

August 16, 2019

Utility Regulation and Competition Office
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Grand Cayman KY1-1002
CAYMAN ISLANDS

**Re: ICT 2019 – 1 – Consultation: Information and Communications Technology
Proposed Section 23 (2) (Regulatory Notice) and ICT Licensing Template Updates**

We refer to the ICT 2019 – 1 Consultation launched by OfReg on June 7, 2019. Please find below the subject consultation response from DataLink, Ltd.

**Question 1: Provide your views on the proposed changes set out in the draft
Regulatory Notice**

DL Response:

1. We note that the definitions of FBO and of SBO are not mutually exclusive. We understand that it is intended that only one licence will be required and that a person (such as DataLink) who potentially falls into both the definition of an FBO and an SBO will be required to hold only an FBO licence. We suggest that it would be helpful to state this explicitly in the Regulatory Notice. This could be done, for example, by adding the following words at the end of the first paragraph of the description of the FBO licence (i.e. after the words *These are telecommunications entities that own or operate transmission facilities.*) *“A licensee that holds an FBO may provide any services that require an SBO licence without the need to seek and acquire a separate SBO licence.”*
2. As DataLink is purely a provider of infrastructure, a number of the Template Licence conditions are not applicable to it (for example, Content Service, much of the 911 provisions and the Universal Service obligations). We suggest that it would be appropriate for DataLink to be licensed under the FBO Niche and Limited Purpose regime, but note that the current wording of paragraph 2.8 of the Policy and



Procedure for Applications for FBO licences is an impediment to that. We invite the Office to consider adding a proviso at the end of paragraph 2.8 in the following or similar form: *“Provided that an applicant whose Network facility is confined to infrastructure provision shall be considered as an FBO Niche Operator.”*

3. We note the need for Broadband access that underlies the SLZ proposal and we note the Office’s belief that barriers to entry and investment are related in part to the licensing requirements and fees. We do, however, entertain concerns that there are significant issues that result from partitioning Grand Cayman in the manner envisaged by the SLZ, which we elaborate below. In the circumstances we question whether the additional incentive to invest, proposed in the SLZ, will in fact produce the desired results in circumstances where the real issue may be the other factors identified by the Office at paragraph 2.3 of Annex 3. Namely the lower housing density and the consequent lack of a market large enough to allow multiple providers to make a sufficient return on investment. We also question whether the additional incentive by way of reduced fees could not be achieved by a means by which the existing fees paid by a licence for the entire island is adjusted by reference to the number of customers located in the SLZs that they service, as opposed to partitioning the island.

We have the following concerns over the SLZ proposal. First, there are licensees (other than DataLink) that currently provide services to Zone A and or more of the other Zones. It is not clear how these licensees will be affected. They will presumably not have multiple licences but retain a single licence. Are they to have adjustments to their licence fees in exchange for being the subject of a Roll Out obligation in the other Zones and if so, would it not be better to retain the existing system but introduce adjustments to it? Second, the proposal appears to contemplate licensees operating in only one Zone. To the extent that the disincentive to providing a service in Zones B to D is the low density mentioned above, there would appear to be a significant risk of operators abandoning these Zones altogether to focus on the more lucrative Zone A. Further, a regime under which licensees would be able to operate in only one Zone impacts on the way that existing infrastructure and agreements regarding that infrastructure have evolved against a system in which licensees providing content are required to provide the content island wide by means of Roll Out obligations. This particularly affects DataLink, which has evolved pole sharing infrastructure and entered into infrastructure sharing agreements that reflect the requirement imposed by the Office itself (or its predecessor the ICTA) that a licensee that takes space on its poles will ultimately have to provide its service island wide and will therefore require



access to the entire network of poles in order to extend its network to meet this requirement.

Should the Office remove the existing requirement for island wide Roll Out for DataLink's Attaching Utility customers and allow certain operators to operate only in particular Zones it is likely that DataLink's business plan will be impacted and require amendment (potentially inclusive of pricing) as it assumes an Island wide roll out obligation for multiple attaching ICT Licencees.

Question 2: Provide your views on the proposed changes to the ICT Licence template

DL Response:

We have the following comments on the Licence Template.

- 2.1 The existence of the licence is made subject to compliance with any and all administrative and legal requirements. The previous form of licence required the licensee to carry on the licensed operations in accordance with all applicable legal requirements. We suggest that the approach previously used is preferable. The proposed new approach creates a situation in which any minor infringement, even one that is unintentional, of any law or administrative requirement, could invalidate the license.
- 2.1 The concluding words refer to an obligation to meet a Roll Out plan, unless otherwise agreed. But not all licencees will necessarily have a Roll Out obligation. We suggest that these words be modified by altering the words "*the Licensee will, unless otherwise agreed to by the Office, meet the Roll Out plan specified in Annex 1A*" to "*the Licensee will meet any applicable Roll Out plan as specified in Annex 1A*."
- 3.2 The former licence contained an undertaking by the Office not to impose discriminatory fees, which does not feature in the Licence Template. We recognise that if the SLZ proposal is to go ahead then fees associated with that are discriminatory for the reasons set out in consultation, but we favour retaining the commitment not to discriminate, except to the extent indicated in the Regulatory Notice and Annexes in connection with the SLZs.
- 5.4 The prohibition on contracts or commercial arrangements with any person or group who directly or indirectly is in a position to control the licensee (subject to the Office's consent) is new. The definition of Ultimate Controller is very wide and would encompass an individual shareholder in a company (because the shareholder could control it jointly with other shareholders). Furthermore DataLink is a wholly owned subsidiary of CUC with whom it works closely. The prohibition is, we suggest, intrusive and



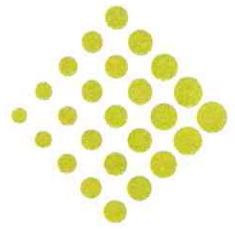
disproportionate. It is not clear to us what concern it is intended to address, but we would suggest that any such concerns could be more proportionately addressed by identifying what sort of contracts or commercial arrangements require consent and under what terms that consent would be granted rather than extending to all and any contracts or commercial arrangements.

8. DataLink has written to the Office requesting that it not be subject to a Roll Out obligation because of its particular position as a supplier of infrastructure for reasons more fully explained in that correspondence. In connection with that request, we would suggest that as and when the Licence Template becomes applicable to DataLink questions of infrastructure coverage are better dealt with by reference to the Development Plan than a Roll Out obligation.
16. This imposes an obligation under the licence to comply with obligations that arise under the ICT Law. We question the benefit of creating a specific further obligation in the Licence in circumstances where (a) the obligation exists under the ICT law and (b) other terms of the Licence already require the licensee to comply with obligations arising under the ICT law.
17. See 16.
18. DataLink does not provide type 1 telephony and this clause would not apply to it. DataLink's existing licence refers to type 1 telephony and as and when the new licence applies to it, this should be removed.
21. This should not apply to DataLink. It should be the subject of a caveat as has been done with e.g 18.1.
25. As 21.
26. As 25.

Question 3: Provide your views on any other matters you consider relevant to this Consultation

DL Response:

Question 4: Do you agree that the Office should offer the ICT Licence template to applicants for new ICT Licences, and applicants for the renewal of existing ICT Licences only? Please provide a detailed explanation of your reasoning.



DL Response:

We agree with the Office's proposal to offer the new licence template only when granting new licences and renewing existing licences. If existing licence holders were obliged to accept different terms before their licences expired it would amount to a significant derogation from the original grant of a licence for a fixed period, which would have a number of adverse implications. Those who apply for licences aim to build a business around that licence and in making decisions about investment and risk they proceed on the basis of the grant. If it were to be thought that the grant did not mean what it said because before the licence had run its term it might be varied in a way that would leave the grantee (licensee) worse off, then that would introduce uncertainty into the business of providing ICT services and infrastructure deterring investment in the sector to the ultimate detriment of consumers of ICT service and the Cayman Islands as a whole. Moreover, the licence is a form of property right and unilateral variation by the grantor (the Office) would, we suggest, be an unjustifiable derogation from that right that is not only wrong in principle but would risk undermining the incentive to participate in this sector resulting in a lessened offering for the Cayman Islands.

Yours Sincerely,

ST

Sacha Tibbetts

President & CEO

DataLink, Ltd.