



**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 (the ‘**Office**’ or ‘**OfReg**’), the Information and Communications Technology Authority (the ‘**Authority**’ or ‘**ICTA**’) 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 Information and Communications Technology (‘**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 a Pole Attachment Industry Working Group (‘**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.
- ES3. In an effort to address the longstanding issues with the pole sharing process, in 2022, the Office consolidated issues presented in the 2016-2 consultation along with issues arising subsequently and restarted the polishing consultation. 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 Requests for Information (‘**RFI**’) 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 considered 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, and on 02 June 2023 via ICT 2016 – 2 - Consultation Part B and Part C (Updated)<sup>1</sup> interested parties were invited to comment on the following proposals:

**Part B** - relating to the permit application process and make-ready work, including:

- i. The application of standard terms and conditions;
- ii. Changes to the permit application process;
- iii. The administration of permits and make-ready work;
- iv. The replacement of poles; and
- v. The need for a definition of “standard pole”.

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<sup>1</sup> ICT 2016 – 2 - Consultation Part B and Part C (Updated) - <https://www.ofreg.ky/consultation-2016-2-part-b-and-part-c>

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**Part C** - relating to the appropriate charging principles for annual attachment fees and charges for make-ready work, namely:

- vi. recurring charges, applicable for recovering the costs relating to the attachment of communication cables to CUC's utility poles (i.e., pole attachment fees);
- vii. non-recurring charges, applicable for recovering the costs relating to make-ready work (i.e., make-ready work charges); and
- viii. the process for refunding make-ready work charges.

ES5. The Office received the comments from the Parties on 02 August 2023, and on 18 September 2023 the Office received the Parties cross comments on each other's 02 August 2023 comments.

ES6. Having reviewed the comments and cross comments received from the Parties, the Office now provides this Draft Determination with the Office's responses to the submissions received, draft determinations on the proposals relating to the permit application process, make-ready work, the appropriate charging principles for annual attachment fees and charges for make-ready work for review by the Parties.

## Section 2 – Introduction

1. The Office is the independent regulator established by section 4 of the Utility Regulation and Competition Act (2021 Revision) (**'URC Act'**) for the electricity, fuels, 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>2</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'**), which has been licensed by CUC to DataLink Limited (a wholly-owned subsidiary of CUC) (**'DataLink'**), under the **CUC-DataLink Pole Sharing Agreement**,<sup>3</sup> to manage and sub-licence the communication space to other ICT licensees, namely Cable and Wireless (C.I.) Ltd. (**'Flow'**, **'CWCIL'** or **'Cable & Wireless'**), Digicel Cayman Limited. (**'Digicel'**), Infinity Broadband Ltd. (**'Infinity'** or **'C3'**) and WestTel Limited. (**'Logic'**), collectively the **'Parties'**.
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 attachments on any given pole is generally permitted.

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

<sup>3</sup> Terms not defined in the body of this Consultation are defined in **APPENDIX 1**.

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7. Before an eligible<sup>4</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 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 Master Pole Joint Use Agreements (**'MPJUA'**) 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 MPJUAs.

### **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 ICTA, to publish *ICT Consultation 2016-2 – pole attachment reservation fees, permit application process and charging*

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<sup>4</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.

<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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*principles* ('**ICT 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.
13. On 02 June 2023 the Office published **ICT 2016 – 2 – Consultation Part B and Part C (Updated)**, where the Office addressed 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.*"
14. On 02 August 2023 the Office received comments on ICT 2016 – 2 – Consultation Part B and Part C (Updated), and on 18 September the Office received cross comments on the comments received on 02 August 2023. These comments, cross comments and the Office's responses is provided in **APPENDIX 4** to this Draft Determination Document.

### C. This Draft Determination

15. In this document, **ICT 2024 – 1 – Determination ICT Consultation 2016-2 Part B and Part C (Updated)**, the Office addresses the issues raised in ICT 2016 – 2 – Consultation Part B and Part C (Updated), "*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

16. The Office is guided by its statutory remit, in particular as set out in the URC Act, the ICT Act and the INI Regulations.
17. 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.
18. 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*.”
19. 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.
20. 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.
21. 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*.”
22. 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.
23. 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 – Draft Determinations on Issues Relating to the Permit Application Process, Including Make-Ready Work (Consultation 2016-2 Part B)

### A. Introduction

24. As noted in Section 4 of the Updated Consultation Paper<sup>8</sup>, 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 of the Updated Consultation Paper 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.

### B. Issues to be Addressed

25. Following its analysis of the responses of the parties to the Updated Consultation Paper, as well as the submissions described in Section 4 of the Updated 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)
  - 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)

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<sup>8</sup> ICT Consultation 2016-2 Part B and Part C (updated) - <https://www.ofreg.ky/consultation-2016-2-part-b-and-part-c>

26. The Office will address each of these in turn below and set out draft determinations that, if adopted following consultation, it considers would address the issues that have been identified.
27. The Office considers that the issues identified in paragraph 26 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**

28. Having reviewed the Pole Sharing Agreements entered into by DataLink and the various Attaching Utilities, the Office notes a number of differences among them. These differences are described in **APPENDIX 3** of this Draft Determination Document. The Office notes that no party challenged their existence.
29. 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.
30. Further, the Office notes that DataLink holds Type 11<sup>9</sup> and 11a<sup>10</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.

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

31. 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.*"

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<sup>9</sup> The provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.

<sup>10</sup> The provision, by lease or otherwise, of dark fibre to a Licensee.

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32. The Office considers that differences in the 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.
33. 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 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).
34. 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 at paragraph 301 of the Updated Consultation Document);
  - 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 at paragraph 301 of the Updated Consultation Document);
  - 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 at paragraph 301 of the Updated Consultation Document);
  - 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 communications cable and would give DataLink a distinct competitive advantage in pricing its ICT services (see Difference vi at paragraph 301 of the Updated Consultation Document);
  - 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

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attach within the specified time frame.<sup>11</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 at paragraph 301 of the Updated Consultation Document);

- f. in favour of Flow by granting it greater flexibility in addressing instances of Attachments that are in non-compliance with the requirements of the pole sharing agreement than is granted to other attachers (including itself) (see Difference x at paragraph 301 of the Updated Consultation Document);
  - 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 at paragraph 301 of the Updated Consultation Document);
  - 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 at paragraph 301 of the Updated Consultation Document); 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 at paragraph 301 of the Updated Consultation Document).
35. 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.
36. 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 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.

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<sup>11</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.

### III. Self-Provision of Service

37. 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>12</sup> and more recently that it is not in competition with the other attachers.<sup>13</sup> However, as the Office set out in the Updated Consultation Paper and in its responses to the submissions of the parties to the Updated Consultation Paper, DataLink is licensed to provide services, and is in fact providing services, that compete with those of the other attachers using ICT facilities that are attached to CUC utility poles (outside of the Communications Space). Further, nothing prevents DataLink from attaching to selected CUC utility poles within the Communications Space in the future or from expanding its service offerings to compete with the other attachers.
38. 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>14</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.
39. 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 ICT services (including Type 1 Fixed Telephony 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.
40. As noted at paragraph 35 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.
41. 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 had made limited use of CUC poles other than for dark fibre optic capacity provided on a few main

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<sup>12</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>13</sup> See DataLink’s 3 August 2023 responses to Questions 2 and 31 of the Updated Consultation Document.

<sup>14</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.

routes.<sup>15</sup> The Office considers that this arrangement (assigning itself a position in the Communications Space on all poles but making limited use of it) 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.

42. 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).
43. The Office understands that DataLink has since changed this situation by relinquishing its claim to a position within the Communications Space and making it available to Digicel.<sup>16</sup> 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.
44. 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.

### Draft Determinations

45. 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 makes the following determinations:
  - a. **DataLink shall ensure that all third-party Attaching 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.**
  - b. **DataLink shall 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.**

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<sup>15</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>16</sup> The Office also notes that it appears DataLink may never have used that position in the Communications Space. Per DataLink’s 9 December 2022 response to RFI 301, no poles have been occupied by DataLink cables in the Communications Space since at least Q1 2018. See also DataLink’s 3 August 2023 response to Question 2 (“... *DataLink does not have fiber itself.*”) and to Question 31 (“*DataLink itself does not possess any cables connected to poles within the Communication Space.*”) of the Updated Consultation Document.

## PUBLIC VERSION

46. To comply with these proposals, if adopted as final determinations, 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. These proposals, if adopted as final determinations following consultation, may also 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.
47. 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 operating ICT networks and providing ICT services, and thereby promote competition in the provision of ICT services and ICT networks.
48. The Office considers that, if its proposed determinations were adopted as final determinations, their 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.
49. It should be noted that, by making this proposal, the Office is not approving at this time any specific form of Pole Sharing Agreement. Indeed, the ICT Act and the INI Regulations do not require prior approval of infrastructure sharing agreements and the Office does not seek to 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 INI Regulations that "*...licensees shall, in the first instance, attempt to reach agreement on interconnection and infrastructure sharing by negotiation...*"<sup>17</sup>

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<sup>17</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.



## D. Permit Application Process and Timetable

### I. Overall Factual Situation

50. 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 described this evidence at paragraphs 341-345 of the Updated Consultation Document and will not reproduce it here, but the Office relies on it here in this Draft Determination Document. The Office also notes that no party suggested in its responses to the Updated Consultation Document that the pace of processing pole permit applications and performing make-ready work had improved materially.
51. The Office considers that this is in part related to DataLink's existing pole permit application process.
52. 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. The Office also notes that DataLink has repeatedly stated that it has limited resources available to it to perform make-ready work.
53. Based on its review of the number of poles being delivered to attachers as set out at paragraphs 341-345 of the Updated Consultation Document, the Office 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 appropriate allocation of resources is made for the timely processing of permit applications.”*
54. 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.
55. 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.

56. In the Updated Consultation Document, the Office proposed for consultation a number of changes to the permit application process that, in its view, would 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. Having considered the responses of the parties, the Office proposes below to make a number of determinations, subject to consultation, to modify the permit application process in the Pole Sharing Agreements.

## II. Pre-Permit Surveys

57. 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).

58. However, the Office notes that, as presently drafted in Article VI (*“Permit Application Procedures”*), paragraph B (*“Review of Permit Application”*) (**“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)

59. 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).

60. 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.

## PUBLIC VERSION

61. 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.
62. 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. Nor is there evidence that the field inspection element of a Pre-Permit Survey involves safety considerations that exceed those which apply to normal maintenance work in the Communications Space, which is routinely performed by attachers. 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.
63. 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. It would also materially reduce the risk that a response to an application could be delayed indefinitely (cf. paragraph 61 above).
64. As further discussed in Section 4.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.
65. If the attaching utility were to perform the Pre-Permit Survey as further discussed in Section 4.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.

### Draft Determinations

66. 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 makes the following determinations:
  - a. **Applicants shall 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.**
  - b. **If an application (including the Pre-Permit Survey) is incomplete, DataLink shall so notify the applicant in writing within the same timeframes as set out in Article VI ("*Permit Application Procedures*"), paragraph C ("*Review Period*") of the Pole Sharing Agreements.<sup>18</sup> DataLink's written notice shall describe in detail what information is missing.**
  - c. **DataLink may refuse an application that is incomplete provided DataLink has provided notice as described in the preceding paragraph and the applicant**

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<sup>18</sup> Within ten (10) days of receipt for "Minor" Permit Applications and within fifteen (15) days of receipt for "Major" Permit Applications.

**has not corrected such deficiencies within the same timeframes following notice as set out in Article VI.C of the Pole Sharing Agreements.**

67. If adopted as final determinations, the effect of these proposals would be that DataLink's Pole Sharing Agreements with attachers would be modified to reflect this change.
68. 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.
69. By making this proposal, the Office is not approving at this time any specific form of Pole Sharing Agreement for the reasons set out at paragraph 50 above.

### **III. Responding to Quotations**

70. 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.
71. 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>19</sup>
72. The Office notes the support from most parties for the proposal that the Pole Sharing Agreement should specify the period of time for applicants to review and respond to quotations. The Office also notes the submissions of parties regarding the appropriate period of time and considers that a 14-calendar day maximum period may be appropriate.

### **Draft Determination**

73. 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 makes the following determination:

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<sup>19</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.

## PUBLIC VERSION

- a. **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 fourteen (14) calendar days following delivery of the estimate by DataLink.**

74. If adopted as a final determination, the effect of this proposal would be that DataLink's Pole Sharing Agreements with attachers should be modified to reflect this change.
75. 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.
76. By making this proposal, the Office is not approving at this time any specific form of Pole Sharing Agreement for the reasons set out at paragraph 50 above.

### IV. Post-Installation Documentation

77. In Section 6.D.V. (*Provisional versus Full Permit*) of the Updated Consultation Document, the Office proposed not to require changes to the permit application process and to the Pole Sharing Agreements that would introduce the provision of a "Pre-Approved Permit" prior to the issuance of a "Full Permit".
78. The Office notes the broad consensus in favour of this proposal and, accordingly, will not pursue it further.
79. However, as discussed in Section A.2.d) (*Provisional versus Full Permit*) of **APPENDIX 4** below, the Office also notes that DataLink's submissions that their proposal was based on a concern to reduce errors in the use of CUC utility poles.
80. The Office considers that erroneous or improperly made attachments on CUC utility poles are likely having the effect of limiting the efficient and harmonised utilisation of infrastructure.
81. The Office further considers that a Post-Installation Survey might assist in achieving DataLink's goals. However, the Office is of the view that requiring a Post-Installation Survey in every case, which would include cases where the attachment was properly made, would be disproportionate in the circumstances and difficult to implement given DataLink's limited resources.
82. The Office considers that it may be more proportionate to require attachers to submit post-attachment "as-built" documentation describing in detail the facilities that were attached and where and how on the pole they were attached, including supporting evidence such as photographs.

83. This would enable DataLink to collect documentation regarding work being performed in the Communications Space, assess the quality of that work, and determine on a case-by-case basis whether a Post-Installation Survey might be required. This would allow DataLink to focus its resources where they are required.

### Draft Determination

84. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, the Office makes the following determination:
- a. **Attachers shall be required to submit to DataLink post-attachment “as-built” documentation describing in detail the facilities that were attached and where and how on the pole they were attached, including supporting evidence such as photographs.**
85. The Office considers that this post-attachment “as-built” documentation should be submitted to DataLink within 14 calendar days of completion of the attachment work.
86. If adopted as a final determination, the effect of this proposal would be that DataLink’s Pole Sharing Agreements with attachers should be modified to reflect this change.
87. By making this proposal, the Office is not approving at this time any specific form of Pole Sharing Agreement for the reasons set out at paragraph 50 above.

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

### I. Scope of Permit

88. 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?”*
89. 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 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 time to deploy or upgrade a network by avoiding the time required 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.

**PUBLIC VERSION**

90. 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>20</sup>
91. 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>21</sup>
92. The Office notes that, whether or not existing attachers apply to DataLink for review of and authorisation to attach new facilities, new attachers would continue to be more likely to trigger the need to incur significant make-ready costs. This is because 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>22</sup>
93. 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 ██████████, that company is being billed for ██████████ permits<sup>23</sup> and ██████████ unauthorized attachments, for a total of ██████████ attachments. As noted at paragraph 412 of the Updated Consultation Document, a significant number of these appear to be second attachments on poles where the ██████████ already has one attachment.
94. 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 for assessment under the permit application process, as an existing attacher adding a “supplemental” attachment to a pole 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.

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<sup>20</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>21</sup> Page 3 of Logic’s 11 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>22</sup> The Office notes that replacing 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 itself and the associated high costs.

<sup>23</sup> ██████████ previously issued plus ██████████ issued in Q3 2022.

**PUBLIC VERSION**

95. 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 attachment if the Attachment Penalty Fee is not paid within 60 calendar days. However, the Office notes that DataLink has been levying fees on unauthorised attachments and, therefore, appears to be exercising its rights under Article XIV.A.
96. 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 attacher’s 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 by the attacher are likely much higher<sup>24</sup> than the Attachment Penalty Fee which presently applies (\$ [REDACTED] as of Q4 2022).<sup>25</sup>
97. 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.
98. 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.
99. 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

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<sup>24</sup> Especially if the addition of the attachment would have required replacement of the pole.

<sup>25</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>



attacher or be in breach of the “one-attachment-per-space” requirement in the Agreement.<sup>26</sup>

100. 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 pole network, potentially places at risk the wireline communications networks on Grand Cayman.
101. The Office further considers that this arrangement has given ██████████ 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 has the effect of limiting the promotion of competition in provision of ICT services or ICT networks.
102. Having considered the views of the parties in response to the Office’s Questions 17 through 22 in the Updated Consultation Document (in the section entitled “Scope of Permit”), the Office considers that measures are required to be taken with respect to the treatment of unauthorised attachments and with respect to the procedures to be applied to maintenance activities.

## II. Unauthorized Attachments

103. The Office considers that unauthorised attachments may pose a risk to the integrity of the pole, the reliability of the provision of ICT services, or the safety of people, particularly in circumstances where DataLink has determined that Make-Ready Work is required because of the existence of the unauthorised attachment(s). The Office considers therefore that the current arrangements may “*have the effect of limiting ... the efficient and harmonised utilisation of infrastructure.*”
104. The Office also notes that an attacher who made unauthorised attachments would be in breach of its Pole Sharing Agreement with DataLink and would have granted itself an unfair advantage over competing ICT Licensees, as it would have avoided Annual Attachment Fees and possible Make-Ready Work Charges and it would have unfairly increased the speed of its ICT network and ICT service rollout (by sidestepping the permit application and make-ready process). Further, unauthorised attachments could occupy space that might have otherwise been used by another attacher. The Office considers therefore that the current arrangements may “*have the effect of limiting ... the promotion of competition in the provision of ICT services or ICT networks.*”

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<sup>26</sup> There is, however, an inconsistency in the Pole Sharing Agreements in this respect. An “Attachment“ is defined to include “overlashed“ cables. An overlashed cable presupposes a prior attached cable over which the second cable can be overlashed. It must therefore be, by definition, a second attachment on the pole, notwithstanding the limit of one attachment per pole.

**PUBLIC VERSION**

105. The Office further considers that the current Pole Sharing Agreements do not appear to be effectively limiting or reducing the number of unauthorised pole attachments.
106. The Office is therefore of the view that it has the jurisdiction under section 69(2)(b) of the ICT Act to inquire into and modify the Pole Sharing Agreements in order to address the effects of unauthorised attachments on the efficient and harmonised utilisation of infrastructure and on the promotion of competition.
107. The possible modifications that were put for consultation in the Updated Consultation Document include:
  - a. Reporting of all unauthorised attachments
  - b. Removal of unauthorised attachments
  - c. Make-ready work caused by unauthorised attachments, and
  - d. Application of Unauthorised Attachment Fees.
108. In Question 18 of the Updated Consultation Document, the Office proposed that attachers should be required to report to DataLink all unauthorised attachments that have not yet come to the attention of DataLink, and to refrain from all future unauthorised attachments. The Office notes that all parties except Flow supported this proposal.
109. For the reasons set out at Section A.3.b) ("*Form of Permit*") of **APPENDIX 4** below of this Draft Determination Document, the Office considers that this proposal, if adopted as a final determination, should only apply to unauthorised attachments discovered on a pole after the applicable changes to the Pole Sharing Agreements come into effect (irrespective of when the unauthorised attachments were actually made).
110. Further, the Office clarifies that this proposal, if adopted as a final determination, would only apply to the attacher's own unauthorised attachments. The Office considers that, in the absence of other information, an attacher could not reasonably know whether an attachment that does not belong to it is authorised or unauthorised.
111. The Office does not consider mandatory removal of unauthorised attachments to be an appropriate remedy. The Office is cognizant of the harmful impact on communications services provided to consumers on Grand Cayman that could result from the mandatory removal of unauthorised attachments. Consistent with Digicel's views, mandatory removal should be considered to be a measure of last resort.
112. The Office's primary concerns<sup>27</sup> in this proceeding are to encourage the efficient and harmonised utilisation of infrastructure and to promote competition in the provision of ICT networks and ICT services, not to remove ICT facilities. The Office is also of the view that

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<sup>27</sup> Note that the Office is also concerned to ensure the safety of the public and personnel living working on and around poles and the security of pole infrastructure.

**PUBLIC VERSION**

- DataLink should be communicating with attachers with respect to unauthorised attachments.
113. The Office considers that attachers with unauthorised attachments should first be given a reasonable opportunity to address any issues, including paying an appropriate share of any Make-Ready Work necessary to secure the pole, before their facilities might be subject to removal.
  114. The Office is also of the view that that attachers should be required to pay for the Make-Ready Work necessary to secure the pole on which they placed their unauthorised attachments. In particular, they should have the same time frame to respond to DataLink's estimate for the necessary Make-Ready Work as if they had applied for a permit under the usual procedure. If the attacher does not accept the estimate or pay the charges, the attacher would be required to remove its unauthorised attachments within sixty (60) days,<sup>28</sup> failing which DataLink would be entitled to remove them at the attacher's expense.
  115. However, if an unauthorised attachment poses an immediate risk to the safety of persons, DataLink should be authorised to remove it immediately at the attacher's expense, and notify the attacher afterwards.
  116. Further, if an unauthorised attachment made *outside* the Communications Space poses an immediate threat to the physical integrity of the pole, DataLink should be permitted to remove it immediately at the attacher's expense, and to notify the attacher afterwards.
  117. Consistent with the foregoing discussion, upon reporting or discovery of an unauthorised attachment, DataLink should be required to assess its impact as if the attacher had properly applied for it, determine whether Make-Ready Work would have been required if the attacher had properly applied for the attachment, and invoice Make-Ready Work Charges accordingly. This would help ensure that an attacher cannot avoid the costs of Make-Ready work that it caused by its use of the pole simply by making unauthorised attachments.
  118. By way of example, if DataLink were to determine that an unauthorised attachment would have required the installation of an additional guy or the replacement of the pole, if the attacher had properly applied for the attachment, and if DataLink does in fact install the additional guy or replace the pole, as the case may be, then the attacher would be required to pay the associated Make-Ready Work Charges (or to remove its unauthorised attachment). In effect, the unauthorised attacher would be treated as if it had made the appropriate application and would be charged Make-Ready Work Charges accordingly.
  119. The Office notes DataLink's proposal to share these Make-Ready costs among two or more attachers, in the event multiple unauthorised attachments are discovered. The Office considers this to be reasonable, as it ensures all attachers cover a portion of the costs they cause DataLink to incur in a way that is relatively simple to administer.

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<sup>28</sup> This is the same time frame as in Article XI ("*Removal*") of the Pole Sharing Agreements.

120. Such attachers should also be subject to the Make-Ready Work Charges reimbursement provisions in the Pole Sharing Agreements. In other words, if a subsequent attacher had to pay for make ready work that the unauthorised attacher would have paid for, if the unauthorised attacher had made the appropriate application, then the unauthorised attacher should reimburse the other attacher.
121. The Office considers that unauthorised attachments should be subject to the Unauthorised Attachment Fee, whether reported by the attacher or discovered by DataLink. The Office does not consider it appropriate to increase the level of the unauthorised attachment fee at this time, but does consider it appropriate to provide for an escalating unauthorised attachment fee in order to create a stronger incentive for attachers to minimise the incidence of unauthorised attachments.
122. The Office proposes, therefore, an escalating penalty if multiple unauthorised attachments belonging to an Attaching Utility are discovered in a given calendar year. For example, the first ten unauthorised attachments belonging to an Attaching Utility and first discovered by DataLink in a calendar year might be subject to the usual unauthorised attachment penalty (and the other measures<sup>29</sup> discussed elsewhere in this Draft Determination Document). However, the next ten discovered by DataLink might be subject to three times the usual unauthorised attachment fee, and any after that would be subject to five times the usual unauthorised attachment fee.

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123. 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 makes the following determinations:
- a. **An attacher shall be required to report to DataLink any of its unauthorised attachments that have not yet come to the attention of DataLink, and must refrain from all future unauthorised attachments;**
  - b. **DataLink shall 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 provide an estimate to the attacher, and, if accepted by the attacher, invoice the attacher the applicable make-ready work charges and complete the required make-ready works to ensure the protection of the utility pole infrastructure;**
  - c. **Where two or more unauthorised attachments are discovered on the same pole, DataLink shall apportion the applicable Make Ready Work Charges equally among all applicable Attaching Utilities;**
  - d. **Attaching Utilities shall be required to accept, reject or otherwise respond to the estimate of the Make-Ready Work associated with the unauthorised**

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<sup>29</sup> For example, payment of the Annual Attachment Fee and of any Make-Ready Work Charges, and possible removal of facilities.

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attachment within fourteen (14) calendar days following delivery of the estimate by DataLink;

- e. **If the Attaching Utility does not accept the estimate or pay the charges, the Attaching Utility shall remove its unauthorised attachments within sixty (60) days of the deadline to respond to the estimate;**
  - f. **If the Attaching Utility fails to remove its unauthorised attachments within that sixty (60) day period, DataLink may remove them at the Attaching Utility's expense;**
  - g. **If an Attaching Utility removes its own unauthorised attachment, or DataLink removes an unauthorised attachment, DataLink shall revise its estimate for Make-Ready Work and provide it to any remaining Attaching Utilities with unauthorised attachments;**
  - h. **Notwithstanding the foregoing, DataLink shall remove immediately any unauthorised attachments which pose an immediate risk to the safety of persons, and may remove immediately any unauthorised attachments made outside the Communications Space which pose an immediate threat to the physical integrity of the pole, in either case at the attacher's expense with notice to the attacher afterwards;**
  - i. **DataLink shall apply the unauthorised attachment fee to the first ten (10) unauthorised attachments discovered by or reported to DataLink in a calendar year, three times (3x) the unauthorised attachment fee to the next ten (10) unauthorised attachments discovered by or reported to DataLink in that same calendar year and five times (5x) the unauthorised attachment fee to any unauthorised attachments discovered by or reported to DataLink in that same calendar year.**
124. 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.
125. These requirements would apply to all unauthorised attachments made after a final determination in this proceeding.
126. The Office considers that the measures proposed in the preceding paragraphs, if adopted, 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.

### III. Maintenance Activities

127. As noted above, there is a large number of unauthorised attachments which has the effect of limiting the promotion of competition.
128. The Office also notes that the Pole Sharing Agreements already set out a process to address “Substantial Construction or Maintenance” in Article VI (“*Permit Application Procedures*”), paragraph A (“*Permit Required*”) (“**Article VI.A**”). However, they do not provide much clarity regarding the process to address routine maintenance, particularly maintenance for the purposes of replacing communications facilities on the poles.
129. The Office’s concerns in this regard are the result of a plain reading of Item 1.D of Appendix C of the Pole Sharing Agreements which states that “*Attaching Utility shall have only one Attachment per Pole per space.*” Given that an Attaching Utility appears to be granted only one space on a pole,<sup>30</sup> this would limit it to a single attachment.
130. However, the Office understands that the least disruptive and most practical process to replace a cable on a pole is similar to the one described by Digicel in its response to Question 23 of the Updated Consultation Document: the new cable would be attached to the pole immediately adjacent to the existing cable, services provided to end-customers would be transferred from the existing cable to the new cable, and the existing cable would be removed. The starting state and end state of the pole would be the same, insofar as there would be only one cable attached to the pole<sup>31</sup> but during the transition there would be a period of time during which two cables would be attached to the pole.
131. On its face, the current wording of the Pole Sharing Agreements would prohibit this process as it involves having two cables attached to the same pole for a period of time. At the very least, the Agreements would require Make-Ready Work before work could begin on the communications cable, to address the increased wind loading from the additional cable, and further Make-Ready Work after the attacher’s work is completed and the existing cable removed, to undo the Make-Ready Work that had just been done. If the attachers follow this process (which appears to be required by the Pole Sharing Agreements), they will be burdened by high costs or severely constrained in their ability to maintain their facilities. If the attachers do not, they will be making a large number of unauthorised attachments (which may perhaps in part explain the large number of apparently unauthorised attachments uncovered by DataLink’s recent audit). The Office does not consider either scenario to be “*efficient and harmonised utilisation of infrastructure.*”
132. The Office understands that CUC poles are engineered to withstand high wind loads, not just normal wind loads. The Office considers that a properly engineered pole should

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<sup>30</sup> Attachment A of Appendix C of the Pole Sharing Agreements describes a three-foot Communications Space which accommodates up to four attachers with a minimum of nine inches between each attachment at the pole. Paragraph F.2 of Item 4 of Appendix A of three of the five Pole Sharing Agreements specifies the “space occupied by the Attachment” to be nine inches (Logic is assigned six inches and DataLink is assigned one foot).

<sup>31</sup> Although the new cable may differ from the existing cable.

therefore have the ability to carry an extra cable for a short period of time, provided the winds during that period are not particularly high.

133. Having considered the views of the parties in response to Question 17 in the Updated Consultation Document, the Office considers that its original proposals at paragraph 421 of the Updated Consultation Document were not proportionate to the issue to be addressed. Consequently, the Office provisionally considers that it may be appropriate to require 15-days' prior notice by attachers to DataLink of planned replacement of communications facilities, as long as those activities do not involve the installation of new or additional permanent attachments onto the pole. Such notice should include information on the affected poles, the date and time the cable replacement activities will take place, how long it is anticipated that the poles may carry two communications facilities, and both the facilities being installed and being replaced. This notice would allow DataLink to assess whether the end state of the changes to the facilities on the pole, if any, increase or lessen the load on the pole and, therefore, whether make-ready is required. However, prior approval by DataLink would not be required unless DataLink, acting reasonably, determines the proposed work amounts to "Substantial Construction or Maintenance," including the installation of additional attachments onto the pole, even on a temporary basis.
134. The onus would be on DataLink to demonstrate that this is the case. However, in such a case, the Office considers that a permit application should be required. While the Office recognises that this notice procedure might place an additional burden on attachers seeking to replace or upgrade their ICT facilities, this would enable DataLink to assess the impact of the additional attachment on the security and integrity of the pole. This would also help ensure existing attachers do not avoid sharing the cost of make-ready if their activities would otherwise have caused that cost. The notice to DataLink would also allow DataLink to update the applicable permits to reflect the new facilities being installed on the poles. In this regard, the Office considers that attachers should submit Post-Installation Surveys, consistent with the discussion at Section D.IV ("Post-Installation Documentation") of this document above.
135. With respect to the appropriate procedures for the replacement of communications facilities on CUC utility poles, the Office notes DataLink's proposal in DataLink's response to Question 23 in the Updated Consultation Document. However, those proposed procedures did not include any provisions for hurricane season.
136. The Office also notes that DataLink has published "*General Guidelines for Telecommunication Workers when Attaching to Electric Utility Assets*" (the "**General Guidelines**").<sup>32</sup> The section on "Excess Fiber Left on Poles" at page 13 describes the procedures and time frames for leaving loops of fibre on the poles, and the Office considers that similar procedures and timeframes could apply to the replacement of communications cables.

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<sup>32</sup> These were emailed by DataLink to all parties on 26 May 2022 and are available on the Office's website. <https://www.ofreg.ky/viewPDF/documents/others/2021-04-28-01-20-55-141727882920140901TelecomsHandbook.pdf>

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137. The Office further notes that the Pole Sharing Agreements already contain provisions addressing work on poles that is “Substantial Construction or Modification,” which is defined as “*construction activity on a Pole that will have an appreciable impact on loading and/or tension and does not include routine maintenance activities.*” Simply put, the Attaching Utility must apply for a Permit in accordance with Article VI.A. The Office does not propose to modify those provisions.
138. However, where the work proposed by an attacher involved the replacement or upgrade of communications facilities that does not amount to “Substantial Construction or Modification,” greater clarity is required for the appropriate procedures and timeframes for the work being done, in order to ensure the efficient, economic and harmonised utilisation of pole infrastructure. Subject to consultation, the Office proposes that:
- the Attaching Utility must notify DataLink of its intention to replace or upgrade its communications facilities in a specific area. The Attaching Utility should include the poles it intends to work on, the date and time the cable replacement activities will take place, how long it is anticipated that the poles may carry two communications facilities, details of the infrastructure to be removed, and specifications of the infrastructure intended to be attached to the poles. This information will allow DataLink to determine whether the proposed changes are Substantial Construction or Modification and a Permit application is required. If it is, DataLink may deny access to its poles for the proposed work and shall notify the Attaching Utility a Permit application is required. For clarity, whether the cable replacement activities amount to Substantial Construction or Maintenance is to be based on an assessment of the end state of the pole, i.e. on the presence of the new facilities, and not on the period of time the pole may be carrying two facilities.
  - If the proposed work is not Substantial Construction or Modification (i.e., DataLink has no basis for denying the work), the Attaching Utility may proceed with the proposed work without further notice or approval from DataLink.
  - Consistent with the General Guidelines, the Attaching Utility may keep both the existing and new communications facilities on the pole at the same time for no more than four (4) weeks outside of hurricane season and no more than two (2) weeks inside of hurricane season, and shall be required to remove any facilities not included in a Permit within two (2) working days of the of the announcement of a storm imminently hitting the island and/or upon notification in writing from the Owner Utility. All work necessary to transfer customers and services from the existing to the new facilities must be completed within those timeframes.
  - After completion of the facilities replacement work, the Attaching Utility shall submit to DataLink a Post-Installation Survey.
  - After completion of the facilities replacement work or at the conclusion of the applicable period, whichever occurs first, the Attaching Utility shall fully remove their old facilities from the pole.



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- At the conclusion of the applicable period, if the Attaching Utility has not removed the old facilities from the pole, DataLink shall consider the old attachments to be unauthorized and shall apply the terms outlined in the Pole Sharing Agreements relating to unauthorised attachments.
- In the event that the Attaching Utility has installed assets that do not match the specifications provided in their original notice and such assets would have an appreciable impact on loading and/or tension, the Attaching Utility must replace the equipment with the correct assets within 10 days of notice to do so by DataLink, failing which DataLink shall consider the installed assets to be unauthorised attachments.

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139. 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 makes the following determinations:
- a. **Attaching Utilities shall provide DataLink with fifteen (15) days' prior written notice of all planned replacement of communications facilities on poles that are not Substantial Construction or Modification as defined in the Pole Sharing Agreements (for clarity, this notice is not an application and does not require DataLink's approval);**
  - b. **Such notice shall include information on the affected poles, the date and time the maintenance activities will take place, the period of time that the existing and the new facilities are anticipated to be on the pole at the same time, and both the facilities being installed and being replaced;**
  - c. **DataLink may, acting reasonably, assess that the cable replacement activities are Substantial Construction or Modification as defined in the Pole Sharing Agreement and (1) provide the Attaching Utility a detailed justification for its assessment and (2) require the Attaching Utility to apply for a Permit in accordance with Article VI.A of the Pole Sharing Agreement;**
  - d. **DataLink shall implement procedures and timeframes substantially consistent with those described in paragraph 139 above for the work intended by an attacher for the replacement or upgrade of communications facilities that does not amount to "Substantial Construction or Modification."**
140. The Office considers that the measures proposed in the preceding paragraph, if adopted, would result in a more efficient and harmonized utilisation of infrastructure, by facilitating the upgrading and maintenance of existing communications facilities.

### IV. Timely Exercise of Access Rights

141. 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

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facilities within 200 calendar days<sup>33</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.

142. 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.
143. 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 or a significant part of it 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.
144. 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?
145. 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.

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<sup>33</sup> Except in the case of the **CUC-DataLink Pole Sharing Agreement**, which imposes a limit of 120 days.

146. The Office notes Logic’s concern, expressed in its response to Question 8 of the Updated Consultation Document, to be able to access poles as soon as they are ready and has modified its proposal accordingly.

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147. 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 makes the following determination;

- a. **a permit to attach to a pole shall remain effective unless the right to attach contained in that permit is not exercised within less than 200 calendar days after the date the last permit in the same batch of poles has been issued.**

148. The Office considers that this proposal, if adopted as a final determination, 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.

### IV. Exchange of Forecasts

149. 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>34</sup> The Office notes that in only three of the five Pole Sharing Agreements does the Owner Utility commit to providing the results 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.

150. 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>35</sup>*

151. 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

<sup>34</sup> For example, Article X, “Abandonment or Removal of Owner Utility’s Facilities.”

<sup>35</sup> ICT Consultation 2016-2, paragraph 175.

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and when applications are submitted.<sup>36</sup> The Office notes that ALL attachers except Flow and DataLink 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 and DataLink will require access to substantially the same set of utility poles in due course.<sup>37</sup> 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.

152. 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.
153. 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.*” The Office also notes the comments of the parties that a three-year forecast period might be too long. As the last year of a three-year forecast may, therefore, be of limited utility, the Office considers a two-year period may be more appropriate.
154. Further, information in forecasts should be updated frequently enough and with sufficient geographic detail such that it can be a useful tool for DataLink to plan its resource requirements, but not so often or in such detail that it becomes an administrative burden on both DataLink and the Attaching Utilities. In light of the comments of the parties, the Office considers forecasts submitted every two years (with a review and possible update after one year) with information provided by electoral district <sup>38</sup>would strike the appropriate balance.
155. Having considered the submissions of the parties, the Office is of the view that an additional forecast, not already proposed by the Office in section 6.E.IV of the Updated Consultation Document, should be provided by DataLink to attachers: a forecast of poles to be erected by CUC in “greenfield” situations or new developments for electricity distribution purposes.
156. DataLink and CUC appear to have taken the position that section 7.1 of CUC’s T&D Licence prohibits the creation of a Communications Space on a pole without an upfront payment from a third party to do so.<sup>39</sup> This means that, currently, CUC would initially install in new “greenfield” developments poles suitable only for the purposes of distributing electricity, i.e. without a Communications Space. If an ICT Licensee were subsequently to

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<sup>36</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.

<sup>37</sup> In addition, Flow is likely to require access to the same set of poles in order to compete and/or continue to provide services to its customers.

<sup>38</sup> <https://portal.elections.ky/index.php/new-maps-2>

<sup>39</sup> For the avoidance of doubt, the Office is not expressing a view on this position and nothing in this Draft Determination Document should be taken to mean the Office is endorsing that position at this time.

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seek to attach to those poles in order to serve consumers in those developments, DataLink would have to replace all of them with new poles capable of accommodating up to four attachers – even though the CUC poles might just have been installed. Under the terms of the Pole Sharing Agreements, this would be at the expense of the requesting attacher(s). The Office considers this to be highly inefficient and a waste of resources by CUC, DataLink and the Attaching Utilities, which ultimately harms both electricity and ICT consumers. The Office is also of the view that this arrangement has the effect of limiting the efficient and harmonised utilisation of ICT infrastructure in Grand Cayman.

157. The Office considers that it would be far more efficient and in the interests of all stakeholders and that it would promote an efficient, economic and harmonised utilisation of ICT infrastructure, if DataLink were to provide all Attaching Utilities with forecasts of “greenfield” streets or areas where CUC intends to install new utility poles for the purposes of electricity distribution. This should be done in sufficient time for the Attaching Utilities to express an interest in attaching to those poles and for CUC to respond by procuring poles capable of accommodating up to four attachers.
158. The Office notes that forecasts include confidential or commercially-sensitive information. The Office further notes that DataLink is both a wholesale provider to the attachers of key inputs into the attachers’ ICT networks and services, and a potential or actual competitor of those attachers in retail ICT markets. Having access to the forecasts of the attachers could therefore potentially give DataLink a commercial advantage, for example, by enabling DataLink to proactively offer point-to-point services to an attacher in an area where DataLink knows the attacher is seeking to expand its ICT network, or by offering point-to-point services to potential retail customers of an attacher before that attacher is able to roll out its own ICT network.
159. The Office is therefore concerned about both the potential disclosure of commercially-sensitive information and the potential use of that information by DataLink for purposes unrelated to the provision of services under the Pole Sharing Agreements. However, the existing Pole Sharing Agreements do not contain any provisions regarding the handling of confidential or commercially sensitive information. As noted in the preceding paragraph, the provision of forecasts to DataLink could potentially give DataLink a commercial advantage over the parties providing the forecasts. As a result, the Office considers that the existing agreements may limit the promotion of competition in the provision of ICT networks or services.
160. The Office is of the view that the most proportionate and least intrusive measure to address this would be a contractual provision, either within the Pole Sharing Agreements or in a separate agreement, prohibiting both the disclosure and the use by DataLink of the forecasts or other confidential or commercially sensitive information provided by attachers for any purposes other than the provision of pole attachment services to those attachers.

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161. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, the Office makes the following determinations:

- a. **Attaching Utilities shall be required provide to the Owner Utility (DataLink or CUC, as applicable) periodic non-binding forecasts of their requirements over the next two-year period for new attachments and for existing attachments that might require “Substantial Construction or Maintenance” as defined in the Pole Sharing Agreements attachments;**
- b. **Information in the Attaching Utilities’ forecasts shall be provided separately by quarter and by electoral district, and updated every two years. One year after providing a forecast, the Attaching Utility shall either confirm in writing that there is no change to their existing forecast or provide a new two-year forecast;**
- c. **DataLink shall be required to provide to Attaching Utilities periodic forecasts of poles that CUC intends to erect in “greenfield” situations or new developments;**
- d. **The forecast of new CUC poles shall be provided no less than six (6) months before CUC intends to erect them; and**
- e. **DataLink and the Attaching Utilities shall agree appropriate contractual provisions prohibiting the disclosure of confidential or commercially sensitive information, including information contained in forecasts, provided by one party to the other, and prohibiting the use of such information for any purposes other than the provision of services under the Pole Sharing Agreements.**

## **F. Right to Perform Work**

162. 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.
163. 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.
164. 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.1 of the Updated

Consultation Document, 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>40</sup> This has clearly been insufficient to meet the demand from attachers 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.

165. 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 of the Updated Consultation Document). 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 of the Updated Consultation Document), DataLink consistently opposed it (see paragraphs 54 and 83-84 of the Updated Consultation Document). 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>41</sup> DataLink submitted 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>42</sup> 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.”*

166. 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

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<sup>40</sup> See page 2 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>41</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>42</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.

resources can perform these activities, likely has the effect of limiting the efficient and harmonised use of infrastructure.

## I. Pre-Permit Surveys

167. There is, for example, no evidence that the field inspection element of 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>43</sup> or that it can only be performed by DataLink in order to “*ensure compliance with established regulations, guidelines and safety standards.*”<sup>44</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 field inspection element 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 the field inspection element of such Pre-Permit Surveys cannot be performed by persons other than DataLink or its contractors and agents.
168. 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>45</sup> The Office is also aware that the FCC permits qualified contractors to conduct surveys under certain conditions.<sup>46</sup> The Office considers, therefore, that allowing attachers to perform the field inspection element of Pre-Permit Surveys should be feasible, provided DataLink provides the necessary information and training to enable them to do so.
169. Based on the foregoing, the Office proposes, subject to consultation, that Attaching Utilities or their contractors should be permitted to perform the field inspection element of Pre-Permit Surveys. The Office further considers that the permit application process would be more efficient if Attaching Utilities or their contractors were to do so prior to submitting permit applications, as DataLink would not be required to find its own resources to perform this step.

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170. 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 makes the following determinations:

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<sup>43</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>44</sup> DataLink’s 3 August 2023 response to the Updated Consultation Document, page 25.

<sup>45</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/>

<sup>46</sup> Refer to the discussion in the Office’s response to the parties’ responses to Question 32 in Appendix 4 (“*Comments, Cross Comments and OfReg Responses*”) of this Draft Determination Document.



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- a. **DataLink shall allow Attaching Utilities to perform the field inspection component of Pre-Permit Surveys prior to submitting pole attachment permit applications to DataLink;**
  - b. **The field inspection element of Pre-Permit Surveys shall consist of visual or no-touch surveys only;**
  - c. **DataLink shall publish the information it reasonably requires from the field inspection element of 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 field inspection element of 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.**
171. For the avoidance of any doubt, the Office’s proposal that Attaching Utilities perform the field inspection element of Pre-Permit Surveys prior to submitting applications for pole attachment permits should not be considered to be authorisation for Attaching Utilities to climb the pole or to perform any work on the pole without a permit to do so or DataLink’s express consent.

**II. Make-Ready Work**

172. 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 Cayman Ltd. (“**UMC**”).
173. 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.

174. Given DataLink’s stated limited capacity to process permit applications, inclusive of performing make-ready work,<sup>47</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 of the Updated Consultation Document) 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.
175. Notably there is no requirement in the Act that both parties must be ICT Licensees in order for the Office to modify an infrastructure sharing agreement or arrangement, as long as the pre-conditions set out in section 69 (2) of the Act are satisfied. In other words, the Office may inquire into and require modifications to DataLink’s agreements with CUC if those agreements 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.*”
176. 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.
177. 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.
178. 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>48</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

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<sup>47</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>48</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>

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

179. 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.
180. However, the Office also considers that the level of certifications or qualifications required 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>49</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.
181. For clarity with respect to the type of make-ready work that third parties should be permitted to perform, the Office has considered the positions of the parties and is of the view that any make-ready work that is to be performed in the Electrical Space or in the Safety Space should only be performed by CUC or its contractors. However, for make-ready work that is to be performed in the Communications Space, the Office considers that any qualified contractor should be permitted to perform it.
182. 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 could agree 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.

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183. 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 makes the following determinations:

**DataLink is required to permit qualified third parties to perform make-ready work in the Communications Space 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;**

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<sup>49</sup> Page 5 of DataLink's 21 April 2017 Working Group position paper.

- 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.**
184. For the avoidance of doubt, the Office’s proposed draft determinations 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.
185. 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.

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

186. 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>50</sup> It is not clear whether DataLink currently applies 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.
187. 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 without the need for a second attachment), 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>50</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>

188. The Office considers that the effect of this arrangement is to give an advantage to an existing attacher over a new 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 Office notes that this may not be an academic question. The evidence discussed at paragraphs 411-412 of the Updated Consultation Document suggests that some Attaching Utilities have a large number of unauthorised attachments and of second attachments on one pole.
189. 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.
190. 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.
191. 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>51</sup> on a CUC pole. If each attachment must be separated from other attachments by 12 inches, per NESC requirements,<sup>52</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>53</sup>
192. 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 by the two previous attachers.
193. The Office notes, though, 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>54</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

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<sup>51</sup> See Article II, paragraph 2.1(iv) of the 1996 **CUC-Flow Pole Sharing Agreement**.

<sup>52</sup> See Article 233 of the NESC.

<sup>53</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 that 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.

<sup>54</sup> For example, the person making the new attachment would only be required to incur the cost of detaching and reattaching one set of communications facilities in order to accommodate the replacement of the pole.

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.

194. The Office notes that the effect of DataLink’s apparent current practices is that, upon receipt of a permit application, DataLink replaces an existing pole with a new pole capable of accommodating up to four attachers, even if there is sufficient space in the existing Communications Space to accommodate the request without replacing the pole. (As noted above, a pole with a 1-foot-8-inch Communications Space can accommodate two attachments with a 12-inch separation between them. If such a pole had one existing attachment, it could accommodate a second without needing to be replaced. However, this does not appear to be taken into account and the pole is simply replaced.)
195. Under the Office’s proposal at paragraph 474 in Section 6.G of the Updated Consultation Document, the associated costs would be shared by all attachers who had included the pole in their forecasts, as they would eventually be using that pole and therefore be deemed to have collectively caused the need for the new pole, and as the Office considered that it would be more efficient and economical to change and pay for the pole earlier than later. The Office considers that basing the cost-sharing on forecasts would be an equitable way of allocating the costs among eventual users of the pole and would help lower the upfront charges paid by each individual attacher. This approach would, therefore, facilitate the rollout of ICT networks and promote competition in the provision of ICT networks and ICT services. It would also be easier to administer, in the Office’s view, than a refund process (although the Office notes that a make-ready work charge refund process would still be required, to prevent attachers from waiting to attach until after others had paid for the make-ready work, and to reflect the fact that, as noted by Logic, forecasts can change).

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196. 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. Taking all of the foregoing into account, in order to promote competition in the provision of ICT networks and ICT services, the Office makes the following determination:
- a. **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.**
197. The Office notes that at paragraphs 139-140 in Section 4.E.IV above it determined that attachment demand forecasts include poles where new attachments are required and poles where “Substantial Construction or Maintenance” might be required. If adopted as a final determination, this would mean future attachers and existing attachers making significant changes to their facilities would share the costs of the new poles. Existing attachers who make no significant changes to their facilities would not.

198. The Office considers this proposal would minimize the cost of fibre network rollout to all ICT licensees rolling out fibre networks and therefore would promote the rollout of fibre networks and 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).

#### **H. Other Matters**

199. In Section 6.E.1 of the Updated Consultation Document, the Office proposed that DataLink be required to establish an online portal or system for the submission of pole attachment permit applications. This portal or system would also include certain information on CUC utility poles.
200. In Section 6.F.1 of the Updated Consultation Document, the Office proposed that DataLink maintain an up-to-date list of all CUC utility poles, including certain information about those poles, and provide access to it to attachers.
201. The Office notes the broad support for such an online platform and for the provision of information regarding CUC utility poles to attachers. The Office also notes DataLink's submissions that it is in the process of developing a Joint Use Platform ('JUP') that would in effect perform those functions.
202. Because DataLink is developing a JUP, the Office does not consider it necessary to mandate DataLink to establish an online application portal at this time. However, the Office will be monitoring DataLink's progress and will reconsider this position if required.
203. The Office also strongly encourages DataLink to engage with its customers (the attachers) to obtain their input and recommendations for the development of a JUP. The Office notes that several parties provided useful comments in this regard during the course of this proceeding. The Office considers that taking the views of the attachers into account would likely promote the efficient, economic and harmonised use of utility pole infrastructure.
204. That said, the Office considers that the continuing absence of access to certain information on poles is contributing to the difficulties currently faced by attachers in planning their network rollouts, which in turn is contributing to DataLink's workload and the inefficient use of resources. This is because, in the Office's view, while an attacher can readily ascertain the location of a pole, the attacher has no basis for assessing, even at a very high level, the degree of possible make-ready work that might be required until after submitting an application and receiving an estimate from DataLink.
205. The Office considers that this is having the effect of limiting the efficient and harmonised utilisation of infrastructure.
206. The Office notes that, in order for the permit application and pre-permit survey process to be as efficient as possible, DataLink should provide Attaching Utilities with certain basic information about the CUC utility pole network. The Office considers, that this information

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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.

207. 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 permit application and 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. In other words, it would improve the planning and coordination among DataLink and the Attaching Utilities.
208. 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.

### Draft Determination

209. Therefore, pursuant to section 69 (2), in order to promote an efficient, economic and harmonized use of infrastructure, the Office makes the following determination:
  - a. **DataLink shall maintain an up-to-date list of all joint-use 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.**
210. The information contained in this list of joint-use poles could be made available through an online permit application portal. However, the Office considers that this information should be made available even if DataLink's JUP is not yet available.



## Section 5 – Draft Determinations on Issues Relating to the Charging Principles (Consultation 2016-2 Part C)

### A. Introduction

211. As explained in Section 5 of the Updated 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>55</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.
212. The Authority also noted that it appeared not to be appropriate to incorporate the costs relating to Make-Ready Work in the pricing formula for calculating Quarterly Attachment Fee.
213. The Authority, however, considered that, in accordance with Section 68 of the Law,<sup>56</sup> 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.
214. 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.

### B. Issues to be Addressed

215. 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 [...].*”
216. 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*”.

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<sup>55</sup> Referred to as “electricity poles” in Consultation 2016-2.

<sup>56</sup> Now, the ICT Act.

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217. As noted in the Updated Consultation Paper, the relevant charges for infrastructure sharing services relating to the attachment of communication cables to utility poles, 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.

218. For the sake of clarity, the recurring and non-recurring charges in this Draft Determination refer to the relevant charges for infrastructure sharing services relating to the attachment of communication cables within the "Communications Space" on CUC utility poles, and exclude any charges related to the attachment of communication cables outside the "Communications Space".

219. Following its analysis of the responses of the parties to the Updated Consultation Paper, as well as the submissions described in Section 5 of the Updated Consultation Paper, the Office has identified the following main 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)**

220. The Office will address each of these in turn below and set out draft determinations that, if adopted following consultation, it considers would address the issues that have been identified.
221. 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

222. In this section C, the Office addresses the submissions received in response to the Updated Consultation Paper in relation to ISSUE 1, which relates 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*”.
223. The Updated Consultation Paper presented the Office’s observations in relation to ISSUE 1, and set out the following questions for consultation by the industry:
- **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,

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- 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.
224. The responses (submissions and cross-submissions) in relation to the questions specified in section C of the Updated Consultation Paper, are listed below, including the Office's draft determinations that, if adopted following consultation, would address the issues identified and the submissions received in response to each question.

### I. Responses to Question 45

#### C3 Response

*"No. It should be based on a bare pole, no more than say 30' that would ensure that their is space for 18'6" road crossing height. The 3' for attaching telcom utilities, safety space from 21'6" to 25' and the space for CUC to connect it power, any poles above this height would only be for the benefit of CUC infrastructure, there should be no annual CPI increases for the space. This would therefore also change the formulas as it relates to the space allocation on the pole."*

#### DataLink Response

*"The Office has noted DataLink's previous responses relating to this matter, including at paragraph 510 (c), that:*

*"the attachment of telecommunications cables does not cause an incremental requirement to augment the height or strength of poles and... any incremental cost relates solely to attaching cables;"*

*DataLink further notes that there is indeed a requirement for taller and stronger poles/pole network which does lead to incremental costs solely relating to attaching cables. The average required height for poles required only to support electricity cables is 35 feet. On the other hand, the height of an electricity pole required to support attaching cables must be at least 40 feet. There is of course a price differential for the two poles: by way of example, a 35ft pole costed US\$662.17 landed, as at July 14th 2023, whereas a 45ft pole had a landed cost of US\$1,322.77 as at that date. Additionally, the two different pole*

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*heights mean that there are differences in the amounts of labor and material required to install them.*

*DataLink has, in the past, also provided evidence of the impact of the additional attachments on the poles during hurricanes due to additional wind loading. As a result, greater strengthening and lower spans length (i.e. shorter distances between poles, resulting in the utilization of more poles than CUC alone would require across the same space) is required to protect the integrity of the T&D system.*

*At paragraph 511 (b), the Office records an assertion by Flow (first noted at paragraph 509 (u)) that: “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”.*

*However, as we trust the Office is aware, the institution of separate regulatory regimes for telecommunications, on the one hand, and electricity, on the other, necessitated the creation of a company separate from CUC. DataLink understands and believes that the provision of the pole attachment service is classified as telecommunication in nature and necessarily had to be separated legally into a different service in order to preserve the integrity of the two business lines. DataLink therefore wishes to note, insofar as it may affect the Office’s own views on this matter, that the assertion made by Flow is misconceived.*

*At paragraph 531, the Office expresses the view that: “...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”.*

*DataLink notes that the Office has, to date, made no recommendations regarding an appropriate model and has proposed to utilize USA prices for benchmarking at paragraphs 553 and 568 of the Consultation. Paragraph 568 refers to the jurisdictions of USA, UK, Ireland & Canada as relevant jurisdictions.*

*The Office has purported, in paragraph 553, to compare US prices in 2018 to Cayman Islands prices in 2022. Even putting to one side the appreciable and material time difference, a country such as the USA, and indeed any of the other jurisdictions to which the Office has referred, are not comparable in any industry, from telecommunications to mortgage rates to fuel for myriad reasons.*

*DataLink considers that the pricing formula for calculation of annual attachment fees is an appropriate pricing methodology. DataLink chose an existing methodology from a more mature market in an effort to avoid significant disagreement with the rate structure given that the chosen methodology had already been questioned in that country, which is considered a relevant jurisdiction. DataLink reviewed multiple jurisdictions, given that CUC is listed on the Toronto Stock Exchange and given that most companies on island utilize US GAAP accounting principles, and it was decided that initial preference would be given to US and Canadian methodologies. UK methodologies were also considered. Canadian provinces all have differing methodologies and requirements as it relates to telecom attachments. The DataLink contacted multiple utility companies in Canada and due to the*

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*Fortis network, received multiple contracts for review and comparison. Notwithstanding its receipt of this information, due to the inaccessibility of these agreements, the methodologies of the various Canadian sectors were at that time deemed insufficient in terms of transparency. The same lack of transparency occurred with the UK. At the time of research and rate design, the US market was one of the few with similar infrastructure (most pole and telecoms equipment is sourced from the US) with a completely transparent rate structure as well as clear instructions on accounting for the same. For this reason, DataLink continues to deem this methodology as appropriate for the Grand Cayman market."*

### **Digicel Response**

*"As per paragraphs 569-584, Digicel agrees, that the pricing methodology for calculating the annual attachment fees are excessively high and simultaneously increase CUC/Datalink's profit and limit the harmonized utilization of infrastructure sharing."*

### **Flow Response**

*"Flow does not agree that DataLink's pricing methodology and calculation for the Annual Attachment Fee is appropriate."*

### **Logic Response**

*"Yes - Logic believes the pricing formula is an appropriate pricing methodology."*

### **DataLink Cross Comment**

*"Yes, Datalink believes that the pricing formula is an appropriate pricing methodology as per FCC recommendations. The pricing takes into consideration the rate of inflation on an annual basis, as is done in other jurisdictions. Response to C3: The formula DataLink utilizes does take the net cost of a bare pole into consideration. The net cost of a bare pole is derived from actual data as recorded in CUC's Asset Register. The space factor allocation considers all of the points raised by C3, this portion of the formula seeks to assign the cost of usable space on the pole based on the proportionate share of usable space occupied by the attacher and assigns costs relating to the unusable space on the pole using a per-capita allocator."*

### **The Office's Observations**

225. DataLink continues to consider the pricing methodology it implemented for calculation of the "Annual Attachment Fee", as appropriate for the Grand Cayman market. DataLink argues that it had considered the pricing methodologies implemented in different jurisdictions, namely the USA, Canada and the UK, before it chose the FCC methodology as *"an existing methodology from a more mature market in an effort to avoid significant disagreement with the rate structure given that the chosen methodology had already been questioned in that country."*
226. Logic also considers that DataLink pricing formula is an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles.

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227. On the other hand, Digicel and Flow do not consider DataLink pricing formula for calculation of the 'Annual Attachment Fee' to be an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles, while C3 appears to accept the pricing methodology but does not agree with the specification for some of the parameters in DataLink pricing formula, namely the height of Bare Pole and the use of inflation factor.
228. Overall, therefore, the parties have diverging views on whether or not DataLink pricing formula is appropriate for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles.
229. DataLink further argues that the Office has not yet made recommendations regarding the appropriate pricing model. The Office, however, notes in this regard that an alternative pricing model can only be proposed once it has been established that the current pricing model is not appropriate.
230. Also, in response to the Office's benchmarking of recurring charges, DataLink has challenged the analysis presented by the Office in paragraphs 553 to 568 of the Updated Consultation Paper, including the comparison between US prices in 2018 and DataLink's prices in Q2 2022, not only because of "material time difference" but also due to lack of comparability between the Cayman Islands and other countries benchmarked in the Updated Consultation Paper (USA, UK, Ireland and Canada).
231. The Office notes that there appears to be a temporal mismatch in the comparison between pole attachment changes observed in the USA in 2018 and those applied by DataLink in Q2 2022, however, as the Office noted in paragraph 555 of the Updated Consultation Paper, the current recurring charges in Grand Cayman have either increased or decreased compared to the recurring charges set for the initial period of the respective pole sharing contracts.
232. In fact, the recurring charges applied in the period Q1 2017 to Q4 2022 were set within the range [REDACTED] to [REDACTED], on a quarterly basis, except for [REDACTED] in which case the recurring charges in the period Q1 2017 to Q4 2020 were set within the range of [REDACTED] to [REDACTED]. The Office further notes that the recurring charges applied by DataLink in 2018 were set at [REDACTED], except for [REDACTED] in which case the recurring charges were set at [REDACTED], in accordance with DataLink's response to RFI 103.
233. Since the prices in the Cayman Islands observed in 2018 were broadly similar to the more recent prices referred to by the Office in paragraph 554 of the Updated Consultation Paper, this means that the comparison between the prices observed in the USA in 2018<sup>57</sup>

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<sup>57</sup> 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 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 (see "Survey of Rates for Pole Attachments and Access to Rights of Way" commissioned by the Broadband Deployment Advisory Committee of the FCC, referenced at paragraph 553 of the Consultation and available at <https://www.fcc.gov/broadband-deployment-advisory-committee>).

and those observed in the Cayman Islands in Q2 2022<sup>58</sup> is still valid, regardless of the apparent "material time difference".

- 234. As for Datalink’s claim that “a country such as the USA, and indeed any of the other jurisdictions to which the Office has referred, are not comparable in any industry, from telecommunications to mortgage rates to fuel for myriad reasons”, the Office however questions the reasons why the recurring charges for pole attachments in the Cayman Islands are higher by [REDACTED] % to [REDACTED] %, when compared to regulated wired pole attachment rates in the USA.<sup>59</sup>
- 235. Such difference in pole attachment prices is even more surprising given that DataLink pricing formula is largely based on the same pricing methodology that has been applied to calculate the regulated wired pole attachment rates in the USA.

## II. Responses to Question 46

### DataLink Response

*“DataLink continues to deem the FCC methodology as appropriate for the Grand Cayman market.”*

### Digicel Response

*“Digicel believes that the same formula, methodology and annual attachment fees should be standardized for all attachers. Research have shown that the annual rates in Cayman are greater than that of other territories, i.e. Canada, UK and Ireland.”*

### Flow Response

*“DataLink’s pricing formula does not comply with the relevant costing principles. DataLink’s pricing formula is based on “value of service” and not incremental costs, which is not a lawful basis under the Regulations. Incremental cost achieves economic and allocative efficiency for the market. Because there are no competitive constraints on DataLink’s price, “value of service” pricing leads to unreasonable and excessive monopoly pricing.*

*As previously submitted to Ofreg in its response to ‘Public Consultation On Pole Attachment Reservation Fees, Permits Application Process And Charging Principles’, dated July 12, 2016 (2016 Response), Flow identified seven issues with DataLink’s pricing formula, which are as current today as they were then. These are:*

***i. Net cost of bare pole is overstated:** In 2016, Flow’s assessment was that the net cost of a bare pole was overstated by 69% based on its review of the average height and cost of installed poles included in the quarterly invoices received from CUC. There has been*

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<sup>58</sup> [REDACTED] per quarter, i.e. [REDACTED] or [REDACTED] per annum.  
<sup>59</sup> [REDACTED] % = [REDACTED] x 4 / (US\$13.97 x 0.82) – 1  
<sup>#</sup> [REDACTED] % = [REDACTED] x 4 / (US\$9.90 x 0.82) – 1



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no change in DataLink's methodology since 2016 so there is no reason to believe that overcharging has abated.

ii. **"Space Factor" is mis-specified:** *Attachers bear an excessive portion of the "common costs" of CUC poles because the size of the "unusable space" is overstated. The space occupied by individual attachers is miscalculated, and the '2/3' factor is inappropriate as it allocates 2/3 of the "unusable space" to attachers when, none of such costs were "caused" by, and therefore should not be allocated to, ICT Licensees.*

iii. **Double Counting the Impact of Inflation:** *The pricing formula double-counts 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.*

iv. **Overhead expense are excessive:** *Including separate cost elements for "Management & Overhead" and "Administrative" has the effect of double counting, creating artificial costs. Particularly since there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC.*

v. **The calculations of the "Maintenance" and "Administration" elements of the carrying charge is flawed:** *Both are expressed as percentages calculated of CUC totals, divided by the NBV of CUC's total assets. This approach is unreasonable, because if CUC decides 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. 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. Further, 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 ICT Licensees.*

vi. **Cost of Capital used in the pricing formula is misstated and excessive:** *Cost of Capital 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. 1CUC declares a WACC for fiscal 2022 of 7.25% and for 2021 of 7%. Even so a WACC of 7.25% would result in DataLink's telecommunications customers subsidizing CUC's business since the utility poles are included in CUC's fixed assets, and CUC is already generating a return on assets through its regulated Return on Rate Base ("RORB"), targeted in the range 6.25% - 8.25% for fiscal 2022. Since CUC is already recovering 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. This should not be the case. DataLink's return should be limited to its own assets.*

vii. **pricing formula appears to vary across Attachers in a manner that is discriminatory:** *DataLink's pricing formula appears to be different in the different pole sharing agreements in a manner that appears discriminatory. This is contrary to the Regulations."*

### Logic Response

"N/A"

### DataLink Cross Comment

*“Response to Digicel comment: DataLink does utilize the same formula methodology for the annual attachment fee for all attachers. All attachers are being billed the exact same rate for the annual pole attachment fee. As regards Digicel's comments on the annual rate in Cayman being higher than in Canada, UK and Ireland, the same can be said for all costs found in the Cayman Islands, from groceries to mobile services (as noted in the introduction to DataLink's previous response, hence the inappropriateness of purporting to use such countries as comparables).*

*Response to FLOW comment: The "Annual Pole Attachment fee" is not based on "value of service" as it is directly derived from the historical cost of poles in service. The "Net cost of a bare pole" (from CUC's Pole Asset Register) are actual costs which are audited by CUC's financial auditors and submitted for review to OfReg Electricity. In relation to the response provided by FLOW to question 7 regarding the 2016 methodology, DataLink agrees that, in light of the existing contractually negotiated agreement, any modifications to such agreements would necessitate negotiation and subsequently be reflected in a new MPJUA between DataLink and all Attaching Utility entities holding a valid MPJUA. The reference to inflation factors being double counted is addressed above as poles are not included at current costs but rather, as explained above, at historical prices via the asset register.”*

### The Office's Observations

236. While DataLink "continues to deem the FCC methodology as appropriate for the Grand Cayman market", Digicel and Flow have expressed different views, while C3 and Logic did not provide any specific comment in response to Question 46.
237. Digicel argues that pricing formula should be standardized for all attachers, and it notes that the annual rates are higher compared to those observed in other countries, namely Canada, Ireland and the UK.
238. Flow argues that DataLink pricing formula is based on "value of service" and not on "incremental costs" which, according to Flow, leads to "unreasonable and excessive monopoly pricing."
239. Flow further refers to "seven issues" it previously raised in its response to 'Public Consultation On Pole Attachment Reservation Fees, Permits Application Process And Charging Principles', dated July 12, 2016. In particular, Flow's comments are focused on (1) the value of the 'Net Cost of a Bare Pole', (2) the specification and the calculation of the 'Space Factor', (3) the double-counting of inflation in DataLink pricing formula, (4) the double-counting of the costs related to 'Administrative' and 'Management & Overhead', (5) the calculations of the contribution towards 'Maintenance' and 'Administration' costs in the pricing formula for the carrying charge, (6) the mis-specification and excessiveness of the cost of capital in the pricing formula, and (7) the variability in the pricing formula across attachers.

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240. The Office agrees with the views expressed by Digicel and Flow that the pricing formula should not vary between attachers and, therefore, should be standardized across all the Agreements with attachers.
241. The Office notes that neither party has proposed a specific alternative pricing methodology to be used for determining cost-oriented prices for attachment of communications cables onto CUC's utility poles.
242. Therefore, the Office considers that there are no compelling reasons for rejecting the pricing methodology adopted in DataLink pricing formula as the basis for the appropriate methodology for determining cost-oriented prices for attachment of communications cables onto CUC's utility poles.
243. However, the Office also notes all the issues identified by Flow, which would require adopting specific amendments in DataLink pricing formula to ensure that the recurring charges for pole attachments are provided at cost-oriented price.
244. With respect to Flow's submission that its "*assessment was that the net cost of a bare pole was overstated by 69% based on its review of the average height and cost of installed poles included in the quarterly invoices received from CUC*", the Office notes that it has not received any evidence in support of Flow's submission in relation to its calculation of "*Net Cost of a Bare Pole*" in DataLink pricing formula. Therefore, the Office considers that there are no compelling reasons for rejecting or amending the methodology applied for calculating "*Net Cost of a Bare Pole*" in DataLink pricing formula.
245. The Office further notes that while DataLink "*continues to deem the FCC methodology as appropriate for the Grand Cayman market*", DataLink pricing formula differs in some key features from the formula applied using the FCC pricing methodology, as discussed in detail below.
246. First, the Office understands that since 2016,<sup>60</sup> the FCC pricing methodology for "telecom rate formula" allows for two different calculations of the pole attachment rate applied to telecommunications attachers, where pole owners can choose the one that yields the higher of the two rates.<sup>61</sup>
247. The two telecom rate formulas are presented below, with common and distinct features specified, as follows:<sup>62</sup>

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<sup>60</sup> <https://www.lermansenter.com/new-fcc-pole-attachment-rate-formula-effective-march-4-2016/>

<sup>61</sup> [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0208/FCC-15-151A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0208/FCC-15-151A1.pdf)

<sup>62</sup> See pages L-5 and L-6 at [https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January\\_BroadbandAppL.pdf](https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January_BroadbandAppL.pdf)

**Common features:**

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

$$\text{Space Factor} = \left( \frac{\text{Space occupied} + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Number of Attaching Entities}} \right)}{\text{Pole Height}} \right)$$

**Distinct features in relation to the “Cost” element in the two telecom rate formulas:**

- **Telecom Rate specified under Section 1.1409(e)(2)(i)**  
*Cost (Section 1.1409(e)(2)(i))*  

$$= N \times (\text{Net Cost of Bare Pole})$$

$$\times \left( \frac{\text{Administrative expenses for overall Plant}}{\text{Net Plant investment}} \right)$$

$$+ \frac{\text{Maintenance Expenses of Poles}}{\text{Net Pole Investment}} + \text{Depreciation Rate}$$

$$+ \text{Return on Investment} + \text{Taxes} \Big)$$

Where “*Net Cost of Bare Pole*” is calculated as follows:

$$\text{Net Cost of Bare Pole} = 0.85 \times \left( \frac{\text{Net Pole Investment}}{\text{Total number of Poles}} \right)^{63}$$

Where *N* is the value specified as follows:

- in Service Areas where the number of Attaching Entities is 5 = 0.66
- in Service Areas where the number of Attaching Entities is 4 = 0.56
- in Service Areas where the number of Attaching Entities is 3 = 0.44
- in Service Areas where the number of Attaching Entities is 2 = 0.31
- in Service Areas where the number of Attaching Entities is not a whole number, *N* is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.<sup>64</sup>

Where “*Return on Investment*” is the applicable rate of return specified by default by the FCC as 11.25%.<sup>65</sup>

<sup>63</sup> The modifier 0.85 is used to remove the investment in crossarms included in Net Pole Investment, see pages L-5 and L-6 at [https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January\\_BroadbandAppL.pdf](https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January_BroadbandAppL.pdf)

<sup>64</sup> See page 26 at [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0208/FCC-15-151A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0208/FCC-15-151A1.pdf)

<sup>65</sup> See pages 75 and 76 of *In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Communications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-97, 97-151,

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- *Telecom Rate specified under Section 1.1409(e)(2)(ii)*

$$\begin{aligned} \text{Cost (Section 1.1409(e)(2)(ii))} &= (\text{Net Cost of Bare Pole}) \\ &\times \left( \frac{\text{Administrative expenses for overall Plant}}{\text{Net Plant investment}} \right) \\ &+ \frac{\text{Maintenance Expenses of Poles}}{\text{Net Pole Investment}} \end{aligned}$$

Where “*Net Cost of Bare Pole*” is also calculated as follows:

$$\text{Net Cost of Bare Pole} = 0.85 \times \left( \frac{\text{Net Pole Investment}}{\text{Total number of Poles}} \right)$$

248. Second, in comparison to the above two distinct pricing formulas applicable to the attachment of telecommunications cables on electricity poles based on the FCC pricing methodology, the formula adopted by DataLink differ in some features from the FCC’s telecom rate formulas, as shown in the example below for the pricing formula for calculating “*Annual Attachment Fee per Attachment*”, taken from *Item 4* in *Appendix A Pole Attachment Fees of the Master Pole Joint Use Agreement* between DataLink, Ltd. and Infinity Broadband, Ltd.

$$\begin{aligned} \text{Annual Attachment Fee per Attachment} &= \text{Net Cost of a Bare Pole} \times \text{Space Factor} \\ &\times \text{CUC's annual carrying charge rate} \times (1 \\ &+ \text{Inflation, initially set at } \blacksquare \% ) \times (1 \\ &+ \text{Management \& Overhead, set at } \blacksquare \% ) \end{aligned}$$

Where “*Net Cost of a Bare Pole*” 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.*”

Where “*Space Factor*” is calculated as follows:

$$\text{Space Factor} = \left( \frac{\text{Space Occupied} + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Number of Attachers}} \right)}{\text{Pole Height}} \right)$$

Where:

- “*Space Occupied*” is specified as nine inches and refers to the “*space occupied by the Attachment*”,

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- “Unusable Space” is specified as 24.5 feet and refers to the “unusable space on the pole”,
- “Number of Attachers” is specified as four,
- “Pole Height” is specified as 38.6 feet and refers to the “weighted average height of all poles”.

Where “CUC’s annual carrying charge rate” is based on the sum of the following components, expressed in percentage values:

$$\begin{aligned} \text{CUC's annual carrying charge rate} \\ = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Return on Equity} \end{aligned}$$

Where:

- “Administrative” component 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.”
- “Maintenance” component 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.”
- “Depreciation” component 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.”
- “Return on Equity” is specified as [REDACTED] %.

249. In summary, the following features differ between DataLink pricing formula and the formulas applied using the FCC pricing methodology:

- DataLink pricing formula applies “Return on Equity”, while FCC pricing formula uses “Return on Investment” (set as default rate of 11.25% by the FCC), as appropriate measure for the rate of return on capital invested in poles;
- Taxes are applied in one of the two applicable FCC formulas, while there is no consideration of taxes in DataLink pricing formula;
- “Net Cost of Bare Pole” value is adjusted by the FCC using the modifier actor of 0.85, to remove the investment in crossarms included in Net Pole Investment, while such adjustment has not been applied in DataLink pricing formula;
- “Inflation” factor, initially set at [REDACTED] %, is applied in DataLink pricing formula, while it is not applied in the FCC pricing formula;

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- “Management & Overhead” factor, specified as [REDACTED]%, is applied in DataLink pricing formula, while it is not applied in the FCC pricing formula.

### III. Responses to Question 47

#### C3 Response

*“C3 Response is of the view that formula in the present Datalink MPJUA has a bit of double dipping and formula needs to be reviewed.*

*Net Cost of the Bare Pole- should be based on a 30’ Pole.*

*Space Factor- 12.5% is acceptable.*

*CUC Annual Carrying Charge- presently at 22% with CUC making a 15% return on asset, C3 is of the view this return should be in line with regular commercial rental asset in Cayman that range from 5-10%, not surely not 15% on an asset that it is already being used to calculate the return on its electrical distribution business.*

*Inflation- this is set at 3%, why are their rates for pole rental to telcom allowed to have an annual 3% inflation rate, again this will result in the cost of telcom services to increase each year, on an asset that its primary use is to deliver electrical services to its customers. Further more it is not insured and the last time the island was hit by a major hurricane the customer of Cayman contributed to a fund to rebuild this infrastructure, which should clearly be considered, on any revenue model used to calculate the attachment fees, maybe these fees should be used to go towards a fund in the event there is another Hurricane the people of the Cayman islands will not once again for any portion of the replacement of this infrastructure.*

*Rather than inflation, straight line depreciation of the asset value should be part of the cost formula.*

*Management & Overhead- 20% is acceptable.”*

#### DataLink Response

*“DataLink does not consider that any changes are required at this time.”*

#### Digicel Response

*“It may be advisable for Digicel to engage in further discussions with CUC to address any discrepancy and clarify the billing process for poles. Open communication and a collaborative approach can help rectify any errors, determine the correct cost structure, and ensure accurate invoicing moving forward. Digicel has assessed that the net cost of bare poles is significantly higher than expected.*

*Digicel believes that there are inaccuracies or unfairness in the determination of common costs and the allocation of space and associated expenses for attachers of CUC poles. To address these concerns, it would be advisable for attaching utilities to engage in discussions with CUC to clarify the specifications and methodologies used in the determination of common costs and the allocation of pole space. A collaborative approach*

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*and open dialogue may help in resolving these issues and establishing a fair and equitable cost-sharing arrangement.*

*Digicel believes that if CUC is already covering the full costs of the poles and generating a return through electricity rates, it may be unfair for Datalink's telecommunications customers to subsidize CUC. Addressing this issue would require a careful examination of the financial arrangements, cost allocation methodologies, and regulatory frameworks in place for pole attachments. It may involve evaluating the fairness of cost sharing, the extent to which telecommunications customers are contributing to CUC's returns, and the appropriate distribution of costs and benefits among stakeholders.*

*Digicel believes that the maintenance/administrative cost elements were derived using the net book value (i.e. that is the historical cost of CUC's total assets less depreciation, amortization and any other depletions) of CUC's total assets.*

*In principle, CUC's admin/distribution costs should not be included in prices paid for attachment to poles...as these costs would have been driven by CUC's demand for poles as opposed to the utilization of said poles by attachers. None of these costs have anything to do with actually providing 'space' on a pole for pole attachments because any utility would incur these costs 'regardless of the presence of pole attachments*

*In layman's terms, the cost drivers for CUC's access charges for attachment to their poles should be premised on the incremental cost of providing said access."*

### Flow Response

*"Flow does not agree that DataLink's pricing formula is correct."*

### Logic Response

*"No - Logic does not believe any changes should be made."*

### DataLink Cross Comment

*"DataLink notes that there is no consensus on what the pricing model should look like, only that it should not look like it does (with the exception of Logic, which indicated that no changes should be made to the elements). The elements of DataLink's pricing model were chosen based upon transparency, the model is in use in a neighbouring jurisdiction and had been designed via a regulatory framework. DataLink management was cognizant that any chosen pricing structure would be challenged and attempted to choose the most transparent process. The costs are all derived from CUC financial statements which are publicly accessible and audited by a reputable auditing firm and subject to regulatory overview. The cost of the annual attachment fee has decreased year on year for 3 years now as the "cost of a bare pole" has decreased.*

*Response to Digicel comment: DataLink chose a transparent and historically proven pricing model. The model chosen does consider proportionate costs, but providing further insight into "incremental" costs would be difficult and is subjective in nature."*



### The Office's Observations

250. While Logic and DataLink consider that no changes should be made in the various elements of DataLink pricing formula, most parties (C3, Digicel and Flow) have expressed the opposite view.
251. In particular, C3 argues for the change in the net cost of bare pole and the removal of the inflation factor, while Digicel considers that cost drivers in recurring charges should be based on "*incremental costs*" of providing access to CUC's utility poles.
252. The Office notes that while most parties consider that some changes are required in DataLink pricing formula, these parties do not necessarily agree on the precise changes that need to be made or which current elements in DataLink pricing formula are deemed acceptable.
253. For example, C3 and Flow seem to disagree on whether the application of '*Management & Overhead*' in the pricing formula and/or its specified value of 20%, are acceptable. The same goes with the specified value of 12.5% for '*Space factor*', which according to C3 is acceptable, whilst Flow and Digicel have expressed concerns about the determination of common costs and the fairness of shared costs, such as those that relate to '*Unusable Space*' in the formula for calculating '*Space Factor*'.

## IV. Responses to Question 48

### C3 Response

*"C3 has not data to provide input on this question but clearly CUC expects to make 15% return on the utility poles.*

*Again, since DL is a licensed telecom provider, the cost of the infrastructure, in this case the communications space on the poles, should be subject to straight line asset depreciation, as per normal infrastructure sharing cost models.*

*CUC can not expect to earn a return on the poles because they are not allowed, under their OfReg license, to generate income from other sources other than power generation and distribution."*

### DataLink Response

*"The rationale for DataLink to be created as an entity was to ensure that costs were kept clearly delineated and CUC customers did not accidentally subsidize the telecom industry. Any costs passed on to telecoms relate specifically to the additional costs incurred to accommodate telecom attachments. DataLink's pricing formula has no effect on the prices that electricity users pay CUC. The pricing structure, like any other non-charitable organization (including the attaching telecoms), seeks to make a fair return. Any such returns are however generally reinvested in the business, on improvements such as the new JUP software (explained above) which DataLink anticipates implementing in the near future, and to cover the significant legal costs which DataLink has often been required to*

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*incur – and thus ensure that DataLink remains self-sustainable, in circumstances where CUC was directed to make its infrastructure available for such purposes. Any remaining returns may, if available, be paid in dividends to CUC, as DataLink’s sole shareholder. DataLink would like to take this opportunity to remind all stakeholders that neither DataLink nor CUC, nor indeed any of the other licensed organizations who pay license and regulatory fees to OfReg based upon revenues earned, is a charitable organization.”*

### Digicel Response

*“Digicel does not have sufficient data or operational insight at this time to provide our view on this question.”*

### Flow Response

*“In its 2022 Annual Report CUC states the following:*

- o The increase in the net other income (by 1057%) for the year was due to an increase in foreign exchange gain and **increase in the revenue of the Company’s wholly owned subsidiary, DataLink.** (pg. 14). (emphasis added)*
- o Revenues from DataLink for Fiscal 2022 are recorded in other income in the amount of \$2.1 million, a \$0.7 million increase from \$1.4 million for Fiscal 2021.(pg.16)*

*CUC’s 2022 Annual Report supports that the profitability of CUC’s business is benefitted by the provision of access to its utility poles which have delivered 50% growth in revenues year on year, and contributing to a net earnings increase for CUC of 9% over fiscal year 2021.*

*It does not appear that DataLink’s formula has any effect on the price paid by users for electricity. In its **2022 Annual Report** CUC states ‘Net earnings for the year ended December 31, 2022 were \$33.2 million, a \$2.9 million increase from net earnings of \$30.3 million for the year ended December 31, 2021. **This increase is primarily attributable to a 2% increase in kWh sales, a 5.4% increase in base rates effective June 1, 2022 and lower finance charges and transmission & distribution costs, partially offset by higher general and administration and consumer services costs.**’ (emphasis added). Nor does CUC state or even allude in its 2022 Annual Report that DataLink’s pricing in any way affects pricing to electricity users. *Indeed CUC describes DataLink as an ICT Licensee.”**

### Logic Response

*“Logic does not believe that the 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.”*

### The Office’s Observations

254. Logic, DataLink and Flow consider that the recurring charges, as determined based on DataLink pricing formula, do not have any effect on the prices that electricity users pay CUC.

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255. Therefore, there seems to be a broad consensus that the recurring charges for attachment of communications cables on CUC's utility poles do not have any effect on the prices that electricity users pay to CUC. As a consequence, there seem to be no reasons to believe that telecommunications users subsidize electricity users in Grand Cayman, through the recurring charges that C3, Digicel, Flow and Logic pay to DataLink for their pole attachments. This also means that there are no reasons to believe that changes in the recurring charges, either increases or decreases in the pole attachment rates, would have any effect on the prices electricity users pay for the services provided by CUC.
256. DataLink argues that (1) the pricing structure, based on DataLink pricing formula, "*seeks to make a fair return*", (2) any such returns are generally reinvested in DataLink's business, and (3) any remaining returns "*may, if available' be paid in dividends to CUC, as DataLink's sole shareholder.*"
257. On the other hand, C3 maintains that CUC cannot expect to earn a return from pole attachments because their income cannot be generated from sources "*other than power generation and distribution*", while Flow argues that "*the profitability of CUC's business is benefitted by the provision of access to its utility poles which have delivered 50% growth in revenues year on year, and contributing to a net earnings increase for CUC of 9% over fiscal year 2021.*"
258. As noted in paragraph 578 of the Updated Consultation Paper, with 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 infrastructure costs paid by CUC and, as a consequence, either:
- a proportional decrease in prices electricity users in Grand Cayman pay to CUC, and/or
  - a proportional increase in profits that CUC and/or DataLink earn from providing access to CUC's utility poles.
259. Since the parties broadly agree that the recurring charges for attachment of communications cables on CUC's utility poles do not have any effect on the prices that electricity users pay to CUC, it follows that the increase in the share of CUC's pole infrastructure costs paid by the attachers has had, solely, the effect of increasing the profits that CUC and/or DataLink earn from providing access to CUC's utility poles.
260. For the reasons noted in paragraph 580 of the Updated Consultation Paper, such extra profits may 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. This is because the incremental amount of the recurring charges that the attachers are paying to DataLink, corresponding to extra profits earned by DataLink and/or CUC above a normal rate of return, creates allocative inefficiencies by limiting the attachers' ability to make additional investments, when and where required to support an

efficient utilisation of infrastructure and/or to promote competition in the provision of ICT services or ICT networks.

## **V. Responses to Question 49**

### **C3 Response**

*“DL has fixed telephony license and is therefore a potential competitor for all the attachers who also have that license type. It is clear therefore, that the objective of fair competition can not be met unless and until the pole attachment conditions apply to all FIVE attachers; C3, Digicel, Flow, Logic AND DataLink.”*

### **DataLink Response**

*“As explained above in detail, DataLink has requested and received an amendment of its license by OfReg so as not to be considered a retail service provider and to avoid being subject to the related Roll Out obligations. DataLink is therefore not a competitor to Attaching Utilities, nor has it engaged in any such competition in any way since its inception in 2012. It follows that its position has no limiting effect on the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.”*

### **Digicel Response**

*“Digicel's highlights valid concerns regarding the potential impact of Datalink having free access to CUC poles. The arrangement could indeed influence the efficient and harmonized use of infrastructure, as well as competition in the market.*

*a) Infrastructure Use and Efficiency: If Datalink is given free access to CUC poles, it may have an advantage over other attachers who must pay for the use of the same infrastructure. This could create an imbalance and potentially lead to congestion and inefficiencies in pole usage.*

*b) Fair Competition: Fair competition is essential for a healthy market. If Datalink receives free access to poles while other attachers must pay, it might distort the competitive landscape, potentially favouring Datalink over other players in the telecommunications industry.*

*c) Impact on ICT Service Providers: Datalink's status as an infrastructure provider to ICT Service Providers might raise concerns about potential conflicts of interest if it were to offer competing ICT services. Free access to infrastructure could give Datalink a competitive advantage over other ICT service providers in the market.*

*To address these concerns, it's important for regulatory authorities and stakeholders to carefully assess the implications of such arrangements and ensure a level playing field for all attachers. Fair and transparent regulations that govern pole access, pricing, and competition can help create an environment that fosters innovation, fair competition, and efficient infrastructure usage.*

*Engaging in dialogue between telecommunications companies, infrastructure providers, and regulatory bodies can help identify balanced and equitable solutions to address these*

*concerns. The goal should be to promote healthy competition, efficient infrastructure utilization, and an equitable playing field for all participants in the telecommunications industry.”*

### **Flow Response**

*“DataLink is a licensed ICT competitor. Access to CUC poles at no charge to DataLink confers an unfair advantage on DataLink, is discriminatory, and contrary to the Regulations. Accordingly, this discriminatory advantage has the effect of limiting the efficient and harmonized utilisation of infrastructure and the promotion of competition in the relevant ICT markets.”*

### **Logic Response**

*“Logic's view is that DataLink's ability access CUC's utility poles at no charges does 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.”*

### **DataLink Cross Comment**

*“As noted previously and above, this question is based on a fallacy.”*

### **The Office's Observations**

261. All the parties, except DataLink, agree that 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.
262. DataLink argues that it is *"not a competitor to Attaching Utilities, nor has it engaged in any such competition in any way since its inception in 2012."*
263. However, in accordance with DataLink's response to RFI 302, DataLink does provide services that are deemed to be in competition with the services provided by Attaching Utilities, namely the [REDACTED] service and the fibre optic service provided to [REDACTED], over the communications cables that are attached on CUC's utility poles outside the *"Communications Space"*.
264. The Office notes that, according to DataLink's response to RFI 301, there are 987 CUC poles occupied by DataLink and/or CUC fibre optic cables outside the communication space, which means these fibre optic cables can be used to provide services in competition to services provided by Attaching Utilities.
265. The Office considers that the most appropriate approach to ensure that DataLink's ability to access CUC's utility poles at no charge does not 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, is to include DataLink as an *"Attacher"* in the *"Number of Attachers"* in DataLink pricing formula. Such approach would ensure that the

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costs of the unusable space on the pole are allocated also to DataLink and, therefore, not subsidised by the attachers in the “*Communications Space*”.

266. As discussed in paragraph 530 of the Updated Consultation Paper, the Office further notes that the justification for the use of the “2/3” factor in the FCC pricing formula had been questioned by the FCC, as follows:

*“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>66</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.**”* [emphasis added]<sup>67</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>68</sup>

267. Therefore, it appears that more than “1/3” of the costs of the unusable space is allocated to the pole owner in the FCC pricing formula, while DataLink pricing formula allocates “1/3” of the costs of the unusable space to all the attachers outside the “*Communications Space*”, including CUC as the pole owner. The Office cannot see any reasons or justification why it should adopt for use in the Cayman Islands an allocation factor based on “*the unexplained result of a political compromise*” reached by the US Congress.
268. The Office considers that allocating the costs of the unusable space equally among the two main classes of users of the poles (attachers within the “*Communications Space*” and attachers outside the “*Communications Space*”) is a more equitable approach, because both classes of users benefit from the existence of the unusable space on CUC’s utility poles.

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<sup>66</sup> FCC 2011 Pole Attachment Order, paragraph 131 (footnotes omitted) – available at <https://docs.fcc.gov/public/attachments/FCC-11-50A1.pdf>

<sup>67</sup> FCC 2011 Pole Attachment Order, footnote 397 at paragraph 131.

<sup>68</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.’*”

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269. Therefore, the Office considers that the following changes in the calculation of “*Space Factor*” in DataLink pricing formula are required in order to ensure that the costs of unusable space are allocated equally among all the attachers on CUC’s utility poles:
- a. to replace the “2/3” factor by a “1/2” factor, in order to divide equally the costs related to the unusable space between the following two classes of users of CUC’s utility poles:
    - ii) attachers within the “*Communications Space*” and
    - iii) attachers outside the “*Communications Space*”.
  - b. to include in the “*Number of Attachers*” all the attachers within the “*Communications Space*” on CUC’s utility poles.

### Draft Determinations

270. Considering the issues addressed in the Updated Consultation Paper under Questions 45 to 49, the Office holds the view that there are no compelling reasons for rejecting the pricing methodology adopted in DataLink pricing formula as the basis for an appropriate methodology for determining cost-oriented prices for attachment of communications cables onto CUC’s utility poles.
271. However, the Office considers that a number of elements in DataLink pricing formula would need to be amended in order to ensure that the recurring charges for pole attachments are provided at cost-oriented levels.
272. In particular, the features that differ between the DataLink pricing formula and the formula applied using the FCC pricing methodology, as discussed by the Office in relation to Question 46 above, would need to be reviewed and, where appropriate, amended.
273. First, the Office considers that DataLink’s choice to apply “*Return on Equity*” as appropriate measure for the cost of capital for investment in CUC’s utility poles, is not justified. The cost of capital invested in DataLink pricing formula should reflect a normal rate of return that CUC is expected to earn for its investment in utility poles.
274. The Office notes that CUC reported a “*Company’s Cost of Capital*” rate of 7.25% in its annual report for year 2022,<sup>69</sup> which is lower than the rate of return that is applied in DataLink pricing formula. The Office further notes that the rate of return in the FCC pricing formula is set by default as 11.25%, which is equally lower than the rate of return in DataLink pricing formula.<sup>70</sup>

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<sup>69</sup> See page 52 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>70</sup> See pages 75 and 76 of FCC 2001 Order on Reconsideration at <https://docs.fcc.gov/public/attachments/FCC-01-170A1.pdf>

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275. The Office also notes that, in addition to the above-mentioned CUC's "*Company's Cost of Capital*", CUC calculates annually the relevant "*Cost of Capital*" value to adjust the "*Return on Rate Base*" in the formula for calculating "*Rate Cap and Adjusting Mechanism*", in accordance with Condition 25 of CUC's electricity distribution and transmission licence.<sup>71</sup>
276. More specifically, Condition 25.12 of CUC's electricity distribution and transmission licence specifies the following methodology for adjusting the "*Cost of Capital*" value annually on a fiscal year basis:

*"Cost of Capital = 10% + [0.75 x (Average Treasury Yield – 5%)]*

*Where,*

*The Cost of Capital of the Licensee for the year ended April 30, 2008, the base year of the Licence, is 10 per cent. For all years after the base year, the Cost of Capital will be subject to adjustment for a given year, if required based on the above formula;*

*The Average Treasury Yield represents the average yield of 10-Year United States Treasury Notes for the preceding fiscal year; and*

*The calculation of [0.75 x (Average Treasury Yield – 5%)] is rounded up or down to the nearest 0.25 per cent, either positive or negative, before adding to, or deducting from, the Cost of Capital."<sup>72</sup>*

277. The Office considers that the "*Cost of Capital*" value calculated based on the methodology specified under Condition 25.12 of CUC's electricity distribution and transmission licence, represents the appropriate benchmark for the "*Cost of Capital*" applied in DataLink pricing formula for the calculation of cost-oriented recurring charges for attachment of communication cables onto CUC's utility poles. This is because the "*Cost of Capital*" calculated based on the methodology specified under Condition 25.12 of CUC's electricity distribution and transmission licence is directly related to CUC's regulated network activities, of which CUC's utility poles are an integral part, while "*Company's Cost of Capital*" is used by CUC for its entire business, consisting of both regulated and unregulated activities.
278. Second, the Office considers that the modifier factor of 0.85 that applies to the "*Net Cost of Bare Pole*" value in the FCC pricing formula, to remove the investment in crossarms included in Net Pole Investment, may not be appropriate to apply in DataLink pricing formula, unless there is evidence to demonstrate that there exists a sizable investment in crossarms and other non-pole investment that is recorded by CUC in its pole accounts. In

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<sup>71</sup> See CUC's electricity distribution and transmission licence at <https://www.ofreg.ky/viewPDF/documents/energy-licensees/2021-04-29-03-54-03-cuc-td-licence-2008.pdf>

<sup>72</sup> Condition 25.12 in CUC's electricity distribution and transmission licence, available at <https://www.ofreg.ky/viewPDF/documents/energy-licensees/2021-04-29-03-54-03-cuc-td-licence-2008.pdf>



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this respect, the Office notes the following submission by DataLink in response to Consultation 2016-2:<sup>73</sup>

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

***For the gross pole investment, the FCC rules require that U.S. electric utilities use gross investment in poles as recorded in Account 364 of the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission (FERC). This account definition includes the costs associated with the bare pole as well as the investment in cross arms and other non-pole investments. An adjustment factor is used by U.S. Electric Utilities to remove these costs to approximate the gross cost of the bare poles. CUC utilises the installed cost of the pole not inclusive of these items as is required by the FCC.”***

[emphasis added]

279. Therefore, because DataLink has stated that it uses the cost of the pole exclusive of items such as cross-arms and other non-pole investments, the Office holds the view that the modifier factor of 0.85 that applies to the “*Net Cost of Bare Pole*” value in the FCC pricing formula, should not be included in DataLink pricing formula.
280. Third, the Office considers that the “*Inflation*” factor in DataLink pricing formula has the effect of double counting the inflation in the pole attachment rate. This is because the inflation is already embedded in the rate of return value that is applied in “*CUC’s annual carrying charge rate*”, which is expressed in nominal terms rather than real (i.e., inflation-adjusted) terms. Therefore, the Office holds the view that the “*Inflation*” factor should be removed from DataLink pricing formula.
281. Fourth, the “*Management & Overhead*” factor in DataLink pricing formula may not be justified.
282. While Flow argues that “*there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC*”, the Office notes that DataLink’s financial statements report, among other things the following expense items:<sup>74</sup>
1. “*General & Administrative Costs*”, which include the following expense accounts: Bank Charges, employee Benefit Program (Phone Allowance, Health Ins & Pension cost), Insurance (Motor Insurance), Legal & Professional Fees, Miscellaneous, Training, Telephone, and Wages.

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<sup>73</sup> See paragraph 70 in DataLink’s response to Consultation 2016-2, dated 12 July 2016.

<sup>74</sup> See DataLink’s response to RFIs 312-315.

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2. “*Depreciation and Amortization*”, which include the following expense accounts: Laptops & Monitors (Depreciation charge period: 3 years), Fiber Optic Cable (Depreciation charge period: 30 years), and Fiber Optic Material (Depreciation charge period: 30 years).
283. Accordingly, Flow’s argument that “*there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC*” seems to be unsubstantiated.
284. However, there is no evidence to support adding a specific “*Management & Overhead*” factor to the pricing formula that is based on the FCC pricing methodology, only because DataLink has been established as a separate business for managing pole attachments.
285. On the contrary, it would seem reasonable to assume that the expenses related to pole owner’s management of pole attachments would be the same regardless of whether the relevant expenses are internalized (i.e., incurred within the pole owner’s business organization) or externalized (i.e., incurred outside of the pole owner’s organization, in a separate business organization established solely for the purposes of managing pole attachments).
286. Therefore, in order to prevent double counting of the management, overhead and administrative costs in the pricing formula for recurring charges, the Office holds the view that the “*Management & Overhead*” factor should be removed from DataLink pricing formula.
287. Fifth, the “*2/3*” factor in the formula for calculating “*Space Factor*” should be replaced with the “*1/2*” factor, to reflect the Office’s view that the cost relating to “*Unusable Space*” on CUC’s utility poles should be equally between two main classes of users of the poles (attachers within the “*Communications Space*” and attachers outside the “*Communications Space*”).
288. Accordingly, the Office makes the following determinations regarding the amendments in DataLink pricing formula:
- a. Determination relating to the formula for calculating “*Annual Attachment Fee per Attachment*”:

**The “*Inflation*” factor and the “*Management & Overhead*” factor to be removed from the formula for calculating “*Annual Attachment Fee per Attachment*”, and the new formula to be applied instead, as follows:**

$$\begin{aligned} \text{Annual Attachment Fee per Attachment} \\ &= \text{Net Cost of a Bare Pole} \times \text{Space Factor} \\ &\times \text{CUC's annual carrying charge rate} \end{aligned}$$

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- b. Determination relating to the “2/3” factor in the formula for calculating “*Space Factor*”:

The “2/3” factor to be replaced by the “1/2” factor in the formula for calculating “*Space Factor*”, and the new formula to be applied instead, as follows:

$$\text{Space Factor} = \left( \frac{\text{Space Occupied} + \left( \frac{1}{2} \times \frac{\text{Unusable Space}}{\text{Number of Attachers}} \right)}{\text{Pole Height}} \right)$$

Where,

- “*Space Occupied*” is specified as nine (9) inches and refers to the *space occupied by the Attachment*,
  - “*Unusable Space*” is specified as 24.5 feet and refers to the *unusable space on the pole*,
  - “*Number of Attachers*” is specified as four (4),
  - “*Pole Height*” is specified as 38.6 feet and refers to the *weighted average height of all poles*.
- c. Determination relating to the following amendment in the formula for calculating “*CUC’s Annual Carrying Charge Rate*”:

- The reference to “*Return on Equity*” to be changed to “*Cost of Capital*”, and the “*Cost of Capital*” value to be calculated annually based on the following formula:

$$\text{Cost of Capital} = 10\% + [0.75 \times (\text{Average Treasury Yield} - 5\%)].$$

Where,

The Average Treasury Yield represents the average yield of 10-Year United States Treasury Notes for the preceding fiscal year;

The average yield of 10-Year United States Treasury Notes shall be calculated based on the data published by the U.S. Department of the Treasury;<sup>75</sup> and

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<sup>75</sup> See “*Daily Treasury par Yield Curve Rates*” published by the U.S. Department of the Treasury at <https://home.treasury.gov/policy-issues/financing-the-government/interest-rate-statistics>

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**The calculation of  $[0.75 \times (\text{Average Treasury Yield} - 5\%)]$  shall be rounded up or down to the nearest 0.25 per cent, either positive or negative, before adding to, or deducting from, the Cost of Capital.**

289. For the sake of clarity, the Office provides below an example of the calculation of the “*Annual Attachment Fee per Attachment*”, as derived from the determinations stated in paragraph 289 above, and based on the following assumptions (for clarity, actual values may differ from the values below which are presented for illustrative purposes only):

- “*Net Cost of a Bare Pole*” = 1,000
- “*Space Factor*” =  $[0.75 + 0.5 \times (24.5 / 4)] / 38.6 = 9.88\%$
- “*Average Treasury Yield*” for fiscal year 2022 is 2.95%
- “*Cost of Capital*” =  $10\% + (0.75 \times (\text{Average Treasury Yield} - 5\%)) = 9.00\%$ <sup>76</sup>
- “*Administrative*” component = 2%
- “*Maintenance*” component = 2%
- “*Depreciation*” component = 5%

290. The “*Annual Attachment Fee per Attachment*” derived using the illustrative values of all the relevant components in DataLink pricing formula as specified in paragraph 290 above, is calculated as follows:

$$\begin{aligned} \text{Annual Attachment Fee per Attachment} &= 1,000 \times 9.88\% \times (2\% + 2\% + 5\% + 9\%) \\ &= 17.78 \end{aligned}$$

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

291. In this section D, the Office addresses the submissions received in response to the Updated Consultation Paper in relation to ISSUE 2, which relates to the question of 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*”.

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<sup>76</sup> The value calculated in the formula  $[0.75 \times (\text{Average Treasury Yield} - 5\%)]$  is rounded up or down to the nearest 0.25 per cent. Given the “*Average Treasury Yield*” of 2.95%, the resulting value in the formula  $[0.75 \times (\text{Average Treasury Yield} - 5\%)]$  is rounded down to -1%.

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292. The Updated Consultation Paper presented the Office’s observations in relation to ISSUE 2, and set out the following questions for consultation by the industry:
- **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.
293. The responses (submissions and cross-submissions) in relation to the questions specified in section D of the Updated Consultation Paper, are listed below, including the Office’s draft determinations that, if adopted following consultation, would address the issues identified and the submissions received in response to each question.

### VI. Responses to Question 50

#### DataLink Response

*“Significant effort has been made by DataLink to ensure that there is transparency around costs charged in respect of Make-Ready work. As explained above in response to Question 45, in order to accommodate Telecom attachments, there is a requirement for taller and stronger poles/pole network that does lead to incremental costs which are solely attributable to attaching cables. In the interests of avoiding repetition, we refer the Office to the detail provided in response to that question regarding cost comparisons between the different sizes of pole and the reasons therefor.*

*As the Office will also have noted from that previous response, there is a significant amount of work required to ensure that the electricity system can withstand hurricanes with the additional load placed on the poles with the addition of telecom attachments.”*

#### Digicel Response

*“As referenced in paragraph 595, Digicel is also unable to determine if Datalink’s charges for MR work are in fact cost oriented.*

*Without detailed invoicing and set structure on charges for similar types of MR works, it would be difficult to determine the pricing methodology utilized.”*

#### Flow Response

*“Please see Flow’s comments in response to questions 45 – 48 on DataLink’s pricing methodology.”*

#### Logic Response

*“Logic believes that the charges are cost oriented, however we do not always agree with the amount of work that is required. Logic is also of the view that Datalink should absorb*

*a higher percentage of the cost of making poles ready when the section of their plant has exceeded its expected lifespan.”*

#### DataLink Cross Comment

*“DataLink's Make Ready charges are cost-oriented. Make Ready charges from CUC are a pass-through cost, DataLink does not profit from Make Ready charges to Attaching Utilities. Make Ready charges are provided to each Attaching Utility, with a breakdown of materials, labour and equipment costs. DataLink also provides Attaching Utility design maps which provide an overview of the work to be performed. The format of how the make ready estimates are presented is a direct result of consultations DataLink has had with the Attaching Utilities over the years. DataLink has also taken on board suggestions from the Attaching Utilities regarding the details they would like to see when being presented with make ready work costing.”*

#### The Office's Observations

294. DataLink asserts that it has made significant effort *"to ensure that there is transparency around costs charged in respect of Make-Ready work."* However, the Office notes, based on the information provided by DataLink in response to RFI 310, that there is no sufficient transparency around the actual costs charged by DataLink for Make-Ready work.
295. For example, two work orders [REDACTED] show that the actual costs billed by DataLink exceeded the estimated costs by [REDACTED] % and [REDACTED] %, while one work order [REDACTED] shows a small difference of [REDACTED] % between estimated and actual costs, mainly related to the 'Labour costs' billed, albeit none of these three documents provide an explanation and/or justification for the actual amount billed.
296. While DataLink argued (as reported at paragraph 585 of the Updated Consultation Paper) that its make-ready charges were cost-based based on actual expenses with no mark-up, the information presented by DataLink to the Office did not provide any evidence to support this argument. Therefore, there is no certainty that DataLink has simply passed through the costs it or CUC incurred in relation to Make-Ready work to accommodate the attachment of communications cables onto CUC's utility poles.
297. In addition, based on the information presented by DataLink in response to RFI 310, each of the three work orders appear to include the instalment of a number of new poles to accommodate the attachment of communications cables onto CUC's utility poles. The new poles represent 25% of all CUC's utility poles (i.e., 19 out of 76) affected by the Make-Ready work related to these work orders. While DataLink argues that CUC is prohibited by its T&D licence from upgrading its electrical infrastructure purely to accommodate telecommunications attachers (see paragraph 585 of the Updated Consultation Paper), it is not clear how CUC treats such changes in its assets (i.e., CUC's utility poles), which result from the replacement of poles. The Office further notes that DataLink did not provide any comment on the Office's statement in paragraph 589 of the Consultation that it is unclear *"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."*

## VII. Responses to Question 51

### DataLink Response

*“As noted above, significant effort has been made by DataLink to ensure that there is transparency around costs charged as it relates to Make Ready to prove that all charges are in fact cost-oriented. DataLink respectfully maintains that the charges are cost-oriented.”*

### Digicel Response

*“Digicel has observed a significant increase in the cost of Make Ready (MR) works for poles over the past year. We have noticed that the average cost per pole within a batch has risen significantly in recent times. It is our view that there should be regulations as it relates to MR works and by following the four (4) charging principles: Non-Discrimination, Transparency, Cost-Relatedness and User Consultation can ensure fairness, equity and compliance.”*

### Flow Response

*“Consistent with having qualified third party contractors carry out Make-Ready work, competitive tender for Make-Ready work will generate the prices closest to cost orientated rates.”*

### Logic Response

*“N/A”*

### DataLink Cross Comment

*“Response to Digicel: The fact that Make Ready costs have risen from their earlier make ready sites is likely due to the earlier sites having required minimal make ready work. For sites that now require extensive make ready work, such as changing out of poles, adding midspan poles, weather head work, re-stringing of lines and moving transformers, the costs of the Make Ready work will be higher. DataLink has always been transparent with make ready costs hence the reason for the breakdown of costs and telecom design maps detailing work to be performed.*

*Response to FLOW: DataLink uses both qualified outside contractors (trained on CUC processes and supervised by CUC team members) and CUC crew members to perform make ready work. If each job was put out to tender, this would slow the process significantly.”*

### The Office’s Observations

298. DataLink, Digicel and Flow provided their respective responses to Question 51. While DataLink maintains that *“significant effort has been made by DataLink to ensure that there is transparency around costs charged as it relates to Make Ready to prove that all charges*

*are in fact cost-oriented*", Digicel and Flow consider that changes are required in order to ensure the Make-Ready work charges are provided at cost-oriented rates.

299. Digicel called for regulations of Make-Ready work, while Flow supported a competitive tender for Make-Ready work, attracting qualified third-party contractors, which is more likely to generate cost-oriented rates for Make-Ready work.
300. The Office notes that neither Digicel nor Flow did present any substantial evidence or analysis to support their respective submissions that regulating non-recurring charges for Make-Ready work or imposing a competitive tender for Make-Ready work would ensure that the Make-Ready work charges are provided at cost-oriented rates.

### Draft Determination

301. **Considering the issues addressed in the Updated Consultation Paper under Questions 50 and 51, the Office determines that there is no need for regulating non-recurring charges or imposing a competitive tender for Make-Ready work at this time.**
302. Should the circumstances change with new evidence emerging in future, the Office reserves the right to reconsider its determination relating to the non-recurring charges for Make-Ready work.

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

303. In this section D, the Office addresses the submissions received in response to the Updated Consultation Paper in relation to ISSUE 3, which relates to the appropriate principles for the reimbursement of relevant make-ready work charges.
304. The Updated Consultation Paper presented the Office's observations in relation to ISSUE 3, and set out the following questions for consultation by the industry:
- **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.

### VIII. Responses to Question 52

#### DataLink Response

*"The Office has proposed, subject to consultation that the refund formula set out in Article VII of the Pole Sharing Agreements should be amended to take into account the matters listed in its proposal. DataLink addresses each of those matters in turn as follows:*

***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;***



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DataLink has already expressed its willingness to review the make-ready refund methodology. The initial design was created around the OfReg license requirements regarding fiber rollout timelines. Those timelines were not abided by and, as such, DataLink considers it appropriate that the design for the refund process be revisited. said it goes without saying that DataLink anticipates that any changes will be implemented in respect of all MPJUs given the imperative to avoid discrimination.

**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;**

DataLink considers that the current calculation takes this into consideration.

**c) DataLink should determine and arrange for refunds of make-ready work charge without requiring the attacher to apply for them; and**

DataLink agrees with this proposal. It will, however, go without saying that DataLink cannot provide a refund where it did not previously receive payment for the attachment.

**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.**

This proposal appears to be based on the observations which the Office has made at paragraphs 622-623 of the Consultation. For the reasons explained in detail and repeated in response to numerous questions above, DataLink is not in competition with the Attaching Utilities and does not stand to benefit from such make-ready work. It is therefore not possible for the existing arrangements to confer any competitive advantage on DataLink, including with respect to its access rights in respect of CUC's poles."

### Digicel Response

"Digicel agrees with the Office's position on this."

### Flow Response

"Flow agrees that DataLink should not be allowed to over recover its costs. Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms."

### Logic Response

"Yes, Logic agrees with the Office's proposal 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 a 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.”*

### The Office’s Observations

305. Most parties agree with the Office’s proposal that Article VII of the Pole Sharing Agreements should be amended as described in paragraph 624 of the Updated Consultation Paper, except for DataLink’s disagreement with the proposal that 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.
306. DataLink maintains that it is “*not in competition with the Attaching Utilities and does not stand to benefit from such make-ready work.*” The Office has already addressed above this claim and considers that DataLink can and does in fact compete with the Attaching Utilities (see paragraph 38 above, and see the discussion at pages 102-103 of **APPENDIX 4** (“*Comments, Cross Comments and OfReg Responses*”) of this Draft Determination Document).
307. The Office understands that the four available locations in the 36” Communications Space on CUC’s utility poles have been allocated to C3, Digicel Flow and Logic. However, this does not mean that each of those attachers must use any given pole. For example, an attacher might have chosen to install its communications facilities in an area in underground ducts instead. To the extent that this might result in unused space on a CUC’s utility pole, the Office considers that this space should be made available to other parties – including DataLink – where practical, in order to promote the efficient use of ICT infrastructure.
308. The Office notes that, if DataLink were to install its own attachments in the Communications Space that another attacher had paid make-ready work charges to establish, DataLink would benefit from the relevant make-ready work and, therefore, should be liable to refund a portion of those make-ready charges to that other attacher. The Office further notes that this would apply to any future attacher (i.e. an ICT licensee other than C3, DataLink, Digicel, Flow or Logic) who might seek to attach to a pole where another attacher paid make-ready charges to establish the Communications Space.
309. The Office, therefore, considers that DataLink and other attachers are deemed to benefit from the make-ready work in instances where they have attached their respective communication cables in the “*Communications Space*” on the relevant pole which is subject to make-ready work, and therefore, they are deemed to be liable to refund make-ready work charges paid by other attachers.

## Draft Determinations

310. Considering the issues addressed in the Updated Consultation Paper under Question 52, the Office determines 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 shall determine and arrange for refunds of make-ready work charges without requiring the attacher to apply for them;**
  - 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.**

## Section 6 – Determination on Timeframe for execution of Determinations.

311. The Office determines that:
- a. **All required changes to the MPJUA, as set out in Section 4 above in this Determination, shall be executed within 60 days of publication of this Determination.**
  - b. **All required changes to the Permitting and Make-Ready Processes as set out in Section 4 above shall be instituted and in operation within 60 days of execution of changes to the MPJUA as per paragraph 312.a. above.**
  - c. **All required changes to the Fees and Charges Processes as set out in Section 5 above shall be instituted and in operation within 120 days of execution of changes to the MPJUA as per paragraph 312.a. above.**
312. For the avoidance of doubt, the Office expects that all required changes to the MPJUA and associated processes will be complete no later than **180 days** after publication of this Determination.

## Section 7 – How to Respond to this Draft Determination.

313. This Draft Determination is shared 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.

314. 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.” For the avoidance of doubt, the Office considers this document to be a “draft administrative determination” for the purposes of section 7(1) of the URC Act.

315. All submissions in response to this Draft Determination should be made in writing and must be received by the Office by **5 p.m. on 13 March 2024 at the latest.**

316. 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>77</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>78</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>79</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>80</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>81</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>82</sup>

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<sup>77</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-47-23-1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf>

<sup>78</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>79</sup> <https://www.ofreg.ky/viewPDF/documents/legislation-regulations/2022-11-08-00-59-44-ICTA-Amendment-Act-2011.pdf>

<sup>80</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>81</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-27-15-ICTACUCDataLinkAgreement20March20121458325766.pdf>

<sup>82</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-46-13-1417708388DeedofVariationCUCInfinityBroadband.pdf>

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6. On **28 March 2012**, the Information and Communications Technology Authority (the '**Authority**') issued an ICT Licence to DataLink, which authorised DataLink to supply certain ICT Services, including Type 11 ICT Service specified as "*the provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.*"<sup>83</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>84</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>85</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>86</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>87</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

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<sup>83</sup> <https://www.ofreg.ky/viewPDF/documents/datalink-limited/2021-08-06-07-32-03-View-Licence-document.pdf>

<sup>84</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-43-03-NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED1458325571.pdf>

<sup>85</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-36-05-1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf>

<sup>86</sup> <https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-40-35-1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf>

<sup>87</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>

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Law<sup>88</sup> to establish whether DataLink has infringed **Section 36** or **Section 40** prohibitions of the ICTA Law.

12. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the '**Dispute Regulations**'),<sup>89</sup> C3 submitted a dispute determination request to the Authority (the '**Dispute Determination Request**')<sup>90</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>91</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>92</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>93</sup> C3,<sup>94</sup> Logic,<sup>95</sup> and Flow,<sup>96</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>97</sup>

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<sup>88</sup> <https://www.ofreg.ky/viewPDF/documents/legislation-regulations/2021-05-13-00-53-33-1507017057ICTALaw2011Revision.PDF>

<sup>89</sup> <https://www.ofreg.ky/viewPDF/documents/legislation/2021-04-15-02-26-36-ICTA-Dispute-Resolution-Regs.-2003.pdf>

<sup>90</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-03-30-30-Infinity-Determination-Request.pdf>

<sup>91</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-36-01-2-Oct-2014-DataLink-Response.pdf>

<sup>92</sup> Documents at <https://www.ofreg.ky/consultations/infinity-datalink-pole-attachment-dispute>

<sup>93</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-30-38-26-June-2015-ICTA-to-DataLink.pdf>

<sup>94</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-32-33-26-June-2015-ICTA-to-Infinity.pdf>

<sup>95</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-32-00-26-June-2015-ICTA-to-Logic.pdf>

<sup>96</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-31-17-26-June-2015-ICTA-to-LIME.pdf>

<sup>97</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-28-34-2-July-2015-Infinity-response-to-ICTA.pdf>



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17. On **7 July 2015**, Logic submitted its response to the Authority's request for information of 26 June 2015.<sup>98</sup>
18. On **21 July 2015**, DataLink submitted its response to the Authority's request for information of 26 June 2015.<sup>99</sup>
19. On **31 July 2015**, Flow submitted its response to the Authority's request for information of 26 June 2015.<sup>100</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>101</sup>
21. On **2 September 2015**, C3 submitted its response to the Authority's additional request for information of 26 August 2015.<sup>102</sup>
22. On **3 September 2015**, Logic submitted its response to the Authority's additional request for information of 26 August 2015.<sup>103</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>104</sup>
25. On **22 September 2015**, Flow submitted its response to the Authority's additional request for information of 26 August 2015.<sup>105</sup>

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<sup>98</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-27-57-July-2015-Logic-response-to-ICTA.pdf>

<sup>99</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-27-14-21-July-2015-DataLink-response-to-ICTA.pdf>

<sup>100</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-26-30-31-July-2015-LIME-response-to-ICTA.pdf>

<sup>101</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>102</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-14-29-2-September-2015-Infinity-response-to-ICTA.pdf>

<sup>103</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-13-44-3-September-2015-Logic-response-to-ICTA.pdf>

<sup>104</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-12-15-16-September-2015-DataLink-response-to-ICTA.pdf>

<sup>105</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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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 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>106</sup>
27. Following from the determination made in ICT Decision 2016-1, the Authority issued a public consultation ('**ICT Consultation 2016-1**')<sup>107</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>108</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>109</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 –

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<sup>106</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>107</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>108</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-02-03-41-27-April-2016-Infinity-DataLink-Pole-Attachment-Decision.pdf>

<sup>109</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>

**PUBLIC VERSION**

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 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>110</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>111</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>112</sup> DataLink,<sup>113</sup> Digicel,<sup>114</sup> and Logic<sup>115</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>116</sup>

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<sup>110</sup><https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-04-45-13-MasterPoleJointUseAgreement1480965308.pdf>

<sup>111</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-53-06-PoleAttachmentIndustryWorkingGroupLetter.pdf>

<sup>112</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-33-53-InfinityWorkingGroupResponse.pdf>

<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/icta-forms-pole/2021-04-28-03-42-33-21DigicelWorkingGroupResponse.pdf>

<sup>115</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-35-33-LogicWorkingGroupResponse.pdf>

<sup>116</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-03-25-58-1513756464149520192620170426FlowWorkingGroupResponse.pdf>

**PUBLIC VERSION**

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 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>117</sup>
40. DataLink,<sup>118</sup> Digicel,<sup>119</sup> Flow<sup>120</sup> and Logic<sup>121</sup> submitted their reply comments on **16 June 2017**. C3 submitted its reply comments on **20 June 2017**.<sup>122</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>123</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>124</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>117</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-22-30-OfficelettertoPoleWorkingGroupnextsteps.pdf>

<sup>118</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-18-10-DatalinkWorkingGroupResponse.pdf>

<sup>119</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-11-58-DigicelWorkingGroupResponse.pdf>

<sup>120</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-02-10-11-FlowWorkingGroupResponse.pdf>

<sup>121</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>122</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>123</sup><https://www.ofreg.ky/viewPDF/documents/icta-forms-pole/2021-04-28-01-56-12-149885071020170630OfReglettertoPoleWorkingGroupprere-launchof2016-2.pdf>

<sup>124</sup><https://www.ofreg.ky/viewPDF/documents/consultations/2021-05-12-06-48-57-1507893772ICT20171DeterminationPoleAttachmentReservationFees.pdf>

**PUBLIC VERSION**

46. On **14 November 2019**, the Office published **ICT 2019 – 2 – Consultation**<sup>125</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>126</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>127</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>125</sup> <https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-08-01-20-51-Consultation-Pole-Attachment-Reservation-Fees.pdf>

<sup>126</sup> <https://www.ofreg.ky/consultation-rfis-and-next-steps-responses>

<sup>127</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.
59. On **02 June 2023** the Office published ICT Consultation 2016-2 Part B and Part C (Updated).
60. On **02 August 2023** the Office received responses from the Parties who wished to comment on ICT Consultation 2016-2 Part B and Part C (Updated).
61. On **18 September 2023** the Office received cross comments from the Parties who had provided comments on ICT Consultation 2016-2 Part B and Part C (Updated).

## Appendix 2 – Legal Framework

In making its draft 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;

(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.



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- (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 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;

[...]

(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, already 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.

These documents are available on the OfReg website:

<https://www.ofreg.ky/consultation-2016-2-part-b-and-part-c>

## Appendix 4 – Comments, Cross Comments and OfReg Responses

### A. Issues Relating to the Permit Application Process, Including Make-Ready Work (Consultation 2016-2 Part B) - Proposals and Questions

#### 1. Standard Terms and Conditions

##### a) 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.**

#### 1. C3 Response

Agreed. This speaks to a basic fairness principle and aligns with principles outlined in section 69(2), as well as concepts contained within the infrastructure sharing regulations.

#### 2. DataLink Response

DataLink understands that s.69(2) of the ICT Act seeks to ensure that third-party utilities are able to attach on non-discriminatory terms, and believes this objective is best achieved through third-party utilities being subject to the same terms and conditions as each other. Nonetheless, we observe that it is the Office, and not DataLink, which has the statutory powers conferred by s.69(2), and DataLink does not believe that it could do any more to “ensure” that this objective is met than to draw the Office’s attention to any areas of concern, at least prior to the expiry and renewal of its agreements with each third-party utility, so that the Office may consider and, if appropriate, address them.

DataLink further notes that paragraph 302 of the Consultation alleges that DataLink did not raise the issue of the differing contractual terms with the Authority prior to the Consultation ICT 2016–2. This is factually incorrect. The correct position is that this issue was raised multiple times with the Authority as a concern, including in response to a Determination Request by Infinity Broadband in 2014 that was shared with the Authority.

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With the objective of s.69(2) in mind, and as stated in our Working Group response paper of June 16th 2017, DataLink has consistently been willing and attempted to negotiate a standard set of terms and conditions with other Licensees. For completeness, this was stated in our Licence Application to the Information and Communications Technology Authority (the “**Authority**”) and as required by the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the “**Regulations**”).

Furthermore, the DataLink standard pole attachment agreement (Master Pole Joint Use Agreement) (“**MPJUA**”) has not materially been altered since the legal framework document was submitted with DataLink’s application to the Authority to become an ICT Licensee, the terms and rates of which were considered by the Authority at that time prior to the issuance of the ICT Licence in 2011.

Some terms of the MPJUA will have evolved, or been updated, each time DataLink signs a new MPJUA with an Attaching Utility, in light of the parties’ experiences over time and due to the amount of time that has passed since the execution of the original agreements with third-party utilities and changes in market rates. Plainly, DataLink cannot force contractual amendments on each other Attaching Utility every time a new MPJUA is executed with one of them, hence the minor differences which presently exist between the various agreements. Notwithstanding, we agree with the Office that the agreements currently in effect are substantially the same.

DataLink has sought both to improve the standard agreement and to negotiate the consistent use of a standard agreement with all Licensees with an existing agreement for infrastructure sharing of the communications space (some of which were novated from CUC as negotiated prior to the issuance of DataLink’s ICT Licence). DataLink has generally been able to put MPJUAs in place with Attaching Utilities without inordinate delay. However, the following serves to illustrate the inability of DataLink itself to “ensure” that third-party utilities sign up to particular terms and conditions: DataLink has experienced considerable difficulty in its negotiations with Infinity Broadband Ltd (trading as C3). In particular, prior to the execution of its current MPJUA on July 22nd 2022, C3 had been operating without any MPJUA in effect since November 20th 2020 (in breach of the statutory requirements). Despite DataLink’s extensive efforts to engage with C3 on this matter during the intervening period including the issuance of a Notice of Grievance filed with the Office, C3 was persistently uncooperative; and when C3 did purport to engage substantively, it provided comments on outdated drafts of the MPJUA before eventually signing the correct MPJUA (as noted above, over a year and a half following the expiry of its previous MPJUA).

### 3. Digicel Response

Digicel agrees with the regulator’s position on this matter. Datalink and other third-party utilities should be guided by the same non-discriminatory terms and conditions, it suggests a standardized or regulatory framework that applies to all participants in the industry. This approach promotes consistency, fairness, and a level playing field among the different entities.

### 4. Flow Response

Flow agrees that third-party utilities (i.e. other than DataLink) who attach communications cables to the communications space on CUC utility poles should do so on non-discriminatory terms and conditions.

### 5. Logic Response

Yes - Logic agrees with this proposal.

**6. C3 Cross Comment**

No cross comment received.

**7. DataLink Cross Comment**

No cross comment received.

**8. Digicel Cross Comment**

No cross comment received.

**9. Flow Cross Comment**

No cross comment received.

**10. Logic Cross Comment**

No cross comment received.

**11. Office Response**

The Office notes the broad consensus of the parties in favour of the proposal.

## b) 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.**

### 12. C3 Response

Agreed. This speaks to a basic fairness principle and aligns with principles outlined in section 69(2), as well as concepts contained within the infrastructure sharing regulations. Furthermore, DataLink has a Fixed Telephony license from OfReg and is therefore a potential competitor to the other attachers. DataLink should not therefore be granted any competitive advantage with respect to pole attachments.

### 13. DataLink Response

The observations made by the Office in the Consultation document are unfortunately factually flawed and reveal either a failure to recall, or a fundamental misunderstanding of, the application previously made by DataLink to remove the Roll Out Schedule previously set out in Annex 1A of its Licence, which was granted (eventually, after a number of years' delay) on February 4th 2022.

Since DataLink does not provide such services to itself, DataLink respectfully considers that this question is academic (the reasons for which are explained in greater detail further below). However, DataLink can confirm that the rates, terms and conditions that are in each of the agreements with the Attaching Utilities are no less favourable to any Attaching Utility than any other Attaching Utility.

As of February 4th 2022, DataLink was granted its request of the Office for a licence amendment to remove the Roll Out Schedule set out in Annex 1A of DataLink's License and as a result to allow the space allocated to DataLink within the Communication Space on the utility poles owned by Caribbean Utilities Company Ltd ("CUC") to be allocated to another Licensee (namely Digicel). Amendment Number 4 of the license granted to DataLink is exhibited below:





**AMENDMENT NUMBER 4 TO THE LICENCE  
OF DATALINK LIMITED.**

**WHEREAS** DataLink Limited ("DataLink") was granted a Licence by the Information and Communications Technology Authority, now the Utility Regulation and Competition Office (the "Office"), dated 28<sup>th</sup> March 2012 (as amended) (the "Licence");

**AND WHEREAS** DataLink has requested that the Office remove the Roll Out Schedule set out in Annex 1A of DataLink's Licence to allow the space allocated to DataLink within the Communication Space on the utility poles owned by Caribbean Utilities Company Ltd) "CUC") to be allocated to another Licensee;

**AND WHEREAS** the Office agrees to the DataLink request for amendment of the license;

**THEREFORE** pursuant to sections 23 and 31 of the Information and Communications Technology Act (2019 Revision), Annex 1A of the licence is hereby amended to remove the Roll Out Schedule for Fibre optic cable – Domestic.

Dated this 4<sup>th</sup> day of February 2022

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

Executive Director Information  
Utility Regulation and Competition Office

Since this amendment was granted by OfReg, an agreement was executed with Digicel, which has begun utilizing the assigned point within the Communication Space on CUC poles previously reserved for DataLink.

Accordingly, DataLink is not and has no intention to utilize such services, and as a result will not be subject to any such rates, terms and conditions applicable to an Attaching Utility (although if it had, they would have been the same as those in place with other Attaching Utilities).

For completeness, we note that the Office has expressed the understanding at paragraph 329 of the Consultation that DataLink has "since changed this situation by moving its attachments to a different position on the pole outside of the communication space". DataLink wishes to advise the Office that its understanding of this matter is incorrect. The true position is that CUC has had a fiber optic loop (of which DataLink has strands for infrastructure sharing to others,) but DataLink does not have fiber itself. The CUC fiber optic loop has been in place for decades without any movement. Extensions to the loop have been added for CI Government CCTV links as needed. This is not anticompetitive in any way, and is simply a provision of services and infrastructure sharing which were anticipated at the time that the ICT Licence was granted.

#### **14. Digicel Response**

Digicel agrees with the office's proposal that the rates, terms and conditions that apply to DataLink should be afforded to all Attachers and no less favourable.

#### **15. Flow Response**

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

#### **16. Logic Response**

Yes - Logic agrees with this proposal.

#### **17. C3 Cross Comment**

No cross comment received.

#### **18. DataLink Cross Comment**

As noted above, this question and the Attaching Utilities' responses to it are misconceived, for the reasons which DataLink has provided in its initial response to this question. Although C3 specifically refers to DataLink's possession of a Fixed Telephony License similar to those of other ICT Licensees, it fails to appreciate the consequences of the amendment which removed the Roll Out obligation, and the reallocation of the space to Digicel (as previously explained). In short, since that time, this question has been rendered entirely academic.

#### **19. Digicel Cross Comment**

No cross comment received.

#### **20. Flow Cross Comment**

No cross comment received.

#### **21. Logic Cross Comment**

No cross comment received.

#### **22. Office Response**

The Office notes that most parties are expressly in favour of the Office's proposal.

DataLink states that the question is academic on the basis that, because DataLink no longer has a Roll Out Schedule in Annex 1A of its ICT Licence for its Fibre optic cable – Domestic network, DataLink does not use and does not intend to use, pole attachment services.

However, the question is not in fact academic. The 4 February 2022 licence amendment only removed the Roll Out Schedule. While DataLink might no longer have a roll out obligation set out in its ICT Licence, DataLink continues to be licensed to operate a Fibre optic cable – Domestic network and to provide services over that network and, therefore, could in the future place attachments of its own on CUC utility poles. To the extent that DataLink does so, the Office considers it appropriate that DataLink 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 it provides the same services to itself.

The Office notes DataLink's explanation that it does not have fibre cables attached to CUC utility poles. Rather it has fibre strands within fibre cables belonging to CUC which are attached to CUC

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utility poles.<sup>128</sup> The Office considers that these fibre strands could be used by DataLink to provide ICT services, such as point-to-point connectivity, to the public in competition with other ICT Licensees, if DataLink is not already doing so.

The Office also notes DataLink's statements in response to this Question 2 that it is using the fibre strands to provide infrastructure sharing services and that extensions have been added to the CUC fibre loop for the CI Government CCTV service. The Office is of the view that these are ICT services. DataLink is therefore providing ICT services to the public. To the extent that other ICT Licensees could provide fibre-strand based infrastructure sharing services or connections for CCTV cameras, DataLink is providing ICT services in competition with other ICT Licensees.

The Office further notes DataLink's comment in response to Question 49 below that "DataLink has requested and received an amendment of its license by OfReg so as not to be considered a retail service provider and to avoid being subject to the related Roll Out obligations." The Office is of the view that DataLink can provide services – for example, wholesale services – in competition with other ICT Licensees even if DataLink is not providing *retail* ICT services. The Office considers therefore that DataLink has not demonstrated that it is not in competition with other ICT Licensees operating in Grand Cayman.

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<sup>128</sup> These are necessarily attached to CUC's poles outside of the Communications Space as all spaces available within the Communications Space have been allocated to other persons or are already being used by those persons.

## 2. Permit Application Process and Timetable

### a) 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.**

#### 23. C3 Response

Agreed.

#### 24. DataLink Response

DataLink respectfully disagrees with this proposal, and considers that the current practice of DataLink verifying and approving Pre-Permit Surveys internally ought to remain in place.

DataLink's position is based on the findings of the Joint Use Audit conducted in 2022 (the "Audit"), which revealed a vast number of breaches of contractual requirements under the MPJUAs, involving all Attaching Utilities to some extent. Against that recent background, DataLink cannot be confident that there would be full compliance with contractual and regulatory requirements, and that the integrity and safety of the utility poles would be safeguarded, if there were to be a departure from the current practice.

By way of brief overview, the Audit revealed a vast number of instances where Attaching Utilities failed to adhere to the terms and conditions provided by their respective MPJUAs, including inter alia (i) by making unauthorised attachments; and (ii) failing to observe the condition that a maximum of four half-inch cables, situated between 18.5ft and 21.5ft above the ground, may be attached within the Communications Space. The Audit identified a total of 47,221 attachments, spanning various heights from 0ft to 23ft, with only 21,878 permits having been issued.

For the avoidance of doubt, no Attaching Utility had fully adhered to its MPJUA. Whilst C3 asserted in the updated Consultation that "telcos only attach at one point in the three-foot communication space", the Audit has shown that is not the case.

As OfReg will be aware, the MPJUAs govern the permit process, and establish and incorporate Engineering and National Electric Safety Code ("NESC") guidelines specifying the permissible size and mounting of attachments. Appendix D of the MPJUA explicitly states that the "Electric Utility will permit a maximum of 4 half (1/2) inch cables to be attached." This provision is grounded in the objective of preventing pole loading from exceeding 100% of its capacity, while adhering to

the relevant NESC and ANSI Standards. Furthermore, it serves to safeguard the integrity of the electricity grid, which is engineered to endure continuous wind conditions of up to 110 mph, typical of a Category 2 storm. Given the extent of non-compliance revealed by the Audit, allowing the Attaching Utilities to conduct their own pre-permit surveys would only introduce additional costs and complexities to the already established permit/make-ready process.

If the current proposal were implemented, then in order to ensure that there had been compliance with the prerequisites of the MPJUA, DataLink would nonetheless be compelled to undertake a thorough verification process for each pre-permit survey submitted by an Attaching Utility. This would create a duplicative verification process, which would inevitably result in increased time and resources being allocated by DataLink to review and cross-reference the survey data.

Considering these challenges and the historical non-compliance observed, DataLink believes that maintaining the current practice of DataLink verifying and approving pre-permit surveys internally is the most prudent approach. This approach allows DataLink to ensure that the Attaching Utilities adhere to the established terms and conditions, mitigating the risks associated with unauthorised attachments and maintaining regulatory compliance.

We emphasize that DataLink remains committed to upholding the integrity of the joint utility infrastructure, which requires it to uphold the necessary guidelines and standards. By independently verifying and approving pre-permit surveys, DataLink is able to effectively safeguard the integrity and safety of the utility poles, while ensuring compliance with the relevant regulatory frameworks.

### **25. Digicel Response**

By advocating for the submission of a complete Pre-permit Survey, Digicel aims to expedite the permitting process and improve efficiency. This can benefit both Digicel and other entities involved in the installation or modification of telecom infrastructure by reducing unnecessary delays and accelerating the deployment of services.

### **26. Flow Response**

Flow agrees that applicants provide a properly completed Pre-Permit Survey with their application to attach to a CUC utility pole.

### **27. Logic Response**

Yes - Logic agrees with this proposal.

### **28. C3 Cross Comment**

No cross comment received.

### **29. DataLink Cross Comment**

Although the Attaching Utilities are in agreement with this proposal, DataLink maintains that its current practice of internal verification and approval of Pre-Permit Surveys, as delineated in our submission for the ICT 2016 – 2 - Consultation Part B and Part C (Updated), is fundamental and cannot safely be abandoned. This has been demonstrated forcefully by the findings of recent audits, which discovered wide-ranging noncompliance by Attaching Utilities with the requirements of the MPJUAs. Implementing this proposal is therefore very likely to escalate the workload for both DataLink and CUC, and reduce efficiency rather than increase it.

### 30. Digicel Cross Comment

Digicel wishes to emphasize that contrary to Datalink's response, we have been guided by the MPJUA agreement between Datalink and Digicel, and have been fully compliant in all of our attachments.

### 31. Flow Cross Comment

No cross comment received.

### 32. Logic Cross Comment

Logic disagrees with DataLink's response to this question. It is evident from the responses of both Logic and the other Licensees (save for DataLink) and from Logic's own experience that the current approach adopted by DataLink with regards applications by Licensees does not work.

Logic's view is that the issue raised by DataLink in its response regarding the lack of adherence of the Licensees to the Master Pole Joint Use Agreements ("MPJUAs") is in part caused by the lack of clarity within the MPJUAs as well as the amount of time taken by DataLink to process applications to attach.

As such, Logic's position remains that applicants should 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.

### 33. Office Response

The Office notes that most parties are expressly in favour of the Office's proposal.

DataLink submits that it should continue "*the current practice of DataLink verifying and approving Pre-Permit Surveys internally.*" DataLink submits that none of the Attaching Utilities have fully adhered to the terms and conditions of their respective Pole Sharing Agreements, as shown by a recent audit, and that it is not confident that, if the current process were to be changed, the integrity and safety of the utility poles would be safeguarded. DataLink submits that it would be compelled to undertake a thorough verification process of any Pre-Permit Survey submitted by an Attaching Utility, which would duplicate efforts and result in increased time and resources being consumed by DataLink.

The Office notes that paragraph 366 of the Consultation Document referred to "*the field inspection element of a Pre-Permit Survey*" while the proposal referred to the Pre-Permit Survey only. The Office's intent was to refer to the field inspection element and the proposal will be amended accordingly.

At this time, there continues to be no evidence that the field inspection element of the Pre-Permit Survey requires more than a visual inspection of the pole or that it must be performed only by DataLink or its agents or employees. Provided that DataLink properly communicates the information that it requires from a field inspection, the Office does not see a reason to believe that an Attaching Utility could not collect and transmit that information to DataLink as part of its application for a pole attachment permit.

The Office anticipates that DataLink would then "verify" that information against its records. If there is a difference (for example, an unexpected unauthorised attachment), DataLink could further investigate. Otherwise, if there is no difference or discrepancy, DataLink would be able to proceed to prepare and provide a quotation that would safeguard the integrity and safety of the utility pole, as it does today.

An advantage of this approach would be that DataLink might become aware of issues on the poles sooner than it might otherwise have been made aware, if it had to wait until another audit were conducted, and would be able to address them before they caused problems for the pole infrastructure. In the meantime, DataLink would not be required to expend scarce resources on the field inspection.

The Office is concerned about DataLink's report of unauthorised attachments and other non-compliance with the terms and conditions of the Pole Sharing Agreements. However, the Office does not agree with DataLink's implied comment that, because Attaching Utilities are not compliant with the terms and conditions of their pole sharing agreements, they necessarily cannot competently perform a field inspection to DataLink's standards of a pole to which they seek to attach.

**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.**

### **34. C3 Response**

Datalink should provide a schedule of charges for the various types of make-ready, an attaching utility could in theory review the pole and have good understanding of the make-ready charges that they would be charge for the pole, to determine if the best route would be to attached to the pole or possible trench the street. Therefore the attaching utility on it application could advise Datalink the make-ready needed on each pole and speed up review time and confirm the quotation for the application. The schedule fo charges should be sent out to each company authorized, including CUC to do basic make-ready work on the poles, that would get a competitive bid for the regulator to review and regulate the charges, as it is now, Datalink is not held accountable and can charge on an hourly basis and is under no pressure to get the project done in a timely manner—they pass on 100% of the cost to the attacher(s).

### **35. DataLink Response**

DataLink repeats its response to Question 3 above. Since DataLink considers that it would, in any event, need to thoroughly verify each Pre-Permit Survey if such a process were adopted, it does not anticipate that there would be any reduction in the time required to provide a quotation to the applicant.

As noted above, the Audit confirms that each Attaching Utility has failed to comply fully with the terms of its MPJUA. In countless instances, the Engineering and NESC guidelines pertaining to the permitted methods and types of attachments on the utility poles have been disregarded. Such non-compliance undermines the integrity of the joint utility infrastructure and raises safety and regulatory compliance concerns.

DataLink thus considers that it would be compelled to undertake additional validation procedures to ensure compliance with the MPJUAs and the applicable guidelines, and that the proposal which is the subject of Question 3 above would only serve to create duplicative work for DataLink and the Attaching Utilities.

By maintaining control over the verification process, DataLink can effectively fulfil its responsibility of safeguarding the utility poles, ensuring adherence to the established standards, and providing

accurate quotations to applicants in a manner that is no less timely than would be the case if the proposal which is the subject of Question 3 above were to be adopted.

### **36. Digicel Response**

By completing the Pre-permit Surveys thoroughly and accurately, applicants aim to provide all the necessary information upfront, reducing the need for subsequent clarification or additional documentation. This can lead to a more efficient evaluation and approval process for pole applications. The time between application and quote is quite dynamic, we however expect a curtailed timeframe with the implementation of a Pre-permit survey.

### **37. Flow Response**

A properly completed Pre-Permit survey would relieve DataLink from having to commit resources to this activity which has the potential to reduce the time to attach to the poles given that DataLink does not have sufficient capacity to process applications for permits. It would also release resources that would have been assigned to Pre-Permit Survey to other areas of the process, which Flow anticipates should also lessen the time to attach to the poles.

### **38. Logic Response**

Logic's view is that if applicants are required to provide properly-completed Pre-Permit Surveys with their applications for a permit to attach, this would likely speed up the processing time for permits by DataLink. This assumes that a standard form of Pre-Permit Survey will be completed by each applicant, submitted in a standard agreed manner and that the Pre-Permit Survey will cover the necessary information required by DataLink to properly determine the feasibility of an application for a permit to attach. At present, there is back and forth between the applicant and DataLink for information regarding applications for a permit to attach which is time consuming and slows down processing time. It is worth also noting however that any requirement to provide a properly-completed Pre-Permit Survey by an applicant will likely result in increased costs to the applicant regarding such applications which should be taken into consideration (especially with regards Make-Ready Costs).

### **39. C3 Cross Comment**

No cross comment received.

### **40. DataLink Cross Comment**

See the response to Question 3. In addition, given the expected inefficiencies, as Logic has observed, this proposal is likely to increase the costs to the applicant. Furthermore, with respect, C3's remarks are misguided: when a Make Ready estimate is provided to an Attaching Utility, it includes a detailed breakdown encompassing the materials, costs and labor prerequisites essential for executing Make Ready in the designated area. And Attaching Utilities are not obliged to proceed, but remain at liberty to assess whether pole attachment or street trenching is their preferred course.

### **41. Digicel Cross Comment**

Digicel wishes to emphasize that contrary to Datalink's response, we have been guided by the MPJUA agreement between Datalink and Digicel, and have been fully compliant in all of our attachments.

### **42. Flow Cross Comment**

No cross comment received.



### 43. Logic Cross Comment

Logic disagrees with DataLink's response to this question for the reasons set out above in respect of Consultation Question 3.

### 44. Office Response

No party provided an estimate of the time that could be saved if applicants were to provide the results of the field inspection element of the Pre-Permit Survey as part of their application for a permit to attach. However, Digicel, Flow and Logic agreed that some time could be saved, and Flow noted that DataLink would be able to redirect its resources to other parts of the permit application process.

DataLink submitted that it would need to undertake additional validation procedures. However, the Office notes that DataLink's concerns appear to be related to non-compliant attachments. While this is of concern to the Office as well, this is not relevant to the permit application process which, by definition, occurs before any attachments are made (whether or not compliant). Further, as noted by the Office in response to Question 3, the existence of non-compliant attachments does not necessarily indicate that Attaching Utilities cannot competently perform field inspections to DataLink's standards.

C3 proposed that DataLink establish a schedule of charges for make-ready work. The Office notes the proposal but also notes that it is outside the scope of this question and, in any event, may be difficult for DataLink to implement given the nature of the work involved.<sup>129</sup> However, the Office encourages DataLink to consider it as, if implemented, it might reduce the number of instances where an Attaching Utility requests a quote that it subsequently chooses not to pursue<sup>130</sup> due to unanticipated high cost. This would allow DataLink to further focus its resources on requests that will result in attachments.

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<sup>129</sup> The Office notes that the FCC declined to impose a similar requirement to provide "a publicly-available schedule of common make-ready charges." See paragraph 114 of the FCC 2018 One Touch Make Ready Order.

<sup>130</sup> While DataLink complains in its response to Question 7 of estimates that are requested only "to be declined or left unanswered," the Office also notes DataLink's statement in its 18 September 2023 cross-comments that "Attaching Utilities are not obliged to proceed" following receipt of a Make Ready estimate.

## b) 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.**

#### 45. C3 Response

Agree. The concept of time-bound activities for each step of the process will address the both the inconsistencies of permitting and the inefficiencies of the existing processes.

#### 46. DataLink Response

DataLink agrees that Attaching Utilities possessing a valid MPJUA and without any outstanding issues, including unpaid invoices or pending relocation requests, should adhere to a predetermined timeframe for responding to the provided estimates.

Such a requirement would serve to ensure that such estimates do not become outdated, and to expedite progress in the realm of Make-Ready work. It would particularly enable DataLink, as the facilitator of Make Ready operations, to proficiently organize and plan its Make-Ready endeavors based on the expeditious approval of estimates. Furthermore, it would establish a consistent framework for Wayleave Coordinators to follow when seeking necessary approvals.

The adoption of such a proposal should therefore also benefit Attaching Utilities, by affording them the opportunity to assess the viability of the proposed works, taking into account factors such as budgetary constraints, customer acquisition timelines, or the need to explore alternative routes in instances where estimated costs for a specific route are deemed excessive due to substantial infrastructure modifications or additions necessary for pole preparation.

#### 47. Digicel Response

Digicel is in agreement with this proposal.

#### 48. Flow Response

Flow agrees that Attaching Utilities be required to accept, reject or otherwise respond to estimates for Make Ready Work charges within a specific period of time or such further time as agreed with DataLink.

**49. Logic Response**

Yes - Logic agrees with this proposal.

**50. C3 Cross Comment**

No cross comment received.

**51. DataLink Cross Comment**

No cross comment received.

**52. Digicel Cross Comment**

No cross comment received.

**53. Flow Cross Comment**

No cross comment received.

**54. Logic Cross Comment**

No cross comment received.

**55. Office Response**

The Office notes the broad consensus in favour of the Office's proposal.

DataLink appears to seek to limit the requirement to respond to an estimate of Make-Ready Work charges within a specified period of time to Attaching Utilities that have a valid Pole Sharing Agreement and do not have any outstanding issues, including unpaid invoices or pending relocation requests. The Office notes that a party without a valid Pole Sharing Agreement would not have a contractual right to apply for an attachment permit and therefore would not normally receive an estimate. However, it is not clear how the other factors mentioned by DataLink would in fact affect DataLink's ability to respond to an estimate in a timely manner. Nor is it clear how limiting the requirement to respond as proposed by DataLink would lead to a faster or more efficient or more effective permit application and make ready process. The Office is therefore not inclined to adopt DataLink's proposal in this regard.

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

**56. C3 Response**

7 days with at least five of those working days.

**57. DataLink Response**

DataLink maintains that a prescribed period of 15 Business Days is both reasonable and appropriate, since that should allow Attaching Utilities adequate time to thoroughly evaluate their options and make informed decisions. In order to ensure that the deadline is observed, the estimate should be deemed null and void upon the expiry of that period.

Implementing a 15 Business Day period for Attaching Utilities to respond aligns with industry best practices and promotes effective collaboration between all parties involved. The imposition of such a timeframe is crucial for effective planning and allows CUC/DataLink to allocate necessary resources, such as personnel and contractors, in a systematic manner. This systematic approach ensures consistent work schedules and enhances the overall efficiency of the deployment

process. Conversely, any appreciable delay in responding directly impacts the overall timeline for CUC/DataLink to prepare the site for attachment.

Providing Attaching Utilities with a specific timeframe for reaching a decision also requires them to focus on and carefully assess the feasibility and logistical considerations associated with the proposed attachment at the relevant times.

In conclusion, DataLink considers that requiring responses to be provided within this timeframe strikes an appropriate balance between providing ample time for evaluation and enabling a streamlined and well-coordinated site preparation process.

### **58. Digicel Response**

Seven (7) calendar days should be sufficient for an attaching utility to respond to quoted estimates from Datalink.

### **59. Flow Response**

Flow proposes ten (10) days to accept, reject or otherwise respond to estimates delivered by DataLink.

### **60. Logic Response**

Logic's view is that the period of time granted to Attaching Utilities to respond to such estimates should correlate to the volume of estimates under consideration. For example, a response period of 14 calendar days for up to 50 estimates.

### **61. C3 Cross Comment**

No cross comment received.

### **62. DataLink Cross Comment**

The Attaching Utilities have suggested response timeframes between 7 and 14 days. DataLink maintains that 15 Business Days is reasonable and appropriate. It does not preclude an earlier response, but affords an Attaching Utility slightly longer to thoroughly assess its options and arrive at well-informed decisions (as underscored by C3's remarks in response to Question 4) on the occasions where they may reasonably require more than one or two calendar weeks to do so. It is also important to appreciate that this 15 Business Day window applies to each estimate separately, and not in the aggregate (which seems to be misunderstood in Logic's commentary referencing up to 50 estimates).

### **63. Digicel Cross Comment**

Digicel, after carefully considering the responses suggest a shorter response time for Attaching Utilities. A response time of 7 to 10 business days seems to be more favorable to Attaching Utilities than the three-week period proposed by Datalink.

### **64. Flow Cross Comment**

No cross comment received.

### **65. Logic Cross Comment**

No cross comment received.

### **66. Office Response**

The Office notes that the parties submitted a wide range of proposed timeframes to respond to an estimate (from 7 calendar days to 15 working days). The Office acknowledges that an

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Attaching Utility will require some time to properly consider an estimate and to respond, and that this may depend upon the volume of estimates under consideration, as noted by Logic. However, the Office considers that having a pre-determined timeframe would provide greater clarity and certainty to all parties. The Office further considers that 15 working days (i.e., up to 3 weeks) as proposed by DataLink may be too long.

In this regard, the Office considers that the 14-calendar day maximum timeframe applied by the FCC may represent a reasonable middle ground that balances the interests of both DataLink and the Attaching Utilities.

The Office notes that this maximum response timeframe does not prevent an Attaching Utility from responding to an estimate earlier.

### **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?**

#### **67. C3 Response**

See the Towerhouse Report, with respect to the recommended Service Level Agreement (SLA) for both Flow and CUC.

#### **68. DataLink Response**

The provision of estimates is resource-intensive, in terms of the various personnel and equipment involved. DataLink therefore proposes the implementation of an upfront application fee of KYD\$1,600 per estimate for up to 10 poles, which would cover the review of the application, route design analysis and site survey necessary to generate the estimate.

An application fee would also serve to encourage Attaching Utilities to submit requests for estimates only for sites they genuinely intend to utilise, and which can properly be considered within the 15 Business Day period proposed above. This approach would help to mitigate unnecessary resource allocation and increase efficiency, whilst enabling CUC/DataLink to recover costs associated with the estimation process.

In this regard, it is important to recognise that DataLink operates with limited resources, as highlighted in OfReg's Consultation. Historically, there have been instances during Joint Use/Make Ready projects where Attaching Utilities have requested estimates for significant areas, requiring substantial efforts from CUC/DataLink, only for the requested estimates then to be declined or left unanswered.

This proposed upfront application fee should encourage a more focused and efficient estimation process, avoiding more substantial wasted expenditure, while supporting the financial sustainability of CUC/DataLink. It should generally ensure that resources are allocated to meaningful estimates, contributing to the overall effectiveness of the joint use infrastructure management.

#### **69. Digicel Response**

It should be stated in the MPJUA under the permit application procedure under the review period or create a new subheading called response period.

VI. "Permit Application Procedure"

Include new section -: "Response to Estimates"

Upon receipt of make-ready cost estimate from the owner utility, the attaching utility has seven (7) calendar days to respond either accepting, rejecting or request for further clarification.

### **70. Flow Response**

Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms.

### **71. Logic Response**

Inclusion of a clear timetable of response times corresponding to volume of estimates received should be included in the Pole Sharing Agreements. The Pole Sharing Agreements should also include a timeline for next steps and timeframes in the event that an Attaching Utility rejects or otherwise responds to an estimate (i.e. if the Attaching Utility raises queries or disagreements with the estimate, there should be a clear pathway to resolution).

### **72. C3 Cross Comment**

No cross comment received.

### **73. DataLink Cross Comment**

C3 relies in its response to Question 7 on the "Towerhouse Report", a piece of advice which it unilaterally commissioned and received in May 2020. Insofar as C3 may be implying (by submitting the advice rather than seeking to convey anything it believes it has learnt from the advice) that the Office should give that advice any greater weight than it would a response provided by C3 itself, DataLink observes that this would be inappropriate.

The Office is asked to note that the advice explicitly refers to the limitations under which it was prepared: for example, on p.28, Note 3 states "The views expressed in this note are based on information we have", and Note 4 states "The factual summaries in this table have been provided by C3 and C3 alone". Furthermore, the Office does not have access to the instructions and material upon and by reference to which it was prepared (which likely included contemporaneous discussions); and Towerhouse was not obliged to be objective and impartial in their provision of that advice. Further, and more importantly, DataLink is not a telecom provider, let alone a dominant provider (and, as noted previously and above, now cannot and will not be), so the analogy which Towerhouse has sought to draw between DataLink's position and that of BT is fundamentally flawed.

For completeness, DataLink concurs with FLOW's view that, in light of the existing contractually negotiated agreement, any modifications to such agreements would necessitate negotiation and subsequently be reflected in a new MPJUA between DataLink and all Attaching Utility entities holding a valid MPJUA.

### **74. Digicel Cross Comment**

Digicel is not in agreement with the proposed upfront application fee by Datalink.

### **75. Flow Cross Comment**

Flow strongly opposes the proposal by DataLink to charge an additional fee called an application fee of KYD\$1,600 per estimate for up to 10 poles. As it stands, DataLink's methodology produces fees that are unreasonable and inflated, which is not in keeping with the Interconnection and

Infrastructure Sharing Regulations. Fundamentally, as well, the fees currently charged by DataLink covers all service provided to attaching operators.

## 76. Logic Cross Comment

Logic disagrees with DataLink's response to this question, specifically the proposal by DataLink to impose an upfront additional application fee as there is no explanation for the figure reached for such fee.

In the event that the upfront fee proposed by DataLink is adopted, Logic's view is that this amount should form part of the make-ready costs for such pole application.

## 77. Office Response

The Office considers that the purpose of a response time in this context is to ensure that DataLink, having put the effort into providing a quotation, can know in a timely manner whether the quotation is accepted or not. In the Office's view, this would allow DataLink to better plan the allocation of its Make-Ready Work resources.

Only Digicel provided specific terms to be included in the Pole Sharing Agreement in the event the proposal was adopted following consultation. Flow noted that the terms should be negotiated, while Logic suggested that follow-up steps should also be included in the Pole Sharing Agreements, without, however, proposing specific timeframes for those steps.

C3 referred to SLAs in the Towerhouse Report. However, these may be of limited relevance in these circumstances, as the SLAs that are discussed in that Report (for example, at paragraphs 71-72 and 81) appear to apply to the provider of services (which, in this context, would be DataLink) and not to the requester (which is what is being considered here).

In light of the foregoing and having reviewed Digicel's proposed text, the Office intends to propose substantially similar language in its Draft Determination.

DataLink proposed the implementation of an upfront application fee, suggesting that this would encourage Attaching Utilities to apply for permits for poles "*they genuinely intend to use*" which in turn would presumably result in fewer permit applications being declined or left unanswered and therefore result in more effective use of DataLink's resources. The Office notes that the evidence of permit applications not being pursued after DataLink provided a quotation is limited<sup>131</sup> and the Office considers that these decisions not to pursue or proceed are more likely to be the result of the high cost of the applicable Make-Ready Work charges than of the applicant not "genuinely" intending to use the pole in question. The Office also notes that cost basis for the proposed application fee was not provided, other than that it would cover "*the review of the application, route design analysis and site survey.*" Nor did DataLink explain how the introduction of an application fee would affect the calculation of the Annual Attachment Fee (which is how DataLink currently recovers those costs).<sup>132</sup>

The Office further notes that the DataLink's proposition that payment of the proposed application fee would "*encourage a more focused and efficient estimation process*" is based largely on the assumption that applications are not in fact "genuine". There is no clear evidence to support this

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<sup>131</sup> RFI 307 focused on the number of attachments not made after an application, not on the number of applications that an attacher chose not to proceed with.

<sup>132</sup> The Office notes, however, Regulation 10(1)(d) of the INI Regulations which states that it would be preferable that "*non-recurring costs ... be recovered through non-recurring charges.*"

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assumption. Further, while a cost-based application fee might in theory lead to some efficiencies as it would require attachers to better crystallise their plans prior to application, the evidence on the record for such efficiencies is limited.

The Office notes that, contrary to its statement in its 18 September 2023 cross comments, DataLink is in fact a “telecom provider” and is licensed to operate ICT networks and to provide ICT services.



### c) 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.**

#### 78.C3 Response

Agree, problem with this is they may sit on batch that only requires makeready on some poles and hold up the build out along that pole line until they finish the make-ready for all poles – again a SLA could speak to this—when they start make-ready work on a street they have X day to complete after there is penalty, similar to what your would find in a construction contract—time is money.

#### 79.DataLink Response

DataLink strongly disagrees with this proposal.

At the time of submitting a batch application, an Attaching Utility will be unaware (or not necessarily aware) of whether the poles in question are categorized as "Green" or "Red." As you will know, those categorized as "Green" poles are those that have undergone the Make Ready process within the past 5 years. On the other hand, "Red" poles refer to those that either haven't undergone the Make Ready process or underwent it more than 5 years ago and require reassessment. Due to the lack of this information prior to pole submission, there are instances where a combination of Green and Red poles is included in such applications.

In such instances, the Green poles may be easily accessible to the applying Attaching Utility, allowing them to attach their infrastructure and commence offering services to the surrounding area once the permit is issued. However, it would be inappropriate for DataLink to issue permits in respect of the Red poles which are effective as of the same date, since those poles will not have been made ready or reassessed as of that date.

Conversely, if DataLink were to withhold (or delay the effective date of) permits for Green poles until the Make Ready processes and/or reassessment of all Red poles within the batch have been completed (which could be extensive depending on the number of Red poles in the batch and the required work, necessary Way Leaves, and other factors), the Attaching Utility could be expected

to miss out on potential customers and revenue in the event that it is able to make use of at least certain of the Green poles pending completion of the make-ready work which the Red poles require.

DataLink considers that each the first of those scenarios is unworkable, whilst the second is less than ideal. We acknowledge that the Office has this potential solution in mind with a view to eliminating “the concern that some permits might lapse due to delays in obtaining other permits” and facilitating “the efficient use of CUC utility poles and the deployment of ICT networks”. However, DataLink considers that a more nuanced approach would better serve Attaching Utilities’ interests, namely to allow them to indicate which (if any) Green Poles within the batch will be unusable pending completion of the Make Ready processes and/or reassessment of all Red poles within the batch have been completed, and to positively request that the permit for those particular Green poles be given the same effective date as permits for the Red poles upon which their use is dependent”.

### **80. Digicel Response**

Digicel is in general agreement with the following proposal (reference paragraph 386-387) with additional explanation below in response to Question 9. Also, a tracker should be in place between Datalink and the attaching utility which should be synchronized according to a specified schedule to ensure the applied for poles and outstanding poles are properly accounted for.

### **81. Flow Response**

Flow agrees with Oreg’s proposal that all permits issued for poles in the same batch application be given the same effective date unless otherwise requested by the applicant.

### **82. Logic Response**

No, Logic does not agree with this proposal. Logic’s view is that permits issued for poles included in the same batch application should not be given the same effective date, regardless whether the pole is ready and available for attachment, unless the applicant requests otherwise. Logic’s position is that generally, where certain poles in a batch application are ready and available for attachment, the batch application should be split into ‘ready and available poles’ and ‘unavailable poles’ for which applications may be taking longer to process. ‘Unavailable poles’ should be seperated into a new batch for processing and should not delay the approval process for ‘ready and available poles’. This would grant the applicant better visibility as to the progress of its applications and allow it to start doing preparatory work (as required) in respect of poles for which applications have been granted rather than having to wait for the entire batch to be approved (which may take significant time).

### **83. C3 Cross Comment**

No cross comment received.

### **84. DataLink Cross Comment**

DataLink and Logic appear to agree that, owing to the intricacies associated with Make Ready procedures, permits should be issued promptly upon pole readiness rather than being withheld until the entire batch of poles has been completed.

DataLink is of the view that the Joint Use software currently in the final stages of implementation and testing will effectively address the concerns raised by Digicel, facilitating the ready reference to the Make Ready status of individual poles.

DataLink disagrees with C3's assertion, since the Way Leave process is an integral component of the Make Ready process. Work cannot commence until all requisite Way Leaves have been granted by the affected landowners.

#### 85. Digicel Cross Comment

Digicel is in agreement with Datalink's response to this question.

#### 86. Flow Cross Comment

No cross comment received.

#### 87. Logic Cross Comment

No cross comment received.

#### 88. Office Response

The Office notes the variety of views expressed by the parties in response to this proposal, with some supporting it and other opposing it.

DataLink in particular notes that there may in fact be instances where use of a green pole in a batch of poles is not dependent on availability of a red pole and that, in these circumstances, it would not make sense to delay the ability to use that green pole. Logic adopts a similar position, specifically, that poles should be made available and usable by the Attaching Utility as soon as they are ready.

The Office's concern was to ensure a batch of poles does not become unusable by the applicant merely because permission to use a given green pole, that could not be used while an associated red pole was waiting to be made ready, expired. The intention was not to preclude use of a green pole in circumstances where it could be used. Rather, the objective is to accelerate use of poles by Attaching Utilities and to minimize barriers to use of poles. The Office notes that its proposal had already addressed this by specifying "unless the applicant requests otherwise." Notwithstanding this, the Office notes DataLink's and Logic's concerns for earlier access to poles and the Office will address its own concerns through the permit expiry provision discussed at Question 24 below instead of here.

The Office notes DataLink's submission that applicants would not know whether a pole is green or red prior to submission of their application, but considers that this information should be relatively easy to provide to Attaching Utilities via access to a pole information database.

The Office also notes that DataLink appears to have modified the definition of Green Pole to limit it to those that have undergone the Make-Ready process within the last 5 years. This specification was not included in the CUC-DataLink-Logic MOU<sup>133</sup> and it is not clear why a pole that was swapped and made ready at a given point in time to accommodate up to four attachments ceases to be able to do solely due to the passage of time.<sup>134</sup>

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<sup>133</sup> Section 2 of the **CUC-DataLink-Logic MOU** defines "Green Poles" as "*poles within a Batch that do not require any work to be completed prior to an Attachment being made*" and defines "Red Poles" as "*poles within a Batch that require work to be completed by CUC prior to an Attachment being made.*"

<sup>134</sup> DataLink may be able to demonstrate that a pole is no longer "green," but the Office considers that it is inappropriate to presume that a pole that once was "green" has ceased to be for no reason other than 5 years having elapsed since it was last made ready.

**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?**

**89. C3 Response**

See the Towerhouse Report, with respect to the recommended Service Level Agreement (SLA) for both Flow and CUC.

**90. DataLink Response**

For the reasons given above, DataLink disagrees with this proposal, and therefore with implementing any alterations to the terms of the MPJUA. As noted above, such changes would be likely to detrimentally affect Attaching Utilities and impede the pace of their network expansion efforts.

**91. Digicel Response**

Addition to the Master Pole Joint Use Agreement to include a new section addressing the issuance of permits for batch applications, the review of pole availability, and the effective date of the quarterly billing cycle.

"Section X: Batch Applications and Permit Issuance

1. While we recognize that batch applications should have the same applied for date, the issuance of permits for approved applications may not carry the same date.
2. The attaching utility shall be granted the allowance to review the availability of red vs green poles within a batch application. This review aims to assess the feasibility of proceeding with the construction of certain segments of the cable while other poles within the same batch are still being worked on.
3. The review of pole availability enables transparency and accountability in determining the effective date of the quarterly billing cycle.
4. All parties involved shall maintain open communication and provide timely updates regarding the progress of pole installations within a batch application.
5. The effective date of the quarterly billing cycle shall be determined based on the completion of pole installations within the respective batch, ensuring accurate billing and allocation of costs.
6. Any disputes or concerns related to the effective date of the quarterly billing cycle shall be resolved through the established dispute resolution mechanisms outlined in the agreement."

**92. Flow Response**

Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms.

**93. Logic Response**

If Logic's position as outlined above in response to Question 8 were adopted, the Pole Sharing Agreements would need to be revised to reflect the concept of 'ready and available poles' and

'unavailable poles'. Clear perimeters of what an applicant would be permitted to do (i.e. in terms of preparatory work) in respect of 'ready and available poles' for which permits had been issued would need to be considered and included, together with a timeframe for response times on 'unavailable poles' which had been broken into a separate batch.

**94. C3 Cross Comment**

No cross comment received.

**95. DataLink Cross Comment**

No cross comment received.

**96. Digicel Cross Comment**

No cross comment received.

**97. Flow Cross Comment**

No cross comment received.

**98. Logic Cross Comment**

No cross comment received.

**99. Office Response**

The Office notes that the parties' responses to this Question 9 follow their responses to the previous question.

#### d) 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”?

##### **100. C3 Response**

Agree. Would create potential conflicts and pathways to different treatment of applicants and therefore unfair situations.

##### **101. DataLink Response**

DataLink agrees that there is no need to change the permit application process. However, DataLink acknowledges that it would be desirable to modify the process to better accommodate the interests of all entities involved in the respects described below.

The introduction of the Pre-Approved Permit is deemed necessary based on the findings of the Audit, which have been described above.

Upon receiving permits, or – as evident from the Audit – even without obtaining permits from DataLink, Attaching Utilities have proceeded to attach to infrastructure however they see fit. In certain instances, these companies installed such a substantial amount of infrastructure that it precluded the possibility of other entities attaching their equipment, thereby violating Article 65.1 of the Interconnection and Infrastructure Sharing Act, which explicitly prohibits a licensee operating a public ICT network from (among other things) obstructing or impeding another licensee in making interconnections or sharing infrastructure.

By implementing a Pre-Approved Permit as an integral part of the Post Installation survey, DataLink aims to effectively mitigate any further misuse of the CUC electricity grid by Attaching Utilities while ensuring effective and harmonized usage of the infrastructure.

##### **102. Digicel Response**

Digicel agrees with the Office that currently there is no need to create a “Pre-Approved Permit” step in the process. However, this is on the basis that that the revisions recommended in this consultation are adopted, there is no benefit in creating a “Pre-Approved Permit” and that all parties, including Datalink, have ubiquitous terms and conditions as it relates to the Pole Attachment Process and agreements.

##### **103. Flow Response**

Flow agrees with Ofreg that there is no need for an additional step of “Pre-Approved Permit”.

**104. Logic Response**

Yes, Logic agrees 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".

**105. C3 Cross Comment**

No cross comment received.

**106. DataLink Cross Comment**

No cross comment received.

**107. Digicel Cross Comment**

No cross comment received.

**108. Flow Cross Comment**

No cross comment received.

**109. Logic Cross Comment**

No cross comment received.

**110. Office Response**

The Office notes the broad consensus in favour of the Office's proposal not to include the provision of a "Pre-Approved Permit."

DataLink proposes that a Pre-Approved Permit be introduced as part of the Post Installation survey in order to mitigate "further misuse" of CUC infrastructure.

The Office notes that, in its response to Question 3 above, DataLink describes two broad categories of problematic use of CUC poles: (1) attachments without authorisation and (2) erroneous or improperly made attachments.

With respect to the first, it is unclear how the introduction of a Pre-Approved Permit would mitigate the use of CUC poles without a permit as, in this scenario, the person making the attachment would not have sought a permit and, therefore, would not have initiated the process leading to the issuance of a Pre-Approved Permit.

With respect to the second, the introduction of a Pre-Approved Permit followed by a Post Inspection Survey might, at first glance, potentially reduce errors in the use of a pole. However, the Office considers that the event that in fact would achieve this goal is the Post Installation inspection of the attachment after the fact, not the issuance of a Pre-Approved Permit before the attachment is made. The Office considers therefore that the introduction of a Pre-Approved Permit would not achieve the goal of reducing errors in the use of poles in any significant manner.

As the Office notes at paragraph 391 of the Consultation Document, the Pole Sharing Agreements already include the concept of a Post Installation Survey (although the term does not appear to be used elsewhere in the Agreements).<sup>135</sup> The Office is of the view that conducting Post Installation Surveys would be more effective at addressing DataLink's concerns about erroneous or improperly made attachments on CUC pole infrastructure than issuing a Pre-Approved Permit. Further, the Office considers that introducing a new step in the permit

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<sup>135</sup> The Office notes that DataLink advised in its response to RFI 307 that: "*Presently DataLink does not do any Quality Inspections (QI) after a permit has been approved to the Attaching Utility's.*"

application procedure that would likely further constrain DataLink’s available resources and further delay access to the Communications Space on CUC utility poles.

However, rather than requiring a Post-Installation Survey in every case (which would include circumstances where the attachment was properly made), the Office considers that it may be more proportionate to require attachers to submit post- attachment “as-built” documentation describing in detail what the facilities that were attached and where and how on the pole they were attached, including supporting evidence such as photographs. This would enable DataLink to assess on a case-by-case basis whether a Post-Installation Survey is required and allow DataLink to focus its resources where they are required.

**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.**

**111. C3 Response**

C3 agrees with the preliminary view of the Office as stated above.

**112. DataLink Response**

DataLink refers to its previous response on this matter.

**113. Digicel Response**

Please refer to response for Question 10.

**114. Flow Response**

Not Applicable

**115. Logic Response**

N/A

**116. C3 Cross Comment**

No cross comment received.

**117. DataLink Cross Comment**

No cross comment received.

**118. Digicel Cross Comment**

No cross comment received.

**119. Flow Cross Comment**

No cross comment received.

**120. Logic Cross Comment**

No cross comment received.

**121. Office Response**

The Office notes that the parties’ responses to this Question 11 follow their responses to the previous question.



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

#### a) 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**
- b) **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.

#### 122. C3 Response

Agreed.

#### 123. DataLink Response

As the Office is aware, during the meeting held on January 27th, 2022, DataLink apprised the Office of its ongoing efforts to develop an online Joint Use Platform ("JUP") specifically designed to monitor assets and attachments, streamlining the current practices that rely on email attachments and manual tracking via spreadsheets. Furthermore, on February 1st, 2022, DataLink sent an email to the Office, providing hyperlinks to the platform that is currently under consideration. For completeness, the JUP includes an 'online portal...for the submission of pole attachment permit applications and the issuance of pole attachment permits'.

With DataLink having informed the Office of, and demonstrated, its consideration of and intentions to adopt an online JUP, it is unclear why the Office would now consider it appropriate (assuming it has jurisdiction) to issue a directive compelling DataLink to pursue an objective that is already underway. Furthermore, DataLink remains committed to leveraging technology and implementing systems that enhance the efficiency and effectiveness of the pole attachment permit application

process. The ongoing development of the online JUP aligns with this objective and aims to provide a seamless and streamlined experience for all stakeholders involved.

In the circumstances, issuing such a directive would seem otiose. DataLink firmly believes that the more appropriate course would be for the Office to collaborate with it in deploying the online JUP, rather than prescribing a specific course of action.

DataLink thus respectfully expresses its disagreement with this proposal.

#### **124. Digicel Response**

Digicel is fully supportive of the creation of an online portal system that would streamline the entire pole application process, from application to issuance. Implementing an online portal can bring several benefits and improve the efficiency of the application process for all parties involved.

Moreover, an online portal can enable faster processing times, as digital applications can be reviewed and assessed more efficiently. This can result in quicker issuance of permits and reduce administrative burdens for both the applicants and the authorities responsible for granting permits.

#### **125. Flow Response**

Flow agrees with the Office's proposal to direct DataLink to investigate the creation of an online portal. DataLink does not lack the financial wherewithal to address pole maintenance or to provide a properly resourced system for processing Permit Applications in accordance with its contractual duties. DataLink receives a substantial recurring fee from ICT Licensees for attachments on the Poles.

Unless DataLink, commit proper resources to pole maintenance and put in place a properly resourced system for processing permit applications, the Cayman Islands will suffer from a system that is unfit for purpose and where DataLink is in perpetual breach of its obligations.

#### **126. Logic Response**

Yes - Logic agrees with this proposal.

#### **127. C3 Cross Comment**

No cross comment received.

#### **128. DataLink Cross Comment**

DataLink is encouraged by the Attaching Utilities' unanimous agreement regarding the establishment of an online portal or system for the submission of pole attachment permit applications and the subsequent issuance of permits. With the Joint Use software being in the final stages of testing and implementation, DataLink respectfully notes that any directive from the Office on this matter would be redundant.

#### **129. Digicel Cross Comment**

No cross comment received.

#### **130. Flow Cross Comment**

No cross comment received.

#### **131. Logic Cross Comment**

Whilst Logic largely agrees with DataLink's response to this question, we wish to clarify this point to state that our view is that OfReg should be required to direct DataLink to investigate the creation of the proposed portal given the time which has elapsed, as referenced by DataLink.

### 132. Office Response

The Office notes the broad support by Attaching Utilities for the development of an online portal for the management of the permit application process and to facilitate the exchange of information between DataLink and the Attaching Utilities. The Office notes that DataLink is also not opposed to the development of such a portal, as it is developing a Joint Use Platform (JUP) which would include that activity. Rather, DataLink appears to be opposed to being *directed* to do so.

The Office notes in particular DataLink's statement that it apprised the Office of its efforts in this regard in January 2022. The Office further notes that it is not clear how much progress may have been made since then, to what extent DataLink may have sought feedback from its customers (i.e., the Attaching Utilities) on their requirements for such a portal,<sup>136</sup> or how much closer DataLink may be to launching that portal. For instance, as reported by Logic, it appears permit applications are still made manually.<sup>137</sup>

**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?

### 133. C3 Response

1. Privacy. Pursuant to the Data Protection Act, and pursuant to fair competition principles in the URC Act, no pole attachment applicant should be able to see any data associated with any other applicant.
2. Regulatory Oversight. Pursuant to its role as ICT regulator, OfReg ICT should be provided administrator rights on the portal to enable the Office to view all data on the portal and to oversee the function of the portal and its impact on ICT infrastructure sharing.
3. Workflow. The proposed portal should provide the ability for tasks to flow from role to role, person to person, and team to team. For example, an application from an ICT licensee should automatically be sent to the responsible DL employee (by email or text notification) and then onwards to other parties as needed. This "workflow" function will automate the transfer of tasks and enable more effective and efficient operations.
4. Time-bound tasks. Pursuant to the Pole Attachment Agreements and relevant regulations, tasks should be automatically monitored to ensure they are completed within the timeframes agreed.

### 134. DataLink Response

For the reasons set out above, DataLink respectfully disagrees with this proposal.

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<sup>136</sup> The Office notes DataLink's submission in its 18 September 2023 cross comments, at Question 36, that "*the Attaching Utilities do not appear to have been made aware of DataLink's efforts and progress with establishing the online Joint Use System.*" It is reasonable to assume that, if DataLink had sought feedback from its customers, the customers would be aware to some degree of DataLink's efforts and progress with respect to the JUP.

<sup>137</sup> See Logic's 11 November 2022 response to paragraph 4(a) of the Office's 12 October 2022 letter.

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The JUP which DataLink is working to implement encompasses a comprehensive range of information pertaining to pole attachments and infrastructure sharing. This includes, but is not limited to, the following elements:

1. Pole Number
2. Street Name
3. District/City
4. Country
5. Pole Height
6. Pole Class
7. Pole Type
8. Pole Installation Date
9. Foundation
10. Grounding
11. Installation Date
12. Longitude and Latitude
13. Make Ready Completed Date
14. Attachment Owner
15. Attachment Type
16. Attachment Height
17. Over-lashing
18. Permit

Furthermore, the JUP will facilitate online permit application submissions for Attaching Utilities with valid MPJUAs, offering transparency throughout the entire process, including, but not limited to, the following stages:

1. Application Submission
2. Application Acceptance
3. Assessment/Survey
4. Make Ready Estimate
5. Make Ready Estimate Response (as outlined in Consultation Questions 5, 6, and 7)
6. Make Ready Work
7. Post Inspection

## PUBLIC VERSION

At each step of the process, the applicant will receive timely updates and notifications regarding the status of its application, ensuring effective communication. Please refer to the screenshots below for a visual representation.

The screenshot shows the 'New Attachment Request' interface with the 'Stage Tracking' tab selected. The process flow is: Identify (< 1 Min) - Permit Acceptance - Survey - Make Ready Estimate - Make Ready Estimate Response - Make Ready Work - Post Inspection. The 'MAKE READY' section is active, displaying the following fields:

Field	Value
Actual Amount	---
Issued Date	---
Billed Date	---
Paid Date	---
Complete Date	---
Post Inspection Complete Date	---

The screenshot shows the 'New Attachment Request' interface with the 'Summary' tab selected. The 'ATTACHMENT REQUEST INFORMATION' section displays the following fields:

Field	Value
Request Id	*
Description	---
Work Order Number	---
Attachment Owner	*
Contact	---
Contract	*
Permit Type	---
Attachment Type	*
Reported Date	* 6/16/2023
Requested Completion Date	---

The 'Timeline' section is empty, displaying the message: "Almost there. Select Save to see your timeline."

Finally, the JUP will serve as a valuable tool for DataLink in addressing Relocation Requests and managing violations identified during the Joint Use Audit. All requests for relocation and remediation of violations will be submitted and processed through the Joint Use Platform, streamlining the resolution process.

**135. Digicel Response**

Digicel agrees with the Office's position on this, and the specifications are answered in Question 15.

**136. Flow Response**

Flow agrees that the Office should direct DataLink to investigate the creation of an online portal system. The requirements and scope of the system should be in compliance with the Decision arising from this Consultation. The actual system build should then be specified in accordance with the Decision.

**137. Logic Response**

The online portal or system for the submission of pole attachment permit applications should follow a standard form and include the following information to allow DataLink to process the request efficiently: Pole number, Pole status (red or green, as defined in the Logic MOU), type of pole (high voltage, service drop, main line, street light, etc), age of pole, any current attachments as well as the ability to apply for pole(s) permit and ability to describe what the applicant plans on attaching.

**138. C3 Cross Comment**

No cross comment received.

**139. DataLink Cross Comment**

No cross comment received.

**140. Digicel Cross Comment**

No cross comment received.

**141. Flow Cross Comment**

No cross comment received.

**142. Logic Cross Comment**

No cross comment received.

**143. Office Response**

The Office notes C3's submissions describing the relevant features that, in its view, should be incorporated into the online platform. The Office agrees in particular with the recommendation that Attaching Utilities should not be able to view each other's specific information, although the Office considers that it may be appropriate for relevant general anonymised information being made available (e.g., current number of attachers).

The Office does not agree that it should have ongoing access to the platform. The Office's role is one of oversight. This does not require ongoing access. Further the Office has powers to request relevant information from DataLink if required and there is no evidence at this time that this is not sufficient for the Office to exercise its oversight role.

The Office agrees with Logic's submission that it would also be useful for DataLink's platform to indicate whether a given pole is "red" or "green". This would give attachers a very high-level indication of the possible difficulty in attaching to the pole in question.

The Office notes the range of pole-related information that DataLink submits will be included in its JUP. The Office considers that it could be useful if the platform were also to include information

regarding the size of the Communications Space (e.g., one foot eight inches, three feet, etc.) and the number of already-permitted attachments (although not the identity of the permit holders). As with Logic's recommendation for an indication of the pole's "red" vs. "green" status, this would allow attachers to form an initial view, subject to verification following a field inspection, on whether a permit request might trigger a pole replacement or other costly make-ready work. The Office considers that, while this might limit the number of permit requests being made, it would also reduce the number of permit requests that are subsequently not followed up on after the Make-Ready Work charges estimate is provided to the applicant (however, as noted earlier in response to Question 7, the evidence in this regard is limited).

**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.

**144. C3 Response**

Agreed.

**145. DataLink Response**

Please see our previous responses above. The JUP which is in the course of being implemented encompasses a comprehensive range of information including, but not limited to, the elements described above, which includes relevant information on the CUC utility poles managed by DataLink.

**146. Digicel Response**

Digicel agrees with the Office's position on this.

**147. Flow Response**

Flow is in agreement. The creation of a database containing information on CUC poles is likely to make due diligence on a pole route more efficient. This database would be part and parcel of the online portal for submitting permit applications and issuing permits.

**148. Logic Response**

Yes - Logic agrees with this proposal.

**149. C3 Cross Comment**

No cross comment received.

**150. DataLink Cross Comment**

No cross comment received.

**151. Digicel Cross Comment**

No cross comment received.

**152. Flow Cross Comment**

No cross comment received.

**153. Logic Cross Comment**

No cross comment received.

**154. Office Response**

The Office notes the broad consensus in support of this proposal.

The Office also notes that making information available to Attaching Utilities and making a platform for the management of the permit application process available to Attaching Utilities are separate issues. The Office included this Question 14 (and the related Question 15 below) to ensure it obtained the views of parties on the two issues separately. The Office considers however that it makes sense for the information to be included in the platform, and notes DataLink's and Flow's submissions specifically in this regard.

**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?

**155. C3 Response**

1. Such a system could take the form of a list (as opposed to a relational database).
2. Access control. Said list should then be made available online via a portal with controlled credentials (usernames & passwords), and utilize multi-factor authentication for access.
3. Permitted Users. Nominated employees, agents, or contractors for each attached telco licensee should be granted credentials. Said credentials should be renewed each year to ensure that former employees, agents, contractors are removed. OfReg ICT should also be granted access.
4. Data format. The relevant data for each pole should include pole number, height, material (wood, concrete, metal, etc.), GPS coordinates, guy wires y/n, stabilizing attachments y/n, U/G riser pipes y/n.

**156. DataLink Response**

Please see our responses above regarding this proposal.

As regards the question of who should have access to the JUP, DataLink proposes that each Attaching Utility holding a valid MPJUA provides DataLink with the names of the individuals responsible for their permit submissions and their Access Network (i.e. components such as Fiber Cables, Cabinets, MSAN's, Splice boxes, and similar assets). It should be noted, for completeness, that DataLink envisages each Attaching Utility only being granted access to view its own assets, and having the ability to generate reports solely for their own assets.

DataLink also envisages providing the Office with a dedicated account, enabling them to access specific reports as determined at a later date.



### **157. Digicel Response**

Digicel envisions a comprehensive database system that includes various data fields and functionalities. Here is a summary of some of the features, but not limited to:

1. **Geographical Map:** The system should provide a map view that allows users to visualize the location of poles and related infrastructure.
2. **Location and Pole Number:** Each pole entry should include its specific location information and a unique identifier, such as a pole number, for easy reference.
3. **Pole Status and Age:** The system should track the status of each pole, indicating whether it is active, decommissioned, or requires maintenance. Additionally, it should record the age of each pole for monitoring purposes.
4. **Height:** The height of each pole should be included in the database to ensure accurate information and facilitate planning for attachments.
5. **Last Date of Make Ready:** The system should record the date when Make Ready work was last performed on a specific pole, providing visibility into recent maintenance or modifications.
6. **Utilities Authorized to Attach:** Information on which utilities are authorized to make attachments to each pole should be available, ensuring clarity and compliance with regulations.
7. **Easy Search Option:** The system should have a user-friendly search function that allows users to quickly locate specific poles based on various criteria, such as pole number, location, or authorized utilities.
8. **Multiple License per Utility:** The system should support the assignment of multiple licenses to individual utilities.

Additionally, the attaching utility should assign key personnel with access to the database, and the owner utility should provide training to ensure proper use of the platform. These specifications indicate a robust and centralized database system that can help streamline operations, facilitate efficient decision-making, and promote effective collaboration among stakeholders. When implementing such a system, it's crucial to consider factors such as data security, user permissions, scalability, and integration with existing infrastructure management processes. Working closely with relevant stakeholders and technology experts can help ensure the successful development and deployment of the platform.

### **158. Flow Response**

The information to be contained in the online database on CUC utility poles must be consistent with the information that DataLink requires of applicants to attach to the poles. Persons with access to the database should be as advised by the Attacher to DataLink.

### **159. Logic Response**

This online database should cover existing and forecasted CUC utility poles managed by DataLink. For both existing and forecasted poles, the following information should be included: if the pole is green or red (as defined in the Logic MOU) (if red then the reason why the pole is red), pole number, pole GPS, operators currently attached on pole, high voltage, low voltage, height of pole and clearance space from power lines, service pole, age of pole, how many anchors on pole

and whether the pole is located on private or public property. The database should be updated quarterly to reflect forecasted poles as necessary. With regards the persons who should have access to the database, Logic's view is that each Attaching Utility should have access via dedicated log-in details to be provided by DataLink to such utility.

**160. C3 Cross Comment**

No cross comment received.

**161. DataLink Cross Comment**

DataLink acknowledges the remarks provided by the Attaching Utilities regarding the requirements and scope of the proposed system. DataLink previously provided a summary and illustrative examples in its submission for the ICT 2016 – 2 - Consultation Part B and Part C (Updated), elucidating the capabilities and features of the Joint Use system, which is well-suited to meet this need.

**162. Digicel Cross Comment**

No cross comment received.

**163. Flow Cross Comment**

No cross comment received.

**164. Logic Cross Comment**

No cross comment received.

**165. Office Response**

The Office notes the requirements for the information database proposed by the various parties and considers that these should be incorporated into the JUP.

The Office notes DataLink's suggestion to give the Office an account on the JUP that would enable the Office to access specific reports. As noted in the Office's response to submissions by C3 to Question 13 above, the Office does not consider it appropriate or necessary for the Office to have on-going access to a platform intended to manage the commercial relationship between ICT licensees.

The Office notes Logic's suggestion that the online database cover in particular "*forecasted CUC utility poles managed by DataLink.*" The Office considers that there is some merit in this suggestion, as it would allow Attaching Utilities to express interest in attaching to a CUC pole before CUC procures a pole without a Communications Space (see the discussion at Question 27 below). The Office notes, though, that a pole is not "managed by DataLink" unless it has a Communications Space. The database should therefore include all CUC forecasted poles, not just those managed by DataLink.

**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?**

**166. C3 Response**

Agreed.

**167. DataLink Response**

Please see our responses above regarding this proposal.

DataLink has already voluntarily embarked on this initiative, demonstrating its dedication to enhancing the efficiency and effectiveness of the pole attachment permit process.

DataLink would welcome the opportunity for further collaboration and engagement with the Office on this initiative, including to refine and finalize the implementation plan for the online JUP, and ensuring compliance with relevant regulations and industry standards.

With the JUP, DataLink aims to foster transparency, efficiency and accountability within the pole attachment permit application process, and will remain committed to leveraging technology and innovation to provide a robust and user-friendly platform that benefits all parties involved.

**168. Digicel Response**

Digicel believes that the Office has jurisdiction and agrees with the Office's position into the investigation of an online portal for the submission of pole applications and further adds that the prompt implementation of same would optimize this process for all Attachers.

**169. Flow Response**

It does appear that the Office has jurisdiction under Section 6(2)(d) to make Regulations under the Act. The Office should explore promulgating Regulations to include this proposal.

**170. Logic Response**

Yes - Logic agrees the Office has jurisdiction under sections 6 and 62 of the URC Act.

**171. C3 Cross Comment**

No cross comment received.

**172. DataLink Cross Comment**

No cross comment received.

**173. Digicel Cross Comment**

No cross comment received.

**174. Flow Cross Comment**

No cross comment received.

**175. Logic Cross Comment**

No cross comment received.

**176. Office Response**

The Office notes that no party provided a specific analysis in response to this Question 16. The Office also notes DataLink's submissions regarding its future Joint Use Platform. The Office considers therefore that it does not need to pursue this question further at this time.

## b) 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.

#### **177. C3 Response**

Agreed.

#### **178. DataLink Response**

DataLink provisionally agrees with the inclusion of a more explicit condition in the contract addressing this issue.

If such a proposal were implemented, DataLink would expect it to require the Attaching Utilities to provide detailed specifications of the equipment and materials intended for replacement of existing attachments, since this information is necessary to enable DataLink to assess the potential wind loading impact on the poles and ensure compliance with relevant safety standards.

Furthermore, DataLink emphasizes the importance of effective communication during maintenance activities. The Attaching Utility should thus be required to notify DataLink both before and after maintenance, providing comprehensive information on the poles included in the maintenance work and the materials to be removed and installed.

In this regard, DataLink again refers to the findings of the Audit, which revealed numerous instances of non-compliance with the MPJUA terms by Attaching Utilities, including a significant number of unauthorised attachments which violated s.65(1) of the ICT Act (as described above).

DataLink recognizes the importance of adhering to regulatory requirements and fostering a cooperative environment among all parties involved in the pole sharing process. It therefore expects that incorporating this proposed modification to the Pole Sharing Agreements would promote compliance, transparency and the efficient management of shared infrastructure.

### **179. Digicel Response**

Digicel agrees with the Office's position on this.

### **180. Flow Response**

Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms. Without prejudice to Flow's position, Flow makes it clear that where an operator is modifying an attachment, which modification remains in the allotted space and no additional load is placed on the poles, notice should be served to DataLink of the intent to do so. Flow does not agree that such a modification should be subject to the permit application process which has steps irrelevant for an existing, approved attachment which requires no make ready work.

A notice requirement is already the practice for existing attaching utilities under FCC rules in the United States. It is submitted that there is no reason these same FCC rules should not be applied to the Cayman Islands. Under rules implemented in 2018 in the FCC proceeding "*Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*," pole owners may not require permission, but rather only require up to 15-days advance notice to the pole owner when a requested modification by an existing attaching utility increases the bundle size or load. In the case of copper-to-fiber modification there is a decrease to the load on the Poles. The FCC's determination recognized an urgent need to reduce barriers to constructing fiber and other technologies pivotal to broadband deployment, and the intent of the pole access rules it implemented in this proceeding were focused on achieving that outcome.

### **181. Logic Response**

Logic does not agree with the Office's proposal to modify the agreements to include this more explicit condition. Logic's view is that a distinction should be made regarding material and non-material changes together with clarity on what would be considered an "authorized" vs an "unauthorized" attachment. Otherwise there is a risk that the process of making attachments to poles will be severely hampered where it such delayed would be unnecessary given the materiality of the change. Logic suggests that a notification of a non-material change rather than a requirement for a review under the permit application process would be more appropriate. If a review under the permit application process is required for a "material" change, then a clear timeframe for such review would need to be set out within the agreement.

**182. C3 Cross Comment**

No cross comment received.

**183. DataLink Cross Comment**

No cross comment received.

**184. Digicel Cross Comment**

No cross comment received.

**185. Flow Cross Comment**

No cross comment received.

**186. Logic Cross Comment**

No cross comment received.

**187. Office Response**

Questions 17 to 23 in the Consultation Document examined two related situations: (1) the impact of changing communications facilities on a pole on make-ready costs related to that pole and (2) the impact of unauthorised attachments on a pole on make-ready costs related to that pole. This Question 17 focuses on the former.

The Office considers that ICT Licensees have a strong interest in being able to maintain and replace / upgrade their ICT facilities with a minimum of financial or procedural constraints. The Office also considers that DataLink, and indeed all attachers, have a strong interest in preserving the security and integrity of the pole infrastructure. The Office seeks to balance these two interests, and proposed that any changes to ICT facilities on a pole be subject to review under the permit application process.<sup>138</sup>

The Office notes that C3 and Digicel agreed with the Office's proposal while DataLink did so provisionally. DataLink submitted that attachers should provide it with detailed information on their maintenance activities and materials both before and after their work on the pole.

Flow and Logic, however, disagreed. Flow submitted that notice to DataLink would be sufficient where a modification "*remains in the allotted space and no additional load is placed on the poles*" and cited an FCC decision in support. Logic submitted that notice to DataLink would be more appropriate for "*non-material changes*" (but did not offer a definition of "non-material").

The Office notes that the FCC 2018 One Touch Make Ready Order cited by Flow<sup>139</sup> does not appear to support the proposition that "*pole owners may not require permission, but rather only require up to 15-days advance notice to the pole owner when a requested modification by an existing attaching utility increases the bundle size or load.*" Rather, the 15-day notice rule appears to apply to overlashing only and is intended to give the pole owner the opportunity to review whether a proposed overlashing would affect the pole, without requiring prior approval of the proposed overlashing.<sup>140</sup>

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<sup>138</sup> This would also address in part the different exposure of existing and new attachers to Make-Ready Charges identified at paragraph 407 of the Consultation Document.

<sup>139</sup> See footnote 2 on page 13 above.

<sup>140</sup> Whether or not the cable being overlashed belongs to the attacher or to a third-party. See paragraph 115 of the 2018 One Touch Make Ready Order).

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Further, the Office notes that the process to replace communications facilities likely often includes the attachment of a second communications facility on the pole on a temporary basis, as this enables the ICT Licensee to transfer its ICT services from the old communications facility to the new communications facility while minimizing the impact on its end-customers. This means that, for practical reasons, there may be a period of time (which may be short or significant) during which an attacher may have two attachments on the pole. By definition, this would increase the load on the pole and, under the terms of Flow's proposal, "notice-only" would not be appropriate.

The Office also notes that Article VI.A of the Pole Sharing Agreement does not require a permit application for "routine maintenance" but requires a permit application for "Substantial Construction or Maintenance." This term is defined to mean "*construction activity on a Pole that will have an appreciable impact on loading and/or tension*" and to exclude "*routine maintenance activities.*" However, "appreciable impact" and "routine maintenance" are not further defined.

Having considered the views of the parties, the Office provisionally considers that it may be appropriate to require 15-days' notice by attachers to DataLink of maintenance activities, as long as those activities do not involve the installation of additional attachments onto the pole. This would encompass, for example, simple replacement of a cable that does not involve overlashing or a second attachment. Such notice should include information on the affected poles, the date and time the maintenance activities will take place, and, if relevant, the facilities being installed or replaced. This notice would allow DataLink to assess whether the changes to the facilities on the pole, if any, increase or lessen the load on the pole and, therefore, whether make-ready is required, without preventing the attacher from performing the maintenance as planned.

If, however, the maintenance activities or the changes to the facilities on the pole involve "Substantial Construction and Maintenance," including the installation of additional attachments onto the pole, even on a temporary basis, the Office provisionally considers that a permit application should be required (subject to the discussion at Question 23 below). While the Office recognises that this might place an additional burden on attachers seeking to replace or upgrade their ICT facilities, this would enable DataLink to assess the impact of the additional attachment on the security and integrity of the pole. This would also help ensure existing attachers do not avoid sharing the cost of pole replacement if their activities would otherwise have caused that cost.

The Office notes that this proposed arrangement is similar to the terms of Article VI.A in the Pole Sharing Agreements today.

**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.**

### **188. C3 Response**

Agreed.

**189. DataLink Response**

DataLink strongly agrees with this proposal.

DataLink recognizes the importance of addressing unauthorised attachments in a proactive manner to ensure compliance with regulatory requirements and to protect the integrity of the shared infrastructure. Implementing measures to encourage prompt reporting and establishing appropriate penalties should mitigate the occurrence of unauthorised attachments and consequential safety concerns, and promote a culture of compliance among all Attaching Utilities.

As the Office will have noted from the discussion of the Audit above, based on the findings of the Audit, there are currently over 20,000 unauthorised attachments attached to the CUC Electricity Grid by the four Attaching Utilities, none of which were reported to DataLink, but were only discovered during the Audit process.

In light of those findings, it is apparent that the existing penalty for making unauthorised attachments, as stated in Section 2.B of Appendix A of the MPJUA, which amounts to one year's fees in arrears, is not a sufficient deterrent. If the Office were to impose a further self-reporting obligation, in order for that obligation to be effective, there should be additional consequences, in the form of increased penalties, for non-compliance.

Furthermore, in order to ensure that Attaching Utilities refrain from making unauthorised attachments in future, DataLink would support revisiting the applicable penalty fee and reinstating the previous provision, which imposed a penalty of six years' fees in arrears, which should plainly be more effective in discouraging such practices.

**190. Digicel Response**

Digicel agrees and has been guided by Datalinks' processes and does not have any unauthorized attachments. An attaching utility would not be privy to information unless provided by Datalink on which utility should or should not be attached to the specific poles. This info can be provided during the application process. This also allows for the attaching utility to track poles whereby make ready refunds would apply.

**191. Flow Response**

Flow does not agree with this proposal. DataLink has the ability to enforce the terms of its commercially negotiated contract regarding unauthorized attachment. The Office cannot enforce the terms for DataLink since it is not a party to the contract.

**192. Logic Response**

Logic agrees with this proposal in principle and has assumed that the Office is proposing that Attachers in this case are being required to report on their own unauthorised attachments. However, Logic notes that in order for this proposal to be effective, there must be a clear definition within the agreements of what constitutes an "unauthorized attachment", a timeframe for such reporting as well as robust system for enforcement or penalty for failure or breach of such reporting obligations.

**193. C3 Cross Comment**

No cross comment received.



**194. DataLink Cross Comment**

Logic suggests that the definition of "unauthorized attachment" is unclear. However, as noted above, the MPJUA comprehensively defines what constitutes both an "Authorized" and "Unauthorized" attachment, and leaves no room for doubt as to the status of any attachment.

**195. Digicel Cross Comment**

No cross comment received.

**196. Flow Cross Comment**

Flow strongly opposes DataLink's proposal to reinstate the previous provision in the Agreement, which imposed a penalty of six years' fees in arrears for unauthorized attachment. Flow does not endorse unauthorized attachment but strongly opposes any attempt by DataLink to extend unreasonable fees to unauthorized attachments. Moreover, while Flow does not endorse unauthorized attachments, DataLink's indifference to the need for efficient processes to support the rollout of broadband services to customers, forces operators to find ways to connect customers. The solution to unauthorized attachments is a workable process from DataLink, not penalties. Not only is DataLink stymying the rollout of broadband services, but to add insult to injury, it is seeking to profit by so doing. Nor does Flow agree with DataLink's proposal of a denial-of-service measure, which would prevent an operator from applying for new permits, perform maintenance, or engage in any other activities related to Joint Use, where an operator has unauthorized attachments.

**197. Logic Cross Comment**

No cross comment received.

**198. Office Response**

The Office notes all parties except Flow agreed with the proposal.

DataLink proposed increasing the Unauthorised Attachment Fee as an increased deterrent to unauthorised attachments. The Office notes that the current fee was first agreed by DataLink and C3 in 2005 and has been agreed by DataLink with each attacher since then, and appears to represent an estimate of how long, on average, an unauthorised attachment might have been in place.<sup>141</sup> The Office does not consider 6 years to be a reasonable estimate, particularly for Digicel which appears to have only started installing attachments within the past year or so.

Logic submitted that there should be a clear definition of "unauthorised attachment," a timeframe for reporting unauthorised attachments, and a robust penalty for enforcement. The Office notes that the Pole Sharing Agreements already include a definition of "unauthorised attachment" and provisions for penalties upon discovery. With respect to the timeframe for reporting, the Office suggests that it should be done as soon as reasonably practicable after an Attaching Utility identifies an unauthorised attachment. The public has an interest in a secure and reliable pole infrastructure to support both telecommunications and electricity infrastructure and any matters which might put that infrastructure at risk should be addressed earlier than later.

Flow disagreed with the proposal on the grounds that (1) DataLink has the ability to enforce its own commercially negotiated contract and (2) the Office cannot enforce the terms of a contract to which it is not a party. The Office agrees that DataLink can enforce its own contract, and indeed

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<sup>141</sup> See Appendix A, Item 2, paragraph B of the Pole Sharing Agreements: "*The Unauthorized Attachment Fee is considered payment in arrears for an Attachment deemed to exist for one year prior to the discovery, no matter what date the Attachment was actually made.*"

appears to be exercising its rights under the Pole Sharing Agreements, as noted at paragraph 114 of the Consultation Document. For clarity, however, the Office notes that it is not proposing to enforce the terms of the existing Pole Sharing Agreements. Rather, it is proposing here a modification to the Pole Sharing Agreements pursuant to section 69 (2) of the ICT Act 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 considers that unauthorised attachments put the security and reliability of the CUC pole infrastructure at risk. This would have the effect of limiting the efficient and harmonised utilisation of infrastructure, to the extent that unauthorised attachments could lead to failure of the poles, or the effect of limiting the promotion of competition, to the extent that unauthorised attachments occupy space that would have otherwise been used by another attacher.

The Office further considers that the current Pole Sharing Agreements do not appear to be effectively limiting or reducing the number of unauthorised pole attachments. The Office considers, therefore, that the current Agreements are having the effect of limiting the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT networks or ICT services and, subject to consultation, should be modified as proposed in this Question 18.

While the Office does not agree that it is appropriate to increase the penalty for unauthorised attachments, the Office considers that there must be a stronger incentive for attachers to minimise the incidence of unauthorised attachments. The Office will propose, therefore, an escalating penalty if multiple unauthorised attachments belonging to an Attaching Utility are discovered in a given calendar year. For example, the first ten unauthorised attachments belonging to an Attaching Utility and first discovered by DataLink in a calendar year might be subject to the usual unauthorised attachment penalty (and the other measures<sup>142</sup> discussed in subsequent Questions). However, the next ten discovered by DataLink might be subject to three times the usual unauthorised attachment fee, and any after that would be subject to five times the usual unauthorised attachment fee.

**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.

### **199. C3 Response**

Agreed.

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<sup>142</sup> For example, payment of the Annual Attachment Fee and of any Make-Ready Work Charges, and possible removal of facilities.

**200. DataLink Response**

As foreshadowed above in response to Questions 17 and 18, DataLink provisionally agrees with this proposal.

DataLink would add that, in situations of the sort previously mentioned when discussing the Audit, where multiple Attaching Utilities are found to have unauthorised attachments, DataLink firmly believes that the cost incurred for the necessary make-ready work should be shared equitably among all offending Attaching Utilities involved. This approach would ensure fairness and proportionality in addressing the consequences of unauthorised attachments.

**201. Digicel Response**

Digicel agrees with the Office's position on this.

**202. Flow Response**

Flow does not agree with this proposal. DataLink's contract already makes a provision for make-ready work and unauthorized attachment. DataLink has every incentive to enforce these terms.

**203. Logic Response**

Yes - Logic agrees with this proposal.

**204. C3 Cross Comment**

No cross comment received.

**205. DataLink Cross Comment**

DataLink agrees with FLOW that the MPJUA already incorporates comprehensive provisions regarding make-ready work and unauthorized attachments, and DataLink is expected to enforce such terms.

**206. Digicel Cross Comment**

No cross comment received.

**207. Flow Cross Comment**

No cross comment received.

**208. Logic Cross Comment**

No cross comment received.

**209. Office Response**

The Office notes all parties except Flow agreed with the proposal.

Flow did not agree with the proposal on the grounds that the Pole Sharing Agreements already makes a provision for make-ready work and unauthorised attachments, and that DataLink has every incentive to enforce these terms. For clarity, the Office notes that it is not proposing to enforce the terms of the existing Pole Sharing Agreements. Rather, it is proposing a modification to the Pole Sharing Agreements 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.

In this case, the Office is proposing a modification that would require DataLink to assess the impact of an unauthorised attachment as if the attacher had properly applied for it, determine

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whether Make-Ready Work would have been required if the attacher had properly applied for the attachment, and invoice Make-Ready Work Charges accordingly. This would help ensure that an attacher cannot avoid the costs of Make-Ready work that it caused by its use of the pole simply by making unauthorised attachments.

By way of example, if DataLink were to determine that an unauthorised attachment would have required the installation of an additional guy or the replacement of the pole, if the attacher had properly applied for the attachment, and if DataLink does in fact install the additional guy or replace the pole, as the case may be, then the attacher would be required to pay the associated Make-Ready Work Charges. In effect, the unauthorised attacher would be deemed to have made the appropriate application and would be charged Make-Ready Work Charges accordingly.

The Office notes DataLink's proposal to share these Make-Ready costs among two or more attachers, in the event multiple unauthorised attachments are discovered. The Office considers this to be reasonable, as it ensures all attachers cover a portion of the costs they cause DataLink to incur in a way that is relatively simple to administer.

**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.**

### 210. C3 Response

Agreed.

### 211. DataLink Response

DataLink considers it important to uphold and enforce the terms and conditions provided by the current MPJUA for unauthorised attachments made prior to a final determination in this Consultation. Relatedly, it accepts that the implementation of a more robust penalty fee structure, specifically a penalty of six years' fees in arrears per unauthorised attachment, cannot fairly be imposed on Attaching Utilities retrospectively, and could only apply to unauthorised attachments post-dating its implementation.

Beyond this, the self-reporting proposal reflected in Question 18 plainly cannot be confined to unauthorised attachments made after a final determination in this proceeding, if it is to be effective; nor is there anything in that proposal which can properly be regarded as having retrospective effect. It is simply to require an Attaching Utility to give a full account of its unauthorised attachments if or when the Office decides to implement the proposal.

The proposal reflected in Question 19 also does not involve any retrospective adjustments: if DataLink is assessing make-ready work necessitated by existing unauthorised attachments following a final determination in this proceeding, it will be assessing and invoicing for that make ready work by reference to current conditions and costs, and not what they would have been at the time that the unauthorised attachment was reportedly made. DataLink considers that any Attaching Utility found in violation should be held financially responsible for the necessary make-

ready costs associated with supporting the unauthorised attachments. DataLink firmly believes that regardless of the installation date, the Attaching Utility responsible for the unauthorised attachments should bear the costs associated with the make-ready work which will nonetheless be required when the unauthorised attachment falls to be addressed.

Whilst it may be contended that the proposal reflected in Question 17 would amount to a retrospective adjustment, if made applicable to changes to the communications facilities authorized to be attached to a pole under a permit which were effected prior to a final determination in this proceeding, the paramount concern is that such changes do not compromise the integrity of the poles and create safety issues. DataLink considers that the Office has a wide jurisdiction under s.69 of the ICT Act to require the necessary contractual modifications to be made, so that where such changes remain in place, they can be required to be addressed following a final determination in this proceeding, by way of a permit application process conducted at that time. In this way, DataLink suggests that such action would not truly be retrospective, but would be to require any such issues to be resolved prospectively, so that they do not persist into the future.

For completeness, in instances where the offending Attaching Utility fails to comply with the obligation to cover the costs of the make-ready work required to properly accommodate its unauthorised attachments, DataLink considers that the Office should grant DataLink the authority to remove the assets associated with the unauthorised attachments from the poles in question. Furthermore, DataLink proposes the implementation of a denial-of-service measure, which would suspend the non-compliant Attaching Utility's ability to apply for new permits, perform maintenance, or engage in any other activities related to Joint Use. This measure aims to reinforce compliance and ensure the resolution of the matter in a fair and efficient manner. Without such abilities, even where financial penalties are imposed, unauthorised attachments may remain unresolved for considerable periods of time.

DataLink remains committed to promoting a transparent and accountable environment in the joint use of infrastructure. We appreciate the opportunity to collaborate with the Office to address unauthorised attachments, enforce penalties for non-compliance, and uphold the integrity of the shared infrastructure.

#### **212. Digicel Response**

Digicel believes this should apply to all unauthorized attachments, irrespective of when they were made or discovered. Attachers that are in full compliance would then be entitled to refunds from utilities with unauthorized attachments.

#### **213. Flow Response**

DataLink has the ability to enforce the terms of its commercially negotiated contract regarding unauthorized attachments. The Office not being a party to the contract, cannot enforce the contract.

#### **214. Logic Response**

Yes - Logic agrees that the requirements should apply only to unauthorised attachments made after a final determination in this proceeding.

#### **215. C3 Cross Comment**

No cross comment received.

**216. DataLink Cross Comment**

No cross comment received.

**217. Digicel Cross Comment**

No cross comment received.

**218. Flow Cross Comment**

No cross comment received.

**219. Logic Cross Comment**

Logic disagrees with the response issued by Digicel in respect of this question. Logic's view is that any refunds issued under this proposal should be considered to fall under the remit of / be calculated in line with the process for make-ready refunds to avoid any issues with the amounts existing attachers should be entitled to (for instance, what loss may have been incurred by that attacher).

Furthermore, should DataLink be permitted to remove unauthorized attachments, there should be a fully transparent process to be followed by DataLink with regards such removals.

**220. Office Response**

The Office notes there was little consensus among the parties in response to this Question 20.<sup>143</sup>

Digicel submitted that the requirements proposed in Question 19 should apply to all unauthorised attachments, irrespective of when they were made or discovered.

Flow submitted that DataLink is able to enforce its commercially negotiated contract and that the Office, not being a party, could not enforce the contract.

Logic submitted that the requirements should only apply to unauthorised attachments made after a final determination in this proceeding.

DataLink submitted that the requirements must apply to all unauthorised attachments including those made prior to a final determination in the proceeding, if the proposal is to be effective. DataLink was of the view that the Office's proposal does not involve retrospective adjustments but rather requires "*issues to be resolved prospectively*," and asserted that the Office has "*a wide jurisdiction under section 69 of the ICT Act to require the necessary contractual modifications*." DataLink did not, however, provide an analysis of the Office's jurisdiction beyond its assertion. DataLink recommended, though, that, if the proposal were implemented, DataLink be granted the authority to remove the attachments of an attacher who did not pay the associated Make-Ready Charges and to suspend the rights of the attacher to engage in any further activities related to joint use of the poles.

Having reviewed the submissions of the parties, the Office considers that its proposal, if adopted following consultation, would not be retroactive in a nature, as it would not go back in time and change what had already occurred. Rather, it would be prospective in its application, as it would involve assessing the status of a pole at a given point in time in the future, determining what needs to be done at that point in time to ensure the safety and integrity of that pole going forward, and invoicing the unauthorised attacher(s) the necessary Make-Ready Work. It would be retrospective

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<sup>143</sup> Due to its brevity, C3's position on the issue was unclear.

only to the extent that DataLink would *look back* to see which attachers had properly applied for a permit.

This is consistent with the power the Office proposes to exercise in this case. Section 69(2)(b) grants the Office to “*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.*” The Office considers that this power is necessarily prospective in nature, as it involves assessing the effect of an agreement at a certain point in time and modifying that agreement, if necessary, to address the specified limiting effects going forward.<sup>144</sup>

As a result, the Office considers that its proposal, if adopted following consultation, should only apply to unauthorised attachments discovered on a pole after the applicable changes to the Pole Sharing Agreements come into effect. However, it would apply to all such unauthorised attachments irrespective of when they were actually made, as these attachments would clearly be in place on the pole at the point of time they were discovered.

The Office notes DataLink’s proposals that it be authorised to remove unauthorised attachments for which charges were not paid after Make-Ready Work was assessed and invoiced, and that it be authorised to suspend all joint use activities of the relevant unauthorised attacher. The first of these proposals has significant overlap with Question 21 and will be addressed below. With respect to the second, the Office did not propose it initially and considers that the parties should have an opportunity to comment on it before the Office takes a view on it.

**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.**

## **221. C3 Response**

No input.

## **222. DataLink Response**

As noted above, DataLink considers that the mandatory removal of all unauthorised attachments from the poles and the ability to deny services are necessary remedies, particularly where an Attaching Utility persistently fails to comply with requests to address its unauthorised attachments and/or is undeterred by the imposition of financial penalties, however substantial.

DataLink does however stand by its recommendation to impose a penalty of six years' fees in arrears per unauthorised attachment on the offending Attaching Utility, on the basis that this would serve as a strong deterrent, encouraging Attaching Utilities to adhere to the agreed-upon processes and refrain from attaching without proper authorisation and permits.

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<sup>144</sup> For the avoidance of doubt, the Office is not expressing a view here on whether it may have other powers under the URC Act or the ICT Act that may authorise it to act retroactively, and the Office reserves its rights in that respect.

## PUBLIC VERSION

In the event that the Attaching Utility fails to comply with the specified terms outlined in the MPJUA by not removing the unauthorised attachment, DataLink suggests engaging a third-party contractor to undertake the removal of the attachments. Should the Attaching Utility fail to settle the invoice issued for the removal and associated costs, DataLink proposes that it be given the authority to implement a "Denial of Service" measure, thereby suspending the Attaching Utility's ability to engage in new permit applications, maintenance activities, or any other duties related to Joint Use until the outstanding fees are resolved, as previously mentioned.

### **Advantages:**

- Unauthorised attachments to the network should diminish or cease entirely because ignoring the applicable requirements will no longer make commercial sense.
- Non-compliant Attaching Utilities will no longer be able to gain an unfair commercial advantage by breaching regulations and reducing costs compared to more compliant competitors.
- DataLink costs – ultimately borne by Cayman residents – should be reduced.
- Risks to the reliable provision of power via the CUC network should be reduced, as pole loading will be better understood and DataLink will be able to identify and monitor issues.
- Safety risks to people, both members of the public and people working on and in the vicinity of CUC poles, should be reduced by the ability to enforce the rules.

### **Disadvantages:**

- Whilst some Attaching Utilities may complain about DataLink's proposed remedies, it is clear that the current system does not ensure compliance, and it is essential to prioritize consumer protection and promote a fair and competitive market.
- We do not consider that there are any genuine disadvantages to the proposed remedies, particularly to consumers, since it is ultimately in consumers' interests that the services they receive are properly and safely delivered.
- We anticipate that certain Attaching Utilities may make commercially-motivated assertions to the contrary. But it is indisputable that the proposed remedies are only engaged if Attaching Utilities breach agreements with which they are already meant to be complying.

In conclusion, while we acknowledge that the proposed remedies may impose certain costs on Attaching Utilities, they are reasonable and necessary. Our primary goal is to safeguard consumers and the infrastructure itself (both electricity distribution and telecoms), promote fair competition, and ensure continued growth and development. The introduction of the proposed remedies, along with continuing to foster an open dialogue with stakeholders, should enable a balanced regulatory framework that benefits all parties.

DataLink remains committed to upholding compliance, ensuring fair practices, and fostering accountability in the joint use of infrastructure. We appreciate the opportunity to collaborate with the Office in developing effective measures to address unauthorised attachments and enforce penalties for non-compliance.



### **223. Digicel Response**

If mandatory removal is being considered, it's important to assess the potential impact on both the organization and the consumer.

Mandatory removal refers to a requirement for certain actions or items to be forcibly removed.

1. **Cost and feasibility:** Mandatory removal can impose significant costs on organizations, especially if they need to dismantle existing infrastructure or systems. This cost burden may eventually be passed on to consumers through increased prices or fees.
2. **Service disruption:** Mandatory removal may result in service disruptions for consumers, as existing infrastructure or systems are removed and replaced. This can lead to inconveniences and potential gaps in service provision.
3. **Stakeholder engagement:** Engaging stakeholders, including organizations and consumers, in the decision-making process is crucial. This ensures that their concerns, needs, and perspectives are considered, potentially leading to alternative solutions that address the underlying issues without resorting to mandatory removal

Considering these factors, it may be beneficial to explore alternative approaches, such as phased upgrades, retrofitting, or other strategies that minimize disruption and balance the needs of both organizations and consumers. Collaborative discussions among relevant parties can lead to more effective solutions that mitigate the potential negative consequences of mandatory removal.

### **224. Flow Response**

DataLink has the ability to enforce the terms of its commercially negotiated contract regarding unauthorized attachment. The Office not being a party to the contract, cannot enforce the contract.

### **225. Logic Response**

Logic's view is that mandatory removal of unauthorized attachments may have a detrimental impact on existing services provided to customers. Mandatory removal should only be required where such unauthorized attachments pose a risk to public safety or the safety of the ICT infrastructure. Instead, Logic suggests that the Office could consider financial penalties for such unauthorized attachments.

### **226. C3 Cross Comment**

No cross comment received.

### **227. DataLink Cross Comment**

Logic's proposal involves the imposition of financial penalties for unauthorized attachments. However, the MPJUA already imposes financial penalties per unauthorized attachment, and given the discovery of over 25 thousand unauthorised attachments in the pole attachment audit completed in December 2022, the existing financial penalties would seem to be largely ineffective as a deterrent.

Although, as Digicel has noted, there are potentially serious implications of mandatory removal, such a measure would of course only be used as a last resort – but the experience with the Audit has shown that the threat of mandatory removal should be far more effective as a deterrent than any financial penalty that may be imposed.

### **228. Digicel Cross Comment**

No cross comment received.

**229. Flow Cross Comment**

No cross comment received.

**230. Logic Cross Comment**

No cross comment received.

**231. Office Response**

The Office notes the diversity of views in response to this Question 21.

DataLink supported mandatory removal of unauthorised attachments and the ability to deny services if an attacher fails to address its unauthorised attachments. DataLink also recommended increasing the “penalty” for unauthorised attachments from one-year's fees to six-years' fees. DataLink argued that these measures would reduce the incidence of unauthorised attachments, ensure an attacher could not gain an unfair commercial advantage by attaching without authorisation, and reduce the risks to reliable provision of power and to the safety of people. DataLink submitted that the measures are necessary because the current system does not ensure compliance, and that the measures would apply only to attachers who are in breach of agreements with which they are meant to comply.

Digicel noted the potential costs and service disruptions associated with mandatory removal and the need to engage stakeholders in the decision-making process, and recommended that alternative approaches be explored.

Flow submitted that DataLink is able to enforce its commercially negotiated contract and that the Office, not being a party, could not enforce the contract.

Logic noted that mandatory removal may have a detrimental impact on existing services and should only be required where the unauthorised attachments pose a risk to public safety or to the ICT infrastructure. Logic recommended the Office consider financial penalties instead.

The Office notes that unauthorised attachment(s) may pose a risk to the integrity of the pole, the reliability of the provision of ICT services, or the safety of people, particularly in circumstances where DataLink has determined that Make-Ready Work is required because of the existence of the unauthorised attachment(s). The Office considers therefore that the current arrangements may “*have the effect of limiting ... the efficient and harmonised utilisation of infrastructure.*”

The Office also notes that an attacher who made unauthorised attachments would be in breach of its Pole Sharing Agreement with DataLink and would have granted itself an unfair advantage over competing ICT Licensees, as it would have avoided Annual Attachment Fees and possible Make-Ready Work Charges and it would have increased the speed of its ICT network and ICT service rollout (by sidestepping the permit application and make-ready process). The Office considers therefore that the current arrangements may “*have the effect of limiting ... the promotion of competition in the provision of ICT services or ICT networks.*”

The Office is therefore of the view that it has the jurisdiction under section 69(2)(b) of the ICT Act to inquire into and modify the Pole Sharing Agreements in order to address the effects of unauthorised attachments on the efficient and harmonised utilisation of infrastructure and on the promotion of competition.<sup>145</sup>

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<sup>145</sup> See also the Office's discussion at Question 18 above.

Further, the Office is of the view that mandatory removal should not be limited to situations where the unauthorised attachment poses a risk to public safety or the safety of the ICT infrastructure, as suggested by Logic, as that would not address the limiting effect of unauthorised attachments on the promotion of competition in the provision of ICT services or ICT networks.

That said, the Office is also of the view that any remedy must be proportionate. The Office is cognizant of the harmful impact on communications services provided to consumers on Grand Cayman that could result from the mandatory removal of unauthorised attachments. Consistent with Digicel's views, mandatory removal should be considered to be a measure of last resort.

The Office's primary concerns are to encourage the efficient and harmonised utilisation of infrastructure and to promote competition in the provision of ICT networks and ICT services, not to remove ICT facilities. Subject to consultation, therefore, the Office considers that attachers with unauthorised attachments should first be given a reasonable opportunity to address any issues, including paying an appropriate share of any Make-Ready Work necessary to secure the pole, before their facilities might be subject to removal.

As noted at Question 18 above, the Office does not consider it appropriate to increase the level of the unauthorised attachment fee as proposed by DataLink, but does consider it appropriate to provide for an escalating unauthorised attachment fee to encourage greater vigilance by attachers.

As noted at Question 19 above, the Office considers it appropriate that attachers be required to pay for the Make-Ready Work necessary to secure the pole on which they placed their unauthorised attachments. The Office will propose that such attachers have the same time frame to respond to DataLink's estimate for the necessary Make-Ready Work as if they had applied for a permit under the usual procedure (see Question 6). If the attacher does not accept the estimate or pay the charges, the attacher must remove its unauthorised attachments within sixty (60) days,<sup>146</sup> failing which DataLink will be entitled to remove them at the attacher's expense (unless the unauthorised attachments pose an immediate risk to the safety of persons, in which case DataLink shall remove the unauthorised attachments at the attacher's expense).

**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?**

**232. C3 Response**

No input.

**233. DataLink Response**

DataLink respectfully disagrees with the notion that different considerations should be applied to unauthorised attachments made by ICT licensees outside of the communication space. While attachments outside of the communication space may initially appear to pose a more visible risk

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<sup>146</sup> This is the same time frame as in Article XI (Removal) of the Pole Sharing Agreements.

to pole safety and the well-being of individuals working in proximity, it is important to note that the level of risk cannot be solely determined by visual assessment.

The implementation of various NESC (National Electric Safety Code) and engineering guidelines during the Make Ready process, as well as their stipulation in the MPJUA, serve to ensure the overall safety and security of both the Electrical Grid and those involved in its operation. Each unauthorised attachment introduces the potential for increased stress on the pole, thus elevating the safety risk associated with potential pole failure.

As noted above (and in respect of unauthorised attachments both within and outside of the communication space), DataLink thus proposes that it be granted the authority to impose significant fines on entities that make unauthorised attachments. Furthermore, DataLink suggests that it should also have the capability to rectify unauthorised attachments if the owner utility fails to do so timeously, with a mechanism in place to recover the expenses incurred for the rectification work. In the event of non-compliance by the Attaching Utility, DataLink supports the view that the Office should levy fines against the violating entity, and proposes that it empower DataLink to enforce a denial of service measure until the matters have been appropriately resolved.

These measures are intended to encourage strict adherence to safety standards, mitigate risks to pole infrastructure, and ensure the overall integrity of the regulatory framework governing pole attachments.

**234. Digicel Response**

Any attachment outside of the communication space should be subject to mandatory removal with an agreed upon timeline as this not only violates the MPJUA, it creates a risk for anyone working on the poles. i.e. CUC electrical & other attaching utilities as well as public safety.

**235. Flow Response**

The Office cannot enforce DataLink's commercially agreed contract with ICT Licensees. DataLink would have to enforce the terms of the contract. Without prejudice to the foregoing, where any ICT licensee is attached outside of the communications space, a warning should be issued and an opportunity be provided to remedy. A fine then could be considered if the situation is not remedied.

**236. Logic Response**

Yes, such unauthorised attachments should be subject to removal and/or possible levying of administrative fines if they pose a danger to the safety/security of persons and/or the electricity network.

**237. C3 Cross Comment**

No cross comment received.

**238. DataLink Cross Comment**

No cross comment received.

**239. Digicel Cross Comment**

No cross comment received.

**240. Flow Cross Comment**

No cross comment received.

#### **241. Logic Cross Comment**

Logic disagrees with the response issued by DataLink to this question. Logic's view is that this response takes a blanket approach to unauthorised attachments which will have a consequence on consumers.

In addition, please note Logic's comment to Consultation Question 20 with regards the requirement for a fully transparent process concerning the removal of attachments by DataLink if permitted.

#### **242. Office Response**

As with the responses to other questions relating to unauthorised attachments, there appears to be limited consensus among the parties in response to this Question 22.

DataLink disagreed that different considerations should apply to an unauthorised attachment outside the communications space. DataLink submitted that, whether the unauthorised attachment is within or outside the communications space, it should have the right to levy significant fees, the right to rectify unauthorised attachments at the attacher's expense, and the right to implement "denial of service" measures. DataLink also submitted that the Office should levy fines against the attacher in question.

Digicel submitted that unauthorised attachments outside the communications space should be subject to mandatory removal within an agreed-upon timeline.

Flow submitted that the Office could not enforce DataLink's commercially agreed contract with ICT Licensees, but suggested that, if an attachment is outside the communications space, the attacher should be given a warning and an opportunity to remedy, following which a fine could be considered.

Logic submitted that unauthorised attachments outside the communications space should be subject to removal if they pose a danger to the safety or security of persons or the electricity network.

The Office notes that this Question 22 focused on unauthorised attachments made outside the Communications Space, not on attachments made outside the Communications Space pursuant to a permit issued by DataLink (in which case DataLink would presumably have assessed the impact of the attachment on the safety and security of persons or ICT or electric infrastructure). The Office is, therefore, subject to consultation, inclined to presume such unauthorised attachments pose a danger to the safety and/or security of persons and/or ICT infrastructure and/or electric infrastructure. Such a presumption can be rebutted as circumstances allow but the Office considers it reasonable that different considerations should apply to unauthorised attachments outside the Communications Space than to those inside the Communications Space.

The Office is also of the view that DataLink should be communicating with attachers with respect to unauthorised attachments. Accordingly, consistent with Digicel's and Flow's responses, subject to consultation, the Office considers that DataLink should notify the attacher as soon as practicable of the need to rectify the unauthorised attachment and of the associated steps and costs. The attacher should have the same time frame to respond and accept the estimated costs as it would have had, if had it applied for a permit (i.e., fourteen days, see Question 6), failing which DataLink would be empowered to remove the attachment at the attacher's expense within sixty (60) days of the original notification.

However, the Office considers that, if the unauthorised attachments made outside the Communications Space pose an immediate threat to the safety of any person, or pose an immediate threat to the physical integrity of the pole, DataLink should be permitted to remove them immediately, and to notify the attacher afterwards.

**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?

**243. C3 Response**

No input.

**244. DataLink Response**

The definition of a “Permit” provided in the MPJUA refers to the written or electronic authorization granted by the Owner Utility to the Attaching Utility, allowing them to make or maintain Attachments, Overlash existing Attachments, or perform Substantial Construction or Modification on specific Poles in accordance with the requirements of the agreement.

Once a permit is issued, it is the responsibility of the Attaching Utility to maintain the attachment associated with the permit. If necessary, the Attaching Utility is permitted to modify the attachment as required by the terms of the agreement. Currently, when performing maintenance on their attachments, Attaching Utilities inform DataLink about the areas where the maintenance will take place and provide details regarding the proposed date and time of commencement and completion of the work.

With respect to the question of replacement "without interrupting service to consumers," if the Attaching Utility determines there is a need to replace its infrastructure without disrupting service to its customers, they should take the following steps:

- The Attaching Utility must notify DataLink of its intention to perform maintenance in a specific area. When submitting this information, the Attaching Utility should include the poles it intends to work on (limited to a maximum of 25 poles at a time), details of the infrastructure to be removed, and specifications of the infrastructure intended to be attached to the poles. This information is crucial in determining the wind loading requirements of the poles. If the new infrastructure increases the wind loading risk beyond acceptable limits, DataLink will deny the request and provide the Attaching Utility with an estimate for the required Make Ready work to support the new assets.
- If the new assets do not necessitate any Make Ready work, DataLink will grant the Attaching Utility permission to attach the new infrastructure to the poles within a 30-day period. During this 30-day period, the Attaching Utility is also expected to fully remove their old assets from the pole.
- At the conclusion of the 30-day period, if the Attaching Utility has not removed the old assets from the pole, DataLink will consider the old attachments unauthorized and

proceed in accordance with the terms outlined in the MPJUA relating to unauthorised attachments.

- In the event that the Attaching Utility has installed assets that do not match the specifications provided in their application, the Attaching Utility must replace the equipment with the correct assets within 10 days. Failure to do so will grant DataLink the right to remove the assets from the pole(s).

It is crucial to note that during the aforementioned activities, strict adherence to all NESC and Engineering standards is of utmost importance. Any violations of these standards should result in the Attaching Utility rectifying or removing the newly installed assets. DataLink reiterates that if the Attaching Utility fails to comply with these requirements, the Office should grant DataLink the authority to have the assets removed.

#### **245. Digicel Response**

Common practice and guidelines in the utility industry when it comes to replacing existing infrastructure.

1. When an attaching utility needs to replace its infrastructure, it is generally expected that they notify all other utilities that share the same pole or infrastructure. Providing a timeline for completion allows other utilities to be aware of the upcoming work and make necessary adjustments if needed.
2. To ensure a smooth transition and minimize disruptions, the new cable is typically placed close to the existing cable without infringing on the space allocated to other attachers. This approach helps maintain the integrity of each utility's infrastructure and avoids unnecessary interference or conflicts.
3. In the event of any service disruption/damage, the affected parties should be immediately informed so that service restoration can quickly commence. The offending party shall be liable for the full cost of the restoration.
4. Furthermore, it is generally expected that once the migration to the new infrastructure is completed, the attaching utility removes the old infrastructure within a specified timeframe. This ensures that the pole or infrastructure is not overcrowded with redundant or obsolete attachments, making it easier for future maintenance and expansions

#### **246. Flow Response**

Consistent with Flow's response to Question 17, where an operator is modifying or replacing an existing attachment, which modification or replacement remains in the allotted space and no additional load is placed on the poles, notice of no less than fifteen (15) days should be served to DataLink of the intent to modify or replace the attachment. Such modification/replacement should not be subject to the permit application process which is not fit for purpose for an existing, approved attachment which requires no make ready work.

A notice requirement is already the practice for existing attaching utilities under FCC rules in the United States. It is submitted that there is no reason these same FCC rules should not be applied to the Cayman Islands. Under rules implemented in 2018 in the FCC proceeding "*Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*," pole owners may not require permission, but rather only require up to 15-days advance notice to the pole owner when a requested modification by an existing attaching utility increases the bundle size or

load. In the case of copper-to-fiber modification there is a decrease to the load on the Poles. The FCC's determination recognized an urgent need to reduce barriers to constructing fiber and other technologies pivotal to broadband deployment, and the intent of the pole access rules it implemented in this proceeding were focused on achieving that outcome.

It is Flow's practice to provide alternative means of communications to customers whose service may be interrupted when a facility is being replaced.

**247. Logic Response**

Having regard to the existing Pole Sharing Agreements, where an Attacher seeks to replace an existing communications facility on a pole with a new facility, without interrupting service to consumers, Logic is of the view that such a replacement would not necessarily require a permit (and by extension, the permit approval process as set out in the Pole Sharing Agreements) depending on the nature of the "new facility" and the impact that this will have on the pole (i.e. windload). Where the new facility results in an increase in the windload of the pole, then the process as currently set out in the Pole Sharing Agreements for new facilities should apply, regardless of whether there is any interruption to consumer service. Where there is a like-for-like change or a reduction in windload, and assuming no interruption to service of consumers, Logic is of the view that only a notification to DataLink that the Attacher will be replacing the existing communications facility (with supporting evidence to be provided to DataLink at the time of notification and confirmation of the length of time the additional cable will be on during the pole(s) for the change out to take place) should be required.

**248. C3 Cross Comment**

No cross comment received.

**249. DataLink Cross Comment**

No cross comment received.

**250. Digicel Cross Comment**

No cross comment received.

**251. Flow Cross Comment**

No cross comment received.

**252. Logic Cross Comment**

In addition to the points made by the other Licensees, Logic is of the view that any pole limits will need to be flexible due to the existence of different neighbourhoods / streets.

**253. Office Response**

The Office notes that the parties appear to agree that replacement or modification of communications facilities on a pole that does not increase the wind load on the pole should not be subject to the same rigorous permit application process as new facilities.

DataLink noted that attachers are permitted to modify and maintain their attachments, providing details to DataLink regarding when and where the work will take place, and described a process the attacher should follow when it wishes to replace its ICT infrastructure. Notably, Make-Ready Work might be required if the new infrastructure increases the wind loading, and work must be completed within a 30-day period.



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Digicel described “*common practice and guidelines*” for replacing existing infrastructure, including notification to other utilities using the same pole, placement of the new cable next to the existing cable, removal of the existing cable within a specified period of time, and notification to affected parties in the event of service disruption or damage.

Consistent with its position in response to Question 17, Flow recommended 15 days’ notice to DataLink of intent to replace an attachment. If the modification or replacement does not place additional load on the poles, Flow considered the work should not be subject to the permit application process. Flow noted that it provides alternative means of communications to customers where service may be disrupted.

Logic submitted that no permit or permit application process should be required where a new facility decreases or does not change the wind load on the pole. The work should only be subject to notification to DataLink, including the length of time the additional cable will be on the poles. However, if the new facility would increase the wind load, the process for a permit to attach a new ICT facility on the pole would apply,

The Office notes that this Question 23 is the result of a plain reading of Item 1.D of Appendix C of the Pole Sharing Agreements which states that “*Attaching Utility shall have only one Attachment per Pole per space.*” Given that an Attaching Utility appears to be granted only one space on a pole,<sup>147</sup> this would limit it to a single attachment.

However, the Office understands that the least disruptive and most practical process to replace a cable on a pole is similar to the one described by Digicel in its response to this Question 23: the new cable would be attached to the pole immediately adjacent to the existing cable, services provided to end-customers would be transferred from the existing cable to the new cable, and the existing cable would be removed.

On its face, the current wording of the Pole Sharing Agreements would prohibit this process as it involves having two cables attached to the same pole for a period of time. At the very least, the Agreements would require Make-Ready Work before work could begin on the communications cable, to address the increased wind loading from the additional cable, and further Make-Ready Work after the attacher’s work is completed and the existing cable removed, to undo the Make-Ready Work that had just been done. If the attachers follow this process (which appears to be required by the Pole Sharing Agreements), they will be burdened by high costs or severely constrained in their ability to upgrade their facilities. If the attachers do not, they will be making a large number of unauthorised attachments (which may perhaps in part explain the large number of apparently unauthorised attachments uncovered by DataLink’s recent audit). The Office does not consider either scenario to be “*efficient and harmonised utilisation of infrastructure.*”

The Office notes that DataLink proposed in its response to this Question 23 procedures to address the replacement of communications facilities on utility poles. However, those proposed procedures did not include any provisions for hurricane season. The Office also notes that DataLink has published “*General Guidelines for Telecommunication Workers when Attaching to*

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<sup>147</sup> Attachment A of Appendix C of the Pole Sharing Agreements describes a three-foot Communications Space which accommodates up to four attachers with a minimum of nine inches between each attachment at the pole. Paragraph F.2 of Item 4 of Appendix A of three of the five Pole Sharing Agreements specifies the “space occupied by the Attachment” to be nine inches (Logic is assigned six inches and DataLink is assigned one foot).

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*Electric Utility Assets*” (the “**General Guidelines**”).<sup>148</sup> The section on “Excess Fiber Left on Poles” at page 13 describes the procedures and time frames for leaving loops of fiber on the poles, and the Office considers that similar procedures and timeframes could apply to the replacement of communications cables.

The Office further notes that the Pole Sharing Agreements already contain provisions addressing work on poles that is “Substantial Construction or Modification,” which is defined “as construction activity on a Pole that will have an appreciable impact on loading and/or tension and does not include routine maintenance activities.” Simply put, the Attaching Utility must apply for a Permit in accordance with Article VI (Permit Application Procedures) Section A (Permit Required). The Office does not propose to modify those provisions.

However, where the work proposed by an attacher involved the replacement or upgrade of communications facilities that does not amount to Substantial Construction or Modification,” the Office proposes that,

- the Attaching Utility must notify DataLink of its intention to replace or upgrade its communications facilities in a specific area. The Attaching Utility should include the poles it intends to work on, details of the infrastructure to be removed, and specifications of the infrastructure intended to be attached to the poles. This information will allow DataLink to determine whether the proposed changes are Substantial Construction or Modification and a Permit application is required. If it is, DataLink shall deny access to its poles for the proposed work and shall notify the Attaching Utility a Permit application is required.
- If the proposed work is not Substantial Construction or Modification (i.e, DataLink has not basis for denying the work), the Attaching Utility may proceed with the proposed work without further notice or approval from DataLink.
- Consistent with the General Guidelines, the Attaching Utility may keep both the existing and new communications facilities on the pole at the same time for no more than four (4) weeks outside of hurricane season and no more than two (2) weeks inside of hurricane season, and shall be required to remove any facilities not included in a Permit within three (3) working days of the of the announcement of a storm hitting the island and/or upon notification in writing from the Owner Utility. All work necessary to transfer customers and services from the existing to the new facilities must be completed within those timeframes.
- At the conclusion of the applicable period, the Attaching Utility shall fully remove their old facilities from the pole.
- At the conclusion of the applicable period, if the Attaching Utility has not removed the old assets from the pole, DataLink shall consider the old attachments unauthorized and proceed in accordance with the terms outlined in the Pole Sharing Agreements relating to unauthorised attachments.
- In the event that the Attaching Utility has installed assets that do not match the specifications provided in their original notice and such assets would have an appreciable impact on loading and/or tension, the Attaching Utility must replace the equipment with

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<sup>148</sup> These were emailed by DataLink to all parties on 26 May 2022 and are available on the Office’s website.

<https://www.ofreg.ky/viewPDF/documents/others/2021-04-28-01-20-55-141727882920140901TelecomsHandbook.pdf>

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the correct assets within 10 days of notice to do so by DataLink, failing which DataLink shall consider the installed assets to be unauthorised attachments.

### c) 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.

#### **254. C3 Response**

Agreed.

#### **255. DataLink Response**

As previously indicated in DataLink's responses to Questions 8, 9 and 10, DataLink disagrees with the proposal 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. DataLink believes that it should have the discretion to determine whether or not to expire a permit based on the terms outlined in the MPJUA, without being obliged to do so.

In addition to the rationale provided in DataLink's previous responses to questions 8, 9 and 10, it is important to note that permits are not issued until certain conditions are met. These conditions include either A) the completion of the job in its entirety, B) the decision by the applying Utility to trench past any potential blockages to reach their desired location, or C) the completion of a redesign to circumvent any potential issues.

Furthermore, permits do not automatically expire or cease once executed unless a specific request is made by the Attaching Utility to DataLink for expiration. Therefore, the issuance date of the permit is of limited relevance. Notably, DataLink does not initiate billing until the permit is issued, and the permit is only issued once all the necessary work is completed.

#### **256. Digicel Response**

Digicel agrees with the Office's proposal.

#### **257. Flow Response**

A permit should not expire. Without prejudice to Flow's position, a permit should not be subject to expiry unless all the permits for the same batch of poles have been issued.

**258. Logic Response**

Yes - Logic agrees with this proposal.

**259. C3 Cross Comment**

No cross comment received.

**260. DataLink Cross Comment**

No cross comment received.

**261. Digicel Cross Comment**

No cross comment received.

**262. Flow Cross Comment**

No cross comment received.

**263. Logic Cross Comment**

No cross comment received.

**264. Office Response**

The Office notes there was some degree of consensus around this issue, with C3, Digicel and Logic agreeing with the Office's proposal. Flow submitted that permits should not expire but agreed that a permit should not expire unless all the permits for the same batch of poles have been issued.

DataLink disagreed with the Office's proposal, submitting that it should retain the discretion to expire a permit subject to the terms of the Pole Sharing Agreement. DataLink also submitted that permits are not issued until certain conditions are met, and that permits do not expire or cease unless a specific request is made by an Attaching Utility.

The Office notes that the Pole Sharing Agreements do not appear to support DataLink's submissions. Article XII.C is clear that Permits "*shall automatically expire after two hundred (200) calendar days from the date of issuance if the Attaching Utility fails to make an Attachment*" (emphasis added). In other words, in this situation, the Permit expires or ceases even though the Attaching Utility did not request the expiry or cessation. Article XII.C does allow the Attaching Utility to ask for a waiver of this automatic expiry for circumstances beyond its control, but the Attaching Utility must proactively ask for it even though the circumstances underlying the Office's concerns might be fully within DataLink's knowledge.

The Office notes that Article IV.F is permissive. However, it does not support DataLink's position. It gives DataLink the discretion to reassign the space to itself or to another attacher, not the discretion to decide whether or not to expire a Permit.

The Office notes DataLink's submission that Permits are not issued until certain conditions are met. However, the Office's concern is not focused on when an individual Permit, viewed in isolation, might be issued. The Office's concern is that an individual Permit, properly issued by DataLink, may automatically expire simply because a second Permit that an Attaching Utility needs in order to use the first Permit, has not yet been issued by DataLink. Put another way, the Office is concerned to avoid a situation where Permits for an entire string of "Green" poles expire simply because the Permit to use one "Red" pole necessary to access and use the "Green" poles was not issued within 200 days of the other Permits.

As discussed above in relation to Question 8, though, the Office recognizes Logic’s concern to be able to access any “Green” poles that it can in fact use, even though Permits have not been issued for other poles in the same batch of applications. The Office considers that this concern can be addressed through a small change to the Office’s original proposal. Specifically, **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 the last permit in the same batch of poles has been issued.**

Nothing prevents DataLink from issuing Permits for Green poles as and when they are ready, which would address Logic’s concern to attach to them as soon as possible. Once all Permits in a batch, both Red and Green, have been issued, the Attaching Utility must exercise its rights in a timely manner. However, under no circumstances should the right to a Green pole be lost simply because a critical Red pole had not yet been made available.

**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.**

**265. C3 Response**

Remain as-is.

**266. DataLink Response**

DataLink maintains that the period of 200 calendar days for exercising the right to attach, as currently stated in the MPJUA, is appropriate. To further support this stance, DataLink presents examples from CenterPoint Energy Houston Electric, Georgia Power, and Florida Power and Light, where their permits expire after a specified duration if the Attaching Utility fails to attach within that timeframe.

**CNP – CenterPoint Energy Houston Electric, LLC**

**Temporary Construction Permit**

*Except in cases where Supply Space Make-Ready and/or a Pole replacement is requested or required, CenterPoint shall issue a TCP upon its approval of Attacher’s Application. The TCP shall authorize Attacher to access such Poles, on a temporary basis, as needed to perform all required Make-Ready, and to install its approved Attachments. In cases where Supply Space Make-Ready and/or a Pole replacement is requested or required, CenterPoint shall issue a TCP upon its completion of such work.*

*Temporary Construction Permits for Non-OTMR requests will automatically expire 120 days after issuance, unless an extension is granted by CenterPoint Energy upon Attacher’s written request, five (5) days prior to the date on which the TCP is scheduled to expire. CenterPoint Energy reserves the right to deny an extension of any TCP in any cases where Attacher fails to commence the approved Attachment installation within the initial 120-day period for which the TCP was issued. Attacher is prohibited from accessing CenterPoint Energy’s Poles if the Temporary Construction Permit has expired, or has been revoked by CenterPoint Energy for any reason.*

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*Pole rental charges shall be applied immediately upon issuance of the relevant Temporary Construction Permits. The charges will be detailed on the following year's annual attachment fee invoice.*

*Attacher must notify CNP when all Make-Ready has been completed by submitting a comment through the respective NJUNS pole attachment request, and its Attachment has been fully constructed and installed, within 15 days after field completion*

### **Georgia Power**

*The applicant will need to make sure the installation is completed within 60 days of being provisionally permitted.*

*Prior to 60 days, the applicant may request an extension from Georgia Power.*

*If the installation goes beyond 60 days, without requesting an extension, the applicant will need to submit a new request.*

*After the applicant performs the installation and the workflow is advanced, the request will go to post inspection and to be reviewed by Georgia Power.*

*If there are violations found, the applicant will need to correct the violations (could be additional charges if major scope change).*

### **FPL- Florida Power and Light**

*If no Gulf Power make-ready work is required, Gulf Power will return the approved permit or Overlapping Notification.*

*If Gulf Power make-ready work is required, Gulf Power will return the approved permit or Overlapping Notification upon completion of Gulf Power make-ready work.*

*You must complete construction within 60 days of permit approval (180 days if major project), or permit will automatically expire, and you will need to re-apply.*

*You may request an extension of the permit life if you are unable to complete construction due to extenuating circumstances.*

*Any request for extension of permit life must be made and approved PRIOR to expiration of the permit*

*Unless Gulf Power has extended the permit in writing, the post-construction inspection will be scheduled for 60 days after permit approval.*

*If violations are found, licensee will be sent a Notification of Non-Compliant Attachment.*

*Licensee will be required to take corrective action within the appropriate time, after which Gulf Power will conduct an additional inspection to ensure the corrective action has been properly performed.*

*This process will continue until violations are corrected*

These examples demonstrate that the inclusion of a time limitation clause is a common practice in the Joint Use industry. DataLink contends that the 200-day period outlined in the MPJUA aligns

with industry standards and serves as a reasonable timeframe for the Attaching Utility to exercise its right to attach to poles.

DataLink acknowledges the importance of receiving notification from an Attaching Utility upon the completion of its attachment of assets to the pole. This notification allows DataLink to maintain an accurate record of the attachments and facilitates effective management of the joint use infrastructure. Again, DataLink believes that it should have the discretion to determine whether or not to expire a permit based on the terms outlined in the MPJUA, without being obliged to do so.

**267. Digicel Response**

Digicel agrees that the duration should remain at 200 calendar days.

**268. Flow Response**

Flow's position is that a permit should not expire.

**269. Logic Response**

Assuming no change to the principles which apply to the Assigned Space set out in Appendix C of the Pole Sharing Agreements, Logic does not believe any modification of the period to exercise the right to attach is required.

**270. C3 Cross Comment**

No cross comment received.

**271. DataLink Cross Comment**

DataLink maintains that the 200-calendar-day period for exercising the right to attach, as currently provided by the MPJUA, remains appropriate. As noted in our previous submission for the ICT Consultation 2016-2 Part B and Part C Updated, it is industry standard to have permits expire if they are not acted upon within a specific timeframe.

**272. Digicel Cross Comment**

No cross comment received.

**273. Flow Cross Comment**

No cross comment received.

**274. Logic Cross Comment**

No cross comment received.

**275. Office Response**

The Office notes that C3, Digicel and Logic submitted that there should be no change to the current 200-day permit expiry window. Logic's submission was predicated on there being "*no change to the principles which apply to the Assigned Space set out in Appendix C.*"

DataLink also supported the current 200-day permit expiry window, and submitted three examples from other jurisdictions which DataLink argued demonstrated that a time limitation is a common practice and that 200 days is reasonable. DataLink noted the importance of having attachers acknowledge when they have made their attachments, and submitted again that it should have the discretion to determine whether or not to expire a permit.

Flow submitted that permits should not expire.



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The Office notes the three examples provided by DataLink were offered with limited context and therefore are not necessarily determinative of whether a permit expiry window is either common or reasonable. With respect to the latter, other factors including, without limitation, the speed with which applications are processed and make-ready work is performed, the availability of contractors and materials to the utility and to attachers, and the prevalence of “red” poles in a pole network, are also relevant to assessing whether a 200-day permit expiry window might be reasonable.

Notwithstanding this, the Office also notes the lack of support among stakeholders for a change to this 200-day provision in the Pole Sharing Agreements and the public interest in the timely exercise of attachment rights. In the absence of a consensus or a clear case for change, the Office is inclined not to propose further changes to this provision in the Pole Sharing Agreements.

The Office has already addressed the matter of whether DataLink has discretion under the current Pole Sharing Agreements to expire a permit if an attacher has not made its attachments within 200 days of being issued a permit (see the discussion at Question 24).

**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.**

### **276. C3 Response**

No input.

### **277. DataLink Response**

DataLink maintains its position that Article IV.F should not be removed from the Pole Sharing Agreements. Removing this clause would deviate from the industry standard and established practices within the Joint Use sector. It is essential to adhere to industry norms and standards to ensure consistency and uniformity in pole sharing arrangements. Practically speaking, it also reflects the period of time beyond which it is appropriate that there be a further review as to whether any further Make-Ready work is required; and it removes the prospect of anti-competitive behavior amongst Attaching Utilities, which may seek to secure attachment spaces for the future without intending to attach within such a period, if and to the extent that further licences are granted.

By retaining Article IV.F, DataLink ensures that the Pole Sharing Agreements align with industry best practices and regulations. This clause serves as a vital provision to govern the rights and obligations of the parties involved in the pole sharing process. It provides clarity and establishes a framework that is widely recognized and accepted within the industry.

Moreover, the inclusion of Article IV.F in the Pole Sharing Agreements helps maintain consistency and harmonization across multiple jurisdictions. It allows for a streamlined and efficient process that adheres to established standards and practices in the Joint Use industry.

Therefore, DataLink asserts that retaining Article IV.F in the Pole Sharing Agreements is crucial to ensure compliance with industry norms and to maintain consistency and fairness among all parties involved in the pole sharing process.

**278. Digicel Response**

Digicel believes that Article IV.F should not be removed from the Pole Sharing Agreement. Our reasoning is that there might be extenuating circumstances that could prevent an attacher from utilizing the poles within the standard 200 calendar day timeframe and suggest that a written notice for an extension should be considered.

Digicel's viewpoint is that it would be highly illogical for a utility to pay for Make Ready services and not utilize the poles within a reasonable timeframe. Highlighting the importance of ensuring that utilities have the necessary flexibility to complete their infrastructure deployment and utilize the poles effectively.

Additionally, Digicel addresses the issue of poles within a batch having the same issuance date. They suggest that, unless specifically requested by the attacher upon review, the issuance dates for poles in a batch should not be the same. This consideration allows the attacher to potentially connect cables even if a portion of the batch is delivered, optimizing the use of available infrastructure.

These perspectives from Digicel highlight their concerns regarding timeframes, flexibility, and efficient utilization of shared pole infrastructure. They emphasize the need for practical considerations and provisions in the Pole Sharing Agreement

**279. Flow Response**

Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms.

**280. Logic Response**

No, Logic does not believe Article IV.F should be removed.

**281. C3 Cross Comment**

No cross comment received.

**282. DataLink Cross Comment**

Digicel has proposed that "the issuance dates for poles in a batch should not be the same," contending that this enables Attachers to potentially establish cable connections even if only a portion of the batch is delivered, and that this would optimize the utilization of available infrastructure. DataLink agrees with those observations, as articulated in our previous response to Question 8 for the ICT Consultation 2016-2 Part B and Part C Updated.

**283. Digicel Cross Comment**

No cross comment received.

**284. Flow Cross Comment**

No cross comment received.

**285. Logic Cross Comment**

No cross comment received.

**286. Office Response**

The Office notes the consensus among the parties who commented in favour of retaining Article IV.F in the Pole Sharing Agreements. DataLink submitted in particular that Article IV.F ensures compliance with industry norms and maintain consistency and fairness among all parties involved

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in the pole sharing process. Digicel noted in particular the need for flexibility and practical considerations in the Pole Sharing Agreements.

In light of the foregoing, the Office is not inclined to propose removing Article IV.F from the Pole Sharing Agreements.

Flow submitted that, as the Pole Sharing Agreement is commercially negotiated, Flow and DataLink would have to agree on any new terms. In this regard, the Office notes that the Pole Sharing Agreement, like other infrastructure sharing agreements, must comply with the ICT Act and is subject to the provisions of the ICT Act, including those found in section 69(2).

## d) 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.

#### 287. C3 Response

Reasonable. However, given the forecasts are effectively commercially sensitive information, DL should be required to treat them as such and be forbidden from disclosing this data to any outside party.

#### 288. DataLink Response

DataLink agrees with this proposal. The provision of such forecasts is necessary due to the substantial workload involved in facilitating Make Ready processes, and the need to ensure as far as possible that sufficient resources are available.

By receiving these forecasts from attaching utilities, DataLink can proactively initiate the necessary Make Ready work based on the anticipated attachment requirements. However, it is crucial to establish a mechanism to recoup the costs incurred by DataLink if the Attaching Utilities decide to alter or deviate from the initially provided forecasts. In DataLink's experience, it is not uncommon for Attaching Utilities frequently to change their plans, and thus to require its planners to conduct reassessments.

DataLink operates within specific resource limitations, and it would be unreasonable to expect an expansion of resources to accommodate fluctuating forecasts without a corresponding financial commitment from the attaching utilities. Financial considerations are necessary to ensure the sustainability and efficiency of the Make Ready processes.

Therefore, DataLink supports the proposal for attaching utilities to submit periodic forecasted attachment requirements, but emphasizes the importance of implementing a financial framework that accounts for any adjustments made by the attaching utilities. This approach ensures that DataLink can effectively allocate its resources and recover costs associated with accommodating changes in the forecasted attachment requirements.

#### 289. Digicel Response

The benefits of proper planning for CUC/DataLink's Pole Infrastructure may include improved coordination, efficient deployment of services, reduced delays, and enhanced overall operational

effectiveness. By supporting these measures, Digicel demonstrates its commitment to fostering a well-organized and collaborative environment in the telecommunications industry.

**290. Flow Response**

Periodic forecast would be useful for DataLink. It would improve efficiency. At the same time, a three (3) year forecast in the current business environment may be unrealistic. A view of two (2) years is likely more realistic.

**291. Logic Response**

Logic suggests that 3 years is probably too long of a time period as priorities change.

**292. C3 Cross Comment**

No cross comment received.

**293. DataLink Cross Comment**

No cross comment received.

**294. Digicel Cross Comment**

No cross comment received.

**295. Flow Cross Comment**

No cross comment received.

**296. Logic Cross Comment**

No cross comment received.

**297. Office Response**

As noted at paragraphs 432 – 435 of the Consultation Document, the Office notes that the existing Pole Sharing Agreements do not require Attaching Utilities to provide forecasts to the Owner Utility, and the Office considers that that the current agreements and arrangements have and are having the effect of limiting the efficient and harmonized utilization of infrastructure.

The Office notes the support among the parties for a requirement for attachers to provide forecasts to DataLink. While only DataLink explicitly agreed with the Office's proposal, the other parties highlighted the benefits that forecasting or improved planning might bring to the pole sharing process. Both Flow and Logic submitted that a three-year forecast period might be too long, and Flow suggested a two-year period might be more realistic.

In light of these submissions, the Office intends to propose terms for forecasts in the Pole Sharing Agreements.

The Office notes the comments that forecasts over a three-year period are unrealistic and that attachers change their plans or priorities. This suggests the last year of a three-year forecast may be of limited utility, and the Office will propose that forecasts cover a two-year period.

The Office notes DataLink's submissions that it should be compensated when attachers revise their forecasts. The Office is of the view that a change in a forecast should not lead to compensation unless the forecast is binding on the party making it. The matter of whether a forecast should be binding on an attacher is addressed below in Question 30.

Having considered the submissions of the parties, the Office is of the view that an additional forecast, not already proposed in this Question 27, should be provided by DataLink to attachers:

a forecast of poles to be erected by CUC in “greenfield” situations or new developments for electricity distribution purposes.

DataLink and CUC appear to have taken the position that section 7.1 of CUC’s T&D Licence prohibits the creation of a Communications Space on a pole without an upfront payment from a third party to do so. This means that, currently, CUC would initially install in new “greenfield” developments poles suitable only for the purposes of distributing electricity. If an ICT Licensee were subsequently to seek to attach to those poles in order to serve consumers in those developments, DataLink would have to replace all of them with new poles capable of accommodating up to four attachers – even though the CUC poles might just have been installed. Under the terms of the Pole Sharing Agreements, this would be at the expense of the requesting attacher(s). The Office considers this to be highly inefficient and a waste of resources by CUC, DataLink and the Attaching Utilities, which ultimately harms consumers. The Office is also of the view that this arrangement has the effect of limiting the efficient and harmonised utilisation of infrastructure in Grand Cayman.

The Office considers that it would be far more efficient and in the interests of all stakeholders, and would promote an efficient, economic and harmonised utilisation of infrastructure, if DataLink were to provide all Attaching Utilities with forecasts of “greenfield” streets or areas where CUC intends to install utility poles for the purposes of electricity distribution. This should be done in sufficient time for the Attaching Utilities to express an interest in attaching to those poles and for CUC to respond by procuring poles capable of accommodating up to four attachers.

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

**298. C3 Response**

Between 3 to 5 years.

**299. DataLink Response**

DataLink considers that forecasted attachment requirements should be submitted on a quarterly basis and should be based on the areas identified by DataLink. This approach is crucial to address the issues arising from each Attaching Utility requiring DataLink to deploy its already limited resources in different locations from other Attaching Utilities, as has been observed thus far.

Given that all Attaching Utilities are obliged to roll out their services across the entirety of Grand Cayman, it is essential to avoid fragmented efforts (which should be unnecessary) and ensure a more concentrated and coordinated approach to Make Ready processes. By granting DataLink the authority to propose specific areas for Make Ready, Attaching Utilities can follow these recommendations, leading to a more efficient and impactful utilization of available resources.

This collaborative approach will allow for a focused and targeted effort in specific regions, maximizing the effectiveness of the Make Ready processes and ultimately achieving superior outcomes. It would ensure that the limited resources are deployed in a manner that benefits all stakeholders, including DataLink, the Attaching Utilities and the end consumers.

Therefore, DataLink proposes quarterly submissions of forecasted attachment requirements based on areas identified by DataLink, as this approach allows for a more coordinated and concentrated effort that can yield optimal results in the Make Ready processes.

**300. Digicel Response**

Digicel believes that forecasts can be done every six (6) months and the level of geographic specificity can be "named roadways".

**301. Flow Response**

Forecast should be provided every two (2) years. However, DataLink must be advised if there are changed circumstances such that the forecast is materially different. The information shared must be kept strictly confidential to DataLink only.

**302. Logic Response**

Logic proposes that attaching utilities be required to update the forecasts at a minimum of twice yearly with district or community level specificity for forecasts.

**303. C3 Cross Comment**

No cross comment received.

**304. DataLink Cross Comment**

DataLink would be content with forecasts spanning six (6) months, as Digicel and Logic propose. Digicel advocates for a level of geographic specificity defined as "named roadways," while Logic posits that district or community-level specificity is warranted. DataLink is more inclined to align with Digicel's viewpoint, as specifying districts or communities may be excessively broad and fail to provide the requisite level of detail for precise planning. It is conceivable that DataLink's resources may encompass roads not included in Logic's forecast at that particular juncture, rendering the exercise somewhat futile.

FLOW has proposed two-year forecasts, whilst C3 has suggested three to five year intervals. However, such levels of infrequency in the provision of forecasts would mean that they would have little to no practical benefit: in particular, forecasts of any such duration will be increasingly speculative and unreliable in their later years, as more time passes beyond the date they were prepared; and they will lack the specificity necessary for practical resource planning.

**305. Digicel Cross Comment**

Digicel maintains that Bi-annual forecast would be sufficient.

**306. Flow Cross Comment**

DataLink's proposal is at odds with Ofreg's intent at paragraph 10 of the Consultative Document which states '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, 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.' DataLink proposes that operators should simply rollout their networks wherever DataLink chooses. And DataLink supports its proposal by citing lack of resources. It is Flow's considered view that DataLink does not lack resources to implement a robust, timely process, with the necessary resources, but rather is contented with its existing ineffective process which stymies the rollout of broadband services. The whole tenor of DataLink's response to the Consultation Document is to maintain the status quo and increase fees. DataLink's proposal is not timely nor will it facilitate the timely rollout of ICT services and ICT networks, or competition. Indeed, nothing in the totality of DataLink's response to the Consutation Document shows any regard to satisfying the Office's intent.

### 307. Logic Cross Comment

Logic disagrees with DataLink’s position that forecasted attachments should be based on areas identified by DataLink. Logic’s position is that DataLink should be permitted to provide feedback regarding common areas for forecasting for Logic to then agree (or disagree) on. In addition, forecasts should be given twice yearly only.

### 308. Office Response

Parties proposed a frequency for forecasts ranging from as often as quarterly to once every three to five years, to a level of geographic specificity ranging from “*named roadways*” to “*district or community level specificity*.” DataLink submitted that forecasts “*should be based on the areas identified by DataLink*” as this would “*avoid fragmented efforts*” and “*allow for a focused and targeted effort in specific regions, maximizing the effectiveness of the Make Ready processes.*”

The Office considers that forecasts need to be refreshed often enough to be useful but not so often that the exercise becomes needlessly burdensome. The Office notes that the interconnection agreements among ICT licensees for voice services specify two-year forecasts (i.e. eight quarters) to be updated quarterly.<sup>149</sup>

Accordingly, the Office will propose that attachers provide two-year forecasts of their attachment requirements, with information to be provided separately by quarter. At the end of the first year of the forecast period, attachers should either confirm to DataLink that there is no change to their forecast or submit a new two-year forecast. If attachers confirm there is no change to their forecast, they must provide a new two-year forecast at the end of the prior two-year forecast period. The Office considers that this process will provide DataLink with the useful information it requires for planning purposes without unduly burdening either DataLink or the attachers with a requirement to determine and analyse forecasts on an unnecessarily frequent basis.

The Office notes the submissions regarding the level of geographic specificity. The Office considers that forecasts should be provided at a minimum broken down by electoral district. The Office notes that there are a limited number of such districts, but the boundaries are well defined and reasonably stable. This should provide DataLink with a reasonable level of geographic specificity for its planning. However, this is a minimum and the Office encourages attachers to provide their forecasts at the level of named streets or neighbourhoods.

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

### 309. C3 Response

New only.

### 310. DataLink Response

DataLink considers that any forecasts of attachment requirements should exclusively pertain to new attachments. There is an existing mechanism in the MPJUA that already covers maintenance-related activities. It is essential to differentiate between new attachments and

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<sup>149</sup> See for example paragraph 2.3.1.2 of the Joint Working Manual attached to the 2011 Interconnection Agreement between Digicel and Flow.

<https://www.ofreg.ky/viewPDF/documents/interconnections/2021-05-12-06-45-14-141771190320110426LIMEDigicel-LIMEICAsched3JWWMFINALMarch2011.pdf>



maintenance activities to avoid unnecessary complexity and confusion, and to ensure accurate planning and resource allocation.

In addition to new attachments, DataLink considers it crucial that the forecasts include specific details such as cable types, size, weight, and other equipment that is intended to be attached to the pole within the forecasted area. Examples of such equipment may include splice boxes, splitters, repeaters, and similar items. By providing comprehensive details regarding the types and characteristics of attachments, DataLink can appropriately assess the potential impact on pole capacity, structural integrity and safety considerations. The inclusion of this information is vital to facilitate proper engineering and adherence to relevant guidelines, particularly NESC standards, and thus to ensure the overall reliability, performance and safety of the shared infrastructure.

**311. Digicel Response**

"All attachments should be included in the forecast, as the replacement, modification, or upgrade of cable infrastructure may necessitate make-ready works and/or pole replacements."

Considering the potential requirements for make-ready works and pole replacements during the forecast stage allows for better planning, resource allocation, and decision-making. It enables stakeholders to proactively address any potential challenges and ensure that the necessary preparations are made to accommodate future modifications or upgrades to the cable infrastructure.

**312. Flow Response**

A forecast should be for new attachments only.

**313. Logic Response**

New attachments only.

**314. C3 Cross Comment**

No cross comment received.

**315. DataLink Cross Comment**

DataLink agrees with the majority of the Attaching Utilities that forecasts of attachment requirements should include only new attachments. To do otherwise would introduce unnecessary complexity and ambiguity (in circumstances where the MPJUA already address maintenance-related activities comprehensively), and would undermine the objectives of precise planning and resource allocation.

**316. Digicel Cross Comment**

Digicel generally agrees with the forecast being only new attachments.

**317. Flow Cross Comment**

No cross comment received.

**318. Logic Cross Comment**

No cross comment received.

**319. Office Response**

The Office notes the consensus among the parties that the forecasts include only new attachments. Digicel, though, submitted that including all attachments in the forecasts "*allows for*

*better planning, resource allocation, and decision-making*" with respect to work on existing attachments could require make-ready work.

The Office considers that a significant purpose for providing forecasts to DataLink is to give the Owner Utility *"the information necessary to plan or coordinate the expansion of capacity on poles of the make-ready required"* (paragraph 434 of the Consultation Document). The Office notes that work on existing attachments could result in make-ready work, particularly if it involves "Substantial Construction or Modification" as defined in the Pole Sharing Agreements. The Office considers, therefore, subject to consultation, that the forecasts should include new attachments as well as any existing attachments that the attacher anticipates might require "Substantial Construction or Modification."

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

**320. C3 Response**

No. If they are to be considered binding on the applicant, then they should be considered applications for attachment and processed accordingly.

**321. DataLink Response**

DataLink considers that the forecasts submitted by Attaching Utilities should not be treated as binding until DataLink receives payment of the proposed fee discussed in response to Question 7 and initiates any part of the forecasted work. This approach is necessary due to the limited resources available to DataLink, which prevents simultaneous action on all forecasts.

More particularly, it is envisaged that DataLink will engage with each submitting Attaching Utility to meticulously examine and validate the provided data. In order to ensure accuracy and reliability, DataLink will thoroughly vet and verify the forecasted information in consultation with the Attaching Utility. This verification process would serve to confirm the feasibility and validity of the forecasted data, guaranteeing that the proposed work aligns with the joint-use infrastructure's capacity and conforms to applicable regulations and guidelines.

As noted above, the proposed fee outlined in Question 7 will also need to be paid by the Attaching Utility before DataLink commences any necessary work based on the validated forecast. In the event of any modifications or changes to the forecasted information, the Attaching Utility will be required to remit the proposed fee again before work can begin on the revised forecast. This fee is necessary to cover the costs associated with initiating the Make Ready process as outlined in the MPJUA.

By adopting this approach, DataLink will be able to ensure a systematic and financially sustainable implementation of the forecasted work, while also safeguarding the interests of all parties involved.

**322. Digicel Response**

Digicel believes any forecast should not be binding as our environment can be quite dynamic.

**323. Flow Response**

Forecast should be provided every two (2) years. However, DataLink must be advised if there are changed circumstances such that the forecast is materially different. A forecast is for the purposes of guidance, is not binding but indicative.

**324. Logic Response**

No, forecasts should not be binding.

**325. C3 Cross Comment**

No cross comment received.

**326. DataLink Cross Comment**

No cross comment received.

**327. Digicel Cross Comment**

No cross comment received.

**328. Flow Cross Comment**

No cross comment received.

**329. Logic Cross Comment**

No cross comment received.

**330. Office Response**

The Office notes the consensus among all parties that the forecasts should not be binding.

The Office further notes that it addressed the matter of the proposed application fee at Question 7 above.

**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?

**331. C3 Response**

Forecasts could be sent to OfReg. The Office can then anonymise the data and forward the batch of consolidated information to DL. Attachers A, B, C, D, etc.

**332. DataLink Response**

As explained in response to Question 2 above, DataLink does not compete with other Attaching Utilities, nor does it have the opportunity to compete with them in the future, following the approval of Amendment 4. As per the current arrangement, there are four designated spaces within the Communication Space, each assigned to an Attaching Utility with whom DataLink has executed an MPJUA. DataLink itself does not possess any cables connected to poles within the Communication Space.

Further and in any event, since its establishment in 2012, DataLink has maintained an unblemished record in safeguarding the Attaching Utilities' confidential and commercially-sensitive information. DataLink takes the confidentiality and commercial sensitivity of such information very seriously and fully comprehends the potential consequences of breaching that confidentiality in any way, and/or violating any data protection laws. The staff at DataLink operate

with the highest level of integrity and professionalism, adhering to stringent protocols to maintain the confidentiality of commercially-sensitive information.

If it would help to underscore DataLink's commitment to confidentiality, DataLink is willing to execute a Non-Disclosure Agreement (NDA) with each Attaching Utility. This additional layer of contractual obligation would provide further assurance to the Attaching Utilities that DataLink is fully dedicated to safeguarding their respective confidential information, and confirm the recourse available if there were ever any breach.

DataLink's track record, coupled with its commitment to confidentiality and willingness to enter into NDAs, demonstrates its unwavering dedication to maintaining the highest standards of professionalism and integrity in the management of joint-use infrastructure and the protection of confidential and commercially sensitive information.

### **333. Digicel Response**

Establishing Non-Disclosure Agreements (NDAs) between Datalink and each attaching utility can help protect sensitive information and ensure confidentiality in their business relationship. The NDA should contain terms permitting the Ofreg to impose severe penalties if breached, including substantial fines and suspension of license.

### **334. Flow Response**

Flow proposes that in order to protect confidential and commercially-sensitive information, DataLink could establish a separate function that receives and processes the information provided by ICT Licensees. The information supplied would remain in the function and the retail, commercial function in DataLink would have no access to and be prohibited from accessing the information, and the data will not be shared with DataLink's retail team or discussed in meetings where the retail team is present. DataLink's technical team who will be assisting third party licensees with their request, are also required not to share confidential information with DataLink's retail team. This new way of interacting will require a culture shift in DataLink, which is achievable.

### **335. Logic Response**

Appropriate separation and storage of build out information provided by each attacher to DataLink in connection with the pole permit application would be required to protect the legitimate commercial interests of the relevant attacher.

### **336. C3 Cross Comment**

No cross comment received.

### **337. DataLink Cross Comment**

As previously noted, DataLink is not engaged in competition with other Attaching Utilities, nor does it anticipate ever doing so. The question is therefore fundamentally misguided and wholly academic.

### **338. Digicel Cross Comment**

No cross comment received.

### **339. Flow Cross Comment**

No cross comment received.

### 340. Logic Cross Comment

No cross comment received.

### 341. Office Response

The Office notes the range of responses from the parties to this Question 31, including sending forecasts to the Office to be merged prior to delivery to DataLink, signing NDAs, establishing a separate internal function to receive and process information from attachers, and separation of the build out information of the attachers.

The Office notes that most parties proposed measures to restrict the disclosure of commercially-sensitive information of an attacher and further notes that a Non Disclosure Agreement (NDA) between DataLink and an attacher can be a useful measure in this regard.

However, the Office is not concerned only about the potential *disclosure* of commercially-sensitive information, but also about the potential *use* of that information by DataLink. NDA's are of limited help in this regard. The concern arose because DataLink is both a wholesale provider to the attachers of key inputs into the attachers' ICT networks and services, and a potential or actual competitor of those attachers in retail ICT markets.

As discussed at Question 2 above, Amendment 4 to DataLink's ICT Licence did not remove DataLink's right or ability to provide fixed ICT services or to operate a domestic fixed network in competition with the other attachers. Nor does the fact that DataLink may have assigned to third parties all four attachment spots on a pole with a three-foot Communications Space necessarily mean DataLink can never attach its own communications facilities to a CUC pole in the future (for example, at an unused spot within the Communications Space, or outside of the Communications Space with CUC's consent).

DataLink could, therefore, compete with the attachers in one or more ICT markets in the Cayman Islands using ICT facilities attached to utility poles DataLink manages on behalf of CUC. Having access to the forecasts of the attachers could therefore give DataLink a commercial advantage, for example, by enabling DataLink to proactively offer point-to-point services to an attacher in an area where DataLink knows the attacher is seeking to expand its ICT network, or by offering point-to-point services to potential retail customers of an attacher before that attacher is able to roll out its own ICT network.

However, the Office is also concerned to ensure that its regulatory measures are proportionate to the issue being addressed. While the establishment of a separate function within DataLink, as proposed by Flow, would protect the confidential and commercially sensitive information of the attachers and address the Office's concerns, the Office considers that less intrusive measures can achieve the same objectives. Accordingly, the Office intends to propose a contractual prohibition on the use by DataLink of the forecasts or other confidential or commercially sensitive information provided by attachers for any purposes other than the provision of pole attachment services to those attachers.

## 4. Right to Perform Work

### a) 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.

**342. C3 Response**

Agreed.

**343. DataLink Response**

DataLink respectfully disagrees with this proposal, on the basis that it does not consider that it would be able to treat pre-permit surveys performed by Attaching Utilities as reliable without verifying such surveys itself.

As explained above, the Audit revealed a significant number of unauthorized attachments, and that unauthorized attachments had been made by each Attaching Utility. In circumstances where none of the Attaching Utilities has fully complied with the terms and conditions of its MPJUA regarding the permit process and adherence to engineering and NESC guidelines regarding attachment size and mounting (and thus demonstrated a lack of discipline and/or willingness to ensure that they do so), DataLink cannot be confident that pre-permit surveys which they conduct will be reliable, let alone in every case. Furthermore, it is necessary for a uniform approach to be taken in relation to all Attaching Utilities.

Granting Attaching Utilities the authority to conduct their own pre-permit surveys would therefore only serve to introduce additional (duplicative double-checking) costs and steps into the permit and make-ready process. Given the Attaching Utilities' collective history of substantial non-compliance with the express terms of the MPJUAs, as explained above, DataLink would be required to extensively review and validate each pre-permit survey submitted. This would result in duplication of efforts, prolong the process and increase administrative burden.

DataLink firmly believes that it is best positioned to conduct the necessary surveys and assessments to ensure compliance with established regulations, guidelines and safety standards. By retaining control over the survey process, DataLink can leverage its expertise and knowledge to accurately assess the feasibility of proposed attachments, guarantee adherence to engineering and NESC guidelines, and maintain the integrity of the joint-use infrastructure.

DataLink's objective is to streamline the permit and make-ready process, eliminate unauthorized attachments, and uphold the highest standards of safety and regulatory compliance. Granting Attaching Utilities the authority to perform pre-permit surveys independently would undermine these objectives, introduce unnecessary complexity and costs and carry the significant risk of compromising the integrity of the joint-use system.

In conclusion, DataLink respectfully requests that the Office reconsider its proposal and continue to entrust DataLink with the responsibility of conducting pre-permit surveys to ensure a streamlined and compliant permit and make-ready process.

**344. Digicel Response**

Digicel agrees with the Office's position on this.

**345. Flow Response**

Flow agrees that DataLink allow attaching utilities to perform pre-permit surveys prior to submitting permit applications.

**346. Logic Response**

Yes - Logic agrees with this proposal.

**347. C3 Cross Comment**

No cross comment received.

**348. DataLink Cross Comment**

No cross comment received.

**349. Digicel Cross Comment**

No cross comment received.

**350. Flow Cross Comment**

No cross comment received.

**351. Logic Cross Comment**

Logic disagrees with DataLink’s response to these questions. Logic’s position is that if there is a standard pre-permit survey, then the surveys submitted by Licensees should be considered reliable and should be simple for DataLink to process, thus avoiding the issues raised by DataLink in its response.

In addition, if there is to be a standard set of requirements to be followed by attachers, then Logic’s view is that any costs of training associated with meeting such standards should be borne by the relevant attacher.

**352. Office Response**

The Office notes that most parties were expressly in favour of the Office’s proposal.

DataLink disagreed and recommended that the current arrangements continue. DataLink argued that its Audit demonstrated a “*collective history of substantial non-compliance*” by attachers which would require DataLink to validate every pre-permit survey submitted. This would, in DataLink’s view, “*result in duplication of efforts, prolong the process and increase administrative burden.*”

As the Office noted at Question 3 above, paragraph 366 of the Consultation Document referred to “*the field inspection element of a Pre-Permit Survey*” while the proposal at paragraph 370 referred to the Pre-Permit Survey only. The Office’s intent was to refer to the field inspection element and the proposal will be amended accordingly.

At this time, there continues to be no evidence that the field inspection element of the Pre-Permit Survey requires more than a visual inspection of the pole or that it must be performed only by DataLink or its agents or employees in order to “*ensure compliance with established regulations, guidelines and safety standards.*” Provided that DataLink properly communicates the information that it requires from a field inspection (which could include photographs of the relevant poles), the Office does not see a reason to believe that an Attaching Utility could not collect and transmit that same information to DataLink as part of its application for a pole attachment permit.

The Office anticipates that DataLink would then “verify” that information against its records. If there is a difference (for example, an unexpected unauthorised attachment), DataLink could further investigate. Otherwise, if there is no difference or discrepancy, DataLink would be able to proceed to prepare and provide a quotation that would safeguard the integrity and safety of the utility pole, as it does today.

An advantage of this approach would be that DataLink might become aware of issues on the poles sooner than it might otherwise have been made aware, if it had to wait until another audit were conducted and would be able to address them before they cause problems for the pole



infrastructure. In the meantime, DataLink would not be required to expend scarce resources on the field inspection.

The Office notes that the concept of a person other than the utility conducting a survey is not novel. Under the FCC rules, qualified contractors other than the utility may conduct surveys, either as part of a “self help” remedy if the utility does not meet the statutory deadlines [47 CFR 1.141(l)(1)] or as part of the One Touch Make Ready process [47 CFR 1.1411 (j)(3)]. While the Office is not proposing the implementation of a One Touch Make Ready regime in the Cayman Islands at this time, the Office notes the FCC’s statement regarding surveys that “*our OTMR regime saves significant time by placing the responsibility on the new attacher (rather than the utility) to conduct a survey of the affected poles to determine the make-ready work to be performed. ... The results of the survey typically will be included in the new attacher’s pole attachment application.*”<sup>150</sup>

As noted earlier, the Office also considers that its proposal will benefit DataLink and, while the Office is not seeking to adopt all aspects of the FCC rules, the Office notes in particular the FCC’s statement to this effect: “*We also agree with those commenters that argue that an OTMR-based regime will benefit utilities. The record indicates that many utilities that own poles are not comfortable with their current responsibilities for facilitating attachments in the communications space. By shifting responsibilities from the utility to the new attacher to survey the affected poles, determine the make-ready work to be done, notify affected parties of the required make-ready work, and perform the make-ready work, our new OTMR regime will alleviate utilities of the burden of overseeing the process for most new attachments and of some of the costs of pole ownership.*”<sup>151</sup> (emphasis added, footnotes omitted)

As noted above at Question 7, the Office is concerned about DataLink’s reports of unauthorised attachments and other non-compliance with the terms and conditions of the Pole Sharing Agreements. However, the Office does not agree with DataLink’s implied comment that, because Attaching Utilities are not compliant with the terms and conditions of their Pole Sharing Agreements, they necessarily cannot competently perform a field inspection to DataLink’s standards of a pole to which they seek to attach.

**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.**

### **353. C3 Response**

Agreed.

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<sup>150</sup> FCC 2018 One Touch Make Ready Order, at paragraph 53.

<sup>151</sup> FCC 2018 One Touch Make Ready Order, at paragraph 24.

**354. DataLink Response**

DataLink respectfully disagrees with this proposal. This disagreement is principally based on the findings of the Audit, which revealed that none of the Attaching Utilities have adhered to the Engineering and NESC guidelines provided in the MPJUA. Additionally, the Attaching Utilities have not complied with the terms of their respective MPJUAs pertaining to attachments.

The non-compliance of the Attaching Utilities has resulted in undue stress on the electricity grid and introduced significant safety violations. Given this behaviour, DataLink believes that allowing Attaching Utilities to conduct pre-permit surveys without strict oversight and control would not effectively address these issues and could potentially lead to further non-compliance. In particular, very limited information can be derived from one or even a few photographs of a given pole. There are numerous perspectives and factors which need to be taken into account in connection with assessing and/or planning for Make-Ready work, the detail of which would be voluminous to present (in photos and/or a form), and thus needs to be the subject of a survey by the planners themselves. It would also serve to create inefficiency if an Attaching Utility were repeatedly required to revisit a pre-permit survey because of inadequacies and/or deficiencies in a previously submitted version.

It is essential to ensure that pre-permit surveys are conducted in a thorough and comprehensive manner, taking into account all engineering and safety requirements. DataLink maintains that it is best positioned to carry out these surveys, as it has the necessary expertise and knowledge of the joint use infrastructure.

By retaining control over the pre-permit survey process, DataLink can ensure that all necessary safety and compliance standards are met, thereby safeguarding the integrity of the electrical grid and minimizing any potential risks associated with unauthorized or non-compliant attachments.

**355. Digicel Response**

Digicel agrees with the Office's position on this.

**356. Flow Response**

Flow is agreed.

**357. Logic Response**

Yes - Logic agrees with this proposal.

**358. C3 Cross Comment**

No cross comment received.

**359. DataLink Cross Comment**

DataLink emphasizes its previous response (and consequential responses to Questions 34 and 35), which explained its strong disagreement with this proposal.

**360. Digicel Cross Comment**

No cross comment received.

**361. Flow Cross Comment**

No cross comment received.

### 362. Logic Cross Comment

Logic disagrees with DataLink’s response to these questions. Logic’s position is that if there is a standard pre-permit survey, then the surveys submitted by Licensees should be considered reliable and should be simple for DataLink to process, thus avoiding the issues raised by DataLink in its response.

In addition, if there is to be a standard set of requirements to be followed by attachers, then Logic’s view is that any costs of training associated with meeting such standards should be borne by the relevant attacher.

### 363. Office Response

As in the case of Question 32, the Office notes that most parties expressly agreed with the Office’s proposal while DataLink did not, and the Office refers to its response at Question 32.

DataLink submits here that “*very limited information can be derived from one or even a few photographs of a given pole*” and that “*there are numerous perspectives and factors which need to be taken into account in connection with assessing and/or planning for Make-Ready work, the detail of which would be voluminous to present (in photos and/or a form), and thus needs to be the subject of a survey by the planners themselves.*” The Office does not consider this to be an insurmountable problem, particularly if DataLink properly communicates to attachers the information that it requires from a field inspection. The Office is of the view that DataLink’s own employees currently engage in an equivalent process when conducting the field inspection component of a Pre-Permit Survey, in so far as they collect and record relevant information from the field and transmit it to the planners at the office.

In addition, as was demonstrated to the Office at the start of DataLink’s Audit, DataLink employed technology (tablets and apps/software) which did not require its personnel or contractors to physically access the poles when it conducted its Audit but enabled them to collect detailed information on the poles and on the attachments on the poles. The Office is of the view that the same or similar technology could be made available to Attaching Utilities, which would allow the latter to conduct field inspections safely and to collect the information required by DataLink – without requiring DataLink to send its own personnel or contractors to collect it.

The Office considers that, because Attaching Utilities would as a result not be required to physically interact with the pole while collecting relevant information during the field inspection element of the Pre-Permit Survey, it is unnecessary for Attaching Utilities to provide DataLink with prior notice of their intent to carry out a Pre-Permit Survey. The Office further considers that dropping the unnecessary requirement for notifications will relieve DataLink of the administrative burden of tracking and managing such notifications.

**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.**

### 364. C3 Response

Agreed.

**365. DataLink Response**

DataLink respectfully disagrees with this proposal, in light of its responses above, which explain why it considers that Attaching Utilities cannot safely be left to conduct pre-permit surveys on their own.

As explained above, DataLink considers that the Attaching Utilities have demonstrated an inability to comply with guidelines, rules, standards and agreements. In this regard, it is important to note that the MPJUA signed by each Attaching Utility contains substantially similar terms and conditions that have been in effect for a considerable period. Despite the clear provisions of these agreements, the Attaching Utilities have persistently violated their terms and conditions.

Given this recurring pattern of non-compliance, DataLink believes that sharing the information it requires from a pre-permit survey publicly is unlikely to address the issues arising from the Audit, as explained in detail above. It is crucial for DataLink to maintain control over the processing of pole attachment permit applications to ensure that all relevant information is accurately captured and verified, and that the necessary engineering and safety standards are upheld.

By retaining the responsibility for processing applications and conducting the necessary assessments, DataLink can closely monitor and evaluate the compliance of the Attaching Utilities with the established guidelines. This approach is aimed at upholding the integrity of the joint use infrastructure and safeguarding the interests of all stakeholders.

**366. Digicel Response**

Digicel agrees with the Office's position on this.

**367. Flow Response**

Flow is agreed that DataLink publishes the information that it reasonably requires from a pre-permit survey.

**368. Logic Response**

Yes - Logic agrees with this proposal.

**369. C3 Cross Comment**

No cross comment received.

**370. DataLink Cross Comment**

No cross comment received.

**371. Digicel Cross Comment**

No cross comment received.

**372. Flow Cross Comment**

No cross comment received.

**373. Logic Cross Comment**

Logic disagrees with DataLink's response to these questions. Logic's position is that if there is a standard pre-permit survey, then the surveys submitted by Licensees should be considered reliable and should be simple for DataLink to process, thus avoiding the issues raised by DataLink in its response.

In addition, if there is to be a standard set of requirements to be followed by attachers, then Logic's view is that any costs of training associated with meeting such standards should be borne by the relevant attacher.

### 374. Office Response

As in the case of Questions 32 and 33, the Office notes that most parties expressly agreed with the Office's proposal while DataLink did not, and the Office refers to its responses at Questions 32 and 33.

The Office also notes that DataLink currently conducts Pre-Permit Surveys of poles requested by attachers and, as part of that process, collects information on poles and attachments (which could include photographs of the poles and the facilities already attached on them). The Office considers that it would be readily feasible for DataLink to documenting the types and categories of information that it currently collects, and to make that available to attachers.

The Office understands that the technology used by DataLink during its recent Audit interfaces with DataLink's other systems in a way that facilitates the upload of data collected in the field. The Office notes that, if DataLink were to provide the technology (tablets and apps/software) or were to provide the necessary details to Attaching Utilities so that the latter can procure them directly, it would reduce the task of upload and analysis of data collected by Attaching Utilities. This in turn would allow DataLink to focus its resources on other tasks, such as the preparation of estimates, and would allow DataLink to provide more timely and efficient services to Attaching Utilities.

The Office notes in particular DataLink's submission that "*sharing the information it requires from a pre-permit survey publicly is unlikely to address the issues arising from the Audit.*" As previously noted, the Office is concerned about DataLink's reports of unauthorised attachments and other non-compliance with the terms and conditions of the Pole Sharing Agreements. However, the Office notes that the existence of unauthorised attachments is not relevant to the ability to competently perform a field inspection to DataLink's standards.

**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.**

### 375. C3 Response

Agreed.

### 376. DataLink Response

DataLink respectfully disagrees with this proposal, as DataLink does not agree with the overall proposal regarding pre-permit surveys.

As previously stated, DataLink does not support the concept of pre-permit surveys and the associated requirements. Consequently, DataLink does not agree to provide any training related to pre-permit surveys, as it is not aligned with our position on the matter.

It is important to clarify that DataLink's disagreement with the training requirement is based on the fundamental disagreement with the proposal itself. Therefore, any associated or consequential obligations, including training, are not considered appropriate or necessary.

**377. Digicel Response**

Digicel agrees with the Office's position on this.

**378. Flow Response**

Flow is not opposed to DataLink providing training at a reasonable cost. However, since the Pre-Permit approval is based on a visual inspection of the poles, Flow is uncertain of the need for actual training since consistent with the Office's assessment at paragraph 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. 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.'*

**379. Logic Response**

Yes - Logic agrees with this proposal.

**380. C3 Cross Comment**

No cross comment received.

**381. DataLink Cross Comment**

No cross comment received.

**382. Digicel Cross Comment**

No cross comment received.

**383. Flow Cross Comment**

No cross comment received.

**384. Logic Cross Comment**

Logic disagrees with DataLink's response to these questions. Logic's position is that if there is a standard pre-permit survey, then the surveys submitted by Licensees should be considered reliable and should be simple for DataLink to process, thus avoiding the issues raised by DataLink in its response.

In addition, if there is to be a standard set of requirements to be followed by attachers, then Logic's view is that any costs of training associated with meeting such standards should be borne by the relevant attacher.

**385. Office Response**

The Office notes that most parties expressly agreed with the Office's proposal. Flow appears to question the need for training at all, while DataLink disagrees with the underlying premise for the training.

The Office notes that the field inspection element of the Pre-Permit Survey might only be a "visual inspection" as stated by Flow. However, it still needs to be done correctly in a manner that is useful to DataLink. The technology used for the field inspection must also be used in a way that allows for the seamless upload of data. The Office further notes that its objective is to gain the

most efficiency in the permit application and make-ready process by transferring tasks that can reasonably be performed by Attaching Utilities so that DataLink can focus its resources on other work. Ineffective or inadequate field inspections would interfere with that objective.

The Office considers that it is in the interests of all parties that the field inspection component of Pre-Permit Surveys be conducted competently, consistently and comprehensively. This suggests that some level of training or instruction would be required, in order to ensure DataLink is supplied with useful information from such field inspections.

**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.

**386. C3 Response**

Agree. Each pole currently has a unique number. There must therefore exist a list or database of poles, along with location data. This is standard practice within the power industry and expected of an entity to manage a critical element of their T&D infrastructure. The age of wooden poles in particular, should be tracked in order to plan replacement of poles as they age and become less structurally sound.

**387. DataLink Response**

DataLink respectfully disagrees with this proposal. As previously communicated to the Office, DataLink is currently in the process of implementing an online JUP that will encompass all relevant information necessary for efficient Joint Use operations. This platform will serve as a comprehensive repository for pole-related data, including the details specified by the Office.

DataLink does not believe that the Office should prescribe a defined methodology or solution for the management of pole information. However, it is worth noting (as explained above) that DataLink has proactively initiated the development and implementation of the online JUP, which will fulfil the requirement of providing essential pole information. The platform will offer a robust and accessible resource for ICT licensees who have executed an MPJUA with DataLink.

DataLink appreciates the Office's consideration of this matter but maintains that the ongoing efforts to implement the online JUP will adequately address the need for an up-to-date list of utility poles and associated information, without there needing to be any separate direction to meet the objective of this proposal by different (and duplicative) means. By utilizing the platform, ICT licensees will have access to accurate and relevant data pertaining to pole locations, dimensions, and other pertinent details, ensuring transparency and facilitating smooth joint use operations.

DataLink remains committed to leveraging technology and industry best practices to enhance the effectiveness and efficiency of Joint Use processes, and looks forward to providing the Office and relevant stakeholders with access to the comprehensive pole information through the online platform as it is implemented and operationalized.

**388. Digicel Response**

Digicel supports the suggestion for Datalink to maintain and regularly update all the utility pole information suggested by the Office. Centralizing the maintenance and updates of utility pole information can bring efficiency and consistency to the process. Including the Telco utility authorized to attach as one of the data fields in the online portal system is a practical suggestion. This addition would provide clarity and transparency regarding which Telco utility has authorization to attach to specific poles. It can help streamline the process by ensuring that only authorized entities are making attachments and reducing the potential for conflicts or unauthorized attachments.

Implementing such features in the online portal system can contribute to better management of utility pole infrastructure, improved coordination among stakeholders, and enhanced overall efficiency.

**389. Flow Response**

Flow is agreed.

**390. Logic Response**

Yes - Logic agrees with this proposal.

**391. C3 Cross Comment**

No cross comment received.

**392. DataLink Cross Comment**

The Attaching Utilities do not appear to have been made aware of DataLink's efforts and progress with establishing the online Joint Use system. Consequently, DataLink respectfully suggests that the Attaching Utilities' responses to this question are purely academic.

**393. Digicel Cross Comment**

No cross comment received.

**394. Flow Cross Comment**

No cross comment received.

**395. Logic Cross Comment**

Logic disagrees with DataLink's response to this question. Please see Logic's response to Consultation Question 12 regarding the creation of a joint use portal.

**396. Office Response**

The Office notes the broad consensus in support of the Office's proposal.

The Office further notes that DataLink's disagreement appears to be related primarily to the fact that DataLink is developing an online Joint Use Platform (JUP) that would include the pole-related detailed specified by the Office in this Question 36. In this regard, the Office also notes that much of the information proposed by the Office in this Question 36 is included in the list of data elements provided by DataLink in response to Question 13. The Office considers that it would make sense to include this information in the proposed JUP instead of developing a separate system. However, if the JUP is not developed, the Office considers that DataLink ought to make this list of poles and associated relevant information available to attachers in some form.

The Office also refers to its responses at Questions 13 through 15 above.





## b) 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.

#### **397. C3 Response**

Agreed.

#### **398. DataLink Response**

DataLink respectfully disagrees with this proposal. DataLink emphasizes that it is not the owner of the infrastructure used to provide electrical services or telecommunication attachments. Rather, DataLink has an agreement with CUC, the infrastructure owner, to manage and maintain the Communication Space allocated for joint use.

DataLink does not possess the authority to dictate to CUC which contractors should be utilized for make-ready work, and is therefore incapable of complying with any requirement which the Office would propose to impose upon it in respect of this matter. CUC, as the infrastructure owner, has exclusive control and supervision over its facilities and determines the contractors it engages for infrastructure-related activities. DataLink's role is to manage and maintain the Communication Space within the framework of its agreement with CUC, but it does not have the jurisdiction to dictate CUC's contracting decisions. The selection of third-party contractors is solely within the purview of CUC as the owner of the infrastructure. DataLink has no involvement in the procurement or signing of agreements with third-party contractors by CUC. The agreements and terms are established by CUC, taking into account their specific operational requirements and considerations.

DataLink reiterates that, based on the significant number of unauthorized attachments identified by the Audit, it is evident that the Attaching Utilities have not consistently adhered to the required engineering and NESC standards outlined in their MPJUAs. Given this context, DataLink has concerns about the ability of Attaching Utilities to meet the necessary safety standards for performing make-ready work.

Furthermore, it is worth noting that CUC has already engaged various third-party contractors to assist in facilitating make-ready work, as stated by the Office in this consultation and confirmed by DataLink in previous correspondence. These third-party contractors have established agreements with CUC, not DataLink, and DataLink's involvement or authorization is not relevant in this context. Therefore, DataLink does not consider it appropriate for the Office to require DataLink to permit third-party contractors to perform make-ready work, as this falls outside the scope of DataLink's agreement with CUC.

DataLink remains committed to fulfilling its obligations and responsibilities within the scope of its agreement with CUC and will continue to work collaboratively with CUC and the Attaching Utilities to ensure the efficient and safe operation of joint use infrastructure.

### **399. Digicel Response**

Digicel does not specialize in Electrical Services and recommends that this function should remain under the purview of Datalink/CUC. However, consideration should be given for make-ready works that are contained within the communication space only which can be done by third party contractors and or if Datalink is resource/operationally challenged at a point in time, permitting qualified third parties to conduct Electrical services work to underpin make ready should be permitted by Datalink.

### **400. Flow Response**

DataLink should have operational control over its infrastructure. Having said that, DataLink already uses third party contractors to perform make-ready work on its behalf, so it would not be unreasonable for qualified third-party contractors to perform make-ready work on behalf of ICT Licensees. DataLink could also choose to publish a list of approved contractors for consideration. Flow does propose that Licensees should have the option to choose to have the make-ready work done by DataLink or by a third- party contractor from the outset.

### **401. Logic Response**

Yes - Logic agrees with this proposal.

**402. C3 Cross Comment**

No cross comment received.

**403. DataLink Cross Comment**

Notwithstanding that the Attaching Utilities generally agree that DataLink should be obliged to grant permission for third parties to conduct make-ready work (including within the electrical space or involving electrical facilities on the utility pole, subject to specific conditions being met), those responses were elicited on an incorrect premise. DataLink reiterates that it lacks the authority to prescribe the selection of contractors for make-ready work by CUC. Consequently, DataLink is incapable of complying with any requirements that the Office might otherwise have contemplated imposing for this purpose.

**404. Digicel Cross Comment**

No cross comment received.

**405. Flow Cross Comment**

No cross comment received.

**406. Logic Cross Comment**

Logic disagrees with DataLink's responses to these questions. Logic understands that the same third-parties being contracted by DataLink are used by Licensees in performing their own contracting work indicating that the standards of such third-party contractors are acceptable to DataLink. As such, there should be no reason for DataLink to deny use of the same contractors to be engaged to provide the same services to the Licensees as would be provided to DataLink in respect of make-ready work.

**407. Office Response**

The Office notes that C3 and Logic agreed with the Office's proposal.

Digicel and Flow appear to agree in part. Digicel noted that work in the Electrical Space should remain under the purview of CUC/DataLink but that qualified third-party contractors should be permitted to do work entirely contained within the Communications Space or, if DataLink is *"resource/operationally challenged at a point in time,"* electrical services work as well. Flow submitted that DataLink should have operational control over its infrastructure, and that DataLink should publish a list of approved contractors and attachers should have the option to choose between DataLink or one of those third-party contractors to perform the make-ready work.

DataLink disagreed with the Office's proposal, noting that it does not own the pole infrastructure and that it cannot dictate CUC's selection of third-party contractors, as this falls outside the scope of DataLink's agreement with CUC. DataLink also expressed concerns about the ability of Attaching Utilities to meet the necessary safety standards for performing make-ready work.

The Office notes that the responses of the parties touch upon three related matters:

- the Office's jurisdiction to modify DataLink's agreements or arrangements with CUC;
- the type of make-ready work that third parties should be permitted to perform; and
- the conditions to be satisfied by any such third parties before they are permitted to perform make-ready work.

The Office notes DataLink's submissions regarding the scope of its agreement with CUC. The Office also notes that CUC is DataLink's parent company, not an arm's-length third party.

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Section 69(2) of the ICT Act permits the Office to “... *require modification of any agreement or arrangements entered into between a licensee and another person or licensee ...*” (emphasis added) provided that the effect of the agreement or arrangements is to limit either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks, and provided that the purpose of any modification is to promote an efficient, economic and harmonised utilisation of infrastructure.

Notably there is no requirement in the Act that both parties must be ICT Licensees in order for the Office to modify an infrastructure sharing agreement or arrangement, as long as the pre-conditions set out in the Act are satisfied. In other words, the Office may inquire into and require modifications to DataLink’s agreements with CUC if those agreements 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.*”

At paragraph 455 of the Consultation Document, the Office stated:

*Given DataLink’s stated limited capacity to process permit applications, inclusive of performing make-ready work, 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. (emphasis added, footnote omitted)*

The Office considers, therefore, that it has the jurisdiction to inquire into and modify DataLink’s agreements or arrangements with Attaching Utilities as well as with CUC in order to promote the efficient, economic and harmonised utilisation of utility pole infrastructure.

With respect to the type of make-ready work that third parties should be permitted to perform, the Office has considered the positions of the parties and is of the view that any make-ready work that is to be performed in the Electrical Space or in the Safety Space should only be performed by CUC or its contractors. However, for make-ready work that is to be performed in the Communications Space, the Office considers that any qualified contractor should be permitted to perform it.

The Office notes that this is similar to what happens today, as both DataLink and CUC appear to employ qualified contractors from time to time. The Office also notes that the concept of a qualified party other than the utility performing make-ready work is not novel. While the FCC rules for non-One Touch Make Ready work require the utility to perform make-ready work [47 CFR 1.1411(e)], they also allow the new attacher to perform the make-ready work itself if the utility does not meet the statutory deadlines [47 CFR 1.1411(1)(2)]. The Office notes that, in the case of such “self-help” make ready work, the FCC rules do not distinguish between “simple” and “complex” make ready work or between work to be done inside the Communications Space or above it. The FCC rules only require that the contractor doing the work be selected from a list of qualified contractors

## PUBLIC VERSION

made available by the utility [47 CFR 1.1412 (a) and (b)].<sup>152</sup> It should be noted that the Office's proposal differs from the FCC rules in that it is not limited to "self help" remedies but it is limited to work in the Communications Space.

The Office also considers that DataLink should make a list of its qualified contractors available to attachers.

The Office notes that, consistent with its original proposal, the foregoing would apply to any Make-Ready work in the Communications Space. However, the Office also notes that the FCC distinguishes between "simple" and "complex" make-ready work, particularly for the purposes of its "One Touch Make Ready" work. The FCC defines "simple" make ready as work where "*existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.*"<sup>153</sup> The FCC defines "complex" make ready as "*transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments,*" including all pole replacements.<sup>154</sup> For the avoidance of doubt, the Office is not proposing the implementation of a One-Touch Make Ready regime in the Cayman Islands at this time. The Office also considers that it does not need to apply this distinction between "simple" and "complex" make ready work for the purposes of defining the type of work that qualified third parties may perform, given that the riskiest work (i.e. work outside the Communications Space, which would include pole replacements) has already been excluded. The additional benefit of flexibility and timeliness of completion of work that would be gained outweighs any potential risk to services delivered to consumers.

With respect to the matter of the conditions that should be satisfied before DataLink should be required to permit third parties to perform make-ready work, the Office notes that this is addressed principally by the next Question 38.

The Office notes DataLink's stated concerns about the ability of Attaching Utilities to meet the necessary safety standards for performing make-ready work. The Office notes, however, that the Office proposed in condition (c) that any third-party contractors hold "*all certifications and qualifications required for the make-ready work in question,*" with relevant certifications and qualifications being published by DataLink. The Office considers, therefore, this measure would adequately address DataLink's concerns.

DataLink stated in response to this Question 37 that CUC has third-party contractors who "*have established agreements with CUC, not DataLink, and DataLink's involvement or authorization is not relevant in this context.*" The Office notes that, under the proposed condition (d), third party contractors would be "*under the supervision and control of CUC personnel and contractually bound to CUC.*" The Office expects therefore that any third-party contractors would establish agreements with CUC.

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<sup>152</sup> With the exception that the utility is not required to keep a list of approved contractors for surveys or simple make ready work. If the utility does not keep such a list, the attacher may choose their own qualified contractor that meets the requirements set out in paragraph 1.1412(c) of the FCC rules.

<sup>153</sup> FCC 2018 One Touch Make Ready Order, at paragraph 17.

<sup>154</sup> FCC 2018 One Touch Make Ready Order, at paragraph 18.

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

**408. C3 Response**

No input.

**409. DataLink Response**

For the reasons explained above, DataLink respectfully maintains its position that the proposed conditions regarding third-party contractors for make-ready work are not suitable.

DataLink does not consider it appropriate for the Office to require DataLink to permit or impose conditions on third-party contractors for make-ready work. DataLink's primary focus is on fulfilling its obligations and responsibilities within the scope of its agreement with CUC, ensuring effective coordination and cooperation among all parties involved in the joint use of infrastructure.

**410. Digicel Response**

Please refer to response on Question 37.

**411. Flow Response**

Flow's proposal is that from the outset, ICT Licensees should have the ability to choose to have make-ready work done by DataLink or by a third party contracted by the ICT Licensee. At this time, DataLink has made it clear that it does not have the capacity to process the volume of applications from the ICT Licensees so one can already anticipate that DataLink will not be able to make the timelines, as is the case today. For this reason, Licensees should be able to choose, from the outset, who will do the make-ready work.

Flow supports that DataLink must maintain operational control over its infrastructure. Still, supervision and control by DataLink of third- party contractors, contracted by Licensees, could become a bottle neck if DataLink does not invest in increasing capacity in this area.

**412. Logic Response**

Yes - Logic agrees that the proposed conditions are appropriate and has no further input regarding additional relevant considerations for the Office to consider.

**413. C3 Cross Comment**

No cross comment received.

**414. DataLink Cross Comment**

FLOW has commented on capacity investment in its response to this question. It is essential to note that any increase in DataLink's operational expenses (OPEX) would ultimately translate into a corresponding increase for the Attaching Utilities, since DataLink's fees are cost-based.

**415. Digicel Cross Comment**

No cross comment received.

**416. Flow Cross Comment**

No cross comment received.

#### 417. Logic Cross Comment

Logic disagrees with DataLink's responses to these questions. Logic understands that the same third-parties being contracted by DataLink are used by Licensees in performing their own contracting work indicating that the standards of such third-party contractors are acceptable to DataLink. As such, there should be no reason for DataLink to deny use of the same contractors to be engaged to provide the same services to the Licensees as would be provided to DataLink in respect of make-ready work.

#### 418. Office Response

The Office notes that Logic agreed with the proposed conditions while C3 did not provide input and Digicel referred to its response to Question 37. Flow submitted that attachers should have the ability to choose at the outset to have make-ready work done by a third party as "*one can already anticipate that DataLink will not be able to make the timelines, as is the case today.*"

DataLink submitted that "*the proposed conditions regarding third-party contractors for make-ready work are not suitable*" for the reasons set out in its response to Question 37, and noted that its "*primary focus is on fulfilling its obligations and responsibilities within the scope of its agreement with CUC, ensuring effective coordination and cooperation among all parties involved in the joint use of infrastructure.*"

The Office notes that DataLink's ability to meet the timelines for make-ready work will depend in part upon the resources that DataLink is willing to bring to bear. It is therefore not appropriate to assume from the outset, as does Flow, that DataLink will not be able to meet the timelines. The Office considers, therefore, that the condition that "*DataLink has failed to meet the timelines ... and DataLink and the relevant attaching utility have not agreed to new timelines*" remains appropriate.

The Office notes DataLink's submissions that it is not appropriate to require DataLink to permit or impose conditions on third-party contractors, and that its primary focus is to ensure effective coordination and cooperation among all parties. However, the Office also notes the views expressed by the Authority in 2016 regarding "*... the apparent lack of adequate planning and coordination with the relevant Licensees of the pole attachment process ...*"<sup>155</sup> The Office considers that the planning and coordination has not improved materially since then,<sup>156</sup> which 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. The Office is of the view, therefore, that DataLink's pole sharing agreements, including with CUC, should be modified in order to ensure an efficient, economic and harmonised utilisation of utility pole infrastructure.

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<sup>155</sup> Paragraph 175 of ICT Consultation 2016-2, reproduced at paragraph 345 of the Consultation Document.

<sup>156</sup> See paragraph 299 of the Consultation Document.



### c) 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.

#### 419. C3 Response

Agreed.

#### 420. DataLink Response

DataLink agrees with this proposal.

It is important to note that Make Ready work aims to facilitate the attachment of four half-inch (1/2) cables to the designated attachment points within the Communication Space, as outlined in Appendix D of the MPJUA. However, as explained above, a historical and ongoing issue is the practice of "cherry picking" by the Attaching Utilities, where they selectively choose specific locations for Make Ready applications. Currently, there is no overlap between the areas selected by the four Attaching Utilities for Make Ready work. This cherry picking has strained the limited resources which DataLink has available for Make Ready work.

While the MPJUA does provide a mechanism for a refund to the Attaching Utilities to recover some of the costs incurred for Make Ready, it is only effective if another Attaching Utility attaches within a two-year period. DataLink has previously proposed to the Office that this period be extended to between five and ten years, as it allows for a more reasonable timeframe. It is worth mentioning that, in cases where unauthorised attachments are made without DataLink's knowledge, the primary Attaching Utility cannot receive the refund until DataLink receives payment from the second Attaching Utility. This process has been observed in the past.

DataLink remains committed to finding solutions that optimize the use of resources and ensure fair and efficient processes for all Attaching Utilities involved in joint use. These considerations are essential for promoting effective infrastructure sharing and maintaining the integrity of the joint use system.

**421. Digicel Response**

Digicel agrees with the Office's position on this.

**422. Flow Response**

Flow does not agree that Attachers should cover the cost for a new pole because they would have already paid to attach to the current pole.

**423. Logic Response**

Yes - Logic generally agrees with this proposal. Logic does note however that consideration must be given to instances whereby forecasts of attachers change and/or where attachers subsequently include such poles in their forecasting, where costs have already been paid by proposed attachers (i.e. refund calculation processes).

**424. C3 Cross Comment**

No cross comment received.

**425. DataLink Cross Comment**

In response to Logic's comment regarding the need to consider instances where attachers' forecasts change or where poles are subsequently included in their forecasting, DataLink emphasizes that all Attaching Utilities are required to confirm the inclusion of specific poles in their forecasts before any Make Ready work commences. This confirmation process ensures that attachment forecasts are up to date and accurate.

**426. Digicel Cross Comment**

No cross comment received.

**427. Flow Cross Comment**

No cross comment received.

**428. Logic Cross Comment**

No cross comment received.

#### 429. Office Response

The Office notes that all parties except for Flow agreed with the Office's proposal.

DataLink submitted that, historically, there has been little overlap among the geographic areas where attachers have chosen to submit permit applications, which has strained DataLink's limited resources. DataLink also proposed changes to its make-ready refund process.

Logic submitted in addition that the Office should take into account situations where forecasts are changed after make-ready work has been paid for by other attachers, i.e., a refund process.

Flow disagreed that existing attachers should cover the cost of a new pole in these circumstances because they would already have paid to attach to the current pole.

The Office notes that the effect of its proposal in Question 39 is that, upon receipt of a permit application, DataLink would replace an existing pole with a new pole capable of accommodating up to four attachers, even if there is sufficient space in the existing Communications Space to accommodate the request without replacing the pole. (The Office notes, for example, that a pole with a 1-foot-8-inch Communications Space<sup>157</sup> can accommodate two attachments with a 12-inch separation between them. If such a pole had one existing attachment, it could accommodate a second without needing to be replaced. The Office's proposal in this Question 39 would not take this into account and simply have the pole replaced.)

Under the Office's proposal, the associated costs would be shared by all attachers who had included the pole in their forecasts, as they would eventually be using that pole and therefore be deemed to have collectively caused the need for the new pole, and as the Office considered that it would be more efficient and economical to change and pay for the pole earlier than later. The Office considers that basing the cost-sharing on forecasts would be an equitable way of allocating the costs among eventual users of the pole and would help lower the upfront charges paid by each individual attacher. This approach would, therefore, facilitate the rollout of ICT networks and promote competition in the provision of ICT networks and ICT services. It would also be easier to administer, in the Office's view, than a refund process (although the Office considers that a make-ready work charge refund process would still be required, to prevent attachers from waiting to attach until after others had paid for the make-ready work, and to reflect the fact that, as noted by Logic, forecasts can change).

The Office notes Datalink's comment about the lack of overlap among the geographic areas selected by the four attachers for make-ready work. The Office considers that its proposal would address this concern, at least in part, as a given area would be made ready for all attachers at the same time even if only one requested access in the immediate term.

Whether an existing attacher would share in these costs would depend upon whether the forecasts would be required to include only new attachments or also existing attachments (the Office refers to the discussion at Question 29 above).

For greater clarity, though, the Office notes its proposal in this Question 39 could result in Flow sharing the costs of a new pole in certain circumstances. This is because, currently, CUC would initially install in new "greenfield" developments poles suitable only for the purposes of distributing electricity – CUC has taken the position that section 7.1 of its T&D Licence prohibits the creation

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<sup>157</sup> This is the standard Communications Space that would have historically been created under the 1996 Pole Sharing Agreement between Cable & Wireless and CUC.

of a Communications Space on a pole without an upfront payment from a third party to do so.<sup>158</sup> If Flow were the first ICT Licensee to request to attach to such poles, DataLink would replace them with poles capable of accommodating up to four attachers and Flow would share the cost of the new pole with other potential attachers. Similarly, if DataLink were to provide forecasts of CUC's new poles and if Flow were to be one of the attachers expressing interest in using those poles, Flow would share in the costs of establishing a Communications Space.

**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.

**430. C3 Response**

Agreed.

**431. DataLink Response**

DataLink offers no view as to whether the Office has such power, but considers that the proposed solution is desirable.

**432. Digicel Response**

The Office has the power to make any general determination that will ensure that infrastructure sharing is based on cost-oriented rates that are reasonable having regard to economic feasibility. The Office also must ensure that such rates shall be sufficiently unbundled such that the licensee requesting the 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.

**433. Flow Response**

While Flow does not agree with the Office's proposal, it does appear that the Office is empowered under Section 6(2)(d) of the URC Act to promulgate Regulations to achieve the outcome.

**434. Logic Response**

Yes - in Logic's view, the Office has the power to mandate such a solution under the Act and Regulations, specifically pursuant to Section 9 of the ICT Act.

**435. C3 Cross Comment**

No cross comment received.

**436. DataLink Cross Comment**

No cross comment received.

**437. Digicel Cross Comment**

No cross comment received.

**438. Flow Cross Comment**

No cross comment received.

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<sup>158</sup> However, the Office has not seen any evidence that CUC or DataLink notify attachers that CUC intends to install new poles for electricity distribution purposes. Attachers therefore have no opportunity to express an interest in sharing those poles until after CUC has spent the money to purchase and install them.

#### 439. Logic Cross Comment

No cross comment received.

#### 440. Office Response

The Office notes there was a range of views among the parties in response to this Question 40.

C3 agreed the Office had the power to mandate the proposed solution but offered no explanation or rationale.

DataLink expressed no views on whether the Office had such power.

Digicel submitted that the Office had the power to make any general determination to ensure infrastructure sharing is based on cost-oriented rates that are reasonable having regard to economic feasibility and that are sufficiently unbundled.

Flow, while it disagreed with the proposal, submitted that the Office had the power to mandate it through regulations made under section 6(2)(d) of the URC Act but did not provide detailed reasoning to explain its position.

Logic submitted the Office had the power under section 9 of the ICT Act but did not provide detailed reasoning to explain its position.

The Office notes that the powers cited by Digicel relate to price-setting. Here, the Office's focus is on the make-ready process, not on prices. The Office considers, therefore, that the powers cited by Digicel are not applicable here.

The power cited by Flow in section 6(2)(d) of the URC Act is the power to "*make administrative determinations, decisions, orders and regulations.*" While this is an important power in the circumstances, the Office does not consider it to be a substantive power specifically regarding infrastructure sharing.

Logic cited section 9 of the ICT Act, which sets out the powers and functions of the Office, without identifying any specific provisions in that section. As a result, it is not possible to identify which specific powers or functions Logic considers to be relevant in these circumstances.

The Office notes that, under the ICT Act, ICT licensees are required to share their ICT infrastructure with each other upon request, with limited exceptions [sections 65(1), 65(2) and 69(3)]. The requester must pay, among other things, the costs incurred by the responder in accommodating the request [section 68(1)] but cannot be required to pay for network components that are not necessary to satisfy the request [section 68(3)].

The Office understands that utility poles are typically supplied to utilities like CUC in five-foot increments. In other words, it is not possible to procure a pole, for example, that is only one foot taller in order to satisfy a need for an additional 12-inch space in the Communications Space. Rather, it is necessary to procure a pole that is a minimum of five feet taller. The request for an additional one foot of space will therefore require DataLink to invest in a five-foot taller pole and, as a result, create more than one additional foot of space in the Communications Space.

The Office notes that three<sup>159</sup> of the four attachers have obligations in their ICT licences to build out fibre networks across Grand Cayman. Given that attaching that fibre to utility poles is likely

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<sup>159</sup> C3, Digicel and Logic.

often the most cost-effective way of rolling out a fibre network, the Office **anticipates** that at least two of those three attachers, if not all three, will seek to attach to any given joint use pole at some point in time as they roll out their fibre networks.<sup>160</sup> The Office notes that these three attachers would signal their intent to use a pole through their forecasts to DataLink.

Because these three attachers will likely be using the same joint use poles across Grand Cayman, the Office considers that they will likely be requesting access to the same joint use poles at some point in time. Because all three attachers must serve the same geographic areas and the same customers across Grand Cayman, the Office **deems** that they will sooner or later be requesting access to the same individual poles (subject to their forecasts). All three will therefore trigger the need for DataLink to create an additional foot of space in the Communications Space on that pole in order to satisfy the request, even though one of them might not have made the request at a given point in time.

In other words, even though only one of the three attachers may have requested access to a given pole at a given point in time, at least one of the other two will be requesting access to that same pole and can be **deemed** to be making a future request for access to that same pole. Either the current request or the future request will necessitate replacement of the pole, depending on available capacity. The most efficient approach would be to bring forward that pole replacement (assuming it is not required immediately), as this would minimize disruption to existing attachers and to consumers (as there will be fewer attachers and therefore fewer networks serving customers at that point in time), and to have all requesters – current and future – pay a share of the costs of the new pole, as this would lower the upfront costs of access to all requesters.

As noted above, all requesters, current and future, must pay for the costs of accommodation associated with their requests. The most efficient approach is for all requesters to pay for pole replacement sooner than later. The Office considers, therefore, that all requesters **must** pay for the costs associated with pole replacement when the first request for attachment is made.

The Office further considers that, if an ICT licensee has an obligation under the ICT Act (in this case, to pay for the costs of accommodation associated with their request for attachment), the Office can mandate that the ICT licensee satisfy that obligation [section 6(2)(gg) of the URC Act]. The Office notes that this approach would be consistent with the Office's functions under sections 9(3)(h) and 9(4) of the ICT Act.

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<sup>160</sup> The Office acknowledges that there are other ways to roll out fibre network, notably to build or to use pre-existing underground duct infrastructure, but this is typically more expensive and difficult than using utility poles.

**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.

**441. C3 Response**

Yes. Would be a commercial agreement outside a regulatory mandate, subject to standard contract law.

**442. DataLink Response**

It would of course be open to the parties to agree on such a solution. However, the question of whether they will be able to reach a consensus on such a solution is a different matter. DataLink would therefore encourage the Office to give careful and close consideration to the question of whether it has the power to mandate such a solution under the current ICT Act and Regulations.

By way of background, and for completeness, DataLink had proposed a "we will lead, you follow" approach to Make Ready, where all Attaching Utilities would be required to build out their network at the same locations and within the same timeframe. However, this approach did not receive support from the Attaching Utilities at that time.

Furthermore, according to CUC's Transmission and Distribution (T&D) License, they are not permitted to undertake work for the Attaching Utilities unless an application is submitted. Unless the Office provides explicit support to CUC to adopt the "we will lead, you follow" approach, DataLink remains reliant on the Attaching Utilities to submit their Make Ready locations.

DataLink recognizes the need for a collaborative and coordinated effort among all stakeholders to effectively address the challenges of Make Ready. DataLink is committed to engaging in constructive discussions and exploring feasible solutions to ensure efficient and streamlined processes within the constraints of the existing regulatory framework.

**443. Digicel Response**

Digicel's view is that the owner utility and the attacher can agree to a mutually beneficial solution.

**444. Flow Response**

The parties can agree to such a solution as a term of their contract and it can be enforced as such.

**445. Logic Response**

Logic assumes for the purposes of this question, the Office is rereferring to mutual commercial agreement between the parties the proposal set out at Question 39. Logic does not believe that the parties can agree to such a solution. Each party has differing commercial interests, motivations and commitments and as such, Logic does not believe that all parties will be able to come to a mutual agreement.

**446. C3 Cross Comment**

No cross comment received.

**447. DataLink Cross Comment**

Logic has observed that "Each party has differing commercial interests, motivations, and commitments, and as such, Logic does not believe that all parties will be able to come to a mutual agreement". Whilst it is of course possible, in principle, for the parties to agree such a solution, it

is worth noting that, during the original working group discussions, it was indeed challenging to secure unanimous agreement on various points, given each Attaching Utility's need to prioritize its own commercial interests.

**448. Digicel Cross Comment**

No cross comment received.

**449. Flow Cross Comment**

No cross comment received.

**450. Logic Cross Comment**

No cross comment received.

**451. Office Response**

The Office notes that most parties agreed that the parties could agree commercially to this approach, but DataLink and Logic expressed scepticism that the parties would in fact reach such consensus.

The Office notes DataLink's comment that it had proposed a "we will lead, you follow" approach to coordinate make-ready work but that this approach did not receive support from Attaching Utilities at the time. The Office will not take a view here on DataLink's proposed approach and on the apparent responses from the attachers. The Office, however, considers it important than any approach which is ultimately adopted incorporate a mechanism to take into account the actual network rollout requirements of the attachers.

**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.

**452. C3 Response**

Agreed. Would be more efficient, less costly and aid in rapid fiber rollout.

**453. DataLink Response**

DataLink respectfully disagrees with this alternative proposal. As explained above, DataLink considers that it is more practical and efficient to replace poles with ones capable of accommodating up to four attachers during the initial replacement process.

According to NESC Rule 235H, which has been in effect since 2002, the spacing between messengers' supporting communication cables should be no less than 300mm (12 inches).



DataLink has entered into MPJUAs with multiple Attaching Utilities between 1996 and 2016, as well as in subsequent years.

Considering that all ICT Licensees, with the exception of one Attaching Utility, are obliged to roll out a Fiber based network in the Cayman Islands, it is essential to allocate sufficient space for up to four Attaching Utilities at the time of pole replacement. This approach avoids the need for repeated visits to the same pole when additional Attaching Utilities request attachments. Additionally, each pole replacement requires obtaining permission from the landowner for the prescribed work, making it redundant to approach the same landowner multiple times for accommodating different Attaching Utilities with valid MPJUAs.

Moreover, the assumption made by the Office that each Attaching Utility would only attach one cable per attachment point on the pole does not align with the Audit findings. In the eastern districts, for instance, where there is currently only one Attaching Utility, a significant number of poles (995 out of 2,185) have two or more attachments. There were even instances where poles were found to have up to eight attachments.

DataLink believes that replacing poles to accommodate multiple attachers during the initial replacement process is a more efficient approach, taking into account the requirements of NESCC, the obligations of ICT Licensees, and the practicality of working with landowners. This approach avoids unnecessary disruptions and minimizes the need for repeated pole replacements in the future.

DataLink asserts that it is imperative to maintain the poles in compliance with the most current wind loading criteria. As industry standards evolve and update, it is within CUC's right to adhere to these standards. Ensuring that the poles meet the latest wind loading criteria is crucial for maintaining the integrity and safety of the entire communications infrastructure. By adhering to updated industry standards, CUC demonstrates its commitment to providing a reliable and secure network for the benefit of all stakeholders involved.

#### **454. Digicel Response**

Digicel supports the view that Datalink should first attempt to accommodate all attachment requests within the existing communications space before replacing the pole with a pole that can accommodate up to four (4) Attachers. However, Digicel believes that Datalink should solely bear the cost of pole replacement and replenishment as the single provider of critical infrastructure in the Cayman Islands and owner of the Datalink assets that it charges attachment fees as well quarterly recurring fees.

#### **455. Flow Response**

Flow is agreed.

#### **456. Logic Response**

Logic does agree that DataLink should first attempt to accommodate all attachment requests within the existing communications space taking into consideration the forecasting proposals above which would allow DataLink generally to determine capacity on such poles, prior to replacing such pole. Logic does not agree that a requestor should pay for the cost of replacing a pole with one which can accommodate up to four attachers (assuming the relevant existing pole does not have appropriate space). In such a case, Logic believes the approach at Question 39 (i.e. DataLink's replacement of the relevant pole with costs to be shared) should be adopted.

**457. C3 Cross Comment**

No cross comment received.

**458. DataLink Cross Comment**

Although the Attaching Utilities are unanimously in agreement with the Office's alternative proposal, this appears to clash with Question 39, which implies that DataLink should replace the pole with one capable of accommodating up to four attachers, with the costs to be shared by all attachers who have included the pole in their attachment demand forecasts. DataLink finds it somewhat contradictory for Attaching Utilities to concur with both questions. It is worth noting that Logic is the only Attaching Utility that explicitly references Question 39 in their response, indicating agreement with the pole replacement and cost-sharing proposal.

DataLink believes that it is imperative to maintain the pole structure and design in compliance with the most current wind loading criteria. Pole structures designed and implemented for one Attaching Utility are not in all cases capable of accommodating additional attachers as per the standards at the time of implementation or current standards. As industry standards evolve and are updated, CUC is responsible for adhering to them. Ensuring that the poles meet the latest wind loading criteria is crucial for maintaining the integrity and safety of the entire communications infrastructure, to be able to provide a reliable and secure network for the benefit of all stakeholders involved.

**459. Digicel Cross Comment**

No cross comment received.

**460. Flow Cross Comment**

No cross comment received.

**461. Logic Cross Comment**

Logic agrees with it being more efficient for Datalink to make-ready a pole for 4 attachers. However Logic does not believe the cost for this should be absorbed by the requesting attaching utility.

**462. Office Response**

The Office notes that all parties except for DataLink agreed with the Office's proposal in this Question 42. However, most parties also agreed with the Office's proposal in Question 39, even though the two proposals were mutually exclusive alternatives to each other. In light of the discussion at Question 39 above, the Office does not intend to pursue further this proposal here.

## **d) 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"?

#### **463. C3 Response**

Agreed.

#### **464. DataLink Response**

DataLink agrees with this view and supports the decision to maintain the existing definition as it stands.

DataLink recognizes that the term "standard utility pole" is a well-established and commonly understood industry term, encompassing the typical poles used for utility infrastructure. It is essential to maintain consistency and clarity in the interpretation of this term across the industry.

Furthermore, DataLink appreciates the Office's consideration of maintaining regulatory stability by not introducing changes to the definition of "standard utility pole" at this stage. Stability and consistency in regulatory frameworks provide certainty for all stakeholders involved in joint utility infrastructure usage.

DataLink wishes to continue to adhere to the existing definition of "standard utility pole" as defined within the relevant regulations and agreements. By adhering to the established definition, DataLink ensures alignment with industry norms and practices, facilitating efficient joint utility infrastructure usage.

Any future changes to this definition can be explored and evaluated through appropriate processes, ensuring all stakeholders have the opportunity to provide input and engage in consultation.

#### **465. Digicel Response**

Digicel agrees with the Office's position that consultation on this is not necessary at this time.

#### **466. Flow Response**

Flow is not so much concerned with the definition of a standard pole so much as it is concerned about the cost of poles charged to ICT Licensee by DataLink. Based on its 2016 assessment of CUC's invoices, the average height of bare poles installed by DataLink was 39ft, which at the time produced a cost of \$533 and yet at that time DataLink calculated the net cost of a bare pole to be

\$900. The accurate cost of the average height of the bare poles must be used in DataLink's calculations.

**467. Logic Response**

Yes - Logic agrees with this preliminary view (on the basis that any new definition would have significant implications on the apportionment of costs associated with installing such poles)

**468. C3 Cross Comment**

No cross comment received.

**469. DataLink Cross Comment**

DataLink affirms, in response to FLOW's comment, that the cost associated with the average height of bare poles is factored into DataLink's calculations when providing Make Ready estimates.

**470. Digicel Cross Comment**

No cross comment received.

**471. Flow Cross Comment**

No cross comment received.

**472. Logic Cross Comment**

No cross comment received.

**473. Office Response**

The Office notes most parties agreed with the proposal not to propose for consultation a revised definition of "standard utility pole." As a result, the Office will not pursue this matter further at this time.

The Office notes Flow's concerns about the use of the accurate cost of the average height of bare poles. This is more properly addressed in the section on pricing below.

**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.

**474. C3 Response**

No input.

**475. DataLink Response**

As noted above, DataLink agrees with the Office's preliminary view on this matter and supports the decision to maintain the existing definition without further modifications.

**476. Digicel Response**

Please refer to response provided on Question 43.

**477. Flow Response**

Flow is not so much concerned with the definition of a standard pole so much as it is concerned about the cost of poles charged to ICT Licensee by DataLink. Based on its 2016 assessment of CUC's invoices, the average height of bare poles installed by DataLink was 39ft, which at the time produced a cost of \$533 and yet at that time DataLink calculated the net cost of a bare pole to be \$900. The accurate cost of the average height of the bare poles must be used in DataLink's calculations.

**478. Logic Response**

N/A

**479. C3 Cross Comment**

No cross comment received.

**480. DataLink Cross Comment**

No cross comment received.

**481. Digicel Cross Comment**

No cross comment received.

**482. Flow Cross Comment**

No cross comment received.

**483. Logic Cross Comment**

No cross comment received.

**484. Office Response**

The Office notes the responses of the parties to this Question 44 and refers to its own response at Question 43 above.

## B. Issues Relating to the Charging Principles (Consultation 2016-2 Part C) - Proposals and Questions

### 485. DataLink Response

In addition to the questions raised in this section, DataLink will seek to address certain observations made by the Authority (as noted in the Introduction at the outset of these responses, above, insofar as they appear material and/or the time allowed has permitted it to do so).

#### Introductory Observations

Paragraph 499 states: *“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”.*

This view is directly opposite to the views expressed by the Attacher with the place at the top of the poles (namely C3), which submitted the determination request noted at paragraph 12 of Appendix 1 of the Consultation, in respect of which the Authority ultimately issued the decision noted at paragraph 26 of Appendix 1 of the Consultation.

Paragraph 500 further states: *“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”.*

As noted above, on February 4th 2022, OfReg granted DataLink’s request to amend its license by removing its fibre rollout obligation and allowing the pole attachment space allocated to DataLink to be allocated to Digicel. Paragraph 500 does not appear to consider the effect of the license amendment, nor the fact that the pole attachment space has in fact been allocated to Digicel.

### 486. Office Response

The Office notes that ICT Decision 2016-1 determined the position on the poles to be occupied by different attachers.<sup>161</sup> It did not address the potential impact of such placement on the prices to be paid by the different attachers.

The Office also notes that it addressed the matter of the effect of DataLink’s ICT licence amendment at Question 2 above

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<sup>161</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, at paragraph 141.  
<https://www.ofreg.ky/viewPDF/documents/ict-decision/2021-05-13-05-45-10-ICT-Decision-2016-1-Infinity-DataLink-Pole-Attachment-Decision.pdf>

## 2. 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.

#### 487. C3 Response

No. It should be based on a bare pole, no more than say 30’ that would ensure that there is space for 18’6” road crossing height. The 3’ for attaching telcom utilities, safety space from 21’6” to 25’ and the space for CUC to connect it power, any poles above this height would only be for the benefit of CUC infrastructure, there should be no annual CPI increases for the space. This would therefore also change the formulas as it relates to the space allocation on the pole.

#### 488. DataLink Response

The Office has noted DataLink’s previous responses relating to this matter, including at paragraph 510 (c), that:

*“the attachment of telecommunications cables does not cause an incremental requirement to augment the height or strength of poles and... any incremental cost relates solely to attaching cables;”*

DataLink further notes that there is indeed a requirement for taller and stronger poles/pole network which does lead to incremental costs solely relating to attaching cables. The average required height for poles required only to support electricity cables is 35 feet. On the other hand, the height of an electricity pole required to support attaching cables must be at least 40 feet. There is of course a price differential for the two poles: by way of example, a 35ft pole costed US\$662.17 landed, as at July 14th 2023, whereas a 45ft pole had a landed cost of US\$1,322.77 as at that date. Additionally, the two different pole heights mean that there are differences in the amounts of labor and material required to install them.

DataLink has, in the past, also provided evidence of the impact of the additional attachments on the poles during hurricanes due to additional wind loading. As a result, greater strengthening and lower spans length (i.e. shorter distances between poles, resulting in the utilization of more poles than CUC alone would require across the same space) is required to protect the integrity of the T&D system.

At paragraph 511 (b), the Office records an assertion by Flow (first noted at paragraph 509 (u)) that: *“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”*.

However, as we trust the Office is aware, the institution of separate regulatory regimes for telecommunications, on the one hand, and electricity, on the other, necessitated the creation of a company separate from CUC. DataLink understands and believes that the provision of the pole attachment service is classified as telecommunication in nature and necessarily had to be separated legally into a different service in order to preserve the integrity of the two business

lines. DataLink therefore wishes to note, insofar as it may affect the Office's own views on this matter, that the assertion made by Flow is misconceived.

At paragraph 531, the Office expresses the view that: *"...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"."*

DataLink notes that the Office has, to date, made no recommendations regarding an appropriate model and has proposed to utilize USA prices for benchmarking at paragraphs 553 and 568 of the Consultation. Paragraph 568 refers to the jurisdictions of USA, UK, Ireland & Canada as relevant jurisdictions.

The Office has purported, in paragraph 553, to compare US prices in 2018 to Cayman Islands prices in 2022. Even putting to one side the appreciable and material time difference, a country such as the USA, and indeed any of the other jurisdictions to which the Office has referred, are not comparable in any industry, from telecommunications to mortgage rates to fuel for myriad reasons.

DataLink considers that the pricing formula for calculation of annual attachment fees is an appropriate pricing methodology. DataLink chose an existing methodology from a more mature market in an effort to avoid significant disagreement with the rate structure given that the chosen methodology had already been questioned in that country, which is considered a relevant jurisdiction. DataLink reviewed multiple jurisdictions, given that CUC is listed on the Toronto Stock Exchange and given that most companies on island utilize US GAAP accounting principles, and it was decided that initial preference would be given to US and Canadian methodologies. UK methodologies were also considered. Canadian provinces all have differing methodologies and requirements as it relates to telecom attachments. The DataLink contacted multiple utility companies in Canada and due to the Fortis network, received multiple contracts for review and comparison. Notwithstanding its receipt of this information, due to the inaccessibility of these agreements, the methodologies of the various Canadian sectors were at that time deemed insufficient in terms of transparency. The same lack of transparency occurred with the UK. At the time of research and rate design, the US market was one of the few with similar infrastructure (most pole and telecoms equipment is sourced from the US) with a completely transparent rate structure as well as clear instructions on accounting for the same. For this reason, DataLink continues to deem this methodology as appropriate for the Grand Cayman market.

#### **489. Digicel Response**

As per paragraphs 569-584, Digicel agrees, that the pricing methodology for calculating the annual attachment fees are excessively high and simultaneously increase CUC/DataLink's profit and limit the harmonized utilization of infrastructure sharing.

#### **490. Flow Response**

Flow does not agree that DataLink's pricing methodology and calculation for the Annual Attachment Fee is appropriate.

#### **491. Logic Response**

Yes - Logic believes the pricing formula is an appropriate pricing methodology.



**492. C3 Cross Comment**

No cross comment received.

**493. DataLink Cross Comment**

Yes, Datalink believes that the pricing formula is an appropriate pricing methodology as per FCC recommendations. The pricing takes into consideration the rate of inflation on an annual basis, as is done in other jurisdictions. Response to C3: The formula DataLink utilizes does take the net cost of a bare pole into consideration. The net cost of a bare pole is derived from actual data as recorded in CUC's Asset Register. The space factor allocation considers all of the points raised by C3, this portion of the formula seeks to assign the cost of usable space on the pole based on the proportionate share of usable space occupied by the attachers and assigns costs relating to the unusable space on the pole using a per-capita allocator.

**494. Digicel Cross Comment**

No cross comment received.

**495. Flow Cross Comment**

No cross comment received.

**496. Logic Cross Comment**

No cross comment received.

**497. Office Response**

DataLink continues to consider the pricing methodology it implemented for calculation of the "Annual Attachment Fee", as appropriate for the Grand Cayman market. DataLink argues that it had considered the pricing methodologies implemented in different jurisdictions, namely the USA, Canada and the UK, before it chose the FCC methodology as "*an existing methodology from a more mature market in an effort to avoid significant disagreement with the rate structure given that the chosen methodology had already been questioned in that country.*"

Logic also considers that DataLink pricing formula is an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles.

On the other hand, Digicel and Flow do not consider DataLink pricing formula for calculation of the "Annual Attachment Fee" to be an appropriate pricing methodology for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles, while C3 appears to accept the pricing methodology but does not agree with the specification for some of the parameters in DataLink pricing formula, namely the height of Bare Pole and the use of inflation factor.

Overall, therefore, the parties have diverging views on whether or not DataLink pricing formula is appropriate for determining cost-oriented prices for attachment of communication cables onto CUC's utility poles.

DataLink further argues that the Office has not yet made recommendations regarding the appropriate pricing model. The Office, however, notes that an alternative pricing model can only be proposed once it has been established that the current pricing model is not appropriate.

Also, in response to the Office's benchmarking of recurring charges, DataLink has challenged the analysis presented by the Office in paragraphs 553 to 568 of the Consultation, including the comparison between US prices in 2018 and DataLink's prices in Q2 2022, not only because of

"material time difference" but also due to lack of comparability between the Cayman Islands and other countries benchmarked in the Consultation (USA, UK, Ireland and Canada).

The Office notes that there appears to be a temporal mismatch in the comparison between pole attachment changes observed in the USA in 2018 and those applied by DataLink in Q2 2022, however, as the Office noted in paragraph 555 of the Consultation, the current recurring charges have either increased or decreased compared to the recurring charges set for the initial period of the respective contracts.

In fact, the recurring charges applied in the period Q1 2017 to Q4 2022 were set within the range [redacted] to [redacted], on a quarterly basis, except for [redacted] in which case the recurring charges in the period Q1 2017 to Q4 2020 were set within the range of [redacted] to [redacted]. The Office further notes that the recurring charges applied by DataLink in 2018 were set at [redacted], except for [redacted] in which case the recurring charges were set at [redacted], in accordance with DataLink's response to RFI 103.

Since the prices in the Cayman Islands observed in 2018 were broadly similar to those referred to by the Office in paragraph 554 of the Consultation, this means that the comparison between the prices observed in the USA in 2018<sup>162</sup> and those observed in the Cayman Islands in Q2 2022<sup>163</sup> is still valid, regardless of the apparent "material time difference".

As for Datalink's claim that "a country such as the USA, and indeed any of the other jurisdictions to which the Office has referred, are not comparable in any industry, from telecommunications to mortgage rates to fuel for myriad reasons", the Office however questions the reasons why the recurring charges for pole attachments in the Cayman Islands are higher by [redacted] % to [redacted] %, when compared to regulated wired pole attachment rates in the USA.<sup>164</sup>

Such difference in pole attachment prices is even more surprising given that DataLink pricing formula is largely based on the same pricing methodology that has been applied to calculate the regulated wired pole attachment rates in the USA.

**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.

**498. C3 Response**

No input.

<sup>162</sup> 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 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 (see "Survey of Rates for Pole Attachments and Access to Rights of Way" commissioned by the Broadband Deployment Advisory Committee of the FCC, referenced at paragraph 553 of the Consultation and available at <https://www.fcc.gov/broadband-deployment-advisory-committee>).

<sup>163</sup> [redacted] per quarter

<sup>164</sup> [redacted] % = [redacted] x 4 / (US\$13.97 x 0.82) - 1

[redacted] % = [redacted] x 4 / (US\$9.90 x 0.82) - 1

#### 499. DataLink Response

DataLink continues to deem the FCC methodology as appropriate for the Grand Cayman market.

#### 500. Digicel Response

Digicel believes that the same formula, methodology and annual attachment fees should be standardized for all attachers. Research have shown that the annual rates in Cayman are greater than that of other territories, i.e. Canada, UK and Ireland.

#### 501. Flow Response

DataLink's pricing formula does not comply with the relevant costing principles. DataLink's pricing formula is based on "value of service" and not incremental costs, which is not a lawful basis under the Regulations. Incremental cost achieves economic and allocative efficiency for the market. Because there are no competitive constraints on DataLink's price, "value of service" pricing leads to unreasonable and excessive monopoly pricing.

As previously submitted to Ofreg in its response to '*Public Consultation On Pole Attachment Reservation Fees, Permits Application Process And Charging Principles*', dated July 12, 2016 (2016 Response), Flow identified seven issues with DataLink's pricing formula, which are as current today as they were then. These are:

i. **Net cost of bare pole is overstated:** In 2016, Flow's assessment was that the net cost of a bare pole was overstated by 69% based on its review of the average height and cost of installed poles included in the quarterly invoices received from CUC. There has been no change in DataLink's methodology since 2016 so there is no reason to believe that overcharging has abated.

ii. **"Space Factor" is mis-specified:** Attachers bear an excessive portion of the "common costs" of CUC poles because the size of the "unusable space" is overstated. The space occupied by individual attachers is miscalculated, and the '2/3' factor is inappropriate as it allocates 2/3 of the "unusable space" to attachers when, none of such costs were "caused" by, and therefore should not be allocated to, ICT Licensees.

iii. **Double Counting the Impact of Inflation:** The pricing formula double-counts 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.

iv. **Overhead expense are excessive:** Including separate cost elements for "Management & Overhead" and "Administrative" has the effect of double counting, creating artificial costs. Particularly since there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC.

v. **The calculations of the "Maintenance" and "Administration" elements of the carrying charge is flawed:** Both are expressed as percentages calculated of CUC totals, divided by the NBV of CUC's total assets. This approach is unreasonable, because if CUC decides 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. 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. Further, 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 ICT Licensees.

vi. **Cost of Capital used in the pricing formula is misstated and excessive:** Cost of Capital 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. 1CUC declares a WACC for fiscal 2022 of 7.25% and for 2021 of 7%. Even so a WACC of 7.25% would result in DataLink’s telecommunications customers subsidizing CUC’s business since the utility poles are included in CUC’s fixed assets, and CUC is already generating a return on assets through its regulated Return on Rate Base (**“RORB”**), 2targeted in the range 6.25% - 8.25% for fiscal 2022. Since CUC is already recovering 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. This should not be the case. DataLink’s return should be limited to its own assets.

vii. **pricing formula appears to vary across Attachers in a manner that is discriminatory:** DataLink’s pricing formula appears to be different in the different pole sharing agreements in a manner that appears discriminatory. This is contrary to the Regulations.

**502. Logic Response**

N/A

**503. C3 Cross Comment**

No cross comment received.

**504. DataLink Cross Comment**

Response to Digicel comment: DataLink does utilize the same formula methodology for the annual attachment fee for all attachers. All attachers are being billed the exact same rate for the annual pole attachment fee. As regards Digicel's comments on the annual rate in Cayman being higher than in Canada, UK and Ireland, the same can be said for all costs found in the Cayman Islands, from groceries to mobile services (as noted in the introduction to DataLink’s previous response, hence the inappropriateness of purporting to use such countries as comparables).

Response to FLOW comment: The "Annual Pole Attachment fee" is not based on "value of service" as it is directly derived from the historical cost of poles in service. The "Net cost of a bare pole" (from CUC's Pole Asset Register) are actual costs which are audited by CUC’s financial auditors and submitted for review to OfReg Electricity. In relation to the response provided by FLOW to question 7 regarding the 2016 methodology, DataLink agrees that, in light of the existing contractually negotiated agreement, any modifications to such agreements would necessitate negotiation and subsequently be reflected in a new MPJUA between DataLink and all Attaching Utility entities holding a valid MPJUA. The reference to inflation factors being double counted is addressed above as poles are not included at current costs but rather, as explained above, at historical prices via the asset register.

**505. Digicel Cross Comment**

No cross comment received.

**506. Flow Cross Comment**

No cross comment received.

### 507. Logic Cross Comment

No cross comment received.

### 508. Office Response

While DataLink "*continues to deem the FCC methodology as appropriate for the Grand Cayman market*", Digicel and Flow have expressed different views, while C3 and Logic did not provide any specific comment in response to Question 46.

Digicel argues that pricing formula should be standardized for all attachers, and it notes that the annual rates are higher compared to those observed in other countries, namely Canada, Ireland and the UK.

Flow argues that DataLink pricing formula is based on "*value of service*" and not on "*incremental costs*" which, according to Flow, leads to "*unreasonable and excessive monopoly pricing.*"

Flow further refers to "*seven issues*" it previously raised in its response to 'Public Consultation On Pole Attachment Reservation Fees, Permits Application Process And Charging Principles', dated July 12, 2016. In particular, Flow's comments are focused on (1) the specification of the net cost of bare pole, (2) the application of the "*unusable space*" in the formula for calculating the 'space factor', (3) the double-counting of inflation in DataLink pricing formula, (4) the double-counting of the costs related to 'Administrative' and 'Management & Overhead', (5) the calculations of the contribution towards 'Maintenance' and 'Administration' costs in the pricing formula for the carrying charge, (6) the mis-specification and excessiveness of the cost of capital in the pricing formula, and (7) the variability in the pricing formula across attachers.

The Office agrees with the views expressed by Digicel and Flow that the pricing formula should not vary between attachers and, therefore, should be standardized across all the Agreements with attachers.

The Office notes that neither party has proposed a specific alternative pricing methodology to be used for determining cost-oriented prices for attachment of communications cables onto CUC's utility poles.

Therefore, the Office considers that there is no compelling reasons for rejecting the pricing methodology adopted in DataLink pricing formula as the appropriate methodology for determining cost-oriented prices for attachment of communications cables onto CUC's utility poles.

However, the Office also notes all the issues identified by Flow, which would require adopting specific amendments in DataLink pricing formula to ensure that the recurring charges for pole attachments are provided at cost-oriented price.

The Office further notes that while DataLink "*continues to deem the FCC methodology as appropriate for the Grand Cayman market*", DataLink pricing formula differs in some key features from the formula applied using the FCC pricing methodology, as discussed in detail below.

First, the Office understands that since 2016,<sup>165</sup> the FCC pricing methodology for "telecom rate formula" allows for two different calculations of the pole attachment rate applied to

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<sup>165</sup> <https://www.lermansenter.com/new-fcc-pole-attachment-rate-formula-effective-march-4-2016/>

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telecommunications attachers, where pole owners can choose the one that yields the higher of the two rates.<sup>166</sup>

The two telecom rate formulas are presented below, with common and distinct features specified, as follows:<sup>167</sup>

Common features:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

$$\text{Space Factor} = \left( \frac{\text{Space occupied} + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Number of Attaching Entities}} \right)}{\text{Pole Height}} \right)$$

Distinct features in relation to “Cost” factor:

$$\begin{aligned} \text{Cost (Section 1.1409(e)(2)(i))} &= N \times (\text{Net Cost of Bare Pole}) \\ &\times \left( \frac{\text{Administrative expenses for overall Plant}}{\text{Net Plant investment}} \right. \\ &+ \frac{\text{Maintenance Expenses of Poles}}{\text{Net Pole Investment}} + \text{Depreciation Rate} + \text{Return on Investment} \\ &\left. + \text{Taxes} \right) \end{aligned}$$

Where “Net Cost of Bare Pole” is calculated as follows:

$$\text{Net Cost of Bare Pole} = 0.85 \times \left( \frac{\text{Net Pole Investment}}{\text{Total number of Poles}} \right)^{168}$$

Where *N* is the value specified as follows:

- in Service Areas where the number of Attaching Entities is 5 = 0.66
- in Service Areas where the number of Attaching Entities is 4 = 0.56
- in Service Areas where the number of Attaching Entities is 3 = 0.44
- in Service Areas where the number of Attaching Entities is 2 = 0.31
- in Service Areas where the number of Attaching Entities is not a whole number, *N* is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.<sup>169</sup>

<sup>166</sup> [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0208/FCC-15-151A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0208/FCC-15-151A1.pdf)

<sup>167</sup> See pages L-5 and L-6 at [https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January\\_BroadbandAppL.pdf](https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January_BroadbandAppL.pdf)

<sup>168</sup> The modifier 0.85 is used to remove the investment in crossarms included in Net Pole Investment, see pages L-5 and L-6 at [https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January\\_BroadbandAppL.pdf](https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January_BroadbandAppL.pdf)

<sup>169</sup> See page 26 at [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0208/FCC-15-151A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0208/FCC-15-151A1.pdf)

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Where “Return on Investment” is the applicable rate of return specified by default by the FCC as 11.25%.<sup>170</sup>

$$\begin{aligned} \text{Cost (Section 1.1409(e)(2)(ii))} &= (\text{Net Cost of Bare Pole}) \\ &\times \left( \frac{\text{Administrative expenses for overall Plant}}{\text{Net Plant investment}} \right) \\ &+ \left( \frac{\text{Maintenance Expenses of Poles}}{\text{Net Pole Investment}} \right) \end{aligned}$$

Where “Net Cost of Bare Pole” is also calculated as follows:

$$\text{Net Cost of Bare Pole} = 0.85 \times \left( \frac{\text{Net Pole Investment}}{\text{Total number of Poles}} \right)$$

Second, in comparison to the above two distinct pricing formulas applicable to the attachment of telecommunications cables on electricity poles based on the FCC pricing methodology, the formula adopted by DataLink has the following features:

$$\begin{aligned} \text{Rate} = & \left( \frac{\text{Space occupied} + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Number of Attaching Entities}} \right)}{\text{Pole Height}} \right) \times \text{Net Cost of Bare Pole} \\ & \times \text{CUC's annual carrying charge rate} \times (1 + \text{Inflation, initially set at 3\%}) \times (1 \\ & + \text{Management \& Overhead, set at 20\%}) \end{aligned}$$

Where “CUC’s annual carrying charge rate” is specified as follows:

$$\begin{aligned} \text{CUC's annual carrying charge rate} &= \frac{\text{Total Administrative and General Expenses}}{\text{Net Book Value of Total Assets}} \\ &+ \frac{\text{Total Distribution Expenses}}{\text{Net Book Value of Total Assets}} + \frac{\text{Annual Depreciation Expense of all Poles}}{\text{Net Book Values of all Poles}} \\ &+ \text{Return on Equity} \end{aligned}$$

Where “Return on Equity” is specified as 15%.

In summary, the following features differ between DataLink pricing formula and the formula applied using the FCC pricing methodology:

- DataLink pricing formula applies “Return on Equity” (set by DataLink as 15%) while FCC pricing formula uses “Return on Investment” (set as default rate of 11.25% by the FCC), as appropriate measure for the rate of return on capital invested in poles;
- Taxes are applied in one of the two applicable FCC formulas, while there is no consideration of taxes in DataLink pricing formula;
- “Net Cost of Bare Pole” value is adjusted using the modifier actor of 0.85, to remove the investment in crossarms included in Net Pole Investment, while such adjustment has not been applied in DataLink pricing formula;

<sup>170</sup> See pages 75 and 76 of FCC 2001 Order on Reconsideration at <https://docs.fcc.gov/public/attachments/FCC-01-170A1.pdf>

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- “*Inflation*” factor, initially set at 3% is applied in DataLink pricing formula, while it is not applied in the FCC pricing formula;
- “*Management & Overhead*” factor, specified as 20%, is applied in DataLink pricing formula, while it is not applied in the FCC pricing formula.

**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.**

### **509. C3 Response**

C3 Response is of the view that formula in the present Datalink MPJUA has a bit of double dipping and formula needs to be reviewed.

Net Cost of the Bare Pole- should be based on a 30’ Pole.

Space Factor- 12.5% is acceptable.

CUC Annual Carrying Charge- presently at 22% with CUC making a 15% return on asset, C3 is of the view this return should be in line with regular commercial rental asset in Cayman that range from 5-10%, not surely not 15% on an asset that it is already being used to calculate the return on its electrical distribution business.

Inflation- this is set at 3%, why are their rates for pole rental to telcom allowed to have an annual 3% inflation rate, again this will result in the cost of telcom services to increase each year, on an asset that its primary use is to deliver electrical services to its customers. Furthermore it is not insured and the last time the island was hit by a major hurricane the customer of Cayman contributed to a fund to rebuild this infrastructure, which should clearly be considered, on any revenue model used to calculate the attachment fees, maybe these fees should be used to go towards a fund in the event there is another Hurricane the people of the Cayman islands will not once again for any portion of the replacement of this infrastructure.

Rather than inflation, straight line depreciation of the asset value should be part of the cost formula.

Management & Overhead- 20% is acceptable

### **510. DataLink Response**

DataLink does not consider that any changes are required at this time.



**511. Digicel Response**

It may be advisable for Digicel to engage in further discussions with CUC to address any discrepancy and clarify the billing process for poles. Open communication and a collaborative approach can help rectify any errors, determine the correct cost structure, and ensure accurate invoicing moving forward. Digicel has assessed that the net cost of bare poles is significantly higher than expected.

Digicel believes that there are inaccuracies or unfairness in the determination of common costs and the allocation of space and associated expenses for attachers of CUC poles. To address these concerns, it would be advisable for attaching utilities to engage in discussions with CUC to clarify the specifications and methodologies used in the determination of common costs and the allocation of pole space. A collaborative approach and open dialogue may help in resolving these issues and establishing a fair and equitable cost-sharing arrangement.

Digicel believes that if CUC is already covering the full costs of the poles and generating a return through electricity rates, it may be unfair for Datalink's telecommunications customers to subsidize CUC. Addressing this issue would require a careful examination of the financial arrangements, cost allocation methodologies, and regulatory frameworks in place for pole attachments. It may involve evaluating the fairness of cost sharing, the extent to which telecommunications customers are contributing to CUC's returns, and the appropriate distribution of costs and benefits among stakeholders.

Digicel believes that the maintenance/administrative cost elements were derived using the net book value (i.e. that is the historical cost of CUC's total assets less depreciation, amortization and any other depletions) of CUC's total assets.

In principle, CUC's admin/distribution costs should not be included in prices paid for attachment to poles...as these costs would have been driven by CUC's demand for poles as opposed to the utilization of said poles by attachers. None of these costs have anything to do with actually providing 'space' on a pole for pole attachments because any utility would incur these costs 'regardless of the presence of pole attachments

In layman's terms, the cost drivers for CUC's access charges for attachment to their poles should be premised on the incremental cost of providing said access

**512. Flow Response**

Flow does not agree that DataLink's pricing formula is correct.

**513. Logic Response**

No - Logic does not believe any changes should be made.

**514. C3 Cross Comment**

No cross comment received.

**515. DataLink Cross Comment**

DataLink notes that there is no consensus on what the pricing model should look like, only that it should not look like it does (with the exception of Logic, which indicated that no changes should be made to the elements). The elements of DataLink's pricing model were chosen based upon transparency, the model is in use in a neighbouring jurisdiction and had been designed via a regulatory framework. DataLink management was cognizant that any chosen pricing structure would be challenged and attempted to choose the most transparent process. The costs are all

derived from CUC financial statements which are publicly accessible and audited by a reputable auditing firm and subject to regulatory overview. The cost of the annual attachment fee has decreased year on year for 3 years now as the "cost of a bare pole" has decreased.

Response to Digicel comment: DataLink chose a transparent and historically proven pricing model. The model chosen does consider proportionate costs, but providing further insight into "incremental" costs would be difficult and is subjective in nature.

**516. Digicel Cross Comment**

No cross comment received.

**517. Flow Cross Comment**

No cross comment received.

**518. Logic Cross Comment**

No cross comment received.

**519. Office Response**

While Logic and DataLink consider that no changes should be made in the various elements of DataLink pricing formula, most parties (C3, Digicel and Flow) have expressed the opposite view.

In particular, C3 argues for the change in the net cost of bare pole and the removal of the inflation factor, while Digicel considers that cost drivers in recurring charges should be based on "incremental costs" of providing access to CUC's utility poles.

The Office notes that while most parties consider that some changes are required in DataLink pricing formula, these parties do not necessarily agree on the precise changes that need to be made or which current elements in DataLink pricing formula are deemed acceptable.

For example, C3 and Flow seem to disagree on whether the application of 'Management & Overhead' in the pricing formula and/or its specified value of 20%, are acceptable. The same goes with the specified value of 12.5% for 'Space factor', which according to C3 is acceptable, whilst Flow and Digicel have expressed concerns about the determination of common costs and the fairness of shared costs, such as those that relate to 'unusable space' in the formula for calculating 'Space factor'.

As noted in response to Question 46 above, the Office considers that there is no compelling reasons for rejecting the pricing methodology adopted in DataLink pricing formula as the appropriate methodology for determining cost-oriented prices for attachment of communications cables onto CUC's utility poles, however, a number of elements in DataLink pricing formula would need to be amended in order to ensure that the recurring charges for pole attachments are provided at cost-oriented price.

In particular, the features that differ between DataLink pricing formula and the formula applied using the FCC pricing methodology, as listed by the Office in response to Question 46 above, would need to be reviewed and, where appropriate, amended.

First, the Office considers that DataLink's choice to apply "*Return on Equity*" as appropriate measure for the rate of return on capital invested in poles, is not justified. The rate of return on capital invested should reflect the weighted average cost of capital (WACC) that the provider of

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access to poles would incur by choosing an efficient mix of debt and equity funding for the corresponding investment, and the associated risk of investing, in such assets.

The Office notes that CUC reported a “*Company’s Cost of Capital*” rate of 7.25% in its annual report for year 2022, which is lower than the rate of return that is applied in DataLink pricing formula.<sup>171</sup> The Office further notes that the rate of return in the FCC pricing formula is set by default as 11.25%, which is equally lower than the rate of return in DataLink pricing formula.<sup>172</sup>

The Office holds the view that the rate of return applied in “*CUC’s annual carrying charge rate*” should be amended to reflect the rate of return that the provider of access to poles would incur by choosing an efficient mix of debt and equity funding for the corresponding investment, and the associated risk of investing, in such assets.

The Office considers that although DataLink “*continues to deem the FCC methodology as appropriate for the Grand Cayman market*”, the CUC’s “*Company’s Cost of Capital*” rate is more appropriate benchmark for the rate of return in “*CUC’s annual carrying charge rate*” than the default rate of return of 11.25% specified in the FCC pricing formula.

Therefore, the Office holds the view that the rate of return applied in “*CUC’s annual carrying charge rate*” should be set by default as 7.25%.

Second, the Office considers that the modifier factor of 0.85 that applies to the “*Net Cost of Bare Pole*” value in the FCC pricing formula, to remove the investment in crossarms included in Net Pole Investment, may not be appropriate to apply in DataLink pricing formula, unless there is evidence to demonstrate that there exists a sizable investment in crossarms and other non-pole investment that is recorded by CUC in its pole accounts.

Therefore, the Office holds the view that the modifier factor of 0.85 that applies to the “*Net Cost of Bare Pole*” value in the FCC pricing formula, should not be included in DataLink pricing formula.

Third, the Office considers that the “*Inflation*” factor in DataLink pricing formula has the effect of double counting the inflation in the pole attachment rate. This is because the inflation is already embedded in the rate of return value that is applied in “*CUC’s annual carrying charge rate*”, which is expressed in nominal terms rather than real (i.e., inflation-adjusted) terms.

Therefore, the Office holds the view that the “*Inflation*” factor should be removed from DataLink pricing formula.

Fourth, the “*Management & Overhead*” factor in DataLink pricing formula may not be justified.

While Flow argues that “*there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC*”, the Office notes that DataLink’s financial statements report, among other things the following expense items:<sup>173</sup>

1. “*General & Administrative Costs*”, which include the following expense accounts: Bank Charges, employee Benefit Program (Phone Allowance, Health Ins & Pension cost),

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<sup>171</sup> See page 52 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>172</sup> See pages 75 and 76 of FCC 2001 Order on Reconsideration at <https://docs.fcc.gov/public/attachments/FCC-01-170A1.pdf>

<sup>173</sup> See DataLink’s response to RFIs 312-315.

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Insurance (Motor Insurance), Legal & Professional Fees, Miscellaneous, Training, Telephone, and Wages.

2. “*Depreciation and Amortization*”, which include the following expense accounts: Laptops & Monitors (Depreciation charge period: 3 years), Fiber Optic Cable (Depreciation charge period: 30 years), and Fiber Optic Material (Depreciation charge period: 30 years).

Accordingly, Flow’s argument that “*there is no evidence that DataLink is a separate business organization, with its own staff and assets fully separate from CUC*” seems to be unsubstantiated.

However, there is no evidence to support adding a specific “*Management & Overhead*” factor to the pricing formula that is based on the FCC pricing methodology, only because DataLink has been established as a separate business for managing pole attachments. On the contrary, it would seem reasonable to assume that the expenses related to pole owner’s management of pole attachments would be the same regardless of whether the relevant expenses are internalized (i.e., incurred within the pole owner’s business organization) or externalized (i.e., incurred outside of the pole owner’s organization, in a separate business organization established solely for the purposes of managing pole attachments).

Therefore, in order to prevent double counting of the management, overhead and administrative costs in the pricing formula for recurring charges, the Office holds the view that the “*Management & Overhead*” factor should be removed from DataLink pricing formula.

Fifth, the Office holds the view that the “*Number of Attachers*” in DataLink pricing formula should be amended to “*Six*” to reflect all attaching entities on CUC’s utility poles (Flow, C3, Digicel, Logic, DataLink and CUC). This approach would be consistent with the approach adopted in the FCC pricing formula.

Accordingly, the Office holds the view that DataLink pricing formula should be amended, as follows:

$$Rate = \left( \frac{Space\ occupied + \left( \frac{2}{3} \times \frac{Unusable\ Space}{Number\ of\ Attaching\ Entities} \right)}{Pole\ Height} \right) \times Net\ Cost\ of\ Bare\ Pole$$

× CUC’s annual carrying charge rate

Where:

- “CUC’s annual carrying charge rate” is specified as follows:

$$CUC's\ annual\ carrying\ charge\ rate = \frac{Total\ Administrative\ and\ General\ Expenses}{Net\ Book\ Value\ of\ Total\ Assets} + \frac{Total\ Distribution\ Expenses}{Net\ Book\ Value\ of\ Total\ Assets} + \frac{Annual\ Depreciation\ Expense\ of\ all\ Poles}{Net\ Book\ Values\ of\ all\ Poles} + Return\ on\ Investment$$

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- “Return on Investment” refers to the CUC’s “Company’s Cost of Capital” rate, and it is set by default as 7.25%; and
- “Number of Attaching Entities” is set by default as six (6).

**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.

### 520. C3 Response

C3 has not data to provide input on this question but clearly CUC expects to make 15% return on the utility poles.

Again, since DL is a licensed telecom provider, the cost of the infrastructure, in this case the communications space on the poles, should be subject to straight line asset depreciation, as per normal infrastructure sharing cost models.

CUC can not expect to earn a return on the poles because they are not allowed, under their OfReg license, to generate income from other sources other than power generation and distribution.

### 521. DataLink Response

The rationale for DataLink to be created as an entity was to ensure that costs were kept clearly delineated and CUC customers did not accidentally subsidize the telecom industry. Any costs passed on to telecoms relate specifically to the additional costs incurred to accommodate telecom attachments. DataLink’s pricing formula has no effect on the prices that electricity users pay CUC. The pricing structure, like any other non-charitable organization (including the attaching telecoms), seeks to make a fair return. Any such returns are however generally reinvested in the business, on improvements such as the new JUP software (explained above) which DataLink anticipates implementing in the near future, and to cover the significant legal costs which DataLink has often been required to incur – and thus ensure that DataLink remains self-sustainable, in circumstances where CUC was directed to make its infrastructure available for such purposes. Any remaining returns may, if available, be paid in dividends to CUC, as DataLink’s sole shareholder. DataLink would like to take this opportunity to remind all stakeholders that neither DataLink nor CUC, nor indeed any of the other licensed organizations who pay license and regulatory fees to OfReg based upon revenues earned, is a charitable organization.

### 522. Digicel Response

Digicel does not have sufficient data or operational insight at this time to provide our view on this question.

### 523. Flow Response

In its **2022 Annual Report** CUC states the following:

- o The increase in the net other income (by 1057%) for the year was due to an increase in foreign exchange gain and **increase in the revenue of the Company’s wholly owned subsidiary, DataLink.** (pg. 14). (emphasis added)

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o Revenues from DataLink for Fiscal 2022 are recorded in other income in the amount of \$2.1 million, a \$0.7 million increase from \$1.4 million for Fiscal 2021.(pg.16)

CUC's 2022 Annual Report supports that the profitability of CUC's business is benefitted by the provision of access to its utility poles which have delivered 50% growth in revenues year on year, and contributing to a net earnings increase for CUC of 9% over fiscal year 2021.

It does not appear that DataLink's formula has any effect on the price paid by users for electricity. In its **2022 Annual Report** CUC states '*Net earnings for the year ended December 31, 2022 were \$33.2 million, a \$2.9 million increase from net earnings of \$30.3 million for the year ended December 31, 2021. **This increase is primarily attributable to a 2% increase in kWh sales, a 5.4% increase in base rates effective June 1, 2022 and lower finance charges and transmission & distribution costs, partially offset by higher general and administration and consumer services costs.***' (emphasis added). Nor does CUC state or even allude in its 2022 Annual Report that DataLink's pricing in any way affects pricing to electricity users. 4Indeed CUC describes DataLink as an ICT Licensee.

### 524. Logic Response

Logic does not believe that the 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.

### 525. C3 Cross Comment

No cross comment received.

### 526. DataLink Cross Comment

No cross comment received.

### 527. Digicel Cross Comment

No cross comment received.

### 528. Flow Cross Comment

No cross comment received.

### 529. Logic Cross Comment

No cross comment received.

### 530. Office Response

Logic, DataLink and Flow consider that the recurring charges, as determined based on DataLink pricing formula, do not have any effect on the prices that electricity users pay CUC.

Therefore, there seems to be a broad consensus that the recurring charges for attachment of communications cables on CUC's utility poles do not have any effect on the prices that electricity users pay to CUC. As a consequence, there seem to be no reason to believe that telecommunications users subsidize electricity users in Grand Cayman, through the recurring charges that C3, Digicel, Flow and Logic pay to DataLink for their pole attachments.

DataLink argues that (1) the pricing structure, based on DataLink pricing formula, "*seeks to make a fair return*", (2) any such returns are generally reinvested in DataLink's business, and (3) any remaining returns "*may, if available be paid in dividends to CUC, as DataLink's sole shareholder.*"

## PUBLIC VERSION

On the other hand, C3 maintains that CUC cannot expect to earn a return from pole attachments because their income cannot be generated from sources “*other than power generation and distribution*”, while Flow argues that “*the profitability of CUC’s business is benefitted by the provision of access to its utility poles which have delivered 50% growth in revenues year on year, and contributing to a net earnings increase for CUC of 9% over fiscal year 2021.*”

As noted in paragraph 578 of the Consultation, with 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 infrastructure costs paid by CUC and, as a consequence, either:

- a proportional decrease in prices electricity users in Grand Cayman pay to CUC, and/or
- a proportional increase in profits that CUC and/or DataLink earn from providing access to CUC’s utility poles.

Since the parties broadly agree that the recurring charges for attachment of communications cables on CUC’s utility poles do not have any effect on the prices that electricity users pay to CUC, it follows that the increase in the share of CUC’s pole infrastructure costs paid by the attachers has solely the effect of increasing the profits that CUC and/or DataLink earn from providing access to CUC’s utility poles.

As noted in paragraph 580 of the Consultation, 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.

**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.**

### **531. C3 Response**

DL has fixed telephony license and is therefore a potential competitor for all the attachers who also have that license type. It is clear therefore, that the objective of fair competition can not be met unless and until the pole attachment conditions apply to all FIVE attachers; C3, Digicel, Flow, Logic AND DataLink.

### **532. DataLink Response**

As explained above in detail, DataLink has requested and received an amendment of its license by OfReg so as not to be considered a retail service provider and to avoid being subject to the related Roll Out obligations. DataLink is therefore not a competitor to Attaching Utilities, nor has it engaged in any such competition in any way since its inception in 2012. It follows that its position has no limiting effect on the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.

### **533. Digicel Response**

Digicel's highlights valid concerns regarding the potential impact of Datalink having free access to CUC poles. The arrangement could indeed influence the efficient and harmonized use of infrastructure, as well as competition in the market.

a) Infrastructure Use and Efficiency: If Datalink is given free access to CUC poles, it may have an advantage over other attachers who must pay for the use of the same infrastructure. This could create an imbalance and potentially lead to congestion and inefficiencies in pole usage.

b) Fair Competition: Fair competition is essential for a healthy market. If Datalink receives free access to poles while other attachers must pay, it might distort the competitive landscape, potentially favouring Datalink over other players in the telecommunications industry.

c) Impact on ICT Service Providers: Datalink's status as an infrastructure provider to ICT Service Providers might raise concerns about potential conflicts of interest if it were to offer competing ICT services. Free access to infrastructure could give Datalink a competitive advantage over other ICT service providers in the market.

To address these concerns, it's important for regulatory authorities and stakeholders to carefully assess the implications of such arrangements and ensure a level playing field for all attachers. Fair and transparent regulations that govern pole access, pricing, and competition can help create an environment that fosters innovation, fair competition, and efficient infrastructure usage.

Engaging in dialogue between telecommunications companies, infrastructure providers, and regulatory bodies can help identify balanced and equitable solutions to address these concerns. The goal should be to promote healthy competition, efficient infrastructure utilization, and an equitable playing field for all participants in the telecommunications industry.

### **534. Flow Response**

DataLink is a licensed ICT competitor. Access to CUC poles at no charge to DataLink confers an unfair advantage on DataLink, is discriminatory, and contrary to the Regulations. Accordingly, this discriminatory advantage has the effect of limiting the efficient and harmonized utilisation of infrastructure and the promotion of competition in the relevant ICT markets.

### **535. Logic Response**

Logic's view is that DataLink's ability access CUC's utility poles at no charges does 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.

### **536. C3 Cross Comment**

No cross comment received.

### **537. DataLink Cross Comment**

As noted previously and above, this question is based on a fallacy.

### **538. Digicel Cross Comment**

No cross comment received.



**539. Flow Cross Comment**

No cross comment received.

**540. Logic Cross Comment**

No cross comment received.

**541. Office Response**

All the parties, except DataLink, agree that 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.

DataLink argues that it is "*not a competitor to Attaching Utilities, nor has it engaged in any such competition in any way since its inception in 2012.*"

However, in accordance with DataLink's response to RFI 302, DataLink does provide services that are deemed be in competition with the services provided by Attaching Utilities, namely the [REDACTED] service and the fibre optic service provided to [REDACTED], over the communications cables that are attached on CUC's utility poles outside the 'Communications Space'. The Office also refers to the Office's response at Question 2 above.

The Office notes that, according to DataLink's response to RFI 301, there are 987 CUC poles occupied by DataLink and/or CUC fibre optic cables outside the communication space, which means these fibre optic cables can be used to provide services in competition to services provided by Attaching Utilities.

The Office considers that the most appropriate approach to ensure that DataLink's ability to access CUC's utility poles at no charge does not 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, is to include DataLink as "*Attaching Entity*" in the "*Number of Attaching Entities*" in DataLink pricing formula. Such approach guarantees that the recurring charges paid by the attachers other than DataLink do not subsidise DataLink's ability to access CUC's utility poles at no charge.

### **3. 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.

#### **542. C3 Response**

No Response received.

#### **543. DataLink Response**

Significant effort has been made by DataLink to ensure that there is transparency around costs charged in respect of Make-Ready work. As explained above in response to Question 45, in order to accommodate Telecom attachments, there is a requirement for taller and stronger poles/pole network that does lead to incremental costs which are solely attributable to attaching cables. In the interests of avoiding repetition, we refer the Office to the detail provided in response to that question regarding cost comparisons between the different sizes of pole and the reasons therefor.

As the Office will also have noted from that previous response, there is a significant amount of work required to ensure that the electricity system can withstand hurricanes with the additional load placed on the poles with the addition of telecom attachments.

#### **544. Digicel Response**

As referenced in paragraph 595, Digicel is also unable to determine if Datalink's charges for MR work are in fact cost oriented.

Without detailed invoicing and set structure on charges for similar types of MR works, it would be difficult to determine the pricing methodology utilized.

#### **545. Flow Response**

Please see Flow's comments in response to questions 45 – 48 on DataLink's pricing methodology.

#### **546. Logic Response**

Logic believes that the charges are cost oriented, however we do not always agree with the amount of work that is required. Logic is also of the view that Datalink should absorb a higher percentage of the cost of making poles ready when the section of their plant has exceeded its expected lifespan.

#### **547. C3 Cross Comment**

No cross comment received.

#### **548. DataLink Cross Comment**

DataLink's Make Ready charges are cost-oriented. Make Ready charges from CUC are a pass-through cost, DataLink does not profit from Make Ready charges to Attaching Utilities. Make Ready charges are provided to each Attaching Utility, with a breakdown of materials, labour and equipment costs. DataLink also provides Attaching Utility design maps which provide an overview of the work to be performed. The format of how the make ready estimates are presented is a direct result of consultations DataLink has had with the Attaching Utilities over the years. DataLink

has also taken on board suggestions from the Attaching Utilities regarding the details they would like to see when being presented with make ready work costing.

**549. Digicel Cross Comment**

No cross comment received.

**550. Flow Cross Comment**

No cross comment received.

**551. Logic Cross Comment**

No cross comment received.

**552. Office Response**

DataLink asserts that it has made significant effort *"to ensure that there is transparency around costs charged in respect of Make-Ready work."* However, the Office notes, based on the information provided by DataLink in response to RFI 310, that there is no sufficient transparency around the actual costs charged by DataLink for Make-Ready work.

For example, two work orders [REDACTED] show that the actual costs billed by DataLink exceeded the estimated costs by [REDACTED] % and [REDACTED] %, while one work order [REDACTED] shows a small difference of [REDACTED] % between estimated and actual costs, mainly related to the 'Labour costs' billed, albeit none of these three documents provide an explanation and/or justification for the actual amount billed.

While DataLink argued (see paragraph 585 of the Consultation) that its make-ready charges were cost-based based on actual expenses with no mark-up, the information presented by DataLink to the Office did not provide any evidence to support this argument. Therefore, there is no certainty that DataLink has simply passed through the costs it or CUC incurred in relation to Make-Ready work to accommodate the attachment of communications cables onto CUC's utility poles.

Also, based on the information presented by DataLink in response to RFI 310, each of the three work orders appear to include the instalment of a number of new poles to accommodate the attachment of communications cables onto CUC's utility poles. The new poles represent 25% of all CUC's utility poles (i.e., 19 out of 76) affected by the Make-Ready work related to these work orders. While DataLink argues that CUC is prohibited by its T&D licence from upgrading its electrical infrastructure purely to accommodate telecommunications attachers (see paragraph 585 of the Consultation), it is not clear how CUC treats such changes in its assets (i.e., CUC's utility poles), which result from the replacement of poles. The Office further notes that DataLink did not provide any comment on the Office's statement in paragraph 589 of the Consultation, that it is unclear *"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."*

**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.

**553. C3 Response**

No Response received.

**554. DataLink Response**

As noted above, significant effort has been made by DataLink to ensure that there is transparency around costs charged as it relates to Make Ready to prove that all charges are in fact cost-oriented. DataLink respectfully maintains that the charges are cost-oriented.

**555. Digicel Response**

Digicel has observed a significant increase in the cost of Make Ready (MR) works for poles over the past year. We have noticed that the average cost per pole within a batch has risen significantly in recent times. It is our view that there should be regulations as it relates to MR works and by following the four (4) charging principles: Non-Discrimination, Transparency, Cost-Relatedness and User Consultation can ensure fairness, equity and compliance.

**556. Flow Response**

Consistent with having qualified third party contractors carry out Make-Ready work, competitive tender for Make-Ready work will generate the prices closest to cost orientated rates.

**557. Logic Response**

N/A

**558. C3 Cross Comment**

No cross comment received.

**559. DataLink Cross Comment**

Response to Digicel: The fact that Make Ready costs have risen from their earlier make ready sites is likely due to the earlier sites having required minimal make ready work. For sites that now require extensive make ready work, such as changing out of poles, adding midspan poles, weather head work, re-stringing of lines and moving transformers, the costs of the Make Ready work will be higher. DataLink has always been transparent with make ready costs hence the reason for the breakdown of costs and telecom design maps detailing work to be performed.

Response to FLOW: DataLink uses both qualified outside contractors (trained on CUC processes and supervised by CUC team members) and CUC crew members to perform make ready work. If each job was put out to tender, this would slow the process significantly.

**560. Digicel Cross Comment**

No cross comment received.

**561. Flow Cross Comment**

No cross comment received.

**562. Logic Cross Comment**

No cross comment received.

### 563. Office Response

Three parties provided responses to Question 51. While DataLink maintains that “*significant effort has been made by DataLink to ensure that there is transparency around costs charged as it relates to Make Ready to prove that all charges are in fact cost-oriented*”, Digicel and Flow consider that changes are required in order to ensure the Make-Ready work charges are provided at cost-oriented rates.

Digicel called for regulations of Make-Ready work, while Flow supported a competitive tender for Make-Ready work, attracting qualified third-party contractors, which is more likely to generate cost-oriented rates for Make-Ready work.

## 4. 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.

### 564. C3 Response

No Response received.

### 565. DataLink Response

The Office has proposed, subject to consultation that the refund formula set out in Article VII of the Pole Sharing Agreements should be amended to take into account the matters listed in its proposal. DataLink addresses each of those matters in turn as follows:

**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;**

DataLink has already expressed its willingness to review the make-ready refund methodology. The initial design was created around the OfReg license requirements regarding fiber rollout timelines. Those timelines were not abided by and, as such, DataLink considers it appropriate that the design for the refund process be revisited. said it goes without saying that DataLink anticipates that any changes will be implemented in respect of all MPJUAs given the imperative to avoid discrimination.

**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;**

DataLink considers that the current calculation takes this into consideration.

**c) DataLink should determine and arrange for refunds of make-ready work charge without requiring the attacher to apply for them; and**

DataLink agrees with this proposal. It will, however, go without saying that DataLink cannot provide a refund where it did not previously receive payment for the attachment.

**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.**

This proposal appears to be based on the observations which the Office has made at paragraphs 622-623 of the Consultation. For the reasons explained in detail and repeated in response to numerous questions above, DataLink is not in competition with the Attaching Utilities and does not stand to benefit from such make-ready work. It is therefore not possible for the existing arrangements to confer any competitive advantage on DataLink, including with respect to its access rights in respect of CUC's poles.

### 566. Digicel Response

Digicel agrees with the Office's position on this.

### 567. Flow Response

Flow agrees that DataLink should not be allowed to over recover its costs. Since Flow's contract with DataLink is commercially negotiated, both Flow and DataLink would have to agree on any new terms and the language to reflect the new terms.

### 568. Logic Response

Yes, Logic agrees with the Office's proposal 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 a 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.

**569. C3 Cross Comment**

No cross comment received.

**570. DataLink Cross Comment**

No cross comment received.

**571. Digicel Cross Comment**

No cross comment received.

**572. Flow Cross Comment**

No cross comment received.

**573. Logic Cross Comment**

No cross comment received.

**574. Office Response**

Most parties agree with the Office's proposal that Article VII of the Pole Sharing Agreements should be amended as described in paragraph 624 of the Consultation, except for DataLink's disagreement with the proposal that 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.

DataLink maintains that it is "*not in competition with the Attaching Utilities and does not stand to benefit from such make-ready work.*" The Office has already addressed above this claim and considers that DataLink can and does in fact compete with the Attaching Utilities.