaching Utilities from attaching (reduction of competition) and it has the means to prevent those attachments (delays in issuing permits, excessive charges for make-ready, citing lack of capacity to carry out make-ready work, preventing others from carrying out that work themselves).

Infinity also wishes a system to be developed whereby there is a contractor approval process which is not entirely controlled by CUC and/or DataLink: if they are able to determine who can carry out the make-ready work it provides scope for further abuse of the system.

At paragraph 190, the consultation suggests “Where the timelines as set out above are not met by DataLink, [the Attacher] may use a third-party contractor to perform the required work”. Third-party means someone other than DataLink or Infinity. We would like to see this amended to permit a third-party contractor or Infinity itself – Infinity would be highly motivated to complete this work itself and has the skills and expertise required to do so.

**QUESTION B4: Provide your view on whether or not the Attachers 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.**

As noted in Question 2B, the Owner Utility should certify contractors or crews within Attaching Utilities to perform certain make-ready work. We accept that there is certain make-ready work that

Owner Utility must do but once the Owner Utility has completed the survey it should allow the Attaching Utility and or certified contractor to bid on the work order.

The Attaching Utilities should be allowed to use qualified contractors to perform Pre-permit Survey and make-ready work, once they have been certified by CUC to do this work. Their certification should not be unreasonably and delayed by CUC. Infinity could hire its own electrical linemen certified to do the make-ready work on the poles.

**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.**

Yes. We agree that whatever is the final decision that entire process from application to issuing of Permits must be standardized between all Attaching Utilities / Pole sharing agreements. The current differences give rise to absurd results and certainly distort competition between Attaching Utilities.

**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.**

We agree that these sections need to be amended and standardised. The proposal made by ICTA has Infinity's broad support but we make the following comments:

**Estimate for make-ready work (from CUC-DataLink agreement):** The proposed wording requires that an Attaching Utility makes a request for an estimate for make-ready work. This seems to be an unnecessary additional step: it should be assumed that an Attaching Utility wants an estimate of make-ready work before it is carried out, unless the Attaching Utility confirms that it does not want that estimate: “, upon request,” should be removed from the third line of that clause.

**Payment of make-ready work (from CUC-DataLink agreement):** A payment in advance should be based on DataLink's *reasonable* estimated cost. Where the actual cost exceeds the estimated cost, (i) DataLink should automatically explain the difference in cost to the Attaching Utility; and (ii) the obligation on the Attaching Utility to pay the additional cost should not be created until DataLink has provided that information. This problem is regularly encountered at present: actual costs are vastly in excess of estimated cost; demands are made for further payment yet little information is provided to explain the further cost. The new system needs to be more transparent so that it is clear that Infinity is only paying for work that was actually and reasonably carried out.

**Required Timing of Make-Ready work (from Lime-CUC-DataLink Novation agreement):** This clause is confusing in that the references are to Owner and Licensee and the obligation to perform make-ready appears to fall on the Attaching Utility. Allowing for this obvious difference with the present situation, Infinity supports this general approach: ie: applying a fixed deadline to the

performance of make-ready work by DataLink, along with appropriate sanctions where those deadlines are missed.

**Who may perform Make-Ready work (from CUC-DataLink agreement):** Infinity has previously requested permission from DataLink to allow Infinity to perform certain work itself. This permission has been refused. To give this power to DataLink – effectively a competitor business – invites them to be difficult and obstructive. There should be a presumption that someone can do this work if they meet a fixed objective standard (eg: holding certain qualifications) and only in very limited circumstances can DataLink object to that person / company carrying out the work.

**Scheduling of Make-Ready work (CUC-DataLink agreement):** Infinity is disappointed at the amount of its make-ready work that has allegedly been carried out by DataLink on weekends and public holidays, necessitating payment of overtime, double time etc. The proposed alternative provision is open to abuse by DataLink. Where a non-urgent Permit request is submitted it should not be open to DataLink to charge overtime / double time rates etc other than equally to all Attaching Utilities (including themselves). It is impossible for another Attaching Utility to know whether it has been appropriately charged these rates.

**Time is of the Essence:** This clause makes time of the essence for the Licensee's obligations. We assume that this would translate to an obligation on DataLink in performing make-ready. If that is the case then the inclusion of this provision is welcomed.

**Refund of make-ready costs:** The reference to “construction” is vague: presumably time starts to run on the date on which the relevant attachment is made by an Attaching Utility, or the later of the date on which the make-ready work is completed and / or notified to the Attaching Utility. Refund requests should be automatic: DataLink knows who has applied and what work they have done – all other Attaching Utilities lack the information needed to drive the refund process. If the refund process is to remain the obligation of the Attaching Utility then DataLink has to have an obligation to notify all Attaching Utilities when attachments are made (or Permits requested) to Poles in respect of which another Attaching Utility has paid make-ready. A failure to put the onus on DataLink gives them a major competitive advantage, as an Attaching Utility. The 90 day refund period seems excessive and unjustifiable. We suggest 21 days is more appropriate.

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

*All relevant points are covered above.*

### Part C

**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.**

The pricing formula should be based on the cost of the Pole type when it was installed. It should not have an escalation clause tied to the CPI. The Attaching Utilities should be charged an annual attachment fee based on the type and height of the Pole to which they have attached. The invoice should state how many of each type/class of Pole the Attaching Utility is attached to and each type should have a set annual attachment fee.

**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”:**
  - o **“Unusable space on the pole”,**
  - o **“Space occupied by the Attachment”,**
  - o **“Number of Attachers”; and,**
  - o **“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.**

*No further comments on this question.*

**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.**

The best way to ensure Attaching Utilities are charged for make-ready work on a cost oriented basis is to allow the other certified contractors and crews to provide bids on the make-ready work orders. By introducing competition into this element of the process we anticipate that costs will be lowered and turn-around times will improve.

**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.**

This is a complicated question, the answer to which depends on the outcome of other parts of the consultation. Where an Attaching Utility is required to pay for the work to permit its attachment to be made it seems reasonable for there to be an adjustment to take account of the relevant position on

the Poles: Infinity should not be penalised as a result of the need for (for example) more tree-trimming to accommodate its higher attachments and could therefore be compensated by a reduction in attachment fees. However, if we move to a system where the total cost of making-ready the Poles to take all proposed attachments are divided equally between all Attaching Utilities this issue ceases to be relevant.

**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.**

*No further comments on this question.*

**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 Attachers.**

We consider it fundamental to this process that DataLink is subject to exactly the same administrative and financial processes as the other Attaching Utilities and that there is some effective oversight to ensure that this is taking place. Only if DataLink has to operate under this new system will it be invested in ensuring that the system is as slick and efficient as possible.

If DataLink are relieved of any of the obligations to which other Attaching Utilities are subjected this will give them a competitive advantage, arising as a result of their monopoly control of the Poles. This is something that we would expect ICTA to address.

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

When CUC/DataLink does the Pre-attachment Survey on the Poles to see what make-ready is needed (particularly the windload calculation) they are assuming that each Attaching Utility will be attaching a large feeder cable, but this is not the case. Some 65% of Infinity's outside plant is what we consider Distribution Fibre cable - that is 12 strands of fibre. The flawed assumption on which CUC/DataLink relies assumes the cables will be large cables and so they install guy wires that are not necessarily needed on these Poles and add to make-ready cost. In our design we can indicate what the size cable will be installed and so there should be an obligation on DataLink to carry out make-ready which is consistent with the proposal submitted and not consistent with their flawed assumption. In the event that the Attaching Utility wishes to make a further attachment to a pole which is more than a service drop, another application for permit to attach must be submitted. If at that time a guy anchor is required to strengthen the pole, the Owner Utility can and should bill all Attachers for the extra cost.