ICT 2025 – 2 - Consultation

Draft Determination on Pole Attachment Reservation Fees

Launch Date: Tuesday, 01 July 2025

Closing Date for Comments: Friday, 01 August 2025

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A. Introduction

1. The Utility Regulation and Competition Office (the '**Office**') is the independent regulator established by section 4(1) of the Utility Regulation and Competition Act (2024 Revision) (the '**URC Act**') for the electricity, information and communications technology ('**ICT'**), water, wastewater and fuels sectors in the Cayman Islands. The Office also regulates the use of the electromagnetic spectrum and manages the .ky Internet domain.

2. This Consultation Document follows the publication by the Office on **14 November 2019** of ICT Consultation 2019-2 Consultation Pole Attachment Reservation Fees ('**ICT Consultation 2019-2**'),[1] which invited Licensees and all interested parties to submit their comments on the Draft Determination relating to Pole Attachment Reservation Fees, namely the matters that had been set out in ICT 2017-1 Determination – Pole Attachment Reservation Fees ('**ICT Determination 2017-1**').[2]

3. The Office received responses from three ICT Licences in response to ICT Consultation 2019-2,[3] and has updated its considerations such that the Office considers it appropriate to undertake a further consultation on its draft determination as set out herein (which is referenced as the Proposed Determination to distinguish it from the Draft Determination set out in ICT Consultation 2019-2). Note that the Office has not determined its views on the matters addressed and the considerations expressed in this consultation document are subject to this consultation.

4. Under section 9(3) of the Information and Communications Technology Act (2019 Revision) ('**ICT Act**'), two of the Office's principal functions are "*to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure*" as well as "*to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers*".

5. The Office, through the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003, ('**the Infrastructure Sharing Regulations**') is responsible for the regulation of interconnection and infrastructure sharing between ICT sectoral providers (hereinafter referred to as '**the ICT Licensees** or **Licensees**'). 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 ITC network*". For the avoidance of doubt, "*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*".

6. DataLink Ltd. ('**DataLink**'), an ICT Licensee of the Office, is responsible for managing and sub-licensing communications spaces on utility poles (that are owned by Caribbean Utilities Company, Ltd ('**CUC**')), which are designated for the attachment of communications cables for ICT. DataLink is a wholly owned subsidiary of CUC. DataLink entered into various pole-sharing agreements for the provision of licensed communications spaces to other Licensees, which allow the Licensees to reserve

[1] www.ofreg.ky/viewPDF/documents/consultations/2021-04-08-01-20-51-Consultation-Pole-Attachment-Reservation-Fees.pdf
[2] https://www.ofreg.ky/viewPDF/documents/consultations/2021-04-08-07-56-54-Determination-Pole-Attachment-Reservation-Fees.pdf
[3] www.ofreg.ky/viewPDF/documents/consultations/2021-04-08-01-21-01-Consultation-Pole-Attachment-Reservation-Fees---Submission-from-DigicelFlowDataLink.pdf

communications spaces on utility poles until such time as they are required, in return for the payment of reserved space fees and total annual minimum payments.

7. 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 Grand Cayman, which in turn is necessary for the promotion of competition in the provision of ICT services and ICT networks.

8. There has been, however, a long list of outstanding issues and various disputes over a number of years between Cable and Wireless (Cayman Islands) Limited, doing business as Flow ('**Flow**'), Digicel (Cayman) Limited ('**Digicel**'), Infinity Broadband Ltd., doing business as C3 ('**C3**') and WestTel Limited doing business as Logic ('**Logic**'), on the one hand, and DataLink on the other hand relating to said pole-sharing agreements (collectively, the '**Agreements**' or '**Pole Sharing Agreements**').

9. This, in the Office's view, has resulted in a highly inefficient process and substantial delays from ICT Licensees relating to the installation and maintenance of attachments of communication cables to the utility poles owned by CUC.

10. These issues and disputes led the Office's predecessor, the Information and Communication Technology Authority (the '**Authority**'), to publish ICT Decision 2016 -1 relating to the allocation of C3's position on CUC's utility poles.[4] In that decision, the Authority noted the order of pole attachment positions at that time for each of Flow, Logic, Datalink and C3.[5]

11. The Authority also published **ICT Consultation 2016-2**,[6] among others, and established an industry working group to consider and address the various issues being considered.[7]

12. DataLink has stated that "***reservation fees***" (defined in the Agreements as the "**Quarterly Reserved Space Payment**") have been introduced in the relevant Pole Attachment Agreements (which are described at **APPENDIX 1 below**) applicable to C3 (by the CUC-C3 Deed of Variation), to Logic (by Appendix C of the DataLink-Logic Pole Sharing Agreement) and to Flow (by Appendix C of the DataLink-Flow Pole Sharing Agreement) – in order to allow C3, Logic and Flow to secure exclusive use of what is defined as the "*Reserved Space*" in the communication space which is designated for attachment of those ICT Licensees' communication cables to CUC's utility poles.

13. In its July 2016 submission in response to Part A of ICT Consultation 2016-2, DataLink noted "[*the reservation] fees were payments in return for a benefit conferred by DataLink, namely exclusivity rights to attach at the prescribed position within the communication space on all CUC poles for the attaching utility*."[8] As mentioned, the relevant contractual clauses at that time are discussed at paragraphs 69 *et seq.* below and are provided in **APPENDIX 1**.

[4] www.ofreg.ky/viewPDF/documents/ict-decision/2021-05-13-05-45-10-ICT-Decision-2016-1-Infinity-DataLink-Pole-Attachment-Decision.pdf
[5] In Annex 1 – Pole Attachment Positions.
[6] https://www.OfReg.ky/consultations/icta-consultation-2016-2
[7] https://www.OfReg.ky/news/icta-forms-pole-attachment-working-group-1
[8] https://www.OfReg.ky/viewPDF/documents/consultations/2021-04-09-01-48-09-12-July-2016-DataLink-Response.pdf

14. Such exclusive use is, however, limited in time to what was defined as "**Build-Out Period**" in those agreements, and which had at that time the following expiry dates:

    a. **31 December 2014** - in the CUC-C3 **20 March 2012** Deed of Variation;[9]
    b. **31 December 2018** - in the **18 July 2013** DataLink-Logic Pole Sharing Agreement;[10] and
    c. a period of **six (6) months** after installation of a new pole - in the **18 November 2016** DataLink-Flow Pole Sharing Agreement.[11]

15. The Office prepared ICT Determination 2017 – 1 in response to the Authority's ICT Consultation 2016 – 2, as well as to the final position papers and cross submissions as a result of the Pole Attachment Industry Working Group (the "**Working Group**"). The Licensees that attended the Working Group were Flow, DataLink, Digicel, C3, and Logic. The Office published the ICT Determination 2017-1 on **11 July 2017** on its website.[12]

16. On **9 August 2017**, DataLink applied for leave to apply for judicial review as well as a stay of Determination 2017-1. DataLink was successful in their application and the hearing of the judicial review took place on **4** to **8 June 2018** and was classified as Grand Court case #134 of 2017.

17. The Grand Court ruled in DataLink's favour in a judgment issued on **17 July 2019** and held that the Office needed to comply with section 7(1) of the URC Act, i.e. provide DataLink (and others) with an opportunity to offer any final submissions on the Determination 2017-1.[13]

18. The Office, in complying with the **17 July 2019** judgment of the Grand Court case #134 of 2017, on **14 November 2019** published ICT Consultation 2019-2 and invited Licensees and all interested parties to submit their comments on the matters as set out in ICT Determination 2017-1.[14]

19. A Cabinet Direction, *Utility Regulation and Competition (Information and Communications Technology) Directions, 2020 (SI 75 of 2020)* (the '**Direction**'),[15] directed the Office "[...] *to address any impediments to fair and equitable competition*" in infrastructure sharing.

20. On **1 April 2021**, the Office issued renewed ICT Licences to each of C3, Digicel, Flow and Logic – their respective D1 Fibre Network Rollout Licence Obligations are as set out at **APPENDIX 2.**

[9] https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-46-13-1417708388DeedofVariationCUCInfinityBroadband.pdf
[10] https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-07-30-40-141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf
[11] https://www.ofreg.ky/viewPDF/documents/interconnections/2021-04-20-04-45-13-MasterPoleJointUseAgreement1480965308.pdf
[12] https://www.OfReg.ky/viewPDF/documents/consultations/2021-05-12-06-48-57-1507893772ICT20171DeterminationPoleAttachmentReservationFees.pdf
[13] https://judicial.ky/judgments/unreported-judgments/
[14] https://www.OfReg.ky/viewPDF/documents/consultations/2021-04-08-01-20-51-Consultation-Pole-Attachment-Reservation-Fees.pdf
[15] www.ofreg.ky/viewPDF/documents/2025-04-13-17-25-52-Utility-Regulation-and-Competition-Information-and-Communications-Technology-Directions-2020..pdf

21. On **21 April 2022**, DataLink entered into a Pole Sharing Agreement with Digicel for Digicel to occupy DataLink's fourth spot on the poles.[16] While that Agreement has references to Quarterly Reserved Space Payments, the Office understands that DataLink has not invoiced or collected such reservation fees from Digicel.

22. On **13 July 2022**, Datalink entered into a new Pole Sharing Agreement with C3.[17]

23. During a meeting held on **11 October 2022** at the Office's office, DataLink confirmed that reservation fees had not been enforced or paid since 2017. In correspondence with the Office, DataLink confirmed on **5 June 2025** that no Quarterly Reserved Space Payment fees have been invoiced or collected by DataLink from C3, from Q1 2015 onwards, and Logic from Q3 2017 onwards.

    As described above, the Office notes that, following its publication of ICT Determination 2017-1, there have been subsequent actions by the Licensees related to this matter, which are set out and considered where relevant. While this consultation relates principally to the Pole Sharing Agreements that were in place at the time of ICT Determination 2017-1, as described in paragraphs 69 et seq. below and **APPENDIX 1**, the principles regarding pole reservation fees set out herein apply equally to any current pole reservation fees. In this regard, although the current 2022 Pole Sharing Agreements between DataLink and C3 and Digicel respectively still reference reservation fees, it is the Office's understanding that DataLink has not collected such fees as from Q3 2017 and is also not opposed to removing references to such fees from the existing contracts.

[16] https://www.ofreg.ky/viewPDF/documents/interconnections/2022-09-09-01-43-08-16626645141662664514MASTERPOLEJOINTUSEAGREEMENTDataLinkDigicelexecutedredacted.pdf

[17] https://www.ofreg.ky/viewPDF/documents/interconnections/2022-09-09-01-46-30-16626645141662664514MASTERPOLEJOINTUSEAGREEMENTStandardagreementfinalC3January2022ExecutionCopyRedacted.pdf

B. Legal Framework

24. The issue of reservation fees and related commercial arrangements between licensees and infrastructure owners is being handled in accordance with the URC Act, ICT Act, applicable regulations, and the relevant judicial guidance. These matters are highly specific in nature and involve complex commercial agreements that predate the Direction and are subject to legal interpretation, regulatory discretion, and procedural safeguards.

25. In considering the appropriateness of the reservation fees relating to the attachment of communication cables to CUC's utility poles, the Office is guided by its statutory remit, in particular as set out in the URC Act, the ICT Act and the Infrastructure Sharing Regulations.

26. The following provisions are of particular relevance:

Section 6 of the URC Act states in part:

(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 under this Law or any other Law, the Office may –

[…]
(d) make administrative determinations, decisions, orders and regulations;
[…]
(j) grant, modify and revoke authorizations;
[…]
(q) initiate and conduct inquires and investigations into any matter or complaint, either on its own initiative or referred to it, which in the opinion of the Office, is not frivolous;
[…]
(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;

[…]
(bb) prohibit unfair trade practices by sectoral providers in any relevant market;

(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 in which a sectoral participant has contravened this Law, the regulations and any sectoral legislation or any administrative determination, and

(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.

Section 7 of the URC Act states in part:

(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.

[…]
(4) Where the Office intends to issue an administrative determination, the Office shall –

a) give written notice of that intention, to any person with sufficient interest or likely to be affected by the proposed determination; and

(b) afford that person an opportunity to make written representations to show cause why the Office ought not to make such a determination.

Section 9(3) of the ICT Act states in part:

(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;

(c) 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;

Section 65 of the ICT Act states in part:

(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.

Section 66 of the ICT Act states in part:

[…]
(5) Where parties cannot agree upon interconnection or infrastructure sharing rates, the Office may impose such rates.

Section 67A of the ICT Act states in part:

(1) The Office may decide on its own initiative, to consider and determine what, in its view, is a dispute between any persons concerning the potential or actual operation of an ICT network or provision of an ICT service and in so doing shall notify all parties to the dispute that it is doing so.

[…]

(3) The Office's determination shall be one which it considers will enable the dispute to be resolved in a way which best contributes to the fulfilment of its functions, responsibilities and duties, and may include any one or more of the following –

a) the making of a declaration setting out the rights and obligations of the parties to the dispute;
(b) the giving of a direction fixing the terms and conditions of transactions between the parties to the duties;
(c) the giving of a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by the Office;
(d) for the purpose of giving effect to a determination by the Office of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, the giving of a direction, enforceable by the party to whom the sums are to be paid, requiring

payment of sums by way of adjustment of an underpayment or overpayment; and

(e) such other course of action as the Office considers necessary to resolve the dispute.

Section 68 of the ICT Act states in part

(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.

Section 69 of the ICT Act states in part:

[…]

(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.

Section 2 of the ICT Act defines "infrastructure sharing" as:

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

Regulation 6 of the Infrastructure Sharing Regulations states in part:

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

[…]

(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;

[…]

(h) interconnection and infrastructure sharing rates shall be cost-oriented 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;
[…]
(iii) enables the development of competition in the provision of public ICT networks and public ICT services in a timely manner;

Regulation 9 of the Infrastructure Sharing Regulations states in part:

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

Regulation 10 of the Infrastructure Sharing Regulations states in part1)

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.

Regulation 22 of the Infrastructure Sharing Regulations states the following:

[…]
(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.

The Office also has the power to resolve disputes regarding Infrastructure Sharing under the ICT Dispute Resolution Regulations (the '**Dispute Resolution Regulations**').[18]

[18] www.ofreg.ky/viewPDF/documents/ict/2021-12-21-01-11-01-1417429170ICTA-DisputeResolutionRegulations.pdf

C. ICT Consultation 2019-2

27. The Office received responses to ICT Consultation 2019-2 (which contained the Determination 2017-1 as a draft for comment (the '**Draft Determination**')) from Flow, Digicel and DataLink. The responses and the Office's considerations are summarised as follows in relation to each of the Consultation Questions set out therein.

Question–1 - Are the facts stated correct and complete? If not, state correct facts and supporting evidence;

a) **DataLink** – no response.

b) **Digicel** – no response.

c) **Flow** – Among the stated facts in the Draft Determination that involve Flow or to which Flow has knowledge, we believe they are accurate. However, given that this proceeding derives from a bilateral dispute between ICT Licensees, C3 and Datalink, there are many statements and assertions specific to these disputants which we have no purview and therefore cannot comment on.

The Office's Response – The Office notes Flow's response and is minded that Consultation 2016-2 was not as a result of the single bilateral dispute between two ICT Licensees, as ICT Determination 2016-1 was, but rather due to the Office's predecessor, the Authority, being keenly aware of various issues in the pole infrastructure sharing market which continue to the present.

Question 1.1 - Without limiting the scope of the foregoing, comment on:

Question 1.1.1 - Are the businesses (or (a) sections of businesses or (b) potential sections) operated by DataLink, Digicel, Flow, Infinity C3 and Logic operated so fundamentally different that they are not in a properly comparable position?

a) **DataLink** - This question goes to the issue of discrimination by self-preference. In assessing whether there has been such discrimination, the question to address is whether one is comparing like with like. The issue is whether one provider of like services is given a privileged position over other providers. As we have explained that is not the case. We do not feel that the question "*are the businesses so fundamentally different that they are not in a properly comparable position*?" is the full question to ask because it does not identify which differences are material and which are not. The question raised is one of discrimination between those providing equivalent services so the focus should be on the similarities between the services provided. As explained above the services provided are fundamentally different.

DataLink was and remains different from each of Flow, C3 and Logic because, contrary to suggestions in the consultation and the judicial review, DataLink does not compete with any of Flow, C3 or Logic.

Flow was and remains different from C3 and Logic because it was in position on the poles and had been for some time, with a mature network, at the time the C3 and Logic agreements were made in 2012 and 2013.

The Office's Response – DataLink is licensed to provide certain of the same networks/services[19] as Flow, C3, Logic and Digicel, other than access to the communications space on CUC's utility poles, and as such does compete in those ICT Network/Service Markets.

All of the licensees mentioned above, including DataLink, have ICT Licences that include the following ICT Network and ICT Service:

- **DataLink** (e.g., D1 ICT Network, Type 1 ICT Service);[20]
- **C3** (e.g., D1 ICT Network, Type 1 ICT Service);[21]
- **Logic** (e.g., D1 ICT Network, Type 1 ICT Service);[22] and,
- **Digicel** (e.g., D1 ICT Network, Type 1 ICT Service).[23]

with DataLink having had D1 ICT Network fibre rollout obligations, similar to other licensees, until the DataLink fibre rollout obligation was removed on **04 February 2022**.

Datalink also held a space on the communication poles up to April 2024 when it entered into a contract for that space with Digicel.

DataLink also provides fibre/connectivity for the Cayman Islands' Government CCTV project, which could be provided by other Licensees, along with DataLink supporting other licensees with fibre/connectivity.

Therefore, subject to this consultation, the Office is of the view that DataLink is licensed to provide and is providing certain services that other Licensees are also licensed to provide.

That said, the Office notes that DataLink is not directly doing business with the retail consumer market.

b) **Digicel** – no response.

c) **Flow** - There are many attributes that differ across ICT Licensees in the Cayman Islands. However, among the attributes relevant to this proceeding and the development of ICT in the Cayman Islands, more generally, we believe all Licensees are comparable, with the same or similar Licence strictures and opportunities to compete and innovate. We believe, therefore, that all ICT Licensees should be treated comparably and held to the same expectations and obligations.

A foundational obligation of ICT Licensees is that they are to serve the entirety of the Cayman Islands and not cherry-pick deployment to only the most lucrative,

[19] As defined in the Office's section 23(2) Notice - ICTA Regulatory Notice Section 23 (2) October 2024. ICT Network D1 is – Fibre optic cable, domestic; ICT Service Type 1 – Fixed Telephony
[20] https://www.OfReg.ky/register-of-licensees/datalink-limited
[21] https://www.OfReg.ky/register-of-licensees/infinity-broadband
[22] https://www.OfReg.ky/register-of-licensees/westtel-limited-1
[23] https://www.OfReg.ky/register-of-licensees/digicel-cayman-limited-1

high-demand areas of our country. At its core, it is the Licensee's obligation to fulfil a build-out obligation and it is the Licensee that must be held accountable.

Where a Licensee chooses to utilise network elements of its competitor, instead of investing in its own facilities, then it is that Licensee's obligation to secure a commercial agreement to access and utilise that competitor's network, consistent with the Infrastructure Sharing Regulations, and if that Licensee cannot reach a commercial agreement, then it is their responsibility to find a solution, be it through the Office's dispute resolution procedures and/or investment in its own facilities. All Licensees face similar obligations and challenges, and we believe it is imperative that they be treated equally and held to an equal standard.

This proceeding is a consequence of a dispute initiated by one Licensee, C3, against another Licensee, Datalink. C3 has, likewise, initiated disputes against other Licensees, including Flow, for access to their infrastructure. C3 justifies its failure to meet its build-out obligation, in part, on these disputes. However, it is now over 15 years since C3 received its ICT License and agreed to the terms of that Licence, and its build-out obligation remains unfulfilled. We believe accountability ultimately rests with the Licensee to meet its Licence obligations. Be it through the OfReg-mediated dispute process or other means, these obligations must be accomplished, and consequences imposed for their failure. We are well past the point where Licensees, such as C3, can be allowed to continue making excuses.

Flow has significant concerns that, having already built-out its network, it is held to a different set of regulatory obligations than are other Licensees, such as C3, who have yet to build out their network. We believe the evidence demonstrates that Licensees are incentivized by this dual-standard and even rewarded for their failure to comply with their buildout obligation. For instance, an explicit rationale cited by OfReg for maintaining asymmetric regulatory standards has been other Licensees' failure to rollout their networks outside of the most lucrative areas of the country. Another example is found in OfReg's ongoing Licence reform public consultation. OfReg presents a myriad of new enforcement measures in this consultation, but none that addresses how it will enforce Licensees' failure to meet their buildout obligation. In fact, the only measure introduced by OfReg to address buildout proposes to reward Licensees by providing them a refund or discount on their License Fees if they choose to achieve some or all of their buildout obligation.

The Office's Response – The Office is of the opinion that all ICT Licensees do not face the same challenges regarding the rollout of their D1 Networks. The Flow ICT Network infrastructure (inclusive of the legacy **copper and fibre,** in fact, Flow is now in the process of removing its legacy copper network) is sufficiently developed to cover the entire country, unlike that of newer entrants. Flow was indeed held to a much different standard than other ICT Licensees when Flow was building out its network as it held a monopoly position at that time and enjoyed a different pole sharing arrangement with CUC.

Flow has also focused its investment in the most lucrative areas of Grand Cayman, as evidenced by the areas where Flow first made fibre service available to retail consumers.

That there are a number of ongoing disputes surrounding ICT Infrastructure Sharing (and specifically focused on access to CUC Poles) is a clear demonstration that there are issues within the ICT Infrastructure market, and this

was an important driver behind the Office taking up the work in ICT Consultation 2016-2.

Question 1.1.2 - Was the inclusion of the reservation fees meant to exclude other competitors therefore putting Logic and Infinity C3 in an advantageous position over any other competitors?

a) **DataLink** – Certainly not. The available infrastructure was limited to three spaces. The purpose of allocating space to C3 and Logic was to promote the development of networks in competition. As explained above, it seems likely that without the guarantee of reserved spaces there would have been no interest from C3 and Logic in developing a pole-based network and there is no evidence to suggest that anybody else would have been interested in doing so without such guarantees.

There is no evidence to support the view that it was DataLink's intention to create a state of affairs in which Logic and C3 were able to monopolise space of the poles to the disadvantage of competitors. We refer to our previous observations on the effect of having to make payments to keep space available for a network roll out when there was already an incumbent in place and there was a third space on the poles.

This is an important question, because even if the Office considers, with the benefit of hindsight, that the effect of these arrangements was to exclude other competitors, it would be wrong to require DataLink to refund payments for reserved space if it was not the intention. That is because the consequence of requiring a refund is to penalise DataLink.

DataLink has always operated on a near breakeven basis. Revenues from reserved space fee and guaranteed minimum payments are part of the revenues that were required to fund DataLink on this basis. If these fees have to be refunded, then DataLink has to find money to do so in circumstances where the original payments have been used to defray expenses that are not going to be reversed and therefore to create a deficit.

The evidence shows that these arrangements were entered into in good faith. It was done openly not covertly. It was done at the insistence of the licensees, not at the insistence of DataLink. It was done in a way that covered expenses, not so as to generate profits. There is no basis on the facts for visiting penal consequences on DataLink.

The Office's Response – The Office notes DataLink's comment that the available infrastructure was limited to three spaces; however, this was because DataLink had, until 2022, reserved one of the communications spaces for its own use.

The Office considers that the evidence of limited rollout of fibre across Grand Cayman suggests that both Logic and C3 have not been able to develop their pole attached networks in timeframes which meet their requirements, so the need of reservations fees to promote build out is at best a weak argument in support of reservation fees.

There was also interest in the space reserved for DataLink by other ICT Licensees at the time that space was reserved, as evidenced by the entrance of Digicel to the pole-attached market in April 2022, utilising the space formerly reserved for DataLink.

Further, the Office considers that, subject to consultation, if there were no available attachments on the poles which were reserved by reservations fees, there should be no costs being incurred by DataLink **–** indeed, such spaces in some cases did not actually exist due to Make Ready work being required to create the communications space.

The reservation fees were to reflect opportunity costs, not to assist with the initial setup and operation of DataLink. The Office notes that CUC was earning pole rental fees prior to setting up DataLink, as additional income earned by CUC from the business activity which DataLink later took over as an ICT licensee.

Furthermore, if the space on the pole was already contracted for by Logic, C3, Flow, and itself, the Office does not consider that DataLink could have contracted with another party for a space it had already contracted for.

Finally, the Office notes that, at its inception, DataLink did not propose to include reserved space fees in the pole attachment contracts; this resulted from a request by C3, who at the time was seeking to support its fibre rollout obligations.

b) **Digicel** – no response

c) **Flow** – We cannot speak for Logic or C3's intentions for agreeing to pay Datalink reservation fees. If the issue of exclusion is considered myopically, based only on access to Datalink's poles, then the record in this proceeding supports the conclusion that Logic and C3 paid reservation fees to Datalink, in part, to ensure access to the remaining communications space on CUC's poles and thereby to exclude subsequent competitors from utilizing that limited space.

It should also be noted that exclusion is inherent to all private goods, which are by definition "*rivalrous*," meaning that one person's consumption of a product reduces the amount available for consumption by another (see, https://www.britannica.com/topic/private-good).

There are, however, other means to provide ICT services and fulfil a build-out obligation than simply relying on access to the limited communications space on CUC's poles. Most ICT Licensees, including Flow, utilize a portfolio of infrastructure that includes not only aerial wireline facilities, but also underground and wireless facilities. Obviously, these latter modes of transmission infrastructure are not related to or effected by Datalink's reservation fees or access to CUC's poles.

The Office's Response – While it is true, as Flow argues, that there are "*other means to provide ICT services and fulfil a build-out obligation than simply relying on access to the limited communications space on CUC's poles*", such alternative options have to be economically viable and not running counter to the promotion of the efficient, economic and harmonised utilisation of infrastructure.

For example, investing in its own passive infrastructure network to fulfil a build-out obligation, is likely to result in inefficient duplication of ICT infrastructure, given the availability of the existing passive infrastructure, primarily CUC's poles and, to a certain degree, Flow's underground duct infrastructure. Building such alternative passive infrastructure would, therefore, undermine the promotion of the efficient, economic and harmonised utilisation of infrastructure.

Question 1.1.3 - Have licensees been rolling out their networks efficiently and harmoniously?

a) **DataLink** – The Draft Determination points to certain matters as evidence that the networks have not always been rolled out harmoniously and efficiently. In particular, delays in processing attachment applications. DataLink's view is that those delays arose from a failure to follow proper processes and a reluctance to meet the relatively high cost of make ready work taken with a spike in demand for attachments. Whether or not the Office agrees, the delays were not the consequence of the reservation fees and guarantee minimum payments.

   The Office's Response – The Office is of the opinion that a spike in demand for attachments could be advantageous in that economies of scale would apply to a properly planned and executed workstream to meet those demands. DataLink themselves concurred with this by bringing in external contractors, Pike, in an effort to meet make-ready work demands.

b) **Digicel** – no response.

c) **Flow** – We agree with elements of the Office's critique of the terms used by Datalink to implement reservation fees; namely, that they may not be consistent with all elements of the Infrastructure Sharing Regulations. In this regard, Datalink's reservation fees may have impacted the efficiency of network rollouts by Licensees that relied upon access to the communications space on CUC's poles.

   However, we do not believe that reliance on a single mode of aerial transmission infrastructure is an efficient or wise rollout strategy. And as we have already indicated, we also do not believe that all Licensees have made a good-faith effort to rollout their networks or been penalized or faced any negative consequences for their failure to do so.

   The Office's Response – The Office by conducting this consultation aims to support the efficient rollout of each Licensee's fibre networks.

Question 1.1.4 - Did licensees choose to reserve 100% of the telecommunications aerial cable (aka communication) space on CUC poles?

a) **DataLink** – The licensees reserved what they reserved in every case as a matter of choice and not compulsion. Initially C3 and Logic reserved 100% of the communication space, but that changed as they attached. Flow never reserved 100% of the communication space because it had a mature network in place throughout.

   The Office's Response – The Office notes DataLink's response.

b) **Digicel** – no response

c) **Flow** – We cannot speak to the choices of other ICT Licensees. Flow's network utilizes a combination of transmission technologies and, therefore, does not require access to or utilization of 100% of the communication space on CUC's poles.

   The Office's Response – The Office notes Flow's response.

Question 1.1.5 - How would the (a) removal or (b) reduction of reservation fees affect the profitability of licensees or sectoral participants**?**

a) **DataLink** – Looking at matters going forward1) There are currently no reservation fees payables by C3 or Logic. So removal of the fees would have no impact on their profitability moving forward2) Reservation fees paid by Flow are optional. It is reasonable to assume that Flow will only pay reservation fees if it considers that there is a corresponding commercial benefit and therefore it is likely that if the fees and the reservations they secure are removed at the same time, it will affect Flow adversely or at best have no effect on Flow's profitability.

If fees are removed and DataLink is required to repay reservation and minimum payment fees, then this will drastically affect DataLink. In the early stages of roll out for Logic and C3 there is very little pole attachment revenue as there were very few permits. However, DataLink had to setup business to administer the pole agreements and to run make ready which is charged at cost. Therefore the administrative overhead of running DataLink required revenue from the Reservation and Minimum Payment Fees for DataLink to be viable. As explained above, those fees were used to pay expenses, which cannot be reversed.

The Office's Response – Regarding the start-up of DataLink, the statement that in the early stages of roll out for Logic and C3 there is very little pole attachment revenue does not consider the long-time existing income from Flow. The records for the DataLink Licence application do not support reservations fees as being a critical element of the start-up plan for DataLink, noting that the income statement submitted with the DataLink ICT License application on 08 August 2011 made no mention of Reservations Fees. In any event, the DataLink Roll Out obligation was removed on 04 February 2022.

b) **Digicel** – no response

c) **Flow** – Flow has not needed to reserve space on unutilized CUC poles and cannot comment on the impact of reservation fees on the profitability of other Licensees.

The Office's Response – The Office notes Flow's response.

Question 1.1.6 - Did the Licensees expect to pay reservation fees for access to all utility poles, including the poles to which they could not attach?

a) **DataLink** – The Licensees paid reserved fees to reserve space on poles. Logic and C3 expressly requested to do so, and Flow had an opt out at all times. They do not appear to require and may not have expected to require attaching to every space that was reserved. Flow and Logic were given the contractual right to opt out of reserving: C3 would have been in the same position had it taken up the opportunity and invitations from DataLink to negotiate a similar agreement to Logic's.

The Office's Response – The collection of reserved fees for pole space that, in reality, were not sufficiently tall enough to accommodate the paying attachment posed a significant concern. This is evidenced by the inclusion of "Expansion of Capacity" as set out in the Master Pole Joint Use Agreements in Section II. Scope of Agreement I. Expansion of Capacity: *"Unless the subject Pole is excluded from joint use, Owner Utility will expand Pole Capacity within a reasonable time when necessary to accommodate Attaching Utility's request for Attachment, such that*

subject Pole meets the requirements of a Standard Utility Pole, such expansion or replacement shall be at the Attaching Utility's expense."

b) **Digicel** – no response

c) **Flow** – We cannot speak to the expectations of other Licensees or the circumstances under which they reached commercial agreement with Datalink to attach to CUC's poles. Flow did not expect to pay reservation fees for access to CUC poles that it did not intend to attach and accordingly negotiated an agreement with Datalink that did not impose such a requirement.

The Office's Response – The Office notes Flow's response.

Question 1.1.7 - Did the Licensees expect to pay the same fees as other Licensees in regard to reservation fees; and

a) **DataLink** – The agreements were all concluded at different times and there are differences between them attributable to this - in particular, DataLink is under-recovering from C3. DataLink understands that the focus of the consultation is not on historic discrepancies between agreements, but on the principle of reserved space fees and guaranteed minimum payments.

The Office's Response – The Office notes DataLink's response and also that DataLink and C3 entered into a new Master Pole Joint Use Agreement on 13 July 2022. This consultation relates to the reservation fees charged by DataLink as set out in the 2017-1 consultation.

b) **Digicel** – no response

c) **Flow** – Flow cannot speak for the expectations of other Licensees. Each Licensee that seeks communications space on CUC's poles is responsible for commercially negotiating its own agreement with Datalink. Consistent with the Infrastructure Sharing Regulations, Flow believes the terms of these pole attachment agreements with Datalink should not be unduly discriminatory, which we interpret to mean the agreements should be comparable, but not necessarily identical, to one another in all material respects.

The Office's Response – The Office acknowledges Flow's response; however, the Office emphasises that all commercial agreements for infrastructure sharing between licensees fall under the regulatory framework established by relevant legislation, including the Infrastructure Sharing Regulations.[24]

Question 1.1.8 - Did the Licensees, apart from DataLink, expect to pay the same fees as DataLink in regard to reservation fees?

a) **DataLink** – The licensees and DataLink were not in the same situation as they were not supplying the same service nor were they in competition: the other licensees could not reasonably expect that DataLink would be paying the same charges as they were.

[24] www.OfReg.ky/viewPDF/documents/radio-regulations/2022-05-10-05-28-38-Interconnection-and-Infrastructure-Sharing-Regulations.pdf

The Office's Response – The Office is of the opinion that the Infrastructure Sharing Regulations do not speak to differences in services, allowing different contracts for access to the same infrastructure. Indeed, Regulation 6 (c) states that: *infrastructure sharing services shall be provided by the responder to the requester at reasonable rates, on terms and conditions which are no less favourable than those provided by the responder to itself*. The service DataLink was providing to other Licensees was Infrastructure Sharing, the same service it was providing to itself. Additionally, as set out in the Office's response to question 1.1.1 above, DataLink is licensed for the same Network and Service as the attachers, allowing DataLink to provide others with access to dark fibre/bandwidth.

b) **Digicel** – no response

c) **Flow** – Flow cannot speak for the expectations of other Licensees. Flow believes that all arms-length transactions between Datalink and ICT Licensees for pole attachments to CUC's poles should be on terms and conditions that are comparable, but not necessarily identical, to one another, consistent with the obligations of the Infrastructure Sharing Regulations. Flow does not believe that a formal agreement by Datalink with itself constitutes an arms-length transaction or a substantive economic agreement.

The Office's Response – The Office notes Flow's response.

Question 2 - Is the analysis reasonable, including taking into account all material considerations? If not, why not?

a) **DataLink** – The reservation fees were not imposed on unwilling ICT service providers by DataLink as a result of market power stemming from control over a scarce resource. They were requested by the attachers who requested the arrangements, and it appeared at the time to facilitate the objectives both of the attachers and ICTA, namely having an Island-wide network in place at the end of a build out period. The analysis in the Draft Determination concludes that the arrangement by which spaces were reserved inhibited network development, whereas the facts indicate that it was essential to promote network development.

The analysis overlooks the fact that the poles have value to the attachers as a network and not as individual poles. The pole network provides the means for the licensees to build a fibre network. A licensee that is starting to build a fibre network planning to use the pole network to do so has to have an assurance that the poles on which the fibre network will be attached will remain available during the build out period. Without that assurance the attacher risks finding itself excluded from poles in certain areas and therefore unable to build a network (or at least unable to do so on the poles). Infinity and Logic and the ICTA at the time these reserved space agreements were entered into all expected and intended that the Infinity and Logic fibre networks would be Island-wide. Given this background there would appear to have been little option but to reserve pole spaces Island wide.

The Office's Response – The Office notes that, in an earlier comment on Question 1.1.4, DataLink said that Logic and C3 chose to reserve 100% of the poles. In a review of the relevant Agreements, it appears that unless the attachers stipulated poles they did not want to reserve, then reservations fees were payable for 100% of the poles.

b) **Digicel** – no response

c) **Flow** – Flow fundamentally disagrees with the premise for the analysis. As we have already explained, we do not believe the issues under consultation require or are appropriate for public consultation. These issues stem from a contractual disagreement between two ICT Licensees, C3 and Datalink. No contractual disagreement exists between Datalink and any ICT Licensee, other than C3. Therefore, we believe these issues of disagreement should be and, pursuant to OfReg's own regulations, are intended to be resolved by the Dispute Resolution Regulations. Resolution of these issues by public consultation is not only bad process, but unnecessary and a wasteful use of OfReg and ICT Licensees' resources and time.

That being said, we believe that OfReg's analysis of this dispute between C3 and Datalink appears valid and reasonable.

The Office's Response – The Office is of the opinion that there is a definite need for public consultation as the matter of the Grand Cayman rollout of fibre is squarely within each consumer's and potential consumer's best interest.

Question 3 - Are the conclusions reasonable? If not, why not?

a) **DataLink** – The conclusions in the Draft Determination are at paragraph 162. They are not correct. The first conclusion is that the reserved space provisions have impeded the efficient utilisation of pole infrastructure contrary to regulation 6(j)(i) of the Infrastructure Sharing Regulations (paragraph 162). That regulation provides: "*interconnection and infrastructure sharing services shall be provided in a manner that maximises the use of public ICT networks and infrastructure*"

At the time that DataLink entered into the relevant arrangements it was on the basis that that they would provide the necessary conditions for two Island wide networks. It is incorrect to suggest that, in doing so, DataLink was not providing infrastructure sharing services in a manner that maximises the use of public ICT networks and infrastructure. While it is correct that the pole network was not in fact fully used, that is not what was intended and not a consequence of the reserved space arrangements.

The Office's Response – As set out at paragraphs 40 *et seq.* below, the Office holds the position that the reservation fees did not enhance or facilitate the rollout of fibre and, in fact, impeded it.

DataLink – The second conclusion is that the provisions harmed competition in the Cayman Islands for ICT networks and for ICT services contrary to regulation 6(j)(iii). That regulation provides: "*interconnection and infrastructure sharing services shall be provided in a manner that enables the development of competition in the provision of public ICT networks and infrastructure in a timely and economic manner*"

At the time DataLink entered into each of the relevant arrangements, it was on the basis that C3 and Logic respectively would at the end of the build out period be operating an Island wide fibre network. At the point of concluding these agreements, Datalink was therefore providing infrastructure sharing services in a manner that would enable the development of competition, by entering into an arrangement that was expected to add an additional ICT fibre network island wide.

While it is correct that the pole network was not in fact fully used that is not a consequence of the reserved space arrangements.

The Office's Response – The Office disagrees with DataLink's response in that the payment of reservation fees at that time was in effect a barrier to the rollout of the other Licensee's Networks as it was a payment to be made by those seeking to attach which could have been used instead to fund the physical operations needed to rollout the fibre – noting also that DataLink held a position that it did not utilise thus preventing other Licensee's from utilising that position.

DataLink – The third conclusion is that the provisions involved rates terms and conditions that were not reasonable contrary to section 65(5) of the ICT Act and Regulation 6(a) Infrastructure Sharing Regulations.

Section 65(5) ICT Act provides that infrastructure sharing: "*shall be provided at reasonable rates, terms and conditions and no less favourable to those provided to: (a) any non-affiliated supplier; (b) any subsidiary of the licensee; or (c) any other part of the licensee's own business*".

Regulation 6(a) Infrastructure Sharing Regulations requires "*each licensee to treat requests to negotiate interconnection and infrastructure sharing agreements and to provide interconnection and infrastructure sharing services in good faith*."

There is nothing to support the view that DataLink did not act in good faith in negotiating the relevant agreements. As set out above, the rates are not unreasonable, and DataLink is not in competition so that there is no improper self-preference. DataLink would suggest that the reference to the rates being those provided to another part of the licensee's own business is a reference to supplies to other parts of the licensee's own business that compete with the third party business with whom infrastructure is being shared. It is aimed a level playing field, but where the business is not in competition they are not on the same playing field. Were this requirement not limited in this way it would involve or risk costs being imposed on customers serviced by DataLink with no corresponding benefit to Logic or Flow in terms of equality of competition.

The Office's Response – The Office disagrees that DataLink's infrastructure sharing services were provided at rates, terms and conditions that were reasonable. In support of its position, the Office notes in particular paragraphs 88 *et seq.* below.

DataLink – The fourth conclusion is that the arrangements were discriminatory in favour of Flow and because there was self-preference, contrary to section 65 of the ICT Law and Infrastructure Sharing Regulations 6(a) and 10(1)(b).

Regulation 10(1)(b) requires that charges for Infrastructure sharing are to be:
"*non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances as the responder provides for itself, any non-affiliated licensee* …".

As we have pointed out, Flow was not in the same position as Logic and Infinity and therefore there was no equivalence of circumstances and Logic and Infinity were not in the same position as DataLink and there was therefore no equivalence of circumstances there either.

The Office's Response – The Office disagrees with DataLink's position. In support of its position, the Office notes in particular paragraphs 107 *et seq.* below.

DataLink – These conclusions lead to the suggestion that DataLink should rebate reservation fees. DataLink maintains that the facts do not support this suggestion. As set out above there were proper reasons for making these Agreements, which were entered into for the purposes of increasing the available fibre network. Moreover, the C3 agreement regarding reserved spaces ended in December 2014 and the Logic agreement in December 2018.

DataLink's position is that the Office's powers to require contract modification pursuant to s 69 of the ICT Law of 2019 exist to promote the efficient and harmonised utilisation of infrastructure or the promotion of competition. The proposed removal of certain terms is retrospective and therefore has no impact on the efficient and harmonised utilisation of infrastructure or the promotion of competition. The Office cannot change the past by modifying the agreements retrospectively.

If in the past there was inefficient and disharmonious use of infrastructure that is not going to change by altering the agreements now.

The Office's Response – The Office addresses the matter of rebates in paragraphs 28 *et seq.* below.

DataLink – As to the Office's powers under 67A(3)(d) of the ICT Act:

(a) DataLink maintains that the proposed requirement that DataLink rebate monies paid is a disproportionate expropriation of DataLink's property rights. In support, DataLink referred to its skeleton argument (Skeleton) lodged in the judicial review proceedings, dated **7 May 2018**.

(b) DataLink maintains that the use of statutory powers to effect a rebate that is proposed in the Draft Determination is *ultra vires*. In support, DataLink referred to its skeleton argument (Skeleton) lodged in the judicial review proceedings dated **7 May 2018**.

These conclusions also lead to the proposed determination requiring the agreements to be amended to remove reference to reserved space. In the case of C3 and Logic there is no purpose to doing that as those provisions are no longer operative. In the case of Flow, it would appear to make no sense to remove the limited reservation for six months, subject to Flow's right to elect to exclude poles from the arrangement. The consultation makes clear that there is nothing objectionable in principle about reserved space arrangements and this limited arrangement appears to have caused concern because it is different from the Logic and C3 arrangement, but once it is appreciated that the circumstances are not equivalent, that concern ought to be dispelled.

Regarding (a) above, DataLink stated in its submission in summary that the Office's decision amounted to a disproportionate expropriation of property, which is contrary to the Bill of Rights and consequently unconstitutional and unlawful.

In the aforementioned skeleton argument, DataLink proposed alternatives to Office's proposed approach at that time, stating that the Office could have directed

that the specified contracts be varied to define reservation fees in a way that was acceptable to the Office.

DataLink submitted that there were obvious alternatives to the regulatory position that the Office had taken in the Draft Determination.

The Office could have directed that the Agreements be varied to define reservation fees in a way that was acceptable to the Office. For example, it might have been possible for OfReg to have required the **Quarterly Reserved Space Payments** to be recalculated by reference to (a) the number of poles that the attaching authorities reasonably expected to attach to in the quarter, having regard to (b) the limit on the number of attachments Datalink was able to make.

Further, even if this had been thought too complicated or prescriptive, the Office could have directed the parties to negotiate amendments to the specified contracts in order to make them acceptable. This would have been consistent with the Office's duty to promote self-regulation (s 6(4)(b) of the URC Act, and its approach when directing the parties to negotiate repayments (para 166 of the Draft Determination).

DataLink submitted that the legal effect of the Draft Determination was to require DataLink to repay all reservation fees. This, in DataLink's view, manifestly went further than was necessary to pursue the legitimate aim of requiring the repayment of excessive reservation fees. Indeed, it went further than the Office intended it to go. This, in DataLink's view, was fatal to the proportionality of the Draft Determination.

By (unintentionally) requiring the repayment of all reservation fees, the Office failed to make any provision for the past benefits obtained by the Licensees from the reservation of communications spaces under the terms of the specified contracts, thereby gifting to the Licensees an unjustified windfall and depriving the Plaintiff of payments properly due for those benefits (or compensation for the opportunity cost of having reserved spaces for Licensees in the past).

Regarding (b) above, DataLink stated in its submission that ICT Determination 2017-1 was *ultra vires* in two respects:

First, the Office was not entitled to find that DataLink was in breach of sections 65(5) and 68(3) of the ICT Act, because those provisions only came into force on 16 January 2017, which is after the conduct complained of (section G.2 below).

Second, neither s 69(2)(b) of the ICT Act nor Regulation 22 of the Infrastructure Sharing Regulations empowered the Office to direct the retrospective variation of the specified contracts (as if they had never made any reference to reserved space, with the effect that the Licensees would have an unqualified, enforceable right to repayment of all reservation fees).

Deleting the reserved space clauses would require DataLink to repay to the Licensees the fees received pursuant to the reserved space clauses. It is a fundamental principle of statutory construction that "*by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law*"[25]

[25] Bennion on Statutory Interpretation, 6th Ed, section 27.8.

Section 69(2)(b) ICT Act provides for the modification of agreements. It is in the present tense. It does not give any clear authority for action that would require the repayment of any sums received. Further, its express purpose is to "*promote …harmonised utilisation of infrastructure*", not to remedy past breaches of regulatory standards. It follows that s 69(2)(b) cannot be read as empowering the Office to require the retrospective modification of concluded contracts in a way that would render the Plaintiff liable for the repayment of sums.

The Office's Response – Regarding the Office's legal vires, the Office disagrees with DataLink's position. In support of its position, the Office notes in particular paragraphs 28 *et seq.* below.

b) **Digicel** – no response

c) **Flow** – We do not believe that the conclusions reached by OfReg are reasonable. We agree and support OfReg's decision to have Licensees pursue renegotiation of their pole attachment agreements with Datalink, considering the guidance and analysis set forth by OfReg in its determination. We do not, however, believe that such renegotiation should be a requirement, and Licensees should have a choice to renegotiate or not. If a Licensee chooses to renegotiate, does so in good faith, and does not succeed in reaching a commercial agreement with Datalink, then we believe OfReg should only intervene if requested by a Licensee per the terms of the bilateral Dispute Resolution Regulations.

We do not agree with the Office's conclusion that all reference to the terms "**Reserved Space**," "**Quarterly Reserved Space Payment**," and "**Total Minimum Annual Payments**" be removed from all pole attachment agreements between Licensees and Datalink. We do not believe that this decision is reasonable or consistent with OfReg's own analysis.

The Office acknowledges in the Draft Determination that reservation payments are appropriate, in principle, and, if appropriately specified, can have an appropriate economic basis and provide economic value to both the payer and receiver of these fees. OfReg's analysis, however, finds that certain of the terms applied by Datalink to reservation fees in its agreements with C3 and Logic are unreasonable and discriminatory. Consistent with that finding, we believe the appropriate conclusion is not to mandate the removal of all effected terms, but to allow Datalink the opportunity to modify those terms and renegotiate an agreement with those Licensees that seek modification. The forced removal of these terms, as OfReg has proposed, is unnecessary to resolve the shortcomings OfReg has identified in its analysis. It is an overreaction that we believe will create its own set of new problems for both Datalink (who would like some certainty to forecast the future utilization of CUC's poles) and Licensees (whom also would like some certainty that they will in the future have access to space on CUC's poles).

The Office's Response – The Office is of the opinion that attachers should not be required to pay a reservation fee to DataLink as a supporting mechanism for forecasting and believes that a simple forecast of future development activity from the attachers would suffice.

Question 4 - Should any other matters be reconsidered?

a) **DataLink** – no response

b) **Digicel** – no response

c) **Flow** – no response

Question 5 - Provide your views on any other matters you consider relevant to this Consultation.

a) **DataLink** – If, despite DataLink's observations above, the Draft Determination proceeds to require that the parties must remove references to reserved space payments and minimum payments, the Draft Determination should make clear whether that is intended to carry with it an immediate obligation to make repayment or only to negotiate with licensees over the amount to repay.

The Office's Response – The Office notes DataLink's response.

b) **Digicel** – no response

c) **Flow** – no response

D. The Office's Analysis

Jurisdiction to Require Changes to Agreements

28. The ICT Act requires the Office to perform certain functions. These include promoting competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so (section 9(3)(a)), licensing and regulating ICT services and ICT networks (section 9(3)(e)) and promoting and maintaining the efficient, economic and harmonised use of ICT infrastructure (section 9(3)(h)).

29. As has been referenced above, the ICT Act and the Infrastructure Sharing Regulations impose a number of obligations directly on ICT Licensees with respect to their infrastructure sharing agreements and arrangements, including when they were entered into.

30. These include but are not limited to the obligations:

a) not to refuse to share infrastructure except on reasonable grounds (section 65(1) ICT Act);

b) infrastructure sharing services provided by a licensee 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 (section 65(5) ICT Act);

c) each licensee has an obligation to treat requests, to negotiate infrastructure sharing agreements and to provide infrastructure sharing services in good faith (Regulation 6 (a) Infrastructure Sharing Regulations);

d) infrastructure sharing services shall be provided by the service provider to the person requesting the service 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 service provider (Regulation 6 (c) Infrastructure Sharing Regulations);

e) costs and tariffs shall be sufficiently unbundled so that the requester shall be obliged to pay the infrastructure service provider only for the infrastructure sharing service that it requires (paragraph 6 (f) Infrastructure Sharing Regulations);

f) infrastructure sharing services shall be provided in a manner that – (i) maximises the use of ICT networks and infrastructure; (ii) minimises the potential for negative environmental impacts; and (iii) enables the development of competition in the provision of public ICT networks and public ICT services in a timely and economic manner ((Regulation 6 (j) Infrastructure Sharing Regulations); and,

g) charges for the provision of infrastructure shall be non-discriminatory in order to ensure that those providing the Infrastructure Sharing Service applies equivalent conditions in equivalent circumstances in providing equivalent services (Regulation 10 (1) (b) Infrastructure Sharing Regulations).

The Infrastructure Sharing Regulations, at Regulation 6 (l), also provide that "*any disputes relating to […] infrastructure sharing shall be referred to the [Office] under the Dispute Resolution Regulations*."

These obligations and requirements have existed since the initial Information and Communications Technology Authority ('**ICTA**') Law, 2002 came into force[26] and the Infrastructure Sharing Regulations were enacted in 2003 – clearly well before the introduction of the concept of reservation fees into the pole sharing agreements applicable to C3, Flow and Logic.

31. In this case, there is no dispute 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 paragraph 5 above). The powers granted to the Office by the ICT Act and its Regulations in respect of infrastructure sharing, therefore, apply to DataLink's service. The Office also notes that DataLink holds Type 11 and 11a ICT service licences.

32. In light of the foregoing, the Office considers that it clearly has the power under the ICT Act and Infrastructure Sharing Regulations to determine that clauses in any of the Pole Sharing Agreements were unreasonable and discriminatory as of the date of those Agreements.

33. The Office also considers that, contrary to DataLink's submissions to Question 3 (above) "*that the use of statutory powers to effect a rebate that is proposed in the Draft Determination is ultra vires*", is incorrect in that the Office has the power to require repayment of fees and charges previously paid to DataLink if required in the specific circumstances. In particular, section 69(2)(b) of the ICT Act does not limit the type of modification "*of any agreement or arrangements entered into between a licensee and another person*" the Office can require, provided that it is for an Office function, including "*in order to promote an efficient, economic and harmonised utilisation of infrastructure*." Further, section 67A (3) (d) of the ICT Act authorises the Office to give directions where there is a dispute "*requiring repayment of sums by way of an adjustment of an underpayment or overpayment*." There is a current dispute between DataLink, C3 and Logic as to the appropriateness of reservation fees and the charges for such.

34. The Office does not agree with DataLink's position that "*the proposed removal of certain terms is retrospective and therefore has no impact on the efficient and harmonised utilisation of infrastructure or the promotion of competition*." This is not a retrospective measure, as the obligations set out to ensure, for example, that access to the infrastructure is provided on "*reasonable rates, terms and conditions which are not less favourable*", infrastructure sharing rates be "*cost-orientated*", and that infrastructure sharing rates be "*non-discriminatory*", were in place and applicable (long) before the implementation of the relevant Agreements.

35. In other words, the Agreements should have reflected the regulatory obligations that were already in place. Therefore, the relevant Laws and Regulations, including the fundamental underlying principles of cost recovery and charging, applied at the time all the relevant Pole Sharing Agreements were being negotiated and signed.

36. In any event, if it were the case that the ICT Act and/or URC Act did not allow the Office to require, in the appropriate circumstances, a recovery of monies improperly charged for infrastructure sharing services, contrary to Laws and Regulations already in place,

[26] https://www.caymanlawschool.ky/n0c-storage/legislation2/information_communications_technology_authority_law_2000.pdf; https://www.ofreg.ky/viewPDF/documents/legislation/2021-04-15-02-25-25-ICTA-Infrastructure-Sharing-Notice-2003.pdf

the Office could be frustrated in performing the functions assigned to it under those Laws, in particular those of promoting competition where reasonable or necessary to do so, and of promoting and maintaining an efficient, economic and harmonised use of ICT infrastructure. DataLink's interpretation in this regard is not a reasonable one.

37. Further, and more generally, both the ICT Act and the URC Act grant the Office the power to require in the appropriate circumstances the recovery of monies improperly charged. Section 9(1) of the ICT Act gives the Office "*the power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law*." Section 6(2)(hh) of the URC Act authorises the Office to "*take any other action, not expressly prohibited by Law, that is necessary and proper to perform its duties under this Act and sectoral legislation*"

38. Finally, section 6(2)(gg) of the URC Act permits the Office to "*take appropriate enforcement action, including the imposition of administrative fines, in any case where a sectoral participant has contravened this Act, the regulations and any sectoral legislation or any administrative determination*."

39. While the imposition of fines is one of the potential enforcements actions the Office may take, it is not the only one and the Office considers that, in the appropriate circumstances, the range of potential enforcement actions available to it certainly includes requiring the repayment of monies overcharged contrary to statutory obligations that were already in place prior to that overcharging.

Are Reservation Fees Unreasonable, Harmful to Competition or otherwise inappropriate?

40. The Office currently considers that the reservation fees, as provided for in the relevant Pole Sharing Agreements (see **APPENDIX 1**), has limited the efficient and harmonised utilisation of infrastructure, limited the promotion of competition in the provision of ICT services or ICT networks, and were provided at rates, terms and conditions which were not reasonable - subject to the discussions below:

A) Opportunity Cost

41. In its response to ICT Consultation 2016 – 2, DataLink stated that its reservation fees were intended to recover the opportunity cost incurred by DataLink by keeping in the communication space a specific attachment point reserved by an ICT licensee but not occupied. In its response to ICT Consultation 2019-2, DataLink states that "*the administrative overhead of running DataLink required revenue from the Reservation and Minimum Payment Fees for DataLink to be viable*."

42. The Office notes that "*opportunity cost*" is a key concept in economics, expressing the relationship between scarcity and choice. In its general interpretation, it represents the value of a best alternative use that was foregone or sacrificed. Where the resources available to economic agents are limited or scarce, the allocation needs to be made in an optimal manner so that the total utility or satisfaction derived from the use of such limited or scarce resources cannot be increased by using them in any other alternative way.

43. Based on such general economic principles relating to an efficient allocation of scarce resources, the Office considers keeping an attachment point reserved but not occupied is likely to create an opportunity cost for DataLink insofar as there is value that could

otherwise be derived from making that attachment point available to be occupied by another ICT licensee – where that space is available for attachment.

44. Accordingly, and as recognised in the Proposed Determination, the Office notes that the introduction of reservation fees may be viewed, in principle, as an appropriate means to ensure an efficient allocation of the relevant costs related to the use of the communication space which is made available to ICT licensees on utility poles in Grand Cayman, where the demand for attachment points exceeds the number of attachment points available.

B) Introduction of Reservation Fees in Pole Sharing Agreements

45. Having noted the foregoing discussion about the term "*opportunity cost*", and as set out by Flow in its response to ICT Consultation 2016 - 2, the Office agrees that, under the 1996 contract between CUC and Cable & Wireless, i.e. the CUC-Flow Pole Sharing Agreement, the opportunity cost for CUC's pole sharing arrangements was zero at that time as there were no other entities potentially requesting access to CUC's poles except for Flow.

46. Further, the absence of any reference to reservation fees in the CUC-C3 Pole Sharing Agreement may be also explained by the limited demand for attachment points at the time the agreement was negotiated, i.e., by the non-existence of an opportunity cost for CUC of making the attachment point available to another ICT licensee.

47. The Office further notes that the reservation fees were initially introduced by CUC, and not by DataLink, and were specified as the "**Quarterly Reserved Space Payment**" in the CUC-C3 Deed of Variation. The "**Quarterly Reserved Space Payment**" applied until **31 December 2014** and was calculated as the product of a percentage of the Annual Attachment Fee and of the total number of poles owned by CUC in Grand Cayman less any poles already attached to by C3.

48. As the CUC-C3 Deed of Variation was agreed on **20 March 2012**, at a time when CUC would have known of ICT Licensees other than C3 potentially interested in attaching to CUC's communications space,[27] the opportunity cost of making the attachment point available to another ICT licensee existed for CUC when it negotiated the terms of the CUC-C3 Deed of Variation with C3. In such circumstances, C3 accepted such new contractual arrangements with the understanding that, without such a reservation, someone else might take over the available attachment points, which would affect C3's ability to roll out its fibre network in Grand Cayman.

49. The Office notes that these contractual arrangements between C3 and CUC occurred at the same time as CUC finalised its decision to outsource its business operation relating to the sharing of its distribution supporting structures with other parties - for the attachment of the other parties' aerial cables and associated equipment - namely to meet the prospective demand from ICT Licensees for the attachment points in the communications space on CUC's utility poles.

[27] By virtue for example of Digicel's Licence Amendment 18 of 9 February 2012 for a D1 ICT Network (https://www.ofreg.ky/viewPDF/documents/digicel-cayman-limited/2021-08-06-04-23-23-View-Amendment-18-Addition-of-Type-D1-Network.pdf); Logic's Amendments 18 of 9 February 2012 adding a D1 rollout schedule (https://www.ofreg.ky/viewPDF/documents/westtel-limited/2021-08-06-06-12-21-View-Amendment-18-Amend-Annex-1A---Add-Fibre-Roll-Out-Schedule.pdf)

50. For that reason, CUC established DataLink as a separate company, fully owned by CUC, and it entered into an agreement with DataLink under which DataLink would have custody and control of the designated communications space on CUC's utility poles, and it would be duly authorised to utilise that space in accordance with its ICT licence granted by the Authority. (The Office notes that the CUC-C3 Deed of Variation is dated **20 March 2012** while DataLink's ICT Licence was issued on **28 March 2012**.)

51. Further, the Office notes that, through the C3-CUC-DataLink Novation Agreement executed on **7 May 2012**, all the responsibilities for invoicing and receiving payments relating to C3's use of the communications space on CUC's utility poles, including for the "*Quarterly Reserved Space Payment*", were transferred from CUC to DataLink.

52. The Office also notes that similar principles which related to the **Quarterly Reserved Space Payment** were later implemented by DataLink in the DataLink-Logic Pole Sharing Agreement and, more recently, in the DataLink-Flow Pole Sharing Agreement.

53. However, the Office notes that the Flow-CUC-DataLink Novation Agreement, dated **9 November 2012**, did not contain any reference to "*reservation fees*" despite the fact that, at the time of this agreement, the theoretical demand for attachment points exceeded the actual number of attachment points available (i.e. the "*opportunity cost*" was not zero).

C) Role of DataLink

54. Based on the above, the Office considers that DataLink 'stands alone' from CUC, as DataLink is the ICT Licensee and has custody and control of the designated communications space on CUC's utility poles. Therefore, DataLink should be required to demonstrate that all reservation fees charged as the "**Quarterly Reserved Space Payment**" are directly related to DataLink's costs incurred as a result of keeping an attachment point reserved but not occupied.

55. In other words, DataLink should demonstrate that the removal of reservation fees would result in a net loss for DataLink, when assuming such attachment points could be otherwise occupied and generate revenues for DataLink through pole attachment rental fees. Any such loss could not and should not be transferred to CUC (and ultimately to electricity users).

56. The Office also notes DataLink's comments that a pole access regime which allowed attachers to occupy but not use a scarce and important resource like space on a utility pole would be problematic and that a regime which encourages network roll-out is desirable. The Office notes that DataLink, in so stating, is purporting to apply statutory public policy considerations as provided for under the ICT Act and URC Act, which is not a DataLink role, nor should it be a consideration in determining the relevant opportunity cost in this case. As has been set out above, DataLink should demonstrate that the removal of reservation fees would result in a net loss for DataLink, and thus the charging of such fees is appropriate.

D) Effect of DataLink's Reservation Fees

57. In any event, even if one accepts DataLink's proposition that the introduction of reservation fees is justified because it encourages network roll-out, the Office has not received sufficient evidence to demonstrate that such goals have been achieved in Grand Cayman through the implementation of reservation fees. On the contrary, it

appears that the reservation fees, as implemented in some, if not all, of the existing Pole Sharing Agreements, have caused disruption in the planned network roll-out schedules.

58. In relation to the specific Pole Sharing Agreements, the Office considers, subject to consultation, that the way the reservation fees worked in those Agreements, in particular:

a) was not provided in a manner that maximised the use of the ICT networks and infrastructure or enabled the development of competition in the provision of public ICT networks in a timely and economic manner (Reg. 6(j) Infrastructure Sharing Regulations) (see paras 59 *et seq.* below); and,

b) constitutes a breach of section 65 (5) of ICT Act, also Regulations 6 and 10 of the Regulations, which states that *"[a]ny 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."

E) Disincentives to the efficient and harmonised utilisation of infrastructure

59. The Office considers that the use of reservation fees in the specific way set out in the Pole Sharing Agreements has served to enable the very behaviour about which DataLink expressed concern. By paying the reservation fees, both C3 and Logic could be confident that no third-party competitors would be able to access the poles managed by DataLink even if their respective network rollouts slowed down or stopped completely.

60. DataLink stated in its submission to ICT Consultation 2016 - 2 that, in 2012, three parties were seeking access to the last attachment point on the poles. The Office notes that Logic ultimately secured that last attachment point. It is possible that one of those other two parties might have been able to roll out their own network if it had been able to access poles in areas where neither Logic nor C3 were rolling out their networks. If this had happened, competing fibre networks and competing ICT services likely would have been available earlier across a wider area of Grand Cayman. In such a case, consumers would have benefited from this competition, and DataLink would have been generating more revenues from pole attachment fees.

61. Instead, the Office considers that DataLink is likely to have felt reduced pressure to licence the right to attach to utility poles to third parties because it knew it would be receiving revenue even if C3 and Logic did not roll out their networks in a timely manner. In this way, DataLink would have been disincentivised to ensure that it enabled the efficient and effective rollout of C3's and Logic's ICT networks, such that their services would be made available to customers across Grand Cayman. The Office notes that several of the issues between the parties concerned attachments to CUC's utility poles made without permits from DataLink and considers that these issues may have been less significant if DataLink had been more effectively incentivised to process applications for attachments quickly and to make poles ready to accommodate them.

62. Because third parties were prevented from accessing the underutilised poles, and because Logic, C3 and DataLink do not appear from the information before the Office to have completed the roll-out of their fibre networks, there are still currently many poles across Grand Cayman not being used to their fullest potential. C3 and Logic would have

known that no other Licensees could enter the market because of the limited nature of the attachments to the communications space and that they had reserved those slots for a period of time.

63. Therefore, the incentives for C3 and Logic to roll out their respective fibre networks in a timely manner across Grand Cayman is likely to have been significantly reduced. Also, DataLink knew that it already had revenue coming in based on reservation fees and the poles to which Flow was already attached and paying for, which meant that it likely felt no urgency to be properly resourced to fulfil the demand on its resources from C3 and Logic requesting access to poles that had to be made ready for such access.

64. Indeed, had Logic, C3 or DataLink had a stronger incentive to use their space on the poles in a timely manner or had third parties been able to access the poles, fewer poles would have been underutilised and the use of the pole infrastructure in this way would have been more economic and effective.

65. Therefore, based on the evidence regarding the number of permit applications processed and the time required to do so, the Office considers that the reservation fees as specified in the Pole Sharing Agreements have acted and continue to act as a disincentive to efficient processing of permit applications, and therefore the reservation fees did and do not promote an efficient, economic and harmonised utilisation of utility pole infrastructure. The reservation fees in this way have not enabled the development of competition in the provision of public ICT networks and services in a timely manner.

66. Further, the Office considers that the evidence does not support DataLink's assertions that the failure of the attachment process was the result of either the attaching utilities not submitting applications "*in an organised and timely manner*" or "*unanticipated demand*". To the contrary, DataLink was in full possession of the other attaching utilities' anticipated pole needs, based on each licensee's fibre roll-out obligations. In any event, given that the reservation fees have been specified as the "**Quarterly Reserved Space Payment**" which is derived from the total number of poles owned by CUC in Grand Cayman, there is no ground for DataLink to claim that the submission of a great number of permit applications was an "*unanticipated demand*".

67. Accordingly, the Office considers that the scope of reservation fees, i.e. the total number of relevant poles to which the "**Quarterly Reserved Space Payment**" makes reference, should be directly related to the forecast or anticipated demand for pole attachments, i.e. permit applications, by ICT licensees. In other words, any lack of resources with DataLink in processing permit applications from ICT licensees should have been reflected in the scope of reservation fees, i.e. the relevant terms of the "**Quarterly Reserved Space Payment**".

68. For example, if DataLink's capability to process permit applications is limited to issuing permits for a maximum of 300 poles per Licensee per quarter, it is then reasonable to assume that the scope of reservation fees would be limited to 300 poles, instead of "*all Poles owned by the Electric Utility in Grand Cayman*" or "*all Poles in Grand Cayman that DataLink owns or has the right to attach to.*"

69. Looking at each of the relevant Pole Sharing Agreements in turn:

i) CUC-C3 Pole Sharing Agreement

70. When CUC and C3 executed the CUC-C3 Deed of Variation on **20 March 2012**, the parties were aware that C3 had a licence obligation to roll out a fibre network sufficient

to make available all its ICT services to 100% of the resident population of Grand Cayman by 31 December 2014. This same date was the end of the reservation period, or "**Build-Out Period**" as it was termed in the CUC-C3 Deed of Variation relating to the CUC-C3 Pole Sharing Agreement, both of which being novated to DataLink through the C3-CUC-DataLink Novation Agreement.

71. Under the terms of the CUC-C3 Deed of Variation, C3 was required to pay a reservation fee (i.e. the "**Quarterly Reserved Space Payment**") during the "**Build-Out Period**", in respect of all of CUC's poles available for pole attachments, stated to be approximately 15,000 as at **22 November 2005** (i.e. the date of the CUC-C3 Pole Sharing Agreement), less any poles already occupied by C3.

72. The Office considers it is reasonable to assume that a substantial majority of those poles would be required to serve "100% of the resident population of Grand Cayman". This means CUC and later Datalink could reasonably have anticipated the number of applications for pole permits that C3 would be submitting, and the timeframe required for processing the applications and issuing pole permits to C3. However, while DataLink could reasonably have anticipated a substantial level of demand for pole access by C3 (given similar build-out obligations of other licensees), this does not translate into a reasonable basis for assuming that C3 would require access to **all** CUC's poles for the purposes of reserving space or justifying a reservation fee - unless such a request is made or substantiated.

ii) DataLink-Logic Pole Sharing Agreement

73. When Logic and Datalink executed the DataLink-Logic Pole Sharing Agreement on **18 July 2013,** the parties were aware that Logic had a licence obligation to complete a fibre network sufficient to enable the provision of ICT services to 100% of the resident population of Grand Cayman by **8 February 2017** and set **31 December 2018** as the end of Logic's "**Build-Out Period**".

74. Under its agreement with DataLink, Logic had been paying a reservation fee (i.e. the **Quarterly Reserved Space Payment**) in respect of all of CUC's poles available for pole attachments, stated to be approximately 16,500 as at 18 July 2013 (i.e. the date of the DataLink-Logic Pole Sharing Agreement), less any poles already occupied by Logic.

75. Again, the Office considers that it is reasonable to assume that a substantial majority of those poles would be required to serve "*100% of the resident population of Grand Cayman*." The Office considers that, in such circumstances, Datalink could reasonably have anticipated the number of applications for pole permits that Logic would then be submitting over the three and a half [3½] year period of Logic's licensed roll-out obligation. In other words, the demand for poles clearly was not "*unanticipated.*"

76. According to the information submitted by Datalink to ICT Consultation 2016-2, Logic began submitting permit requests in the same calendar quarter as the parties executed the DataLink-Logic Pole Sharing Agreement. Again, this could clearly have been anticipated by DataLink.

77. By the end of June 2015, DataLink's submission shows Logic had submitted 4,455 permit requests. Of these, 3,700 remained outstanding, according to the evidence submitted by Logic as referenced in the CUC Restraining Order application against

Logic judgment (para. 41).[28] The Office notes DataLink's comments that "*the evidence was not tested by the court*" and that a "*significant number of the applications identified in Logic's evidence as delayed or outstanding were instances where payment for make ready work was sought and not pre-paid for*". However, in the result, DataLink's success at issuing permits amounted to approximately **17%** of applications filed.

78. Even taking into account that some of the delay in issuing permits was due to non-payment of make-ready charges, this result does not suggest DataLink was processing permit applications efficiently, while Logic continued to pay the reservation fees.

79. Subsequent to the publication of ICT Consultation 2016-2, Logic, CUC and Datalink executed a Memorandum of Understanding in **June 2016** in relation to pole permit processing and pole attachment matters (the '*CUC-DataLink-Logic MOU*').[29] Under this agreement, DataLink agreed to use "*best efforts*" to process up to 200 permit applications per month until the expiry of the agreement on **31 December 2018**. These best efforts may be limited by applications received from other parties, as DataLink stated it can process no more than 300 applications per month for all attachers.

80. In addition, under the CUC-DataLink-Logic MOU, Logic acknowledged that the submission of new permit requests will affect DataLink's ability to process the backlog of outstanding permit requests and agreed to pay a fixed fee for make-ready for all poles.

81. The term of the CUC-DataLink-Logic MOU was 18 months. During this time, DataLink therefore agreed to process a maximum of 3,600 permit requests for Logic, including all outstanding requests as well as any new requests to address unauthorised attachments and any additional poles. The Office notes that this could be sufficient to address the 3,700 backlogs noted previously. However, Logic agreed to pay a fixed fee per permit request as well as the reservation fee during this same time. In other words, by the end of term of the CUC-DataLink-Logic MOU on **31 December 2018**, Logic was unlikely to have attached to substantially more poles than it had applied for by the end of 2015, notwithstanding the payment of substantial fees to DataLink.

iii) DataLink-Flow Pole Sharing Agreement

82. The Office notes that the foregoing discussion relates principally to the reservation fees included in DataLink's Pole Sharing Agreements with C3 and Logic. The Office also notes that neither the 1996 CUC-Flow Pole Sharing Agreement nor the 2012 Flow-CUC-DataLink Novation Agreement included a reservation fee to be paid by Flow. However, after the expiry of the CUC-Flow Pole Sharing Agreement, the reservation fee (i.e. the "*Quarterly Reserved Space Payment*") was introduced in the 2016 DataLink-Flow Pole Sharing Agreement.

83. The Office further notes that reservation fees in the C3 and Logic Pole Sharing Agreements apply to *all* CUC's poles for which those companies have not been granted a permit at the start of the relevant calendar quarter period, for the purposes of calculating the "**Quarterly Reserved Space Payment**", and such reservation fees are

[28] www.ofreg.ky/viewPDF/documents/others/2021-04-28-01-10-31-1458327054CUCLtdvWestelLtdTALogic.pdf - DataLink sought an injunction to prevent Logic attaching its fibre on the communications space where DataLink had not provided its agreement to do so. That application was dismissed.
[29] www.ofreg.ky/viewPDF/documents/consultations/2021-04-09-01-53-34-12-July-2016-DataLinkLogic-MoU.pdf

levied during a "**Build-Out Period**". According to DataLink, because Flow is not building out a new network like C3 and Logic, DataLink and Flow agreed to different contractual terms.

84. The reservation fees in the 2016 DataLink-Flow Pole Sharing Agreement applied instead to any new poles installed by DataLink and were to be levied only for a period of six (6) months following installation of the new pole. The DataLink-Flow Pole Sharing Agreement does not define the term "*new pole*", and the Office considers that the term includes both new poles installed in new neighbourhoods being served by CUC ("*greenfield*" poles) as well as "mid-span" poles installed by CUC in established neighbourhoods in order to manage wind loading issues created by the attachment of additional telecommunications facilities on existing poles. Further, Flow has the option to exclude any pole or collection of poles from the **Reserved Space** by notice to DataLink

85. DataLink submitted to ICTA Consultation 2016-2 that, "[i]*f the provisions are considered to be discriminatory because they are absent from some contracts, then they should be introduced into those contracts and not removed from the contracts with Logic and C3.*"[30] The Office considers that DataLink's proposal would be ineffective in resolving the identified discrimination.

86. At the time that DataLink made its submissions to ICT Consultation 2016-2, both Flow and C3 were past their respective initial roll-out periods, the former because it has been in operation for many years and the latter because its deadline for island-wide network roll-out had passed. DataLink's initial form of reservation fee was designed to be, in effect, only during that initial network roll-out period and, at that time, would have only applied to Logic, even if it were inserted into all pole sharing agreements. The Office considers that this would have been discriminatory against Logic (as noted above, in breach of the ICT Act and of the Infrastructure Sharing Regulations) and put Logic at a competitive disadvantage as against the other attachers.

87. In any event, the Office considers that DataLink's revised form of reservation fee, contained in the DataLink-Flow Pole Sharing Agreement, would have been also discriminatory noting that it did not apply to DataLink's own business at the time. In other words, DataLink's proposal in paragraph 85 above, if it had been adopted, would be in breach of section 65 (5) of ICT Act and Regulation 10(1)(b) of the Infrastructure Sharing Regulations because it would not "*ensure that [DataLink] applies equivalent conditions in equivalent circumstances in providing equivalent services, as [DataLink] provides to itself […].*"

F) Infrastructure not provided at reasonable rates, terms and conditions

88. The Office notes that the total number of poles owned by CUC in Grand Cayman, as reference for calculating the "**Quarterly Reserved Space Payment**" in each of the relevant Pole Sharing Agreements, was estimated by CUC, and then DataLink, at the following levels listed chronologically:

- On **22 November 2005** there were approximately **15,000 poles** owned by CUC and available for pole attachments in Grand Cayman, as specified in the CUC-C3 Deed of Variation;

[30] See para.129 of ICT 2017-1 Determination.

- On **18 July 2013** there were approximately **16,500 poles** owned by CUC and available for pole attachments in Grand Cayman, as specified in the DataLink-Logic Pole Sharing Agreement;
- On **18 November 2016** there were approximately **17,475 poles** owned by CUC and available for pole attachments in Grand Cayman, as specified in the DataLink-Flow Pole Sharing Agreement.

89. Accordingly, the reservation fees, as a means to ensure an efficient allocation of scarce resources, were determined by CUC and DataLink based on the assumption that the opportunity cost incurred by DataLink by keeping an attachment point in the communication space reserved but not occupied, relates to all the poles owned by CUC in Grand Cayman, regardless of whether and when any of those poles will be made available for attachment by ICT licensees.

90. However, the Office notes DataLink's claim that the resource capability available to CUC and DataLink for processing and issuing permits for attachment of communication cables on utility poles is limited to a maximum of 300 permits (i.e. poles) per month on an aggregated level for all attaching utilities, noting that, presumably within that number, DataLink had contracted with Logic at that time to use "*best efforts*" to process up to 200 permit applications per month (which, in effect, means that the other attachers would have to share the remaining 100 permits between them each month).

91. Further, and given that there were four ICT licensees at that time (C3, DataLink, Flow and Logic) sharing the communication space on CUC's utility poles, all in theory potentially requiring CUC's and/or DataLink's resources to process and issue permit applications, including performing any make-ready work if and when necessary, it is reasonable to assume that at that time a maximum of 900 utility poles could be reserved in any given quarter for all four ICT licensees, including DataLink, for attachment of their communication cables.

92. If the demand for permits or accessing poles is the same across all the attaching utilities (though noting for example the discussions regarding DataLink not utilising its space) it can be assumed that, on average, each of the four ICT licensees would be granted the permits for attachment of communication cables on up to 225 utility poles in each quarter on average. If so, for fairness, it would be reasonable to assume that a maximum of 225 utility poles could be reserved on average each quarter by an ICT licensee for attachment of its communication cables which, as discussed above, is not the factual case here.

93. Indeed, the Office notes that the charging principles for the "**Quarterly Reserved Space Payment"** for reservation of attachment point on CUC's utility poles did not take into account what was actually achievable. Instead, the reservation fee was based on the total number of reserved poles (i.e. all poles owned by CUC and available for pole attachments in Grand Cayman), less any poles for which the licensee already has permits, times a percentage of the Annual Attachment Fee.

94. In light of the discussion above, this exceeds the maximum number of poles that would have been available for attachment in any given quarter and therefore constitutes a form of infrastructure sharing charges which the Office considers is not reasonable.

95. First, this in effect assumes that the licensee would necessarily request access to all of CUC's utility poles, regardless of the timeframe required for processing applications and issuing pole permits for attachment to all CUC's utility poles. Such an assumption is not reasonable unless it is specifically asked for by the Licensee.

96. It is also premised on the idea that an ICT Licensee must attach to 100% of CUC's utility poles in order to comply with its licence obligation to provide ICT services to 100% of the resident population of Grand Cayman. As DataLink, and CUC before it, has provided pole attachment services to Flow for many years, the Office considers that DataLink would have known whether or not this was a reasonable premise.

97. Either of these two factors would reduce the proportion of CUC utility poles to which a licensee would reasonably need access. In these circumstances, the Office considers that basing a reservation fee on a requirement for access to 100% of CUC's utility poles is not reasonable.

98. Second, the reservation fee was set as a percentage of the **Annual Attachment Fee**, without reference to DataLink's actual costs. This means it is not possible to assess whether the reservation fees determined in such way are directly related to DataLink's costs incurred as a result of keeping an attachment point reserved but not occupied. Nor is it possible to assess whether the offer presented to ICT Licensees to keep attachment points reserved but not occupied is provided at reasonable rates.

99. Third, the reservation fees as specified in the C3 and Logic Pole Sharing Agreements assumed that DataLink would be able to provide access to the reserved poles (i.e., all poles owned by CUC in Grand Cayman) within a reasonable period of time, and certainly no less time than was specified for the **Build-Out Period** in the respective Agreements.

100. When C3 agreed to the reservation fees in the CUC-C3 Deed of Variation, this would have covered more than 15,000 poles in less than three years' time, from **20 March 2012 to 31 December 2014**, or approximately 450 per month on average. Later, when Logic entered into the DataLink-Logic Pole Sharing Agreement, this would have covered approximately 16,500 poles in less than five and a half years' time, from **18 July 2013 to 31 December 2018**, or approximately 250 per month on average, noting that in the period from July 2013 through December 2014, DataLink would have had to satisfy the combined demand for permit requests from both C3 and Logic.

101. However, the evidence submitted by DataLink in these proceedings states that DataLink could process a maximum of 300 poles per month for all licensees requesting attachments combined. Moreover, as it is first mentioned in the CUC-DataLink-Logic MOU which was executed in July 2016, there is no evidence that DataLink had resourced itself to process the referenced 300 pole permit applications per month prior to that date, let alone 450 in March 2012 or a further 250 in July 2013.

102. In any event, whether or not DataLink was capable of providing access to the reserved poles within the timeframes suggested by the Pole Sharing Agreements, it did not provide this.

103. Further, as in the DataLink-Logic Pole Sharing Agreement, the reservation fees in the DataLink-Flow Pole Sharing Agreement are also based on the total number of poles owned by CUC in Grand Cayman, as estimated at the date of the agreement, less the poles Flow identifies to be excluded from being reserved. The Office understands that, although Flow is attached to far fewer than 100% of CUC's poles, its network is largely built out and Flow would reasonably only require access to incremental CUC poles which might be installed, for example, in new neighbourhoods or as 'mid-span' poles required to strengthen adjacent poles when new communications cables are attached to them. However, as no new poles installed by CUC after October 2016 would include a communications space, any new poles to which Flow would seek to attach would need

to be replaced and made ready and would be subject to DataLink's limitation of a maximum of 300 poles per month for all licensees combined.

104. Additionally, it is the Office's understanding that certain of the poles were not sufficient in order to accommodate all four designated attachers.

105. Therefore, under the circumstances explained above, C3, Logic and Flow were paying to reserve access to infrastructure that DataLink could not reasonably provide for use within the timeframes set out in their respective Pole Sharing Agreements.

106. Accordingly, for the reasons set out above, the Office considers that the offer presented by DataLink to other licensees to keep their respective attachment points reserved but not occupied was provided at rates, terms and conditions that were not reasonable.

G) Discriminatory provisions

107. The Office notes, as set out above, that the provisions establishing the rights to keep an attachment point in the communication space reserved but not occupied are materially different between various Pole Sharing Agreements.

108. Also, the Office notes that, at the relevant time of reservation fees being charged by Datalink, DataLink held a space on the communication poles but was exempt at that time from any obligation to pay reservation fees in respect of the attachment point in the communications space to which DataLink has the right to attach.

109. In other words, DataLink continued during that time to provide its own business with the option to keep DataLink's attachment point reserved but not occupied at rates - terms and conditions for which that were more favourable than those provided to other licensees, namely to C3, Logic and Flow, without there being an objective justification for doing so.

110. The Office considers that such behaviours, subject to this consultation, were contrary to the provisions of the ICT Act, in particular section 65 (5), and Infrastructure Sharing Regulations, in particular Regulations 6 (c) and 10 (1) Infrastructure Sharing Regulations.

i) Horizontal discrimination

111. The imposition of reservation fees on attachers who were in the earliest period of their network roll-out (Logic and C3), and not on attachers who had largely completed their roll-out (Flow), the Office considers was potentially discriminatory. Flow's fixed line network was not in a high-growth phase like Logic's or C3's, but it is reasonable to assume that it would also be expanding to the extent that the population expands, and new neighbourhoods are developed. Flow, therefore, has the same interest as Logic and C3 in knowing space would be reserved and available for it on the utility poles.

112. However, Flow was not charged any reservation fees by DataLink prior to **November 2016**, and currently in its Pole Attachment Agreement is being charged for the Reserved Space on terms and conditions which appear to be more favourable than those applied to either C3 or Logic, as explained below. The Office understands that no charges for reservation fees have been invoiced or collected by Datalink from Flow to date.

113. First, the '**Build-Out Period**' in the DataLink-Flow Pole Sharing Agreement does not have a set sunset date and only features a reference to 'END OF ROLL OUT', which

suggests the attachment point allocated to Flow may be reserved for exclusive use by Flow for a significantly longer period of time compared to the period of exclusive use granted to C3 and Logic.

114. Second, after the 'END OF ROLL OUT' period, Flow will be granted automatically the 'Reserved Space' for newly installed poles for a maximum of six months. Such option to have any newly installed poles automatically reserved is not available to either C3 or Logic.

115. Also, as noted in paragraph 84 above, Flow has the possibility, under the DataLink-Flow Pole Sharing Agreement, to exclude any number of poles from the '**Reserved Space**', which, combined with the term of the '**Build-Out Period**', suggests the reservation fees that Flow is now required to pay to DataLink under the new agreement may be related to Flow's actual demand for accessing new poles additional to the existing poles occupied in accordance with its previous agreement. This same combination of terms, and therefore ability to relate reservation fees to actual demand, is not available to C3 or Logic.

116. The Office, therefore, considers that the Pole Sharing Agreement entered into by DataLink with Flow to keep its attachment point reserved, but not occupied, is provided at rates, terms and conditions that are more favourable than those provided by DataLink to C3 and Logic, without there being an objective justification for such horizontal discrimination.

ii) Self Preference

117. Noting, among other obligations, section 65 (5) ICT Act and Regulation 6 (c) of the Infrastructure Sharing Regulations, which references that infrastructure sharing services shall be provided on "*not less favourable*" terms and conditions (including rates) than those provided to "*any subsidiary or affiliate of the [licensee],*" the Office considers that DataLink prior to vacating its place on the communications space to Digicel in 2022 treated itself materially more favourably than the other ICT Licensees.

118. To expand, DataLink also had at the relevant time an obligation in its ICT licence, similar to that in the C3 and Logic ICT licences, to have "*installed additional fibre optic cable sufficient to enable ICT Services to be provided to 100% of the resident population Grand Cayman*" by **31 December 2015**. (DataLink's fibre rollout obligation was removed by the Office on **4 February 2022**.)

119. Therefore, at the relevant time, Datalink too had the same interest as Logic and C3 in knowing space would be available for it on the utility poles to comply with its rollout obligation. DataLink submitted to ICTA Consultation 2016-2, however, that it "*does not pay itself for reserved space*," which effectively relieved the company of the expense or burden of a reservation fee.

120. In this regard, the Office notes that DataLink holds a licence to provide a Type 11a ICT Service ("*the provision, by lease or otherwise, of dark fibre to a Licensee*") and a Type 1 ICT Service ("*Fixed Telephony*"). Further, and as discussed at the Office's response to Question 1.1.1, paragraph 27 above, Datalink does provide a D1 Network to the Government for its CCTV provisions, along with a wholesale fibre-based data service to another ICT Licensee – both of which are ICT provision that is in direct competition with those attaching in the communication space it manages on CUC's behalf.

121. The Office notes DataLink's assertion that "*it is in a unique position compared to the other attaching utilities in regard to the communications space*." DataLink did in fact at the relevant time play a dual role in respect of the communications space on the poles, as prior to 2022, when it entered into an infrastructure sharing agreement with Digicel, it both managed access to that space by other attaching utilities and utilised space on the CUC utility poles in competition with other attachers.

122. This dual role, however, did not at the time grant DataLink permission to ignore the obligations in the ICT Act and the Infrastructure Sharing Regulations to provide access to infrastructure on a non-discriminatory basis. In fact, the non-discrimination provisions in the ICT Act and in the Infrastructure Sharing Regulations were created specifically to address the situation of such 'vertically integrated' licensees who are both suppliers to and competitors with other ICT Licensees. By imposing a reservation fee on Logic, C3 and Flow but not on itself, DataLink in the Office's view clearly discriminated in its own favour.

123. This principle of such undue preference has been applied in other jurisdictions. For example, the Office notes the statement made in 2018 of the UK ICT regulator (Office of Communications ('**Ofcom**')) in relation to the terms and conditions under which the incumbent ICT provider, British Telecommunications plc ('**BT**'), provided access to its passive infrastructure (e.g. its communications poles) (through a wholly owned subsidiary of BT, called Openreach, which manages BT's local access network). BT also plays a dual role in respect of the communications space on the poles, as it both manages access to that space by other attaching providers and uses that space in competition with other providers.[31] Ofcom stated at paragraph 1.9 of the **Wholesale Local Access Market Review: Statement – Volume 3,** Physical infrastructure access remedy: "*In the absence of a regulatory obligation to ensure equivalent access, BT would be able to engage in practices that could distort downstream competition, including providing access on less favourable terms compared to those obtained by its own downstream activities*."[32]

124. The Office considers that, by providing itself with materially more favourable terms and conditions than those provided to competing licensees without any objective justification for doing so, DataLink acted contrary to its obligations under the ICT Act and the Infrastructure Sharing Regulations, as referenced.

[31] *Wholesale Local Access Market Review - Consultation on Duct and Pole Access remedies* (consultation document – published 20 April 2017) – https://www.ofcom.org.uk/__data/assets/pdf_file/0008/101051/duct-pole-access-remedies-consultation.pdf

[32] https://www.ofcom.org.uk/siteassets/resources/documents/consultations/category-1-10-weeks/97923-wholesale-local-access-market-review/associated-documents-/wla-statement-vol-3.pdf?v=323092

E. Proposed Administrative Determination

125. For the reasons set out in this consultation, and subject to this consultation, the Office considers that the operation of "**Reserved Space**", "**Quarterly Reserved Space Payments**" and "**Total Minimum Annual Payments**" as applied to the C3 and Logic from the date of each of their respective Pole Sharing Agreement until the date when DataLink stopped charging reservation fees to each, C3 - Q1 2015, Logic – Q3 2017, was contrary to section 65 (5) of the ICT Act and Regulations 6(a), 6(c), 6(f), 6(j) and 10(1)(b) of the Infrastructure Sharing Regulations.

126. To particularise:

- by charging C3 and Logic for infrastructure sharing services in the form of pole reservation fees, that it could not physically provide, DataLink acted contrary to its obligations under the ICT Act and the Infrastructure Sharing Regulations (see e.g., paragraphs 88 *et seq.* above);

- by Datalink providing itself with materially more favourable terms and conditions than those provided to competing licensees without any objective justification for doing so, DataLink acted contrary to its obligations under the ICT Act and the Infrastructure Sharing Regulations as referenced (see e.g., paragraphs 117 *et seq.* above); and,

- by providing Flow with materially more favourable terms and conditions than those provided to competing licensees without any objective justification for doing so, DataLink acted contrary to its obligations under the ICT Act and the Infrastructure Sharing Regulations (see e.g., paragraphs 111 *et seq.* above).

127. In support, and as set out above, the Office considers that the operation of the Pole Sharing Agreements has, in particular:

a. impeded the efficient utilisation of pole infrastructure enabling the development of competition in the provision of ICT networks and services, contrary to Regulation 6(j) (e.g., as described in paragraphs 59 *et seq*. above);

b. harmed competition in the Cayman Islands for ICT networks and for ICT services, contrary to Regulation 6(j)(iii) (e.g., as described in paragraphs 59 *et seq*. above);

c. been provided at rates, terms and conditions which were not reasonable, contrary or in good faith, contrary to section 65 (5) ICT Act and Regulation 6(a), 6(c), 6(f) (e.g., as described in paragraphs 88 *et seq*. above); and,

d. been discriminatory (both at horizontal level and with self-preference), contrary to section 65 (5) ICT Act and Regulations 6(a) and 10(1)(b) (e.g., as described in paragraphs 107 *et seq*. above);

128. THEREFORE, the Office proposes to determine the following:

a. In principle, the charging by an infrastructure sharing service provider of reservation fees can be appropriate where there is an opportunity cost to that provider in doing so.

b. It was appropriate for DataLink to have charged C3 and Logic reservation fees in the relevant Pole Sharing Agreements from the dates in the earliest period of their

network roll-out up to when DataLink stopped invoicing each under their respective Pole Sharing Agreements (C3, from Q1 2015 onwards, and Logic from Q3 2017 onwards).

c. The reservation fees that were charged by DataLink during the period in paragraph 128. b. above should have been calculated by reference to the opportunity cost associated with the number of poles that DataLink could effectively have made ready and available for attachment, and it had committed to do so, in a given period of time (e.g., 300 reserved poles per month), which is directly related to the foregone revenue from pole attachment rental fees (i.e. revenue which could be normally earned by charging a licensee an attachment fee for occupying all the reserved poles in a given period of time).

d. For the reservation fees that were charged by DataLink during the period in paragraph 128. b. above, the **Quarterly Reserved Space Payments** for each of C3 and Logic Pole Sharing Agreements should be recalculated by reference to (a) the number of reserved poles that the attaching authorities reasonably expected to attach to in the quarter for the duration of each Agreement, having regard to (b) the limit on the number of attachments Datalink was able to make available. This means that if DataLink could only make ready and actually available for attachment 200 poles per month, instead of the committed number of 300 reserved poles, the Quarterly Reserved Space Payments should be amended to reflect the actually available rather than the committed number of poles.

e. Noting in particular that the Office has set out which four attachers are to attach to CUC utility poles, namely C3, DataLink, Flow and Logic (see ICT Decision 2016-1),[33] the charging of reservation fees by DataLink as from Q3 2017 was and is unreasonable.

(Paragraph 128 is referred to as the '**Proposed Determination**').

Should DataLink Give Affected Attachers a Rebate?

129. In ICT 2019-2 Consultation, the Office proposed that, subject to consultation, DataLink reimburse C3 and/or Logic, preferably in the form of a credit allowance against future payments by C3 and Logic to DataLink for the charges relating to the "**Annual Attachment Fee**", where the "**Total Minimum Annual Payments**" made by C3 or Logic in a given year exceed the total annual payments relating to the "**Quarterly Pole Rental Fees"** paid by C3 or Logic respectively, unless the parties agree otherwise.

130. DataLink opposed this proposal, while C3 supported the proposal but suggested that the rebate take the form of a cash payment.

131. Noting that the Proposed Determination has been modified subsequent to the responses received to the ICT Consultation 2019-2, to reflect that the Office considers that reservation fees during the early phase of each of C3 and Logic's rollout were appropriate to be charged, the Office considers that issues of the quantum and form of any repayments based on the Proposed Determination have not been considered as part of this consultation process.

[33] https://www.ofreg.ky/viewPDF/documents/consultations/2022-10-06-07-58-59-ICTA-Consultation-2016-2.pdf

132. Noting section 6 (4) (b) of URC Act, which states that the Office shall rely on self-regulation where appropriate to do so, the Office considers that the relevant ICT Licensees, namely DataLink, C3 and Logic, should be given the commercial opportunity to agree the quantum and form of any repayments based on the above (Proposed) Determination.

133. As DataLink's invoices and the corresponding payments made by the licensees relate to various items billed by DataLink under the Pole Sharing Agreements, including but not limited to "**Reserved Space Charge**", "**Attachment Fee**", "**Unauthorized Attachments Audit**", "**Late charge on outstanding invoices**" and "**Make-Ready Work**", the Office considers that the matters relating to the quantum and form of compensation should be properly addressed by the parties within the framework of their respective Pole Sharing Agreements, while taking into account the matters expressed in this (Proposed) Determination.

134. Given DataLink's stated limitation of being able to process no more than 300 permit applications per month, DataLink manifestly could not at the time that the reservation fees were invoiced have made available its entire network of poles (which has been stated to be 17,475)[34] and a reservation fee based on the entire network of poles is not reasonable. The Office notes that, at 300 permit applications per month, DataLink would have been able to make available a maximum of 3,600 poles to C3, Logic and Flow in a twelve-month period.

135. However, where DataLink was unable to process all the permit applications in a given quarter, for which a reservation fee was paid in advance by a licensee, the Office considers that DataLink should reimburse the amount corresponding to the number of poles that had been reserved but not made ready for use by the licensee. Otherwise, DataLink would have in effect been charging for something it was unable to provide.

136. For example, if a Licensee submitted permit applications for 300 poles to be made available within a period of one quarter, and the Licensee was charged the "**Quarterly Reserved Space Payment**" based on those 300 poles being reserved, but DataLink was only able to process and grant the permits for 200 poles, the licensee should be reimbursed the amount equivalent to the reservation fee for 100 poles.

137. THEREFORE, the Office requests:

    a. DataLink negotiate with C3 and Logic in good faith and with reasonable efforts the quantum and form of any compensation by DataLink to C3 and Logic based on the Proposed Determination.

    b. confirm to the Office within four [4] months from the date of this (proposed) Determination that the request in paragraph 137. a. above has been fulfilled.

    As provided for in the Infrastructure Sharing Regulations, at Regulation 6 (l), if no agreement has been reached within that four month period, the Office will likely consider the matter to be in dispute between the Licensees and would invite any of the parties to commence a dispute resolution process pursuant to the Office's Dispute Resolution Regulations, which may include sending the matter either to Mediation or Arbitration.

[34] See Appendix C of the **DataLink-Flow Pole Sharing Agreement**. http://www.icta.OfReg.ky/upimages/agreement_documents/MasterPoleJointUseAgreement_1480965308.pdf

F. Consultation Questions

138. The Office invites all interested parties to submit their comments, with supporting evidence, on any or all of the following questions:

> **Question 1**: Are the facts stated correct and complete? If not, state the correct facts and supporting evidence.
>
> **Question 2**: Is the analysis reasonable, including taking into account all material considerations? If not, why not?
>
> **Question 3**: Is the Proposed Determination appropriate? If not, why not?
>
> **Question 4**: Should any other matters be reconsidered?
>
> **Question 5**: Provide your views on any other matters you consider relevant to this Consultation

G. Next Steps

139. At the end of this consultation period, the Office will review and consider submissions. After an analysis of the submissions is complete, the Office will issue its final determination and notify the relevant ICT Licensees accordingly.

H. How to respond to this Consultation

140. 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*." The Office considers that, for the reasons set out in this document, Part E titled "Proposed Administrative Determination" is the "draft administrative determination" for the purposes of section 7(1).

141. If a respondent chooses to file any information in confidence with the Office, it should, *at the time of making its filing*, also file redacted versions for the public record along with the reasons for each confidentiality claim and the other requirements for confidentiality claims as specified in section 107 of the URC Act. Any submission not accompanied by a confidentiality request in accordance with these procedures will be presumed to be non-confidential and may be placed on the public record.

142. If a respondent chooses to apply to the Office for an extension of the time to file comments or reply comment, it must do so no less than four (4) days before the day of the existing deadline, include a complete and detailed justification for the request, and copy all other respondents (if known) *at the same time* as it applies to the Office. The other respondents (if applicable) may comment on the application for an extension within two (2) days of submission of the application, copying all other respondents *at the same time*. The Office reserves the right not to accept applications for extensions that do not satisfy these requirements. However, at no time will the Office accept an application for an extension submitted after the deadline in question has passed.

143. All submissions on this consultation should be made in writing and must be received by the Office by **5 p.m. on 01 August 2025** at the latest. When responding, please repeat the entire question above the corresponding response to each question.

144. Submissions may be filed as follows:

By e-mail to: consultations@ofreg.ky

Or by post:
Utility Regulation and Competition Office
PO Box 10189
Grand Cayman KY1-1002
CAYMAN ISLANDS

Or by courier:
Utility Regulation and Competition Office
3rd Floor, Monaco Towers II,
11 Dr. Roy's Drive,
George Town
Grand Cayman
CAYMAN ISLANDS

145. The Office expects to issue its final determination on the matters addressed by this Consultation by end of 2025.

APPENDIX 1 - RESERVATION FEE CONTRACTUAL CLAUSES

CUC-C3 Deed of Variation – 07 May 2012

F. The Communication Space allocated to the Communications Utility as illustrated in the drawing in Attachment A, on all Poles owned by the Electric Utility in Grand Cayman shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each Pole owned by Electric Utility:

(i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and
(il) 31 December 2014,

((i) and (ii) together the "**Build-Out Period**").

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1 the Communications Utility shall pay the following in relation to all Poles owned by the Electric Utility in Grand Cayman (i.e., approximately 15,000 Poles as at the date of this Agreement) :

(i) of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., of the Annual Attachment Fee = = Poles = a Quarterly Reserved Space Payment of for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);

(ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;

(iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee amount (i.e., per annum. as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly instalments, being (as may be adjusted on the adjustment of the Annual Attachment Fee) (the "**Quarterly Pole Rental Fee**") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;

(iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:

a. Quarterly Reserved Space Payment =

b. Quarterly Pole Rental Fee =

c. Total Payment to Electric Utility for each quarter =

Where:

x = all Poles owned by Electric Utility in Grand Cayman
y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

(v) at the end of each quarter period the Electric Utility will update and notify the Communications utility of the current number of Poles it owns in Grand Cayman;

(vi) notwithstanding the foregoing, Communications Utility guarantees the following minimum total annual payments ("**Total Minimum Annual Payments**") to the Electric Utility

a. 2012:
b. 2013:
c. 2014:

and at the end of each calendar year above, Communications Utility shall calculate the total actual payment owed to the Electric Utility, by way of the aggregate of the Quarterly Reserved Space Payments and the Quarterly Pole Rental Fees for each relevant calendar year (the "**Total Annual Payments**") as compared to the relevant Total Minimum Annual Payment above, and in the event that the Total Annual Payments are less than the Total Minimum Annual Payment owed Communications Utility shall calculate the difference and pay the same to the Electric Utility by January 31 in the following calendar year;

(vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Electric Utility's Poles.

DataLink-Logic Pole Sharing Agreement – 18 July 2013

F. The Communication Space allocated to the Communications Utility as illustrated in the drawing in Attachment A, on all Poles in Grand Cayman that DataLink owns or has the right to attach to (i.e., approximately 16,500 Poles as at the date of this Agreement) shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each such Pole:

(i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and
(ii) 31 December 2018,

((i) and (ii) together the "**Build-Out Period**") .

The Communications Utility shall have the option to exclude any Pole or collection of Poles from the Reserved Space by notice to DataLink. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space the Pole shall no longer be taken into account when calculating the Quarterly Reserved Space Payment (as defined below) from the next quarterly payment date onwards. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space, the Communications Space on that Pole shall no longer be reserved for the Communication Utility's exclusive use - from that point onwards DataLink shall be free to grant another party a permit to use the Communications Space on such Pole, in which event it would no longer be available for the Communication Utility's use.

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1. the Communications Utility shall pay the following in relation to all Poles on which the Reserved Space is located:

(i) % of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., % of the Annual Attachment Fee (CI$) x % = CI$; CI$ /4 = CI$; CI$ x 16,500 Poles = a Quarterly Reserved Space Payment of CI$ for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);

(ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;

(iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee amount (i.e., CI$ per annum, as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly installments, being CI$ (as may be adjusted on the adjustment of the Annual Attachment Fee) (the "**Quarterly Pole Rental Fee**") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;

(iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:

a. Quarterly Reserved Space Payment = (x - y) x CI$

b. Quarterly Pole Rental Fee = (y x CI$) – Quarterly Reserved Space Payment

c. Total Payment to DataLink for each quarter = Quarterly Reserved Space Payment + Quarterly Pole Rental Fee

Where:

x = all Poles owned by Electric Utility in Grand Cayman less the poles Communication Utility identifies to be excluded from being reserved, as outlined in Item 2F.

y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

(v) at the end of each quarter period DataLink will update and notify the Communications Utility of the current number of Poles it owns or has the right to attach to in Grand Cayman and of the number of Poles on which the Reserved Space is located;

(vi) notwithstanding the foregoing, Communications Utility guarantees the following minimum total annual payments ("**Total Minimum Annual Payments**") to DataLink (in respect of the cumulative total of Quarterly Reserved Space Payments and Quarterly Pole Rental Fees) in each of the following calendar years:

a. 2013: CI$
b. 2014: CI$
c. 2015: CI$
d. 2016: CI$
e. 2017: CI$
f. 2018: CI$

and at the end of each calendar year above, Communications Utility shall calculate the total actual payment owed to the Owner Utility, by way of the aggregate of the Quarterly Reserved Space Payments and the Quarterly Pole Rental Fees for each relevant calendar year (the "**Total Annual Payments**") as compared to the relevant Total Minimum Annual Payment above, and in the event that the Total Annual Payments are less than the Total Minimum Annual Payment owed Communications Utility shall calculate the difference and pay the same to the Owner Utility by January 31 in the following calendar year;

(vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Owner Utility's Poles.

DataLink-Flow Pole Sharing Agreement – 18 November 2016

F. The Communication Space allocated to the Communications Utility as illustrated in the drawing in Attachment A, on all Poles in Grand Cayman that DataLink owns or has the right to attach to (Le., approximately 17,475 Poles as at the date of this Agreement) shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each such Pole:

(i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and

(ii) [END OF ROLL OUT), after which Reserved Space will automatically be granted for newly installed poles for a maximum period of six (6) months.

((i) and (ii) together the "**Build-Out Period**").

The Communications Utility shall have the option to exclude any Pole or collection of Poles from the Reserved Space by notice to DataLink. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space the Pole shall no longer be taken into account when calculating the Quarterly Reserved Space Payment (as defined below) from the next quarterly payment date onwards. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space, the Communications Space on that Pole shall no longer be reserved for the Communication Utility's exclusive use - from that point onwards DataLink shall be free to grant another party a permit to use the Communications Space on such Pole, in which event it would no longer be available for the Communication Utility's use.

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1 the Communications Utility shall pay the following in relation to all Poles on which the Reserved Space is located:

(i) % of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., % of the Annual Attachment Fee (CI$ x = CI$; CI$ = CI$; CI$ x 17,475 Poles = a Quarterly Reserved Space Payment of CI$ for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);

(ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;

(iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee amount (i.e., CI$ per annum, as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly installments, being CI$ (as may be adjusted on the adjustment of the Annual Attachment Fee) (the "**Quarterly**

Pole Rental Fee") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;

(iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:

a. Quarterly Reserved Space Payment = (x - y) x CI$

b. Quarterly Pole Rental Fee = (y x CI$) - Quarterly Reserved Space Payment

c. Total Payment to DataLink for each quarter = Quarterly Reserved Space Payment + Quarterly Pole Rental Fee

Where:

x = all Poles owned by Electric Utility in Grand Cayman less the poles Communication Utility identifies to be excluded from being reserved, as outlined in Item 2F.

y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

(v) at the end of each quarter period DataLink will update and notify the Communications Utility of the current number of Poles it owns or has the right to attach to in Grand Cayman and of the number of Poles on which the Reserved Space is located;

(vi) [Not Used]

(vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Owner Utility's Poles.

APPENDIX 2 – Current D1 Fibre Network Rollout Obligations

Digicel (date of issue – 1 April 2021)[35]

ANNEX 1A: Type D1 Fibre Network

The Licensee shall make every effort to deploy and offer in Grand Cayman its Fibre optic cable network and make available ICT Services over that network in accordance with the following timetable:
a) by Q2 2023: complete a fibre network sufficient to enable the provision of ICT Services to 100% of the residents and businesses of Grand Cayman.
b) By Q3 2023: complete a fibre network sufficient to enable the provision of ICT Services to 100% of the residents and businesses of Cayman Brac and Little Cayman.

C3 (date of issue – 1 April 2021)[36]

ANNEX 1A: Type D1 Fibre Network

The Licensee shall make every effort to deploy and offer in Grand Cayman its Fibre optic cable network and make available ICT Services over that network in accordance with the following timetable:
a) by Q3 2022: complete a fibre network sufficient to enable the provision of ICT Services to 100% the residents and businesses of Bodden Town.
b) by Q2 2023: complete a fibre network sufficient to enable the provision of ICT Services to 100% of the residents and businesses of Grand Cayman.
c) By Q3 2023: complete a fibre network sufficient to enable the provision of ICT Services to 100% of the residents and businesses of Cayman Brac and Little Cayman.

Logic (date of issue – 1 April 2021)[37]

ANNEX 1A: Type D1 Fibre Network

The Licensee shall make every effort to deploy and offer in Grand Cayman its Fibre optic cable network and make available ICT Services over that network in accordance with the following timetable:
a) by Q3 2022: complete a fibre network sufficient to enable the provision of ICT Services to 100% the residents and businesses of Bodden Town.
b) by Q2 2023: complete a fibre network sufficient to enable the provision of ICT Services to 100% of the residents and businesses of Grand Cayman

Flow (date of issue – 1 April 2021)[38]

No D1 Fibre Network rollout obligations in the ICT Licence.

[35] https://www.ofreg.ky/viewPDF/documents/digicel-cayman-limited/2021-08-06-04-01-18-View-Licence-document.pdf
[36] https://www.ofreg.ky/viewPDF/documents/infinity-broadband/2021-08-06-06-38-19-View-Licence-document.pdf
[37] https://www.ofreg.ky/viewPDF/documents/westtel-limited/2021-08-06-05-57-46-View-Licence-document.pdf
[38] https://www.ofreg.ky/viewPDF/documents/cable-and-wireless/2021-08-06-01-34-35-TL-R3-2021CableandWirelessCILtdTelecommunicationsLicenceSigned1622717179.pdf