Digicel

Digicel Cayman Limited
Cayman Technology Centre
115 Printer's Way
George Town
P.O. Box 700
Grand Cayman, KY1-1107
Cayman Islands

Tel: +1 345 623 3444
Fax: +1 345 623 3329

digicelcayman.com

Friday, 28 February 2020

Utility Regulation and Competition Office
3rd Floor, Alissta Towers
85 North Sound Rd.
Grand Cayman

Dear Sir or Madam,

Re: ICT 2019 – 2 – Consultation | Digicel (Cayman) Limited Response - Consultation on Pole Attachment Reservation Fees

Digicel thanks the Utility Regulation and Competition Office ("OfReg") for the opportunity to submit its comments on the Consultation referred to at caption.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in this consultation or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement nor does any position taken by Digicel in this document represent a waiver or concession of Digicel's rights in any way. We expressly reserve all rights in this matter generally.

General Comments

While Digicel does not have any immediate plans to roll out Fiber-To-The-Home Services ("**FTTH**") in Cayman Islands, these comments are submitted by Digicel as a potential future user of the Poles. Digicel's comments are therefore limited to more general observations, while reserving the right to provide further exhaustive comments in future, should the need arise.

Digicel broadly accepts and agrees with the conclusions the Office has reached in so far as the detriment to the industry the reservation fees are causing and the real impediment it has to progressive infrastructure and sharing, and unreasonably limiting the promotion of competition in Cayman Islands. To that end, competition is the key to promoting telecommunication services penetration and development. The OECD paper on *Broadband Policies for Latin American and the Caribbean* (a Digital Toolkit, Chapter 4 – Competition and Infrastructure Bottlenecks), aptly set out that "another relevant key issue, affecting both competition and investment…is to remove infrastructure bottlenecks, because access to the existing passive infrastructure acts as a high

barrier for existing operators and new entrants alike." Digicel therefore welcomes the Office's move to lowering, and where appropriate, eliminating such barriers, by both simplifying processes and procedures for access, as well as the time and costs for gaining access to such infrastructure.
Further, access to Poles and similar infrastructure, is defined by the ITU as being essential facilities in telecommunications network markets. It would therefore be unfortunate if operators, rather than seeking to gain access to already available infrastructure in Cayman, are forced to duplicate the Pole facilities. This option will be technically difficult, more economically inefficient, and will come at the cost of operators not being able to concentrate effort and investment towards other technological advancements. This in turn will hinder Digicel from bringing to the people of Cayman next level services, as may be enjoyed and experienced by neighbouring territories without such demanding and oppressive infrastructure access issues.
Any operator or user of the Poles, including Digicel as a potential future user, reasonably expects rental rates, including make ready costs, which are reasonable, and economically viable to operators, which at a minimum must have in place efficient, cost-effective, and acceptable Pole sharing terms and conditions. This is not the current state of things in Cayman.
Digicel iterates its earlier submissions in this regard (2017), that the goal of any pole sharing arrangement must be to facilitate both island wide connectivity, and at costs that are not excessive. That being said, Digicel is of the view that any reservation fees for the 'Reserved Space' should be charged, minimal at best (if at all), to an operators actual demand for the use of the Poles. Digicel therefore welcomes the Office's position that basing a reservation fee on a requirement for access to 100% of CUC's utility poles is simply not reasonable.
It is understood that DataLink presently permits Flow to maintain its attachment point reserved, but not occupied, at rates, terms and conditions that are more favourable than those provided by DataLink to C3 and Logic. Such openly discriminatory behaviour concerns Digicel as a potential future user of the Poles. Other users, and potential users like Digicel, are clearly already at a disadvantage. This in itself is anti-competitive and is a barrier to entry, albeit other users like Digicel are not new to the market. Digicel therefore expects a level playing field, not just for Digicel, but all operators alike. To that end, Digicel welcomes the Office's summary at page 6 of its Consultation document, at paragraph 20(a), which states that the "Office holds the position that the reservation fees and corresponding terms and conditions, in their current form, are discriminatory". There simply must not be any discrimination, and any access to such facilities must be based on an open access regime, which is true to the meaning of being cost-oriented, economical, and must not be set up to benefit or allow DataLink to double dip.
Further, Digicel submits that the exclusivity on 'Reserved Space', if not removed completely, should in the alternative be required to have an expiry. This would ensure operators that presently hold the space without actual use, and over a long period of time, would be forced to either consider its use of the Poles, or make a real effort to utilise the Poles. This also eliminates restriction placed on other operators from considering the use of the Poles, which in turn may delay or hamper any plans for rolling out services that requires the use of the Poles by such operators. Until this happens, effective competition is undeniably discouraged.
Finally, and with respect to the cost of access and the current rates for Pole reservation and access, Digicel refers to the provisions of Regulation 6(h) of the Interconnection and Infrastructure Sharing Regulations, which provides that 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. This must be enforced.
The costs associated with the poles are already entirely recovered within CUC's regulated prices for electricity, and these costs are therefore recovered, whether or not there is any Pole sharing.

The attachment of telecommunications cables causes no incremental requirement to augment the Poles in terms of either height or strength. Any incremental capital cost, therefore, relates only to the direct cost of attaching the cables to the Poles. Allowing CUC therefore to recover more than the incremental cost of attaching the cables is to allow them a double recovery of the same costs, which cannot, and indeed should not be encouraged or permitted.

Respectfully submitted for your consideration.

Yours sincerely,

.....

Mr. Raul Nicholson-Coe
Chief Executive Officer
Digicel (Cayman) Limited

CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED
COMMENTS ON

PUBLIC CONSULTATION ON POLE ATTACHMENT RESERVATION FEES

(Ref: ICT 2019-2-Consultation)

By E-mail to: consultations@icta.ky
28 February 2020

I. INTRODUCTION

Cable and Wireless (Cayman Islands) Limited, dba FLOW ("**FLOW**") is pleased to provide the following comments and responses to the consultation questions presented in the Consultation Document (ICT 2019-2-Consultation – Pole Attachment Reservation Fees) published by the Utility Regulation and Competition Office ("**the Office**" or "**Ofreg**") on 14 November 2019.

Before addressing Ofreg's consultation questions, we have several comments that we believe are central to this matter and Ofreg's overall regulatory framework. First, the issues in this proceeding do not require public consultation, and therefore, we believe this proceeding is unnecessary and a misallocation of Ofreg's and ICT Licensees' time and resources. These issues stem from a bilateral contractual dispute between two ICT Licensees, C3 and Datalink. No contractual disagreements exist between Datalink and any ICT Licensee on these issues, other than C3. Therefore, the appropriate means to resolve this disagreement that is consistent with to Ofreg's own regulatory framework is the Dispute Resolution Regulations and the processes enumerated in those Regulations. Resolving these issues by Public Consultation is not just bad process, but unnecessary and a wasteful use of Ofreg and ICT Licensees' resources and time.

Second, we do not believe C3's dispute with Datalink over the terms of access to CUC's poles, or any of C3's other disputes with other ICT Licensees over access to their infrastructure should be used to obviate or excuse any Licensees' failure to accomplish the buildout requirements in their License. If a Licensee cannot reach a commercial agreement to utilize a competitor's infrastructure, then it is their responsibility to find a solution, be it through Ofreg's Dispute Resolution procedures and/or investment in its own facilities. Accountability ultimately resides with each individual Licensee to satisfy their License obligations. We do not believe all Licensees have made a good-faith effort to meet their rollout obligation, nor have they been penalized or held account for this failure. It is now over 15 years since C3 received its ICT License and agreed to the terms of that License, and its build-out obligation remains unfulfilled. We are well past the point where Licensees, such as C3, should 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 Licensees, such as C3, who have yet to do so. In fact, as

detailed below, we believe the evidence demonstrates that Licensees are incentivized and have been rewarded for their failure to comply with this obligation. This must change.

Third, despite our objections with the premise of this public consultation, we believe Ofreg's analyses and most of its conclusions are appropriate and reasonable.

- Ofreg acknowledges 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 of the terms applied to Datalink's reservations fees identifies several instances where those terms violate the Infrastructure Sharing Regulations; and
- Ofreg concludes from this analysis that, in part, Datalink must modify its pole attachment agreements and where necessary renegotiate these agreements, such that they comply with Ofreg regulations.

We agree with each of these analyses and conclusions. However, we do not agree with one of Ofreg's conclusions that would require all reference to the terms "Reserved Space," "Quarterly Reserved Space Payment," and "Total Minimum Annual Payments" removed from Datalink's pole attachment agreements. We do not believe that this conclusion is necessary or consistent with Ofreg's own analysis. We believe a less-intrusive remedy is sufficient, i.e., one that allows Datalink the opportunity to modify, yet retain these terms if it so chooses, and renegotiate an agreement with Licensees that seek a modification. The forced removal of these terms is not necessary or appropriate to resolve the shortcomings Ofreg has identified.

II. ARE THE FACTS STATED CORRECT AND COMPLETE? IF NOT, STATE CORRECT FACTS AND SUPPORTING EVIDENCE (QUESTION 1)

FLOW response to QUESTION 1: 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.

III. 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 (QUESTION 1.1.1)

FLOW response to QUESTION 1.1.1: 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 License 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, high-demand areas of our country. At its core, it is the Licensees obligation to fulfill a build-out obligation and it is the Licensee that must be held accountable. Where a Licensee chooses to utilize network elements of its competitor, instead of investing in its own facilities, then it is that Licensees obligation to secure a commercial agreement to access and utilize 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 Ofreg'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 License, and its build-out obligation remains unfulfilled. We believe accountability ultimately rests with the Licensee to meet its License 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 Licensees, such as C3, who have yet to buildout 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 License 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.

IV. 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? (QUESTION 1.1.2)

FLOW response to QUESTION 1.1.2: 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 fulfill 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.

V. HAVE LICENCEES BEEN ROLLING OUT THEIR NETWORKS EFFICIENTLY AND HARMONIOUSLY? (QUESTION 1.1.3)

FLOW response to QUESTION 1.1.3: We agree with elements of Ofreg'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.

VI. DID LICENSEES CHOOSE TO RESERVE 100% OF THE TELECOMMUNICATIONS AERIAL CABLE (AKA COMMUNICATION) SPACE ON CUC POLES? (QUESTION 1.1.4)

FLOW response to QUESTION 1.1.4: 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.

VII. HOW WOULD THE (A) REMOVAL OR (B) REDUCTION OF RESERVATION FEES AFFECT THE PROFITABILITY OF LICENSEES OR SECTORAL PARTICIPANTS? (QUESTION 1.1.5)

FLOW response to QUESTION 1.1.5: 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.

VIII. DID THE LICENSEES EXPECT TO PAY RESERVATION FEES FOR ACCESS TO ALL UTILITY POLES, INCLUDING THE POLES TO WHICH THEY COULD NOT ATTACH? (QUESTION 1.1.6)

FLOW response to QUESTION 1.1.6: 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.

IX. DID THE LICENSEES EXPECT TO PAY THE SAME FEES AS OTHER LICENSEES IN REGARD TO RESERVATION FEES? (QUESTION 1.1.7)

FLOW response to QUESTION 1.1.7: 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.

X. DID THE LICENSEES, APART FROM DATALINK, EXPECT TO PAY THE SAME FEES AS DATALINK IN REGARD TO RESERVATION FEES? (QUESTION 1.1.8)

FLOW response to QUESTION 1.1.8: 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.

XI. IS THE ANALYSIS REASONABLE, INCLUDING TAKING INTO ACCOUNT ALL MATERIAL CONSIDERATIONS? IF NOT, WHY NOT? (QUESTION 2)

FLOW response to QUESTION 2: 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.

XII. ARE THE CONCLUSIONS REASONABLE? IF NOT, WHY NOT? (QUESTION 3)

FLOW response to QUESTION 3: 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 Ofreg'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.

Ofreg acknowledges in its 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 (whom 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).

XIII. CLOSING REMARKS

70. Kindly send any communication in relation to this consultation to:

Paul Osborne
paul.osborne@cwc.com

David Burnstein
david.burnstein@cwc.com

END DOCUMENT

DataLink

February 28, 2020

DATALINK'S RESPONSE TO CONSULTATION ICT 2019-2

ON POLE ATTACHMENT RESERVATION FEES

1. This response will:
   (1) Deal with the history of agreements by which attachment points on CUC poles were reserved taking each attacher (Infinity, Logic, Flow) separately.
   (2) In dealing with the Infinity and Logic histories, deal with the concerns raised in the draft determination concerning the arrangements with specific reference to the particular attacher.
   (3) Go through the questions at paragraph 23 of the Consultation.

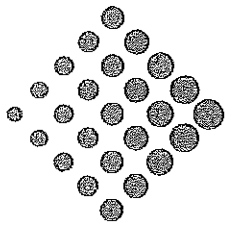
2. In this response:
   (1) Cable and Wireless (Cayman Islands) Ltd now trading as Flow is referred to as either **Lime** or **Flow**;
   (2) Infinity Broadband, Ltd now trading as C3 is referred to as either **Infinity** or **C3**;
   (3) WestTel Ltd trading as Logic is referred to as **Logic**;
   (4) Digicel (Cayman) Limited is referred to as **Digicel**; and
   (5) The regulator is referred to either as **ICTA** or **OfReg**.

HISTORY

3. CUC, the sole provider of electricity services in the Cayman Islands, owns transmission and distribution utility poles located across Grand Cayman that it uses for the purposes of electricity transmission and distribution[1]. Each pole holds electrical cables, which CUC uses for the transmission and distribution of electricity. The poles, suitably modified, can also be used to attach aerial cables used by providers of telecommunications and other ICT services.

4. The first company that attached to CUC's poles for ICT purposes was Flow. For present purposes, it is not necessary to go back any further than an agreement signed on 5 November 1996 setting out the terms on which Flow could attach to CUC's poles in return for the payment of various fees. At this time, the industry was not regulated and neither the ICTA nor DataLink had been established. The terms were commercial terms agreed at arm's length between two companies with access to legal advice. It is also important to understand that at the time that the CUC-Flow Agreement was entered into, Flow was already providing telecommunication services to a large percentage of the island.

[1] At the time of the events in question, it owned approximately 18,000 poles.



5. Schedule B to the CUC-Flow Agreement set out the rates applicable to Flow, including an "Initial Charge" that Flow was to pay to CUC for each new pole installed by CUC after the date of the agreement regardless of whether Flow subsequently attached to the pole, unless CUC received written notification from Flow of its intention to opt out of a particular area in which poles were being installed. Flow also agreed to pay an Attachment Rental fee on all poles on which Flow attached (or had a permit to attach). This form of agreement reflected the fact that Flow was already providing telecommunication services to a large percentage of the island and, accordingly, did not need to reserve space on existing poles.

6. The draft Determination suggests that it was inappropriate that between 2012 and 2016 Flow was not charged a separate fee to reserve space whereas Infinity and then Logic were[2]. The suggestion is that Infinity and Logic were in competition with Flow and were discriminated against. This way of looking at the matter is, it is suggested, flawed.

7. Between 2012 and 2016 the difference between Flow and Infinity and Logic was that Flow had in place a mature network whereas the others did not. At the point in 2012 and 2013 when Infinity and Logic negotiated their agreements, Flow was paying attachment fees for a large number of poles and Infinity and Logic were not. Flow was also charged a fee for newly installed poles whether it was attached or not. The agreements with both Infinity and Logic both provided that when they attached they would stop paying reserved space fees and pay attachment fees instead. It is therefore not correct to assume that Flow was subject to no fee in respect of poles where it was not attached. All three agreements contained provisions for attachment fees to be paid for actual attachments and for fees to be paid in respect of poles where there was no attachment[3].

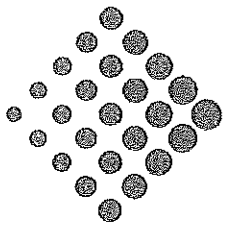
8. These similar charging structures may have had different impacts on the licensees, but that was because their situations were different. Because Flow had a mature network it was paying attachment fees for many poles and paying the schedule B charge (paragraph 5) for fewer new poles as they were installed and prior to attachment. Because Infinity and C3 had not rolled out, the ratios of attachment fees to fees paid for poles with no attachments were entirely different. It is not correct that the charging structures were fundamentally different even though the ratios would have been different.

INFINITY

9. On 13 December 2004, Infinity was granted an ICT Licence (**Infinity Licence**). Unlike Flow, Infinity was a new entrant to the market and did not yet have an ICT network in place. Pursuant to the Infinity Licence, the ICTA required Infinity to roll out all ICT Networks and ICT Services on

[2] See e.g. ¶24.

[3] This was subject to a right to opt out in the case of both Flow and Logic.



Grand Cayman within 18 months. In other words, Infinity had to put in place ICT infrastructure across the island within 18 months. The most cost effective means of doing so was to attach ICT cables to CUC's utility poles (rather than laying them underground).

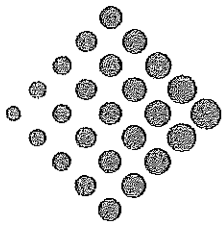
10. On 22 November 2005, CUC entered into a Master Pole Joint Use Agreement with Infinity for the purpose of sharing poles owned by CUC for the attachment of aerial cables and associated equipment by Infinity (**CUC-Infinity Agreement**). Pursuant to its licence, it was required to roll out its network within 18 months of the licence commencement date (so by June 2006). At the time that Infinity entered into the CUC-Infinity Agreement, Flow was already attached to the majority of poles on the Island.

11. Under the CUC-Infinity Agreement, Infinity was required to apply to CUC for a permit when it wished to attach its cables to particular utility poles. When such an application was made, CUC was required to undertake make-ready work. In 2006 and 2007, as part of Infinity's initial plans to roll out island wide, it requested that CUC undertake some initial work (site inspections, measurements, relocating other assets already installed on the poles, installations of guys and anchors). However, Infinity stopped paying for the work in a timely manner and in fact took no further steps to progress its fibre optic network build out until late 2011.

12. Despite Infinity's inactivity, Infinity's roll out deadline was extended after the CUC-Infinity Agreement as follows:
    (a) To 31 December 2008 pursuant to Amendment No. 1 dated 27 July 2006;
    (b) To 31 March 2010 pursuant to Amendment No. 2 dated 30 April 2009;
    (c) Pursuant to Amendment No. 5 dated 22 December 2011. This extension contemplated various dates. In the event that there was a particular contract in place to purchase a majority shareholding in Infinity then the roll out was extended to 31 December 2014 on a staged basis with stages at 31 December 2012, and 31 December 2013.

13. During this time, other licensees also sought access to CUC's poles. One of these was WestStar TV Limited (**WestStar**). WestStar approached CUC on numerous occasions throughout 2010 to discuss how it might gain access to the telecommunications area of the CUC poles for the purpose of hanging WestStar's cable to build out its fibre optic cable network. At that time, and in anticipation of Infinity utilising the space and rolling out its own network, CUC informed WestStar (on more than one occasion) that there was not currently enough space on the pole.

14. By 2011 CUC had received no income from Infinity making attachments. The regulator had placed a roll out obligation on Infinity which Infinity had said it planned to meet by using a space on CUC's pole and CUC had kept that space available for Infinity and informed other licensees that there was not currently any space available on the poles to accommodate their attachments. This was on the basis that, if some of the communications spaces which Infinity required for its network



were occupied by other licensees, Infinity would be unable to comply with the regulatory requirement to achieve island-wide coverage within the roll-out period.

15. By 2011 CUC had come to the conclusion that it was not commercially viable to continue the arrangement by which a space was held for Infinity on its poles, without payment, against a background of interest in making attachments from other licensees who would pay. CUC therefore informed Infinity that it could not continue to hold a space on the pole for it. Infinity's response, by Randy Merren (Managing Director of Infinity), was to assure CUC that Infinity would shortly be in a position to commence its build out. On 13 December 2011, Infinity sent a proposed draft Deed of Variation to CUC to amend the Master Pole Agreement. A copy of the email from Randy Merren to Andrew Small (former Vice-President of CUC) is at attachment 1.

16. In that email, Infinity gave an unequivocal written assurance that it was now ready to commence the deployment of its fibre network across Grand Cayman utilizing CUC's pole infrastructure, governed by the CUC-Infinity Agreement. This deployment, it said, required a financial investment and in order for that investment to be made there needed to be an assurance that the pole infrastructure would remain available for a period of 24 months during which, Infinity said, 95% or more of its primary fibre runs would have been deployed. Infinity proposed a temporary change to the terms of the agreement, to enable the investment to proceed with the assurance that the CUC infrastructure would be available as required for 24 months, whereby the spaces allocated for the Infinity attachments on all CUC poles in Grand Cayman, would be assured by CUC up until 31 December 2013 through a pre-payment deposit. This pre-payment deposit was suggested to be CI$30,000 per annum (payable quarterly in advance) for the first year, and CI$75,000 for the second year (payable quarterly in advance). The sums were to be treated as pre-payments of the annual attachment fees payable under the existing contract terms, and were to be treated as a minimum annual attachment fees for each of the two years (regardless of actual pole utilisation by Infinity). While this proposal was made by Infinity, the final contractual terms were not reflective of the above.

17. The email from Randy Merren demonstrates that it was Infinity who approached CUC to vary the contract and introduce a fee that ensured that CUC's poles were available for Infinity to attach and roll out its fibre network. This is at odds with the position taken by Infinity during the consultation process that there is "*no objective justification for charging these fees to some attaching utilities and not to others*". It is at odds with this suggestion because at the time the arrangement was entered into there was only one other attacher (Flow). Flow was not in a comparable position to Infinity because Flow was the incumbent, with a full network in place and FLOW was continuing to pay proportionately for new pole installations. Infinity on the other hand had no network. Flow did not need to reserve space into which it could roll out a network, but Infinity did. It is inherent in Infinity's statement above that Flow ought to have been charged to reserve spaces because it was in a comparable position to Infinity, such that to charge reservation fees to one and not to the

other could not be objectively justified. That completely overlooks the fact that the positions of Flow and Infinity were entirely different. The true position is that there was a strong, if not compelling, objective justification for charging these fees to Infinity and not to Flow: Infinity needed to reserve spaces for an entire network, had asked to do so and had offered to pay to do so: Flow did not need to reserve for an entire network, had not asked to do so and could not reasonably be charged to reserve spaces for a network for which it was already paying attachment fees.

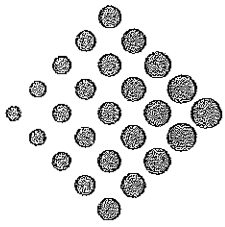
18. In any event, the agreement with Flow *did* provide for payments for any newly installed pole, unless there was an opt out from the area in which the pole was installed[4]. It is not therefore correct to suggest that Flow was not charged fees for poles where there were no attachments.

19. Paragraph 101 of the draft determination is incorrect in noting that "the reservation fees were initially introduced by CUC". The draft determination proceeds on a mistaken assessment of the facts surrounding reservation fees. The suggestion that they were "imposed by CUC" does not reflect the fact that they came about because Infinity had delayed its roll out, the spaces that had been reserved for Infinity without charge had not been used. Those spaces for which no charge was being made were capable of generating income by being assigned to others. There was and had been for some time a potential loss of revenue to CUC from keeping the spaces reserved without charge. There was an opportunity cost to CUC in doing so. CUC's response was not to seek a charge but to advise Infinity that the reservation could not be expected to continue. It was Infinity that responded by proposing a payment to compensate CUC for the opportunity cost involved in continuing the reserved space arrangement. What resulted was an arrangement under which an opportunity cost payment was agreed in good faith by CUC on the basis of a limited period within which roll out was to occur.

20. DataLink notes that on 22 December 2011 (so 11 days after Infinity had made its proposal for a reservation fee) ICTA extended Infinity's roll out period on a staged basis (see paragraph 12 above). One of the requirements of the extension was that Infinity "*complete a fibre network sufficient to enable the provision of Public Service and Subscription Television Broadcasting Services over that network to 90% of the resident population of Grand Cayman by 31 December 2013*" (there was a further and final stage at 31 December 2014).

21. In December 2011 therefore, Infinity, the ICTA and CUC were all playing their separate complementary roles in working to the same outcome: a network rolled out to at least 90% by the end of 2013. The grant of reserved spaces and the grant of an extension to Infinity's licence roll out conditions were not unconnected events. Infinity wanted the roll out, the regulator wanted the roll out and the roll out couldn't happen as planned *unless* spaces were reserved.

[4] The Schedule B charge.



22. The draft determination ultimately concludes that the reserved spaces payments should be repaid to Infinity. That conclusion is predicated on earlier conclusions that it was introduced by CUC and that it was a disincentive for Infinity to roll out. It was none of these things at the time it was entered into. Infinity had a plan to roll out on the strength of which both CUC and the regulator acted to facilitate the planned roll out. It is incorrect to characterise the reserved space arrangement as a way for Infinity to keep competitors off the pole without itself rolling out. It is incorrect to suggest that it removed the incentive to roll out. That is because if Infinity *did not* roll out then it paid reserved space fees without any corresponding revenue, whereas if Infinity *did* roll out then it paid attachment fees but also gained corresponding revenues. Infinity therefore had a financial incentive to roll out so as to move from a position where it would be paying fees with no revenue to cover them to a position to where it would be paying fees with revenue to cover them (and make a profit on top).

23. These discussions eventually led to a variation to the agreement between CUC and Infinity dated 20 March 2012 in which a space at the top of the communications space of each pole was reserved for Infinity until the earlier of:

(1) Such time as Infinity actually attached to that pole; or

(2) The end of a build out period, which by this time had come to be set at 31 December 2014 (so two years and nine months).

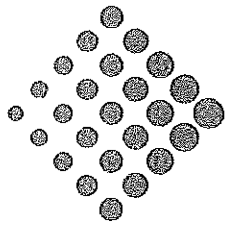
24. Prior to that variation, on 6 March 2012, [a copy of this is at attachment 2] CUC wrote to the ICTA to notify it of the proposed variation, explaining: "*the primary purpose of the proposed variation is to allow Infinity Broadband to reserve space on CUC's poles for a reasonable period in order to enable it to attach its fibre cables to CUC's poles in accordance with the revised role out schedule that is set out in the annex to Amendment No 5 to Infinity Broadband's ICTA licence*".. As we have already pointed out, at the time these arrangements were entered into:

(1) each of the ICTA, Infinity and CUC had the same goal in mind: that Infinity should *complete a fibre network sufficient to enable the provision of Public Service and Subscription Television Broadcasting Services over that network to 90% of the resident population of Grand Cayman by 31 December 2013* [with the final stage at 31 December 2014]"

(2) each of them was following the same path to that goal: roll out to which spaces on CUC's poles were essential;

(3) each of them needed to know, and did know, that means by which the goal was to be achieved (the availability of space on poles through what would inevitably be an extended roll out period) was in place[5].

[5] Although the email of 6 March 2012 was written with a view to pre-approval, we are, as can be seen, not referring to it in support of a suggestion that there was pre-approval but because it, when taken together with



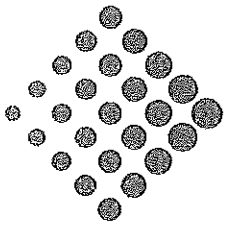
25. We make these points because it is now being proposed in the draft determination that after the events have played out the arrangements made at the time should be reversed retrospectively. While DataLink do not accept that the law permits this at all, even if the Office reject what DataLink say about the legal position, the fact remains that the arrangement was entered into in good faith by DataLink within the context of a plan that was credible and on the basis of which the ICTA granted roll out extensions, *which themselves the ICTA knew were only feasible with the benefit of the reserved space arrangement.* The facts therefore show that the arrangement that is now criticised was not at the time it was entered into anything but a good faith agreement based on opportunity cost intended to achieve (and essential to) an objective to which the ICTA also subscribed. It would, DataLink submits, be wholly wrong to require after the event reimbursement of payments already made under this arrangement (which has now run its course).

26. On 28 March 2012, the Authority issued DataLink its licence and the agreement between CUC and Infinity was novated to DataLink. In the period leading up to the grant of this licence Digicel, WestStar and Logic had been in contact with DataLink to say they wanted to discuss pole sharing arrangements (attached are letters in February and March 2012 to that effect [a copy of this is at attachment 3]).

27. Paragraph 111 of the Draft Determination expresses the view that the reservation fee arrangement with C3 served to assure Infinity that no competitor could attach and therefore was a disincentive to C3 to construct a network. We have already pointed out that the reservation fee served as incentive to attach, because without an attachment there was a fee with no corresponding revenue. Paragraph 111 is making a further suggestion that the fee may have been seen by C3 as a price worth paying to prevent competitors attaching. DataLink makes the following points in response to this suggestion:
    (1) There is no evidence, other than the fact that C3 did not build out its network in this limited period, to support a conclusion that C3 in fact secured the reserved space for this purpose. In fact all the evidence strongly indicates that when the arrangement was made C3 genuinely intended to build out a network.
    (2) It is not correct that by reserving a space C3 in fact kept rivals off the poles. As explained in more detail (at paragraph 55 below) at the time the reserved space agreement was entered into (20 March 2012), DataLink and the ICTA had already reached an agreement to introduce another space on the pole (the reached agreement in February 2012). C3 were not therefore able to exclude competition by reserving the space because there was an additional space for which there was more than one contender and C3 were not therefore able to keep competition off the poles by reserving a space.

---

other material from the time, shows exactly what the relevant parties, including the ICTA, understood was the purpose of the reserved spaces at the time.



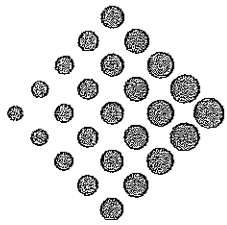
(3) If it was in fact C3's object in securing reserved spaces to keep rivals off the poles (as to which DataLink says the evidence shows the opposite) it has failed (because Logic have attached using the additional space). It would also be the case that CUC and DataLink made agreements with C3 in good faith on the basis that the space would be used so that it would be wholly wrong now to reward C3 at DataLink's expense by returning payments made by C3 on the basis that in making those payments C3 secured an improper competitive advantage

(4) The position with C3 is that for whatever commercial reasons it did not follow through with the intended roll out, but it is not the function of the Office to restore to C3 the price it paid to secure what it needed to execute its plan at the time simply because that plan was not executed for commercial reasons known best to C3.

28. Paragraph 112 of the Draft Determination suggests that this arrangement (the reserved space arrangement) would have disincentivised DataLink by reducing pressure on it to licence pole space to other licensees. That is not correct. DataLink's commercial interest lay in having attachments on as many pole spaces as possible. On the facts, and at the time, the best way to achieve that appeared to be to negotiate an agreement with C3 which itself was seeking to roll out an entire network to service 100% of the population of Grand Cayman. C3 was motivated to achieve this result because (1) it was under a regulatory requirement to do so (2) it had an apparent commercial interest in doing so (3) and the terms of the reserved space arrangement were such that C3 incurred cost without revenue to cover that cost if spaces that it had reserved were not used. By entering into an agreement with C3 under these conditions DataLink was taking steps to maximise its revenue from attachments which had the consequence of maximising the use of pole spaces.

29. It is wrong to characterise the arrangement with C3 to reserve spaces as a means of taking pressure off DataLink to licence pole spaces. The route chosen was to make an agreement that would allow C3 to build a network that could extend to all the poles (or as many as it needed to meet its roll out requirement). Once that had been done, there was no scope for licensing those particular spaces to others. The decision to reserve spaces for C3 was not taken so as to be able to avoid having to licence to others: it was taken because it appeared at the time to be the best way of maximising revenue from the spaces while honouring the existing commitment to Infinity and creating an incentive for attachment (and therefore the use of the spaces). It is no more a way to relieve pressure than if DataLink had wished to dispose of a vehicle by sale. Once the vehicle is sold that is the end of it. The sale to X is not a means of relieving pressure to sell to Y or Z.

30. In any event there was still a space left after the C3 contract, which was eventually the subject of an agreement with Logic. Like the agreement with C3, DataLink's purpose in making this agreement was to maximise pole use and therefore maximise its revenues.



31. Paragraph 113 of the Draft Determination suggests that in fact Infinity did not roll out in this period so that there were unused poles. While it is correct that Infinity and Logic have reserved spaces to which they have not attached, the evidence does not support the conclusion that the payment of reserved space fees was the cause. The purpose of reserving spaces was to create an area into which Infinity and Logic could roll out their networks in a rational manner over a defined period and within a space both of which were laid down in the agreement and were consistent with the ICTA Licence condition. The draft determination points to the fact that the networks have not occupied all of the spaces reserved and goes on to conclude that reserved spaces are responsible for that state of affairs; but the one does not follow from the other. Because Infinity and Logic were paying for unused space, their commercial interests lay, had it been commercially viable, in attaching in that space to generate revenues to cover the cost of the unused space. They did not and the evidence suggests that this was because it was not in fact considered commercially viable to attach. That may well have to do with the high cost of make ready work (from CI$ 1,000 a pole), which may have meant that for many poles, particularly in less densely populated parts of Grand Cayman, it was not considered commercially attractive to proceed with attaching. The commercial rationale is not something to which DataLink is privy, but it is wrong to conclude from the fact that there were unattached spaces that it was reserved space and minimum charges that caused that state of affairs. The evidence suggests that spaces remained unattached *despite* these charges and the incentives to attach that they created rather than *because* of them.

32. DataLink make the following further points:

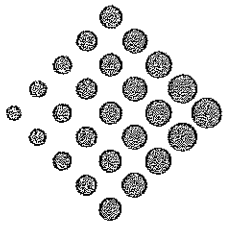
(1) The facts show that reserving spaces was an essential precondition for the network launch in the both of Infinity and Logic. The evidence therefore indicates that without the reserved space arrangements there may have been no further pole based networks provided by these providers.

(2) There is no evidence to show that any other providers would have been willing to commit to a pole based network without reserved space arrangements.

(3) The information available therefore suggests that the effect of not reserving space would have been to inhibit the use of the poles for the provision of networks. The contrary suggestion in the determination that not reserving space would have promoted the use of pole based networks is not supported by the evidence.

(4) The growth of a licensee's network is driven by a number of factors, including the economics of supply and demand. The Office has already expressed a belief that the economics of making broadband internet available in the less densely populated parts of Grand Cayman have made those areas less commercially attractive with the result that no or only a limited broadband service is available there[6].

[6] Consultation 2019-1, Annex 3 (Special License Zone) ¶2.3.



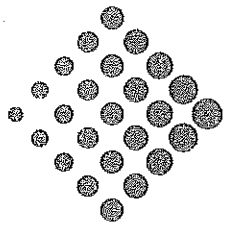
(5) One significant factor in network roll out is the cost of make ready work. As the Office will be aware, no attachment is permitted until make ready has been carried out and paid for by the attacher. Make ready costs were in the order of CI$1,000 a pole, for sites with little to no complexity (i.e. they could be considerably more in other cases).

(6) Given the role of supply and demand in shaping the network and the need to recover the costs of attaching (including make ready costs), it is almost inevitable that not all available spaces on the poles will be taken. The fact of unused spaces is not evidence that reserved space fees have inhibited the network and the suggestion to that effect in the draft Determination is incorrect.

33. The argument that reserved space fees are responsible for unused pole spaces is also based on the suggestion that these fees meant that there was a guaranteed income for DataLink which removed the incentive for DataLink to play its part in ensuring that attachments could be made and therefore that networks could be rolled out. This argument contains a contradiction - or at least makes an assumption that DataLink does not respond to financial incentives in a rational manner. The fee for a reserved space is on average one third of the fee for a space with an attachment. DataLink therefore has a strong financial incentive to facilitate attachments because by doing so it triples its revenue from any given space. In arguing that the income from reserved spaces removes the incentive to facilitate attachments the draft Determination treats DataLink as being impervious (or barely pervious) to a tripling of its revenues. That is not rational.

34. The draft determination also argues that the reserved space fees provided Infinity and Logic with an incentive not to attach. The argument is that by reserving a space they kept rivals off the poles and could afford to be inactive safe in the knowledge that they were not exposed to the activities of competitors. But that is an incorrect analysis of the consequences of reserving spaces for the network. Taking Infinity first. At the time of its agreement in 2012 there was an incumbent already in place with an established network on the poles. In that situation there is no incentive for Infinity to incur the cost of reserving space and then do nothing to roll out its network. That would involve incurring a cost while leaving the field to an incumbent already in place. Furthermore, and as we have pointed out, not only was there an incumbent but there was another space on the pole that was taken up by Logic. The facts do not support a conclusion that the reservation arrangement provided Infinity with an incentive to delay developing its network.

35. The position is the same with Logic. The fact that a space is reserved provides Logic with no incentive to defer making attachments that would otherwise produce profits, because if it were not to take the opportunity to service a customer need there were two rivals that would. It is only if one assumes some form of collusion between the three licensees that the notion that reserving spaces worked to disincentivise attachments becomes remotely credible. There is no basis for any such assumption and there is naturally no suggestion of it in the draft Determination.



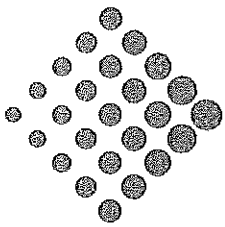
36. Paragraph 114 of the Draft Determination concludes:
"*Therefore, based on the evidence regarding the number of permit applications processed and the time required to do so* [citation to two sources], *the Office considers that the reservation fees as specified in the Pole Sharing Agreements have acted and continue to act as a disincentive to efficient processing of permit applications, and therefore the reservation fees did and do not promote and efficient, economic and harmonised unitisation 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.*"

37. The first source cited in support of this conclusion is a response from DataLink to an earlier consultation[7]. It shows a very large number of applications for permits. It does not indicate the time taken to process them. That response acknowledges that there had been challenges in providing sufficient resources to keep up with necessary make ready work caused by a spike in demand for permits over a short period. It explains that this was aggravated by repeated breaches by the licensees of the procedures set out in the agreement. Those included failure to pay for make ready work and making attachments without permission. The second source cited in support of this conclusion is a contentious allegation made in an interlocutory application (and therefore not the subject of any determination by the court) that there were at one time some 3,700 permit applications outstanding from Logic. Neither piece of evidence supports the conclusion that it was reserved space fees that caused any delay.

38. Paragraph 114 of the draft determination suggests that there was no reason for DataLink to have been taken by surprise by the number of applications because the licensees' roll out obligations were adequate advance notice of the likely demand. DataLink does not accept this and we deal with it below, but the issue is whether the fact of reserved fees and guaranteed minimum payments were the cause of the delays in processing permits. DataLink has already pointed out that no causal connection between guaranteed payments and delays in processing has been identified. The only connection to which the Determination points is the fact that income was guaranteed from reserved fees. The suggestion being that the guaranteed income was an incentive to do nothing more. As we have pointed out, that argument assumes that DataLink is not motivated by financial incentives in a rational manner.

39. The draft Determination proceeds on a mistaken footing when it rejects DataLink's explanation for what took place with permit processing. The Determination reasons that because all spaces on the poles were reserved and there was a roll out requirement imposed by the regulator, then DataLink should have expected applications to attach to all of the poles in a short period. That is the opposite of what DataLink had in fact experienced with Infinity, which, as explained above, had for some years not sought to attach to poles where a space was reserved for it. It is also at odds with what

[7] ICT Consultation 2016-2, page 9 of DataLink's response.



has actually happened, which is that for various commercial reasons the network does not extend to every available space on the poles.

40. At the end of the day, whatever the reasons behind the permit backlog, they were not the guaranteed revenues from reserved spaces or minimum payments and it is not appropriate to require those payments to be rebated in consequence of the backlog.

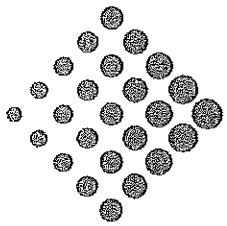
41. A mismatch of demand to resource was met in the case of Logic by the parties sitting down to resolve the problem and agreeing a process under which Logic and DataLink agreed a protocol for resolving disputes over unpaid fees, recognised and quantified Logic's needs moving forward and came up with Memorandum of Understanding on 15 June 2016 (**MOU** - see DataLink's response to Consultation 2016-2) to ensure that attachment requests could be processed accordingly. That Memorandum set an upper limit to attachment applications and allowed DataLink to put in place resources to service a level of demand up to that upper limit.

42. Despite invitations from DataLink, Infinity refused to negotiate a similar arrangement.

43. Paragraphs 115 and 116 of the Draft Determination refer to the Logic MOU. Those paragraphs conclude that there is an upper limit on the number of poles that can be processed. The Draft Determination refers to a figure of 300 a quarter per licensee... The Logic MOU refers to a limit of 300 a month or 3,600 a year.

44. It is on the assumption that the 300 number is a fixed limit that the Draft Determination suggests that there should not be more than 300 poles on which spaces are reserved at any one time. The reasoning behind the suggestion is that that there should be no more than one month's worth of spaces reserved at any one time. But that ignores the fact that the spaces were reserved to create a network. The number of spaces of that have to be reserved to achieve that must be a function of the size of the eventual network, not a function of the monthly build rate. It is therefore suggested, that the conclusion that no more than 300 spaces should be reserved is based on errors of reasoning.

45. Paragraph 138 of the Draft Determination suggests that the reserved space fee arrangement was not reasonable because it assumes that the attacher would necessarily request access to all of CUC's utility poles, which the Determination says would only be reasonable if specifically asked for by the licensee. As the account above shows, Infinity did specifically ask for reserved space on all poles (as did Logic as we will explain when we come to the part of this response dealing with Logic). The implicit suggestion in paragraph 138 that the provision was unreasonable is therefore based on an incorrect assumption that licensees were required to reserve space whether they wanted to or not.



46. Paragraph 139 of the Draft Determination suggests that the reserved space fee was not reasonable because it is premised on the idea that the licensee would have to attach to every pole, when the licensee will have alternatives. If the fee had been imposed by DataLink, this might be a fair point, but it was not, imposed by DataLink it was required by Infinity (and later Logic), each of which knew better than DataLink what its commercial needs were at the time. It may well be true, as suggested at paragraph 139, that not all spaces would be required in the end, but DataLink was not to know which spaces would not be required and, given that they had a choice whether to reserve particular spaces or not, it is to be inferred that Infinity and Logic did not know at the outset which spaces were required. In any event they both chose to reserve all spaces. In the circumstances DataLink's opportunity cost falls to be calculated by reference to what was reserved, which was all the spaces and the Draft Determination proceeds on a misunderstanding in suggesting that DataLink was at fault on charging by reference to all that was reserved.

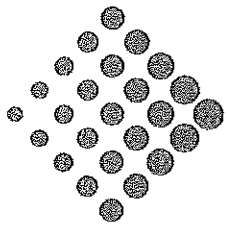
47. Paragraph 141 of the Draft Determination suggests that the fee was set without regard to the actual costs to DataLink. That is not correct. There was, as the Draft Determination itself acknowledges, an opportunity cost to DataLink when a space is reserved without being attached. There was also a cost to DataLink of administering pole spaces and the attachment agreements. That cost as regards Infinity was expected to be funded by attachment fees when Infinity was fully rolled out, but until then was intended to be funded by reserved space fees and guaranteed minimum payments.

48. Paragraph 142 of the Draft Determination suggests that the reservation fees as specified in the C3 and Logic Pole Sharing Agreements assumed that DataLink would be able to facilitate attachments to every single reserved poles in no less time that the build out period in the C3 agreement. There is nothing in the agreements to this effect. These fees were a means of funding DataLink by charging a fee based on opportunity cost until such time as an adequate revenue stream from attachments was in place. It does not follow that they depend for their existence on an assumption that DataLink would be able to process attachments to all poles on the network, including the performance of make ready work .

49. Paragraphs 147 to 148 of the draft Determination point to the fact that DataLink did not pay reserved space fees and concludes that there was discrimination against C3, Logic and Flow, all whom did pay reserved space fees. This suggestion fails to recognise that the cases of DataLink on the one hand and C3, Logic and Flow on the other were different. Treating them differently does not amount to discrimination. The draft Determination proceeds on the assumption that DataLink was in competition with C3, Logic and Flow[8]. That is not the case, as we explain below.

50. It was also suggested in the judicial review proceedings that "the licenses held by DataLink and its position as one of the four attachers to CUC's utility poles allows it to engage in ICT Service

[8] See ¶24.



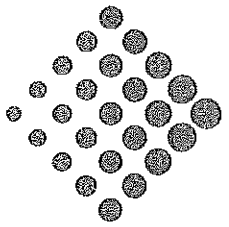
provision 'that is in direct competition with those attaching in the communication space that it manages on CUC's behalf'. The example given was of DataLink having actually "attached its own fibre-optic cables to the utility poles, and provides fibre services to the Cayman Islands Government (**CIG**) for remote access to CCTV cameras (which could otherwise be provided by another Licensee)". But this is based on a misunderstanding of what DataLink was providing, and compares services that are fundamentally different. DataLink provided dark fibre for CCTV cameras. In doing so, DataLink was not competing with suppliers of domestic broadband and telephony (C3, Logic, Flow, WestStar) rather they were providing a service at the specific request of CIG to CUC. At the time that this service was required neither C3 nor Logic had commenced their network roll out.

51. It was also suggested in the judicial review proceedings that DataLink's position is closely analogous with that of BT in the United Kingdom. DataLink's position is completely different to that of BT: BT competes for domestic broadband and telephony whereas (as set out above) DataLink does not.

52. Whilst DataLink has an ICT licence for "Fixed Telephony", it does not and has not ever marketed itself as a provider of those services. DataLink has raised with the Office the question whether its licence should be amended. However, what is relevant for this response is that it cannot be correct that C3 and Logic are at a competitive disadvantage to DataLink when it does not compete with those companies for the provision of domestic broadband and telephony services.

53. Paragraphs 150 and following of the Draft Determination suggest that the reservation fees discriminate against Infinity and in favour of Flow because Flow was not paying reservation fees when Infinity was. As a matter of semantics it is correct the Flow was not paying reservation fees, but was making a payment in respect of poles to which it was not attached and there was no discrimination. Until November 2016 Flow was paying a fee both for poles where it was attached and for poles where it was not attached, although the schedule B charge was not described as a reserved space fee, the agreements were not fundamentally different. Importantly, however, the positions of Flow and Infinity were fundamentally different and there is nothing discriminatory in treating different cases differently. Flow had had in place a mature network for years in 2012 whereas Infinity had none. Flow's requirements for poles where it was not attached were different from Infinity's and Flow was already paying a contribution to DataLink's costs through its attachment fees.

54. In any event on 18 November 2016 the agreement with Flow was revised (having been under negotiation for a number of years) and the revised agreement introduced explicit reserved space provisions. The clause reserved space until the end of roll out. That had already occurred, so the only reserved space arrangement was an agreement that where new poles were installed, Flow has a reserved space for a maximum of six months. By this time the Infinity reserved space



arrangement had come to an end (it ended in December 2014) and the Logic arrangement was still running. Throughout the relevant period there was in practice very little difference and what difference there was is referable to the different situations of Flow on the one hand and Infinity and Logic on the other - not to discrimination.

LOGIC

55. Throughout 2011 and 2012 the ICTA had been in discussions with CUC with a view to increasing the communication space on the poles. As configured in 2011 the space allowed for three attachment positions. One was taken by Flow, the second was the subject of the agreement with Infinity discussed above and the third was reserved for DataLink itself. An agreement was reached to enlarge the space in February 2012 to permit a fourth attachment. This enlargement of the space was made a condition of DataLink's licence, which was finally granted on 28 March 2012.

56. At this time and as explained above Logic, WestStar and Digicel had expressed interest in attaching to the poles. DataLink decided to issue a Request for Qualifications and sought the ICTA's guidance on the Request. The Authority declined to provide guidance on the basis that it wished to preserve its independence. The Request is at attachment 4. What was being offered was the remaining point of attachment to a single attacher. It was inherent in this arrangement that space would be reserved and DataLink does not believe that there would have been any interest from attachers in a different arrangement because the pole attachment position was for *network* use not for single attachments to particular poles. At the very least attachers would have required reservation of contiguous poles in sufficient number to form a network that would be commercially viable. The attacher that emerged from the Request process was Logic and what Logic requested was to be able to use all of the poles as a network. Mr Edenholm wrote on 17 April 2013 that Logic *"will require reservation to 100% of pole assets"* [attachment 5].

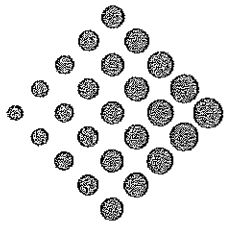
57. We refer generally to the points we made in connection with Infinity again for Logic. The evidence once again shows that far from inhibiting network development, as the draft Determination suggests, the agreement to reserve spaces on the poles was essential to it.

58. DataLink entered into an agreement with Logic on 18 July 2013. That contained a reserved space arrangement that was also time limited by reference to the earlier of attachment or the end of the build out period. In the case of Logic the build out period was to end on 31 December 2018. Logic was given the option to exclude poles from the reserved space arrangement at any time[9].

FLOW

59. As noted above, until November 2016 there was an arrangement with Flow by which it paid for poles to which it was not attached, subject to a right to opt out. That is not dissimilar to the

[9] We note that although Infinity did not have this option in its contract it was given the option to move to the same contractual terms as Logic but refused to enter into discussions to achieve this.



position with Infinity and Logic[10]. After November 2016 Flow had a reserved space arrangement, but its space was reserved for only 6 months. There was no real difference between this and Logic's position because both of them were able to opt out of reservation arrangement should they want to[11] and only a limited reserved space arrangement after that. It was entirely a matter for Flow whether to take up the reserved space arrangement because it was entitled to exclude poles from it.

60. It is suggested in the draft Determination that the differences between the Flow agreement and the Logic and Infinity agreement were such that there was discrimination. In fact the same features were present in all agreements (payments for attachments and payments for poles where there were no attachments). Flow was in a very different position from C3 and Logic and such differences as there were (absence of large amounts of reserved spaces) were not discriminatory treatment of like cases in a different manner, but the result of treating different cases differently.

61. It is suggested that DataLink competed with Flow and therefore discriminated in its own favour by not charging itself fees, but as pointed out above that it is not correct.

CONSULTATION QUESTIONS

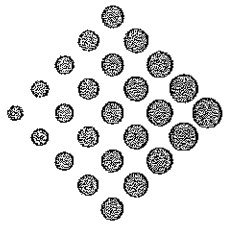
62. **Question.** *Are the businesses or (a) sections of businesses or (b) potential sections operated by DataLink, Digicel, Flow, Infinity, C3 and Logic so fundamentally different that they are not in a properly comparable position?*

63. **Response.** This question goes to the issue of discrimination by self-preference addressed in our response above. 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.

(1) 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.

[10] Logic had a contractual opt out and Infinity was offered the opportunity to move a more modern contract as reflected by the Logic model but refused.

[11] And the reason Infinity did not have opt out was its refusal to negotiate revised terms along the lines of Logic's.



(2) 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.

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

65. **Response.** 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.

66. 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.

67. 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.

68. 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.

69. **Question.** *Have licensees being rolling out their networks efficiently and harmoniously?*

70. **Response.** The draft Determination request 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.

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

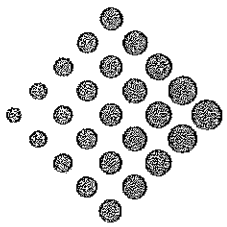
72. **Response.** The licensees reserved what they reserved in every case as a matter of choice and not compulsion. Initially Infinity and Logic reserved 100% of the communication space, but that changed as they attached. Flow never reserved 100% of the communication space because it had a mature network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

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

74. **Response.** Looking at matters going forward:

(1) There are currently no reservation fees payables by Infinity or Logic. So removal of the fees would have no impact on their profitability moving forward.
(2) 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.

75. 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 Infinity 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.

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

77. **Response.** 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 to attach 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.

78. **Question.** *Did the Licensees expect to pay the same fees as other licensees in regard to reservation fees?*

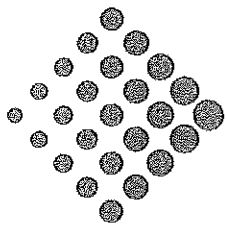
79. **Response.** The agreements were all concluded at different times and there are differences between them attributable to this in particular, DataLink is under-recovering from Infinity. DataLink understands that the focus of the consultation is not on historic discrepancies between agreements, but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

80. **Question.** *Did the Licensees, apart from DataLink, expect to pay the same fees as DataLink in regard to reservation fees?*

81. **Response.** 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.

82. **Question.** *Is the analysis reasonable, including taking into account all material considerations? If not, why not?*

83. **Response.** 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.

84. 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.

85. **Question.** *Are the conclusions reasonable? If not, why not?*

86. **Response.** 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:

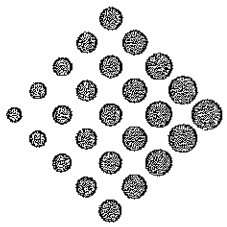
"interconnection and infrastructure sharing services shall be provided in a manner that maximises the use of public ICT networks and infrastructure"

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.

87. 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)(ii). 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 the Infinity 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

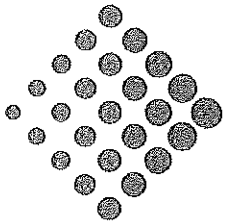


competition, by entering into an arrangement that was expected to add an additional ICT fibre network island wide. While it is correct that the pole network was not in fact fully used that is not a consequence of the reserved space arrangements.

88. The third conclusion is that the provisions involved rates terms and conditions that were not reasonable contrary to section 65(5) of the ICT Law and Regulation 6(a). Regulation 65(5) 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*". While regulation 6(a) 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 the another part of the licensees 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 are 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.

89. 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 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.

90. 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 Infinity agreement regarding reserved spaces ended in December 2014 and the Flow agreement in December 2018. DataLink's position is that:
    (1) 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.

(2) As to the Office's powers under 67A(3)(d) of the ICT Law 2019:

(a) DataLink maintains that the proposed requirement that DataLink rebate monies paid is a disproportionate expropriation of DataLink's property rights. We refer to the skeleton argument (**Skeleton**) lodged in the judicial review proceedings dated 7 May 2018 at section E on pages 31 onwards.

(b) DataLink maintains that the use of statutory powers to effect a rebate that is proposed in the Draft Determination is *ultra vires*. We refer to the Skeleton at section G on pages 46 and onwards.

91. These conclusions also lead to the proposed determination requiring the agreements to be amended to remove reference to reserved space. In the case of Infinity 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 Infinity arrangement, but once it is appreciated that the circumstances are not equivalent, that concern ought to be dispelled.

Question 4 Should any other matters be reconsidered?

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

92. **Response.**

If, despite DataLink's observations above, the Determination proceeds to require that the parties must remove references to reserved space payments and minimum payments, the 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.