



**UTILITY REGULATION AND COMPETITION OFFICE  
THE CAYMAN ISLANDS**

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## Section 1 – Executive Summary

- ES1. In 2016, the predecessor of the Utility Regulation and Competition Office (**‘Office’**), the Information and Communications Technology Authority (**‘Authority’**) considered that the existing arrangements for the sharing of utility pole infrastructure had 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, and published ICT Consultation 2016-2 to consider various related matters. Parts B and C of ICT Consultation 2016-2 addressed matters relating to the pole attachment permit application process, including make-ready work, and to the appropriate charging principles for pole attachments and make-ready work, respectively.
- ES2. The Authority subsequently suspended the ICT Consultation 2016-2 process while an industry working group (the **‘Working Group’**) considered a number of issues related to the permit application process, the roll-out of ICT networks on Grand Cayman, and appropriate charging principles. The Working Group completed its work in 2017 and, noting a lack of consensus among the parties, the Authority determined to continue with the ICT Consultation 2016-2 procedure.
- ES3. In 2022, the Office asked the parties to provide additional comments or submissions on the matters raised in Parts B and C of ICT Consultation 2016-2, and issued a number of RFIs to update and supplement the existing record.
- ES4. Having reviewed the submissions of the parties in response to ICT Consultation 2016-2, the output of the Working Group, and the responses to the 2022 requests, the Office considers that the current arrangements for the sharing of utility pole infrastructure have 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 network.
- ES5. Accordingly, interested parties are being invited by this consultation to comment in proposals relating to the permit application process and make-ready work, including:
- a. The application of standard terms and conditions;
  - b. Changes to the permit application process;
  - c. The administration of permits and make-ready work;
  - d. The replacement of poles; and
  - e. The need for a definition of “standard pole”.
- ES6. Parties are also being invited to comment on proposals relating to the appropriate charging principles for annual attachment fees and charges for make-ready work, namely:
- a. recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s utility poles (i.e., pole attachment fees);
  - b. non-recurring charges, applicable for recovering the costs relating to make-ready work (i.e., make-ready work charges); and
  - c. the process for refunding make-ready work charges.

## Section 2 – Introduction

1. The Utility Regulation and Competition Office (**'OfReg'** or the **'Office'**) is the independent regulator established by section 4 of the Utility Regulation and Competition Law 2016 (the **'URC Law'**) for the electricity, fuels, information and communications technology (**'ICT'**), water and wastewater sectors in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain.
2. Different decisions by the Office will affect persons and organisations throughout the country in different ways. It is therefore important that the Office makes regulatory decisions with the appropriate input from persons with sufficient interest or who are likely to be affected by the outcome of such decisions. Consultation is an essential aspect of regulatory accountability and transparency and provides the formal mechanism for these persons to express their views in this manner. The requirement for the Office to consult is mandated in its enabling legislation.
3. Under its enabling and foundational legislation, the Office has several principal functions. One of these principal functions is to protect the short- and long-term interests of consumers in relation to utility services and, in so doing, *inter alia*, to ensure that utility services are satisfactory and efficient and that charges imposed in respect of utility services are reasonable and reflect efficient costs of providing the services. The scope of the Office's duties includes the regulation of the sharing of ICT infrastructure in the Cayman Islands and the resolution of disputes among ICT licensees.

### A. Background

4. Among the ICT infrastructure which is shared by ICT licensees are the utility poles<sup>1</sup> owned by Caribbean Utilities Company, Ltd. (**'CUC'**).
5. Certain of CUC utility poles contain an area designated for the attachment of communications cables of ICT licensees (the **'communication space'**). The communication space has been licensed by CUC to DataLink, Ltd. (a wholly-owned subsidiary of CUC) (**'DataLink'**), under the **CUC-DataLink Pole Sharing Agreement**,<sup>2</sup> to manage and sub-licence to other ICT licensees, including Cable and Wireless (Cayman Islands) Limited, trading as Flow (**'Flow'**, **'CWCIL'** or **'Cable & Wireless'**), Infinity Broadband Limited (**'Infinity'** or **'C3'**) and WestTel Limited trading as Logic (**'Logic'**).
6. In accordance with Attachment A to the **CUC-DataLink Pole Sharing Agreement**, the communication space on a CUC utility pole is restricted to 36 inches and, given a minimum space of 12 inches between each attachment point, a maximum of four on any given pole is generally permitted.
7. Before an eligible<sup>3</sup> ICT licensee can attach a communications cable to the CUC utility pole, DataLink investigates, among other things, whether there is an attachment point available

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<sup>1</sup> Referred to as "electricity poles" in ICT Consultation 2016-2.

<sup>2</sup> Terms not defined in the body of this Consultation are defined in **APPENDIX 1**.

<sup>3</sup> Only DataLink and those ICT licensees sub-licensed by DataLink (as of today's date, C3, Flow, Digicel and Logic) may access the communication space to attach their communications cables.

in the communication space and whether the pole can accommodate the load of the additional communications cable. If necessary, DataLink arranges for the pole to be '**made ready**' to accommodate the additional communications cable. This can range in scope and complexity from adding a guy wire to brace the pole to replacing the pole entirely with a new pole that is taller or thicker. Because CUC utility poles are also used to support electrical facilities, this work can involve moving or modifying CUC's electrical facilities as well. This process of investigation, planning, engineering and construction is known as '**make-ready**' work.

8. The make-ready process is described in the Pole Sharing Agreements<sup>4</sup> between DataLink and the ICT licensees. To date, make-ready work for the ICT licensees has been managed exclusively by DataLink (or by CUC, prior to DataLink's formation in 2012) and performed exclusively by CUC or its contractors.
9. Before DataLink will perform the make-ready work, the relevant ICT licensee must pay the applicable charges ('**make-ready charges**'). Once permission to attach to a pole has been granted, the ICT licensee must pay a fee, calculated annually and charged quarterly (the '**Annual Attachment Fee**'). Both the make-ready charges and the Annual Attachment Fee are specified in greater detail in the Pole Sharing Agreements.

## B. History

10. The Office considers that an effective process (which includes appropriate contractual terms and conditions) relating to the installation and maintenance of attachments of communication cables to the utility poles owned by CUC, a process in effect managed by DataLink,<sup>5</sup> is fundamental for the timely rollout of ICT networks across the Cayman Islands, which in turn is necessary for the promotion of competition in the provision of ICT services and ICT networks.
11. There has been, however, a long list of outstanding issues and various disputes over a number of years between Flow, Digicel, C3 and Logic, on the one hand, and DataLink on the other hand. This has contributed in no small way, in the Office's view, in a highly inefficient process and substantial delays relating to the installation and maintenance of attachments of communication cables to the utility poles owned by CUC. These issues and disputes have led the Office's predecessor, the Information and Communication Technology Authority (the '**ICTA**' or '**Authority**'), to publish *ICT Consultation 2016-2 – pole attachment reservation fees, permit application process and charging principles* ('**ICT**

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<sup>4</sup> The **CUC-Flow Pole Sharing Agreement**, the **CUC-C3 Pole Sharing Agreement** as amended by the **CUC-C3 Deed of Variation** and novated by the **CUC-C3-DataLink Novation Agreement**, **CUC-DataLink Pole Sharing Agreement**, the **DataLink-Logic Pole Sharing Agreement** as supplemented by the **CUC-DataLink-Logic MOU**, and the **DataLink-Flow Pole Sharing Agreement** shall be referred to collectively as the '**Pole Sharing Agreements**'.

<sup>5</sup> DataLink was granted an ICT licence on 28 March 2012.

<https://www.ofreg.ky/viewPDF/documents/datalink-limited/2021-08-06-07-32-03-View-Licence-document.pdf>

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**Consultation 2016-2'**),<sup>6</sup> among others, on 27 April 2016, and to establish an industry working group to consider and address the various issues and disputes.<sup>7</sup>

12. A detailed background on the outstanding issues and disputes is provided in **APPENDIX 1** to this Consultation.

### C. This Consultation

13. In this document, **ICT 2016 – 2 – Consultation Part B and Part C (Updated)**, the Office addresses the issues raised in Part B of ICT Consultation 2016-2, "*Consultation on the Permit Application Process, Including Make-Ready Work, for the Attachment of Communication Cables to CUC's Electricity Poles*" and in Part C of ICT Consultation 2016-2, "*Consultation on Charging Principles Relating to the Attachment Of Communication Cables to CUC's Electricity Poles.*" The Office notes that the issues raised in Part A of ICT Consultation 2016-2 are being addressed separately.

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<sup>6</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2022-10-06-07-58-59-ICTA-Consultation-2016-2.pdf>

<sup>7</sup> The record relating to various pole attachment issues can be found at <http://www.ofreg.ky/infinitydatalink-pole-attachment-dispute> and <http://www.ofreg.ky/ict/icta-forms-pole-attachment-working-group>

### Section 3 – Legal Framework

14. The Office is guided by its statutory remit, in particular as set out in the Utilities Regulation and Competition Act (**'URC Act'**), the Information and Communications Technology Act (**'ICT Act'**) and the Information and Communications Technology (Interconnection and Infrastructure Sharing) Regulations (**'INI Regulations'** or **'Regulations'**)).
15. Section 6(5) and Schedule 1 of the URC Act assign responsibility for "*Information and Communications Technology markets...*" to the Office. Sections 6(1) and 6(2) of the URC Act and sections 9(3) and 9(4) of the ICT Act set out the Office's powers to regulate those markets.
16. Of particular relevance are the functions and duties of the Office in section 6(1) of the URC Act to "*promote appropriate effective and fair competition*", to "*protect the short and long term interests of consumers*" and to "*promote innovation and facilitate economic national development,*" in section 9 of the ICT Act to "*promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so,*" to "*promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure,*" and to "*regulate the rate, prices, terms and conditions of any ICT service or ICT network that is required to be licensed where the Office is of the opinion that it is in the interests of the public to do so.*"
17. The Office's powers, though, are circumscribed by the procedural and fairness requirements imposed on the Office by sections 6(4) and 7 of the URC Act.
18. The key provisions in the ICT Act regarding the sharing of infrastructure can be found in sections 65, 66, 68 and 69, which set out the rights and obligations of ICT licensees with respect to infrastructure sharing. The INI Regulations give effect to these provisions and set out in greater detail the rights and obligations of licensees in respect to the sharing of ICT infrastructure.
19. Of particular relevance are the powers of the Office set out in section 69(2)(b) of the ICT Act to "*in order to promote an efficient, economic and harmonized utilisation of infrastructure, ... inquire into and require modification of any agreement or arrangements entered into between a licensee and a 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*" (emphasis added – see also regulation 28 of the INI Regulations) and, in regulation 22 of the INI Regulations, to reject any infrastructure sharing agreement in whole or in part if the Office "*determines that the agreement does not comply with the [ICT Act], conditions of the licence, relevant guidelines, regulations, decisions, directives or standards and other guidelines that the [Office] may prescribe.*"
20. In addition, the Office has the power set out in section 66 of the ICT Act to impose rates for infrastructure sharing where parties cannot agree upon such rates.



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21. The relevant provisions of the URC Act, ICT Act and INI Regulations are reproduced in full in **APPENDIX 2** attached to this document.

## Section 4 – Consultation 2016-2 Part B

22. Part B of ICT Consultation 2016-2 focused on issues relating to the pole attachment permit application process, including make-ready work. The Authority published as part of the initial consultation in 2016 a number of proposals intended to address these issues. The consultative process to date has included submissions by licensees in 2016 on those proposals, discussions among licensees in the Working Group in 2017, and responses to RFIs and further submissions by the licensees in 2022.

### A. ICT Consultation 2016-2, Part B

23. Part B of Consultation 2016-2, paragraphs 169 to 171, referenced the following:

*Section 65 (3) of the Law stipulates that a: licensee to whom [an infrastructure sharing] request is made ... shall, in writing, respond to the request within a period of one month from the date the request is made to him and ... provide the interconnection service in a reasonable time.*

*Section 69 (2) of the Law states that: 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.*

*Regulation 6 of the Infrastructure Sharing Regulations states that, among other things, “infrastructure sharing services shall be provided in a manner that [...] enables the development of competition in the provision of public ICT networks and public ICT services in a timely manner” and “each licensee has an obligation to [...] provide [...] infrastructure sharing services in good faith.”*

24. The Authority noted the concerns expressed by DataLink regarding what it stated were unauthorised attachments by C3 and the impact of these on DataLink’s resources, the statements made by DataLink regarding its efforts to ensure all parties attached on the same terms and conditions, and the concerns expressed by Logic regarding the length of time to process attachment permit applications.
25. The Authority then set out three proposals to amend the permit application process in the Pole Sharing Agreement, which are summarised in the following sections.

#### I. Proposal A

26. Subject to consultation, the Authority considered 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 efficient and timely manner. The Authority considered that the apparent lack of adequate planning and coordination with the relevant ICT

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licensees of the pole attachment process was likely to result in an inefficient use of resources and create processing delays giving rise to a significant backlog of unprocessed permit applications. The Authority considered that such a backlog was detrimental to the efficient roll-out of communication cables across the Cayman Islands which, in turn, detrimentally impacted competition in the provision of ICT networks and ICT services.

27. The Authority also considered that an efficient provider of access to poles operating in a hypothetically competitive market would strive to speed up the permit application process, rather than delay it, given that provider's opportunities to maximise its revenues by receiving quarterly pole rental payments earlier rather than later.
28. The Authority noted that the sections and clauses in the Pole Sharing Agreements<sup>8</sup> referring to the timelines relating to permit applications or consents for pole attachments may lead to different interpretations of the relevant process, including the timing for DataLink issuing pole permits for the attachment of communication cables to CUC's electricity poles. Subject to consultation, the Authority considered that the current timelines were inadequate for an efficient and timely completion of the permit application process and that an amendment to the relevant sections of the Pole Sharing Agreements was appropriate in order to enable the development of competition in the provision of public ICT networks and public ICT services in a timely manner. The Authority noted such an amendment would require DataLink to process all the current and future pole attachment permit applications in a timely and efficient manner.
29. Therefore, the Authority proposed that Article VI ("Permit Application Procedures"), paragraphs B ("Review of Permit Application") and C ("Review Period") of the **CUC-C3 Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**, be replaced as follows:

*"B. Review of Permit Application.*

- *Within five (5) days of receipt of a Permit Application, the Owner Utility shall inform the Attaching Utility whether or not such Permit Application is complete and, if such a Permit Application is not complete, what further information is required to make that Permit Application complete. Owner Utility acceptance of the submitted design documents does not relieve the Attaching Utility of full responsibility for any errors and/or omissions in the engineering analysis. For the avoidance of doubt, if no response is received from the Owner Utility within **five (5) days** then Permit Application shall be deemed to be complete.*

*C. Review Period.*

- *On receipt of a complete Permit Application, as referenced above under Review of Permit Application, the Owner Utility shall undertake and complete the Pre-Permit Survey within **fifteen (15) days**.*

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<sup>8</sup> The **CUC-DataLink Pole Sharing Agreement**, the **CUC-C3 Pole Sharing Agreement**, the **DataLink-Logic Pole Sharing Agreement** and the **CUC-LIME Pole Sharing Agreement**. This last agreement has since been replaced by the **DataLink-Flow Pole Sharing Agreement**, however, the timelines relating to permit applications in this new agreement are substantially the same as in the other three agreements.

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- *If the Owner Utility is not able to complete the Pre-Permit Survey within fifteen (15) days, or earlier by agreement between the Owner Utility and the Attaching Utility, the Attaching Utility shall be allowed to perform any required work itself or employ a qualified contractor to perform such work, with the objective to complete the Pre-Permit Survey in a timely manner. The costs relating to the performance of Pre-Permit Survey by the Attaching Utility of a qualified contractor employed by the Attaching Utility, shall be borne by the Owner Utility.*
  
- *After completing the Pre-Permit Survey, as referenced above, the Owner Utility shall review and respond to:*
  - o a) *“Minor” Permit Applications – less than ten (10) Attachments/Poles – within **ten (10) days** of receipt; or,*
  
  - o b) *“Major” Permit Applications – ten (10) or more Attachments/Poles – within **fifteen (15) days** of receipt,*

*and discuss any issues with the Attaching Utility, including engineering or Make-Ready Work requirements associated with the Permit Application.”*

30. The Authority considered that the proposed additional step, that the ‘Owner Utility’<sup>9</sup> respond to a Permit Application within 5 days of receipt, was reasonable given that it involves a straightforward process of verifying whether all the required information, as specified in the Pole Sharing Agreements, has been provided (or not). The Authority further considered that it was reasonable that the Owner Utility commit to undertake and complete the Pre-Permit Survey within 15 working days, as the Owner Utility should have in place appropriate field inspectors and the relevant administrative processing arrangements to deal with the production of such surveys in a timely manner.
31. The Authority proposed that the clauses considered above for the **CUC-C3 Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement** also replace the equivalent clauses in the **CUC-LIME Pole Sharing Agreement**.<sup>10</sup> This would ensure all ICT licensees attaching to CUC utility poles would have the same timetable for processing permit applications set out in their Pole Sharing Agreements with DataLink.

## II. Proposal B

32. The Authority considered that, subject to consultation, the possibility for ICT licensees to use qualified contractors for performing various tasks relating to the pole attachment

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<sup>9</sup> The Owner Utility is the person who owns the pole or manages the communication space. In the case of the **CUC-DataLink Pole Sharing Agreement**, CUC is the Owner Utility. In the case of the other Pole Sharing Agreements, DataLink is the Owner Utility.

<sup>10</sup> The **CUC-LIME Pole Sharing Agreement** expired in November 2016. On 18 November 2016, DataLink and Flow executed a new pole sharing agreement (the ‘**DataLink-Flow Pole Sharing Agreement**’), containing the same paragraphs B and C in Article VI as stated in the **CUC-C3 Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**.

process, where timelines in the pole attachment process as set out in Proposal A were not met by DataLink, was likely to contribute to a faster rollout of ICT networks and ICT services in the Cayman Islands. Therefore, the Authority proposed that the following be added to *Article VI - Permit Application Procedures* in the relevant Pole Sharing Agreement:

*“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.”*

### **III. Proposal C**

33. The Authority noted that each of the Pole Sharing Agreements included an article relating to *“Make Ready Work/Installation”*. However, these articles differed among the Pole Sharing Agreements. In order to standardise the various sections of the relevant article referring to *Make Ready Work/Installation* across all Pole Sharing Agreements, the Authority proposed to amend all agreements by inserting/amending, where required, the appropriate wording in the following sections:
- *“Estimate for Make-Ready Work”*, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
  - *“Payment of Make-Ready Work”*, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
  - *“Required Timing of Make-Ready Work”*, to be based on the existing wording used in the **LIME-CUC-DataLink Novation Agreement (Article XVI)**;
  - *“Who May Perform Make-Ready Work”*, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
  - *“Scheduling of Make-Ready Work”*, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
  - *“Attaching Utility’s Installation/Removal/Maintenance Work”*, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
  - *“Time is of the Essence”*, to be based on the existing wording used in the **LIME-CUC-DataLink Novation Agreement (Article XVI)**; and
  - *“Refund of Make-Ready costs”*, to be based on the existing wording used in the **DataLink-Logic Pole Sharing Agreement (Article VII)**.
34. The Authority considered that such amendments to the Pole Sharing Agreements were appropriate because they are likely to guarantee that DataLink’s infrastructure sharing services are provided on terms consistent with the requirements of regulation 6 (d) of the Infrastructure Sharing Regulations.

35. The Authority then posed a number of questions regarding the above proposals.

## B. Responses to ICT Consultation 2016-2, Part B

36. The Authority received responses to Part B of ICT Consultation 2016-2 from Flow,<sup>11</sup> Datalink,<sup>12</sup> Digicel,<sup>13</sup> and C3.<sup>14</sup> Generally, Flow did not object to the Authority's proposals and Digicel generally agreed with the Authority's proposals. Digicel also requested that the Authority underscore the requirement that the principles and guidelines in regulation 6 of the Infrastructure Sharing Regulations shall continue to apply to the fullest extent in relation to requests for pole access. C3 and Datalink provided detailed comments which will be set out below.

37. Prior to addressing the Authority's specific questions, DataLink provided a number of preliminary comments. DataLink supported the objective of standardising pole sharing agreements but disagreed with the evidence from Logic suggesting that DataLink was responsible for the substantial delay in processing permit requests. DataLink claimed that its resources were overwhelmed by permit requests submitted on a massive scale, which was aggravated by factors outside of DataLink's control, specifically, attachers not prioritising permit requests, not paying for make-ready work, and forcing DataLink to divert resources to address unauthorised attachments.

38. With respect to the Authority's Proposal A, DataLink supported the objective of common timetables for processing permits. DataLink submitted that timetables must reflect the availability of resources to accommodate demand for permits, and proposed that the Authority use the **CUC-DataLink-Logic MOU** as the basis for common terms, because, in its view, it requires DataLink to use best efforts to process permit requests, which is fairest to all.

39. DataLink noted that the Authority's Proposal B was based on an FCC<sup>15</sup> proposal which contemplated attachers engaging only contractors approved and certified by the utility. Proposal B, however, provides for any contractor chosen by the attacher to perform work and does not require that contractor to be approved and certified by DataLink. Citing risk to public and employee safety, DataLink opposed Proposal B.

40. DataLink also provided detailed comments on the Authority's Proposal C, proposing in many cases alternative modifications to harmonise the Pole Sharing Agreements:

- The clause "*Estimate for Make-Ready Work*" ought to be based on the **DataLink-Logic Pole Sharing Agreement**, as it provided for sharing of make-ready costs

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<sup>11</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-12-12-July-2016-Flow-Response.pdf>

<sup>12</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

<sup>13</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

<sup>14</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-44-12-July-2016-Infinity-Response.pdf>

<sup>15</sup> The 'Federal Communications Commission' in the United States.

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by multiple parties, instead of requiring the first attacher to finance the make-ready work required by all;

- The clause “*Payment of Make-Ready Work*” ought to be based on the **DataLink-Logic Pole Sharing Agreement** for the same reason, and “*to ensure ... no company would them strategically choose to follow the path of another contract holder after that company has solely borne the costs for make ready;*”
- The clause “*Required Timing of Make-Ready Work*” ought to be based on the wording of the **CUC-DataLink-Logic MOU**, as it ensured permit requests and responses to them are reasonable and is the most practical approach to the limited resources available on island;
- The proposal to base the clause “*Who May Perform Make-Ready Work*” on the wording used in the **CUC-DataLink Pole Sharing Agreement** was acceptable as it is the same as in the DataLink-Logic Pole Sharing Agreement;
- The proposal to base the clause “*Scheduling of Make-Ready Work*” on the wording used in the **CUC-DataLink Pole Sharing Agreement** was acceptable as it is the same as in the DataLink-Logic Pole Sharing Agreement;
- The clause “*Attaching Utility’s Installation/Removal/Maintenance Work*” ought to be based on the **DataLink-Logic Pole Sharing Agreement** as it has been updated to address safety matters;

41. DataLink opposed the inclusion of the proposed “*Time is of the Essence*” clause, arguing that the consequences of doing so are inappropriate and unreasonable, as it would allow the entire agreement to be ended, including for missing a deadline by a small period of time for reasons beyond DataLink’s control.
42. DataLink agreed with the proposal to base the clause “*Refund of Make-Ready costs*” on the wording used in the **DataLink-Logic Pole Sharing Agreement**.
43. In summary, the Authority received the following responses in relation to the stated questions.

### I. 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.**

#### DataLink

44. In its comments, Datalink supported the standardisation of agreement among attachers. Datalink stated that the backlog of permit applications with Logic related in part to Logic’s

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failure to pay for make-ready work, in part to an imbalance between the demand for permits and the level of resources available to deal with the demand, and in part to the responses of C3 and Logic to this problem, which was to make unauthorised attachments which needed to be dealt with and further strained Datalink's resources.

45. Datalink also supported the application of a common timetable. However, that timetable needed to reflect finite resources and the fact that the parties are commercial enterprises carrying on business with a view to profit. Datalink proposed that the common timetable ought instead to be based on the timetable in the **CUC-DataLink-Logic MOU**, which reflects the commercial needs of both parties. In particular, there is a limit on the number of permit applications which can be made in any given month, and Datalink is contractually obligated to use its best efforts to process that agreed number of applications.
46. DataLink noted that under the **CUC-DataLink-Logic MOU**:
- Logic is allowed to submit a maximum of 20 batches of permit requests in a month, for a maximum of 200 poles per month and no more than 25 poles in a single batch.
  - Logic is also required to keep an up-to-date list prioritising batches.
  - Within 15 business days of receipt of a batch, DataLink will identify those which do not require make-ready work ('Green Poles') and those which do ('Red Poles').
  - For Green Poles,
    - Logic will pay an \$850 fixed fee per pole within 14 business days; and
    - DataLink will then issue a permit within 10 business days of receipt of the money.
  - For Red Poles,
    - DataLink and Logic will meet within 10 business days to discuss the make-ready required, the timeframes for completing it and any alternatives;
    - If Logic agrees to proceed, it will pay the \$850 fixed fee per pole;
    - If Logic does not pay the fee within 3 months of the meeting, the permit request is treated as withdrawn; and
    - Within 75 business days of receipt of the fees, DataLink will complete the make-ready work and issue a permit.
  - If DataLink does not complete the make-ready work within the 75 business days, DataLink will either set the fee off against future fixed fees or refund the money.
  - If the work is completed after the 75 business days, it will be treated as a Green Pole and the Green Pole process will apply before Logic can attach to the pole.



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47. In Datalink's view, its MOU with Logic was the fairest approach to all and ought to be used as the basis for harmonisation of the pole attachment agreements.

**C3**

48. C3 proposed a different timetable which should apply in lieu of the timetable in the Authority's Proposal A:

- An attacher would submit an application covering no more than 25 poles.
- Within 10 days, Datalink would provide a list of poles for which no make-ready work is required, a detailed list of the make-ready work that is required, and an estimated cost per pole for the make-ready work. The attacher would be permitted to seek estimated costs from other parties, and make-ready costs could not include costs to upgrade CUC's pole infrastructure or to fix historic issues.
- Within 15 days of the application date, the parties would meet to review and discuss the make-ready work and confirm the price.
- Within 10 days of receipt of payment by the attacher, Datalink would complete the make-ready work and notify the attacher that the attachments can be made.
- Where the attacher paid for the make-ready work within 5 days of the meeting, permits must be issued by the 25th day after the application date. If Datalink did not do so, Datalink would be responsible for all make-ready costs and the attacher would be allowed to do the make-ready work themselves.

49. C3 welcomed the proposal that applications be deemed complete if Datalink did not respond within the 5-day period, but requested that the language be clear that the timeframes to perform pre-permit surveys apply to applications that were deemed complete, not just those determined to be complete by Datalink. C3 also expressed concern over the interpretation of the expression "*review and respond*" in the Authority's Proposal A, as this could be taken to mean a simple email acknowledgement without imposing any timeframes with respect to subsequent steps in the process.

50. Where no make-ready is required, C3 proposed that the permits actually be issued within the 10- or 15-day periods to respond to "minor" and "major" permit applications, respectively. Where make-ready work is required, C3 considered the proposed language inadequate as it was insufficiently precise to ensure work is completed in a timely basis and for attachers to know what those timeframes might be. C3 proposed that the Authority include defined time-periods which, if not met by Datalink, would either deem a response to have been given or allow the attacher to do the work themselves.

## II. 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.

### DataLink

51. DataLink disagreed with the proposed timing as it considered the timing in the **CUC-DataLink-Logic MOU** to be fair and reasonable.

### C3

52. C3 was broadly supportive of the Authority's proposals. However, it recommended treating the permit review and pre-permit survey as part of the same process. In its view, the pre-permit survey should begin as soon as a permit request is received and both the permit review and pre-permit survey should be completed no more than 7 days after, and ideally within 5 days of, receipt of the permit request.
53. C3 also recommended that DataLink allow all approved contractors to provide an estimate on the work, and the attaching utility should be allowed to choose the contractor. This would address what it saw as inflated costs for use of CUC labour and equipment.

## III. 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.

### DataLink

54. DataLink noted that the attachers are not certified utility employees trained to the required standards, and that the risk to public and employee safety is too great to allow persons not evaluated or supervised by CUC to plan or modify CUC's Transmission & Distribution infrastructure.

### C3

55. C3 considered the Authority's proposal to be essential as C3 submitted that DataLink had an incentive and the means to prevent others from attaching. C3 recommended that the contractor approval process not be entirely controlled by CUC and/or DataLink, and suggested that it also be considered an eligible contractor.

## IV. 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.

DataLink

56. DataLink submitted that the service level agreements and timing in the **CUC-DataLink-Logic MOU** would allow attachers to make appropriate and reasonable plans for their roll out and avoid the use of third-party contractors. DataLink did not see any benefit in attachers bringing in contractors as make-ready work often involves moving electrical facilities which must be done or supervised by CUC. Finally, if CUC were to have to work with contractors with which they had no contractual relationship, costs could increase and quality and safety levels could decrease, which is unacceptable to both DataLink and CUC.

C3

57. C3 recommended that CUC certify attachers and contractors to perform pre-permit surveys and make-ready work, and that their certification not be unreasonably delayed by CUC.

V. 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.**

DataLink

58. DataLink also agreed that the principles governing the permit application process should be standardised and applied across all existing and future pole sharing agreements. DataLink also suggested consideration be given to the inherent built-in make-ready cost provisions in its agreement with Cable & Wireless.

C3

59. C3 agreed that the permit application process should be standardised among all pole sharing agreements.

VI. 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.**

## DataLink

60. DataLink did not consider picking sections from various contracts to be helpful or fair, and submitted that the **CUC-DataLink-Logic MOU** was the most up-to-date, fair to all parties, and in line with FCC guidelines.

## C3

61. C3 was broadly supportive of the Authority's proposals but recommended a number of changes. C3 considered that DataLink should assume attachers want an estimate of make-ready work without having to make a specific request. The company proposed that advance payments be based on reasonable estimated costs and that any differences with actual costs be fully explained before an obligation to pay them arises, and agreed that DataLink should have fixed deadlines for performing make-ready work and appropriate sanctions where those are missed.
62. C3 noted that it had previously requested permission from DataLink to perform certain make-ready work, which was denied. The company proposed that a person who meets a fixed objective standard should be presumed qualified to perform make-ready work and that only in limited circumstances should DataLink be able to object.
63. C3 also proposed that DataLink not be permitted to charge overtime or double-time rates for non-urgent permit requests, unless it charges all attachers including itself these rates, and supported making time of the essence an obligation with respect to DataLink's performance of make-ready work.
64. C3 also proposed a number of changes to the provisions for repayment of make-ready costs where another attacher places attachments on the same pole. C3 considered that the timeframes were unclear and proposed that, as DataLink has the necessary information, refunds be automatic and that the onus be on DataLink to effect the payments. Alternatively, DataLink should be required to notify all attachers when another person makes an attachment to a pole in respect of which another has paid make-ready charges. C3 also proposed that the refund period be reduced to 21 days.

## VII. Question B7

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

## DataLink

65. DataLink reiterated that the same make-ready process should apply to all attachers and should be based on the **DataLink-Logic Pole Sharing Agreement** as clarified by the **CUC-DataLink-Logic MOU**. In its view, these agreements would achieve the Authority's goals with respect to fair competition, transparency of process and efficiency of network roll-out.

66. DataLink also invited the Authority to make clear that the practice of making unauthorised attachments is unacceptable, as these are a risk to the infrastructure and to the health and safety of workers and the public, and these contravene the agreements and undertakings among the attachers, DataLink and CUC. Further, in its view, this practice of unauthorised attachments is anti-competitive as it puts attachers who follow the permit process at a competitive disadvantage. Following the permit process, on the other hand, supports the promotion of an efficient, economic and harmonised use of infrastructure.

### C3

67. C3 noted that all of its relevant points had been covered earlier.

### C. Working Group Position Papers

68. In December 2016, the Authority established a Pole Attachment Industry Working Group (the '**Working Group**') consisting of representatives of Flow, DataLink, Digicel, C3 and Logic.<sup>16</sup> In order to allow the members an opportunity to resolve the matters being considered by the ICT Consultation 2016-2, including the questions relating to the make-ready process, the Authority put that consultation process on hold for the duration of the Working Group.
69. The Authority noted that, where the members of the Working Group achieved consensus on an issue under consideration, the Authority would review it and, where it considered it appropriate, issue a determination approving it. Where no consensus was achieved, the Authority would consider how to use its powers under the ICT Law and the URC Law, including continuing with the ICT Consultation 2016-2 procedure, to address any outstanding issues. In such an event, any final positions expressed by the members of the Working Group could be referenced in any follow-up procedure and the Authority could take them into account in reaching determinations on any of the outstanding issues.
70. The Office considers that four of the five issues under consideration by the Working Group are directly relevant to the matters being considered under Part B of ICT Consultation 2016-2:
- a. Standard pole attachment contracts (Issue 1);
  - b. Pole attachment specification standards, including minimum standard pole and certification for make-ready resources (Issue 2); and
  - c. Permit application process (Issue 3).
71. In April 2017, the members of the Working Group submitted their final position papers on the issues they had discussed.

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<sup>16</sup> <https://www.ofreg.ky/viewPDF/documents/icfa-forms-pole/2021-04-28-03-51-47-ICTAFormsPoleAttachmentWorkingGroup.pdf>

72. Flow did not make detailed submissions on the issues being considered by the Working Group.<sup>17</sup> Instead, the company submitted that the process of procuring and securing pole attachments from DataLink is a commercial process. Flow noted that it had commercially negotiated and finalised a pole attachment contract with DataLink and was of the view that this contract satisfactorily specified both the specification standards for and timelines for securing pole attachments. In the absence of “*a clear indication of market failure*”, there was in its view no need for regulatory intervention.
73. DataLink,<sup>18</sup> Digicel<sup>19</sup> C3,<sup>20</sup> and Logic<sup>21</sup> directly addressed matters relating to the make-ready process and associated charging principles.

### DataLink

74. In preliminary comments, DataLink noted the (then) Authority’s claim that the initiative to form the Working Group arose from a long list of outstanding issues and various disputes over a number of years between Flow, Digicel, C3 and Logic on the one hand, and DataLink on the other. DataLink further noted, however, that when the Working Group was formed, C3’s complaint was the only remaining active and outstanding complaint.
75. DataLink disagreed with the Authority’s assertion that the existing agreements provided disparate terms and conditions as, when the Working Group was formed, all but one party had agreements with materially the same terms. DataLink submitted that it has constantly maintained the “*position that, to satisfy all of the requirements of the law, all attaching utilities require an agreement on materially the same terms and conditions.*”
76. DataLink also noted that compliance by CUC with its regulatory obligations (including “*reliability and other performance requirements and also [...] the obligation to assign the charges related to non-electrical uses*”) would “*by necessity, [result] in some restrictions on the ability of CUC and, by extension, DataLink to perform make-ready.*”
77. Digicel also submitted general comments in its final position paper on Working Group issues. Digicel noted that pole access and joint pole usage fall within the scope of the Infrastructure Sharing Regulations and the Working Group must be guided by the principles in those regulations. Digicel submitted that there was in practice a single provider of the physical access infrastructure necessary to deploy high speed fixed broadband. Digicel further submitted that a telecommunications operator with access to CUC poles would have a structural economic advantage over an operator that had to build

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<sup>17</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-25-58-1513756464149520192620170426FlowWorkingGroupResponse.pdf>

<sup>18</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-43-49-1513756858149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>19</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-42-33-21DigicelWorkingGroupResponse.pdf>

<sup>20</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-33-53-InfinityWorkingGroupResponse.pdf> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-33-53-InfinityWorkingGroupResponse.pdf>

<sup>21</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-35-33-LogicWorkingGroupResponse.pdf>

its own pole network and stated that unduly complicated processes for new attachers benefit DataLink (and CUC) as well as Flow, as both are already on the poles. In light of the network deployment obligations of the various operators and the defined size of the pole estate, Digicel recommended that implementing access to poles be treated as a single project.

## **I. Standard Pole Attachment Contracts**

78. The Working Group was tasked with, among other things, considering whether there should be an industry-standard Pole Sharing Agreement and, if so, what the terms and conditions of such an Agreement should be. The Authority noted that discussion of other issues by the Working Group would feed into this issue.

### **DataLink**

79. DataLink submitted it desired a standard Pole Attachment Agreement with each ICT licensee and the draft it had previously submitted to the Authority was materially the same as the version offered to the ICT licensees and executed by Logic and Flow.
80. With its position paper DataLink submitted a new draft Pole Sharing Agreement which included options discussed with participants and which DataLink considered “*fair and non-discriminatory, provide achievable timelines for the permit process including make-ready, to support realistic roll out goals while providing fair compensation for make ready expenses necessitated solely by the addition of ICT attachments to the infrastructure and to support the additional resources necessary to reach stated timelines.*” DataLink then provided a summary of the new proposed amendments in the draft standard attachment contract.

### **Logic**

81. Logic noted that it had a commercially negotiated agreement with DataLink and would honour its commitments. Logic was in general agreement that the terms and conditions of attachment agreements should be substantially the same. This includes fees,<sup>22</sup> processes and contractual timelines. Logic recommended that a standard contract detail the consequences of non-performance, particularly where fees were paid in relation to an action with a stipulated timeline, and that the process for the sharing of make-ready costs where one provider seeks to attach after another provider has incurred make-ready costs should be clarified. Logic recommended that the period during which reimbursement would be made to the first provider should be extended from 2 years to the lifespan of the pole.

## **II. Pole Attachment Specification Standards**

82. The Working Group was tasked, among other things, with considering whether or not there should be industry-agreed specification standards relating to principles supporting the

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<sup>22</sup> Logic also submitted comments on “*reservation fees*” and “*total minimum annual payments*” which, as previously noted, the Office is addressing separately.

attachment of communication cables to CUC electricity poles and, if so, what those standards should be. The positions of the Working Group addressed two main issues: the certification of make-ready resources and the definition of the 'standard utility pole.'

**A) Make-Ready Resource Certification**

**DataLink**

83. DataLink noted that each person working on CUC infrastructure in close proximity to the electrical space requires power line technician training and CUC control and supervision. DataLink further noted this training is available through courses offered internationally and apprenticeships at approved electric utilities. DataLink stated that CUC's safety awareness training does not equate to power line technician training or apprenticeships. DataLink submitted that CUC requires third-party contractors who work on its infrastructure to be under its control and supervision to ensure the work is done in accordance with CUC's safety and operational requirements. DataLink also submitted that this allows CUC to manage its service reliability performance which must meet regulatory performance standards.
84. DataLink noted that CUC procures the necessary make-ready materials from its regular vendors for power line hardware and bills them to DataLink as they are used. DataLink further noted that contractors do not supply their own materials for make-ready.

**Digicel**

85. Digicel noted that CUC allows accredited third parties to work on its facilities, and submitted that CUC should share the accreditation requirements and the Office should oversee the accreditation process to ensure that it is prompt. This would benefit CUC in the longer term as it would create a pool of accredited resources that could be drawn upon in the event of a disaster recovery situation.

**C3**

86. C3 stated that DataLink had confirmed that third party contractors working on CUC poles must be qualified, approved and under the direct contractual control of CUC, and noted that DataLink currently used CUC or UMC Cayman Ltd. (**'UMC'**) services to complete all make-ready work. C3 requested confirmation of a number of other details, including the accreditation of CUC and UMC, the appropriate liability insurance, annual re-certification or developmental training programs.
87. Referencing regulations 6 and 10 of the Infrastructure Sharing Regulations, C3 also requested confirmation that all material and services provided by CUC or approved accredited vendors complied with the regulations. C3 recommended "*all items should be listed, fully transparent, based on cost and specifically non-discriminatory*" and considered this would ensure fair and equal costs among all attachers. C3 submitted that attachers should be permitted "*to use independent utility approved / accredited contractors to perform all make-ready and communication channel deployments.*"<sup>23</sup>

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<sup>23</sup> Page 3 of C3's 21 April 2017 Working Group position paper.



## Logic

88. Logic noted that it did not have any specific concerns with CUC and/or DataLink continuing to set the applicable standards.

### B) Standard Utility Pole

## DataLink

89. DataLink noted that the current definition of 'standard utility pole' was no longer accurate but reasonably described a typical pole with a communication space made ready. It noted that CUC has several pole standards to meet electricity supply requirements but these are not relevant to telecommunications attachments. DataLink noted that the proposed definition based on a minimum clearance of 25' (which it noted should be 25'10") would only apply to poles where telecommunications utilities had paid to facilitate the communication space.<sup>24</sup>
90. DataLink submitted that, due to the conditions set out in CUC's T&D Licence,<sup>25</sup> attaching utilities must pay for any modifications required solely to accommodate them on the pole infrastructure. DataLink stated that poles are installed to meet electrical service needs, so telecommunications attachers might have to pay for poles of different heights. DataLink further stated that CUC retrofits poles to accommodate new standards only as needed, in order to manage expenses for electric consumers, so some poles may not meet current standards. Modifications to these poles over and above the provision of a communication space would be, according to DataLink, payable by CUC.
91. DataLink submitted that a new definition of a standard pole with a communication space automatically provided should only be adopted if there is also provision for an automatic payment to account for the expense of the extra length of pole required. In its view, attaching utilities should pay for moving any electrical facilities located below 25' on the pole because those facilities would have been located there before there was a need to accommodate a telecommunications space. For future make-ready work, DataLink stated that in the case of weatherheads below 23'6", CUC would pay 65% and the attaching utility would pay 35% of the costs of relocating it. In the case of weatherheads at or above 23'6", the attaching utility would pay 100% of the costs.

## C3

92. With respect to the definition of a standard utility pole, C3 submitted that the definition in the Pole Sharing Agreements was not appropriate as it reflected a pole required to provide electrical service not a pole required to provide telecommunications service. C3 further submitted that the appropriate definition should be "*a pole that is capable of allowing all*

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<sup>24</sup> DataLink noted that, if there are no telecommunications attachers on a pole, CUC could attach electrical facilities lower than 25'10" while complying with NESC standards.

<sup>25</sup> *Electricity Transmission and Distribution Licence Granted to Caribbean Utilities Company, Ltd.* by the Government of the Cayman Islands on 3 April 2008 – <https://www.ofreg.ky/viewPDF/documents/energy-licensees/2021-04-29-03-54-03-cuc-td-licence-2008.pdf>

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*four licensees to attach while exceeding the minimum height needed to cross the roads presently 18'6" above ground."*

93. C3 submitted that DataLink should adhere to all applicable standards, including the National Electric Safety Code and the Infrastructure Sharing Regulations. Submitting that the minimum clearance for electrical facilities was 25' after 2014, C3 was of the view that attachers should not be required to pay to move electrical facilities which are not above 25'. For poles installed before 2014, attachers should not be required to pay where the electrical facilities were not above 23'. In those two cases, the infrastructure was not compliant with CUC / DataLink regulated standards and those companies should absorb the replacement pole costs. If a pole must be replaced during make-ready and the pole would otherwise need replacing within 2 to 4 years, C3 considered that CUC should contribute to the cost. C3 recommended that mid-span poles should be no taller than 25' and that telecommunication attachers pay for those.

### Logic

94. Logic noted that it did not have any specific concerns with CUC and/or DataLink continuing to set the applicable standards.

### III. Permit Application Process

95. The Working Group was tasked, among other things, with considering whether limitations in the capability of DataLink to ensure an efficient and timely processing of all the pole attachment permits applied for could be remedied by allowing appropriately-certified independent contractors to perform the tasks related to the pole attachment process that have been, until now, exclusively performed by DataLink/CUC or their appointed contractors.

### DataLink

96. DataLink noted that the timelines it proposed for the permit application were based on FCC guidelines and were expressed in business days for ease of calculation, and further noted that periods based on calendar days may be unnecessarily restrictive during holiday periods. DataLink submitted that, due to finite resources, the timeframes were only possible if a maximum number of applications was required. In its view, permits should be applied for in batches of no more than 25 poles with a maximum of 300 poles per month. Other requirements proposed by DataLink were to: base timelines on FCC guidelines, require upfront payment for make-ready to ensure availability of resources, and allow for obtaining wayleaves which cannot be controlled by DataLink.
97. DataLink noted that its proposed permit application process was described in full in the proposed standard contract that it attached to its position paper. Under this process, its infrastructure must be reviewed (pre-permit survey) for current authorised and unauthorised attachments and necessary make-ready for each pole, and payments such as the "fixed fee" should be received in advance.

98. DataLink expressed a strong preference to continue with the current approach of managing individual ICT licensees' requests, taking into account "*CUC's finite make ready resources, payments received for make ready and the requirement to share infrastructure on an even basis among all providers.*"<sup>26</sup> It submitted that it had proposed a process for large scale make-ready that was already in practice with Logic and has resulted in improved efficiency. It also proposed a deposit for ICT licensees to reserve the resources necessary to respond to their make-ready requests, and a process to allocate CUC's limited resources among ICT licensees in the event those resources were over-subscribed.

### Digicel

99. Digicel submitted that Regulation 6 (j) of the INI Regulations requires infrastructure sharing services be provided in a manner that enables the timely and economic development of competition in the provision of public ICT networks and public ICT services. Digicel estimated that under CUC's proposed timelines, it would take CUC approximately 4 years to make its entire network ready. In the meantime, both Flow and CUC's downstream arm, DataLink, would be shielded from additional competition. Digicel noted it also constrains an operator's ability to commit to roll out time lines. This outcome, in Digicel's view, would not be consistent with the regulations.
100. Digicel proposed that DataLink's FCC-based process should be set aside in favour of a "project-based approach". Given the coverage obligations of the telecommunications operators, the size of the pole network and the need of all operators to deploy fibre on "trunk" routes before they can serve access branches, Digicel considered this approach would be more appropriate and efficient. Digicel noted that using third parties would allow operators to carry out make-ready on different parts of the pole estate, and protocols could be agreed to avoid jump starts for actual cable deployment or to create incentives (such as not gaining access to another portion of the made-ready pole estate until one's own make-ready is late).

### C3

101. C3 recommended that the permit application process be expressed in calendar days to expedite the process, but noted that it would need assurance that DataLink would not incur additional over-time costs due to weekend labour.
102. C3 submitted that, once DataLink entered into contracts with the telecommunications operators, DataLink was aware that island-wide fibre network coverage was required. C3 noted DataLink's statement that DataLink was required by the Authority to offer pole attachment agreements to the telecommunications operators regardless of infrastructure and space limitations. C3 also noted DataLink's statement that only CUC can authorise attachment permits, and queried whether there might be efficiencies in eliminating the middle-man, i.e. DataLink. C3 further queried why DataLink had not proactively planned its infrastructure to facilitate the attachment requirements of the telecommunications operators, having signed the first attachment agreement in 2005 and the others in 2012.

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<sup>26</sup> See page 8 of DataLink's 21 April 2017 Working Group position paper.

103. C3 submitted that DataLink’s permit application process was ineffective and inefficient. C3 noted that DataLink’s timelines, if fully maximized, would require 165 business days, or an estimated 7.6 months, during which C3 would bear the burden of consumer frustration and financial / operational shortfalls. C3 also noted that DataLink would need to make ready 300 poles per month in order to complete island-wide fibre coverage within three years. However, according to C3, DataLink was in fact only completing 100 to 150 poles per month. C3 then presented examples of jurisdictions which allow 60 to 90 days to complete make-ready works.
104. C3 recommended that CUC and DataLink consider additional third-party contractors to assist in completing the pole attachment make-ready process, and offered its assistance by adding additional accredited resources to its team.

### **Logic**

105. Logic acknowledged the challenge of the permit process and CUC’s limited resources to carry out the make-ready work in a timely manner, and noted that this is a continuing concern for Logic. Logic submitted that delays in processing permits and progressing make-ready work must be taken into account when the Office considers if a carrier has breached its fibre infrastructure roll out commitments, as pole attachments are a key component of the network infrastructure.
106. Logic also noted that it had no issue with properly certified contractors doing some of the work instead of DataLink, provided the work is done to a sufficiently high standard and the cost-sharing benefits accrue to all carriers on the pole.

### **D. Working Group Reply Comments**

107. On 1 June 2017, the Office invited the members of the Working Group to submit comments on each other’s final position papers, as well as on whether there was consensus among the members of the Working Group on any issues, and on whether the Office ought to address the outstanding issues, if any, by continuing with the ICT Consultation 2016-2 procedure or by adopting another procedure.<sup>27</sup>
108. DataLink, Digicel, Flow and Logic submitted their reply comments on 16 June 2017. C3 submitted its reply comments on 20 June 2017.<sup>28</sup>
109. Whereas Flow, Digicel and Logic noted they had no comments in addition to those already provided in their final position papers, DataLink and C3 responded as follows:

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<sup>27</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-22-30-OfficelettertoPoleWorkingGroupnextsteps.pdf>

<sup>28</sup> All documents referenced in this paragraph are available at <http://www.ofreg.ky/ict/icta-forms-pole-attachment-working-group>

DataLink

110. In its reply comments, DataLink noted as a preliminary matter that the utility pole infrastructure is owned by CUC, who is entitled to income at commercially-negotiated rates for use of that infrastructure by third parties. DataLink further noted that ICT licensees have been offered access to share CUC's infrastructure at reasonable rates (negotiated with commercial parties in arm's length transactions) and on the same (or similar) terms and conditions, and stated that there has been no breach of the ICTA Law or of the Infrastructure Sharing Regulations in these commercial dealings.
111. DataLink stated that it aimed safely and efficiently to provide infrastructure sharing so that the Cayman Islands may benefit from the provision of service. At the same time, DataLink submitted that it aimed to maintain a sensible and sustainable business model while CUC complies with its Transmission and Distribution Licence conditions and reliability and safety requirements and protects the structural integrity of the electrical infrastructure.
112. DataLink submitted that the best outcome would be for all licensees to enter into a standardized contract in the form of the draft it submitted, which contains the same (or similar) terms as those already negotiated with commercial parties in arm's length transactions. In DataLink's view, this would result in the efficient and harmonized utilization of the infrastructure and the promotion of competition in the provision of ICT services. DataLink submitted that a process whereby OfReg sets the rates, prices, and terms and conditions of commercial contracts primarily on the basis of a complaint from one licensee would not be in the interests of the parties or the public.
113. DataLink noted that its duty under the (then) ICTA Law and Regulations is to share existing capacity and that, while DataLink has committed to reasonably address preparing room for the communication space on the existing infrastructure, the licences governing the construction of pole infrastructure did not include automatic provision of space for ICT licensees.
114. DataLink specifically disagreed with Digicel's position that its infrastructure sharing processes were unduly complicated or that they give DataLink or CUC a competitive advantage. DataLink submitted that neither it nor CUC compete directly with other ICT licensees and that it does not have a monopoly position in the ICT industry. DataLink also submitted that the fact that sharing of existing pole infrastructure may be a lower cost option than trenching or building a new pole network does not require DataLink to do more than required by the ICT Law or Regulations, or entitle other businesses to use that infrastructure without negotiating reasonable terms for access.
115. With respect to the issue of standard pole attachment contracts, DataLink submitted that it has consistently maintained the desire to negotiate a standard set of terms and conditions with other licensees. DataLink noted that Logic, CWCIL<sup>29</sup> and Digicel agree with the need for a standard agreement and further noted that Logic and CWCIL both have successfully negotiated agreements with DataLink. DataLink submitted that C3, on the other hand, was not exhibiting good faith or respect for the terms and conditions in the

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<sup>29</sup> i.e. Flow.

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agreement it negotiated with DataLink, and was now seeking the nullification of that agreement while continuing to use the pole infrastructure. DataLink submitted that such an approach was not provided for or supported by the ICTA Law or Regulations.

116. With respect to the issue of pole attachment specification standards, DataLink stated it had sought to explain the standards which define the space on the pole up to the top of the safety space, and noted that the Authority's ICT Decision 2016-1<sup>30</sup> had clearly stated the attachment points for each attacher, which was reflected in the draft proposed standard agreement.
117. DataLink noted that Infinity's suggestion that the definition of a standard pole include automatic provision for four attachments would require either a change to CUC's licence or up-front payment of proportionate costs.
118. DataLink submitted that Digicel's comments were based on the incorrect assumptions that attachments do not impact the strength or integrity of existing infrastructure, or that the provision of a communication space does not require a longer pole than for electrical service alone.
119. DataLink submitted that there was general consensus that a communication space should be provided and that the real issue outstanding was responsibility for the associated costs. While noting that "telco-only" poles may be less expensive than poles which also carry electrical infrastructure, DataLink considered their use to be inappropriate, as DataLink is in the business of facilitating sharing of existing electrical infrastructure, not the business of providing telco-only infrastructure, and any mid-span poles are planted to ensure the integrity of the existing pole network.
120. With respect to the issue of certification of make-ready resources, DataLink stated that CUC and DataLink are under strict obligations to protect the integrity of the infrastructure and to ensure applicable standards are followed at all times. DataLink submitted that the ICTA Law and regulations do not require it to accept infrastructure sharing requests that risk damage to property, endanger life or safety, threaten the integrity, security or interoperability of the network, allow another ICT licensee to perform make-ready works on CUC infrastructure, or allow unsupervised third party contractors to perform work on CUC infrastructure.
121. DataLink submitted that Infinity's requests for evidence of accreditation, supervision, insurance and certification to work on CUC infrastructure and the vendors who supply the materials for CUC are misguided. DataLink noted that CUC and its regulator agree upon the standards required to provide reliable electrical service.
122. DataLink suggested that there is general agreement with the issue of the utilization of approved third-party contractors under strict supervision of CUC. DataLink submitted that

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<sup>30</sup> ICT Decision 2016-1 – dispute determination relating to the allocation of Infinity Broadband Ltd.'s position on CUC's electricity poles, 27 April 2016 ("ICT Decision 2016-1"). Available at: <https://www.ofreg.ky/viewPDF/documents/ict-decision/2021-05-13-05-45-10-ICT-Decision-2016-1-Infinity-DataLink-Pole-Attachment-Decision.pdf>

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Digicel's alternative proposal in the form of a suggested 'project based approach' using resources assembled to perform a 'make-ready deployment' would not be feasible. DataLink noted that sufficient resources are not available locally, a project-based approach would be a major undertaking that would inevitably result in an adverse impact on the supply of electrical service to customers, leading to possible regulatory impact, fines or brand damage, and a project-based approach could only be achieved under CUC supervision and fair payment upfront from all attaching ICT licensees. DataLink submitted it is not required to finance the costs for infrastructure sharing under the Law or Regulations nor will it agree to do so, and further submitted that both Digicel's and Infinity's apparent requests for this are unreasonable.

123. With respect to the issue of timeframes for the permit application process, DataLink submitted that the members of the Working Group generally agree that these should be defined. DataLink noted that it proposed timeframes close to or faster than the FCC guidelines applicable in North America, which are based on experience of make-ready challenges in diverse areas including some similar to the market in the Cayman Islands. DataLink further noted that the **CUC-DataLink-Logic MOU** uses these timelines as targets for make-ready work and that DataLink has been able to meet them.
124. DataLink did not support Infinity's proposal to apply calendar days without incurring additional over-time costs applicable to weekend labour, submitting that this is unreasonable and that a business day approach is appropriate. DataLink further submitted that, should calendar days be adopted as standard, the timelines should then be increased accordingly or over-time allowed in accordance with the Labour Law and general safe practice.

### C3

125. In its reply comments, C3 submitted that Flow was being given an advantage over other attaching utilities. C3 noted that, historically, Flow paid CUC to create an 18" communication space on the utility poles, and submitted that DataLink was now allowing Flow to place multiple attachments on a pole without paying any make-ready charges. C3 submitted this was contrary to the Infrastructure Sharing Regulations.
126. With respect to the issue of standard pole attachment contracts, C3 submitted that neither communications utilities nor consumers should be required to pay to raise CUC power lines or weatherheads which are below 23'10", as neither should bear the cost of CUC failing to meet NESC standards. C3 also submitted that the period during which a second attacher should refund make-ready charges to the first attacher should be extended to be the 40-year lifespan of the pole.
127. With respect to the issue of pole attachment specification standards, C3 submitted that CUC should comply with the same NESC standards it requires of attachers. As well, C3 submitted that the fact that CUC's Transmission and Distribution Licence might not allow CUC to build infrastructure for non-electrical purposes does not mean that CUC should not follow NESC standards. C3 further submitted that, because the original Pole Sharing Agreement with Flow imposed on CUC an obligation to place electrical facilities no lower

than 23'6", CUC should pay for the costs to move any electrical facilities installed below that level.

128. With respect to the issue of the use of qualified third-party contractors, C3 noted that DataLink was now disclosing it uses two third party contractors whereas it referred to only one during the Working Group, and submitted that communications utilities should be notified of the tendering process for such accredited contractors.

#### **E. Continuation of ICT Consultation 2016-2**

129. Following a review of the final position papers and reply comments of the Working Group, the Office noted a clear lack of consensus among the members of the Working Group and considered that the issues addressed in ICT Consultation 2016-2 remained outstanding. Accordingly, the Office advised the members of the Working Group by letter dated 30 June 2017 that it would continue with the ICT Consultation 2016-2 procedure, addressing Parts A, B and C of ICT Consultation 2016-2 separately and would issue determinations or additional questions for consultation as appropriate.
130. On 22 September 2022, the Office notified parties that it had recommenced work on ICT Consultation 2016-2 Part B and Part C and attached an activity plan and current status (**'the September 2022 Notice'**).
131. As noted above, the Office is addressing the issues raised in Part A separately.

#### **F. Updated Responses to Consultation 2016-2 Part B**

132. On 12 October 2022, the Office asked the parties to provide additional comments or submissions in response to Parts B and C of Consultation 2016-2 and to certain additional issues (the **'2022 Re-Submissions'**). The Office also requested that the parties respond to a number of RFIs to update and supplement the existing record (the **'2022 RFIs'**).<sup>31</sup>

#### **Flow**

133. Flow responded to the Office's 2022 RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>32</sup> Flow noted that it considered the additional issues raised by the Office to be relevant to Consultation 2016-2. However, Flow chose to defer additional comments or submissions as well as responses to the additional issues until publication of consultation in accordance with the September 2022 Notice.

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<sup>31</sup> The documents referenced in this paragraph can be found at: <https://www.ofreg.ky/consultation-rfis-and-next-steps>

<sup>32</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-05-31-Cayman-Flow-Response-to-RFI-on-ICT-Consultation-20162-Parts-B-and-C.pdf>



## DataLink

134. DataLink responded to the Office's 2022 RFIs 301, 308 and 309 on 11 November 2022 and to the remaining 2022 RFIs on 9 December 2022.<sup>33</sup> DataLink also submitted comments in response to Consultation 2016-2 and to the additional issues on 9 December 2022.
135. In its 9 December 2022 submission,<sup>34</sup> DataLink did not specifically refer to its submissions from 2017 and earlier. However, DataLink did provide some additional comments and submissions relevant to Consultation 2016-2 Part B.
136. Regarding "*Make Ready Area Selection*," DataLink noted that its limited resources were divided among four Attaching Utilities "*each addressing a different area for Make Ready as any given point in time.*" DataLink suggested a faster make-ready and network rollout process would result if DataLink were to select the areas to be made ready, taking into account the varying requirements of the Attaching Utilities.
137. Regarding "*Infrastructure Relocates*," DataLink stated that it is spending "*an exorbitant amount of time liaising with the various Attaching Utility's after notice has been given to verify that their infrastructure has been relocated/removed*", following notice under section 8 of the MPJUA.<sup>35</sup> DataLink also submitted that section 83 of the ICT Act operated to prevent it from removing or relocating such infrastructure itself. DataLink further submitted that it should have the right to do so, provided the agreed notice period in the MPJUA is adhered to.
138. Regarding "*Unauthorized Attachments*," DataLink also submitted that section 83 of the ICT Act prevented it from removing unauthorised attachments and that DataLink should have the right to do so, provided the agreed notice period in the MPJUA is adhered to.
139. Regarding "*Non Payment*," DataLink submitted that several Attaching Utilities were not paying their respective fees while remaining attached to the Owner Utility infrastructure as well as expanding their use of that infrastructure through further unauthorized attachments. DataLink submitted that this was "*hindering the progress of Make Ready and Joint Use.*"

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<sup>33</sup> As agreed with the Office on 26 October 2022.

<sup>34</sup> See DataLink Responses - OfReg ICT Consultation 2016-2 7A 7B.pdf. Available at: <https://www.ofreg.ky/viewPDF/documents/consultations/2023-05-18-07-57-35-DataLink-Responses---OfReg-ICT-Consultation-2016-2-7A-7B.pdf>

<sup>35</sup> "Master Pole Joint Use Agreement," referred to elsewhere in this document as the "Pole Sharing Agreement."

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140. DataLink also submitted comments on the additional issues raised by the Office in its 12 October 2022 letter.<sup>36</sup> In its preliminary comments on those issues,<sup>37</sup> DataLink recommended that the Office adopt the same approach with respect to these additional issues as it did in Consultation 2016-2, namely an approach in which the Office “*presented a background which included legal and factual matters, highlighting matters of interest or concern to the Office and containing an initial view, then inviting responses to a proposal or series of proposals that was clearly spelled out.*”
141. With respect to the additional issue raised by the Office relating to the process to issue permits, DataLink began by describing in some detail the existing process under the PSAs. DataLink proposed that the existing process be modified such that, instead of returning the signed Permit after all required make-ready work has been performed, DataLink would issue a “Pre-Approval Permit” entitling the Attaching Utility to attach its facilities, and only issue the “Full Permit” after DataLink had verified the attachment was made in accordance with the Pre-Approval Permit.
142. DataLink submitted a permit would only be considered to be issued once this process, including payment of any applicable costs, was complete.
143. DataLink noted that the “*permit format is a PDF of the Joint Use Request form stating when and by whom the permit was issued ...*”
144. With respect to the additional issue raised by the Office regarding the type of communications equipment specified in a pole attachment permit, DataLink submitted it “*considers it essential that a permit to attach be limited to the specific type of communications equipment specified therein, and that it is not deemed to allow other communications facilities the attacher may choose to attach in the future*” due to the risk to the “*safety, reliability and resiliency of electric and telecommunications infrastructure and service.*” DataLink provided a non-exhaustive list of the factors it considers when assessing whether to permit an attachment.
145. With respect to the additional issues raised by the Office regarding the appropriate “triggers” for replacement of poles, DataLink submitted that a pole “*shall be replaced*” upon receipt of (1) a request to attach, (2) a determination by DataLink’s engineers “*whether [the pole] can accommodate up to four Attaching Utilities,*” and (3) a payment of the corresponding make-ready cost.<sup>38</sup> In support of this position, DataLink cited sections 7.A, 7.B and 7.E of the PSA.

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<sup>36</sup> See DataLink Responses - OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf - <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>37</sup> See section 7.B on page 2 of DataLink Responses - OfReg ICT Consultation 2016-2 7A 7B.pdf. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-05-18-07-57-35-DataLink-Responses---OfReg-ICT-Consultation-2016-2-7A-7B.pdf>

<sup>38</sup> See DataLink’s response to Question 5.B on pages 7 – 9 of DataLink Responses - OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf. - <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

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146. DataLink further submitted that “*any alteration, modification, replacement, etc. of current attachments by an Attaching Utility*” must be assessed by DataLink engineers to ensure “*the new communications facilities (attachments) do not violate the strength and loading line design calculations from the NESC.*”

### Digicel

147. Digicel responded to the Office’s 2022 RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>39</sup> Digicel noted that its engagement with DataLink and experience with the issues raised by Consultation 2016-2 was embryonic, as it had only begun to roll out fibre services in the Cayman Islands.
148. Digicel “*found DataLink receptive, supportive, and engaging to work with*”, and noted that “*the time it takes to rollout services dependent upon DataLink infrastructure is a challenge.*” However, Digicel considered it would be premature for it to specifically comment in detail on the issues raised in the consultation.
149. With respect to the additional issues raised by the Office in the 12 October 2022 letter to parties, Digicel considered that it would be helpful to have complete copies of all relevant submissions by C3 and Logic, and that it would need OfReg’s response and submissions in order to provide a proper response.

### C3

150. C3 responded to the Office’s 2022 RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 22 November 2022.<sup>40</sup>
151. With respect to issues relevant to Consultation 2016-2 Part B, C3 noted that, per Article II.I of its Pole Sharing Agreement, it is required to bear the full cost of additional capacity required to accommodate its Attachments, even though the Owner Utility also benefits from the greater capacity (both for its own use and further sharing of that infrastructure with third parties). C3 further noted that this applies to both the expansion of existing poles and to the addition of “in-span” poles of the same height as the rest of the poles along the route. C3 submitted that, if it is to bear the cost of either of these types of poles, the cost to C3 should be based on a pole “*of no more than 25-30’*” as “*the ICT attaching utilities can attach no higher than 21’6”*”.

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The Office notes that DataLink also indicated in its response to RFI 310 that “*All Make Ready work carried out is to accommodate 4 Attaching Utility’s, Make Ready is not done to accommodate a single Attaching Utility.*”

<sup>39</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-03-50-Cover-Letter-Final-Nov.-11-2022.pdf>

<sup>40</sup> The submission is dated 24 October 2022 but it was emailed to the Office on 22 November 2022. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-00-57-17-C3-Response-to-RFIs-for-ICT-Consultation-2016-224-Oct-2022.pdf>

## Logic

152. Logic responded to the Office's 2022 RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>41</sup> Logic re-iterated its position with respect to matters raised in Consultation 2016-2 and provided some additional comments or submissions relevant to Consultation 2016-2 Part B.
153. With respect to the additional issue raised by the Office relating to the process to issue permits, Logic noted that it must manually submit applications to DataLink and that the timelines for the review and response period for permit applications set out in its Pole Sharing Agreement "*remain consistently unmet.*" Logic considered that the process set out in the Agreement "*does not work and that a functioning, equitable permit process with clear time frames is required.*" Logic proposed the establishment of "*a centralised online portal for submission of pole application requests,*" and "*an online database which reflects current information on which poles have or have not been permitted.*" Logic further proposed that "*a permit be considered issued once permit confirmation has been issued electronically via the proposed online portal.*"
154. With respect to the additional issue raised by the Office regarding the type of communications equipment specified in a pole attachment permit, Logic submitted that a permit to attach should continue to be limited to the specific type of communications equipment specified therein, on the basis of safety considerations.
155. With respect to the additional issues raised by the Office regarding the appropriate "triggers" for replacement of poles, Logic submitted that "*an existing pole should be replaced when the existing pole is no longer able to support the loads required by the permitted attachers*" and that replacement "*should be triggered when the last permit application request is received by DataLink.*"
156. Logic further submitted that communications equipment "swaps" "where no further make-ready work is required to be performed on the relevant pole" should not trigger a pole replacement.

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<sup>41</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>

## Section 5 – Consultation 2016-2 Part C

157. Part C of ICT Consultation 2016-2 focused on issues relating to applicable charging principles for the Annual Attachment Fee and for make-ready work charges. The Authority published as part of the initial consultation in 2016 a number of proposals intended to address these issues. The consultative process to date has included submissions by licensees in 2016 on those proposals, discussions among licensees in the Working Group in 2017, and responses to RFIs and further submissions by the licensees in 2022.

### A. ICT Consultation 2016-2, Part C

158. Part C of Consultation 2016-2, paragraphs 198 to 229, referenced the following:

Section 69 (2) of the Law states that: *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 a 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.*

Further, section 66 (5) of the Law states that: *Where parties cannot agree upon inter connection [and infrastructure sharing] rates, the Authority may impose such rates.*

Section 68 (1) and (3) of the Law requires that the costs for infrastructure sharing be “*based on cost-orientated rates that are reasonable and arrived at in a transparent manner [...].*” Noting the aforementioned obligation, and that infrastructure sharing services “*shall be provided by the responder to the requestor at reasonable rates*” (see Regulation 6 (c) of the Infrastructure Sharing Regulations) and 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*” (see Regulation 6 (h) of the Infrastructure Sharing Regulations), the Authority is consulting on what the appropriate costs for the attachment of communication cables to CUC’s electricity poles more generally are, as provided by the various pole sharing agreements between CUC/DataLink and the Attachers.

159. The Authority noted DataLink’s statement that, since 2012, it “*has attempted to negotiate a replacement Master Joint Use Pole Agreement with LIME and Infinity with a view to ensuring essentially the same terms and conditions for all attaching ICT Licensees.*”
160. The Authority then noted that, subject to consultation, the applicable charges relating to the attachment of communication cables to electricity poles, as specified and implemented through the relevant pole sharing agreements between CUC/DataLink and the Attachers, appeared unlikely to satisfy the obligations set out in the Law and applicable regulations.

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161. In particular, the Authority noted that the fees in the different Pole Sharing Agreements were calculated using different formulae and based on factors whose values were specified in different ways, resulting in different rates for the provision of the same service.
162. The Authority also noted that the *Net Cost of a Bare Pole*, as the main component in the pricing formula for the calculation of the *Quarterly Attachment Fee*, is determined using a historic (i.e., backward-looking) costing approach and not a forward-looking costing approach as provided for by Regulation 10 of the Infrastructure Sharing Regulations.
163. After further assessment, the Authority considered that as long as the charging principles relating to the attachment of communication cables to CUC's electricity poles are cost-orientated, and therefore comply with the requirements set out at section 68 (3) of the Law and Regulation 6 of the Infrastructure Regulations, it may not be necessary to establish a FLLRIC methodology for the purpose of determining the *Quarterly Attachment Fee*. However, the Authority concluded that it remained open for consultation whether or not the values determined for the *Net Cost of a Bare Pole* in the various pole sharing agreements, are cost-orientated.
164. The Authority further noted that it appears not to be appropriate to incorporate the costs relating to *Make-Ready Work* in the pricing formula for calculating *Quarterly Attachment Fee*. However, the Authority considers that, in accordance with Section 68 of the Law, the charging principles relating to *Make-Ready Work* should be (1) based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and (2) sufficiently unbundled such that the Attacher requesting a new pole attachment does not have to pay for network components that are not required for the service to be provided.
165. The Authority also noted that there may be advantages for the Attacher to be at the top of the communication space and it, therefore, considered that it may be appropriate to establish appropriate costing principles relating to attaching and maintenance costs, which may take into account any necessary adjustments to the existing charges based on the relevant position of each Attacher in the Communication Space.
166. Finally, the Authority considered that DataLink, as an Attacher utilising the Communication Space on CUC's electricity poles in accordance with its ICT licence granted by the Authority, and as provided for in legislation, should be subject to the same terms and conditions relating to the pole sharing arrangements, including the relevant charging principles, as they apply to all the other Attachers.
167. The Authority therefore posed a number of questions regarding the charging principles relating to the attachment of communication cables to CUC's electricity poles.

**B. Responses to Consultation 2016-2 Part C**

168. The Authority received responses from Flow, DataLink, Digicel, and C3.<sup>42</sup>

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<sup>42</sup> See footnotes 11 to 14 at paragraph 36 above.

169. Digicel generally agreed with the Authority's proposals. Digicel also requested that the Authority underscore the requirement that the principles and guidelines in regulation 6 of the Infrastructure Sharing Regulations shall continue to apply to the fullest extent in relation to requests for pole access.
170. Flow, DataLink and C3 provided detailed comments which are set out below.

**I. 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.**

**Flow**

171. Flow submitted that DataLink's pricing formula does not comply with relevant costing principles. Flow claimed that the pricing formula is based on "value of service" and not incremental costs, which is not a lawful basis under the Regulations. Flow argued that because there are no competitive constraints on DataLink's price, "value of service" pricing leads to unreasonable and excessive monopoly pricing.

**DataLink**

172. DataLink submitted that the formulas and methodologies for calculating the Logic, C3 and Flow annual attachment fee in the agreements were appropriate, because the calculation is transparent and based on a fair allocation of actual costs, and it complies with the respective agreement with CUC or DataLink. DataLink claimed that any differences among agreements resulted from them being executed at different times and, to the extent they affect the competitiveness of the attachers, are not appropriate.
173. DataLink noted that it had been attempted to negotiate new agreements with Flow and C3 and submitted that all attachers should be subject to the same formula, methodology and annual adjustment date for the annual attachment fee, as described in more detail in its response to Question C2.

**C3**

174. C3 submitted that the pricing formula should be based on the cost of the type of pole when it was installed, and should not have a CPI escalation clause. In addition, the annual attachment fee should be based on the type and height of the pole to which the attaching utility has attached.

**Digicel**

175. Digicel did not provide any specific comment on this question.

## II. 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 Attachers”**; and,

- **“Weighted average height of all poles”<sup>43</sup>** or **“Weighted average height of wood poles”<sup>44</sup>**

- **“Annual Carrying Charge Rate”<sup>45</sup>** or **“20 year Levelized Fixed Charge Rate”<sup>46</sup>**,

is appropriately specified or determined in the relevant pole sharing agreements.

### Flow

176. Flow identified seven issues with DataLink’s pricing formula.

177. First, Flow considered that the net cost of bare pole was overstated by 69%, based on its review of the average height and cost of installed poles included in the most recent quarterly invoices received from CUC.

178. Second, Flow considered that the “Space Factor” was mis-specified, resulting in attachers bearing an excessive portion of the “common costs” of CUC poles: the size of the “unusable space” was overstated, the space occupied by individual attachers was miscalculated, and the ‘2/3’ factor was inappropriate as it allocated 2/3 of the “unusable space” to attachers when, in Flow’s view, none of such costs were “caused” by, and therefore should be allocated to, telecommunications users.

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<sup>43</sup> As specified in the 2013 **DataLink-Logic Pole Sharing Agreement**.

<sup>44</sup> As specified in the 2012 **CUC-DataLink Pole Sharing Agreement** and the 2005 **CUC-Infinity Pole Sharing Agreement**.

<sup>45</sup> As specified in the 2013 **DataLink-Logic Pole Sharing Agreement** and the 2005 **CUC-Infinity Pole Sharing Agreement**.

<sup>46</sup> As specified in the 2012 **CUC-DataLink Pole Sharing Agreement**.



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179. Third, Flow considered that the pricing formula double-counted the impact of inflation, once through the inclusion of the cost of new poles at current, not historical, prices, and again through the CUC annual carrying charge rate.
180. Fourth, Flow considered the charges for overhead expense to be excessive. Including separate elements for “Management & Overhead” and “Administrative” costs was unnecessary and resulted in artificial costs. Flow claimed that there is no evidence that Datalink is a separate business organization, with its own staff and assets fully separate from those of CUC, and that CUC has in effect “created” costs which did not exist before (“Management & Overhead”) or which were already included in CUC’s General and Administrative costs, merely by incorporating a new subsidiary. Flow argued that DataLink’s “management and overhead” costs are astonishingly high for an organization which does not appear to have its own staff separate from the staff of the parent company, which does not actually maintain the poles itself, and which has three (3) customers other than itself (Flow, Logic and C3).
181. Fifth, Flow submitted that the calculations of the “Maintenance” and “Administration” elements of the carrying charge were flawed. Both are expressed as percentages calculated as CUC totals, divided by the NBV of CUC’s total assets. Flow claimed that this approach is patently unreasonable, because if CUC decided to accelerate depreciation of its assets, or write down their asset values for reasons unrelated to the attachment activities, this would have a significant impact on the attachment Fee. Flow argued that the prices paid for access to infrastructure should be based on the incremental costs of providing that access, not on irrelevant factors such as CUC’s decision to accelerate depreciation of unrelated assets. In addition, Flow argued that CUC administration and distribution costs should not be included in prices paid for attachment to poles, as they were “caused” by CUC’s need for poles and not a result of use of poles by attachers.
182. Sixth, Flow submitted that the cost of capital used in the pricing formula was misstated and excessive, as it should be based on DataLink’s Weighted Average Cost of Capital (**‘WACC’**) instead of an arbitrary 15% Return on Equity (**‘ROE’**), as use of ROE results in telecommunications customers subsidizing CUC. Flow argued that the appropriate figure to be used cannot exceed 7.4%, which corresponds to the WACC from CUC’s last two Annual Reports. However, Flow argued that even a more reasonable WACC of 7.4% would result in DataLink’s telecommunications customers subsidizing CUC’s business. Flow further noted that CUC’s utility poles are included in CUC’s fixed assets, which meant CUC is already generating a return on assets through its regulated Return on Rate Base (**‘RORB’**) of 7.4%. Flow argued that if CUC is already covering the full costs of the utility poles and generating a return through its electricity rates, it is difficult to come to any other conclusion than that DataLink’s telecommunications customers are subsidizing CUC. Flow questioned whether this is reasonable, and recommended that DataLink’s return be limited to its own assets.
183. Seventh, Flow stated that the pricing formula appeared to be different in the different pole sharing agreements in a manner that appeared to be discriminatory.

## DataLink

184. DataLink proposed that the annual attachment fee formula for Flow and C3 be modified to be consistent with the formula applicable to Logic, and described in detail the differences among the existing agreements and the changes to be required.
185. DataLink submitted that, in its view, the values determined for the net Cost of a Bare Pole were, in fact, cost-oriented.
186. DataLink claimed that 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, labour, equipment and overheads necessary to erect the bare pole. For aluminium poles this would include the cost to build the foundation on which the pole is bolted.
187. DataLink noted that the number of attaching utilities used in the proposed Space Factor formula would be set at four, which implies that no new telecommunications providers (other than Logic, C3, DataLink and Flow) would be allowed to attach to CUC poles.
188. DataLink also claimed that 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, and that 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.

## C3

189. C3 had no comments on this question.

## Digicel

190. Digicel did not provide any specific comment on this question.

### III. 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.**

## Flow

191. Flow referred to its response to Question C2.

DataLink

192. DataLink submitted that the make-ready costs it provides are 100% cost based and in compliance with Fully Allocated Cost (FAC) methodology. In order to be transparent, DataLink provides details on the make-ready work in order to be transparent. DataLink does not add a profit mark-up on these costs, and charges only the license and regulatory fee component charged by the Authority to ensure DataLink is not incurring a loss in providing this service.
193. DataLink noted that some attachers request multiple estimates and choose not to attach, and suggested a fixed fee per pole for the cost to assess, design and calculate estimated costs for accommodating an attachment.

C3

194. C3 submitted that the best way to ensure charges for make-ready work were cost-oriented was to allow other certified contractor and crews to bid on make-ready work orders, i.e. to introduce competition.

Digicel

195. Digicel did not provide any specific comment on this question.

**IV. 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.**

Flow

196. Flow referred to its response to Question C2.

DataLink

197. DataLink disagreed that fees, make-ready charges or maintenance costs should vary based on position of attachment on the pole, as it has seen no evidence that position has any material impact on an attacher's costs.

C3

198. C3 submitted that it seems reasonable to adjust make-ready costs to take into account the height of the position of the attachment on the pole. However, if the total cost of making poles ready to take all proposed attachments is divided equally between all attaching utilities, this would cease to be relevant.

**Digicel**

199. Digicel did not provide any specific comment on this question.

**V. 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.**

**Flow**

- 200. In light of Flow's concerns with DataLink's approach, Flow proposed two alternative price-setting methodologies that it believed would address the deficiencies in Datalink's approach and be more in compliance with the Regulations.
- 201. Flow first proposed a new methodology based on the allocation of a portion of the Net Cost of Bare Pole to an attacher, plus an allocation of a portion of a yet-to-be-agreed set of DataLink's costs.
- 202. Noting that this would require further discussion on relevant DataLink costs and the sharing of sensitive DataLink financial information, Flow next proposed five 'corrections' to DataLink's price-setting approach that, in its view, would result in a fairer allocation of costs and a price more consistent with the Regulations.
- 203. Flow also recommended that prices not be reviewed annually but, in order to have relatively stable prices, be reviewed only every five years, consistent with the five-year period for joint inventory of poles.

**DataLink**

204. DataLink asked that the Authority not charge license and regulatory fees on make-ready charges, as Datalink passed these through at cost and they are not income to DataLink.

**C3**

205. C3 had no comments on this question.

**Digicel**

206. Digicel did not provide any specific comment on this question.

**VI. 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.**

**Flow**

207. Flow submitted that DataLink should be subject to the same terms and conditions as all other attachers, per the non-discrimination requirements in the Regulations.

**DataLink**

208. DataLink submitted that its position is not the same as the other attachers and it should not be subject to an identical regime. As DataLink is effectively an “owner utility” in relation to the communication space, it would not be appropriate to require it to pay itself or CUC identical charges to those levied on the attachers.

**C3**

209. C3 considered it fundamental that DataLink be subject to the same administrative and financial processes as the other attaching utilities. Relieving DataLink of any of the obligations to which other utilities are subject would give them a competitive advantage.

**Digicel**

210. Digicel did not provide any specific comment on this question.

**VII. Question C7**

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

**Flow**

211. Flow responded it had no further comments

**DataLink**

212. DataLink proposed a new fee to cover the cost of planting a new pole with the make-ready already done in anticipation of pole attachment requests. While the cost of a pole with a communication space is greater than that of one without, the incremental cost is substantially less than the cost of making one ready for communications use after it has already been put into electrical service. This would save make ready costs in the long run and allow a smoother attachment permit process.
213. DataLink further proposed that, going forward, all attachers pay the same fee, on the basis of DataLink’s agreement with Logic as clarified by the Datalink-Logic MOU.
214. DataLink did not consider that its charging structure created an incentive for attachers to erect their own pole network, as the cost of attaching to existing poles is a fraction of the cost of installing another pole network.

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- 215. DataLink submitted that its one-off make-ready work is not being recovered through recurring attachment fees, and that make-ready does not include any of the bolts, connection points or work needed to perform the actual attachment on the pole.
- 216. DataLink stated it had no objection to attacher workers or contractor performing attachments once permits are issued.
- 217. DataLink submitted that its make-ready charges are cost-based based on actual expenses with no mark-up. These costs are unnecessary to the electric utility but desired, and should be absorbed, by the telecommunications attacher. Further, CUC is prohibited by its licence from upgrading its electrical infrastructure purely to accommodate telecommunications attachers.
- 218. DataLink also submitted that its attachment fee structure is similar to that seen in the Western hemisphere, and that they represent the on-going cost to use a portion of the asset which increases the utility's maintenance and administrative costs.
- 219. DataLink disagreed that it should be subject to the same charges as other attachers, as this does not reflect DataLink's unique position. DataLink pays management and other charges to CUC and pays a set fee for all attachments, whether it is DataLink's own or placed by an attacher. As it is effectively the "owner" of the communication space which it is sharing with attachers, it is not appropriate that DataLink should in effect charge itself for its own use of the shared infrastructure.
- 220. In response to the statement that "*it appears the annual attachment fee did not vary over time,*" DataLink submitted that it provides quarterly invoices to the regulator for review and these clearly illustrate a change in the attachment fees.

### C3

- 221. C3 submitted that CUC/DataLink's process to determine necessary make-ready, particularly the wind loading calculation, assumes each attaching utility is attaching a large feeder cable. As some 65% of C3's outside plant is smaller distribution fibre cable, this results in higher make-ready costs. As C3's design indicates to DataLink the size of the cable to be installed, DataLink should not use their flawed assumption.

### Digicel

- 222. Digicel did not provide any specific comment on this question.

### C. Working Group Position Papers

- 223. As noted at paragraph 68 above, the Authority established a Working Group consisting of representatives of Flow, DataLink, Digicel, C3 and Logic in December 2016. In order to allow the members an opportunity to resolve the matters being considered by ICT Consultation 2016-2, the Authority put that consultation process on hold for the duration of the Working Group.

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224. The Authority noted that, where the members of the Working Group achieved consensus on an issue under consideration, the Authority would review it and, where it considered it appropriate, issue a determination approving it. Where no consensus was achieved, the Authority would consider how to use its powers under the ICT Law and the URC Law, including continuing with the Consultation 2016-2 procedure, to address any outstanding issues. In such an event, any final positions expressed by the members of the Working Group could be referenced in any follow-up procedure and the Authority could take them into account in reaching determinations on any of the outstanding issues.
225. The Office considers that one of the five issues under consideration by the Working Group is directly relevant to the matters being considered under Part C of Consultation 2016-2, namely, pricing/costing elements applicable in the Pole Sharing Agreements (Issue 5).
226. The Working Group was tasked with, among other things, considering the appropriateness of various charges, including but not limited to *Make-Ready Work* charges, *Annual Attachment Fee*, and *Reservation Fees* as set out in the Pole Sharing Agreements, all within the framework of the relevant Laws. The Office notes that the positions submitted by members of the Working Group regarding *Reservation Fees* are being addressed separately.
227. In April 2017, the members of the Working Group submitted their final position papers on the issues they had discussed.<sup>47</sup>
228. Flow did not make detailed submissions on Issue 5. Instead, the company submitted that the process of procuring and securing pole attachments from DataLink is a commercial process. Flow noted that it had commercially negotiated and finalised a pole attachment contract with DataLink and was of the view that, in the absence of “*a clear indication of market failure*”, there was in its view no need for regulatory intervention.
229. DataLink, Digicel, C3, and Logic directly addressed matters relating to the appropriateness of make-ready work charges and attachment fees, and associated charging principles.
230. In preliminary comments, DataLink noted the (then) Authority’s claim that the initiative to form the Working Group arose from a long list of outstanding issues and various disputes over a number of years between Flow, Digicel, C3 and Logic on the one hand, and DataLink on the other. DataLink further noted, however, that when the Working Group was formed, C3’s complaint was the only remaining active and outstanding complaint.
231. DataLink disagreed with the Authority’s assertion that the existing agreements provided disparate terms and conditions as, when the Working Group was formed, all but one party had agreements with materially the same terms. DataLink noted that “*there are some material differences in C3’s agreement such as prices for services ...*” but it submitted that it has constantly maintained the “*position that, to satisfy all of the requirements of the law, all attaching utilities require an agreement on materially the same terms and conditions.*”

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<sup>47</sup> See <https://www.ofreg.ky/news/icta-forms-pole-attachment-working-group-1>

232. Digicel also submitted general comments in its final position paper on Working Group issues. Digicel noted that pole access and joint pole usage fall within the scope of the INI Regulations and the Working Group must be guided by the principles in those Regulations.

### DataLink

233. DataLink noted that CUC had an “*obligation to assign the charges related to non-electrical uses, outside of those purely necessary to provide electrical services, to attaching telecoms*”<sup>48</sup> and “[*d]ue to the requirement in CUC’s T&D Licence*”<sup>49</sup> that it may not build infrastructure for non-electrical purposes, Attaching Utilities **must** pay for any modifications required **solely** in order to accommodate them on the infrastructure.”<sup>50</sup> [emphasis in original]. DataLink also noted its views on the appropriate sharing of costs relating to the pole (summarised in section 5.2 of this Determination).
234. DataLink attached a draft proposed standard contract to its Working Group position paper, based largely on its existing arrangements with Logic, which included a number of clauses addressing charges for make-ready. DataLink proposed in that draft contract that persons requesting attachments pay a “*fixed fee*” per pole included in an application, whether it was a ‘green’ or a ‘red’ pole, with a true-up on a quarterly basis to reflect the costs actually incurred by DataLink in performing make-ready work. DataLink introduced a new proposed “*resource availability deposit*” which would allow “*DataLink and CUC to commit further resources to a high volume of make ready work with less risk and therefore lower costs and greater efficiencies.*” DataLink also proposed to extend from 2 years to 5 years the period during which attaching utilities reimburse those who attached earlier and incurred the associated make-ready costs.
235. DataLink also proposed a new “*equal automatic charge for each new pole planted for all attaching utilities.*” DataLink noted that the cost of making the communication space is lower at the outset than retrofitting the space into an existing line of poles. This approach, DataLink submitted, would allow CUC to remain compliant with its T&D Licence, and the permit application process would be more efficient.<sup>51</sup>
236. In its issue-specific comments, DataLink submitted that the net book value and number of all poles, except aluminium poles, should be considered, as all other pole types are currently attached to by at least one attacher.<sup>52</sup>

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<sup>48</sup> Page 2 of DataLink’s 21 April 2017 Working Group position paper.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-04-52-149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>49</sup> *Electricity Transmission and Distribution Licence Granted to Caribbean Utilities Company, Ltd.* by the Government of the Cayman Islands on 3 April 2008 –

<https://www.ofreg.ky/viewPDF/documents/energy-licensees/2021-04-29-03-54-03-cuc-td-licence-2008.pdf>

<sup>50</sup> Page 4 of DataLink’s 21 April 2017 Working Group position paper.

<sup>51</sup> Page 3 of DataLink’s 21 April 2017 Working Group position paper.

<sup>52</sup> Page 10 of DataLink’s 21 April 2017 Working Group position paper.



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237. DataLink further submitted that all contracts should be standardised to specify the space available to be occupied as nine inches (noting that attachers are actually assigned a specific attachment point separated from others by at least 12 inches).<sup>53</sup>
238. DataLink noted that the “unusable space” is defined to be from the end point in the ground to the bottom of the communication space, and is the portion of the pole that supports all attachments and is therefore used by all attachers and the owner utility, consistent with the FCC methodology.<sup>54</sup>
239. DataLink further noted that the Weighted Average Pole Height is the average height of all poles except aluminium poles. DataLink stated that a minimum pole height of 40 feet was required to allow space for four attachers, but all poles and pole heights were considered in the calculation of the weighted average (noting that 30 and 35 foot poles could be excluded if determined to be necessary).<sup>55</sup>
240. DataLink submitted that the result of the ‘2/3’ allocation factor in the space factor formula is that each attacher pays for just under 17% of the unusable space while CUC pays the largest share at 33%. This factor was based on precedent in an FCC determination.<sup>56</sup>
241. DataLink also submitted that street lighting is part of CUC’s electrical system and CCTV attachments fall outside of the communication space, and therefore should have no impact on the calculation of the annual pole attachment fee.<sup>57</sup>
242. DataLink submitted that there were no elements in the Annual Carrying Charge Rate formula that were also taken into account in the calculation of the Net Cost of a Bare Pole. DataLink noted that carrying charges are incurred in relation to owning and maintaining poles regardless of the presence of pole attachments, and that they are not related to the costs for managing the licensing, permitting and attachment process borne by DataLink.<sup>58</sup>
243. DataLink also noted that the Annual Carrying Charge Rate is based on CUC’s actual costs and a formula used by the FCC which, in DataLink’s view, has already been determined to be a fair allocation of costs in North American markets. DataLink further submitted that the costs considered as part of the Annual Carrying Charge Rate are increased due to the presence of attachers, that the formula adequately captures those costs, and that the calculation is fair, proportionate, measureable and transparent.<sup>59</sup>
244. DataLink submitted that the Return on Equity is the process DataLink has chosen to calculate its margin, and that it is fair, reasonable, transparent and measurable.<sup>60</sup>

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<sup>53</sup> Page 10 of DataLink’s 21 April 2017 Working Group position paper.

<sup>54</sup> Page 10 of DataLink’s 21 April 2017 Working Group position paper.

<sup>55</sup> Pages 10-11 of DataLink’s 21 April 2017 Working Group position paper.

<sup>56</sup> Page 11 of DataLink’s 21 April 2017 Working Group position paper.

<sup>57</sup> Page 11 of DataLink’s 21 April 2017 Working Group position paper.

<sup>58</sup> Page 11 of DataLink’s 21 April 2017 Working Group position paper.

<sup>59</sup> Pages 11-12 of DataLink’s 21 April 2017 Working Group position paper.

<sup>60</sup> Pages 12-13 of DataLink’s 21 April 2017 Working Group position paper.

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245. DataLink noted that, under its proposed methodology, the historical costs for a calendar year would be used to set an Attachment Fee for the period from 6 to 18 months after the end of that calendar year. Given this, DataLink submitted that an inflation adjustment to escalate those costs by one year is reasonable. For transparency and accountability, DataLink would use the same inflation calculation as that reported by CUC to the then-Electricity Regulatory Authority (now the Office).<sup>61</sup>
246. DataLink stated that, by using a model similar to the FCC model, it had proven its pricing mechanism is fair and reasonable and comparable to similar jurisdictions. The company noted that the management and overhead allowance is a unique requirement due to the regulatory framework in the Cayman Islands which requires DataLink to be a separate company, and submitted that its management and overhead allowance adequately and fairly captured these costs in a transparent cost based manner.<sup>62</sup>

### Digicel

247. Digicel commented separately on “access pricing” and make-ready cost recovery and price structure.
248. Regarding access pricing, Digicel submitted that rates are required to comply with Regulation 6(h). DataLink, however, justified its pricing methodology on the basis that it is a US market-based approach without justifying why it is appropriate or relevant to Grand Cayman.
249. Digicel argued that the capital cost of the pole is entirely recovered within CUC’s electricity prices and is attributable to CUC’s electricity business. Digicel further argued that the attachment of telecommunications cables does not cause an incremental requirement to augment the height or strength of poles, and that any incremental cost relates solely to attaching cables.
250. In its view, pricing pole attachment on the basis of direct incremental costs (and excluding assets costs) would not result in electricity users subsidizing telecommunications users, but allowing CUC to recover assets costs via pole attachment prices would result in telecommunications users subsidizing electricity users.
251. Digicel submitted that the optimum approach was “*a pricing regime which is neutral to the electricity sector while not burdening the telecommunications sector with costs which are unrelated to the provision of wholesale pole sharing service, i.e. allow CUC to only charge the direct incremental cost of the pole attachment.*”<sup>63</sup>
252. With respect to make ready cost recovery and price structure, Digicel submitted that allowing operators to use third parties to carry out make-ready work would mean they

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<sup>61</sup> Page 13 of DataLink’s 21 April 2017 Working Group position paper.

<sup>62</sup> Pages 13-14 of DataLink’s 21 April 2017 Working Group position paper.

<sup>63</sup> Page 3 of Digicel’s 21 April 2017 Working Group position paper.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-03-57-149520183720170421DigicelWorkingGroupResponse.pdf>

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could fund make-ready work without going through CUC and that, if an appropriate division of activity could be agreed, there would be no requirement for CUC to levy any make-ready charges. Alternatively, Digicel submitted that if operators chose to use CUC for the purposes of make-ready, the associated costs should be amortised over the lifetime of the asset and recovered in the pole attachment charges. Digicel further submitted that all poles should be made fully ready and the cost of doing so should be averaged across all poles *“using a project utilisation factor based on the roll-out commitments of operators” and that “a ‘committed update’ provision in the sharing agreement with payments specified in lieu of uptake would fully mitigate any cost recovery risk for CUC.”*<sup>64</sup>

### C3

253. Referencing Regulations 6 and 10 of the INI Regulations, C3 requested confirmation that all material and services provided by CUC or approved accredited vendors complied with those regulations. C3 recommended that *“all items should be listed, fully transparent, based on cost and specifically non-discriminatory”* and considered this would ensure fair and equal costs among all attachers.<sup>65</sup>
254. C3 further recommended that a schedule of charges be established for the most common categories of work, that the payment schedule for make-ready be linked to actual performance rather than be fully paid upfront, that make-ready payments be distributed to the four attachers (C3, DataLink, Flow and Logic), and that reimbursement of make-ready fees be allowed *“in perpetuity.”*<sup>66</sup>
255. C3 also noted that it experienced what it described as *“inconsistent invoicing.”* C3 stated that DataLink was not aiding in C3’s requests for further information and would impose a 15% administration fee on C3 for the additional information. C3 requested that interest on late invoice payments be waived until DataLink’s invoices were consistent with Regulation 6 of the Infrastructure Sharing Regulations.<sup>67</sup>
256. Further referencing Regulations 6 and 10 of the INI Regulations, C3 noted it had several concerns on DataLink’s costing / pricing models.
257. Regarding the Net Cost of Bare Pole, C3 submitted it was overstated. CUC infrastructure was built to provide electricity. Only the cost of a pole sufficient for telco-only use capable to carrying four attachers should be used. C3 further submitted that telcos only attach at one point in the three-foot communication corridor, and allocating the full cost of a pole is inappropriate.<sup>68</sup>

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<sup>64</sup> Pages 4-5 of Digicel’s 21 April 2017 Working Group position paper.

<sup>65</sup> Page 3 of C3’s 21 April 2017 Working Group position paper.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-59-57-1495201977201704InfinityWorkingGroupResponse.pdf>

<sup>66</sup> Page 7 of C3’s 21 April 2017 Working Group position paper.

<sup>67</sup> Pages 7-8 of C3’s 21 April 2017 Working Group position paper.

<sup>68</sup> Page 12 of C3’s 21 April 2017 Working Group position paper.

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258. C3 submitted that several elements of the Space Factor were problematic, and due to the allocation of space to the communication corridor, attachers were subsidizing CUC's infrastructure. In addition, the "space occupied" should be a minimum of nine inches, and only one attachment should be permitted in that space.<sup>69</sup>
259. C3 disagreed with the inclusion of "unusable space" as it would exist regardless of the presence of the communications corridor.<sup>70</sup>
260. C3 argued that DataLink's statement that its parent company demands a profitable return indicated non-compliance with cost-orientation in Regulation 6(h). C3 submitted that DataLink's methodology created unnecessary pricing structures, and submitted that the ROE of 15% was "extremely aggressive, considering zero capital investment, minimal risks...". C3 further submitted that inclusion of the Inflation Rate was unreasonable, as the majority of the costs and profits have been recovered through CUC's financial structure.<sup>71</sup>

### Logic

261. Logic did not comment directly on charging principles, noting instead that "[w]e would obviously want to have the benefit of lower costs across the board, but we are committed to fulfilling our contractual obligations."<sup>72</sup>

### I. Reply Comments on Position Papers

262. On 1 June 2017, the Office invited the members of the Working Group to submit comments on each other's final position papers, as well as on whether there was consensus among the members of the Working Group on any issues, and on whether the Office ought to address the outstanding issues, if any, by continuing with the Consultation 2016-2 procedure or by adopting another procedure.<sup>73</sup>
263. Flow, DataLink, Digicel, and Logic submitted their reply comments on 16 June 2017. C3 submitted its reply comments on 20 June 2017.<sup>74</sup>
264. Whereas Flow, Digicel, and Logic noted they had no comments in addition to those already provided in their final position papers, DataLink and C3 responded as follows:

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<sup>69</sup> Page 13 of C3's 21 April 2017 Working Group position paper.

<sup>70</sup> Page 14 of C3's 21 April 2017 Working Group position paper.

<sup>71</sup> Pages 14-16 of C3's 21 April 2017 Working Group position paper.

<sup>72</sup> Section 5 of Logic's 21 April 2017 Working Group position paper.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-01-13-149520188420170421LogicWorkingGroupResponse.pdf>

<sup>73</sup> <https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-22-30-OfficelettertoPoleWorkingGroupnextsteps.pdf>

<sup>74</sup> All documents referenced in this paragraph are available at <http://www.ofreg.ky/ict/icta-forms-pole-attachment-working-group>

DataLink

265. As a preliminary observation, DataLink noted that it is providing an infrastructure sharing service, the regulation and negotiation of which is subject to the principles in Regulation 6. DataLink believed that its prices were determined in a transparent manner and are reasonable, and noted that both Logic and Flow had negotiated and expressed support for their commercial agreements.<sup>75</sup>
266. DataLink noted that C3's agreement did not include equivalent terms, and submitted that C3 was refusing to negotiate or attend mediation. Instead C3 had launched a number of dispute determination requests and had been ignoring the terms and conditions of the original agreement. This was, in DataLink's view, not in line with the Regulations and not fair to the other attachers who were following the procedures and paying fees. DataLink submitted that the best outcome would be for all licensees to enter into agreements on the same terms as CWCIL and Logic.<sup>76</sup>
267. DataLink submitted that the issue of costs and pricing lacked consensus and remained outstanding.<sup>77</sup>
268. Regarding make-ready charges, DataLink submitted that the Regulations provide for the recovery of costs related to infrastructure sharing. They do not require a responder to accept third-party contractors to perform work, or to fund or subsidize the request. DataLink objected to the Digicel and C3 proposals to pay third-party contractors directly to directly work on CUC infrastructure, disagreed that there would be cost savings (noting any cost savings might result in lower quality), and insisted that third parties working on CUC electrical infrastructure must be under the direct control and supervision of CUC.<sup>78</sup>
269. DataLink noted that it was amenable to extending the refund period for make-ready costs beyond two years, but not beyond the reasonable life of a pole.<sup>79</sup>
270. Regarding attachment fees, DataLink submitted that they comply with the Regulations: they are cost based, transparent and equivalent for all attachers except C3 (for reasons already explained). DataLink submitted the fee structure was fair and transparent, and recommended that the fee structure agreed by Flow and Logic be adopted.<sup>80</sup>
271. Responding to C3's submission that CUC should not factor the cost of bare poles, DataLink noted that "*the infrastructure to which the various entities seek to attach has been constructed for the purpose of the transmission of electricity*" and "*the expected incremental value to the telecoms is then calculated*"<sup>81</sup> based on the actual costs of the

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<sup>75</sup> Page 10 of DataLink's 16 June 2017 Working Group response paper.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Pages 10-11 of DataLink's 16 June 2017 Working Group response paper.

<sup>79</sup> Page 11 of DataLink's 16 June 2017 Working Group response paper.

<sup>80</sup> Page 12 of DataLink's 16 June 2017 Working Group response paper.

<sup>81</sup> DataLink Working Group Response Paper, 16 June 2017, at page 13.

<https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-18-10-DatalinkWorkingGroupResponse.pdf>

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poles. DataLink further submitted that its annual fee calculation uses data from CUC's audited financial statements for ease of reference and transparency.

272. Responding to C3's submission that the Net Cost of a Bare Pole was overstated, DataLink submitted that the poles values used are as per the CUC asset register.<sup>82</sup>
273. Responding to Digicel's submission that the costs of the poles have already been recovered within CUC's regulated prices for electricity, DataLink referred to Condition 25 of CUC's Transmission and Distribution Licence and noted that its earnings augment CUC's earnings and in turn lower CUC's fee calculations.<sup>83</sup>

### C3

274. With respect to the issue of charging principles for make-ready charges, C3 recommended that if CUC/DataLink requires full payment in advance an agreed "penalty formula" should apply to each day DataLink is late in issuing permits. C3 submitted that, at the very least, the fee schedule should be in full compliance with the INI Regulations.<sup>84</sup>
275. C3 commented on two of DataLink's submissions regarding Annual Attachment Fees.
276. In response to DataLink's submission regarding the effect of the "2/3" allocation factor, C3 urged OfReg to be clear as to the type of pole the FCC determination was based on, noting that the FCC identifies three types of pole ownership.<sup>85</sup>
277. In response to DataLink's submission regarding the impact of street lighting and CCTV attachments, C3 submitted that CUC is generating revenue from these attachments, and that these attachments must factor into wind loading calculations (along with CUC's own fibre cables). They should therefore be considered in the annual attachment fees as well as guying of poles.<sup>86</sup>

### D. Continuation of ICT Consultation 2016-2

278. Following a review of the final position papers and reply comments of the Working Group, the Office noted a clear lack of consensus among the members of the Working Group and considered that the issues addressed in Consultation 2016-2 remained outstanding. Accordingly, the Office advised the members of the Working Group by letter dated 30 June 2017 that it would continue with the ICT Consultation 2016-2 procedure, addressing Parts A, B and C of ICT Consultation 2016-2 separately and would issue determinations or additional questions for consultation as appropriate.

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Page 5 of C3's 16 June 2017 Working Group response paper.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-00-09-149805241620170620IBLWorkingGroupResponse.pdf>

<sup>85</sup> Page 6 of C3's 16 June 2017 Working Group response paper.

<sup>86</sup> Ibid.

279. As noted above, the Office is addressing the issues in Part A separately.

## E. Updated Responses to Consultation Part C

280. On 12 October 2022, the Office asked the parties to provide additional comments or submissions in response to Parts B and C of Consultation 2016-2 and to certain additional issues (the ‘**2022 Re-Submissions**’). The Office also requested that the parties respond to a number of RFIs to update and supplement the existing record (the ‘**2022 RFIs**’).

### Flow

281. Flow responded to the Office’s 2022 RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>87</sup> Flow noted that it considered the additional issues raised by the Office to be relevant to Consultation 2016-2. However, Flow chose to defer additional comments or submissions as well as responses to the additional issues until publication of consultation in accordance with the September 2022 Notice.

### DataLink

282. DataLink responded to the Office’s 2022 RFIs 301, 308 and 309 on 11 November 2022 and to the remaining 2022 RFIs on 9 December 2022,<sup>88</sup> and provided additional comments in response to Parts B and C of Consultation 2016-2.

283. DataLink’s response to the Office’s RFIs included information regarding the Annual Attachment Fees and Make-Ready Work charges paid,<sup>89</sup> as well as its response to the Office’s request to provide detailed explanation about expenses and assets listed in DataLink’s financial statements.<sup>90</sup>

284. With respect to the additional issue raised by the Office regarding a make-ready cost reimbursement process, DataLink noted that the MPJUAs already included such a process, and cited the relevant provisions in the Agreement. DataLink also indicated that it would be willing to extend the refund period to 5 years.<sup>91</sup>

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<sup>87</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-05-31-Cayman-Flow-Response-to-RFI-on-ICT-Consultation-20162-Parts-B-and-C.pdf>

<sup>88</sup> As agreed with the Office on 26 October 2022.

<sup>89</sup> DataLink Responses – OfReg RFI 301 – 315.x sx and DataLink Responses – OfReg RFI 302 MR Revenue 2018-2022.x sx. Redacted versions at <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-31-DataLink-Responses---OfReg-RFI-301---315-Redacted.x.sx> and <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-32-DataLink-Responses---OfReg-RFI-302-MR-Revenue-2018-2022-Redacted.x.sx>

<sup>90</sup> DataLink Responses – OfReg RFI 312-315.pdf. Redacted versions at <https://www.ofreg.ky/viewPDF/documents/consultations/2023-05-18-08-11-30-DataLink-Responses---OfReg-RFI-312-315---Redacted.pdf>

<sup>91</sup> See pages 8-9 of DataLink Responses - OfReg ICT Consultation on 2016-2 4A 5A 5B 5C.pdf.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

## Digicel

285. Digicel responded to the Office's RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>92</sup> Digicel noted that its engagement with DataLink and experience with the issues raised by Consultation 2016-2 was embryonic, as it had only begun to roll out fibre services in the Cayman Islands, and that it would be premature for it to specifically comment in detail on the issues raised in the consultation.

## C3

286. C3 responded to the Office's RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 22 November 2022.<sup>93</sup> C3 expressed the view that "*the 2019 Version of the Master joint Pole Use Agreement is severely slanted in the Owner Utilities favor with some commercial terms unacceptable.*"

287. C3 noted that the Annual Attachment Fee is based on the net book value of all CUC poles, which can be as high as 75', and the weighted average height of which is specified in the Agreement as 38'6", even though attaching utilities are only allowed to attach at a maximum height of 25'. C3 submitted that the net book value should be based on a pole of no more than 25' to 30' height, and of a lower class.

288. C3 further submitted that OfReg "*needs to determine if CUC is allowed to create a profit centre from Telecom attachments on its poles or simple a cost recovery model*", and that "*a FLLRIC model should be adopted for this infrastructure as well.*"

289. C3 also submitted that the Pole Sharing Agreement should not have an annual escalation clause tied to the CPI of the Cayman Islands as, if there were a catastrophic event, "*the annual attachment fees could skyrocket.*" C3 further submitted that "*At the very least any upward adjustment should require the Regulators' approval every 3-5 years and not automatic.*"

## Logic

290. Logic responded to the Office's RFIs and provided additional comments in response to Parts B and C of Consultation 2016-2, on 11 November 2022.<sup>94</sup> Logic re-iterated its position with respect to matters raised in Consultation 2016-2.

291. With respect to the additional issue raised by the Office regarding a make-ready cost reimbursement process, Logic noted that "*currently, the make-ready charges levied*

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<sup>92</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-03-50-Cover-Letter-Final-Nov.-11-2022.pdf>

<sup>93</sup> The submission is dated 24 October 2022 but it was emailed to the Office on 22 November 2022. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-00-57-17-C3-Response-to-RFIs-for-ICT-Consultation-2016-224-Oct-2022.pdf>

<sup>94</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>



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*against Logic include the costs of making the communications space ready for all attachments (not just the attachments requested by Logic), meaning that other licensees are being permitted to attach without the same requirements.”*

292. Logic further noted that its Pole Sharing Agreement currently provides a two-year window for reimbursement of make-ready charges. However, Logic submitted that this period was too short as it *“amounts to a second carrier essentially being able to use the capital of the first carrier for make-ready purposes”* and *“either rewards second carrier delay or discourages any carrier from being the first carrier to build, in both instances discouraging efficient, economic and harmonized utilisation of ICT infrastructure in the Cayman Islands.”*
293. Logic proposed that the reimbursement period be extended to the lifespan of the pole, and submitted that *“there must be an equitable rebate process where a licensee that pays the make-ready will recover a portion of the funds so expended when other licensees make attachments.”* Alternatively, Logic proposed that each attacher be *“charged a portion of the overall make-ready charge in respect of a pole, rather than the first attacher being responsible for fronting such costs.”*

## Section 6 – Analysis of Issues Relating to the Permit Application Process, Including Make-Ready Work (Consultation 2016-2 Part B)

### A. Introduction

294. As noted in Section 4 above of this consultation paper, a number of concerns had been raised with respect to the make-ready process, the permit application process, and the differences between the various Pole Sharing Agreements in effect on Grand Cayman. Concerns had also been raised about the impact of unauthorised attachments, DataLink's limited resources, and the time required to process permit applications. As noted in paragraph 11 above and in Consultation 2016-2, these outstanding issues and various disputes have likely resulted, in the Office's view, in a highly inefficient process and substantial delays relating to the installation and maintenance of attachments of communication cables to the electricity poles owned by CUC.
295. In order to address these issues and disputes, the Authority proposed in 2017 three specific sets of remedies: revising certain deadlines in the permit application process (Proposal A), allowing attaching utilities to perform required work in certain circumstances (Proposal B), and standardising the contractual terms regarding make-ready work and installation (Proposal C). The parties commented on these proposals, among others, during the Consultation 2016-2 and Working Group processes. At the conclusion of the Working Group process, DataLink proposed a draft standard Pole Sharing Agreement (the '**draft Working Group Pole Sharing Agreement**') to replace its existing Pole Sharing Agreements with the attaching utilities which, in its view, would address the concerns noted above.<sup>95</sup>
296. The Office notes that the parties did not materially alter their positions in their 2022 Re-Submissions, although DataLink did not refer to the draft Working Group Pole Sharing Agreement.

### B. Issues to be Addressed

297. Based on the review of Consultation 2016-2 (in particular the matters in Part B), the Working Group, and the 2022 Re-Submissions in Section 4 of this consultation paper, the Office has identified the following main issues to be addressed in relation to the make-ready process and the permit application process:
- a. Should all utilities attach to CUC utility poles under the same terms and conditions? (see section C below)
  - b. Should the current permit application process be changed, in particular the specifications for responding to applications, responding to quotations, the treatment of applications for batches of poles, and the issuance of final permits? (see section D below)

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<sup>95</sup> See page 2 of DataLink's 21 April 2017 Working Group position paper.

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- c. Should the current permit administration process be changed, in particular the specifications for the form of permit, the scope of a permit, the timely use of permits, and the exchange of forecasts? (see section E below)
  - d. Should attaching utilities have the right to perform certain steps in the permit application and make-ready processes and, if so, under what circumstances or limits? (see section F below)
  - e. Under what circumstances should utility poles be replaced with poles that can accommodate four attachers? (see section G below)
  - f. What is the appropriate definition of a “Standard Utility Pole” and should DataLink make this available to attaching utilities? (see section H below)
298. The Office will address each of these in turn below and set out proposals for consultation that would address the issues that have been identified.
299. The Office considers that the issues identified in paragraph 297 above, the apparent lack of adequate planning and coordination among DataLink and the relevant ICT licensees of the pole attachment process, and the disputes between DataLink and the attaching utilities, have likely led to an inefficient use of resources and have created processing delays that gave rise to a significant backlog of unprocessed permit applications. The Office further considers that such a backlog, which delays the ICT licensees’ access to poles, is detrimental to the efficient roll-out of communication cables across the Cayman Islands which, in turn, detrimentally impacts competition in the provision of ICT networks and ICT services. These issues, therefore, have likely had 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.

### C. Standard Terms and Conditions

#### I. Overall Factual Situation

300. Having reviewed the Pole Sharing Agreements entered into by DataLink and the various attaching utilities, the Office notes a number of differences among them. The Office notes that, since 2017, DataLink has entered into the **DataLink-Digicel Pole Sharing Agreement** and has replaced its earlier agreements with C3 with the **DataLink-C3 Pole Sharing Agreement**. In addition, the **CUC-DataLink-Logic MOU** appears to have expired in 2018 and its provisions appear no longer to apply as neither party has provided clear evidence that they agreed to extend the application of its terms. While these developments have addressed a number of the differences among Pole Sharing Agreements previously observed by the Authority and the Office, they have not eliminated all of them.

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301. Some of the substantive differences<sup>96</sup> between the various Agreements, including with the **CUC-DataLink Pole Sharing Agreement**, include:
- a. **Difference i)** – The definition of “standard utility pole” in the **DataLink-Flow Pole Sharing Agreement**, the **DataLink-Logic Pole Sharing Agreement** and in the **CUC-DataLink Pole Sharing Agreement** is limited to forty-foot wood poles, while the definition in the **DataLink-C3 Pole Sharing Agreement** and **DataLink-Digicel Pole Sharing Agreements** describes any CUC utility pole capable of supporting the Attaching Utility’s Attachments. This difference could affect an attacher’s right to access a given pole, as “Communications Space” is defined by reference to a Standard Utility Pole. It could also affect DataLink’s obligations to expand the capacity of a pole under Article II.I which refers to the meeting the requirements of a Standard Utility Pole. In effect, C3 and Logic would have different rights to attach and rights to require expansions than Flow, Logic or DataLink.
  - b. **Difference ii)** – The **CUC-DataLink Pole Sharing Agreement** does not include the requirement at Article II.K.3 for third-parties wishing to overlash on the Attaching Utility’s facilities to seek a separate agreement with the Owner Utility. In effect, a third party overlashing DataLink’s facilities would not be required to pay the Owner Utility (in this case, CUC) a separate Attachment Fee, while in all other cases, a third party overlashing another attacher’s facilities would be required to pay such a fee to DataLink.
  - c. **Difference iii)** – Article III.E of the **DataLink-Logic** and **CUC-DataLink Pole Sharing Agreements** does not require the Owner Utility to provide the results of an inventory to the Attaching Utility, even though the latter may have been required to contribute to the cost of performing it. This different level of transparency in the relationship between the Owner Utility and the Attaching Utility deprives the latter of the opportunity to understand or challenge the inventory, which has a direct impact on the fees it pays.
  - d. **Difference iv)** – Article III.I of the **DataLink-Flow Pole Sharing Agreement** requires Flow to pay the difference between DataLink’s actual and estimated costs only up to a maximum of 20% of the estimated expenses. In the other agreements, the Attaching Utility is required to defray the full amount (subject to a \$50 threshold, but only in the cases of the **DataLink-Logic Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**). Depending upon the accuracy of DataLink’s or CUC’s estimates, this difference could result in Flow paying less than the other attachers for equivalent services.
  - e. **Difference v)** – In Article VI.D of the **DataLink-Logic Pole Sharing Agreement** and of the **CUC-DataLink Pole Sharing Agreement**, the Attaching Utility commits to paying all of the overtime and other applicable costs associated with an expedited review of an application, while in the other three agreements, only costs

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<sup>96</sup> This list focuses on differences that might affect a party’s costs or ability to operate in a downstream market. As a result, not all differences are listed here. A detailed comparison of the Pole Sharing Agreements currently in force can be found in **APPENDIX 3**.

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“reasonably” incurred must be covered. This difference could result in Logic and DataLink incurring higher costs than the other parties for an equivalent expedited review.

- f. **Difference vi)** – Article VII of the **CUC-DataLink Pole Sharing Agreement** does not include provisions, which exist in the other agreements, for reimbursing prior attachers for make-ready charges that they to DataLink (for example, for replacing an existing pole with a new pole capable of accommodating four attachers) and that DataLink might benefit from by attaching to the relevant pole within the applicable reimbursement period. DataLink, therefore, has the ability to attach to CUC utility poles at lower cost than other attachers who are required to pay for any make-ready work they directly caused as well as for a portion of the make-ready costs incurred by prior attachers.
- g. **Difference vii)** – In Article VII.D of three of the pole sharing agreements, the Owner Utility is required to inform an Attaching Utility of the increased costs of performing make-ready work on an expedited basis prior to incurring them, but this same requirement is not included in the **DataLink-Logic Pole Sharing Agreement** or in the **CUC-DataLink Pole Sharing Agreement**. This different level of transparency in the relationship between the Owner Utility and the Attaching Utility deprives the latter (Logic or DataLink, as the case may be) of the opportunity to understand or challenge the increased charges, which could result in the Attaching Utility paying higher costs than the other attachers might for an equivalent request.
- h. **Difference viii)** – In all pole sharing agreements, the Owner Utility (DataLink or CUC, as applicable) is responsible for performing any required emergency work, per Article IX.D. However, in only the **DataLink-C3 Pole Sharing Agreement** and the **DataLink-Digicel Pole Sharing Agreement** is this work explicitly at the Attaching Utility’s expense. Further, in the other three agreements, the Attaching Utility has the express right to perform the work at the Owner Utility’s expense if the Owner Utility does not do it in a timely manner. C3 and Digicel, therefore, would incur higher expenses for emergency work than the other Attaching Utilities, without having the same ability to mitigate the effects of delay by the Owner Utility.
- i. **Difference ix)** – The consequences of a failure to exercise a right to attach granted by a Permit in a timely manner differ across the pole sharing agreements. According to Article IV.F in all five pole sharing agreements, the Owner Utility gains the right to reassign the applicable space on the pole to another party if the right has not been exercised within a specified period of time (200 days, except in the case of the **CUC-DataLink Pole Sharing Agreement**, where it is 120 days). If this occurs and the attacher subsequently asks for access to the pole, the Owner Utility agrees to endeavour to make other space available, subject to all requirements of the agreement.<sup>97</sup> However, in the case of the **DataLink-C3 Pole Sharing Agreement** and the **DataLink-Digicel Pole Sharing Agreement**, Article XII.F

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<sup>97</sup> In all cases, there is an exception if the failure to exercise the access rights is due to circumstances outside the Attaching Utility’s control.

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specifies that the Permit itself “*shall automatically expire*” after the 200 day period. In other words, it appears Flow, Logic and DataLink would only lose the right attach to a specific location on the pole while C3 and Digicel must re-apply *de novo* for a Permit, which may result in a heavier administrative burden on them. Further, only the **DataLink-Flow Pole Sharing Agreement** specifies in Article IV.F that the Attaching Utility would not be charged for any access rights reassigned by the Owner Utility. This raises the question of whether the Logic and DataLink would be required to continue to pay for a Permit even though the Owner Utility might have assigned the applicable location on the pole to another party.<sup>98</sup>

- j. **Difference x)** – In Article XIII.C, the Attaching Utilities agree to bring Attachments into full compliance with the requirements of their respective pole sharing agreements within 30 days of receipt of written notice from the Owner Utility. However, the **DataLink-Flow Pole Sharing Agreement** only requires the Attaching Utility to “*use all reasonable endeavours*” and includes provisions for separate “side agreements” allowing the Attaching Utility up to an additional 150 days to come into compliance for specified Attachments (but does not specify when such side agreements would be agreed). This has the potential of reducing the burden of compliance on Flow compared to the other attachers.
- k. **Difference xi)** – Only the **CUC-DataLink Pole Sharing Agreement** (in Article XIX.C) grants the Attaching Utility the right to sub-licence to a non-affiliated party, subject to notice to the Owner Utility within 30 days and compliance with certain other terms in the Agreement. This grants DataLink significantly more flexibility in the use and exercise of its rights to attach than is granted to other attachers.
- l. **Difference xii)** – The specifications for calculating the Annual Attachment Fee set out in Item 4.A of Appendix A are different in the **CUC-DataLink Pole Sharing Agreement**. Specifically, the other agreements include additional factors not included in the **CUC-DataLink Pole Sharing Agreement**, - the Annual Carrying Charge Rate (including Return on Equity) per Item 4.G and Inflation per Item 4.H. The effect of this is to calculate a lower Annual Attachment Fee for DataLink even if the same Net Cost of a Bare Pole were to be applied to all pole sharing agreements.
- m. **Difference xiii)** – Further in Item 4.D of Appendix A of the **CUC-DataLink Pole Sharing Agreement**, the Annual Attachment Fee is based on the Net Cost of Bare Pole of CUC’s wood poles only, even though it is expressly acknowledged that DataLink may attach to poles that are not wood poles.<sup>99</sup> In the case of the other agreements, the Net Cost of Bare Pole is based on all poles. To the extent that a non-wood pole might be more expensive than a wood pole of the same height, excluding non-wood poles might mean that the Net Cost of Bare Pole used in the calculation of DataLink’s Annual Attachment Fee, and the resulting Fee, would be lower than that applied in the other agreements.

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<sup>98</sup> In the case of C3 and Digicel, the Permits would have expired, therefore, the Office expects they would not be included in any billing.

<sup>99</sup> For example, concrete poles.

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- n. **Difference xiv)** – Appendix C of the **CUC-DataLink Pole Sharing Agreement** does not include Item 1.E which requires the Attaching Utility to install its Attachment at the top of the Assigned Space. Further, unlike the other pole sharing agreements, Attachment A to Appendix C of the **CUC-DataLink Pole Sharing Agreement** does not assign a specific location within the communications space to DataLink. This would give DataLink greater operational flexibility, and potentially lower operational costs, when installing Attachments.
  - o. **Difference xv)** – Item 2 of Appendix C of the **CUC-DataLink Pole Sharing Agreement** does not include provisions to calculate and apply a Reservation Fee to DataLink. However, given the wording of the provisions in the other pole sharing agreements, it is not clear whether DataLink currently charges a Reservation Fee to the other attachers.<sup>100</sup> In any event, matters relating to Reservation Fees are being addressed in a separate proceeding and will not be further addressed here.
302. The Office notes that DataLink has stated that it seeks to apply the same contractual terms to all attaching utilities.<sup>101</sup> The Office also notes that DataLink did not raise this issue with the Authority prior to Consultation 2016-2, even though it must have been aware of material differences among the Pole Sharing Agreements at the earliest from November 2012 when it executed the **Flow-CUC-DataLink Novation Agreement** or at the latest from July 2013 when it executed the **DataLink-Logic Pole Sharing Agreement**. The Office further notes the continued significant differences between the **CUC-DataLink Pole Sharing Agreement**, on the one hand, and the other Pole Sharing Agreements, on the other, not all of which appear to reflect DataLink’s dual role as both manager of the communications space and attacher on CUC utility poles. The Office considers that harmonisation of the **CUC-DataLink Pole Sharing Agreement** with the others should not have been unduly difficult, in light of DataLink’s status as wholly-owned subsidiary of CUC.
303. In this case, the Office considers that DataLink’s ICT service, allowing ICT licensees to attach their facilities to CUC’s utility poles, is a form of infrastructure sharing. This service falls squarely within the definition of infrastructure sharing “*tangibles*” in section 2 of the ICT Act (see the definition in Appendix 2 below). The powers granted to the Office and the obligations imposed on ICT licensees by the ICT Act and its regulations in respect of infrastructure sharing therefore apply to DataLink’s service.
304. Further, the Office notes that DataLink holds Type 11<sup>102</sup> and 11a<sup>103</sup> ICT Service licences, as well as a Type 1 ICT Service Fixed Telephony Licence and a Type D1 ICT Network Fibre Optic Cable-Domestic Licence.

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<sup>100</sup> The Reservation Fee provisions in the **DataLink-Logic Pole Sharing Agreement**, for example, appear to have expired in 2018.

<sup>101</sup> See, for example, paragraph 35 of DataLink’s 12 July 2016 Submission in response to Consultation 2016-2: “*DataLink supports the standardisation of agreements with attaching utilities.*” See also page 2 of DataLink’s 21 April 2017 Working Group position paper: “*For the avoidance of doubt, DataLink has consistently maintained its position that, to satisfy all of the requirements of the law, all attaching utilities require an agreement on materially the same terms and conditions.*”

<sup>102</sup> The provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.

<sup>103</sup> The provision, by lease or otherwise, of dark fibre to a Licensee.

**II. Non-discriminatory provision of service to attachers**

305. The ICT Act provides, at section 69 (2), that the Office, *“in order to promote an efficient, economic and harmonised utilisation of infrastructure,”* may *“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.”*
306. The Office considers that differences in treatment of different users of the same infrastructure sharing services are likely to limit the efficient and harmonised utilisation of infrastructure and are likely to limit the promotion of competition in the provision of ICT services and ICT networks. For example, where higher price or non-price costs are imposed on some market participants and not others, demand for infrastructure sharing services is likely to be suppressed and utilisation of the relevant infrastructure reduced. Where that infrastructure is used to support other ICT facilities, as is the case with utility poles, this in turn would delay or reduce ICT network roll-out by competing licensees and, as a result, would limit competition in the provision of ICT services and networks.
307. The Office considers that, in relation to the current permit application and make-ready processes, DataLink is discriminating against other ICT licensees such that it has the effect of limiting either the efficient and harmonised utilisation of infrastructure and/or the promotion of competition in the provision of ICT services or ICT networks (see section 69 (2) (b) of the ICT Act).
308. In support, the Office considers that DataLink is discriminating in particular:
- a. in favour of C3 and Digicel by applying a broader definition of “standard utility pole” and therefore potentially giving them greater rights to access poles that DataLink manages and greater rights to require DataLink to expand poles to accommodate their attachments, than are afforded to other attachers (see Difference i);
  - b. in its own favour by not applying an additional fee for overlash on DataLink facilities while requiring parties who overlash on the facilities of other attachers to enter into separate agreements with, and pay Annual Attachment Fees to, DataLink (see Difference ii);
  - c. in favour of Flow by imposing a limit on Flow’s obligation to pay the difference between estimated and actual costs, which could result in Flow paying less to DataLink than other attachers for equivalent work (see Difference iv);
  - d. in its own favour through the make-ready charges reimbursement provisions. This allows DataLink to take advantage of make-ready work paid for by other attachers without having to reimburse or compensate those other attachers – unlike other attachers who have the make-ready reimbursement provisions in their pole sharing agreements. This would lower the costs to DataLink of rolling out its own



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communications cable and would give DataLink a distinct competitive advantage in pricing its ICT services (see Difference vi);

- e. against C3 and Digicel by terminating a Permit, in addition to taking over the right to attach to a specific location on the pole, in the event that the attacher does not attach within the specified time frame.<sup>104</sup> This could have the effect of imposing on C3 and Digicel greater costs and delays relating to permit applications, as they must re-apply for access while the other attachers are presumed to continue to hold valid Permits (see Difference ix);
- f. in favour of Flow by granting it greater flexibility in addressing instances of Attachments in non-compliance with the requirements of the pole sharing agreement than is granted to other attachers (including itself) (see Difference x);
- g. in its own favour by giving itself the right to sub-licence attachment rights upon notice after the fact to the Owner Utility while limiting the sub-licensing rights of other attachers to prior approval. This might restrict the ability of other attachers to make full and efficient use of rights to attach granted by a Permit. (see Difference xi);
- h. in its own favour by applying different specifications for the calculation of the Annual Attachment Fee to its own Fee than are applied to the Fees charged to other attachers. This would lower the costs to DataLink of attaching its own communications cable to CUC utility poles and would give DataLink a distinct competitive advantage in pricing its ICT services (see Differences xii and xiii); and
- i. in its own favour by imposing fewer restrictions on how and where it can place its own attachments in the communications space. This would give DataLink greater flexibility when it attaches its cables in the field, potentially reducing its costs to roll out its ICT network and giving DataLink a competitive advantage in pricing its ICT services (see Difference xiv).

309. The Office considers that the discriminatory practices identified above have had the effect of limiting the efficient and harmonised utilisation of CUC utility pole infrastructure. Insofar as the ability of ICT licensees such as Logic to attach to that CUC utility pole infrastructure has been restricted, a portion of that infrastructure is not being utilised to the fullest extent it otherwise could have been.

310. They have also had the effect of limiting the promotion of competition. The limits on the ability of ICT licensees to access the CUC pole infrastructure have contributed to delays in the installation of new fibre optic networks and, as a result, to the roll-out of competition in ICT networks and ICT services across the country. In addition, by not facing the same restrictions in access to CUC utility poles and by not being subject to make-ready charges reimbursement provisions similar to those faced by other ICT licensees, DataLink has

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<sup>104</sup> Conversely, DataLink is also discriminating in favour of all other attachers by imposing upon itself a shorter time from the issuance of a Permit within which to make an attachment.

gained an unfair competitive advantage in the deployment and pricing of its own services, which in turn has the effect of limiting the promotion of competition.

311. The Office further considers that DataLink has not provided an objective basis for these discriminatory differences across its Pole Sharing Agreements. While DataLink has stated the differences exist for historical reasons,<sup>105</sup> and the differences have been reduced since 2017, this does not explain why the differences were allowed to persist from 2012 when DataLink must first have become aware of them (that is, when the CUC agreements were novated to DataLink). DataLink provided no other explanation or justification for this inequity.
312. The Office notes that there was some support among the parties (including DataLink) to Consultation 2016-2 and the Working Group for the principle that all attaching utilities should attach to CUC utility poles on non-discriminatory terms and conditions. In their responses to Question B5 of ICT Consultation 2016-2, for example, both C3 and DataLink submitted that the permit application process should be standardised and applied across all Pole Sharing Agreements (see paragraphs 58 - 59 above). In their position papers at the end of the Working Group process, both DataLink and Logic addressed the issue by agreeing that attaching utilities should be subject to the same terms and conditions for attaching to CUC utility poles (see paragraphs 79 - 81 above).

### Proposal for Consultation

313. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation, to require **DataLink to ensure that all third-party utilities (i.e. other than DataLink) who attach communications cables to the communications space on CUC utility poles do so on non-discriminatory terms and conditions.**
314. To comply with this proposal, if it were adopted as a determination following consultation, DataLink's Pole Sharing Agreements with each of C3, Flow, Digicel and Logic (and any future attaching utilities) would be required to include the same or substantially the same terms and conditions. To the extent that they currently do not, the Office would expect DataLink and the relevant parties to begin negotiations in good faith on the necessary amendments to their respective Pole Sharing Agreements to ensure DataLink is providing pole attachment services to them on a non-discriminatory basis.
315. The Office considers that, if the Pole Sharing Agreements contained the same or substantially the same terms and conditions, DataLink's pole permit application and make-ready processes would likely be more efficient and harmonised. This in turn would facilitate access by ICT licensees to CUC utility pole infrastructure for purposes of

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<sup>105</sup> "These terms have differed in some respects, simply due to the amount of time that has passed between agreements, the competition in the ICT space at the relevant time and change in market rates." See page 4 of DataLink's 16 June 2017 Working Group response paper.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

operating ICT networks and providing ICT services, and thereby promote competition in the provision of ICT services and ICT networks.

316. The Office notes that the ICT Act and the INI Regulations also establish the principle that infrastructure sharing services are to be provided on a non-discriminatory basis. Section 65(5) of the ICT Act states that “*any interconnection or infrastructure sharing 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; (b) any subsidiary or affiliate of the licensee; or (c) any other part of the licensee’s own business*” (emphasis added).
317. Section 65 (5) was amended by the *Information and Communications Technology Authority (Amendment) (No. 2) Act 2016* to expressly refer to infrastructure sharing. However, prior to that amendment, section 65(5) applied to the provision of infrastructure sharing services through the operation of section 69(1) ICT Act and of the *Information and Communications Technology Authority (Infrastructure Sharing) Notice 2003*. In other words, the non-discrimination obligation applied at all material times to the provision of pole attachment services by DataLink.
318. Further, Regulation 6(c) of the INI Regulations requires infrastructure sharing services be provided “*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*” while regulation 6(k) requires they be “*provided by the responder to the requestor at any technically feasible point on terms and conditions that are just, reasonable and **non-discriminatory**...*” (emphasis added in bold).
319. Similarly, Regulation 10(1)(k) specifies that charges for infrastructure sharing services must be “***non-discriminatory** in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides for itself, any non-affiliated licensee or any subsidiary or affiliate of the responder*” (emphasis added).
320. The Office considers (without so determining) that, because of the above-noted material differences among them, the Pole Sharing Agreements may well be in breach of the statutory requirement to be non-discriminatory. The Office also considers that, if it were adopted as a determination following consultation, the proposal it set out above would address this possible breach of the statutory requirement to be non-discriminatory.

### Questions for Consultation

**QUESTION 1** Do you agree with the proposal to require DataLink to ensure that all third-party utilities (i.e. other than DataLink) who attach communications cables to the communications space on CUC utility poles do so on non-discriminatory terms and conditions? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

### III. Self-Provision of Service

321. The Office notes that elsewhere in its submissions, DataLink suggested that it was in a “unique position” and that it could not be subject to exactly the same terms and conditions as other attachers.<sup>106</sup> These submissions and DataLink’s submissions described in paragraph 312 above indicate that DataLink’s position appears to be in fact that all attaching utilities except itself ought to be subject to the same terms and conditions for attaching to utility poles.
322. In any event, the parties other than DataLink addressed only indirectly, if at all, whether the same terms and conditions of attachment ought to apply to DataLink itself, or whether the standard terms and conditions ought to apply only to third-party attaching utilities (i.e. other than DataLink). The Office notes that the change in scope of the issue, from standardisation of the permit application process (as described in Consultation 2016-2) to standardisation of the entire agreement (as discussed in the Working Group) over the course of the proceedings may have affected the responses from the parties.
323. DataLink is licensed to construct a number of ICT networks and to offer a number of ICT services (see paragraph 304 above) – and in fact provides or could provide some of these networks and services – in competition with other licensed ICT network and ICT service providers in the Cayman Islands. For example, DataLink has provided point-to-point data services to another ICT licensee and could expand its service offerings in that market relatively easily using its existing ICT facilities or by installing new ICT facilities. The Office encourages such competition as the Office considers that sustainable infrastructure-based competition is more likely to spur investment in new ICT networks and ICT services and to lead to the availability for consumers of quality services at reasonable prices.
324. However, this competition and these benefits would likely be substantially dampened if one of the participants in the market were able to give itself an unfair competitive advantage over other participants, for example, through its control of an input required by its competitors.<sup>107</sup> While control of the input would provide the ability to discriminate, the fact of competing in other markets with purchasers of that input would provide the incentive to discriminate. The Office considers that the effect of this type of discrimination would be to distort those other markets and to limit the promotion of competition in those markets. Indeed, this is why, in the Office’s view, the ICT Act and the Regulations do not permit discrimination when providing interconnection or infrastructure sharing services to other ICT licensees.
325. In this case, DataLink is wearing two hats. Under the first, DataLink controls access to CUC utility poles, a service which is a key input required by other ICT licensees, as well as DataLink, for the construction of a fixed wireline ICT network and for the provision of

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<sup>106</sup> See paragraph 13 of DataLink’s 12 July 2016 submission in ICT Consultation 2016-2 and page 15 of DataLink’s 21 April 2017 Working Group position paper.

<sup>107</sup> For example, by applying different processes to access to the infrastructure than it applies to third parties, or by charging itself a different cost for access to the infrastructure than it charges to third parties, thereby facilitating its ability to provide downstream services at favourable prices compared to its downstream competitors.

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ICT services over that ICT network. Under the second, as previously noted, DataLink is also licensed to provide, among others, Type 1 Fixed Telephony services, in competition with the customers of its pole attachment services. The first provides the ability to discriminate, while the second provides the incentive to discriminate.

326. As noted at paragraph 308 above, the Office considers that DataLink is in fact discriminating against other ICT licensees and in its favour for the reasons set out in that paragraph.
327. Further, the Office notes that, for a number of years, DataLink had assigned itself a position in the communications space on all CUC poles that it manages but made limited use of it other than for dark fibre optic capacity provided on a few main routes.<sup>108</sup> The Office considers that this arrangement had the effect of preventing a third-party ICT licensee from using that position. In turn, this had the effect of limiting the efficient and harmonised use of CUC pole infrastructure.
328. The Office further considers that the discrimination noted earlier has limited the promotion of competition in Grand Cayman (see section 69 (2) (b) of the ICT Act).
329. The Office understands that DataLink has since changed this situation by moving its attachments to a different position on the pole outside of the communication space,<sup>109</sup> thereby freeing the position in the communication space it had formerly assigned to itself for use by a third-party ICT licensee (a review of Attachment A to Appendix C of the various Pole Sharing Agreements suggests the position has been re-assigned to Digicel). While this has alleviated the limiting of efficient and harmonised utilisation of infrastructure and of the promotion of competition, it has not eliminated it entirely, as DataLink's use of CUC pole infrastructure appears to be under different terms and conditions than it applies to other attachers.
330. For infrastructure-based competition to be effective and sustainable, the Office considers that DataLink should not be permitted to be in a position to discriminate against other ICT licensees, or in its own favour, when it provides pole attachment services. The Office also considers that the most proportionate regulatory measure to achieve this goal would be to enjoin DataLink from engaging in discrimination.

### Proposal for Consultation

331. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation, to require **DataLink to provide its pole attachment services to all attaching utilities on rates**,

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<sup>108</sup> See paragraph 14 of DataLink's 12 July 2016 Submission in response to Consultation 2016-2. <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

See also DataLink's 9 December 2022 response to October 2022 RFI 301. <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-31-DataLink-Responses---OfReg-RFI-301---315-Redacted.xlsx>

<sup>109</sup> See DataLink's 9 December 2022 response to October 2022 RFI 301.

**terms and conditions that are no less favourable than the rates, terms and conditions as DataLink provides the same services to itself.**

332. The Office considers that, if this proposal were adopted as a determination following consultation, its implementation would address the circumstances described above that are limiting the efficient and harmonised utilisation of infrastructure and the promotion of competition in the provision of ICT services or ICT networks. In particular, it would result in DataLink not having an unfair competitive advantage in the provision of other ICT networks or ICT services by virtue of the terms and conditions under which it attaches to CUC utility poles.
333. It should be noted that, by making this proposal, the Office is not approving at this time any specific form of Pole Sharing Agreement, whether the draft Working Group Pole Sharing Agreement or any other Pole Sharing Agreement. Indeed, the ICT Act and the INI Regulations do not require prior approval of infrastructure sharing agreements and the Office cannot fetter its discretion to consider such matters when resolving a dispute or undertaking an investigation. Further, the Office considers it appropriate that a provider of infrastructure services be responsible for proposing and negotiating an agreement which complies with the ICT Act, the URC Act, the Regulations and any applicable rules. This approach is consistent with among other things the Office's mandate under section 6 (4) of the URC Act, "*to rely on self-regulation and co-regulation, where appropriate*" as well as the principle in regulation 6(b) of the Infrastructure Sharing Regulations that "*...licensees shall, in the first instance, attempt to reach agreement on interconnection and infrastructure sharing by negotiation...*"<sup>110</sup>
334. The Office notes that this proposal, if it were adopted as a determination following consultation, may require DataLink to renegotiate the terms of the **CUC-DataLink Pole Sharing Agreement**, in order to ensure the terms and conditions in its agreements with third party attaching utilities are no less favourable than those under which it provides services to itself.
335. As a separate matter, the Office considers that section 65 (5) of the ICT Act and Regulations 6(c), 6(k) and 10(1)(k) require that all utilities attaching their facilities to CUC's utility poles ought to do so on substantially the same terms and conditions. This includes DataLink in its capacity as attaching utility. While DataLink may manage the communications space and provide a pole attachment service which no other ICT licensee is providing, DataLink is also an attaching utility which provides or could readily provide ICT services in competition with other attaching utilities (for example, trunk segments or point-to-point data services) on the basis of an ICT network constructed using those pole attachment services. The ICT Act and the Regulations are clear that DataLink must therefore provide that pole attachment service to others on rates, terms and conditions that are no less favourable than those it provides to itself.
336. The Office notes that Ofcom considered a similar issue in its physical infrastructure access consultations. Ofcom recognised that, while it might be the most effective non-

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<sup>110</sup> For the avoidance of doubt, the Office reserves its right to propose changes to specific provisions in Pole Sharing Agreements in a subsequent stage of this proceeding, if the Office considers it necessary.

discrimination remedy, a strict Equivalence of Input ('EOI') requirement might entail disproportionate costs and difficulties to implement. Accordingly, Ofcom adopted a strict non-discrimination requirement.

*In the 2016 PIA Consultation, we did not consider that BT should be required to consume its physical infrastructure on a completely equivalent basis, but said we would apply a principle of equivalence with the aim of ensuring that other telecoms providers are not at a material disadvantage compared to Openreach's own internal consumption of duct and pole access. This principle of equivalence is important because where differences in processes mean that a competing telecoms provider faces extra cost, time or uncertainty, this would undermine the effectiveness of the PIA remedy.<sup>111</sup>*

*We have therefore decided to extend the application of the no undue discrimination SMP condition we are imposing on BT (see Volume 1) in relation to PIA. Although this falls short of the strict equivalence of EOI, we have decided that in order to ensure a level playing field in downstream markets, this non-discrimination requirement should be as close to EOI as possible.<sup>112</sup>*

337. The Office considers that, if it were adopted as a determination following consultation, its proposal above would likely also address any possible concerns under section 65 (5) of the Act and under Regulations 6(c), 6(k) and 10(1)(k).

### Questions for Consultation

**QUESTION 2** Do you agree with the proposal to require DataLink to provide its pole attachment services to all attaching utilities on rates, terms and conditions that are no less favourable than the rates, terms and conditions as DataLink provides the same services to itself? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

338. Notwithstanding the foregoing two proposals, the Office notes that other specific provisions in the Pole Sharing Agreements have given rise to issues to be addressed. The Office will set out in the following sections of this consultation paper, subject to consultation, specific proposals regarding the specifications under which DataLink provides pole attachment services to itself and to third-parties, in order to address these issues.
339. Note that, at this point in time, the Office is not proposing specific changes to the text of any particular Pole Sharing Agreement. However, the Office reserves its right to do so in subsequent stages of this proceeding after considering the submissions of parties to this consultation paper.

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<sup>111</sup> Ofcom, *Wholesale Local Access Market Review: Consultation on Duct and Pole Access Remedies*, 20 April 2017 ('**2017 DPA Consultation**'), at paragraph 5.15.

<sup>112</sup> Ofcom, *Wholesale Local Access Market Review: Statement - Vol. 3, Physical infrastructure access remedy*, 28 March 2018 ('**2018 PIA Remedy Statement**'), at paragraph 3.45.

## D. Permit Application Process and Timetable

### I. Overall Factual Situation

340. The evidence available to the Office demonstrates that DataLink is processing pole permit applications and performing make-ready work slowly and inefficiently and, in any event, at a pace that is insufficient to meet the demonstrated demand in the market. Further, these conditions have prevailed for many years. The Office considers that this is in part related to DataLink’s existing pole permit application process.
341. In order to access the communication space on CUC utility poles, ICT licensees must apply to DataLink for a permit to attach a communications cable. As part of the permit application process, DataLink assesses whether the pole requires work in order to be made ready to accommodate the communications cable in question. The Office notes that this make-ready work can vary from adding a guy to support the pole to replacing the pole with a taller and/or stronger one or adding new mid-span poles.
342. The Office notes DataLink has stated that it has limited resources available to it to perform make-ready work. At page 7 of its Working Group position paper<sup>113</sup> and at clause 10 of the **CUC-DataLink-Logic MOU**,<sup>114</sup> for example, DataLink stated that it could process no more than 300 pole attachment permit applications per month for all attaching utilities combined, and these should be in batches of no more than 25 applications. The Office notes, however, that the MOU may have expired in 2018 and similar statements regarding limits on the number of applications and poles in batches have not been included in subsequent pole sharing agreements.
343. The Office also notes that DataLink described limits on the number of applications it processes, stating in December 2022 that the process to issue pole attachment permits begins with Attaching Utilities submitting “*permit application requests, individually or in batches totaling **no more than 50 poles per calendar month***” (emphasis added).<sup>115</sup> Given that DataLink has Pole Sharing Agreements with four Attaching Utilities (other than itself), this would amount to a maximum of 200 poles per month.
344. The information available to the Office suggests that DataLink is delivering less than 200 poles attachment permits per month.<sup>116</sup>

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<sup>113</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-43-49-1513756858149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>114</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-53-34-12-July-2016-DataLinkLogic-MoU.pdf>

<sup>115</sup> See page 2 of DataLink Responses - OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf, submitted 9 December 2022. The contractual or other basis for this limit is unclear as it does not appear in the Pole Sharing Agreements.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>116</sup> Based on DataLink’s quarterly licence fee reporting to the Office, the only period where DataLink approved more than 900 permits in a quarter (i.e., 300 permits per month) was the quarter July-September 2016. In all the other quarters, DataLink delivered significantly fewer than 200 permits per month on average.



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- a. For example, DataLink’s 12 July 2016 submission in response to ICT Consultation 2016-2 shows that, between Q3 2013 and the end of Q2 2015, Logic had submitted 4,455 permit requests.<sup>117</sup> Of these, 3,700 remained outstanding at the end of Q2 2015, according to the evidence submitted by Logic as referenced in the CUC Restraining Order application against Logic judgment. This would mean DataLink delivered 755 poles over an eight (8) quarter period – which equates to an average of 95 poles per month.<sup>118</sup>
- b. The Office notes DataLink’s comments that “*the evidence was not tested by the court*”<sup>119</sup> and that 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*”.<sup>120</sup> However, even taking into account that some of the delay in issuing permits was due to non-payment of make-ready charges, this result does not suggest DataLink was processing permit applications efficiently. The Office also notes that, over this same period, C3 submitted 4,647 permit applications,<sup>121</sup> however, the evidence does not suggest DataLink was more effective in processing C3’s applications than Logic’s.
- c. The Office notes that these figures pre-date the **CUC-DataLink-Logic MOU** and therefore might not represent DataLink’s current ability to process permit applications. Information provided by DataLink on 9 December 2022 in response to 2022 RFI 308 suggests DataLink’s performance may have declined since 2016, as they have issued an average of [REDACTED] additional permits per month between Q1 2018 and Q2 2022.<sup>122</sup> in any event, the Office notes that this figure falls short of 200 poles per month.
- d. Noting that invoices may be issued in one quarter and associated make-ready work may be performed in another quarter, and noting that DataLink can only issue permits for which applications were received, the Office considers that this figure reasonably reflects DataLink’s actual performance in processing permit applications. The Office considers that this rate of processing permit applications, while considerably improved over prior periods, is still inadequate to support the roll-out of fibre optic cable ICT networks to all areas of Grand Cayman in a reasonably timely manner.

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<sup>117</sup> See the table of permit requests at paragraph 31 of the DataLink 12 July 2016 submission in ICT Consultation 2016-2. The first few applications were submitted at the very end of Q2 of 2013.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

<sup>118</sup> The relevant date for the balance relating to outstanding permit requests is not specified (see paragraph 41 of the CUC Restraining Order application against Logic judgment), however the Office notes that the relevant affidavit was filed on 17 July 2015.  
<https://www.ofreg.ky/viewPDF/documents/others/2021-04-28-01-10-31-1458327054CUCLtdvWestelLtdTALogic.pdf>

<sup>119</sup> Paragraph 36 of DataLink’s 12 July 2016 response to ICT Consultation 2016-2.

<sup>120</sup> Paragraph 37 of DataLink’s 12 July 2016 response to ICT Consultation 2016-2.

<sup>121</sup> See footnote 117 above.

<sup>122</sup> [REDACTED] permits issued as at end of Q2 2022 less [REDACTED] permits issued as at end of Q1 2018, divided by 51 months.

- e. Further, the evidence available to the Office suggests that a significant percentage (but less than half) of the additional permits issued between Q1 2018 and Q2 2022 were for attachments on existing poles. With respect to other attachments, DataLink's 9 December 2022 response to 2022 RFI 309 suggests an average of 82 additional poles per month received attachments between Q1 2018 and Q2 2022.<sup>123</sup> Even if one were to assume that each of these poles represented poles newly made ready to accommodate up to four attachers, this rate of additional poles being made ready would be inadequate to support the roll-out of fibre optic cable ICT networks to all areas of Grand Cayman in a reasonably timely manner.

345. The Office notes that the Authority stated in ICT Consultation 2016-2:

*The Authority considers that the apparent lack of adequate planning and coordination with the relevant Licensees of the pole attachment process, as referenced by the example in paragraphs 173 and 174 above, is likely to result in an inefficient use of resources and create processing delays giving rise to a significant backlog of unprocessed permit applications. The Authority considers that such a backlog, which delays the Attachers' access to poles, is detrimental to the efficient roll-out of communication cables across the Cayman Islands which, in turn, detrimentally impacts competition in the provision of ICT networks and ICT services.<sup>124</sup>*

[...]

*Subject to consultation, the Authority considers that the current timelines, referred to in paragraph 178 above, are inadequate for an efficient and timely completion of the permit application process and an amendment to the relevant sections of the pole sharing agreements is appropriate in order to enable the development of competition in the provision of public ICT networks and public ICT services in a timely manner.<sup>125</sup>*

346. Based on the foregoing review of the number of poles being delivered to attachers as set out above, the Office also considers that the current pole attachment permit application process is not efficient and is contributing to delays in the roll-out of fibre optic networks in the Cayman Islands. As stated above, the roll-out of made-ready poles is not keeping up with demand. However, as noted by the ICTA at paragraph 176 of Consultation 2016-2:

*In addition, the Authority considers that an efficient provider of access to poles operating in a hypothetically competitive market would strive to speed up the permit application process, rather than delay it, given that provider's opportunities to maximise its revenues by receiving quarterly pole rental payments earlier rather than later. In general, an efficient access provider would ensure that the*

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<sup>123</sup> 14,671 poles with 1, 2, 3 or 4 attachments as at end of Q2 2022 less 10,475 poles with 1, 2, 3 or 4 attachments as at end of Q1 2018, divided by 51 months.

<sup>124</sup> Paragraph 175, ICT Consultation 2016-2.

<sup>125</sup> Paragraph 181, ICT Consultation 2016-2.

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*appropriate allocation of resources is made for the timely processing of permit applications.*

347. Further, the fact that DataLink has limited resources available to it underlines the need to ensure the permit application process is as fast and efficient as possible.
348. The current Pole Sharing Agreements do not appear to address in much detail the timeframes for delivering access to poles. Article VI (“*Permit Application Procedures*”) paragraph C (“*Review Period*”) states that the Owner Utility will “*review and respond to*” applicants within 5 and 10 days for “minor” and “major” applications, respectively. The Office notes that, per Article VI. Paragraph B (“*Review of Permit Application*”), the review only begins following receipt of a “*properly executed Application for Permit ... including the Pre-Permit Survey.*” Given that the Owner Utility currently performs all of the activities associated with the Pre-Permit Survey and does not commit to completing the Pre-Permit Survey within any particular time frame, the Pole Sharing Agreement provides the applicant little certainty regarding the interval between the date of application and the date of the Owner Utility’s response.<sup>126</sup>
349. The Office considers that delays in delivering poles to attachers and the absence of an efficient and timely pole permit application process have the effect of limiting the efficient and harmonised utilisation of infrastructure. Put simply, attachers are unable to access CUC pole infrastructure in an efficient and timely manner. This is contributing to delays in the roll-out by competing ICT licensees of fibre optic cable networks which rely on that pole infrastructure, which has the effect of limiting the promotion of competition in the provision of ICT services and ICT networks. The Office, therefore, may inquire into and require modification of any agreements or arrangements which are having these limiting effects.
350. In order to address these effects, a number of changes to DataLink’s pole permit application and make-ready processes were proposed, in particular by the Authority in Consultation 2016-2, by DataLink in its MOU with Logic, by C3, and by DataLink following the Working Group.
351. In ICT Consultation 2016-2, the Authority proposed that the process and timetable applied by DataLink in processing permit applications be modified, in order to make the process more efficient and to accelerate the issuance of permits. These proposed modifications are described in paragraphs 26 - 34 in Section 4 above.
352. The Office notes that the Authority’s 2016 proposals only addressed the initial stages of the permit application process, that is, up until the issuance of a make-ready work

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<sup>126</sup> In addition, Article VII (“*Make-Ready Work / Installation*”) paragraph C (“*Who May Perform Make-Ready Work*”) provides that an attacher may ask to perform make-ready work if the Owner Utility has not been able to perform it within 10 calendar days of the issuance of a Permit. However, the agreement to allow the attacher to perform the work appears to be at the sole discretion of the Owner Utility and there is no evidence available to the Office so far that the Owner Utility has in fact agreed to any such requests. It is not clear, therefore, that this provision is of much practical assistance to attachers seeking timely access to CUC utility poles.

quotation. The Office also notes that the Authority's proposals addressed DataLink's process and timelines as they are reflected in the Pole Sharing Agreements and not in the **CUC-DataLink-Logic MOU**, because the revised process and timetable in the MOU was not established until 15 June 2016, after the publication of ICT Consultation 2016-2 on 21 April 2016. That said, DataLink in particular commented extensively during both the ICT Consultation 2016-2 proceeding and the Working Group proceeding on the revised process and timetable in the MOU, which included later stages of the permit application process. While it is not clear whether the MOU has expired, the Office nevertheless considers that the Authority's proposals in Part B of ICT Consultation 2016-2 need to be updated to address all stages of the permit application process.

353. In its response to ICT Consultation 2016-2,<sup>127</sup> C3 proposed an alternative process, which is summarised at paragraph 48 in Section 4 above. The Office notes that C3's proposal would, among other things, give DataLink ten (10) calendar days to provide a quotation for make-ready work, and a separate ten (10) calendar day period after receipt of payment to complete the make-ready work and allow attachments to be made. The Office considers that this proposed timetable would accelerate the permit application process and, as a result, the roll-out of fibre optic networks.
354. However, C3's proposal would likely not allow DataLink sufficient time in all cases to properly assess the make-ready work which may be required or to perform the make-ready work safely or completely (particularly where the make-ready work might involve replacing or adding a pole). The Office also considers that requiring DataLink to work to those proposed timelines would likely not allow DataLink (and, through it, CUC) the time to ensure the safety and reliability of the electrical transmission and distribution infrastructure. As a result, the Office considers that C3's proposal should not be adopted.
355. DataLink proposed in its own response to ICT Consultation 2016-2 to make changes to the permit application process and timetable in all Pole Sharing Agreements. These proposed changes would reflect the process and timetable agreed with Logic in the **CUC-DataLink-Logic MOU**.
356. Later, at the conclusion of the Working Group, DataLink provided the draft Working Group Pole Sharing Agreement "*with new proposed amendments for increased efficiency*" consistent with its prior position.<sup>128</sup> These amendments were listed as follows:
1. *The introduction of timelines, clearer permit application processes and maximum numbers of pole applications, see Section VI. These timelines have been in place with Logic since June 2016 and have proven to provide efficiencies for the make ready process.*
  2. *The introduction of a resource availability deposit and fixed initial costs for permit applications, see additions to Section VII B. This allows DataLink &*

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<sup>127</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-44-12-July-2016-Infinity-Response.pdf>

<sup>128</sup> See page 3 of DataLink's 21 April 2017 Working Group position paper. <https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-04-52-149520178520170421DatalinkWorkingGroupResponse.pdf>

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*CUC to commit further resources to a high volume of make ready work with less risk and therefore lower costs and greater efficiencies.*

3. *Provision for an equal automatic charge for each new pole planted for all attaching utilities to avoid the additional cost of remedial make-ready at the time of a permit application process, see addition to Section VII E. There are a number of benefits to this feature.*
  - 3.1. *The cost of making communications space at the outset are less than retrofitting the space into an existing line.*
  - 3.2. *CUC remains compliant with its licence as the licence disallows CUC to take on this communications utility expense at cost of the electric consumer.*
  - 3.3. *Permit application process for these new poles will be significantly more efficient.*
4. *Provision for the implied applications for required mid-span poles including payment for the same see addition to Section VII B. Mid-span poles are necessary to maintain structural integrity of the pole line to accommodate four telco attachments. CUC's infrastructure was initially designed to accommodate only one telco attachment as at the time Cable & Wireless was the only telco in the market.<sup>129</sup>*

357. The following table summarises the timetables proposed by the Authority in ICT Consultation 2016-2, on the one hand, and those proposed by DataLink following the Working Group, on the other.

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<sup>129</sup> A fifth change addressing the duration of the make-ready refund period was also listed. This change, however, is not directly applicable to the permit application process and timetable and will be addressed later in this document.

**PUBLIC VERSION**

<b>Step in process</b>	<b>Current Agreements</b>	<b>ICTA 2016-2 Proposal</b>	<b>DataLink Proposal (2016-2 and WG)</b>	
Application	Day 1	Day 1	Day 1	
Review for Completeness	not specified	Day 5		
Pre-Permit Survey	not specified	Day 15		
Provide Make-Ready Quotation	(+10 or + 15 days)	Day 25 or 30	Day 21 (+15 business days)	
Discuss with applicant		not specified	(Green Poles) N/A	(Red Poles) Day 35 (+10 business days)
Pay Make-Ready Charges	not specified	not specified	Day 41 (+14 business days)	Day 125 (+3 months)
Perform Make-Ready Work	not specified <sup>130</sup>	not specified		Day 230 (+75 business days)
Issue Permit	not specified	not specified	Day 55 (+10 business days)	Day 230 (+0 business days)

<b>Total # of days:</b>	n/a	n/a	55	230
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Notes:

- All deadlines after "Review for Completeness" assume the original application was complete.
- All DataLink proposals assume batches of 25 poles max, 200 poles per month per attacher max and 300 poles per month max across all attachers

358. The Office notes that the process and timetable described in the draft Working Group Pole Sharing Agreement provided by DataLink at the conclusion of the Working Group were largely the same as those negotiated and agreed with Logic in the **CUC-DataLink-Logic MOU**, with additional provisions to describe the process applicable to mid-span poles.

359. The Office notes, however, that DataLink does not appear to continue to endorse its 2017 draft Working Group Pole Sharing Agreement, as it does not refer to it in its 2022 Re-Submission, and as it has not incorporated any of its principles or concepts into the Pole

<sup>130</sup> The only reference to timeframes to perform make-ready work is an Attaching Utility's right in Article VII.C to seek permission to do the work itself or to employ a qualified contractor in the event the owner Utility does not perform it within 10 calendar days. Article VII does not commit the Owner Utility to perform the work within that or any other timeframe or to give the Attaching Utility permission to perform the work.

Sharing Agreements it executed after 2017. As a result, the Office will use the current Pole Sharing Agreements as the basis for its review of the permit application process.

360. These proposed changes will, in the Office's view, address the limits to the efficient and harmonised utilisation of infrastructure and to the promotion of competition in the provision of ICT networks and ICT services – by setting up a more efficient process for managing requests for pole attachment permits.

## II. Responding to Permit Applications

361. The Office notes that, under the existing Pole Sharing Agreements, DataLink will review a complete application for a permit to attach a communications cable to a CUC utility pole, provide a quotation for make-ready work, and discuss it with the applicant, within ten (10) to fifteen (15) days (depending on the size and scope of the application).

362. However, the Office notes that, as presently drafted in Article VI.B of the Pole Sharing Agreements, DataLink's obligation to respond to an application does not begin until DataLink is in receipt of a complete application, including a pre-permit survey.

*B. Review of Permit Application. Upon receipt of a properly executed Application for Permit (Appendix B), including the Pre-Permit Survey, Owner Utility will review the Permit Application and discuss any issues with Attaching Utility, including engineering or Make-Ready Work requirements associated with the Permit Application. ...*  
(emphasis added)

363. However, the definition of "Pre-Permit Survey" in Article I.BB of the Pole Sharing Agreements appears to consist of activities currently performed by DataLink. The Office notes that a Pre-Permit Survey is defined in Article I.BB of the Pole Sharing Agreements as "*all work or operations required by Applicable Standards or reasonably required by Owner Utility to determine the potential Make-Ready Work necessary to accommodate Attaching Utility's Facilities on a Pole. Such work includes, but is not limited to, field inspection and administrative processing*" (emphasis added).

364. To the extent that the Pre-Permit Survey consists of activities that are performed by DataLink, and to the extent that DataLink finds itself without the resources to perform those activities in a timely manner, DataLink's obligation to respond to an application could be delayed indefinitely.

365. The Office considers that this arrangement in the DataLink Pole Sharing Agreements has the effect of limiting the efficient and harmonised utilisation of pole infrastructure.

366. The Office notes there is no evidence that the field inspection element of a Pre-Permit Survey requires more than a visual survey to report on the status of the pole and on the availability of space on that pole. In particular, this activity does not require DataLink or indeed any party to climb the pole or to modify, move or interfere in any way with existing electrical or ICT facilities on the pole. Therefore, there is no evidence the field inspection must be performed by DataLink or its agents or employees.

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- 367. Permitting attachers to perform that element of the Pre-Permit Survey would reduce the demand on DataLink's limited resources and allow DataLink to respond to applications in a more timely manner.
- 368. As further discussed in Section 6.F.I below, the Office considers there is no reason why such Pre-Permit Surveys cannot be performed by persons other than DataLink or its contractors and agents.
- 369. If the attaching utility were to perform the Pre-Permit survey as further discussed in Section 6.F.I below, before submitting a permit application, the Office considers that DataLink would not require an unspecified period of time after initial submission of an application to prepare and provide a quotation.

### Proposal for Consultation

- 370. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes applicants be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole.**
- 371. If adopted following consultation, the effect of this proposal would be that DataLink's Pole Sharing Agreements with attachers would be modified to reflect this change.
- 372. By permitting the attacher to perform the field inspection and provide the Pre-Permit Survey, DataLink's resources would be freed to perform other duties and DataLink would be enabled to respond to permit applications in a more timely manner. The Office considers this would have the effect of promoting the efficient, economic and harmonized utilisation of infrastructure.
- 373. If an attaching utility were to submit a permit application which is incomplete, including if the Pre-Permit Survey were incomplete or improperly carried out,<sup>131</sup> the Office proposes that DataLink be permitted to refuse such an application, PROVIDED that DataLink advises the attaching utility comprehensively and in writing at the same time what information is missing, so that the applicant may revise and resubmit the application if they wish to do so.
- 374. Subject to consultation, the Office proposes that DataLink's response be provided within the same timeframe as quotations. While this may delay an attaching utility's roll-out plans, it will also give that attaching utility a strong incentive to submit complete permit applications.

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<sup>131</sup> The requirements for such application are discussed in section 6.F.I of this document below.



### Questions for Consultation

**QUESTION 3** Do you agree with the proposal that applicants be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 4** If applicants were to be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole, what would be, in your view, the impact on the time required to provide a quotation to the applicant? Explain in detail the basis for your view.

### III. Responding to Quotations

375. DataLink's existing Pole Sharing Agreements currently do not require applicants to respond to quotations, let alone within a specified period of time. This limits DataLink's ability to plan for the resources it will require to perform make-ready work as DataLink cannot know with a high degree of certainty when or whether a quotation will be accepted and DataLink will be required to deploy the resources. Given the restraints on DataLink's resources, the ability to plan future requirements is important to ensure the appropriate resources are mobilised when needed. The Office notes that delays in making poles ready for attachment can delay deployment of an ICT licensee's network. The Office considers, therefore that in these circumstances, the absence of a requirement to respond to quotations has the effect of limiting the efficient and harmonised utilisation of infrastructure as well as the promotion of competition.
376. The Office considers that, in these circumstances, applicants for pole attachment permits should be able to decide and act within a reasonable time on a quote. The Office notes that the maximum timeframe mandated by the FCC for the equivalent step in its process is fourteen (14) calendar days.<sup>132</sup>
377. Subject to consultation, therefore, the Office considers that the Pole Sharing Agreement should specify the period of time for applicants to review and respond to quotations.

### Proposal for Consultation

378. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation, **Attaching Utilities should be required to accept, reject or otherwise respond to estimates of the Make-Ready Work charges necessary to accommodate the Attaching Utility's**

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<sup>132</sup> See *In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5246, 7 April 2011 ('**FCC 2011 Pole Attachment Order**'), paragraph 26.

**attachment within a specific period of time following delivery of the estimate by DataLink.**

379. If adopted as a determination following consultation, the effect of this proposal would be that DataLink's Pole Sharing Agreements with attachers should be modified to reflect this change.
380. The Office notes that the consequence of not acting on a quote within the required timeframe would be that the quote lapses. This would not prevent the attaching utility from re-applying for a permit for the relevant pole, but it would re-set the clock to zero. While this may delay an attaching utility's roll-out plans, it will give a strong incentive to attaching utilities to respond in a timely manner.

### **Questions for Consultation**

**QUESTION 5** Do you agree with the proposal that Attaching Utilities should be required to accept, reject or otherwise respond to estimates of the Make-Ready Work charges necessary to accommodate the Attaching Utility's attachment within a specific period of time following delivery of the estimate by DataLink? If not, explain in detail the reasons why you disagree. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 6** What period of time should Attaching Utilities be given in order to accept, reject or otherwise respond to estimates delivered by DataLink?

**QUESTION 7** What specific changes to the terms of the Pole Sharing Agreement would you propose to implement this proposal, if it were adopted as a determination following consultation?

### **IV. Treatment of Batches of Poles**

381. The existing Pole Sharing Agreements allow for Attaching Utilities to submit applications to attach to single poles or in batches of poles.<sup>133</sup> The Office notes that deployment of a segment of an ICT network typically requires a series of poles to support the communications cable and that batch applications, therefore, facilitate ICT network deployment.
382. However, it is not clear whether approval of permits under the existing Pole Sharing Agreements is done individually, even when applications are made in batches. Even if one permit might cover several poles, it is reasonable to assume that, in any given batch of poles, some will be ready to accommodate the requested attachments while others will

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<sup>133</sup> As noted above, there appear to be limits to the number of poles which can be included in a single application, but these do not appear to be documented in the existing Pole Sharing Agreements.

require greater or lesser make-ready work in order to be able to accommodate the requested attachment.<sup>134</sup> In other words, not all poles will be ready at the same time.

383. If a segment of an ICT network requires a series of poles to support deployment of the communications cable, the unavailability of as few as one pole can prevent, or at least delay, deployment of the entire segment of the ICT network, even if all of the other poles are ready and available to accommodate the attachments.
384. The Office notes that the Pole Sharing Agreements also provide for the loss of rights granted by permits if they are not exercised within a specified period of time.<sup>135</sup> This leaves open the possibility under the existing Pole Sharing Agreements that an attacher might be granted some permits to attach poles in a given batch but be unable to use them, and therefore lose those rights, because other poles were not made-ready and permitted in sufficient time. While an applicant could, in principle, re-apply for the permits which lapsed, which DataLink would, in principle, be able to re-issue quickly, in the Office's view this would represent an unnecessary duplication of effort and a waste of the time and resources of both the applicant and DataLink.
385. The Office considers that this possibility has the effect of limiting the efficient and harmonised utilisation of infrastructure.

### Proposal for Consultation

386. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation, **all permits issued for poles included in the same batch application be given the same effective date, irrespective of when the pole is actually ready and available for attachment, unless the applicant requests otherwise.**
387. The Office considers that this measure, if adopted following consultation, would eliminate the concern that some permits might lapse due to delays in obtaining other permits, which in turn would facilitate the efficient use of CUC utility poles and the deployment of ICT networks. This measure would, therefore, facilitate the efficient and harmonized use of CUC pole infrastructure.

### Questions for Consultation

**QUESTION 8 Do you agree with the proposal that all permits issued for poles included in the same batch application be given the same effective date, irrespective of when the pole is actually ready and available for attachment, unless the applicant requests otherwise? If not, explain in detail the reasons**

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<sup>134</sup> Referred to as "Green" and "Red" poles, respectively, in the 2016 **CUC-DataLink-Logic MOU**, in DataLink's 2017 draft Working Group Pole Sharing Agreement, and in the Office's October 2022 RFIs.

<sup>135</sup> 200 calendar days, except in the **CUC-DataLink Pole Sharing Agreement**, where it is 120 calendar days. See Article IV.F in each of the Pole Sharing Agreements.

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why you disagree. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 9** What specific changes to the terms of the Pole Sharing Agreement would you propose to implement this proposal, if it were adopted following consultation?

### V. Provisional versus Full Permits

388. In the existing Pole Sharing Agreements, the process for issuing a permit ends after the applicant pays for any necessary make-ready work charges and the make-ready work has been performed.<sup>136</sup>
389. In its December 2022 Re-Submission, DataLink proposed modifying this process to include a “Pre-Approved Permit” in addition to the “Full Permit” Attaching Utilities currently receive.<sup>137</sup>

*5. Payment of the estimated costs of the Make-Ready Work is expected, as per the MPJUA, from the Attaching Utility in advance of completing the Make-Ready Work.*

*6. Upon receiving payment in full of the estimated costs, DataLink proceeds to complete all required Make-Ready Work.*

*7. DataLink provides pre-approval by returning the updated form; indicating the request was accepted, to the requesting Attaching Utility and that the Make-Ready Work has been completed. This constitutes a **Pre-Approved Permit**.*

*8. Attaching utility is now pre-authorized to make attachments in the designated location within their ‘Assigned Space’. ...*

*9. DataLink proposes to include in the process that after Attaching Utility attaches their infrastructure, Owner Utility will perform a quality check to verify that Attaching Utility has attached in their correct assigned space and that they have only attached the infrastructure that they have applied for. If there are any discrepancies, Attaching Utility will either rectify or remove their infrastructure and retract their permit application.*

*10. Once Owner Utility verifies that Attaching Utility is attached in the correct assigned space and have only attached what has been applied for in the permit application a **Full Permit** will be provided electronically to the Attaching Utility.*  
(emphasis added)

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<sup>136</sup> See Articles VI.E, VI.F, and VII.B, and Item B of Appendix 3, of the Pole Sharing Agreements.

<sup>137</sup> See pages 2-3 of DataLink Responses –OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

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390. The purpose of this proposed change to the process appears to be to allow DataLink to verify whether an attachment was made properly and in the correct location on the pole prior to issuing a permit to attach to the pole.
391. The Office notes that the existing Pole Sharing Agreements include a definition for “Post-Installation Survey” meaning “*all work and inspections required by Utility to determine and verify that the Attachments have been made in accordance with Applicable Standards and the Permit.*” While the term “Post-Installation Survey” does not appear to be used elsewhere in the Pole Sharing Agreement, the presence of the term does suggest the parties contemplated inspecting an attachment after the attachment was made,<sup>138</sup> rather than as a pre-condition to obtaining permission to make the attachment.
392. In any event, it is unclear how the lack of a “Pre-Approved Permit” in the existing Pole Sharing Agreements “*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*”, or how the introduction of a new step into the permit application review and approval process would “*promote an efficient, economic and harmonised utilisation of infrastructure.*” In particular, the Office notes that the proposed changes would require DataLink to expend additional resources in order to properly manage, and would require additional field visits by DataLink personnel that are not presently mandated in all instances by the existing Pole Sharing Agreements. The Office considers that this would likely exacerbate DataLink’s existing resource constraints.
393. Accordingly, subject to consultation, the Office is of the preliminary view that the Office should not require this change to the permit application process and to the Pole Sharing Agreements proposed by DataLink in its December 2022 Re-Submission.

### Questions for Consultation

**QUESTION 10** Do you agree with the Office’s preliminary view that it should not require changes to the permit application process and to the Pole Sharing Agreements to include the provision of a “Pre-Approved Permit” prior to the issuance of a “Full Permit”?

**QUESTION 11** If not, explain in detail the reasons why you disagree, and describe in detail how the changes proposed by DataLink would promote an efficient, economic and harmonised utilisation of infrastructure on Grand Cayman.

## E. Administration of Permits and Make-Ready Work

### I. Form of Permit

394. In its October 2022 letter to parties, the Office asked the parties to comment on the following:

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<sup>138</sup> As provided for example in Article XIII, “*Inspection of Attaching Utility’s Facilities.*”

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*Certain rights and obligations of attachers are connected to the issuance of a permit to attach.<sup>1</sup> In order to ensure the rights and obligations of the parties to a pole sharing agreement are clear, what is the appropriate process for the issuance of a permit, including when should a permit be considered to be issued such that an attacher is authorized to attach its communications facilities to its assigned spot in the communications space on the pole, and what form should that permit take?*

<sup>1</sup> For example, right to attach communications facilities to utility poles, obligation to attach within a specified period of time, obligation to pay pole attachment fees, etc.

395. Certain parties suggested (Digicel in particular) suggested that they needed to see the 2017 Dispute Determination Request ('DDR') from C3 in order to comment on these questions. As the Office is not determining that DDR in this proceeding, the Office considers it would be inappropriate to do so.
396. Nevertheless, the 2017 DDR did raise questions that are appropriate to be considered in this proceeding.
397. As noted, the issuance of a Permit triggers the right to attach to a Pole (Article VI.F), the obligation to pay Annual Attachment Fees (Article III.C) and the obligation to attach in a timely manner (Article IV.F), among others. Having the Permit in hand is therefore critical to establishing the rights and obligations of both the Owner Utility and the Attaching Utility under a Pole Sharing Agreement, and attaching to a Pole in the absence (or perhaps following the misplacement) of a Permit, even with the written consent of the Owner Utility or its agents, can lead to uncertainty regarding the parties' rights and obligations under their Agreement.
398. Under the Pole Sharing Agreements, a Permit is in effect defined as the Attaching Utility's application form countersigned by the Owner Utility (Article VI.F).<sup>139</sup> The Office notes that application forms are submitted manually by Attaching Utilities,<sup>140</sup> and each such form is signed separately to become, in due course, a separate Permit to be returned to the Attaching Utility.
399. The Office also notes that DataLink reports that it has issued over [REDACTED] Permits as of the end of Q2 2022.<sup>141</sup> The Office further notes each Attaching Utility is also managing thousands of Permits, depending upon the number of Poles it is attaching to.
400. The Office considers that these arrangements impose a significant administrative burden on all parties, and on DataLink in particular, as their back office operations have to

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<sup>139</sup> See also page 3 of DataLink Responses –OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf: “The permit format is a PDF of the Joint Use Request form stating when and by whom the permit was issued ...”  
<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>140</sup> See Logic's November 2022 Re-Submission.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>

<sup>141</sup> See DataLink's response to October 2022 RFI 308 (confidential).  
<https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-31-DataLink-Responses---OfReg-RFI-301---315-Redacted.xlsx>

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process, manage and track thousands of individual Permits, with the consequences noted above in the event Permits are not received or mislaid.

401. In addition, DataLink has stated that it has limited resources to process applications. The Office considers that the burden of managing thousands of Permits and processing application forms manually contributes in no small way to DataLink’s resource constraints. The Office also considers that this manual process to receive applications and issue Permits is limiting the efficient and harmonised utilisation of infrastructure, by imposing an excessive and potentially unnecessary burden on DataLink and the Attaching Utilities.
402. The Office notes Logic’s proposal that DataLink establish “*a centralised online portal for submission of pole application requests*” and that “*a permit be considered issued once permit confirmation has been issued electronically via the proposed online portal.*”<sup>142</sup> The Office considers that this proposal has merit and that it would promote the efficient and harmonised utilisation of pole infrastructure. However, the Office does not have at this time sufficient information in order to determine the requirements of such a portal.
403. The Office also notes that, under the URC Act, one of its functions is the promotion of innovation in the ICT sector:
6. (1) *The principal functions of the Office, in the markets and sectors for which it has responsibility, are —*  
...
    - (c) *to protect the short and long term interests of consumers in relation to utility services ...; and*
    - (d) *to promote innovation and facilitate economic and national development; ...*
  - (2) *In performing its functions and exercising its powers under this or any other Law, the Office may —*  
...
    - (p) *assign resources and implement initiatives designed to enable the introduction of new and innovative technologies and systems in the markets and sectors for which it has responsibility; ...*
62. *The Office shall have a duty to promote innovation within the sectors for which it has responsibility with a view to contributing to national economic competitiveness and development, and in doing so it may —*
  - (a) *through its policies actively facilitate the development and introduction of relevant innovative technologies into the national economy;*  
... and

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<sup>142</sup> Logic also proposed that DataLink establish “*an online database which reflects current information on which poles have or have not been permitted.*” See Logic’s 11 November 2022 Re-Submission, at page 2. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>

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(e) *take such other initiatives as it considers to be consistent with its mandate to contribute to national development and economic growth.*

404. The Office considers that the development of platforms and systems that facilitate access to utility pole infrastructure would be consistent with that function.

### Proposal for Consultation

405. Therefore, pursuant to section 69 (2) of the ICT Act, in order to promote an efficient, economic and harmonized use of infrastructure, and pursuant to section 62 of the URC Act, in order to promote innovation within the sectors for which it has responsibility with a view to contributing to national economic competitiveness and development, the Office **proposes**, subject to consultation, that:

**DataLink be directed to investigate and report to the Office within ninety (90) of a final determination by the Office:**

- a) **the feasibility of the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits, including the requirements, scope and cost of such a system, and**
- b) **the feasibility of the creation of an online database containing relevant information on CUC utility poles managed by DataLink.**

### Questions for Consultation

**QUESTION 12** Do you agree with the Office's proposal to direct DataLink to investigate the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits? If not, explain in detail the reasons why you disagree.

**QUESTION 13** If you agree with the Office's proposal to direct DataLink to investigate the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits, what should be the requirements and scope of such a system?

**QUESTION 14** Do you agree with the Office's proposal to direct DataLink to investigate the creation of an online database containing relevant information on CUC utility poles managed by DataLink? If not, explain in detail the reasons why you disagree.

**QUESTION 15** If you agree with the Office's proposal to direct DataLink to investigate the creation of an online database containing relevant information on CUC utility poles managed by Data, what should be the requirements and scope of such a system? In particular, what information in relation to CUC utility poles should be included and which persons should have access to the database?



**QUESTION 16** Do you agree the Office has the jurisdiction under sections 6 and 62 of the URC Act to require DataLink to investigate the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits and/or the creation of an online database containing relevant information on CUC utility poles managed by DataLink?

## II. Scope of Permit

406. In its October 2022 letter to parties, the Office asked the parties to comment on the following:

*Should a permit to attach be limited to the specific type of communications equipment specified therein, or should it be deemed to allow other communications facilities the attacher may choose to attach in the future? What are the relevant considerations that should be taken into account when addressing this question?*

407. The Office has identified a potential issue where existing attachers appear to be able to replace existing communications facilities attached to a CUC pole with new facilities on those poles without engaging in the DataLink permit application process, while new attachers must go through that permit application process before attaching new communications facilities to CUC poles. This could give existing attachers a significant advantage in speed to deploy or upgrade a network by avoiding the time to request and obtain a permit. The Office notes this might also increase the likelihood that new attachers would trigger the need to replace poles or otherwise pay for significant make-ready work charges, as compared to existing attachers who replace existing communications facilities without engaging in the permit application process.
408. In response to the Office's October 2022 question, DataLink stated that it considered "*it essential that a permit to attach be limited to the specific type of communications equipment specified therein*" and that it not be deemed to include other, future facilities. DataLink noted that a permit to attach is limited to the type, diameter, and weight of attachment stipulated in the permit, as this is the information DataLink uses to determine the load and stress factor the attachment will place on the pole. Placing an attachment of a different type, diameter and weight could pose a safety risk and compromise the electrical grid. As a result, DataLink submitted that all changes to facilities attached to pole must be reviewed through the permit application process.<sup>143</sup>
409. Logic took a similar position that "*a permit to attach should continue to be limited to the specific type of communications equipment specified therein ... on the basis of safety considerations which should be taken into account in respect of each specify type of communications equipment which is being proposed to be attached.*"<sup>144</sup>

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<sup>143</sup> Pages 6-7 of DataLink Responses – OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>144</sup> Page 3 of Logic's 11 November 2022 Re-Submission.

410. The Office notes that, even if existing attachers were to apply to DataLink for review of and authorisation to attach new facilities, the increased likelihood that new attachers would trigger the need to incur significant make-ready costs would not be completely removed, as existing attachers are likely replacing existing facilities with lighter facilities on an existing attachment, whereas new attachers would be adding a new attachment to the pole.<sup>145</sup>
411. The Office also notes that most Attaching Utilities have unauthorised attachments, but one in particular stands out. According to DataLink's October 2022 invoice to [REDACTED], that company is being billed for [REDACTED] permits<sup>146</sup> and [REDACTED] unauthorized attachments, for a total of [REDACTED] attachments.
412. While the specific numbers are not clear, a large number of these appear to be second attachments on poles where the company already has one attachment. For example, DataLink's response to 2022 RFI 309 suggests there are 14,671 poles with one or more attachments.<sup>147</sup> If one assumes [REDACTED] In other words, it appears to the Office that [REDACTED] has "supplemental" attachments on some [REDACTED]. In light of the large number of unauthorised attachments being invoiced to [REDACTED], the vast majority if not all of the "supplemental" attachments are likely unauthorised.
413. Irrespective of the specific number of such attachments, the Office considers that it is likely that each of these "supplemental" attachments would have triggered a requirement for make-ready, if the attacher in question had submitted them to DataLink's for assessment under the permit application process, as they would be the equivalent of a new attacher adding a new attachment to a pole. In other words, these would not be instances where an existing communications facility was replaced by a new, lighter or smaller facility, but rather where a new facility was added to a pole that already supported an existing facility.
414. The Office notes that the existing Pole Sharing Agreements do not require DataLink to take any specific action upon discovery of an unauthorized attachment. For example, Article XIV ("*Unauthorised Occupancy or Access*") paragraph A ("*Penalty Fee*") ("**Article XIV.A**") is permissive, not mandatory. It provides DataLink the right, but not the obligation, to impose an "Attachment Penalty Fee" equal to Annual Attachment Fee (see Appendix A Item 2 paragraph B) and the right, but again not the obligation, to remove the unauthorized

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<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>

<sup>145</sup> The Office notes that substituting heavier facilities with lighter facilities might also require some make-ready work, for example adjusting guy wires to ensure the pole is not over-tensioned, but the Office considers it is unlikely to require replacement of the pole and the associated high costs.

<sup>146</sup> [REDACTED] previously issued plus [REDACTED] issued in Q3 2022.

<sup>147</sup> This is the sum of the number of poles with one, two, three or four attachments. See tab 309 of DataLink Responses – OfReg RFI 301 – 315.xlsx. <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-31-DataLink-Responses---OfReg-RFI-301---315-Redacted.xlsx>

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attachment if the Attachment Penalty Fee is not paid within 60 calendar days. The Office notes, though, that DataLink has been levying fees on unauthorised attachments and, therefore, appears to be exercising its rights under Article XIV.A.

415. The Office notes, however, in particular that the existing Pole Sharing Agreements do not impose an obligation on DataLink either (1) to assess the impact (at the unauthorized attachers' expense) of the unauthorized attachment on the pole or (2) to determine if make-ready work would have been required, had an application for the relevant attachment been properly submitted by the attacher prior to making the attachment. The potential make-ready work charges that could thereby be avoided are likely much higher than the Attachment Penalty Fee which presently applies (\$ [REDACTED] as of Q4 2022).<sup>148</sup>
416. The Office notes that, as reported by DataLink in its December 2022 response to 2022 RFI 304, [REDACTED] attachments were made to poles that required make-ready work over the 2018-2021 period. Over the same period, DataLink reported receiving some \$ [REDACTED] in make-ready revenue, per its December 2022 response to 2022 RFI 302, and the attachers reported paying some \$ [REDACTED] in make-ready charges, per their responses to 2022 RFIs 203, 403, 503 and 603. This amounts to an average of \$ [REDACTED] and \$ [REDACTED], respectively, per pole requiring make-ready work over the 2018-2021 period. Both of these figures are well in excess of the current Attachment Penalty Fee.
417. The Office further notes that the applicable quarterly attachment fee is the same whether an attachment is authorized or not and that there is no obligation on unauthorised attachers to pay for make-ready work, or to reimburse those who paid make-ready work charges, retrospectively. In brief, the Office considers that there are limited financial or other incentives on attachers NOT to make unauthorized attachments.
418. The Office further notes that paragraph D of Item 1 of Appendix C of all of the Pole Sharing Agreements expressly states "*Attaching Utility shall have only one Attachment on Pole per space.*" If an attacher has an unauthorised, second attachment on a pole, the Office considers that it must either be occupying a space that DataLink has allocated to another attacher or be in breach of the "one-attachment-per-space" requirement in the Agreement.<sup>149</sup>
419. The Office considers that this arrangement has the effect of limiting the efficient and harmonised utilisation of infrastructure, as it does not incentivise attachers to apply the contractually-required application processes which ensure the safety and integrity of the CUC utility pole network. Further, it may interfere with the efficient and harmonized allocation of the capacity of poles among attachers and, by putting at risk the CUC utility

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<sup>148</sup> 4 x the Quarterly Attachment Fee of \$ [REDACTED]. See page 1 of DataLink Responses – OfReg RFI 102 – 103.pdf. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-00-59-31-DataLink-Responses---OfReg-RFI-102---103.pdf>

<sup>149</sup> There is, however, an inconsistency in the Pole Sharing Agreements in this respect. An "Attachment" is defined to include "overlashed" cables. As an overlashed cable presupposes a prior attached cable over which the second cable can be overlashed. An overlashed cable must therefore be, by definition, a second attachment on the pole, notwithstanding the limit of one attachment per pole.

pole network, potentially places at risk the wireline communications networks on Grand Cayman.

420. The Office further considers that this arrangement has given [REDACTED] a material competitive and commercial advantage over its competitors, as it allowed that company to roll out its new ICT infrastructure without waiting on DataLink's attachment permit application approval or make-ready work processes. The Office therefore considers that the current arrangement as the effect of limiting the promotion of competition in provision of ICT services or ICT networks.

### Proposal for Consultation

421. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:
- a. **the Pole Sharing Agreements be modified to include a more explicit condition in contract that *any* changes to the communications facilities authorised to be attached to a pole under a permit *must* be reviewed by DataLink under the permit application process *before* the change is made;**
  - b. **Attachers be required to report to DataLink all unauthorised attachments that have not yet come to the attention of DataLink, and must refrain from all future unauthorised attachments; and**
  - c. **DataLink be required to review each unauthorised attachment that comes to its attention, determine the make-ready work that would have been required if the attacher in question had properly applied for a permit for the attachment under the Pole Sharing Agreement, and invoice the attacher the applicable make-ready work charges and complete the required make-ready works to ensure the protection of the electrical grid.**
422. If another attacher has already paid for make-ready work for that pole, DataLink would be required to reimburse that other attacher for the difference between what it paid and its proportional share of what the unauthorised attacher is being invoiced. The Office's objective is to put all parties in the position they would have been in, to the greatest extent possible, if the unauthorised attacher had properly applied for a permit in the first place.
423. These requirements would apply to all unauthorised attachments made after a final determination in this proceeding.
424. The Office considers that the measures proposed in the preceding paragraphs, if adopted following consultation, would result in a more efficient and harmonized utilisation of infrastructure, by reducing the incentive to make unauthorised attachments contrary to the terms of the Pole Sharing Agreements, and by reducing or eliminating the unfair advantage gained by unauthorised attachers over other attachers who followed the proper procedures under the Pole Sharing Agreements.

**Questions for Consultation**

**QUESTION 17** Do you agree with the Office’s proposal to modify the Pole Sharing Agreements to include a more explicit condition in contract that *any* changes to the communications facilities authorised to be attached to a pole under a permit *must* be reviewed by DataLink under the permit application process *before* the change is made? If not, explain in detail the reasons why you disagree.

**QUESTION 18** Do you agree with the Office’s proposal to require Attachers to report to DataLink all unauthorised attachments that have not yet come to the attention of DataLink, and must refrain from all future unauthorised attachments? If not, explain in detail the reasons why you disagree.

**QUESTION 19** Do you agree with the Office’s proposal to require DataLink to review each unauthorised attachment that comes to its attention, determine the make-ready work that would have been required if the attacher in question had properly applied for a permit for the attachment under the Pole Sharing Agreement, and invoice the attacher the applicable make-ready work charges? If not, explain in detail the reasons why you disagree.

**QUESTION 20** Do you agree that the requirements should apply only to unauthorised attachments made after a final determination in this proceeding, or do you consider that they should apply to all unauthorised attachments, irrespective of when they were made or discovered? If the latter, describe in detail the power or jurisdiction that the Office would exercise in order to require retrospective adjustments to make-ready work charges.

**QUESTION 21** Are there are other remedies that the Office should consider instead, such as mandatory removal of all unauthorised attachments? If yes, describe in detail the advantages or disadvantages of such other remedies including, without limitation, the impact on existing services provided to consumers.

**QUESTION 22** Should different considerations apply to unauthorised attachments made by ICT licensees outside of the communication space. for example, in light of the danger to the safety and security of persons and of the electricity network, should they be subject to mandatory removal and/or to review under section 91 of the URC Act with a view to possible levying of administrative fines?

**QUESTION 23** In light of the current limit of one Attachment per Assigned Space set out in Appendix C of the Pole Sharing Agreements, what process do you consider should apply when an Attacher seeks to replace an existing communications facility on a pole with a new facility, without interrupting service to consumers?

### III. Timely Exercise of Access Rights

425. Article IV (“*Specifications*”), paragraph F (“*Effect of Failure to Exercise Access Rights*”) (“**Article IV.F**”) of the Pole Sharing Agreements require attaching utilities to attach their facilities within 200 calendar days<sup>150</sup> of a permit being granted, or risk having the applicable attachment space assigned to another attacher. In effect, the authorisation in the permit would lapse. Article IV.F provides an exception for situations where the attaching utility is unable to attach due to circumstances beyond its control upon written notification to DataLink or CUC, as applicable.
426. The Office is concerned that Article IV.F as currently written may operate in an unfair manner. This is because applications for access to poles are often submitted in batches. Indeed, the permit application process contemplates they may be submitted in batches and sets a limit on the size of any given batch of poles in an application. Batch applications are reasonable because communications cables are generally attached to a series of poles at the same time, not individually as permits are sought and granted, and the attacher can be expected to seek access rights that align with its ICT network deployment plans.
427. Permits, however, appear to be issued individually. Further, permits may be issued at different times, depending on whether the pole requires make-ready work and on when the make-ready work in respect of a given pole is completed. This means that an attaching utility could be granted a permit for a given pole in a batch well before it is granted a permit for another pole in the same batch. There is a reasonable likelihood that, if one pole in a given batch remains unavailable for attachment, the entire batch is in practice unavailable for attachment – as noted above, because communications cables are attached to a series of poles at the same time. If a permit for that other pole is not granted within 200 calendar days of the permit for the first pole, Article IV.F provides that the permit for the first pole lapses, even though the attaching utility may have acted as expeditiously as possible. While the exception in Article IV.F would presumably apply, it requires the attacher to notify DataLink or CUC, as applicable, of the circumstances beyond the attacher’s control, even though those circumstances are within DataLink’s or CUC’s knowledge.
428. The Office considers that an attaching utility should exercise its rights in a reasonably timely manner, and should not apply for permits and cause make-ready work to be performed if the pole is not going to be used within a reasonable period of time, particularly if there is other demand for that pole or for DataLink’s make-ready resources generally. However, the Office also considers that an attaching utility might not be able to attach immediately to a given pole because of changes in circumstances or, as noted above, another pole in the series of poles required is not yet ready. Further, the Office notes no specific technical or other justification has been provided for the chosen number of days. In other words, why should a permit lapse after 200 days and not some other number of days?

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<sup>150</sup> Except in the case of the **CUC-DataLink Pole Sharing Agreement**, which imposes a limit of 120 days.

429. In the circumstances, the Office considers, subject to consultation, that permits should not be allowed to lapse merely because another pole *in the same batch* is not yet ready for attachment. In the Office's view, such an occurrence would have the effect of limiting the efficient and harmonised use of infrastructure.

#### Proposal for Consultation

430. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that **a permit to attach to a pole should remain effective unless the right to attach contained in that permit is not exercised within no less than 200 calendar days after the date all permits in the same batch of poles have been issued.**
431. The Office considers that this proposal, if adopted following consultation, would help ensure applicants act expeditiously on permits which have been granted, but would also ensure the lapsing provisions in the Pole Sharing Agreements are better aligned with how ICT networks are actually deployed, and would ensure the attachers' rights to attach do not lapse merely because of action or inaction over which they have no control.

#### Questions for Consultation

**QUESTION 24** Do you agree with the Office's proposal to ensure a permit to attach to a pole remains effective unless the right to attach contained in that permit is not exercised within no less than 200 calendar days after the date all permits in the same batch of poles have been issued? If not, explain in detail why you disagree.

**QUESTION 25** Should the duration of the period to exercise the right to attach remain 200 calendar days or should it be modified? If so, what should be the new period to exercise the right to attach? Explain in detail why and, in particular, how changing the period to exercise might promote an efficient, economic and harmonised utilisation of infrastructure.

**QUESTION 26** Alternatively, should Article IV.F be removed from the Pole Sharing Agreements? Explain in detail why and, in particular, how removing Article IV.F might promote an efficient, economic and harmonised utilisation of infrastructure.

#### IV. Exchange of Forecasts

432. The Office notes that the existing Pole Sharing Agreements do not require Attaching Utilities to provide forecasts of demand to the Owner Utility. Nor do the Pole Sharing Agreements require the Owner Utility to provide information on available poles to Attaching Utilities, except in limited circumstances.<sup>151</sup> The Office notes that in only three of the five Pole Sharing Agreements does the Owner Utility commit to providing the results

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<sup>151</sup> For example, Article X, "Abandonment or Removal of Owner Utility's Facilities."

of an inventory conducted under Article III (“*Fees and Charges*”), paragraph E (“*Inventory*”), even though such inventory has an impact on the fees paid by the Attaching Utility.

433. In ICT Consultation 2016-2, the ICTA considered this lack of communication likely resulted in an inefficient use of resources and created processing delays:

*175. ... The Authority considers that the apparent lack of adequate planning and coordination with the relevant Licensees of the pole attachment process, as referenced by the example in paragraphs 173 and 174 above, is likely to result in an inefficient use of resources and create processing delays giving rise to a significant backlog of unprocessed permit applications. ...*<sup>152</sup>

434. The Office considers that, without reasonable and regular forecasts from attachers, DataLink would not have the information necessary to plan or coordinate the expansion of capacity on poles or the make-ready required, except in a purely reactive manner as and when applications are submitted.<sup>153</sup> The Office notes that ALL attachers except Flow have obligations in their ICT licences to deploy fibre networks and to provide service to all of Grand Cayman, so it can be reasonably inferred that ALL attachers except Flow will require access to substantially the same set of utility poles in due course. In other words, the current arrangements preclude DataLink from coordinating make-ready work on the most efficient manner for two or more attachers seeking to deploy ICT networks in the same areas within similar timeframes, even if the overall costs to the attachers and to consumers would be reduced if the make-ready were coordinated and performed for the attachers at the same time.
435. The Office considers therefore that the current agreements and arrangements have and are having the effect of limiting the efficient and harmonized utilization of infrastructure.
436. The Office notes that INI Regulation 8(3)(e) requires infrastructure sharing requestors to provide “*projected quantities to be ordered with a period of 3 years forecast.*”

### Proposal for Consultation

437. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, the Office **proposes**, subject to consultation, that **attaching utilities be required to the Owner Utility (DataLink or CUC, as applicable) periodic forecasted attachment requirements over the next three-year period.**

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<sup>152</sup> ICT Consultation 2016-2, paragraph 175.

<sup>153</sup> The Office notes that the Pole Sharing Agreements include provisions in Article IX (“*Pole Modifications and/or Replacements*”), paragraph B (“*Treatment of Multiple Requests for Same Pole*”) regarding multiple requests for the same pole, but they are of limited application as the requests must be received within 60 days of each other. Further, DataLink is at best limited to reacting to requests submitted by attachers. These provisions, therefore, do not facilitate longer-term planning.



## Questions for Consultation

**QUESTION 27** Do you agree with the Office’s proposal attaching utilities be required to the Owner Utility (DataLink or CUC, as applicable) periodic forecasted attachment requirements over the next three-year period? If not, explain in detail why you disagree.

**QUESTION 28** How often should attaching utilities be required to provide the forecasts, if any, and at what level of geographic specificity?

**QUESTION 29** Should such forecasts, if any, include only new attachments, or should all attachments be included?

**QUESTION 30** Should the forecasts, if any, be binding?

**QUESTION 31** In light of the fact that DataLink also competes with the other attachers as an ICT licensee, what measures should be implemented, if any, in order to protect the confidential and commercially-sensitive information of the other attachers?

## F. Right to Perform Work

438. As noted in the previous sections of this document, one of the key issues in the ICT Consultation 2016-2 and Working Group proceedings was whether persons other than DataLink should be allowed to perform some of the activities associated with permit applications and make-ready work and, if so, under what terms and conditions.
439. At the present time, all such activities are performed by DataLink or by its contractors or agents, which includes, in particular, CUC. DataLink describes several of these activities at page 9 of its 21 April 2017 Working Group Position Paper, such as “*make ready design, switching procedures for isolation of work areas, mapping of as-builts in CUC’s systems etc*” although it is not clear which of these are performed by DataLink and which are performed by CUC. Because utility poles are also used for electricity transmission and distribution purposes, and because making poles ready for ICT purposes may often involve making changes to the electricity transmission and distribution network, CUC’s involvement is inevitable.
440. However, in the Office’s view, this has led to a complex and inefficient permit application process. More critically, DataLink’s resources, whether its own or those of its contractors and agents, are limited. As noted at paragraph 342 in Section 6.D.I above, DataLink stated at page 7 of its Working Group Position Paper and at clause 10 of the **CUC-DataLink-Logic MOU**, that it can process no more than 300 pole attachment permit applications per month, and that these should be in batches of no more than 25 applications. In its December 2022 Re-Submission, DataLink’s comments suggest it has now limited the number of applications it will process per month to 200 (50 for each of the other four attaching utilities).<sup>154</sup> This has clearly been insufficient to meet the demand from attachers

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<sup>154</sup> See page 2 of DataLink Responses - OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf.

for access to CUC utility poles and has contributed to the delay in the roll-out of fibre networks on Grand Cayman. The Office considers that the foregoing has limited the efficient and harmonised utilisation of infrastructure and has limited the promotion of competition in Grand Cayman.

441. In ICT Consultation 2016-2 Part B, the Authority proposed, among other things, subject to consultation, the insertion of a new provision into the Pole Sharing Agreements which would allow an attaching utility to use a third-party contractor to perform steps in the permit application process where DataLink was not able to meet the specified timelines (see paragraph 32 above). While C3 and Digicel supported the concept of third parties performing some of the activities of the permit application process (see paragraphs 55, 85 and 86 above), DataLink consistently opposed it (see paragraphs 54 and 83 - 84 above). DataLink was particularly concerned that the Authority's proposal did not include a requirement that the third-party contractor be approved and certified by the electric utility.<sup>155</sup> DataLink noted that make-ready work which affects the electrical transmission and distribution infrastructure needs to be performed by suitably-qualified persons under the control and supervision of CUC in order to ensure the continued service reliability performance of electricity supply services in Grand Cayman.<sup>156</sup> As noted at paragraph 46 of its 12 July 2016 submission, DataLink submitted:

*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.*

442. The Office has reviewed the evidence provided to it regarding DataLink's permit application process and make-ready work process and considers, subject to consultation, that not all steps in these processes must necessarily be performed by DataLink or by its contractors and agents (including CUC). The Office is of the view that some of them (such as pre-permit surveys) could be performed by the attaching utilities themselves, while others (such as make-ready work) could be performed by suitably-qualified third-party contractors. The Office considers that the current arrangements, whereby only DataLink's resources can perform these activities, likely has the effect of limiting the efficient and harmonised use of infrastructure.

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<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>155</sup> Paragraph 45 of DataLink's 12 July 2016 Submission in ICT Consultation 2016-2.

<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

<sup>156</sup> See page 6 of DataLink's 21 April 2017 Working Group position paper and pages 6-7 of DataLink's 16 June 2017 Working Group response paper.

## I. Pre-Permit Surveys

443. There is, for example, no evidence that pre-permit surveys require more than a visual survey to report on the status of the pole and on the availability of space on that pole.<sup>157</sup> In particular, this activity does not require DataLink or indeed any party to climb the pole or to modify, move or interfere in any way with existing electrical or ICT facilities on the pole. Indeed, it is following receipt of the results of the pre-permit survey that DataLink determines whether work must be done on the pole, including modifying, moving or interfering with the existing electrical or ICT facilities (whether or not the pole itself must be replaced), to make it ready to accommodate the requested attachment. There is therefore no reason why such pre-permit surveys cannot be performed by persons other than DataLink or its contractors and agents.
444. The Office is aware of at least one other pole access provider, open eir in Ireland, who requires a pole access seeker to survey the poles in question and to provide certain prescribed information as part of a pole access order.<sup>158</sup> The Office considers, therefore, that requiring attachers to perform pre-permit surveys should be feasible.
445. Based on the foregoing, the Office proposes, subject to consultation, that attaching utilities or their contractors should be permitted to perform pre-permit surveys. The Office further considers that the permit application process would be more efficient if they were to do so prior to submitting permit applications, as DataLink would not be required to find its own resources to perform this step.

### Proposal for Consultation

446. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:
- a. **DataLink shall permit attaching utilities to perform pre-permit surveys prior to submitting pole attachment permit applications to DataLink.**
  - b. **These pre-permit surveys shall consist of visual surveys only and may be subject to reasonable terms and conditions such as a requirement to give DataLink reasonable advance notice of an intent to carry out a pre-permit survey.**
  - c. **DataLink shall publish the information it reasonably requires from a pre-permit survey in order for DataLink to process an application for a pole attachment permit.**

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<sup>157</sup> The Office notes that the definition of “Pre-Permit Survey” in Article I.BB of the Pole Sharing Agreements also includes “*administrative processing*” but there is no evidence at this time that this is anything other than a clerical process that should not require a significant amount of time to perform.

<sup>158</sup> See section 3.2 “Pole Survey / design by OAO” in the open eir Pole Access Industry Process Manual, version 6.0 (2019-11-01), available at: <https://www.openeir.ie/products/data/pole-and-duct-access/>

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**d. DataLink shall provide training at a reasonable cost to the persons proposing to do the Pre-Permit Surveys, and may also carry out a verification process whereby DataLink may audit a representative number of Pre-Permit Surveys to verify compliance with the requirements.**

447. The purpose of the notification requirement would be to allow DataLink and the attaching utility to coordinate the timing of the work so as to minimize interference with other work that may be taking place on or near those poles (for example, work by CUC on the electrical infrastructure).
448. *For the avoidance of any doubt, the Office's proposal that attaching utilities perform pre-permit surveys should not be considered to be authorisation for attaching utilities to climb the pole or to perform any work on the pole without DataLink's consent.*
449. The Office notes that, in order for the pre-permit survey process to be as efficient as possible, DataLink should provide attaching utilities with certain basic information about the CUC pole network. The Office considers, subject to consultation, that this information would consist, at a minimum, of the X and Y coordinates of each pole, its height, the pole number or other identifying information used by CUC or DataLink to manage the pole, and the size of the existing communications space (where known). The Office notes that, in the example of open eir mentioned earlier, pole access seekers can be provided with a .CSV file containing the X and Y co-ordinates and a barcode identifier of open eir poles.
450. Making this information available to persons who have entered into pole sharing agreements with DataLink (i.e. both current attachers and prospective attachers) would facilitate the pre-permit survey process and would allow attachers to plan their networks as efficiently and effectively as possible. This information will also assist attachers in planning batches of applications for pole attachment permits, finding alternative routes if estimated make-ready costs are not acceptable, and reducing delays from applications not being complete.
451. DataLink has already provided such information to the Office in the past. The Office, therefore, does not consider that providing it to attaching utilities, or updating it from time to time and providing the updated information to attaching utilities, will represent a significant burden on DataLink. However, the Office considers that the information may be sensitive. As a result, the Office considers it appropriate that DataLink be permitted to provide it in confidence only and the Office will not require DataLink to provide it to persons who have not entered into a pole sharing agreement.

### Proposal for Consultation

452. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:

**DataLink shall maintain an up-to-date list of all CUC utility poles, which shall include information on the X and Y coordinates, height, CUC pole number or equivalent information, and size of communications space (where known) of each such pole,**

and shall provide the list upon request to ICT licensees who have executed a master joint use pole sharing agreement with DataLink.

### **Questions for Consultation**

**QUESTION 32** Do you agree with the Office’s proposal that DataLink permit attaching utilities to perform pre-permit surveys prior to submitting pole attachment permit applications to DataLink? If not, explain in detail why you disagree.

**QUESTION 33** Do you agree with the Office’s proposal that these pre-permit surveys would consist of visual surveys only and may be subject to reasonable terms and conditions such as a requirement to give DataLink reasonable advance notice of an intent to carry out a pre-permit survey? If not, explain in detail why you disagree.

**QUESTION 34** Do you agree with the Office’s proposal that DataLink publish the information it reasonably requires from a pre-permit survey in order for DataLink to process an application for a pole attachment permit? If not, explain in detail why you disagree.

**QUESTION 35** Do you agree with the Office’s proposal DataLink provide training at a reasonable cost to the persons proposing to do the Pre-Permit Surveys, and carry out a verification process to verify compliance with the requirements? If not, explain in detail why you disagree.

**QUESTION 36** Do you agree with the Office’s proposal that DataLink maintain an up-to-date list of all CUC utility poles, which shall include information on the X and Y coordinates, height, CUC pole number or equivalent information, and size of communications space (where known) of each such pole, and shall provide the list upon request to ICT licensees who have executed a master joint use pole sharing agreement with DataLink? If not, explain in detail why you disagree.

## **II. Make-Ready Work**

453. At the present time, when DataLink receives an application for a permit to attach to a utility pole, including an application for a permit for one of its own attachments, DataLink does not do all of the work itself. Instead, it outsources aspects of the processing of permit applications and make-ready work to a third party, CUC, who in turn subcontracts at least some of the time certain parts of the make-ready work process to other persons such as UMC.
454. The Office understands that it may be appropriate for CUC, as owner of the utility pole, to undertake certain tasks relating to issuing permits and performing make-ready work on behalf of DataLink. However, the Office also notes DataLink’s submissions regarding the limits on its resources and its ability to process permit applications, and further notes the

impact of DataLink’s limited resources on the ability of ICT licensees to deploy fibre optic networks in Grand Cayman. It does not appear reasonable for DataLink to reject offers by attaching utilities to provide additional resources to DataLink, particularly when such resources might enable DataLink to process permit applications and to perform make-ready work more quickly and to generate additional revenues from providing access to the communications space on utility poles.

455. Given DataLink’s stated limited capacity to process permit applications, inclusive of performing make-ready work,<sup>159</sup> DataLink’s refusal to subcontract certain parts of the make-ready work process to a third-party contractor when requested to do so by an attaching utility is likely contributing to the inadequate rate of processing permit applications (see paragraphs 344 – 346 above) and the delays in rolling out competing fibre optic ICT networks across Grand Cayman. In the Office’s view, this is likely having the effect of limiting the efficient and harmonised utilisation of ICT infrastructure in Grand Cayman and the promotion of competition in the provision of ICT services or ICT networks.
456. This does not mean, however, that DataLink should be required to subcontract this make-ready work on different terms and conditions to different third parties.
457. The Office notes that section 65 (5) of the ICT Act requires DataLink to provide infrastructure sharing services “*at reasonable rates, terms and conditions which are not less favourable than those provided to - (a) any non-affiliated supplier; (b) any subsidiary or affiliate of the licensee; or (c) any other part of the licensee’s own business.*” The Office considers, without deciding, that DataLink may be in breach of this requirement when it refuses to subcontract certain parts of the make-ready work process to a third-party contractor when requested to do so by an attaching utility, particularly when DataLink is aware that CUC subcontracts those same parts of the make-ready work process to other third parties.
458. However, the Office also notes DataLink’s position that “*DataLink and CUC will not entertain third parties working on the electrical infrastructure (owned by CUC) without them being under the direct supervision and control of CUC.*”<sup>160</sup> The Office is of the view that where the make-ready work affects electrical facilities on the pole, the person performing the make-ready work should do so on behalf of DataLink under the same terms and conditions as DataLink’s other contractors performing make-ready work which affects electrical facilities on the pole. This means that the person performing the make-ready

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<sup>159</sup> See, for example, paragraph 38 of DataLink’s 2016 response to ICT Consultation 2016-2 (“resources for processing permits and performing make ready work are and will always be finite”), as well as page 7 (“Timeframes are only possible with a maximum number of applications due to finite resources. ... Permits should be applied for in batches of no more than 25 poles each with a maximum total of 300 Poles applications per month. This limit is an aggregate limit for all attaching utilities.”) and page 9 (“...CUC’s maximum resource capability of 300 permits per month...”) of DataLink’s 21 April 2017 Working Group position paper. See also Article VI (“Permit Application Procedures”), paragraph F (“DataLink’s Processing Obligations”) in the draft Pole Sharing Agreement proposed by DataLink with its 21 April 2017 Working Group position paper.

<sup>160</sup> Page 11 of DataLink’s 16 June 2017 Working Group response paper.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

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work must be suitably-qualified and certified and must do so under contract to CUC and under the supervision and control of CUC personnel.

459. The Office is of the view that only suitably-qualified persons should be permitted to perform work on utility poles. The Office notes that these qualifications may vary, depending upon whether the work affects the electrical facilities on the pole, whether it is only related to ICT make-ready work, or whether it is limited to attaching communications cables to the communication space on the pole.
460. However, the Office also considers that the level of certifications or qualifications should be appropriate for the work being performed. The Office notes DataLink's statement that "[t]o work on CUC's infrastructure in close proximity to the electrical space requires power line technician training and CUC control and supervision. ... Each person working in close proximity to the electrical space requires power line technician training" (emphasis in original).<sup>161</sup> Conversely, where the work does not involve work in close proximity to the electrical space, power line technician training should not be required, although other certifications and qualifications may be appropriate.
461. The Office further considers that Regulation 6 (5) does not require DataLink to allow third parties to perform make-ready work before DataLink has had reasonable opportunity to do the work itself (although DataLink is free to agree to other arrangements with attaching utilities). The obligation imposed on ICT licensees by the ICT Act and Regulations is to share infrastructure, not to allow other ICT licensees to have operational control over the infrastructure.

### Proposal for Consultation

462. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation:

**DataLink is required to permit third parties to perform make-ready work, including make-ready work in the electrical space or involving electrical facilities on the utility pole, provided all of the following conditions are satisfied:**

- a. **DataLink has failed to meet the timelines set out in Article VII (or equivalent) of the Pole Sharing Agreement, and DataLink and the relevant attaching utility have not agreed to new timelines;**
- b. **The attaching utility in question has requested in writing that a third-party contractor perform the work;**
- c. **The third-party contractor holds all certifications and qualifications required for the make-ready work in question (DataLink shall publish the relevant certifications and qualifications); and**

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<sup>161</sup> Page 5 of DataLink's 21 April 2017 Working Group position paper.

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- d. **Whether or not the third-party contractor is paid by the attaching utility, the third-party contractor must be under the supervision and control of CUC personnel and contractually bound to CUC.**

463. *For the avoidance of doubt, the Office's proposals set out above should not be considered general authorisation for attaching utilities or third parties to perform make-ready work, to access the utility poles, or to move electrical facilities on the utility poles.*
464. The Office considers that it is necessary to strike the right balance between the interests of ICT licensees in effective and efficient access to utility poles and the interests of the general public in the safe and reliable provision of electrical services. The Office considers it, therefore, necessary to place reasonable limits on the rights of third parties to work on the utility poles.

### Questions for Consultation

**QUESTION 37** Do you agree with the Office's proposal that DataLink be required to permit third parties to perform make-ready work, including make-ready work in the electrical space or involving electrical facilities on the utility pole, provided certain conditions are satisfied? If not, If not, explain in detail why you disagree.

**QUESTION 38** Are the proposed conditions appropriate? Are there are other relevant considerations that the Office should consider?

### G. Pre-Conditions for Pole Swaps / Replacements

465. The Office notes that DataLink's current approach appears to be to upgrade or replace a pole to one which is capable of accommodating four attachers, if an application for access to a pole requires make-ready.<sup>162</sup> It is not clear whether there is a threshold level of make-ready work that must be met before a pole will be replaced, or whether any request for access that requires make-ready work will trigger a pole replacement.
466. The Office infers from DataLink's submissions that if no application is filed (e.g. as in the case of unauthorized attachments) or if DataLink determines that the work on the pole does not require make-ready work (e.g. as in the case of the replacement of existing communications facilities with lighter or smaller communications facilities), DataLink would not upgrade / replace the pole and, as a result, no person would incur the cost of upgrading / replacing the relevant pole to one that can accommodate up to four attachers.

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<sup>162</sup> See DataLink's response to Question 5.B on pages 7 – 9 of DataLink Responses - OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

The Office notes that DataLink also indicated in its response to 2022 RFI 310 that "All Make Ready work carried out is to accommodate 4 Attaching Utility's, Make Ready is not done to accommodate a single Attaching Utility." <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-35-DataLink-Responses---OfReg-RFI-310-MR-Work-Details-Redacted.xlsx>



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467. The Office considers that the effect of this arrangement is to give an advantage to an existing attacher over a second attacher. In brief, existing attachers who are rolling out fibre cable infrastructure in competition with new attachers seeking to roll out fibre cable infrastructure would not incur costly make-ready charges if they (the existing attachers) (1) do not require significant make-ready work in order to accommodate their new facilities, or (2) do not bring their work to the attention of the Owner Utility by submitting an application. The second attachers, however, have no option but to submit requests to the Owner Utility, at which point DataLink’s current approach is likely to determine the pole must be replaced and therefore likely to require them (the second attachers) to pay to replace the pole.
468. This in turn, in the view of the Office, has the effect of limiting the promotion of competition in the provision of ICT services or ICT networks, contrary to section 69 (2) of the ICT Act, by giving an advantage to certain attachers over others and by having the effect of disincentivising applications to DataLink.
469. The Office notes that the 1996 **CUC-Flow Pole Sharing Agreement** provided for Flow to pay CUC a per-pole fee in order to create a 1-foot 8-inch communications space (5 feet less a 40-inch “safety clearance”)<sup>163</sup> on a CUC pole. If each attachment must be separated from other attachments by 12 inches, per NESC requirements,<sup>164</sup> then each such pole established under the 1996 **CUC-Flow Pole Sharing Agreement** should have sufficient vertical capacity to accommodate up to two attachers without requiring replacement of the pole, providing CUC complied with the terms of the agreement and the NESC standards.<sup>165</sup>
470. Further, section 68 (3) of the ICT Act requires that rates “*shall be sufficiently unbundled such that the licensee requesting the interconnection or infrastructure sharing service does not have to pay for network components that are not required for the interconnection or infrastructure sharing service to be provided.*” Subject to consultation, the Office is of the preliminary view that this statutory requirement means an attacher should not be *required* to pay for the replacement of a pole if the attacher’s specific request could in fact be accommodated without replacing the pole (i.e. using existing capacity on the pole and/or make-ready work other than pole replacement). In other words, under this view, a second attacher should not be *required* to pay for a new pole capable of accommodating four attachers if the existing pole has a 1-foot 8-inch communications space and is being used by only one other attacher.
471. This also appears to be Logic’s view. In their 2022 Re-Submission, Logic stated that “*Logic’s view is that an existing pole should be replaced when the existing pole is no longer*

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<sup>163</sup> See Article II, paragraph 2.1(iv) of the 1996 **CUC-Flow Pole Sharing Agreement**.

<sup>164</sup> See Article 233 of the NESC.

<sup>165</sup> The Office notes that these terms of the 1996 **CUC-Flow Pole Sharing Agreement** would only have applied to new poles and would have ceased to be applied when the Agreement ended 20 years later in 2016. The average lifespan of a pole is 40 years. There may therefore be a number of poles which pre-date the 1996 Agreement and therefore might not have been modified to include a 1’ 8” communications space.

The Office also notes that other pole strengthening measures, such as guy wires, may still be required.

*able to support the loads required by the permitted attachers. Replacement of the pole should be triggered when the last permit application request is received by DataLink.”*

472. Of course, if a third attacher were to request access to that same pole, that third attacher would be required to pay for a new pole capable of accommodating its request, as all capacity on the pole would be occupied. The Office notes that there may be occasions when it might be more cost-effective overall to replace the pole when there is only one existing attacher than when there are two existing attachers.<sup>166</sup> This means DataLink’s current approach of replacing a pole as soon as there is a request to attach by a second attacher might be the more efficient approach, particularly if there is evidence that three or more attachers may sooner or later require access to that pole. Further, the practice of refunding the make-ready costs incurred by prior attachers would help ensure the burden of pole replacement costs is shared as widely and equitably as possible.
473. Taking the all of the foregoing into account, in order to promote competition in the provision of ICT networks and ICT services but also consistent with the terms of section 68 (3) of the ICT Act, the Office proposes the following, subject to consultation.

#### Proposals for consultation

474. The Office considers there is merit in DataLink’s proposal that a pole be replaced and made ready to accommodate up to four attachers upon receipt of any request to attach to that pole. The Office **proposes**, therefore, subject to consultation, that **upon receipt of a request to attach to a CUC utility pole, DataLink should replace the pole with one capable of accommodating up to four attachers, and that the costs of pole replacement should be shared by all attachers who have included the pole in their attachment demand forecasts**, as this means they would sooner or later be requesting access.
475. The Office notes that the scope of this proposal will vary depending upon the results of the consultation on the proposal for exchange of forecasts discussed above.
476. If the demand forecasts include all attachments (new and existing), this means all ICT licensees with Pole Sharing Agreements would share the cost of the new pole (including existing attachers within the communications space and attachers outside the communications space). If the demand forecasts include only new attachments, then only future attachers would share the cost of the new poles. Existing attachers, whether or not their facilities are attached in the communications space, would not.
477. However, in either case, the Office considers this proposal would minimize the cost of fibre network rollout to all ICT licensees rolling out fibre networks and therefore would ultimately minimize the prices of ICT services to consumers. Further, the Office considers, subject to consultation, that this proposal would be consistent with its functions under the URC Act, in particular section 6(1)(c)(ii), and under the ICT Act, in particular section 9(2)(h).

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<sup>166</sup> For example, only one attacher would be required to incur the cost of detaching and reattaching its communications facilities in order to accommodate the replacement of the pole.

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478. Notwithstanding this preliminary view, however, the Office notes that section 68 (3) of the ICT Act can be interpreted in such a way as to preclude the Office *mandating* this proposal. The Office will seek below the views of the parties on the scope of the Office's jurisdiction. In the event the Office concludes that it does not have jurisdiction to mandate such a solution, the Office **proposes in the alternative**, subject to consultation, that **DataLink should first attempt to accommodate all attachment requests within the existing communications space before replacing the pole with a pole with can accommodate up to four attachers, subject to the terms discussed below.**
479. If adopted as a determination following consultation, this proposal would mean DataLink must first assess whether, given its height and class, a pole can accommodate a new attachment without replacing the pole (the Office notes other make-ready work may be required). If it can, attachment should proceed with any necessary make-ready work but without replacing the pole. In other words, the Office would not permit the practice of automatic pole replacement upon receipt of an attachment request. As noted earlier, one effect of this proposal would be that in many cases third attacher (and fourth attacher, if any) would bear the cost of replacing the pole to accommodate up to four attachers.
480. If a pole must be replaced to accommodate an attachment request (either because it has no communications space, the existing communications space is not NESC-compliant, or the existing communications space is fully occupied), the Office **proposes**, subject to consultation, that **the requester pay for the cost of replacing the pole with one that can accommodate up to four attachers** (subject to the exception discussed below). The Office considers, subject to consultation, that this approach would be consistent with section 68 (3) of the ICT Act. The Office notes that the make-ready work charges paid by this requester would be subject to the make-ready cost reimbursement process set out in the Pole Sharing Agreement.
481. As discussed above, poles that were installed pursuant to the terms of the 1996 **CUC-Flow Pole Sharing Agreement** should have a 1-foot 8-inch communications space and should therefore be able to accommodate a second attacher without replacement of the pole. If that pole does not have such a communications space, the Office is of the preliminary view that CUC may not have not fully complied with the terms of the CUC-Flow Pole Sharing Agreement. Therefore, the Office **proposes**, subject to consultation and as an exception to the "requester pays" approach set out above, that **if a pole was installed between 1996 and 2016 and does not have a 1-foot 8-inch communications space, DataLink should bear half the cost of replacing the pole unless DataLink can demonstrate that Flow declined future use of the pole in question under the terms of the 1996 CUC-Flow Pole Sharing Agreement.** The Office considers DataLink bearing half the cost of the replacement pole to be reasonable as, in these circumstances, Flow would have paid for a pole with a 1-foot 8-inch communications space under the terms of the CUC-Flow Pole Sharing Agreement and CUC would apparently not have delivered. The Office does not expect there to be a large number of such poles as the Office expects CUC to have generally complied with its contractual obligations, but notes, however, that the number of such poles will not be known until DataLink completes an audit of its pole infrastructure.

482. The Office considers that an effect of this proposal, if adopted as a determination following consultation, would be to minimize costs to existing attachers, which in turn would incentivize ICT licensees to be the second attacher in a given area. The Office notes, however, that it in effect shifts the costs of pole replacement onto the third attacher who then will have fewer opportunities for reimbursement of make-ready work charges pursuant to the reimbursement provisions of the Pole Sharing Agreement.<sup>167</sup>

### Questions for Consultation

**QUESTION 39** Do you agree with the Office’s proposal that upon receipt of a request to attach to a CUC utility pole, DataLink should replace the pole with one capable of accommodating up to four attachers, and that the costs of pole replacement should be shared by all attachers who have included the pole in their attachment demand forecasts. If not, explain in detail why not.

**QUESTION 40** In your view, does the Office has power to mandate such a solution under the current ICT Act and Regulations? Provide your reasoning in detail.

**QUESTION 41** In your view, can the parties (Owner Utilities and Attaching Utilities) agree to such a solution, in the event the Office does not have the power to mandate such a solution under the current ICT Act and Regulations? Provide your reasoning in detail.

**QUESTION 42** Do you agree with the Office’s alternative proposals that DataLink should first attempt to accommodate all attachment requests within the existing communications space before replacing the pole with a pole with can accommodate up to four attachers, that in such a case the requester should pay for the cost of replacing the pole with one that can accommodate up to four attachers, provided that, if a pole was installed between 1996 and 2016 and does not have a 1-foot 8-inch communications space, DataLink should bear half the cost of replacing the pole unless DataLink can demonstrate that Flow declined future use of the pole in question under the terms of the 1996 CUC-Flow Pole Sharing Agreement? If not, explain in detail why not.

483. When providing your views on this proposal and alternative proposals, please provide your views on how it might impact other proposals set out for consultation in this document.

### H. Standard Poles

484. As noted in paragraph 297(f) above, the Office has identified the definition of a “standard pole” as an issue to be addressed in this consultation.

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<sup>167</sup> As the third attacher would only be able to be reimbursed by a fourth attacher, who may not materialise, e.g. if the fourth attacher were to decide to build underground facilities.

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485. Three of DataLink’s Pole Sharing Agreements currently in force,<sup>168</sup> as well as the draft Working Group Pole Sharing Agreement, define the term “standard utility pole” as:

*... a forty (40) foot wood pole which is owned by either Utility for the distribution of Electric and/or Communications Service and is capable of supporting the Attachments requested by Attaching Utility.*

486. The other two Pole Sharing Agreements<sup>169</sup> define it as:

*... a utility pole which is owned by either Utility for the distribution of Electric and/or Communications Service and is configured in accordance with the Owner Utility’s current construction standards such that it is capable of supporting Attachments requested by Attaching Utility.*

487. The Office considers that this definition is not fit for purpose. For example, the earlier version of the definition refers to a 40-foot wood pole. Information provided to the Office by DataLink suggests licensees in fact attach today to poles of several different heights, not just 40-foot poles.<sup>170</sup> The Office also understands that licensees may attach to poles of different materials, not just wood. While the later version of the definition is sufficiently broad to accommodate poles of different heights and materials, it is so broad as to provide little clarity as to what is meant by a “standard pole.”

488. The Office tasked the members of the Working Group to consider this question of the appropriate definition of a standard utility pole, as part of Issue 2, and provided parties with a discussion paper setting out a number of specific questions intended to serve as a starting point for those Working Group discussions. These questions focused on a possible new definition and on who should assume liability for certain costs associated with the new “standard pole,” and led to the submissions summarised above at paragraphs 89 to 94 of Section 4.C.II.B) above.

489. The Office notes in particular DataLink’s statement that a definition of a standard pole which includes automatic provision for the attachments of four licensees “*would add efficiency on a go forward basis*” and “*was discussed at length during the IWG process*” but that “*for this to occur a change in either CUC’s Licence and/or the negotiation of payment of proportionate costs upfront would be required.*”<sup>171</sup>

490. The Office notes that DataLink proposed a new provision (Article VII (“*Make-Ready Work / Installation*”), paragraph E (“*Charge of Make-Ready for new Poles*”)) in the proposed draft Working Group Pole Sharing Agreement it submitted with its 21 April 2017 Working Group position paper which appears to address some of the cost-sharing issues discussed

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<sup>168</sup> The 2012 **CUC-DataLink Pole Sharing Agreement**, the 2013 **DataLink-Logic Pole Sharing Agreement**, and the 2016 **DataLink-Flow Pole Sharing Agreement**.

<sup>169</sup> The 2022 **DataLink-Digicel Pole Sharing Agreement** and the 2022 **DataLink-C3 Pole Sharing Agreement**.

<sup>170</sup> See, for example, Flow’s 2016 submission in response to Consultation 2016-2, at page 7.

<sup>171</sup> Pages 5-6 of DataLink’s 16 June 2017 cross-comments on the Working Group Position Papers.

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as part of Issue 2 in the Working Group. DataLink, however, also proposed to retain the earlier version definition of “standard utility pole” in that proposed draft Working Group Pole Sharing Agreement.

491. The Office considers that the earlier version of the definition does not accurately describe the range of size of poles to which licensees actually attach. The Office also considers that neither version of the definition describes a utility pole which conforms to NESC standards, given that it does not refer to such standards. Nor do they describe a pole which could accommodate four attaching utilities, that is, the parties with contractual rights to attach to CUC utility poles, without incurring material make-ready costs, given that they refer to the attachments of only one attaching utility.
492. However, the Office does not consider that, in light of the many different types of poles that attachers can currently use, the existing definition of “standard utility pole” is responsible in any material way for limiting the efficient and harmonised use of infrastructure. Nor does the Office consider that including a single, revised definition of “standard utility pole” in all Pole Sharing Agreements would be likely to facilitate access by attachers to CUC utility poles.
493. The Office also considers that any new definition would have significant implications on the apportionment of costs associated with installing such poles, particularly in light of Condition 7.1 of CUC’s T&D Licence.
494. Accordingly, the Office will not propose for consultation a revised definition of “standard utility pole” at this time.

### Questions for Consultation

**QUESTION 43** Do you agree with the Office’s preliminary view that it should not propose for consultation a revised definition of “standard utility pole”?

**QUESTION 44** If not, explain in detail the reasons why you disagree, provide a revised definition of “standard utility pole”, and describe in detail how the application of that revised definition would promote an efficient, economic and harmonised utilisation of infrastructure on Grand Cayman.

## Section 7 – Analysis of Issues Relating to the Charging Principles (Consultation 2016-2 Part C)

### A. Introduction

495. As explained in Section 5 above of this consultation paper, in the Consultation 2016-2 Part C the Authority noted that the applicable charges relating to the attachment of communication cables to utility poles,<sup>172</sup> as specified and implemented through the relevant pole sharing agreements between CUC/DataLink and the Attachers, appeared unlikely to satisfy the obligations set out in the Law and applicable regulations.
496. The Authority considered that as long as the charging principles relating to the attachment of communication cables to CUC's utility poles are cost-orientated, and therefore comply with the requirements set out at section 68 (3) of the Law and Regulation 6 of the INI Regulations, it may not be necessary to establish a FLLRIC methodology for the purpose of determining the *Quarterly Attachment Fee*.
497. The Authority noted that it appears not to be appropriate to incorporate the costs relating to Make-Ready Work in the pricing formula for calculating Quarterly Attachment Fee.
498. The Authority, however, considered that, in accordance with Section 68 of the Law, the charging principles relating to Make-Ready Work should be:
- a) based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and
  - b) sufficiently unbundled such that the Attacher requesting a new pole attachment does not have to pay for network components that are not required for the service to be provided.
499. The Authority further noted that there may be advantages for the Attacher to be at the top of the Communication Space and it, therefore, considered that it may be appropriate to establish appropriate costing principles relating to attaching and maintenance costs, which may take into account any necessary adjustments to the existing charges based on the relevant position of each Attacher in the Communication Space.
500. The Authority also considered that DataLink, as an Attacher utilising the Communication Space on CUC's utility poles in accordance with its ICT licence granted by the Authority, and as provided for in legislation, should be subject to the same terms and conditions relating to the pole sharing arrangements, including the relevant charging principles, as they apply to all the other Attachers.
501. The parties provided their responses to Consultation 2016-2 Part C, and during the Working Group processes they presented further comments on the charging principles relevant to this consultation paper.

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<sup>172</sup> Referred to as "electricity poles" in Consultation 2016-2.

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502. In a letter dated 12 October 2022, the Office asked the parties to provide additional comments or submissions in response to Parts B and C of Consultation 2016-2 and to certain additional issues, and the Office also requested that the parties respond to a number of RFIs to update and supplement the existing record. The parties provided additional comments and submissions in response to the letter dated 12 October 2022, and these are summarized in Section 5 above.

### B. Issues to be Addressed

503. Sections 68 (1) and (3) of the Act require that the costs for infrastructure sharing be “*based on cost-orientated rates that are reasonable and arrived at in a transparent manner [...]*.”

504. Regulation 6(h) of the INI Regulations sets out that charges for infrastructure sharing services 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*”.

505. The charges for infrastructure sharing services, which are relevant to this consultation paper are:

- a) Recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s utility poles, and
- b) Non-recurring charges, applicable for recovering the costs relating to Make-Ready work.

506. Based on the review of Consultation 2016-2 Part C, the Working Group, and the 2022 Re-Submissions in Section 5 of this consultation paper, and in accordance with Sections 68 (1) and (3) of the Act and Regulation 6(h) of the INI Regulations, the Office has identified the following issues to be addressed in relation to the applicable charges relating to the attachment of communication cables to CUC’s electricity poles:

ISSUE 1 Are the current recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s electricity poles:

- a. “*reasonable and arrived at in a transparent manner*”?, and
- b. “*cost orientated and 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*”?

(see section C below)

ISSUE 2 Are the current non-recurring charges, applicable for recovering the costs relating to Make-Ready work:

- a. “*reasonable and arrived at in a transparent manner*”?, and



- b. “cost orientated and 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”?

(see section D below)

ISSUE 3 What are the appropriate principles for the reimbursement of relevant make-ready work charges?

(see section E below)

- 507. The Office will address each of these in turn below and set out proposals for consultation that would address the issues that have been identified.
- 508. The Office considers that, to the extent that the fees and charges imposed by DataLink do not comply with the relevant requirements of the Act and of the INI Regulations, in particular that they be “reasonable and arrived at in a transparent manner” and “cost orientated and 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,” those fees and charges would have 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.

### C. Recurring Charges for the Attachment of Communications Cables

- 509. The main responses and submissions in relation to the question of whether recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s electricity poles, are (1) “reasonable and arrived at in a transparent manner” and (2) “cost orientated and 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”, are listed below.

#### DataLink’s views

- a) DataLink argued that the formulas and methodologies for calculating the Logic, C3 and Flow annual attachment fee in the agreements were appropriate, because the calculation is transparent and based on a fair allocation of actual costs.<sup>173</sup>
- b) DataLink submitted that there were no elements in the Annual Carrying Charge Rate formula that were also taken into account in the calculation of the Net Cost of a Bare Pole. DataLink noted that carrying charges are incurred in relation to owning and

<sup>173</sup> Paragraph 67 of DataLink’s 12 July 2016 Response to Consultation 2016-2 Part C.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

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maintaining poles regardless of the presence of pole attachments, and that they are not related to the costs for managing the licensing, permitting and attachment process borne by DataLink.<sup>174</sup>

- c) DataLink also noted that the Annual Carrying Charge Rate is based on CUC's actual costs and a formula used by the FCC which, in DataLink's view, has already been determined to be a fair allocation of costs in North American markets. DataLink further submitted that the costs considered as part of the Annual Carrying Charge Rate are increased due to the presence of attachers, that the formula adequately captures those costs, and that the calculation is fair, proportionate, measurable and transparent.
- d) DataLink submitted that the Return on Equity is the process DataLink has chosen to calculate its margin, and that it is fair, reasonable, transparent and measurable.<sup>175</sup>
- e) DataLink stated that, by using a model similar to the FCC model, it had proven its pricing mechanism is fair and reasonable and comparable to similar jurisdictions. The company noted that the management and overhead allowance is a unique requirement due to the regulatory framework in the Cayman Islands which requires DataLink to be a separate company, and submitted that its management and overhead allowance adequately and fairly captured these costs in a transparent cost based manner.<sup>176</sup>
- f) DataLink submitted that its attachment fee structure is similar to that seen in the Western hemisphere, and that they represent the on-going cost to use a portion of the asset which increases the utility's maintenance and administrative costs.<sup>177</sup>
- g) DataLink also submitted that its annual fee calculation uses data from CUC's audited financial statements for ease of reference and transparency.<sup>178</sup>
- h) Responding to C3's submission that the Net Cost of a Bare Pole was overstated, DataLink submitted that the poles values used are as per the CUC asset register.<sup>179</sup>
- i) Responding to C3's submission that CUC should not factor the cost of bare poles, DataLink noted that "*the infrastructure to which the various entities seek to attach has been constructed for the purpose of the transmission of electricity*" and "*the expected incremental value to the telecoms is then calculated*" based on the actual costs of the poles.<sup>180</sup>
- j) DataLink argued that 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,

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<sup>174</sup> Page 14 of DataLink's 21 April 2017 Working Group position paper.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-04-52-149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>175</sup> DataLink's 21 April 2017 Working Group position paper, at page 12.

<sup>176</sup> DataLink's 21 April 2017 Working Group position paper, at page 14.

<sup>177</sup> Paragraph 91 of DataLink's 12 July 2017 Response to Consultation 2016-2 Part C.

<sup>178</sup> DataLink's 16 June 2017 Working Group response paper, at page 13.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

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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.<sup>181</sup>

- k) DataLink submitted that the net book value and number of all poles, except aluminium poles, should be considered, as all other pole types are currently attached to by at least one attacher.<sup>182</sup>
- l) DataLink further noted that the Weighted Average Pole Height is the average height of all poles except aluminium poles. DataLink stated that a minimum pole height of 40 feet was required to allow space for four attachers, but all poles and pole heights were considered in the calculation of the weighted average (noting that 30 and 35 foot poles could be excluded if determined to be necessary).<sup>183</sup>
- m) DataLink submitted that the result of the '2/3' allocation factor in the space factor formula is that each attacher pays for just under 17% of the unusable space while CUC pays the largest share at 33%. This factor was based on precedent in an FCC determination.<sup>184</sup>
- n) DataLink also submitted that street lighting is part of CUC's electrical system and CCTV attachments fall outside of the communications space, and therefore should have no impact on the calculation of the annual pole attachment fee.<sup>185</sup>
- o) Responding to Digicel's submission that the costs of the poles have already been recovered within CUC's regulated prices for electricity, DataLink referred to Condition 25 of CUC's Transmission and Distribution Licence and noted that its earnings augment CUC's earnings and in turn lower CUC's fee calculations.<sup>186</sup>
- p) DataLink disagreed that it should be subject to the same charges as other attachers, as this does not reflect DataLink's unique position. DataLink pays management and other charges to CUC and pays a set fee for all attachments, whether it is DataLink's own or placed by an attacher. As it is effectively the "owner" of the communications space which it is sharing with attachers, it is not appropriate that DataLink should in effect charge itself for its own use of the shared infrastructure.<sup>187</sup>

### Flow's views

- q) Flow argued that the pricing formula is based on "*value of service*" and not incremental costs, which is not a lawful basis under the INI Regulations. Because there are no competitive constraints on DataLink's price, "*value of service*" pricing leads to unreasonable and excessive monopoly pricing.<sup>188</sup>

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<sup>181</sup> DataLink's 12 July 2016 Response to Consultation 2016-2 Part C, paragraph 71.

<sup>182</sup> DataLink's 21 April 2017 Working Group position paper, at page 10.

<sup>183</sup> DataLink's 21 April 2017 Working Group position paper, at pages 10-11.

<sup>184</sup> DataLink's 21 April 2017 Working Group position paper, at page 11.

<sup>185</sup> Ibid.

<sup>186</sup> DataLink's 16 June 2017 Working Group response paper, at page 13.

<sup>187</sup> DataLink's 12 July 2016 Response to Consultation 2016-2 Part C, paragraph 92.

<sup>188</sup> Flow's 12 July 2016 Response to Consultation 2016-2 Part C, at page 7.

<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-12-12-July-2016-Flow-Response.pdf>

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- r) Flow considered that the net cost of bare pole was overstated by 69%, based on its review of the average height and cost of installed poles included in the most recent quarterly invoices received from CUC.<sup>189</sup>
- s) Flow also considered that the “Space Factor” was mis-specified, resulting in attachers bearing an excessive portion of the “common costs” of CUC poles: the size of the “unusable space” was overstated, the space occupied by individual attachers was miscalculated, and the ‘2/3’ factor was inappropriate as it allocated 2/3 of the “unusable space” to attachers when, in Flow’s view, none of such costs were “caused” by, and therefore should be allocated to, telecommunications users.<sup>190</sup>
- t) Flow considered the charges for overhead expense to be excessive, noting that including separate elements for “Management & Overhead” and “Administrative” costs was unnecessary and resulted in artificial costs.<sup>191</sup>
- u) Flow claimed that there is no evidence that Datalink is a separate business organization, with its own staff and assets fully separate from those of CUC, and that CUC has in effect “created” costs which did not exist before (“Management & Overhead”) or which were already included in CUC’s General and Administrative costs, merely by incorporating a new subsidiary.<sup>192</sup>
- v) Flow submitted that the calculations of the “Maintenance” and “Administration” elements of the carrying charge were flawed. Both are expressed as percentages calculated as CUC totals, divided by the NBV of CUC’s total assets. Flow claimed that this approach is patently unreasonable, because if CUC decided to accelerate depreciation of its assets, or write down their asset values for reasons unrelated to the attachment activities, this would have a significant impact on the attachment Fee.<sup>193</sup>
- w) Flow further argued that the pricing formula double-counted the impact of inflation, once through the inclusion of the cost of new poles at current, not historical, prices, and again through the CUC annual carrying charge rate.<sup>194</sup>
- x) Flow submitted that the cost of capital used in the pricing formula was misstated and excessive, as it should be based on DataLink’s Weighted Average Cost of Capital (‘WACC’) instead of an arbitrary 15% Return on Equity (‘ROE’), as use of ROE results in telecommunications customers subsidizing CUC. Flow argued that the appropriate figure to be used cannot exceed 7.4%, which corresponds to the WACC from CUC’s last two Annual Reports. However, Flow argued that even a more reasonable WACC of 7.4% would result in DataLink’s telecommunications customers subsidizing CUC’s business.<sup>195</sup>
- y) Flow argued that if CUC is already covering the full costs of the utility poles and generating a return through its electricity rates, it is difficult to come to any other

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<sup>189</sup> Ibid., at page 8.

<sup>190</sup> Ibid., at pages 8-9.

<sup>191</sup> Ibid., at page 10.

<sup>192</sup> Ibid., at page 10.

<sup>193</sup> Ibid., at pages 11-12.

<sup>194</sup> Ibid., at pages 9-10.

<sup>195</sup> Ibid., at pages 12-13.

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conclusion than that DataLink’s telecommunications customers are subsidizing CUC. Flow questioned whether this is reasonable, and recommended that DataLink’s return be limited to its own assets.<sup>196</sup>

- z) Flow argued that DataLink’s “management and overhead” costs are astonishingly high for an organization which does not appear to have its own staff separate from the staff of the parent company, which does not actually maintain the poles itself, and which has three (3) customers other than itself (Flow, Logic and C3).<sup>197</sup>
- aa) Flow argued that CUC administration and distribution costs should not be included in prices paid for attachment to poles, as they were “caused” by CUC’s need for poles and not a result of use of poles by attachers.<sup>198</sup>

### Digicel’s views

- bb) Digicel submitted that rates are required to comply with Regulation 6(h). DataLink, however, justified its pricing methodology on the basis that it is a US market-based approach without justifying why it is appropriate or relevant to Grand Cayman.<sup>199</sup>
- cc) Digicel argued that the capital cost of the pole is entirely recovered within CUC’s electricity prices and is attributable to CUC’s electricity business. Digicel further argued that the attachment of telecommunications cables does not cause an incremental requirement to augment the height or strength of poles, and that any incremental cost relates solely to attaching cables.<sup>200</sup>
- dd) Digicel argued that pricing pole attachment on the basis of direct incremental costs (and excluding assets costs) would not result in electricity users subsidizing telecommunications users, but allowing CUC to recover assets costs via pole attachment prices would result in telecommunications users subsidizing electricity users.<sup>201</sup>
- ee) Digicel submitted that the optimum approach was “*a pricing regime which is neutral to the electricity sector while not burdening the telecommunications sector with costs which are unrelated to the provision of wholesale pole sharing service, i.e. allow CUC to only charge the direct incremental cost of the pole attachment*”.<sup>202</sup>

### C3’s views

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<sup>196</sup> Ibid., at page 13.

<sup>197</sup> Ibid., at page 10.

<sup>198</sup> Ibid., at page 12

<sup>199</sup> Digicel’s 21 April 2017 Working Group position paper, at page 2.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-03-57-149520183720170421DigicelWorkingGroupResponse.pdf>

<sup>200</sup> Ibid., at pages 2-3.

<sup>201</sup> Ibid., at page 3.

<sup>202</sup> Ibid., at page 3.

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- ff) C3 noted that the Annual Attachment Fee is based on the net book value of all CUC poles, which can be as high as 75', and the weighted average height of which is specified in the Agreement as 38'6, even though attaching utilities are only allowed to attach at a maximum height of 25'. C3 submitted that the net book value should be based on a pole of no more than 25' to 30' height, and of a lower class.<sup>203</sup>
- gg) Regarding the Net Cost of Bare Pole, C3 submitted it was overstated. CUC infrastructure was built to provide electricity. Only the cost of a pole sufficient for telco-only use capable to carrying four attachers should be used. C3 further submitted that telcos only attach at one point in the three-foot communication corridor, and allocating the full cost of a pole is inappropriate.<sup>204</sup>
- hh) C3 argued the pricing formula should be based on the cost of the type of pole when it was installed, and should not have a CPI escalation clause. The annual attachment fee should be based on the type and height of the pole to which the attaching utility has attached.<sup>205</sup>
- ii) C3 submitted that several elements of the Space Factor were problematic, and due to the allocation of space to the communication corridor, attachers were subsidizing CUC's infrastructure. In addition, the "space occupied" should be a minimum of nine inches, and only one attachment should be permitted in that space.<sup>206</sup>
- jj) C3 disagreed with the inclusion of "unusable space" as it would exist regardless of the presence of the communications corridor.<sup>207</sup>
- kk) C3 argued that DataLink's statement that its parent company demands a profitable return indicated non-compliance with cost-orientation in Regulation 6(h). C3 submitted that DataLink's methodology created unnecessary pricing structures, and submitted that the ROE of 15% was "*extremely aggressive, considering zero capital investment, minimal risks...*". C3 further submitted that inclusion of the Inflation Rate was unreasonable, as the majority of the costs and profits have been recovered through CUC's financial structure.<sup>208</sup>
- ll) In response to DataLink's submission regarding the effect of the "2/3" allocation factor, C3 urged OfReg to be clear as to the type of pole the FCC determination was based on, noting that the FCC identifies three types of pole ownership.<sup>209</sup>

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<sup>203</sup> See pages 2-3 of C3 Response to RFIs for ICT Consultation 2016-2\_24 Oct 2022.pdf.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-00-57-17-C3-Response-to-RFIs-for-ICT-Consultation-2016-224-Oct-2022.pdf>

<sup>204</sup> C3's 21 April 2017 Working Group position paper, at page 12.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-59-57-1495201977201704InfinityWorkingGroupResponse.pdf>

<sup>205</sup> C3's 12 July 2016 Response to Consultation 2016-2 Part C, page 9.

<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-44-12-July-2016-Infinity-Response.pdf>

<sup>206</sup> C3's 21 April 2017 Working Group position paper, at pages 13-14.

<sup>207</sup> Ibid., page 14

<sup>208</sup> Ibid., at pages 14-15.

<sup>209</sup> C3's 20 June 2017 Working Group response paper, at page 6.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-00-09-149805241620170620IBLWorkingGroupResponse.pdf>

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- mm) In response to DataLink's submission regarding the impact of street lighting and CCTV attachments, C3 submitted that CUC is generating revenue from these attachments, and that these attachments must factor into wind loading calculations (along with CUC's own fibre cables). They should therefore be considered in the annual attachment fees as well as guying of poles.<sup>210</sup>
- nn) C3 further submitted that OfReg "needs to determine if CUC is allowed to create a profit centre from Telecom attachments on its poles or simple a cost recovery model", and that "a FLLRIC model should be adopted for this infrastructure as well".<sup>211</sup>
- oo) C3 also submitted that the Pole Sharing Agreement should not have an annual escalation clause tied to the CPI of the Cayman Islands as, if there were a catastrophic event, "the annual attachment fees could skyrocket." C3 further submitted that "At the very least any upward adjustment should require the Regulators' approval every 3-5 years and not automatic".<sup>212</sup>

### The Office's observations

510. The Office notes that DataLink appears to argue that the recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC's electricity poles, are (1) "reasonable and arrived at in a transparent manner" and (2) "cost orientated and 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", because, among other things:
- a) by using a model similar to the FCC model, DataLink had proven its pricing mechanism is fair and reasonable and comparable to similar jurisdictions;
  - b) the result of the '2/3' allocation factor in the space factor formula is that each attacher pays for just under 17% of the unusable space while CUC pays the largest share at 33%;
  - c) the capital cost of the pole is entirely recovered within CUC's electricity prices and is attributable to CUC's electricity business, and the attachment of telecommunications cables does not cause an incremental requirement to augment the height or strength of poles, and that any incremental cost relates solely to attaching cables;
  - d) the annual fee calculation uses data from CUC's audited financial statements for ease of reference and transparency;
  - e) the cost of bare poles is based on the actual costs of the poles;

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<sup>210</sup> Ibid.

<sup>211</sup> See page 3 of C3 Response to RFIs for ICT Consultation 2016-2\_24 Oct 2022.pdf.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-00-57-17-C3-Response-to-RFIs-for-ICT-Consultation-2016-224-Oct-2022.pdf>

<sup>212</sup> Ibid.

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- f) given the costs considered as part of the Annual Carrying Charge Rate are increased due to the presence of attachers, the pricing formula adequately captures those costs, and the calculation is fair, proportionate, measurable and transparent;
  - g) the Annual Carrying Charge Rate is based on CUC's actual costs and a formula used by the FCC which, in DataLink's view, has already been determined to be a fair allocation of costs in North American markets;
  - h) the Return on Equity is the process DataLink has chosen to calculate its margin, and it is fair, reasonable, transparent and measurable; and
  - i) since DataLink is effectively the "owner" of the communications space which it is sharing with attachers, it is not appropriate that DataLink should in effect charge itself for its own use of the shared infrastructure.
511. On the other hand, the other parties, namely Flow, Digicel and C3, appear to argue that the recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC's electricity poles, are not (1) "*reasonable and arrived at in a transparent manner*" and (2) "*cost orientated and 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*", because, among other things:
- a) the pricing formula is based on "value of service" and not incremental costs, which leads to unreasonable and excessive monopoly pricing;
  - b) there is no evidence that Datalink is a separate business organization, with its own staff and assets fully separate from those of CUC, which suggests that CUC has in effect "created" costs which did not exist before;
  - c) CUC is already covering the full costs of the utility poles and generating a return through its electricity rates, which suggests that DataLink's telecommunications customers are subsidizing CUC;
  - d) adopting the pricing methodology on the basis that it is a US market-based approach may not be appropriate or relevant to Grand Cayman;
  - e) the "Space Factor" was mis-specified, resulting in attachers bearing an excessive portion of the "common costs" of CUC poles;
  - f) several elements of the Space Factor were problematic, and due to the allocation of space to the communication corridor, attachers were subsidizing CUC's infrastructure;
  - g) regarding the effect of the "2/3" allocation factor, it needs to be clear what type of pole the FCC determination was based on, considering that the FCC identifies three types of pole ownership;
  - h) the cost of capital used in the pricing formula was misstated and excessive, as it should be based on DataLink's Weighted Average Cost of Capital ('**WACC**') instead of an arbitrary 15% Return on Equity ('**ROE**');



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- i) the charges for overhead expense are excessive;
  - j) the net cost of a bare pole was overstated by 69%;
  - k) only the cost of a pole sufficient for telco-only use capable to carrying four attachers should be used; and
  - l) calculating the Annual Attachment Fee based on the net book value of all CUC poles, may not be a reasonable approach to determining the recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC's utility poles.
512. The Office notes that there appears to be no common views between all the licenses to ascertain whether or not the recurring charges are (1) *“reasonable and arrived at in a transparent manner”* and (2) *“cost orientated and 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”*.
513. In particular, the Office notes the comments received from Flow, Digicel and C3, relating the current pricing formula for calculation of the *“Annual Attachment Fee”*. These submissions question the appropriateness of the various elements of the pricing formula.
514. As specified in Appendix A of the various Pole Sharing Agreements (‘MPJUAs’), as executed between DataLink and each Attacher,<sup>213</sup> the current pricing formula multiplies the following elements together to derive the *“Annual Attachment Fee”*:
- a) Net Cost of a Bare Pole – its value is specified in each Pole Sharing Agreements, it varies between each Pole Sharing Agreement, and it is *“based on 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”*;<sup>214</sup>
  - b) Space Factor – its value is fixed, for example at ██████████%,<sup>215</sup> using a formula for *“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”*, and as derived from the following values:
    - i) Unusable space on the pole = 24.5 feet
    - ii) Space occupied by the Attachment = 9 inches<sup>216</sup>

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<sup>213</sup> The 2013 **DataLink Logic Pole Sharing Agreement**, the 2022 **DataLink- Digicel Pole Sharing Agreement** and the 2022 **DataLink C3 Pole Sharing Agreement**.

<sup>214</sup> “Net Cost of a Bare Pole” varies in the Pole Sharing Agreements between CI \$ ██████████, CI \$ ██████████ and CI \$ ██████████, depending on when the respective Pole Sharing Agreements were executed.

<sup>215</sup> “Space Factor” varies in Pole Sharing Agreements between ██████████% and ██████████%.

<sup>216</sup> “Space occupied by the Attachment” varies in Pole Sharing Agreements between 6 inches and 9 inches.

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- iii) Number of Attachers = 4
  - iv) Weighted average height of all poles = 38.6 feet<sup>217</sup>
  - v) 2/3
- c) CUC's Annual Carrying Charge Rate – its value is specified in each Pole Sharing Agreement, for example at ██████%,<sup>218</sup> based on the sum of the following component percentage values:
- i) Administrative = ██████%,<sup>219</sup> this value is “based on total administrative and general expenses for the fiscal year divided by the net book value of total assets as of fiscal year end, as reported in the most recent annual financial statements of the Owner Utility”
  - ii) Maintenance = ██████%,<sup>220</sup> this value is “based on total distribution expenses for the fiscal year divided by the net book value of distribution system assets as of fiscal year end, as reported in the most recent annual financial statements of the Owner Utility”
  - iii) Depreciation = ██████%,<sup>221</sup> this value is “based on the annual depreciation expense of all poles divided by the net book value of all poles as of the fiscal year end. Depreciation and net book value for purposes of this calculation exclude any amounts associated with the Electric Utility equipment attached to the poles”
  - iv) Return on Equity = ██████%
- d) Inflation – its value is set at ██████% for the first year of a Pole Sharing Agreement, it is “based on readily available external data pertaining to the Cayman Islands annual Consumer Price Index (“CPI”)” but “declines in CPI will not impact this calculation”, and
- e) Management & Overhead – the value is set at ██████%.

515. Therefore, the pricing formula in the Pole Sharing Agreements result in the “Annual Attachment Fee” being set, for the initial period of the contracts, at CI \$ ██████, CI \$ ██████ or CI \$ ██████, depending on the specific values for each element of the pricing formula, as specified in the respective contracts.

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<sup>217</sup> “Weighted average height of all poles” varies in Pole Sharing Agreements between 38.0 feet and 38.6 feet.

<sup>218</sup> “Annual Carrying Charge Rate” varies in Pole Sharing Agreements between ██████% and ██████%.

<sup>219</sup> “Administrative” varies in Pole Sharing Agreements between ██████%, ██████% and ██████%.

<sup>220</sup> “Maintenance” varies in Pole Sharing Agreements between ██████%, ██████% and ██████%.

<sup>221</sup> “Depreciation” varies in Pole Sharing Agreements, between ██████%, ██████% and ██████%.

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516. The Office notes that without access to detailed information from CUC's financial accounts, it is not possible for the Office to determine whether the values specified for various elements of the pricing formula produce recurring charges that are reasonable and are arrived at in a transparent manner. In particular, it is not possible to determine whether the values set for "*Net Cost of a Bare Pole*", and the specific percentage values set for "*Administrative*", "*Maintenance*" and "*Depreciation*", are reasonable and arrived at in a transparent manner, for the purposes of determining the cost-orientated rates for attachment of communication cables onto CUC's utility poles.
517. Further, the Office notes that the pricing formula, as specified in the Pole Sharing Agreements, does not provide sufficient transparency regarding some other elements of the pricing formula, namely:
- a) the value specified as ██████% for "*Management & Overhead*", and
  - b) the value specified as ██████% "*Return on Equity*".
518. DataLink submitted that the "*Management & Overhead*" allowance "*is a unique requirement due to the regulatory framework in the Cayman Islands which requires DataLink to be a separate company from its parent*" and that it "*adequately and fairly captures these costs in a transparent cost based manner.*"<sup>222</sup> However, the Office has not received any specific evidence from DataLink to demonstrate that the use of the value of ██████% as "*Management & Overhead*", in the pricing formula for calculation of the "*Annual Attachment Fee*", is justified.<sup>223</sup>
519. Further, there appears to be no justification for the use of the "*Return on Equity*" value of ██████% in the formula for calculation of "*CUC's Annual Carrying Charge Rate*".
520. As noted in Flow's submission, it may be more appropriate to apply the cost of capital value based on, as Flow argued, "*DataLink's Weighted Average Cost of Capital ('WACC') instead of an arbitrary 15% Return on Equity*".
521. The Office's view is, subject to consultation, that the relevant rate of return on capital should reflect the risk associated with the relevant pole infrastructure assets used by the Attachers for attachment of communication cables onto CUC's utility poles, and shared between telecommunications and electricity users.
522. For the sake of clarity, in the specific cases where the relevant pole infrastructure assets have been constructed and fully paid for through non-recurring charges relating to Make-Ready work, such assets should be excluded from the calculation of the recurring charges, applicable for recovering the costs relating to the attachment of communication cables onto CUC's utility poles. Including such assets in the calculation of the recurring charges

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<sup>222</sup> DataLink – Working Group position paper, dated 21 April 2017, paragraph 4.5.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-04-52-149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>223</sup> See the Office's assessment of DataLink's net profit margin observed over the period 2018-2021, as discussed below in paragraph 575.

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would amount to double-recovery of their costs, which is not consistent with the pricing principles in the Act and the INI Regulations. This view is also consistent with the view expressed by the FCC when stating the following:

*"...it is important to ensure that the attaching entity is not charged twice for the same costs, once as up-front "make-ready" costs and again for the same costs if they are placed in the corresponding pole line capital account that is used to determine the recurring attachment rate."*<sup>224</sup>

523. The Office further notes that DataLink pricing formula may have the effect of double counting of the inflation. This is because it appears that the value for "Return on Equity" is expressed in nominal terms, and not in real terms, which means the inflation is included in the "Return on Equity" value of [REDACTED] % as well as in the "Inflation" value of [REDACTED] %.
524. The Office also notes that in response to the question "Is the ROE (or the cost of capital) determined at nominal or real values, and if so, determine whether there is a double-counting for inflation in the proposed Annual Attachment Fee formula", DataLink provided the following response:<sup>225</sup>

*"ROE is the process DataLink has chosen to calculate its margin. The calculation is fair, reasonable, transparent and measurable."*

525. The Office notes that DataLink did not answer the question whether the "Return on Equity" value of [REDACTED] % is expressed in nominal or real terms. Therefore, the Office has not received any specific evidence from DataLink to demonstrate that the combination of the "Return on Equity" value and the "Inflation" value in DataLink pricing formula, does not create the effect of double counting of the inflation.

**The '2/3' factor**

526. DataLink submitted that the result of the "2/3" allocation factor in the space factor formula is that each attacher pays for just under 17% of the unusable space while CUC pays the largest share at 33%.<sup>226</sup>
527. The Office understands that the percentage values in DataLink's statement reflect the situation where four attachers share 2/3 of the costs associated with the unusable space, which means each attacher pays around 17% of the costs, and CUC shares 1/3 of the costs. This suggests that CUC recovers at a minimum 33%, while the attachers, as a

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<sup>224</sup> Notice of Proposed Rulemaking in the Matter of Amendment of Rules and Policies Governing Pole Attachments (CS Docket No. 97-98, FCC 97-94), paragraph 122, available at <https://transition.fcc.gov/Bureaus/Cable/Orders/1998/fcc98020.txt>

<sup>225</sup> DataLink – Working Group position paper, dated 21 April 2017, paragraph 4.4.2. <https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-04-52-149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>226</sup> DataLink's 21 April 2017 Working Group position paper, at page 11.

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class, would pay up to 67%, of the costs associated with the unusable space of the pole, as shown in the table below.<sup>227</sup>

Number of attachers	0	1	2	3	4
Share of the costs associated with the unusable space of the pole paid by CUC	100.00%	83.25%	66.50%	49.75%	33.00%
Share of the costs associated with the unusable space of the pole paid by the attachers as a class	0.00%	16.75%	33.50%	50.25%	67.00%

528. The term “unusable space” is not defined in the Pole Sharing Agreements, but DataLink has defined it as the portion of the pole “*from the end point (within the ground) of the pole to the bottom of the communications space*”<sup>228</sup> and it is set at 24.5 feet in the Pole Sharing Agreements. The Office also notes DataLink’s statement that “*the infrastructure to which the various entities seek to attach has been constructed for the purpose of the transmission of electricity.*”<sup>229</sup>
529. In other words, the “unusable space” would be required for electricity purposes, even if the pole had not been constructed to accommodate telecommunications uses. It is therefore not incremental to the needs of telecommunications attachers. Further, while the Office considers it appropriate that attachers contribute to the fixed and common costs of the pole, it is not clear that attachers should pay up to 67% of the relevant costs of the unusable space on a utility pole, which was “*constructed for the purpose of the transmission of electricity.*” It is, therefore, not clear that “2/3” is the appropriate factor to apply in these circumstances.
530. Further, the Office understands that the use of the “2/3” factor in the pricing formula is adopted by DataLink from the FCC model. However, the Office notes that the justification for the use of this factor in the FCC model had been questioned by the FCC. More specifically, the FCC provided the following explanation in relation to the rate formula applied to pole attachments used by “*telecommunications carriers*”:

<sup>227</sup> If CUC’s share of the cost is 33% and the remaining 67% of the costs are shared equally between four attachers, each attacher will have to share 16.75% of the costs. If there is only one attacher on CUC’s utility poles, CUC will have to pay for 83.25% of the costs, while the remaining 16.75% is paid by the attacher.

<sup>228</sup> DataLink’s Working Group position paper dated 21 April 2017, page 10. DataLink also stated “*This is the portion of the pole that is supporting all of the attachments and is therefore used by all attaching utilities and the owner utility. This calculation is the equivalent of the calculation used in the FCC methodology.*” The Office notes the FCC has stated “*The term unusable space “means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.” 47 C.F.R. § 1.1402(l). Usable space, in turn, “means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility.” 47 C.F.R. § 1.1402(c).*” FCC 2011 Pole Attachment Order, footnote 472 at paragraph 156.

<sup>229</sup> Page 13 of DataLink’s 16 June 2017 cross-comments on the Working Group Position Papers.

<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

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*“By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate methodologies to determine the maximum rates for pole attachments – one applies to pole attachments used by telecommunications carriers (the telecom rate formula), and the other to pole attachments used “solely to provide cable service” (the cable rate formula).”<sup>230</sup>*

*“The cable and telecom rate formulas both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies. Under the cable rate formula, the costs of unusable space are allocated in the same way. Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.”<sup>231</sup>*

***“The formula itself and the basis for Congress’ selection of the two-thirds allocator for unusable space are not explained in the legislative history; rather it appears to be the unexplained result of a political compromise.”***  
[emphasis added]<sup>232</sup>

531. Based on this historic background around the use of the “2/3” factor in the FCC pole attachment pricing model, it is questionable whether the use of the “2/3” factor in DataLink’s pricing formula for calculation of the “*Annual Attachment Fee*” is effectively justified. Moreover, it is not just the use of the “2/3” factor but also the FCC pole attachment pricing model itself, which may not be justified for calculation of the “*Annual Attachment Fee*”.

### The FCC pole attachment pricing model

532. The Office has examined more carefully the historic background of the FCC pole attachment pricing model, which evolved in accordance with specific policy objectives that the FCC had to take into account over a long period of time, as explained below.
533. Starting in 1978, with the Communications Act Amendments of 1978 (addition of section 224 to the Communications Act),<sup>233</sup> the United States Congress (the Congress) directed the FCC to “*ensure that the rates, terms and conditions for pole attachments by cable television systems were just and reasonable.*”<sup>234</sup>
534. Those legislative changes were introduced in the market “*in an effort to curb anticompetitive practices by utilities in connection with cable television service.*”<sup>235</sup> More

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<sup>230</sup> FCC 2011 Pole Attachment Order (see footnote 132 above), paragraph 131 (footnotes omitted) – available at <https://docs.fcc.gov/public/attachments/FCC-11-50A1.pdf>.

<sup>231</sup> FCC 2011 Pole Attachment Order, footnote 397 at paragraph 131.

<sup>232</sup> FCC 2011 Pole Attachment Order, paragraph 163 (footnotes omitted). It is noted that the FCC cited in particular a submission by one of the submitting parties that “*the [King County Superior Court] concluded that Congress’s final adoption of the FCC Telecom Rate allocation was ‘primarily a political compromise, and not based on cost accounting issues.’*”

<sup>233</sup> See the current version of 47 U.S. Code § 224 at <https://www.law.cornell.edu/uscode/text/47/224>

<sup>234</sup> FCC 2011 Pole Attachment Order, paragraph 127.

<sup>235</sup> <https://casetext.com/case/kansas-city-power-v-american-fiber-systems-inc>

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specifically, the owners of utility poles often prevented cable operators “to secure either pole attachments or channel service offerings” or were “imposing unreasonably high rents for pole attachments.”<sup>236</sup>

535. Section 224(d)(1) of the Communication Act defined a just and reasonable rate as “ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs.”<sup>237</sup>
536. The FCC provided further clarification as to what constituted the additional costs and the fully allocated costs, as follows:

*“Section 224 ensures a utility pole owner just and reasonable compensation for pole attachments made by telecommunications carriers. When Congress in 1978 directed the Commission to regulate rates for pole attachments used for the provision of cable service, Congress established a zone of reasonableness for such rates, bounded on the lower end by incremental costs and on the upper end by fully allocated costs. In the pole attachment context, incremental costs are those costs that the utility would not have incurred “but for” the pole attachments in question. Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments. The Commission has noted that, in arriving at an appropriate rate between these two boundaries, it is important to ensure that the attaching entity is not charged twice for the same costs, once as up-front “make-ready” costs and again for the same costs if they are placed in the corresponding pole line capital account that is used to determine the recurring attachment rate.”<sup>238</sup>*

537. In 1996, the Congress expanded the reach of section 224 through the Telecommunications Act of 1996,<sup>239</sup> with the objective “to promote infrastructure investment and competition.”<sup>240</sup> The Congress “expanded the coverage of the act to cover not only cable television systems”<sup>241</sup>, by adding the reference to “provider[s] of telecommunications service[s]” as a “category of attachers entitled to pole attachments at just and reasonable rates, terms and conditions under section 224.”<sup>242</sup>
538. In addition, a new section 224(e) was introduced to provide a methodology “to govern the charges for pole attachments used by telecommunications carriers to provide

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<sup>236</sup> Morrissey, John P. (1988) “Comments: Equal Access to Pole Attachment Agreements: Implications of Telephone Company Participation in the Cable Television Market,” *University of Baltimore Law Review*: Vol. 18: Iss. 1, Article 7, available at <https://scholarworks.law.ubalt.edu/ublrl/vol18/iss1/7/>

<sup>237</sup> FCC 2011 Pole Attachment Order, paragraph 127.

<sup>238</sup> Notice of Proposed Rulemaking in the Matter of Amendment of Rules and Policies Governing Pole Attachments (CS Docket No. 97-98, FCC 97-94), paragraph 122, available at <https://transition.fcc.gov/Bureaus/Cable/Orders/1998/fcc98020.txt>

<sup>239</sup> <https://www.fcc.gov/general/telecommunications-act-1996>

<sup>240</sup> FCC 2011 Pole Attachment Order, paragraph 130.

<sup>241</sup> <https://www.fcc.gov/general/telecommunications-act-1996>

<sup>242</sup> FCC 2011 Pole Attachment Order, paragraph 130 (footnote omitted).

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*telecommunications services'*<sup>243</sup>, with the specific requirement that the cost of providing a space on a pole, other than usable space, shall be apportioned based on the "2/3" factor.

539. Under section 224, charges for pole attachments used by telecommunications carriers were initially established based on the same methodology that applied to pole attachments by cable operators. After the initial five-year period, the changes introduced through the Telecommunications Act of 1996 gave rise to two separate methodologies to determine the maximum rates for pole attachments, one that is applied to pole attachments by telecommunications carriers (the telecom rate formula), and another one that is applied to pole attachments by cable operators (the cable rate formula).
540. More specifically, the two formulas differ in the way they treat the allocation of the costs associated with the unusable space on a pole, as the FCC explained:

*"The cable and telecom rate formulas both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies. Under the cable rate formula, the costs of unusable space are allocated in the same way. Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner."*<sup>244</sup>

541. Accordingly, the two formulas created a situation where the telecommunications carriers were paying higher rates for attachments on utility poles than the cable operators, as the FCC explained:

*"Under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole. Under the telecom rate formula, each attacher, other than the pole owner, pays between about 11.2% of the annual cost of a pole in urban areas to about 16.9% in non-urban areas. These rates are based on the Commission's rebuttable presumptions of 37.5 feet for the height of a pole, 24 feet for the unusable space on a pole, 13.5 feet for the usable space, 1 foot for the space occupied by an attachment, 3 attachers in non-urban areas, and 5 attachers in urban areas."*<sup>245</sup> [emphasis added]

542. The Office notes here that DataLink's pricing formula is based on a methodology that is broadly similar to the telecom rate formula, with some notable exceptions,<sup>246</sup> and it produces the "Space factor" of around ██████%, which is broadly similar to the percentage that was applied by the FCC under the telecom rate formula in non-urban areas.

543. In a Notice of Proposed Rulemaking issued in 2007, the FCC sought to address the difference in pole attachment rates between cable operators and telecommunications

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<sup>243</sup> FCC 2011 Pole Attachment Order, paragraph 130 (footnote omitted).

<sup>244</sup> FCC 2011 Pole Attachment Order, footnote 397 at paragraph 131.

<sup>245</sup> FCC 2011 Pole Attachment Order, footnote 399.

<sup>246</sup> The use of Inflation rate (initially set at ██████%) and the Management & Overhead rate (set at ██████%), as well as the use of the Return on Equity



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carriers. The FCC recognized “*the importance of promoting broadband deployment and the importance of technological neutrality*”, it concluded that “*all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service*”, and it proposed to introduce a uniform rate that “*should be higher than the current cable rate, yet no greater than the telecommunications rate*”<sup>247</sup>

544. However, in another Notice of Proposed Rulemaking issued in 2010, the FCC changed its position and declined to adopt the uniform rate because increasing the pole attachment rates that cable operators pay “*would come at the cost of increased broadband prices and reduced incentives for deployment.*”<sup>248</sup>
545. In the Pole Attachment Order issued in 2011 following the Further Notice, the FCC adopted a new telecom rate within a range of possible rates “*from the current application of the telecom rate formula at the upper end, to an alternative application of the telecom rate formula based on cost causation principles at the lower end.*” This new telecom rate was introduced with the objective “*to balance the goals of promoting broadband and other communications services with the historical role that pole rental rates have played in supporting the investment in pole infrastructure.*”<sup>249</sup>
546. Accordingly, with the FCC 2011 Pole Attachment Order, the FCC recognized that “*telecommunications attachers have historically contributed to the capital costs of the pole network, and that the new telecom rate should not “unduly burden [utility] ratepayers.*”<sup>250</sup>
547. By seeking to address what proportion of the fully allocated costs should be considered appropriate for the upper end of the new telecom rate formula, the FCC defined the appropriate costs as “*66 percent of fully-allocated costs in urban areas and 44 percent in non-urban areas.*”<sup>251</sup>
548. The alternative application, which represented the lower end of the new telecom rate formula, is based on the “cost causation principle”, whereby the attacher is required to recover the costs for which it is “*causally responsible*”, which meant that a utility pole owner would be allowed to “*recover its administrative and maintenance costs through the telecom rate, but not capital costs other than those associated with make-ready expenses.*”<sup>252</sup>

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<sup>247</sup> FCC Notice of Proposed Rulemaking, WC Docket No. 07-245, FCC 07-187 (November 30, 2007) (“**Pole Attachment Notice**”), paragraph 36, cited at FCC Report and Order and Order on Reconsideration, WC Docket No. 07-245 (April 7, 2011), paragraph 133 (footnotes omitted).

<sup>248</sup> FCC Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, FCC 10-84 (May 20, 2010) (“**Further Notice**”), paragraph 118, cited at FCC Report and Order and Order on Reconsideration, WC Docket No. 07-245 (April 7, 2011), paragraph 134 (footnotes omitted).

<sup>249</sup> FCC Report and Order and Order on Reconsideration, WC Docket No. 07-245 (April 7, 2011), paragraph 135.

<sup>250</sup> See paragraph 10 at <https://www.federalregister.gov/documents/2016/02/03/2016-01182/pole-attachment-rates>

<sup>251</sup> Ibid.

<sup>252</sup> See paragraph 11 at <https://www.federalregister.gov/documents/2016/02/03/2016-01182/pole-attachment-rates>

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549. However, soon after the FCC 2011 Pole Attachment Order was issued, “a *petition for reconsideration or clarification of the rules adopted in the 2011 Pole Attachment Order, asking the Commission either to clarify that 66 percent and 44 percent are ‘illustrations’ of the new rule, or to revise the rules to ‘provide corresponding cost adjustments to other entity counts.’*”<sup>253</sup>
550. In 2015, in response to that petition for reconsideration or clarification of the rules adopted in the FCC 2011 Pole Attachment Order, the FCC introduced “*new cost allocators for poles with 2 attaching entities (0.31 percent of costs) and 4 attaching entities (0.56 percent of cost).*”<sup>254</sup>
551. After taking into account such a complex historic background around the FCC pole attachment pricing model, the Office considers that following questions need to be addressed:
- a) Is DataLink’s pricing formula for calculation of the “*Annual Attachment Fee*” an appropriate pricing methodology for determining cost-oriented prices for attachment of communications cables onto CUC’s utility poles?
  - b) If DataLink’s pricing formula for calculation of the “*Annual Attachment Fee*” is not an appropriate pricing methodology, what other methodology should be used for determining cost-oriented prices for attachment of communications cables onto CUC’s utility poles?
  - c) If DataLink’s pricing formula for calculation of the “*Annual Attachment Fee*” is an appropriate pricing methodology, should any changes be made in the various elements of the formula, namely:
    - i) Net Cost of a Bare Pole.
    - ii) Space Factor,
    - iii) CUC’s Annual Carrying Charge Rate,
    - iv) Inflation, and
    - v) Management & Overhead.

**Benchmarking recurring charges**

552. The Office has sought to assess whether the pole attachment rates derived, directly or indirectly, from the FCC pole attachment pricing model, are similar to the recurring charges based on DataLink pricing formula for calculation of “*Annual Attachment Fee*”.

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<sup>253</sup> See paragraph 2 of FCC Order on Reconsideration, WC Docket No. 07-245, FCC 15-151 (November 24, 2015) (“**FCC 2015 Order on Reconsideration**”), available at <https://www.federalregister.gov/documents/2016/02/03/2016-01182/pole-attachment-rates>

<sup>254</sup> FCC 2015 Order on Reconsideration, paragraph 3; at <https://www.federalregister.gov/documents/2016/02/03/2016-01182/pole-attachment-rates>

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553. The Office has, therefore, examined a survey of pole attachment rates in the USA published in 2018.<sup>255</sup> This survey showed the following average values for pole attachment rates across the USA:
- a) Unregulated wired pole attachment rates had a mean value of US\$21.86 per annum and a median value of US\$20.01 per annum, and
  - b) Regulated wired pole attachment rates had a mean value of US\$13.97 per annum and a median value of US\$9.90 per annum, of which:
    - i) FCC regulated wired pole attachment rates had a mean value of US\$14.11 per annum and a median value of US\$9.21 per annum, and
    - ii) State regulated wired pole attachment rates had a mean value of US\$13.77 per annum and a median value of US\$10.40 per annum.
554. The Office notes that the recurring charges, which are specified as “*Quarterly Attachment Fee per Attaching Utility*”, are now set at C\$ [REDACTED] since [REDACTED], in accordance with DataLink’s response to RFI 103. This means that the recurring charges for pole attachments now amount to C\$ [REDACTED] per annum per each Attaching Utility, and they are applied equally to all the Attachers, in accordance with DataLink’s response to RFI 103.
555. The Office also notes that the current recurring charges have either increased or decreased compared to the recurring charges set for the initial period of the respective contracts. However, there is limited information available to allow the Office to understand how the new “*Annual Attachment Fee*”, which seems to be applicable since [REDACTED], has been calculated.
556. The Office further notes DataLink’s submission that, by using a model similar to the FCC model, it had proven its pricing mechanism is fair and reasonable and comparable to similar jurisdictions (see paragraph 246 above).
557. However, as shown in paragraph 36 above the recurring charges applied by DataLink, which are specified as “*Quarterly Attachment Fee per Attaching Utility*” and currently amount to C\$ [REDACTED] per annum, appear to be appreciably high compared to the pole attachment rates observed across the USA, which in 2018 were ranging on average between US\$9.21 and US\$14.11 per annum for regulated wired pole attachment rates, and between US\$20.01 and US\$21.86 per annum for unregulated wired pole attachment rates.
558. The Office further notes that the recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s utility poles, appear to be higher than the recurring charges that apply for pole attachments in other comparable jurisdictions, namely United Kingdom, Ireland and Canada.

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<sup>255</sup> See <https://www.fcc.gov/sites/default/files/ad-hoc-committee-survey-04242018.pdf>

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559. In the United Kingdom, OpenReach, the incumbent telecommunications infrastructure access provider, provides access to its pole infrastructure<sup>256</sup> based on the following pole products price structure:<sup>257</sup>
- a) GBP 6.29 per annum (excl VAT) for “*Facility on pole for Multi-end-user attachment*” or GBP 2.46 per annum (excl VAT) for “*Facility on pole for Single-end-user attachment*”
  - b) GBP 1.85 per annum (excl VAT) for “*Pole top equipment*”
  - c) GBP 1.23 per annum (excl VAT) for “*Cable up a pole (per cable)*”.
560. In Ireland, ComReg (the ‘Commission for Communications Regulation’) has recently launched a consultation<sup>258</sup> which “sets out ComReg’s analysis of the *Physical Infrastructure Access (‘PIA’) market and its proposal to regulate the PIA market on the basis that it is characterised by the presence of market failure in the form of Significant Market Power (‘SMP’), and associated competition problems arising from Eircom’s [the incumbent telecommunications infrastructure access provider] ability and incentive to behave anti-competitively.*” [emphasis added]
561. ComReg’s consultation paper specifies the following maximum annual rental prices that Eircom can apply for access to its pole infrastructure:
- a) EUR 21.23 per annum for the period 1 July 2022 to 30 June 2023,
  - b) EUR 21.89 per annum for the period 1 July 2023 to 30 June 2024,
  - c) EUR 22.36 per annum for the period 1 July 2024 to 30 June 2025,
  - d) EUR 22.91 per annum for the period 1 July 2025 to 30 June 2026,
  - e) EUR 22.60 per annum for the period 1 July 2026 to 30 June 2027.
562. The above maximum annual rental prices refer to “*the total price of a pole and so the annual rental price may vary depending on the number of users seeking access to the pole.*”<sup>259</sup>
563. In Canada, the Ontario Energy Board has recently issued a decision specifying the generic wireline pole attachment charge, effective 1<sup>st</sup> January 2023, at CAD 36.05 per attached, per year, per pole.<sup>260</sup>

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<sup>256</sup> See

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=HVq9a8GLQXHxxeddQQNTOU54K0Q0jcp%2BntrdT9k8TPIZ6rNZujnCs99NblKJZPD9hXYmiiixH6wrCQm97GZMyQ%3D%3D>

<sup>257</sup> As of 1 April 2023.

<sup>258</sup> ComReg, “*Physical Infrastructure Market Review*”, the consultation paper posted on 9<sup>th</sup> January 2023, available at <https://www.comreg.ie/publication/physical-infrastructure-market-review>.

<sup>259</sup> ComReg’s consultation paper, Table 3, page 29.

<sup>260</sup> See <https://www.rds.oeb.ca/CMWebDrawer/Record/760272/File/document>.

564. In a report published in 2018, the Ontario Energy Board stated the following in relation to the wireline pole attachment charges.<sup>261</sup>

*“Pole attachment charges are what electricity distributors charge third parties, such as telecommunications and cable companies, for access to their network of electricity poles. These charges generate revenues for distributors that result in lower electricity distribution rates for electricity distribution customers. **Without these revenues, the full cost of the poles would be embedded in electricity distribution rates, and electricity distribution customers would in effect be providing a subsidy to third party attachers.**”* [emphasis added]

565. The Office notes that in those jurisdictions where the recurring charges relate to the attachment of communication cables onto electricity pole infrastructure, namely in the USA and Canada, the charges determined by the regulators take into account a balance of interests between electricity distribution customers and the telecommunications companies and their customers.

566. The Office further notes DataLink’s submission:

*“DataLink would clarify that any earnings from DataLink that are passed on to DataLink’s parent company, CUC, augment CUC’s earnings and in turn lower CUC fee calculations. DataLink would refer all telecommunication attachers to the Transmission and Distribution licence held by CUC, section 25, for additional reference.”*<sup>262</sup>

567. The Office has reviewed section 25 of CUC’s Transmission and Distribution Licence, which refers to “*Rate Cap and Adjustment Mechanism (RACM)*”,<sup>263</sup> but it has been unable to see any clear indication that CUC’s earnings from recurring charges for providing access to its utility poles would indeed lower CUC fee calculations. In other words, it appears that any change in the recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC’s utility poles, would have limited, if any, effect on CUC’s electricity distribution charges.

568. Overall, the Office notes that the recurring charges applied by DataLink, which are specified as “*Quarterly Attachment Fee per Attaching Utility*” and currently amount to C\$ [REDACTED] per annum, appear to be higher compared to the above benchmarking of recurring charges in other relevant jurisdictions, namely the USA, the United Kingdom, Ireland and Canada.

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<sup>261</sup> Report of the Ontario Energy Board – Wireline Pole Attachment Charges, dated 22 March 2018, available at <https://www.oeb.ca/sites/default/files/report-pole-attachment-20180322.pdf>.

<sup>262</sup> DataLink Working Group response paper, dated 16 June 2017. <https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

<sup>263</sup> See pages 23-27 at [https://www.cuc-cayman.com/otherpdf/download\\_pdf?file=1606315589cuc\\_t\\_d\\_licence\\_08.pdf](https://www.cuc-cayman.com/otherpdf/download_pdf?file=1606315589cuc_t_d_licence_08.pdf)

### Revenues earned by DataLink and CUC from Annual Attachment Fees

569. The Office further examined how the recurring charges applied by DataLink reflect on the revenue that is earned by DataLink from the Attachers, and what proportion of that revenue is transferred to CUC.
570. The Office notes, based on the information provided by DataLink in its response to RFI 302,<sup>264</sup> that DataLink earned an annual revenue of C\$ [REDACTED] in 2021, relating to the recurring charges, applicable for recovering the costs relating to the attachment of communication cables onto CUC's utility poles, which represents an increase of [REDACTED] % compared to year 2020.<sup>265</sup>
571. The Office further notes that CUC reported in its 2021 Annual Report<sup>266</sup> that the revenues from DataLink "for Fiscal Year 2021 are recorded in other income in the amount of \$1.4 million, comparable to the revenues for Fiscal 2020."<sup>267</sup>
572. CUC's 2021 Annual Report states the following:
- "Other income is comprised of **pole rental fees**, income from pipeline operations, sale of meter sockets, sale of recyclable metals, late fees on customer accounts and other miscellaneous income. Other Income is recognised when sales are delivered, services are rendered and rental fees are recognized over the period of the lease."*<sup>268</sup>  
[emphasis added]
573. The Office notes that there appears to be an appreciable difference in the amount or revenue from pole rental fees reported in CUC's 2021 Annual Report and the amount of annual revenue relating to recurring charges reported by DataLink in response to RFI 302.
574. The difference observed appears to show that CUC earned in 2021 an annual revenue from DataLink relating to "pole rental fees" that exceeded the annual revenue earned by DataLink from all the Attachers based on the "Annual Attachment Fee" specified in the Pole Sharing Agreements.
575. The Office also notes that DataLink's financial statements appear to show that DataLink operated at loss in each financial period based on the income DataLink earned from recurring charges. However, after adding the income DataLink earned from Make-Ready

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<sup>264</sup> DataLink Responses - OfReg RFI 302 MR Revenue 2018-2022.xlsx (confidential). Redacted version at: <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-32-DataLink-Responses---OfReg-RFI-302-MR-Revenue-2018-2022-Redacted.xlsx>

<sup>265</sup> DataLink also earned in 2021 an annual revenue of C\$ [REDACTED] from non-recurring charges relating to Make-Ready Work, which represents an increase of [REDACTED] % compared to year 2020, and an annual revenue of C\$ [REDACTED] from other income.

<sup>266</sup> DataLink – 2021 Annual Report, page 20 – available at [https://www.cuc-cayman.com/reports/download\\_pdf?file=1644947773cuc\\_ar\\_2021\\_final\\_110222.pdf](https://www.cuc-cayman.com/reports/download_pdf?file=1644947773cuc_ar_2021_final_110222.pdf).

<sup>267</sup> DataLink 2022 Annual Report shows an increase in CUC's revenues received from DataLink for FY 2022 in the amount of \$2.1 million, which represents a \$0.7 million increase from \$1.4 million for FY 2021 (see page 16 of DataLink 2022 Annual Report, available at [https://www.cuc-cayman.com/reports/download\\_pdf?file=1676573390cuc2022\\_ar\\_low\\_res.pdf](https://www.cuc-cayman.com/reports/download_pdf?file=1676573390cuc2022_ar_low_res.pdf)).

<sup>268</sup> DataLink – 2021 Annual Report, page 52.

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work and other income, DataLink operated with a net profit margin of [REDACTED] % on average during the period 2018-2021, as illustrated in table below.

	Year ended 31 December 2018	Year ended 31 December 2019	Year ended 31 December 2020	Year ended 31 December 2021
Gross revenues	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Other Income	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Make Ready Other Income	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Make Ready Other Income Lic & Reg Fees	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>TOTAL REVENUE</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Net Income / (Loss)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Net profit margin</b>	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %
<b>Average profit margin</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED] %

576. The Office further notes that DataLink pricing formula specifies the percentage value of “Space Factor” as 12.5%,<sup>269</sup> which effectively means that each attacher pays 12.5% of the total pole infrastructure cost (capex and opex). This also means that as the number of attachers on CUC’s utility poles increases the share of the total pole infrastructure costs paid by CUC, and presumably recovered through electricity prices charged by CUC to electricity users, decreases over time in the proportions given in the table below.

Number of attachers	0	1	2	3	4
Share of total pole infrastructure cost (capex and opex) paid by CUC	100.00%	87.50%	75.00%	62.50%	50.00%
Share of total pole infrastructure cost (capex and opex) paid by the attachers as a class	0.00%	12.50%	25.00%	37.50%	50.00%

577. Based on the information provided by DataLink in response to RFI 309, the Office understands that there were [REDACTED] attachments on any single CUC’s utility pole over the period from Q1 2018 to Q2 2022. However, the percentage increase in the number of CUC’s utility poles with [REDACTED] attachments, over the same period, was significantly higher than the percentage increase in the number of CUC’s utility poles with [REDACTED].<sup>270</sup>

<sup>269</sup> See for example **DataLink-C3 Pole Sharing Agreement**, Appendix A, page 2 of 4, available at <https://www.ofreg.ky/viewPDF/documents/interconnections/2022-09-09-01-46-30-16626645141662664514MASTERPOLEJOINTUSEAGREEMENTStandardagreementfinalC3January2022ExecutionCopyRedacted.pdf>

<sup>270</sup> [REDACTED]

578. Accordingly, given the increase in the number of attachers on CUC's utility poles over the period Q1 2018 to Q2 2022, and therefore the increase in the share of CUC's pole infrastructure costs paid by the attachers, one would expect a noticeable decrease in the costs paid by CUC and, as a consequence, either:
- a) a proportional decrease in prices electricity users in Grand Cayman pay to CUC, and/or
  - b) a proportional increase in profits that CUC and/or DataLink earn from providing access to CUC's utility poles.
579. If the consequence is solely the decrease in prices electricity users pay to CUC, one could argue that DataLink pricing formula produces recurring charges that promote efficient outcomes for electricity users in Grand Cayman, while not limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.
580. On the other hand, if the consequence is also the increase in profitability above the normal rate of return CUC and/or DataLink are expected to earn from their regulated businesses in Grand Cayman, one could argue that such extra profits have 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.
581. In its response to Working Group position papers, DataLink submitted that "*any earnings from DataLink that are passed on to DataLink's parent company, CUC, augment CUC's earnings and in turn lower CUC fee calculations.*"<sup>271</sup> However, the Office was unable to assess the effect the revenues earned by CUC may have on the prices electricity users pay to CUC nor was the Office able to assess the potential change in profitability of CUC's business operations resulting from the provision of access to its utility poles.
582. The Office further notes that DataLink should be subject to the same terms and conditions relating to the pole sharing arrangements, including the relevant charging principles, as they apply to all the other Attachers. This view was expressed by the Authority in the ICT Consultation 2016-2 Part C, although DataLink did not seem to agree with this view when it submitted that 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.*"<sup>272</sup>
583. The Office, therefore, understands that CUC provides DataLink with access to CUC's utility poles at charges that are different to those that apply to other attachers, which is not consistent with Regulation 10(1) of the INI Regulations.

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<sup>271</sup> DataLink Working Group response paper, dated 16 June 2017.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

<sup>272</sup> DataLink 12 July 2016 submission to ICT Consultation 2016-2, paragraph 84.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>



584. Overall, it appears that DataLink pricing formula produces recurring charges that are potentially excessive and have the main, if not the only, effect of concurrently:
- a) increasing profitability of CUC and/or DataLink business operations, and
  - b) limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.

### **Questions for Consultation**

**QUESTION 45** Is DataLink pricing formula for calculation of the “Annual Attachment Fee” an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC’s utility poles, and if so, why.

**QUESTION 46** If DataLink pricing formula for calculation of “Annual Attachment Fee” is not an appropriate pricing methodology, what other methodology should be used for determining cost-oriented prices for attachment of communications cables onto CUC’s utility poles.

**QUESTION 47** If DataLink pricing formula for calculation of the “Annual Attachment Fee” is an appropriate pricing methodology, should any changes be made in the various elements of the formula, namely:

- Net Cost of a Bare Pole,
- Space Factor,
- CUC’s Annual Carrying Charge Rate,
- Inflation, and
- Management & Overhead.

**QUESTION 48** Provide your view as to whether or not DataLink pricing formula has any effect on the prices electricity users pay to CUC and/or the potential profitability of CUC’s business operations resulting from the provision of access to its utility poles, including any evidence you have to support your view.

**QUESTION 49** Provide your view as to whether or not DataLink’s ability to access CUC’s utility poles at no charge 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.

**D. Non-recurring charges for Make-Ready work**

585. The main responses and submissions in relation to the question whether non-recurring charges, applicable for recovering the costs relating to Make-Ready work, are (1) “reasonable and arrived at in a transparent manner” and (2) “cost orientated and 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”, are listed below.

- a) DataLink argued that the make-ready costs it provides are 100% cost based and in compliance with Fully Allocated Cost (FAC) methodology.<sup>273</sup>
- b) DataLink did not consider that its charging structure created an incentive for attachers to erect their own pole network, as the cost of attaching to existing poles is a fraction of the cost of installing another pole network.<sup>274</sup>
- c) DataLink noted that it was amenable to extending the refund period for make-ready costs beyond two years, but not beyond the reasonable life of a pole.<sup>275</sup>
- d) DataLink submitted that its one-off make-ready work is not being recovered through recurring attachment fees, and that make-ready does not include any of the bolts, connection points or work needed to perform the actual attachment on the pole.<sup>276</sup>
- e) DataLink argued that its make-ready charges are cost-based based on actual expenses with no mark-up. These costs are unnecessary to the electric utility but desired, and should be absorbed, by the telecommunications attacher. Further, CUC is prohibited by its licence from upgrading its electrical infrastructure purely to accommodate telecommunications attachers.<sup>277</sup>
- f) DataLink submitted that the INI Regulations provide for the recovery of costs related to infrastructure sharing. They do not require a responder to accept third-party contractors to perform work, or to fund or subsidize the request. DataLink objected to the Digicel and C3 proposals to pay third-party contractors directly, disagreed that there would be cost savings (noting any cost savings might result in lower quality), and insisted that third parties working on CUC electrical infrastructure must be under the direct control and supervision of CUC.<sup>278</sup>

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<sup>273</sup> DataLink’s 12 July 2016 Response to Consultation 2016-2 Part C, at paragraph 79.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf>

<sup>274</sup> Ibid., at paragraph 88.

<sup>275</sup> DataLink’s 16 June 2017 Working Group response paper, at page 11.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

<sup>276</sup> DataLink’s 12 July 2016 Response to Consultation 2016-2 Part C, at paragraph 90.

<sup>277</sup> Ibid., at paragraph 91.

<sup>278</sup> DataLink’s 16 June 2017 Working Group response paper, at pages 10-11.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-09-34-34-149805226120170616DatalinkWorkingGroupResponse.pdf>

- g) Digicel submitted that all poles should be made fully ready and the cost of doing so should be averaged across all poles “*using a project utilisation factor based on the roll-out commitments of operators*” and that “*a ‘committed update’ provision in the sharing agreement with payments specified in lieu of uptake would fully mitigate any cost recovery risk for CUC*”.<sup>279</sup>
  - h) Digicel submitted that allowing operators to use third parties to carry out make-ready work would mean they could fund make-ready work without going through CUC and that, if an appropriate division of activity could be agreed, there would be no requirement for CUC to levy any make-ready charges. Alternatively, Digicel submitted that if operators chose to use CUC for the purposes of make-ready, the associated costs should be amortised over the lifetime of the asset and recovered in the pole attachment charges.<sup>280</sup>
  - i) C3 argued that the best way to ensure charges for make-ready work were cost-oriented was to allow other certified contractor and crews to bid on make-ready work orders, i.e., to introduce competition.<sup>281</sup>
  - j) C3 submitted that CUC/DataLink’s process to determine necessary make-ready, particularly the wind loading calculation, assumes each attaching utility is attaching a large feeder cable. As some 65% of C3’s outside plant is smaller distribution fibre cable, this results in higher make-ready costs.<sup>282</sup>
586. The Office notes that DataLink appears to argue that the non-recurring charges, applicable for recovering the costs relating to Make-Ready work, are (1) “*reasonable and arrived at in a transparent manner*” and (2) “*cost orientated and 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*”, because, among other things:
- a) the make-ready costs it provides are 100% cost based and in compliance with Fully Allocated Cost (FAC) methodology;
  - b) its make-ready charges are cost-based based on actual expenses with no mark-up; and
  - c) the charging structure did not create an incentive for attachers to erect their own pole network, as the cost of attaching to existing poles is a fraction of the cost of installing another pole network.

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<sup>279</sup> Digicel’s 21 April 2017 Working Group position paper, at pages 4-5.  
<https://www.ofreg.ky/viewPDF/documents/news/2021-05-11-10-03-57-149520183720170421DigicelWorkingGroupResponse.pdf>

<sup>280</sup> Ibid., at page 4.

<sup>281</sup> C3’s 12 July 2016 Response to Consultation 2016-2 Part C, at page 9.  
<https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-56-44-12-July-2016-Infinity-Response.pdf>

<sup>282</sup> Ibid., at page 10.

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587. On the other hand, the other parties, namely Digicel and C3, appear to argue that the recurring charges, applicable for recovering the costs relating to Make-Ready work, are not (1) “reasonable and arrived at in a transparent manner” and (2) “cost orientated and 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”, because, among other things:
- a) the best way to ensure charges for make-ready work were cost-oriented was to allow other certified contractor and crews to bid on make-ready work orders, i.e., to introduce competition; and
  - b) allowing operators to use third parties to carry out make-ready work would mean they could fund make-ready work without going through CUC and that, if an appropriate division of activity could be agreed, there would be no requirement for CUC to levy any make-ready charges.
588. The Office notes that there appears to be no common views between all the licenses to ascertain whether or not the non-recurring charges, applicable for recovering the costs relating to Make-Ready work, are (1) “reasonable and arrived at in a transparent manner” and (2) “cost orientated and 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”.
589. Based on the information provided by DataLink in response to RFI 310,<sup>283</sup> the Office understands that for a Make-Ready work that includes pole replacement, the cost of a new bare pole is paid entirely by the attacher who requested the Make-Ready work. This means that an older CUC’s utility pole has been replaced by a new utility pole at no cost to CUC. It is unclear, however, how CUC treats the costs relating to the older pole that has been, presumably, written off from its fixed assets register, and/or the costs related to the new pole that has been acquired by CUC at no cost.
590. Based on the information provided by DataLink in response to RFI 303,<sup>284</sup> the Office understands that in the period from Q1 2018 to Q2 2022, there were [REDACTED] poles identified as “Red Poles with pole replacement” or “poles that require strengthening (i.e., Make-Ready work is required), and which require pole replacement (i.e., a new pole would need to be installed) - for which a permit application has been filed”. Assuming, therefore, that all of those [REDACTED] poles have been replaced and fully paid by the attachers through non-recurring charges for Make-Ready work, and the corresponding amount of CUC’s old

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<sup>283</sup> See DataLink Responses - OfReg RFI 310 (MR Work Details).xlsx (confidential). Redacted version at <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-35-DataLink-Responses---OfReg-RFI-310-MR-Work-Details-Redacted.xlsx>

<sup>284</sup> See DataLink Responses – OfReg RFI 301-315.xlsx (confidential). Redacted version at <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-31-DataLink-Responses---OfReg-RFI-301---315-Redacted.xlsx>

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poles have been written off, one would expect the net cost of a bare pole, as specified in DataLink pricing formula, to be reduced proportionally, more or less.

591. However, there is no evidence that any such changes in CUC's fixed asset register relating to the replacement of CUC's utility poles through Make-Ready work fully paid by the attachers, have been reflected in the amount paid by the attachers for recurring charges for the attachment of communications cables. This raises the question whether or not the non-recurring charges for Make-Ready work are reasonable and arrived at in a transparent manner.
592. The Office further notes, based on the information provided by DataLink in response to RFI 302,<sup>285</sup> that DataLink earned an annual revenue of C\$ [REDACTED] in 2021, relating to the non-recurring charges, applicable for recovering the costs relating to Make-Ready work, which represents an increase of [REDACTED] % compared to year 2020.
593. The Office notes that DataLink reports its financial statements under "Intercompany Accounts Payable" any amounts due to CUC, i.e., intercompany fees payable that "*include make ready invoices, make ready accruals, intercompany pole attachment fees, intercompany fiber optic fees, intercompany maintenance and management fees.*"<sup>286</sup>
594. However, as noted in paragraphs 571 and 572 above, the information provided in CUC's 2021 Annual Report seems to suggest that the revenues earned by CUC from DataLink comprise of "*pole rental fees*" only. It is, therefore, unclear how the intercompany fees payable by DataLink to CUC relating to make ready invoices are accounted for in CUC's financial accounts.
595. Based on the analysis above, the Office's view is, subject to consultation, that there is no sufficient evidence to ascertain whether or not the non-recurring charges, applicable for recovering the costs relating to Make-Ready work, are:
- a) "*based on cost-orientated rates that are reasonable and arrived at in a transparent manner*" and
  - b) "*cost orientated and 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*".

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<sup>285</sup> DataLink Responses - OfReg RFI 302 MR Revenue 2018-2022.xlsx (confidential). Redacted version at <https://cdn.ofreg.ky/documents/consultations/2023-05-18-08-00-32-DataLink-Responses---OfReg-RFI-302-MR-Revenue-2018-2022-Redacted.xlsx>

<sup>286</sup> See pages 2-3 of DataLink Responses - OfReg RFI 312-315.pdf. Redacted version at <https://www.ofreg.ky/viewPDF/documents/consultations/2023-05-18-08-11-30-DataLink-Responses---OfReg-RFI-312-315---Redacted.pdf>

Questions for Consultation

**QUESTION 50** Provide your view as to whether or not DataLink’s charges for Make-Ready work are cost-orientated, including a detailed explanation supporting your view.

**QUESTION 51** If your view is that DataLink’s charges for Make-Ready work are not cost-orientated, provide your view as to what approach should be taken to ensure the non-recurring charges for Make-Ready work are cost-orientated.

**E. Process for Refund of Make-Ready Costs**

- 596. Responses by the parties to the Office’s October 2022 RFIs 203, 302, 403, 503 and 603 suggest the attachers have collectively paid between \$ [REDACTED] and \$ [REDACTED] in make-ready work charges between 2018 and 2021. DataLink’s response to RFI 303 suggests DataLink received over that same period [REDACTED] applications for permits which required make-ready work to be performed. The Office therefore notes that make-ready costs represent a substantial amount of expenses, both overall and on a per-permit basis, incurred by ICT licensees relating to the attachment of communication cables onto CUC’s electricity poles.
- 597. As such costs appear to be significant for ICT licensees, and are incurred well in advance of any revenue being potentially earned by the licensee whose attachments require make-ready work to be performed, the Office considers that it is important to determine the appropriate principles for determining an efficient mechanism for recovery of make-ready costs in situations where more than one licensee effectively benefits from the make-ready work performed on a given pole.
- 598. For clarity, it should be noted that, in this section of this document, the Office is only addressing the question of what principles are deemed to be appropriate for determining the relevant refund of make-ready costs already paid by a relevant attacher (or attachers). The question of what constitute appropriate charging principles for make-ready work (to be paid by an attacher to the Owner Utility) are considered in a separate section above relating to non-recurring charges, applicable for recovering the costs relating to make-ready work.
- 599. It should also be emphasised that the process for refund of make-ready costs does not impact whether DataLink, in its role of manager of access to the communication space, is fully compensated for make-ready work that it is required to undertake. The first attacher has already paid for the relevant make-ready work and, whether the first attacher is reimbursed or not by subsequent attachers does not change this fact. This refund process only affects whether other attachers ultimately pay the appropriate amounts for their access to the communication space.
- 600. The Office notes that the current make-ready cost refund arrangements appear to be ineffective at delivering actual refunds. As reported by the parties in their responses to the Office’s 2022 RFIs 203, 403, 503, and 603, only \$ [REDACTED] was refunded to all attachers during the 2018-2021 period. The Office considers this to be a very small amount

in light of the significant amount paid in make-ready work charges.<sup>287</sup> They also appear to create a perverse incentive for attachers to delay their own attachments until the two-year period has expired.

601. The Office notes in this regard Logic's submission that "*The relatively short two-year reimbursement window might provide a motivation to wait for deployment.*"<sup>288</sup> The Office considers that this is having the effect of limiting the efficient and harmonised use of infrastructure and, by delaying the installation of fibre optic cables on utility poles by competing ICT licensees, limiting the promotion of competition in the provision of ICT services and ICT networks. The Office also notes DataLink's 2016 submission that "*it is not appropriate for that one attaching utility who may attach first to, in effect, finance the work required for the others to roll-out.*"<sup>289</sup>
602. The Office considers that the absence of an efficient mechanism for recovery of make-ready costs in situations where more than one licensee effectively benefits from the make-ready work performed on a given pole, is unlikely to satisfy the requirement set out in Regulation 10 of the INI Regulations for the charges applied to infrastructure sharing to be non-discriminatory.
603. The Office further considers that the failure to remedy such distortion in the markets will ultimately limit the efficient and harmonised utilisation of infrastructure, and the promotion of competition.
604. As noted in ICT Consultation 2016-2, the relevant section relating to "*Refund of Make-Ready costs*" was initially introduced in **DataLink-Logic Pole Sharing Agreement**. The same principles have subsequently been applied in **DataLink-Flow Pole Sharing Agreement**, the **DataLink-Digicel Pole Sharing Agreement**, and the **DataLink-C3 Pole Sharing Agreement**, but do not apply in the **CUC-DataLink Pole Sharing Agreement**.
605. The Office notes the following principles that currently apply (albeit in only four of five Pole Sharing Agreements) for a refund of make-ready costs:
- a) It is the responsibility of the Attaching Utility to request a refund;
  - b) Make-Ready costs are refundable in part as additional utilities are attached within the communication space within 24 months of the date of the invoice for those make-ready costs;

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<sup>287</sup> While some portion of the refunds paid during the 2018-2021 period could relate to make-ready work paid for during the two years before 2018, the Office notes that the amount refunded to all attachers during the 2018-2021 period amounts to less than ██████ % of the amount paid as make-ready work charges paid by all attachers during that same period. The Office further notes that the amount refunded to all attachers in 2021 represents approximately ██████ % of the amounts paid as make-ready work charges by all attachers during the prior 24 months (2019-2021), as reported by DataLink and by the attachers in response to the Office's October 2022 RFIs.

<sup>288</sup> See page 4 of Logic's 11 November 2022 ICT Consultation 2016-2 RFIs and Next Steps - WestTel Limited (ta Logic) response.pdf. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps--WestTel-Limited-ta-Logic-response.pdf>

<sup>289</sup> Page 14 of DataLink's 2016 response to ICT Consultation 2016-2.

- c) A 12.5% reduction is applied each calendar quarter to the original payment, less any refunds already paid;
  - d) Upon receipt of a written request for refund, DataLink shall pay the Attaching Utility an amount equal to the payment amount divided by 3, provided there is a refundable balance remaining after the quarterly reduction and any previous refunds;
  - e) A refund becomes due 90 days following an authorised attachment by an additional Attaching Utility.
606. In response to ICT Consultation 2016-2, C3 proposed a number of changes to the provisions for repayment of make-ready costs where another attacher places attachments on the same pole, including the proposal that the relevant period for refund of make-ready costs should be extended to the 40-year lifespan of the pole. DataLink stated that it was amenable to a change but considered a period beyond the reasonable life of a pole not to be appropriate. C3 also proposed that the period for receiving the refund should be reduced to 21 days, instead of current 90-day period.
607. In its 11 November 2022 Re-Submission, Logic suggested that “*the period for reimbursement of make-ready charges period be increased to the lifespan of the pole.*”<sup>290</sup> In its 9 December 2022 Re-Submission, DataLink noted a willingness to extend the period for reimbursement to 5 years should all attaching utilities agree.<sup>291</sup>
608. The Office notes that the FCC has applied the principle that the costs of make-ready work should be shared by all parties who benefit from it. See for example the following long-standing rule regarding the treatment of “modification costs”:<sup>292</sup>

**§ 1.1408 Imputation of rates; modification costs.**

...

*(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part,*

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<sup>290</sup> See page 4 of Logic’s 2022 ICT Consultation 2016-2 RFIs and Next Steps - WestTel Limited (ta Logic) response.pdf.

<https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-20-03-ICT-Consultation-2016-2-RFIs-and-Next-Steps---WestTel-Limited-ta-Logic-response.pdf>

<sup>291</sup> See page 10 of DataLink Responses – OfReg ICT Consultation 2016-2 4A 5A 5B 5C.pdf. <https://www.ofreg.ky/viewPDF/documents/consultations/2023-06-02-01-01-19-DataLink-Responses---OfReg-ICT-Consultation-2016-2-4A-5A-5B-5C.pdf>

<sup>292</sup> 47 CFR 1.1408(b) – [https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-1/subpart-J#p-1.1408\(b\)](https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-1/subpart-J#p-1.1408(b))



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*it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct 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 necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. **If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.***  
[emphasis added]

609. The FCC has recently specified that “...section 1.1408(b) stands for the proposition that parties benefitting from a modification share proportionately in the costs of that modification, unless such a modification is necessitated solely as a result of an additional or modified attachment of another party, in which case that party bears the costs of the modification.”<sup>293</sup>
610. The Office notes that different models have been adopted elsewhere. For example, under Telefonica’s SMP pole sharing obligation in Spain, the second operator compensates the first for half of the cost incurred by the first operator to upgrade the pole. A third operator is responsible for compensating the first operator for half of the remaining cost.<sup>294</sup>
611. The Office considers that similar principles apply in the Cayman Islands by virtue of Regulations 6(f) and 6(g)<sup>295</sup> – once the second requestor seeks access to the same infrastructure, the first requestor is deemed to no longer require part of the infrastructure and make-ready costs it paid for, which should then be unbundled and charged to the second requestor who is deemed to have required them.

*(f) costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires;*

*(g) costs shall be borne either by the requestor or the responder or both based on whether their respective requests and compliance with those requests cause those costs to be incurred; ...*

612. The Office considers, subject to consultation, that the relevant period for refund of make-ready costs should be directly related to the actual lifespan of the relevant pole rather than

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<sup>293</sup> FCC, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 2021-01-20 (FCC 18-111) (“**2021 Pole Replacement Declaratory Order**”), at paragraph 7. The FCC went on to clarify in the next paragraph of the 2021 Pole Replacement Declaratory Order that these principles mean the new attacher should not pay 100% of the cost of replacing a pole if it needed to be replaced or upgraded anyway.

<sup>294</sup> See section 6 “Condiciones sobre la compartición de los costes de adecuación de postes” in section 6.2.4.4 “Replanteo, Análisis De Viabilidad Y Ejecución De Obras En Postes” of annex 2 “Procedimiento De Gestión” of Telefónica de España’s reference offer “Servicio Mayorista De Acceso a Registros y Conductos (MARCo)”. Available at:

[https://www.cnmc.es/sites/default/files/editor\\_contenidos/Telecomunicaciones/Ofertas/Marco/Oferta\\_MA\\_RCo\\_vigente.zip](https://www.cnmc.es/sites/default/files/editor_contenidos/Telecomunicaciones/Ofertas/Marco/Oferta_MA_RCo_vigente.zip)

<sup>295</sup> See also section 68(3) of the ICT Act.

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a 40-year lifespan, as proposed by C3 and Logic. The Office also considers the reference to the actual lifespan of a pole should be based on accounting principles, and directly linked to the remaining asset life of the pole, as recorded in CUC's fixed asset register.

613. The Office further considers, subject to consultation, that the relevant period for refund of make-ready costs and the quarterly depreciation rate should be aligned in a way that the total accumulated depreciation of the make-ready costs over the relevant refund period equals the make-ready costs paid. For the avoidance of doubt, the depreciation rate should apply to all the costs incurred for make-ready work, regardless of their type (assets or expenses). The Office also considers that the value of the make-ready costs should be reduced each quarter based on the straight-line depreciation method. For example, make-ready costs of a pole with 10 years of lifespan (remaining asset life) would be depreciated at the quarterly depreciation rate of 2.50% applied on the total make-ready costs.<sup>296</sup>
614. The Office further considers, subject to consultation, that the relevant period for refund of make-ready costs should begin on the date DataLink issues a permit to the attacher who paid for the make-ready work, and not the date that attacher was invoiced for the make-ready work. The Office notes that there could be a substantial delay between the time an attacher is invoiced for make-ready work and when that work is completed, a permit is issued and the attacher is able to make use of the made-ready pole. Starting the relevant refund period on the earlier date of invoicing would reduce the period of time during which an attacher is entitled to reimbursement for make-ready it paid for and that another person benefits from. The Office does not consider this outcome consistent with Regulations 6(f) and 6(j).
615. The Office considers that the current principles in the refund formula where the amount equal to the payment is divided by three (3) do not appear to be the appropriate principles that respect the proportionality of sharing the benefits of make-ready work on poles.
616. First, there appears to be no reason to assume that for each individual pole there would be three (3) attachers who would directly benefit from make-ready work, and would therefore share the relevant make-ready costs in a proportional manner (each attacher to share up to one third of the relevant make-ready costs).<sup>297</sup> For example, there could be the case where there are only two attachers who directly benefit from the relevant make-ready work on a given pole. In such case, the amount of refund should be divided by two (2).

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<sup>296</sup> In other words, for make-ready costs of \$800 for a pole with 20-year lifespan, the quarterly depreciation would be \$20, which means the total amount of refund would be:

1. \$780, one quarter after the date of the invoice for the relevant make-ready work,
2. \$760, two quarters after the date of the invoice for the relevant make-ready work,
3. \$740, three quarters after the date of the invoice for the relevant make-ready work, and so on.

Total accumulated depreciation over 10 years would amount to \$800, which would be equal to the make-ready costs paid.

<sup>297</sup> In addition, one attacher may make significantly greater use of a pole by having a greater number of attachments on a given pole than another attacher.

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617. Second, once fully upgraded, CUC’s utility poles are deemed to be able to accommodate four (4) attachers in the communication space<sup>298</sup> and at least one (1) attacher (e.g. CUC) in the “electrical space.”<sup>299</sup> As there may be some situations where make-ready work can directly benefit attachers in both the communication space and the “electrical space”, there is therefore no reason to limit the number of attachers liable for payment of refund of make-ready costs to three (3).
618. The Office notes that the existing process requires the attaching utility to request a refund. In other words, the attacher expected to monitor continually all poles for which it has paid make-ready work charges and identify whether any other entities may have attached within two years of the invoice for those make-ready work charges. If the attacher does not do this or does not do so in a sufficiently timely manner, it will not be reimbursed for the make-ready work charges it paid no matter how many other parties might be benefiting from that make-ready work.
619. Further, it appears that Article VII (“*Make-Ready Work / Installation*”), paragraph A (“*Estimate for make-Ready Work*”) (“**Article VII.A**”) of the Pole Sharing Agreements could allow DataLink to invoice each subsequent attacher for their proportionate share of the make-ready work charges, whether or not the prior attacher requested a refund of the make-ready work charges they paid, because invoicing under Article VII.A appears to be separate from any refunds requested under paragraph E (“*Refund of Make-Ready Costs*”) of Article VII. Further, under the current process, the Office notes that, practically speaking, the first attacher could not reasonably be in a position to request a refund until after the second attacher has actually made its attachments (as this is the earliest the first attacher could become aware of the second attachment). However, this would be well after the second attacher would have been invoiced for its share of make-ready work charges, including any “*proportionate make-ready charges previously invoiced to a prior attaching utility...*” (Article VII.A). This means that a request by the first attacher could not practically form the basis for invoicing the second attacher.<sup>300</sup>
620. The end-result is the likelihood of over-recovery of make-ready work charges by DataLink, to the extent it might invoice a subsequent attacher for charges that are not actually refunded to a prior attacher. The Office considers this to be inappropriate and has the effect of limiting the promotion of competition in the provision of ICT services or ICT networks, as it would result in compensation in excess of costs to DataLink from other ICT licensees it competes with.
621. Further, it should be unnecessary to require a prior attacher to request a refund. DataLink holds all information necessary to determine whether an attacher is eligible for a refund of make-ready work charges, as it knows when each attacher was invoiced and when each subsequent attacher sought and was granted access to the pole. Subject to consultation, the Office is of the view that DataLink should manage the process of refunding make-

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<sup>298</sup> That is, once a three-foot communications space has been created.

<sup>299</sup> In some cases, DataLink might be a second attacher in the electrical space, to the extent they are attached to CUC utility poles but not in the communications space.

<sup>300</sup> The Office notes that, under the Telefónica model described above, Telefónica appears to be responsible for communicating the amounts to the relevant parties.

ready work charges without requiring prior attachers to request a refund, and simply credit the prior attachers as and when appropriate.

622. The Office notes that, under the existing arrangements, DataLink itself would never be liable to refund the make-ready work charges paid by other attachers, even if DataLink might subsequently benefit from such make-ready work charges. This results from the fact that only “attaching utilities” are liable to pay the refunds, but the refund provisions are not included in the only Pole Sharing Agreement in which DataLink is an “attaching utility,” i.e. the **CUC-DataLink Pole Sharing Agreement**. The Office considers this could confer a competitive advantage to DataLink *vis-à-vis* the other attaching utilities, which has the effect of limiting the promotion of competition in the provision of ICT services or ICT networks.
623. In addition, DataLink’s ability to access at no cost CUC’s utility poles, for which other attachers were required to pay make-ready work charges, appears to be discriminatory and, therefore, not in compliance with Regulation 10(1) of INI Regulations, which require that “*a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides for itself, any non-affiliated licensee or any subsidiary or affiliate of the responder.*”

### Proposal for Consultation

624. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation that **the refund formula set out in Article VII of the Pole Sharing Agreements should be amended to take into account:**
- a) **the appropriate principles for depreciation of the value of make-ready costs eligible for refund; such depreciation to be based on the actual lifespan of the relevant poles, and calculated using straight-line depreciation method;**
  - b) **the principles of proportionality for determining the relevant amount of refund of make-ready costs; such proportionality to be related to appropriate sharing of costs by all the parties that directly benefit from the relevant make-ready work;**<sup>301</sup>
  - c) **DataLink should determine and arrange for refunds of make-ready work charge without requiring the attacher to apply for them; and**
  - d) **DataLink should be liable to refund the make-ready work charges paid by other attachers in instances where it also benefits from the relevant make-ready work.**

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<sup>301</sup> As noted in paragraph 608 above, the principles of proportionality are also proposed to be adopted by the FCC, with the view that if “*a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.*”

**Questions for Consultation**

**QUESTION 52** Do you agree with the Office's proposal that Article VII of the Pole Sharing Agreements should be amended as described in the preceding paragraph? If not, explain in detail why not.

## Section 8 – How to Respond to this Consultation

625. This consultation is conducted in accordance with the Consultation Procedure Guidelines determined by the Office and found on the Office’s website here:

<https://www.ofreg.ky/viewPDF/documents/Policies/2022-07-04-01-01-01-OF-2022-G1-Consultation-Procedure-Guidelines--.pdf>

626. Lists of the proposals for consultation and of the questions for consultation set out in the previous sections of this consultation paper are reproduced in **APPENDIX 4** and **APPENDIX 5**, respectively, to this consultation paper.

627. In accordance with the Office’s correspondence to the parties on 22 September 2022 and 14 December 2022, the Office anticipates conducting this consultation as a single-phase consultation over a period of thirty (30) days. Where, upon review of the responses to the consultation, it becomes clear that a second phase of consultation is required, a further notice will be issued accordingly.

628. Section 7(1) of the URC Act states that prior to issuing an administrative determination of public significance, the Office shall “*issue the proposed determination in the form of a draft administrative determination.*” This will be done following review by the Office of the responses to this consultation, and of the responses to the second phase of consultation if applicable. For the avoidance of doubt, the Office does not consider this document to be a “draft administrative determination” for the purposes of section 7(1) of the URC Act.

629. All submissions on this consultation should be made in writing and must be received by the Office **by 5 p.m. on 03 July 2023 at the latest.**

630. Submissions may be filed as follows:

By e-mail to:

[consultations@ofreg.ky](mailto:consultations@ofreg.ky)

Or by post to:

Utility Regulation and Competition Office  
P.O. Box 10189  
Grand Cayman KY1- 1002  
CAYMAN ISLANDS

Or by courier to:

Utility Regulation and Competition Office  
3rd Floor, Monaco Towers II,  
11 Dr. Roy’s Drive, George Town,  
Grand Cayman  
CAYMAN ISLANDS

## Appendix 1 – Background

1. On **22 November 2005**, Infinity Broadband, Ltd. Trading as C3 ('**C3**') and Caribbean Utilities Company, Ltd. ('**CUC**') entered into a Master Pole Joint Use Agreement, which allows C3 to attach its communication cables to the electricity poles owned by CUC (the '**CUC-C3 Pole Sharing Agreement**').<sup>302</sup>
2. On **22 April 2011**, by amendment to section 23 of the Information and Communications Technology Authority Law (2011 revision) (the '**ICTA Law**'),<sup>303</sup> 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]."<sup>304</sup>
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".<sup>305</sup>
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**').<sup>306</sup>
5. On **20 March 2012**, CUC and C3 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-C3 Agreement (the '**CUC-C3 Deed of Variation**').<sup>307</sup>
6. On **28 March 2012**, the Information and Communications Technology Authority (the '**Authority**') issued an ICT Licence to DataLink, which authorised DataLink to supply

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<sup>302</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-47-23-1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf>

<sup>303</sup>[https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2002/2002-0004/InformationandCommunicationsTechnologyAuthorityAct\\_2011%20Revision.pdf?zoom\\_highlight=information+and+communications+technology+authority#search=%22information%20and%20communications%20technology%20authority%22](https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2002/2002-0004/InformationandCommunicationsTechnologyAuthorityAct_2011%20Revision.pdf?zoom_highlight=information+and+communications+technology+authority#search=%22information%20and%20communications%20technology%20authority%22)

<sup>304</sup><https://www.ofreg.ky/viewPDF/documents/legislation-regulations/2022-11-08-00-59-44-ICTA-Amendment-Act-2011.pdf>

<sup>305</sup>[https://legislation.gov.ky/cms/images/LEGISLATION/SUBORDINATE/2011/2011-0030/InformationandCommunicationsTechnologyAuthorityCUC-DatalinkNotice\\_SL%2030%20of%202011.pdf?zoom\\_highlight=information+and+communications+technology+authority#search=%22information%20and%20communications%20technology%20authority%22](https://legislation.gov.ky/cms/images/LEGISLATION/SUBORDINATE/2011/2011-0030/InformationandCommunicationsTechnologyAuthorityCUC-DatalinkNotice_SL%2030%20of%202011.pdf?zoom_highlight=information+and+communications+technology+authority#search=%22information%20and%20communications%20technology%20authority%22)

<sup>306</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-27-15-ICTACUCDataLinkAgreement20March20121458325766.pdf>

<sup>307</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-46-13-1417708388DeedofVariationCUCInfinityBroadband.pdf>

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certain ICT Services, including Type 11 ICT Service specified as “*the provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.*”<sup>308</sup>

7. On **7 May 2012**, C3, CUC and DataLink executed an agreement which novated and transferred all the rights and obligations under the **CUC-C3 Pole Sharing Agreement** and the CUC-C3 Deed of Variation, from CUC to DataLink (the ‘**C3-CUC-DataLink Novation Agreement**’).<sup>309</sup>
8. On **9 November 2012**, Cable and Wireless (Cayman Islands) Limited, now trading as Flow (‘**Flow**’ or ‘**Cable & Wireless**’), CUC and DataLink executed a Novation and Amendment Agreement (the ‘**Flow-CUC-DataLink Novation Agreement**’)<sup>310</sup> which amended, and novated and/or transferred all of CUC’s rights and obligations under the Agreement for Licensed Occupancy of CUC Poles by Flow made on 5 November 1996 (the ‘**CUC-Flow Pole Sharing Agreement**’),<sup>311</sup> to DataLink.
9. On **18 July 2013**, WestTel Limited trading as 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**’).<sup>312</sup>
10. In a letter to DataLink, dated **16 July 2014**, C3 raised a number of contentious issues with DataLink in relation to the implementation of the **CUC-C3 Pole Sharing Agreement** and the **CUC-C3 Deed of Variation**, as novated through the **C3-CUC-DataLink Novation Agreement**, including, among other things, the initiative made by DataLink establishing a new form of agreement with C3 to replace the existing agreements, which in C3’s view was “*biased in favour of DataLink*”, and the allegations made by DataLink that C3 breached the existing agreements with certain unauthorised attachments to CUC’s electricity poles.
11. In a letter to the Authority, dated **5 August 2014**, C3 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. C3 requested that the Authority commence an investigation under **Section 41** of the ICTA Law<sup>313</sup> to establish whether DataLink has infringed **Section 36** or **Section 40** prohibitions of the ICTA Law.

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<sup>308</sup> <https://www.ofreg.ky/viewPDF/documents/datalink-limited/2021-08-06-07-32-03-View-Licence-document.pdf>

<sup>309</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-43-03-NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED1458325571.pdf>

<sup>310</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-36-05-1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf>

<sup>311</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-40-35-1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf>

<sup>312</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-30-40-141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf>

<https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-30-40-141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf>

<sup>313</sup> <https://www.ofreg.ky/viewPDF/documents/legislation-regulations/2021-05-13-00-53-33-1507017057ICTALaw2011Revision.PDF>



12. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the '**Dispute Regulations**'),<sup>314</sup> C3 submitted a dispute determination request to the Authority (the '**Dispute Determination Request**')<sup>315</sup> contending that a dispute had arisen between C3 and DataLink relating to the allocation of communication space used by C3 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**').<sup>316</sup>
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 C3 and DataLink, the Authority opened a public consultation relating to the Dispute.<sup>317</sup> 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 C3 and DataLink.*"
15. On **26 June 2015**, upon consideration that the matter of the Dispute between C3 and DataLink may be relevant to other Licensees, the Authority sent requests for information to DataLink,<sup>318</sup> C3,<sup>319</sup> Logic,<sup>320</sup> and Flow,<sup>321</sup> with the intention to investigate in more detail the matter of the Dispute.
16. On **2 July 2015**, C3 submitted its response to the Authority's request for information of 26 June 2015.<sup>322</sup>
17. On **7 July 2015**, Logic submitted its response to the Authority's request for information of 26 June 2015.<sup>323</sup>

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<sup>314</sup> <https://www.ofreg.ky/viewPDF/documents/legislation/2021-04-15-02-26-36-ICTA-Dispute-Resolution-Regs.-2003.pdf>

<sup>315</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-03-30-30-Infinity-Determination-Request.pdf>

<sup>316</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-36-01-2-Oct-2014-DataLink-Response.pdf>

<sup>317</sup> Documents at <https://www.ofreg.ky/consultations/infinity-datalink-pole-attachment-dispute>

<sup>318</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-30-38-26-June-2015-ICTA-to-DataLink.pdf>

<sup>319</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-32-33-26-June-2015-ICTA-to-Infinity.pdf>

<sup>320</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-32-00-26-June-2015-ICTA-to-Logic.pdf>

<sup>321</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-31-17-26-June-2015-ICTA-to-LIME.pdf>

<sup>322</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-28-34-2-July-2015-Infinity-response-to-ICTA.pdf>

<sup>323</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-27-57-July-2015-Logic-response-to-ICTA.pdf>

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18. On **21 July 2015**, DataLink submitted its response to the Authority's request for information of 26 June 2015.<sup>324</sup>
19. On **31 July 2015**, Flow submitted its response to the Authority's request for information of 26 June 2015.<sup>325</sup>
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.<sup>326</sup>
21. On **2 September 2015**, C3 submitted its response to the Authority's additional request for information of 26 August 2015.<sup>327</sup>
22. On **3 September 2015**, Logic submitted its response to the Authority's additional request for information of 26 August 2015.<sup>328</sup>
23. On **11 September 2015**, the Authority received a letter from Ogier, a law firm acting on behalf of C3, 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.<sup>329</sup>
25. On **22 September 2015**, Flow submitted its response to the Authority's additional request for information of 26 August 2015.<sup>330</sup>
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-C3 Pole Sharing Agreement** shall be amended to define and reflect the allocation position for the attachment of

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<sup>324</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-27-14-21-July-2015-DataLink-response-to-ICTA.pdf>

<sup>325</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-26-30-31-July-2015-LIME-response-to-ICTA.pdf>

<sup>326</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-15-17-26-August-2015-ICTA-to-Logic.pdf>, <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-15-53-26-August-2015-ICTA-to-LIME.pdf>, <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-19-37-26-August-2015-ICTA-to-Infinity.pdf> and <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-20-07-26-August-2015-ICTA-to-DataLink.pdf>

<sup>327</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-14-29-2-September-2015-Infinity-response-to-ICTA.pdf>

<sup>328</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-13-44-3-September-2015-Logic-response-to-ICTA.pdf>

<sup>329</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-12-15-16-September-2015-DataLink-response-to-ICTA.pdf>

<sup>330</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-11-25-22-September-2015-LIME-response-to-ICTA.pdf>

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communication cables by C3 to be at the top of the Communication Space, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**.<sup>331</sup>

27. Following from the determination made in ICT Decision 2016-1, the Authority issued a public consultation ('**ICT Consultation 2016-1**')<sup>332</sup> seeking views from interested parties on the relevant cost recovery principles relating to the reattachment of C3'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.
28. The Authority also issued a public consultation ('**ICT Consultation 2016-2**')<sup>333</sup> seeking views from interested parties on (A) the appropriateness of the reservation fees relating to the attachment of communication cables to CUC's electricity poles; (B) the pole attachment permit application process, including make-ready work, for the attachment of communication cables to CUC's electricity poles; and (C) the charging principles relating to the attachment of communication cables to CUC's electricity poles.
29. On **5 May 2016**, pursuant to the Dispute Regulations, Flow submitted a dispute determination request to the Authority contending that a dispute had arisen between Flow and DataLink relating to a Master Pole Joint Use Agreement proposed by DataLink to supplant the **CUC-Flow Pole Sharing Agreement**, noting that Flow and DataLink had been negotiating the new agreement "*in fits and starts for a couple of years*".
30. On **15 June 2016**, CUC, DataLink and Logic executed a Memorandum of Understanding dated 21 June 2016 ('**CUC-DataLink-Logic MOU**') regarding, among others, the make-ready process applicable to Logic attachment permit applications.
31. On **12 July 2016**, Flow, Digicel, C3 and DataLink submitted comments in response to ICT Consultation 2016-2. DataLink stated amongst other things that "[t]he *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.*"
32. On **30 September 2016**, the Authority issued a decision ('**ICT Decision 2016-2**')<sup>334</sup> determining the cost recovery principles for the reattachment of C3's communication cables onto CUC's electricity poles to the new height of 258 inches above the ground.
33. On **4 October 2016**, the Authority wrote to DataLink, that in the event the **CUC-Flow Pole Sharing Agreement** expires before the parties have concluded a new agreement – DataLink should "*...not remove CWCIL's [Flow's] attachments from DataLink's poles, other than in the normal course of business...*" and to "*...refrain from issuing a notice, or exercising any rights under sub-clause 8.1(ii) of the 1996 Agreement.*" The Authority also

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<sup>331</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>332</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>333</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>334</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-59-24-2016-September-2016-ICT-Decision-2016-2-Pole-Reattachment-Cost-Recovery.pdf>

directed DataLink and Flow to report to the Authority on all steps taken by the two parties, including all material dates, in the past twenty-four (24) months to negotiate and conclude a new agreement, if not already so reported, by 24th October 2016.

34. On 24 November 2016, DataLink submitted to the Authority a newly executed master pole joint use agreement between DataLink and Flow (the '**DataLink-Flow Pole Sharing Agreement**')<sup>335</sup> that had been signed by both parties on 18 November 2016.
35. On 9 December 2016, the Authority formed the Pole Attachment Industry Working Group (the '**Working Group**'), consisting of representatives from Flow, DataLink, Digicel, C3 and Logic, to consider various issues relating to the installing and maintaining of attachments of communications cables to the electricity poles owned by CUC (the '**Working Group Letter**').<sup>336</sup>
36. In order to allow the members of the Working Group an opportunity to resolve the matters being considered by the ICT Consultation 2016-2 process, the Authority put that consultation process on hold for the duration of the Working Group. Further, to encourage an honest and open discussion within the Working Group on the various outstanding issues, including but not limited to the five issues identified in the Working Group Letter, the Authority specified that any views and comments expressed during the Working Group discussions on the issues relevant to ICT Consultation 2016-2 will not be made available as part of that consultation. However, the final position papers of the members of the Working Group at the conclusion of the Working Group would be so made available.
37. On **16 January 2017**, the Authority was dissolved and all of its functions and powers were transferred to OfReg.
38. The Working Group met nine (9) times between 16 December 2016 and 17 March 2017. On **21 April 2017**, C3,<sup>337</sup> DataLink,<sup>338</sup> Digicel,<sup>339</sup> and Logic<sup>340</sup> submitted final position papers on the issues discussed by the Working Group. Flow submitted its final position paper on the issues discussed by the Working Group on **26 April 2017**.<sup>341</sup>
39. On **1 June 2017**, the Office invited the members of the Working Group to submit comments on each other's final position papers, as well as on whether there was

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<sup>335</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-04-45-13-MasterPoleJointUseAgreement1480965308.pdf>

<sup>336</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-53-06-PoleAttachmentIndustryWorkingGroupLetter.pdf>

<sup>337</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-33-53-InfinityWorkingGroupResponse.pdf>

<sup>338</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-43-49-1513756858149520178520170421DatalinkWorkingGroupResponse.pdf>

<sup>339</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-42-33-21DigicelWorkingGroupResponse.pdf>

<sup>340</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-35-33-LogicWorkingGroupResponse.pdf>

<sup>341</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-25-58-1513756464149520192620170426FlowWorkingGroupResponse.pdf>

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consensus among the members of the Working Group on any issues, and on whether the Office ought to address the outstanding issues, if any, by continuing with the **ICT Consultation 2016-2** procedure or by adopting another procedure.<sup>342</sup>

40. DataLink,<sup>343</sup> Digicel,<sup>344</sup> Flow<sup>345</sup> and Logic<sup>346</sup> submitted their reply comments on **16 June 2017**. C3 submitted its reply comments on **20 June 2017**.<sup>347</sup>
41. On **30 June 2017**, the Office wrote to the members of the Working Group, noting that “[a]s a result of the clear lack of consensus ... the issues addressed in ICT Consultation 2016-2 remain outstanding.”<sup>348</sup> Accordingly, consistent with paragraph 45 of the Working Group Letter, the Office advised the members of the Working Group that it would continue with the **ICT Consultation 2016-2** procedure, addressing Parts A, B and C of **ICT Consultation 2016-2** separately and would issue determinations or additional questions for consultation as appropriate.
42. On **11 July 2017**, the Office published **ICT 2017 – 1 – Determination**, “*Pole Attachment Reservation Fees*”<sup>349</sup> addressing the issues in **Part A** of **ICT Consultation 2016-2**.
43. On **11 August 2017**, the Grand Court granted DataLink leave to apply for Judicial Review, and a stay, of **ICT 2017 – 1 – Determination**.
44. DataLink was successful in their applications. The hearing of the judicial review took place on **4 to 8 June 2018** and was classified as Grand Court case #134 of 2017.
45. The Grand Court ruled in DataLink’s favour in a decision issued on **17 July 2019**, and held that the Office needed to comply with section 7 (1) of the URC Law, i.e. provide DataLink (and others) with an opportunity to offer any final submissions on **ICT 2017 – 1 – Determination**.

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<sup>342</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-22-30-OfficelettertoPoleWorkingGroupnextsteps.pdf>

<sup>343</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-18-10-DatalinkWorkingGroupResponse.pdf>

<sup>344</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-11-58-DigicelWorkingGroupResponse.pdf>

<sup>345</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-10-11-FlowWorkingGroupResponse.pdf>

<sup>346</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2022-11-07-00-40-40-2017-06-16-Logic-Working-Group-Response.pdf>

<sup>347</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2022-11-07-00-40-40-2017-06-20-C3-Working-Group-Response.pdf>

<sup>348</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-01-56-12-149885071020170630OfReglettertoPoleWorkingGroupprere-launchof2016-2.pdf>

<sup>349</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-05-12-06-48-57-1507893772ICT20171DeterminationPoleAttachmentReservationFees.pdf>

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46. On **14 November 2019**, the Office published **ICT 2019 – 2 – Consultation**<sup>350</sup>, “*Pole Attachment Reservation Fees*,” inviting comments on the attached draft administrative determination addressing the issues in **Part A** of **ICT Consultation 2016-2**.
47. On **22 September 2022**, the Office notified the parties that, with regard to **Part A** of **ICT Consultation 2016-2**, work on **ICT 2019 – 2 – Consultation** will be shortly concluded and, with regard to **Part B** and **Part C** of **ICT Consultation 2016-2**, the Office had recommenced work.
48. On **12 October 2022**, the Office sent requests for information to Flow, DataLink, Digicel, C3 and Logic, and invited them to provide additional comments or submissions on the issues raised in **Part B** and **Part C** of **ICT Consultation 2016-2**, as well as to comment on certain additional issues raised in the Office’s letter.
49. On 18 October 2022, DataLink requested an extension of the deadline to provide responses to the Office’s RFIs. After considering comments from Flow and Digicel on the request, the Office granted it in part on **26 October 2022**.
50. On **11 November 2022**, the Office received responses to its RFIs and additional comments in response to **Part B** and **Part C** of **ICT Consultation 2016-2** from Flow, Digicel, C3 and Logic.<sup>351</sup> The Office also received responses to three of its RFIs from Datalink on the same date.
51. On **9 December 2022**, DataLink responded to the remaining RFIs and submitted additional comments in response to **Part B** and **Part C** of **ICT Consultation 2016-2**.<sup>352</sup>
52. On **14 December 2022**, the Office published an update of the status of the major activities in the consultation, including a timeline for the next major activity.
53. On **10 March 2023**, the Office wrote to Flow, DataLink, Digicel, C3 and Logic informing them that the publication date had to be pushed back in part for want of responses from one licensee to the 12 October 2022 RFIs.
54. On **17 March 2023** the Office wrote to Flow, DataLink, Digicel, C3 and Logic regarding confidentiality claims regarding the responses received by the Office to the 12 October 2022 RFIs.
55. On **11 April 2023** the Office followed up with Flow, DataLink, Digicel, C3 and Logic regarding the letter of 17 March 2023 as no responses had been received by the Office.
56. On **11 April 2023** Flow, Digicel, C3 and Logic confirmed they had no further comment regarding the 17 March 2023 letter, DataLink responded asking for an extension to 14 April 2023 to provide its response, this request was granted.

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<sup>350</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-08-01-20-51-Consultation-Pole-Attachment-Reservation-Fees.pdf>

<sup>351</sup> <https://www.ofreg.ky/consultation-rfis-and-next-steps-responses>

<sup>352</sup> Ibid.

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57. On **14 April 2023** DataLink provided its response to the 17 March 2023 letter, stating that they did not agree with the Office's stated intent to publish certain information as set out in the 17 March 2023 letter.
58. On **11 May 2023** the Office communicated its decision on the confidentiality claims regarding the responses received by the Office to the 12 October 2022 RFIs to Flow, DataLink, Digicel, C3 and Logic.

## Appendix 2 – Legal Framework

In making its determination of pole attachment make-ready and permit application processes and charging principles, the Office was guided by its statutory remit, in particular as set out in the URC Act, the ICT Act, and the INI Regulations.

The following provisions are of particular relevance:

### URC Act Section 6

(1) The principal functions of the Office, in the markets and sectors for which it has responsibility, are -

[...]

- (b) to promote appropriate effective and fair competition;
- (c) to protect the short and long term interests of consumers in relation to utility services and in so doing -
  - (i) supervise, monitor, and regulate any sectoral provider, in accordance with this Law, the regulations and sectoral legislation and any general policies made by Cabinet in writing;
  - (ii) ensure that utility services are satisfactory and efficient and that charges imposed in respect of utility services are reasonable and reflect efficient costs of providing the services; and
- [...]
- (d) to promote innovation and facilitate economic and national development.

(2) In performing its functions and exercising its powers under this or any other Law, the Office may -

[...]

- (d) make administrative determinations, decisions, orders and regulations;
- [...]
- (u) review and, as appropriate, approve, reject or modify tariffs filed by a sectoral provider governing the provision of covered services;
- (v) establish and enforce quality of service standards applicable to covered services;
- [...]
- (cc) resolve disputes between sectoral providers, and between sectoral providers and sectoral participants;
- [...]
- (gg) take appropriate enforcement action, including the imposition of administrative fines, in any case where a sectoral participant has contravened this Law, the regulations and any sectoral legislation or any administrative determination;
- (hh) take any other action, not expressly prohibited by Law, that is necessary and proper to perform its duties under this Law and sectoral legislation;
- [...]

(4) In performing its functions and exercising its powers under this or any other Law, the Office shall —

- (a) act in a timely manner;



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- (b) rely on self-regulation and co-regulation, where appropriate;
  - (c) act in a reasonable, proportionate, impartial and consistent manner;
  - (d) operate transparently, to the full extent practicable;
  - (e) engage in reasoned decision-making, based on the administrative record;
  - (f) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest; and
  - (g) subject to section 12, act free from political interference.
- (5) The markets and sectors for which the Office has responsibility are set out in Schedule 1.

### **URC Act Section 7 (1)**

Prior to issuing an administrative determination which, in the reasonable opinion of the Office, is of public significance, and subject to specific procedures under sectoral legislation, the Office shall —

- (a) issue the proposed determination in the form of a draft administrative determination;
- (b) allow persons with sufficient interest or who are likely to be affected a reasonable opportunity to comment on the draft administrative determination; and
- (c) give due consideration to those comments with a view to determining what administrative determination (if any) should be issued.

### **ICT Act Section 2**

“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; and for the purposes of this definition -

- (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; ...”
- (b) “intangibles” includes agreements, arrangements, licences, franchises, rights of way, easements and other such interests;

Prior to the coming into force of the *Information and Communications Technology Authority (Amendment) (No. 2) Law, 2016* on 16 January 2017, sections 65, 66, and 68 of the *Information and Communications Technology Authority Law (2016 Revision)* did not reference “infrastructure sharing” but applied to infrastructure sharing through the operation of the then-section 69 (1) :

69. (1) Sections 65 to 68 shall, with necessary amendment, apply to such infrastructure sharing as the Cabinet may, after consultation with the Authority, prescribe.

and through section 2 of the *Information and Communications Technology Authority (Infrastructure Sharing) Notice, 2003*:

2. (1) The provisions of section 44 to 47 of the *Information and Communications Technology Authority Law, 2002* shall apply to infrastructure sharing which has the following meaning:

“infrastructure sharing” means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the use of a public ITC 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, landing stations, huts, lands, buildings or facilities; and
- (b) intangibles include agreements, arrangements, licences, franchises, rights of way, easements and other such interests.

**ICT Act Section 9 (3)**

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

- (a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;
- (b) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;  
[...]
- (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;  
[...]

**ICT Act Section 65**

(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 or the sharing of any infrastructure and shall, in accordance with this section, ensure that the interconnection or infrastructure sharing provided is made at technically feasible physical points.

[...]

(5) Any interconnection or infrastructure sharing 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;
- (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 Office 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.

**ICT Act Section 66 (5)**

(5) Where parties cannot agree upon interconnection or infrastructure sharing rates, the Office may impose such rates.

**ICT Act Section 68**

(1) The cost of making any interconnection or infrastructure sharing to the ICT network of another licensee shall be borne by the licensee requesting the interconnection or infrastructure sharing.

[...]

(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 or infrastructure sharing service does not have to pay for network components that are not required for the interconnection or infrastructure sharing service to be provided.

**ICT Act Section 69**

(2) The Office, 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.

**INI Regulation 6**

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;

[...]

(c) interconnection and infrastructure sharing services shall be provided by the responder to the requester 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;

[...]

(f) costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires;

(g) costs shall be borne either by the requestor or the responder or both based on whether their respective requests and compliance with those requests cause those costs to be incurred;

and in accordance with an interconnection or infrastructure sharing agreement between the two parties;

(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;

[...]

(j) Interconnection and infrastructure sharing services shall be provided in a manner that –

(i) maximises the use of public ICT networks and infrastructure;

[...]; and

(iii) enables the development of competition in the provision of public ICT networks and public ICT services in a timely manner;

### **INI Regulation 9**

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

### **INI Regulation 10**

(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.

### **INI Regulation 22 (2)**

(2) The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of licence, relevant regulations, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe.

### **INI Regulation 28**

In promoting the efficient, economic and harmonised utilisation of infrastructure, the Authority may inquire into and require modification of any agreement or arrangements entered into a responder or requestor and another licensee which has the effect of limiting either efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of public ICT services or public ICT networks.



## **Appendix 3 – Comparison of Pole Sharing Agreements**

This Appendix consists of two documents, provided separately due to their size:

- Comparison of Pole Sharing Agreements - main agreement

This document consists of a table comparing side-by-side the clauses in the main body of the Master Pole Joint Use Agreements currently in effect.

- Comparison of Pole Sharing Agreements – appendices

This document consists of a table comparing side-by-side the provisions in the appendices to the Master Pole Joint Use Agreements currently in effect.

Some of the information in this document was provided by a party with a request for confidential treatment and it is being made available to the public in redacted form. For clarity, the redactions in the document reflect a party's request for confidential treatment at the time of submission to the Office and do not necessarily reflect the Office's 11 May 2023 decision on certain confidentiality matters in this proceeding.

The tables are to be read left to right, with the most recent agreement (2022) in the left-most column and the oldest (2012) in the right-most column. Differences between the most recent agreement from 2022 and the other agreements are shown in red text and strike-out font.

## Appendix 4 – Issues Relating to the Permit Application Process, Including Make-Ready Work (Consultation 2016-2 Part B) - Proposals and Questions

### Standard Terms and Conditions

#### Non-discriminatory provision of service to attachers

##### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation, to require **DataLink to ensure that all third-party utilities (i.e. other than DataLink) who attach communications cables to the communications space on CUC utility poles do so on non-discriminatory terms and conditions.**

##### Question

**QUESTION 1 Do you agree with the proposal to require DataLink to ensure that all third-party utilities (i.e. other than DataLink) who attach communications cables to the communications space on CUC utility poles do so on non-discriminatory terms and conditions? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.**

#### Self-Provision of Service

##### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation, to require **DataLink to provide its pole attachment services to all attaching utilities on rates, terms and conditions that are no less favourable than the rates, terms and conditions as DataLink provides the same services to itself.**

##### Question

**QUESTION 2 Do you agree with the proposal to require DataLink to provide its pole attachment services to all attaching utilities on rates, terms and conditions that are no less favourable than the rates, terms and conditions as DataLink provides the same services to itself? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.**

## Permit Application Process and Timetable

### Responding to Permit Applications

#### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes applicants be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole.**

#### Questions

**QUESTION 3** Do you agree with the proposal that applicants be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole? If not, explain in detail the reasons why. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 4** If applicants were to be required to provide a properly-completed Pre-Permit Survey with their applications for a permit to attach a communications cable to a CUC utility pole, what would be, in your view, the impact on the time required to provide a quotation to the applicant? Explain in detail the basis for your view.

### Responding to Quotations

#### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation, **Attaching Utilities should be required to accept, reject or otherwise respond to estimates of the Make-Ready Work charges necessary to accommodate the Attaching Utility's attachment within a specific period of time following delivery of the estimate by DataLink.**

#### Questions

**QUESTION 5** Do you agree with the proposal that Attaching Utilities should be required to accept, reject or otherwise respond to estimates of the Make-Ready Work charges necessary to accommodate the Attaching Utility's attachment within a specific period of time following delivery of the estimate by DataLink? If not, explain in detail the reasons why you disagree. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 6** What period of time should Attaching Utilities be given in order to accept, reject or otherwise respond to estimates delivered by DataLink?



**QUESTION 7** What specific changes to the terms of the Pole Sharing Agreement would you propose to implement this proposal, if it were adopted as a determination following consultation?

### **Treatment of Batches of Poles**

#### **Proposal**

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation, **all permits issued for poles included in the same batch application be given the same effective date, irrespective of when the pole is actually ready and available for attachment, unless the applicant requests otherwise.**

#### **Questions**

**QUESTION 8** Do you agree with the proposal that all permits issued for poles included in the same batch application be given the same effective date, irrespective of when the pole is actually ready and available for attachment, unless the applicant requests otherwise? If not, explain in detail the reasons why you disagree. Please also indicate changes, if any, you suggest should be made to the proposed requirement.

**QUESTION 9** What specific changes to the terms of the Pole Sharing Agreement would you propose to implement this proposal, if it were adopted following consultation?

### **Provisional versus Full Permits**

#### **Proposal**

Subject to consultation, the Office is of the preliminary view that the Office should not require this change to the permit application process and to the Pole Sharing Agreements proposed by DataLink in its December 2022 Re-Submission.

#### **Questions**

**QUESTION 10** Do you agree with the Office’s preliminary view that it should not require changes to the permit application process and to the Pole Sharing Agreements to include the provision of a “Pre-Approved Permit” prior to the issuance of a “Full Permit”?

**QUESTION 11** If not, explain in detail the reasons why you disagree, and describe in detail how the changes proposed by DataLink would promote an efficient, economic and harmonised utilisation of infrastructure on Grand Cayman.

## **Administration of Permits and Make-Ready Work**

### **Form of Permit**

#### **Proposal**

Pursuant to section 69 (2) of the ICT Act, in order to promote an efficient, economic and harmonized use of infrastructure, and pursuant to section 62 of the URC Act, in order to promote innovation within the sectors for which it has responsibility with a view to contributing to national economic competitiveness and development, the Office **proposes**, subject to consultation, that:

**DataLink be directed to investigate and report to the Office within ninety (90) days of a final determination by the Office:**

- a) **the feasibility of the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits, including the requirements, scope and cost of such a system, and**
- c) **the feasibility of the creation of an online database containing relevant information on CUC utility poles managed by DataLink.**

#### **Questions**

**QUESTION 12 Do you agree with the Office’s proposal to direct DataLink to investigate the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits? If not, explain in detail the reasons why you disagree.**

**QUESTION 13 If you agree with the Office’s proposal to direct DataLink to investigate the creation of an online portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits, what should be the requirements and scope of such a system?**

**QUESTION 14 Do you agree with the Office’s proposal to direct DataLink to investigate the creation of an online database containing relevant information on CUC utility poles managed by DataLink? If not, explain in detail the reasons why you disagree.**

**QUESTION 15 If you agree with the Office’s proposal to direct DataLink to investigate the creation of an online database containing relevant information on CUC utility poles managed by Data, what should be the requirements and scope of such a system? In particular, what information in relation to CUC utility poles should be included and which persons should have access to the database?**

**QUESTION 16 Do you agree the Office has the jurisdiction under sections 6 and 62 of the URC Act to require DataLink to investigate the creation of an online**

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portal or system for the submission of pole attachment permit applications and the issuance of pole attachment permits and/or the creation of an online database containing relevant information on CUC utility poles managed by DataLink?

### Scope of Permit

#### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:

- a. **the Pole Sharing Agreements be modified to include a more explicit condition in contract that *any* changes to the communications facilities authorised to be attached to a pole under a permit *must* be reviewed by DataLink under the permit application process *before* the change is made;**
- b. **Attachers be required to report to DataLink all unauthorised attachments that have not yet come to the attention of DataLink, and must refrain from all future unauthorised attachments; and**
- c. **DataLink be required to review each unauthorised attachment that comes to its attention, determine the make-ready work that would have been required if the attacher in question had properly applied for a permit for the attachment under the Pole Sharing Agreement, and invoice the attacher the applicable make-ready work charges and complete the required make-ready works to ensure the protection of the electrical grid.**

#### Questions

**QUESTION 17** Do you agree with the Office's proposal to modify the Pole Sharing Agreements to include a more explicit condition in contract that *any* changes to the communications facilities authorised to be attached to a pole under a permit *must* be reviewed by DataLink under the permit application process *before* the change is made? If not, explain in detail the reasons why you disagree.

**QUESTION 18** Do you agree with the Office's proposal to require Attachers to report to DataLink all unauthorised attachments that have not yet come to the attention of DataLink, and must refrain from all future unauthorised attachments? If not, explain in detail the reasons why you disagree.

**QUESTION 19** Do you agree with the Office's proposal to require DataLink to review each unauthorised attachment that comes to its attention, determine the make-ready work that would have been required if the attacher in question had properly applied for a permit for the attachment under the Pole Sharing

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Agreement, and invoice the attacher the applicable make-ready work charges? If not, explain in detail the reasons why you disagree.

**QUESTION 20** Do you agree that the requirements should apply only to unauthorised attachments made after a final determination in this proceeding, or do you consider that they should apply to all unauthorised attachments, irrespective of when they were made or discovered? If the latter, describe in detail the power or jurisdiction that the Office would exercise in order to require retrospective adjustments to make-ready work charges.

**QUESTION 21** Are there are other remedies that the Office should consider instead, such as mandatory removal of all unauthorised attachments? If yes, describe in detail the advantages or disadvantages of such other remedies including, without limitation, the impact on existing services provided to consumers.

**QUESTION 22** Should different considerations apply to unauthorised attachments made by ICT licensees outside of the communication space. for example, in light of the danger to the safety and security of persons and of the electricity network, should they be subject to mandatory removal and/or to review under section 91 of the URC Act with a view to possible levying of administrative fines?

**QUESTION 23** In light of the current limit of one Attachment per Assigned Space set out in Appendix C of the Pole Sharing Agreements, what process do you consider should apply when an Attacher seeks to replace an existing communications facility on a pole with a new facility, without interrupting service to consumers?

### Timely Exercise of Access Rights

#### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that **a permit to attach to a pole should remain effective unless the right to attach contained in that permit is not exercised within no less than 200 calendar days after the date all permits in the same batch of poles have been issued.**

#### Questions

**QUESTION 24** Do you agree with the Office's proposal to ensure a permit to attach to a pole remains effective unless the right to attach contained in that permit is not exercised within no less than 200 calendar days after the date all permits in the same batch of poles have been issued? If not, explain in detail why you disagree.

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**QUESTION 25** Should the duration of the period to exercise the right to attach remain 200 calendar days or should it be modified? If so, what should be the new period to exercise the right to attach? Explain in detail why and, in particular, how changing the period to exercise might promote an efficient, economic and harmonised utilisation of infrastructure.

**QUESTION 26** Alternatively, should Article IV.F be removed from the Pole Sharing Agreements? Explain in detail why and, in particular, how removing Article IV.F might promote an efficient, economic and harmonised utilisation of infrastructure.

### Exchange of Forecasts

#### Proposal

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, the Office **proposes**, subject to consultation, that **attaching utilities be required to the Owner Utility (DataLink or CUC, as applicable) periodic forecasted attachment requirements over the next three-year period.**

#### Questions

**QUESTION 27** Do you agree with the Office's proposal attaching utilities be required to the Owner Utility (DataLink or CUC, as applicable) periodic forecasted attachment requirements over the next three-year period? If not, explain in detail why you disagree.

**QUESTION 28** How often should attaching utilities be required to provide the forecasts, if any, and at what level of geographic specificity?

**QUESTION 29** Should such forecasts, if any, include only new attachments, or should all attachments be included?

**QUESTION 30** Should the forecasts, if any, be binding?

**QUESTION 31** In light of the fact that DataLink also competes with the other attachers as an ICT licensee, what measures should be implemented, if any, in order to protect the confidential and commercially-sensitive information of the other attachers?

## Right to Perform Work

### Pre-Permit Surveys

#### Proposals

1. Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:
  - a. **DataLink shall permit attaching utilities to perform pre-permit surveys prior to submitting pole attachment permit applications to DataLink.**
  - b. **These pre-permit surveys shall consist of visual surveys only and may be subject to reasonable terms and conditions such as a requirement to give DataLink reasonable advance notice of an intent to carry out a pre-permit survey.**
  - c. **DataLink shall publish the information it reasonably requires from a pre-permit survey in order for DataLink to process an application for a pole attachment permit.**
  - d. **DataLink shall provide training at a reasonable cost to the persons proposing to do the Pre-Permit Surveys, and may also carry out a verification process whereby DataLink may audit a representative number of Pre-Permit Surveys to verify compliance with the requirements.**
2. Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation that:

**DataLink shall maintain an up-to-date list of all CUC utility poles, which shall include information on the X and Y coordinates, height, CUC pole number or equivalent information, and size of communications space (where known) of each such pole, and shall provide the list upon request to ICT licensees who have executed a master joint use pole sharing agreement with DataLink.**

#### Questions

**QUESTION 32** Do you agree with the Office's proposal that DataLink permit attaching utilities to perform pre-permit surveys prior to submitting pole attachment permit applications to DataLink? If not, explain in detail why you disagree.

**QUESTION 33** Do you agree with the Office's proposal that these pre-permit surveys would consist of visual surveys only and may be subject to reasonable terms and conditions such as a requirement to give DataLink reasonable

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advance notice of an intent to carry out a pre-permit survey? If not, explain in detail why you disagree.

**QUESTION 34** Do you agree with the Office’s proposal that DataLink publish the information it reasonably requires from a pre-permit survey in order for DataLink to process an application for a pole attachment permit? If not, explain in detail why you disagree.

**QUESTION 35** Do you agree with the Office’s proposal DataLink provide training at a reasonable cost to the persons proposing to do the Pre-Permit Surveys, and carry out a verification process to verify compliance with the requirements? If not, explain in detail why you disagree.

**QUESTION 36** Do you agree with the Office’s proposal that DataLink maintain an up-to-date list of all CUC utility poles, which shall include information on the X and Y coordinates, height, CUC pole number or equivalent information, and size of communications space (where known) of each such pole, and shall provide the list upon request to ICT licensees who have executed a master joint use pole sharing agreement with DataLink? If not, explain in detail why you disagree.

**Make-Ready Work**

**Proposal**

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes** that, subject to consultation:

**DataLink is required to permit third parties to perform make-ready work, including make-ready work in the electrical space or involving electrical facilities on the utility pole, provided all of the following conditions are satisfied:**

- a. **DataLink has failed to meet the timelines set out in Article VII (or equivalent) of the Pole Sharing Agreement, and DataLink and the relevant attaching utility have not agreed to new timelines;**
- b. **The attaching utility in question has requested in writing that a third-party contractor perform the work;**
- c. **The third-party contractor holds all certifications and qualifications required for the make-ready work in question (DataLink shall publish the relevant certifications and qualifications); and**
- d. **Whether or not the third-party contractor is paid by the attaching utility, the third-party contractor must be under the supervision and control of CUC personnel and contractually bound to CUC.**

## Questions

**QUESTION 37** Do you agree with the Office's proposal that DataLink be required to permit third parties to perform make-ready work, including make-ready work in the electrical space or involving electrical facilities on the utility pole, provided certain conditions are satisfied? If not, explain in detail why you disagree.

**QUESTION 38** Are the proposed conditions appropriate? Are there are other relevant considerations that the Office should consider?

## Pre-Conditions for Pole Swaps / Replacements

### Proposals

Subject to consultation, that **upon receipt of a request to attach to a CUC utility pole, DataLink should replace the pole with one capable of accommodating up to four attachers, and that the costs of pole replacement should be shared by all attachers who have included the pole in their attachment demand forecasts**, as this means they would sooner or later be requesting access.

In the event the Office concludes that it does not have jurisdiction to mandate such a solution, the Office **proposes in the alternative**, subject to consultation, that **DataLink should first attempt to accommodate all attachment requests within the existing communications space before replacing the pole with a pole with can accommodate up to four attachers, subject to the terms discussed below.**

The Office **proposes**, subject to consultation, that **the requester pay for the cost of replacing the pole with one that can accommodate up to four attachers.**

### Questions

**QUESTION 39** Do you agree with the Office's proposal that upon receipt of a request to attach to a CUC utility pole, DataLink should replace the pole with one capable of accommodating up to four attachers, and that the costs of pole replacement should be shared by all attachers who have included the pole in their attachment demand forecasts. If not, explain in detail why not.

**QUESTION 40** In your view, does the Office has power to mandate such a solution under the current ICT Act and Regulations? Provide your reasoning in detail.

**QUESTION 41** In your view, can the parties (Owner Utilities and Attaching Utilities) agree to such a solution, in the event the Office does not have the power to mandate such a solution under the current ICT Act and Regulations? Provide your reasoning in detail.

**QUESTION 42** Do you agree with the Office's alternative proposals that DataLink should first attempt to accommodate all attachment requests within the existing communications space before replacing the pole with a pole with can accommodate up to four attachers, that in such a case the requester should pay for the cost of replacing the pole with one that can accommodate up to four



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attachers, provided that, if a pole was installed between 1996 and 2016 and does not have a 1-foot 8-inch communications space, DataLink should bear half the cost of replacing the pole unless DataLink can demonstrate that Flow declined future use of the pole in question under the terms of the 1996 CUC-Flow Pole Sharing Agreement? If not, explain in detail why not.

### Standard Poles

#### Proposal

The Office also considers that any new definition would have significant implications on the apportionment of costs associated with installing such poles, particularly in light of Condition 7.1 of CUC's T&D Licence.

Accordingly, the Office will not propose for consultation a revised definition of "standard utility pole" at this time.

#### Questions

**QUESTION 43** Do you agree with the Office's preliminary view that it should not propose for consultation a revised definition of "standard utility pole"?

**QUESTION 44** If not, explain in detail the reasons why you disagree, provide a revised definition of "standard utility pole", and describe in detail how the application of that revised definition would promote an efficient, economic and harmonised utilisation of infrastructure on Grand Cayman.

## **Appendix 5 – Issues Relating to the Charging Principles (Consultation 2016-2 Part C) - Proposals and Questions**

### **Recurring Charges for the Attachment of Communications Cables**

#### **Questions**

**QUESTION 45** Is DataLink pricing formula for calculation of the “Annual Attachment Fee” an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC’s utility poles, and if so, why.

**QUESTION 46** If DataLink pricing formula for calculation of “Annual Attachment Fee” is not an appropriate pricing methodology, what other methodology should be used for determining cost-oriented prices for attachment of communications cables onto CUC’s utility poles.

**QUESTION 47** If DataLink pricing formula for calculation of the “Annual Attachment Fee” is an appropriate pricing methodology, should any changes be made in the various elements of the formula, namely:

- Net Cost of a Bare Pole,
- Space Factor,
- CUC’s Annual Carrying Charge Rate,
- Inflation, and
- Management & Overhead.

**QUESTION 48** Provide your view as to whether or not DataLink pricing formula has any effect on the prices electricity users pay to CUC and/or the potential profitability of CUC’s business operations resulting from the provision of access to its utility poles, including any evidence you have to support your view.

**QUESTION 49** Provide your view as to whether or not DataLink’s ability to access CUC’s utility poles at no charge 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.

## Non-recurring charges for Make-Ready work

### Questions

**QUESTION 50** Provide your view as to whether or not DataLink's charges for Make-Ready work are cost-orientated, including a detailed explanation supporting your view.

**QUESTION 51** If your view is that DataLink's charges for Make-Ready work are not cost-orientated, provide your view as to what approach should be taken to ensure the non-recurring charges for Make-Ready work are cost-orientated.

## Process for Refund of Make-Ready Costs

### Proposals

Pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, and to promote competition in the provision of ICT networks and ICT services, the Office **proposes**, subject to consultation that **the refund formula set out in Article VII of the Pole Sharing Agreements should be amended to take into account:**

- a) **the appropriate principles for depreciation of the value of make-ready costs eligible for refund; such depreciation to be based on the actual lifespan of the relevant poles, and calculated using straight-line depreciation method;**
- b) **the principles of proportionality for determining the relevant amount of refund of make-ready costs; such proportionality to be related to appropriate sharing of costs by all the parties that directly benefit from the relevant make-ready work;**
- c) **DataLink should determine and arrange for refunds of make-ready work charge without requiring the attacher to apply for them; and**
- d) **DataLink should be liable to refund the make-ready work charges paid by other attachers in instances where it also benefits from the relevant make-ready work.**

### Question

**QUESTION 52** Do you agree with the Office's proposal that Article VII of the Pole Sharing Agreements should be amended as described in the preceding paragraph? If not, explain in detail why not.