



## **ICT Decision 2016-1 – dispute determination relating to the allocation of Infinity Broadband Ltd’s position on CUC’s electricity poles**

## **ICT Consultation 2016-1 – costs of reattaching of Infinity Broadband Ltd’s communication cables to CUC’s electricity poles**

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

**A: Consultation on the appropriateness of the reservation fees relating to the attachment of communication cables to CUC’s electricity poles.**

**B: Consultation on the permit application process for the attachment of communication cables to CUC’s electricity poles.**

**C: Consultation on the charging principles relating to the attachment of communication cables to CUC’s electricity poles.**

Grand Cayman, 27 April 2016

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# **ICT Decision 2016-1 – dispute determination relating to the allocation of Infinity Broadband Ltd’s position on CUC’s electricity poles**

## **BACKGROUND**

1. On **22 November 2005**, Infinity Broadband, Ltd (**'Infinity'**) and Caribbean Utilities Company, Ltd (**'CUC'**) entered into a Master Pole Joint Use Agreement, which allows Infinity to attach its communication cables to the electricity poles owned by CUC (the **'CUC-Infinity Pole Sharing Agreement'**).<sup>1</sup>
2. On **22 April 2011**, by amendment to section 23 of the Information and Communications Technology Authority Law (2011 revision) (the **'Law'**),<sup>2</sup> the "Governor in Cabinet may [...] exempt a company from the requirement to obtain an ICT licence if the sole ICT network or ICT service that the company provides is the provision of ICT infrastructure to a wholly-owned subsidiary that is subject to [the Law]."<sup>3</sup>
3. On **10 May 2011**, in exercise of the powers conferred by section 23 of the Law, the Governor in Cabinet issued a Gazette Notice (the **'Information and Communications Technology Authority (CUC – Datalink) Notice, 2011'**) exempting CUC from "the requirement to obtain an ICT licence with respect to its provision of ICT infrastructure to DataLink Limited".<sup>4</sup>
4. On **20 March 2012**, CUC and DataLink, Ltd (**'DataLink'**) entered into a Master Pole Joint Use Agreement, which allows joint use of CUC’s electricity poles for the purpose of maintaining or installing attachments of communication cables to CUC’s electricity poles (the **'CUC-DataLink Pole Sharing Agreement'**).
5. On **20 March 2012**, CUC and Infinity executed a Deed of Variation relating to the Master Pole Joint Use Agreement, dated 22 November 2005, which amended and supplemented the terms of the CUC-Infinity Agreement (the **'CUC-Infinity Deed of Variation'**).<sup>5</sup>
6. On **28 March 2012**, the Information and Communications Technology Authority (the **'Authority'**) issued an ICT Licence to DataLink, which authorised DataLink to supply certain ICT Services, including Type 11 ICT Service specified as "the

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[http://www.icta.ky/upimages/agreement\\_documents/1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf](http://www.icta.ky/upimages/agreement_documents/1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf)

<sup>2</sup> <http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

<sup>3</sup> <http://www.icta.ky/upimages/commonfiles/1417276774ICTAAmendmentLaw2011.pdf>

<sup>4</sup> <http://www.icta.ky/upimages/commonfiles/141727998220110517CUC-DataLinkNotice.pdf>

<sup>5</sup> [http://www.icta.ky/upimages/agreement\\_documents/1417708388DeedofVariationCUCInfinityBroadband.pdf](http://www.icta.ky/upimages/agreement_documents/1417708388DeedofVariationCUCInfinityBroadband.pdf)

provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.”<sup>6</sup>

7. On **7 May 2012**, Infinity, CUC and DataLink executed an agreement which novated and transferred all the rights and obligations under the CUC-Infinity Pole Sharing Agreement and the CUC-Infinity Deed of Variation, from CUC to DataLink (the '**Infinity-CUC-DataLink Novation Agreement**').<sup>7</sup>
8. On **9 November 2012**, Cable and Wireless (Cayman Islands), Ltd ('**LIME**'), CUC and DataLink executed a Novation and Amendment Agreement (the '**LIME-CUC-DataLink Novation Agreement**')<sup>8</sup> which amended, and novated and/or transferred all of CUC's rights and obligations under the Agreement for Licensed Occupancy of CUC Poles by LIME made on 5 November 1996 (the '**CUC-LIME Pole Sharing Agreement**'),<sup>9</sup> to DataLink.
9. On **18 July 2013**, WestTel Limited T/A Logic ('**Logic**') and DataLink entered into a Master Pole Joint Use Agreement, which allows Logic to attach its communication cables to electricity poles owned by CUC (the '**DataLink-Logic Pole Sharing Agreement**').<sup>10</sup>
10. In a letter to DataLink, dated **16 July 2014**, Infinity raised a number of contentious issues with DataLink in relation to the implementation of the **CUC-Infinity Pole Sharing Agreement** and the **CUC-Infinity Deed of Variation**, as novated through the **Infinity-CUC-DataLink Novation Agreement**, including, among other things, the initiative made by DataLink establishing a new form of agreement with Infinity to replace the existing agreements, which in Infinity's view was "*biased in favour of DataLink*", and the allegations made by DataLink that Infinity breached the existing agreements with certain unauthorised attachments to CUC's electricity poles.
11. In a letter to the Authority, dated **5 August 2014**, Infinity expressed its concerns in relation to the decisions made by DataLink regarding the height above ground at which the various attaching parties must attach their communication cables to CUC's electricity poles. Infinity requested that the Authority commence an investigation under Section 41 of the Law<sup>11</sup> to establish whether DataLink has infringed Section 36 or Section 40 prohibitions of the Law.
12. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the '**Dispute Regulations**'),<sup>12</sup> Infinity submitted a dispute determination request to the Authority (the '**Dispute Determination Request**')<sup>13</sup> contending that a dispute had arisen

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<sup>6</sup> [http://www.icta.ky/upimages/licencedocument/ViewLicencedocument\\_1417650665.pdf](http://www.icta.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf)

<sup>7</sup> [http://www.icta.ky/upimages/agreement\\_documents/NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED\\_1458325571.pdf](http://www.icta.ky/upimages/agreement_documents/NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED_1458325571.pdf)

<sup>8</sup> [http://www.icta.ky/upimages/agreement\\_documents/1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf](http://www.icta.ky/upimages/agreement_documents/1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf)

<sup>9</sup> [http://www.icta.ky/upimages/agreement\\_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf](http://www.icta.ky/upimages/agreement_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf)

<sup>10</sup> [http://www.icta.ky/upimages/agreement\\_documents/141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf](http://www.icta.ky/upimages/agreement_documents/141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf)

<sup>11</sup> <http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

<sup>12</sup> <http://www.icta.ky/upimages/commonfiles/1417277080ICTA-DisputeResolutionRegulations.pdf>

<sup>13</sup> <http://www.icta.ky/upimages/commonfiles/141726659620140912C3DeterminationRequest.pdf>

between Infinity and DataLink relating to the allocation of communications space used by Infinity for attachment of its communication cables on poles managed by DataLink (the '**Dispute**').

13. On **2 October 2014**, DataLink submitted its response to the Dispute Determination Request ('**Response to the Dispute Determination Request**')<sup>14</sup>.
14. Considering it appropriate to invite submissions from any interested parties on the issues addressed in each of the filings made by Infinity and DataLink, the Authority opened a public consultation relating to the Dispute.<sup>15</sup> Interested parties were invited to present any such submissions by 5 November 2014. However, the Authority received no submissions to that public consultation. Indeed, CUC replied to the Authority on 5 November 2014 stating that "*CUC does not intend to provide submissions in respect of the pole attachment services dispute between Infinity and DataLink.*"
15. On **26 June 2015**, upon consideration that the matter of the dispute between Infinity and DataLink may be relevant to other Licensees, the Authority sent requests for information to DataLink,<sup>16</sup> Infinity,<sup>17</sup> Logic,<sup>18</sup> and LIME,<sup>19</sup> with the intention to investigate in more detail the matter of the dispute. In particular, the Authority requested copies of the non-redacted versions of Appendix A to the **CUC-DataLink Pole Sharing Agreement**, the **CUC-Infinity Deed of Variation** and Schedule B to the **CUC-LIME Pole Sharing Agreement**. The Authority also requested the following information, by each Licensee, for the period Quarter 1 of 2012 through Quarter 1 of 2015:
  - list of all the relevant fees (reservation fee and attachment/pole rental fee) applicable for the attachment of communication cables to CUC's electricity poles;
  - number of poles reserved/occupied by the Licensee;
  - number of new pole attachment permits approved by DataLink;
  - estimated length of fibre optic cables attached on CUC's electricity poles; and
  - estimated length of fibre optic cables deployed in Grand Cayman.
16. On **2 July 2015**, Infinity submitted its response to the Authority's request for information of 26 June 2015.<sup>20</sup>
17. On **7 July 2015**, Logic submitted its response to the Authority's request for information of 26 June 2015.<sup>21</sup>
18. On **10 July 2015**, the Authority received a letter from Appleby, a law firm acting on behalf of CUC, relating to the proceedings filed in the Grand Court of the Cayman

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<sup>14</sup> <http://www.icta.ky/upimages/commonfiles/141726651120141002DataLinkResponse.pdf>

<sup>15</sup> <http://www.icta.ky/infinitydatalink-pole-attachment-dispute>

<sup>16</sup> <http://www.icta.ky/upimages/commonfiles/143836666320150626ICTAtoDataLinkrepoledispute.pdf>

<sup>17</sup> <http://www.icta.ky/upimages/commonfiles/143836669520150626ICTAtoInfinityrepoledispute.pdf>

<sup>18</sup> <http://www.icta.ky/upimages/commonfiles/143836676620150626ICTAtoLogicrepoledispute.pdf>

<sup>19</sup> <http://www.icta.ky/upimages/commonfiles/143836672520150626ICTAtoLIMErepoledispute.pdf>

<sup>20</sup> <http://www.icta.ky/upimages/commonfiles/14595195658July2015InfinityresponsetoICTA.pdf>

<sup>21</sup> <http://www.icta.ky/upimages/commonfiles/145951962817July2015LogicresponsetoICTA.pdf>

Islands (the '**Court**') against Infinity, in which CUC sought from the Court, amongst other things, an order restraining Infinity from "*attaching anything to [CUC's] poles without permission*" (the '**Restraining Order against Infinity**').

19. On **10 July 2015**, the Authority received a letter from Appleby, a law firm acting on behalf of CUC, relating to the proceedings filed in the Court against Logic, in which CUC sought from the Court, amongst other things, an order restraining Logic from "*attaching anything to [CUC's] poles without permission*" (the '**Restraining Order against Logic**').
20. On **21 July 2015**, DataLink submitted its response to the Authority's request for information of 26 June 2015.<sup>22</sup>
21. On **31 July 2015**, LIME submitted its response to the Authority's request for information of 26 June 2015.<sup>23</sup>
22. On **14 August 2015**, a judgment was issued by Justice Ingrid Mangatal refusing the application by CUC for an interlocutory injunction against Logic (see paragraph 19 above) (the '**CUC Restraining Order application against Logic**').<sup>24</sup>
23. On **26 August 2015**, as a follow-up to the submissions received in response to the Authority's request for information of 26 June 2015, the Authority sent additional requests for information in order to clarify certain responses provided by the Licensees, and to make further progress on the investigation of the Dispute.<sup>25</sup>
24. On **27 August 2015**, Logic served a notice of grievance to DataLink, in accordance with Regulation 3 of the Dispute Regulations ('**Logic's Notice of Grievance**'), concerning the permit application process, make-ready estimates, and other matters in relation to the attachment of communication cables by Logic on the electricity poles managed by DataLink.
25. On **2 September 2015**, Infinity submitted its response to the Authority's additional request for information of 26 August 2015.<sup>26</sup>
26. On **3 September 2015**, Logic submitted its response to the Authority's additional request for information of 26 August 2015.<sup>27</sup>
27. On **3 September 2015**, DataLink submitted its response to Logic's Notice of Grievance ('**DataLink's Response to Logic's Notice of Grievance**'), stating, amongst other things, that DataLink "*is prepared to meet in good faith with Logic to discuss any outstanding matters at the earliest convenience.*"
28. On **11 September 2015**, Logic confirmed that it is "*willing to meet with [DataLink] in an order to attempt to resolve the grievance.*"

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<sup>22</sup> <http://www.icta.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>

<sup>23</sup> <http://www.icta.ky/upimages/commonfiles/145951959831July2015LIMEresponsetoICTA.pdf>

<sup>24</sup> <http://www.icta.ky/upimages/commonfiles/1458327054CUCLtdvWestelltdTALogic.pdf>

<http://www.icta.ky/upimages/commonfiles/145952018126August2015ICTAtoLIMEfollow-up.pdf>

<http://www.icta.ky/upimages/commonfiles/145952013926August2015ICTAtoInfinityfollow-up.pdf>

<http://www.icta.ky/upimages/commonfiles/145952011026August2015ICTAtoDataLinkfollow-up.pdf>

<sup>25</sup> <http://www.icta.ky/upimages/commonfiles/145952021226August2015ICTAtoLogicfollow-up.pdf>

<http://www.icta.ky/upimages/commonfiles/145952018126August2015ICTAtoLIMEfollow-up.pdf>

<sup>26</sup> <http://www.icta.ky/upimages/commonfiles/14595202892September2015InfinityresponsetoICTA.pdf>

<sup>27</sup> <http://www.icta.ky/upimages/commonfiles/14595203193September2015LogicresponsetoICTA.pdf>

29. On **11 September 2015**, the Authority received a letter from Ogier, a law firm acting on behalf of Infinity, urging the Authority to expedite the processing of the Dispute Determination Request.
30. On **16 September 2015**, DataLink submitted its response to the Authority's additional request for information of 26 August 2015.<sup>28</sup>
31. On **22 September 2015**, LIME submitted its response to the Authority's additional request for information of 26 August 2015.<sup>29</sup>
32. On **25 September 2015**, Logic responded to DataLink's Response to Logic's Notice of Grievance, noting among other things the disagreement with DataLink in relation to the timeframes for the permit process, and it requested that "*some agreements needs to be reached that will allow permits to be processed in a reasonable period*". Logic also requested "*the processing of permits, issuance of Make-Ready invoices and performance of Make-Ready work to be executed in a workable order and in a reasonable time frame*", and it stated that "*the licensees need to be treated in the same manner and have equally access to the infrastructure*".

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<sup>28</sup> <http://www.icta.ky/upimages/commonfiles/145952035118September2015DataLinkresponsetoICTA.pdf>

<sup>29</sup> <http://www.icta.ky/upimages/commonfiles/145952038322September2015LIMEresponsetoICTA.pdf>

## LEGAL FRAMEWORK

33. In making the Decision and conducting the Consultations, the Authority is guided by its statutory remit, in particular as set out in the Law, the Dispute Regulations, and the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the '**Infrastructure Sharing Regulations**').<sup>30</sup>

In particular:

34. Section 9 (3) of the Law states, among other things, that:

*[...] the principal functions of the Authority are -*

*(a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;*

*[...]*

*(c) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks*

*[...]*

*(e) to license and regulate ICT services and ICT networks as specified in this Law and the Electronic Transactions Law (2003 Revision);*

*[...]*

*(g) to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;*

*(h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure; [...]*

35. Section 40 of the Law states the following:

*(1) Any conduct on the part of one or more licensees which amounts to the abuse of a dominant position in a market is prohibited if it may affect the trade in ICT networks and ICT services within the Islands.*

*(2) The conduct referred to in subsection (1) may, in particular, constitute such an abuse if it consists in-*

*(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

*(b) limiting production, markets or technical development to the prejudice of subscribers;*

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<sup>30</sup> <http://www.icta.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>

*(c) applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage;*

...

*(3) In this section-  
“dominant position” means a dominant position within the Islands.*

36. Section 65 of the Law states, among other things, that:

*(1) Subject to this section, a licensee that operates a public ICT network shall not refuse, obstruct or in any way impede another licensee in the making of any interconnection with its ICT network and shall, in accordance with this section, ensure that the interconnection provided is made at technically feasible physical points.*

*[...]*

*(3) A licensee to whom a request is made in accordance with this section shall, in writing, respond to the request within a period of one month from the date the request is made to him and, subject to subsection (5), provide the interconnection service in a reasonable time.*

*[...]*

*(5) Any interconnection provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to -*

*(a) any non-affiliated supplier;*

*(b) any subsidiary or affiliate of the licensee; or*

*(c) any other part of the licensee’s own business.*

*(6) Without prejudice to subsection (5), the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnections will be determined.*

37. Section 66 of the Law states, among other things, that:

*(1) Interconnection agreements between licensees shall be in writing, and copies of each agreement shall be submitted to the Authority within seven days of that agreement having been signed.*

*[...]*

*(5) Where parties cannot agree upon interconnection rates, the Authority may impose such rates.*

38. Section 67 of the Law states that:

*(1) Where, during negotiations for the provision of interconnection, there is any dispute between the parties (hereinafter in this section referred to as the “pre-contract dispute”) as to the terms and conditions of such*

*provision, either of them may refer the dispute to the Authority for resolution.*

- (2) The Authority may make rules applicable to the resolution of pre-contract disputes by means of arbitration or other dispute resolution mechanisms.*
- (3) A decision of the Authority in relation to any pre-contract dispute shall be consistent with any agreement reached between the parties as to matters that are not in dispute.*

39. Section 68 of the Law states, among other things, that:

- (1) The cost of making any interconnection to the ICT network of another licensee shall be borne by the licensee requesting the interconnection.*

*[...]*

- (3) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.*

40. Section 69 of the Law states, among other things, that:

- (1) Sections 65 to 68 shall, with necessary amendment, apply to such infrastructure sharing as the Governor in Cabinet may, after consultation with the Authority, prescribe.*

- (2) The Authority, in order to promote an efficient, economic and harmonised utilisation of infrastructure, may-*

*[...]*

- (b) inquire into and require modification of any agreement or arrangements entered into between a licensee and another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.*
- (3) A licensee shall not deny another licensee access to its infrastructure or infrastructure arrangements except-*
  - (a) where there is insufficient capacity taking into account reasonably anticipated requirements;*
  - (b) there are reasons of safety or security; or*
  - (c) there are technical and engineering matters which would make such access difficult or impossible.*

41. The Information and Communications Technology Authority (Infrastructure Sharing) Notice, 2003<sup>31</sup> states that the provisions of section 44 to 47 [being sections 65 to 68 of the Law (2011 revision)] inclusive of the Information and Communications Technology Authority Law, 2002:
- “shall apply to infrastructure sharing which has the following meaning-*
- ”infrastructure sharing” means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the utilisation of a public ICT network.*
- (2) *For the avoidance of doubt-*
- (a) *tangibles include lines, cables or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, **poles**, landing stations, huts, lands, buildings or facilities...” [emphasis added]*
42. Regulation 11 of the Dispute Regulations states that:
- In determining a dispute, the Authority shall act expeditiously, and in doing so may have regard to-*
- (a) *the subject matter of the dispute;*
- (b) *the need to inquire into and investigate the dispute;*
- (c) *the objectives and functions of the Authority; and*
- (d) *all matters affecting the merits, and fair settlement of the dispute.*
43. Regulation 6 of the Infrastructure Sharing Regulations states the following:
- The following general principles and guidelines shall apply to the provision of interconnection and infrastructure sharing services –*
- (d) *Interconnection and infrastructure sharing services shall be provided by the responder to the requestor at reasonable rates, on terms and conditions which are no less favourable than those provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder and shall be of no less favourable quality than that provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder; [...]*
- (h) *Interconnection and infrastructure sharing rates shall be cost-orientated and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder's fixed and common costs;*
44. Regulation 9 of the Infrastructure Sharing Regulations states the following:
- The rates offered by the responder to the requestor shall clearly identify all charges for interconnection or infrastructure sharing*

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<sup>31</sup> <http://www.icta.ky/upimages/commonfiles/1417280230ICTA-InfrastructureSharingNoticeDefinition.pdf>

45. Regulation 10 of the Infrastructure Sharing Regulations states the following:
- (1) *A responder's charges for interconnection or infrastructure sharing shall be-*
    - (a) *determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;*
    - (b) *non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;*
    - ...
    - (e) *such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and*
    - (f) *based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.*

## DECISION REGARDING THE DISPUTE BETWEEN INFINITY AND DATA LINK RELATING TO THE ALLOCATION OF POSITION ON CUC'S ELECTRICITY POLES

46. On **12 September 2014**, Infinity submitted the Determination Request, stating that *"despite Infinity's good faith and reasonable efforts, the dispute remains unresolved"*, and presenting *"full details of the issues to which this determination request relates."*
47. On **2 October 2014**, DataLink submitted its Response to the Dispute Determination Request, and it requested the Authority *"to use its powers to direct changes to the contract between DataLink and Infinity so that Infinity contribute to the costs of the changes and receive reimbursement of the costs of the changes on the same footing as other attachers."*
48. Both the Dispute Determination Request and the Response to the Dispute Determination Request are discussed further below.

### *Dispute Determination Request, 12 September 2014*

49. Infinity submitted that it *"has raised a number of grievances with DataLink in recent months"*, that this *"determination request relates only to the matters covered in Infinity's letter to the Authority of 5 August 2014, and considered in the Authority's board meeting on 14 August 2014"*, and that *"Infinity reserves the right to separately refer other aspects of the dispute between the parties, which are not covered within this determination request, to the Authority."*
50. Infinity referred to the *"background to the creation of the relevant agreements"* noting that, on 22 November 2005, CUC entered into a Master Pole Joint Use Agreement with Infinity, which was amended by the parties on 20 March 2012 by a deed of variation, and that the agreement was *"novated from CUC to DataLink"* by a novation agreement on 7 May 2012.
51. Infinity noted that it *"understand[s] that DataLink is a wholly owned subsidiary of CUC"* and that it *"consider[s] that DataLink occupies a monopoly position in respect of the Poles."* It further submitted that the *"issue to which this determination request relates is the height above ground at which Infinity are required to attach their fibre optic cables to the Poles."*
52. Infinity submitted that *"[a]t the time that the Original Agreement was entered into between CUC and Infinity, that agreement allocated assigned space on the Poles to just two licensees – Infinity and Lime."*
53. Infinity further submitted that *"[a]t the time of the Original Agreement, Infinity's attachment position was immediately above the space allocated on the Poles to Lime"*, that its *"directors believed (and still believe) that this gave Infinity the second best position on the Poles at which to attach"* and that the *"directors reasonably believed that Infinity would always occupy the second best position on the Poles."*
54. Infinity also submitted that *"[a]t some time after Infinity entered into the Original Agreement, it was determined that DataLink and Logic should also become"*

Attaching Utilities”, that “[b]oth DataLink and Logic were somehow allocated space on the Poles (by DataLink) below Infinity’s space, rather than above it” and that “[t]his relegation of Infinity to a higher position on the Poles is, in Infinity’s submission, going to result in (i) considerably higher costs for Infinity in getting its cable onto the Poles, and (ii) significant delays for Infinity in getting its cables onto the Poles.”

55. Infinity claimed that “it has the worst position on the Poles.” It further claimed that **“DataLink is taking unilateral steps to require Infinity to attach at 258 inches above ground (rather than 254 inches, which is what Infinity’s Agreement provides)”** [emphasis added], and it submitted that “Infinity has not agreed to this further increase in the height of its attachments but it appears that DataLink is performing Make-Ready, and expecting Infinity to attach, at 258 inches and not 254 inches” and that “[t]his is in clear violation of the express terms of the Agreement.”
56. Infinity noted that, “[a]t the time of the Original Agreement, **Infinity’s space ran from 242 inches above ground to 254 inches above ground**” [emphasis added] and that “Infinity were granted the right to attach to the Poles anywhere within their assigned space (i.e. the lowest point Infinity could attach was 242 inches above the ground).”
57. Infinity further noted that “[u]nder the terms of the Deed of Variation, Infinity agreed, amongst other things, to attach at the top of their assigned space (i.e. at 254 inches above the ground)” and that “[w]hilst this point was previously the subject of some discussions between the parties, this is not a point which Infinity requires the Authority to address.”
58. Infinity submitted that it “does not dispute that it is desirable to have four Attaching Utilities on the Poles” nor that “it is desirable to have a 12 inch “gap” between each Attaching Utility’s cables”, and that it “appreciates that someone needs to be at the top of the Poles.”
59. Infinity further submitted that “[w]hat Infinity does dispute is that (i) DataLink can unilaterally move Infinity further up the Poles, simply because it is convenient to do so; (ii) DataLink can implement changes to the order of attachments which directly benefit both itself and Logic, to Infinity’s detriment; and (iii) Infinity should be the Attaching Utility who ends up at the top of the Poles, despite being the second Attaching Utility to enter into a Master Pole Joint Use Agreement, and despite paying reservation fees in respect of the Poles since 2012.”
60. Infinity also submitted that “[h]ad Infinity known that the height of its assigned space would be unilaterally raised by a further 4 inches, Infinity would not have agreed to attach only at the top of its space, as it did in the Deed of Variation”.
61. Infinity claimed that “all Attaching Utilities are aware that there is a major commercial and competitive advantage to being assigned space lower down the Poles.”
62. Infinity noted that in “the context of the Agreement, “Make-Ready work” is the name given the work required to prepare a Pole for a cable to be attached to it” and that “this divides into two different types of work: (i) that which is required to strengthen the Pole to take a new attachment (Strengthening Make-Ready); and

- (ii) that which is required to make the Pole to take the attachment (Safety Make-Ready).”
63. Infinity further claimed that if “Infinity wishes to attach to a Pole (at its assigned height of 254 inches) Safety Make-Ready will always be required where the requested attachment would otherwise fall within the Safety Zone” and as “Infinity is the highest Attaching Utility it has the highest probability of falling within the Safety Zone.”
64. Infinity submitted that the “Safety Zone problem is made worse by the fact that some of the Poles to which Infinity (and the other Attaching Utilities) wish to attach are older Poles, which tend to be shorter than newer Poles” and, therefore, that “an Attaching Utility which has a higher assigned space may not be able to immediately attach to the shorter Poles because the Attaching Utility’s assigned space falls within the Safety Zone.”
65. Infinity further submitted that the “first consequence of a requested attachment falling within the Safety Zone is that Infinity will experience delays whilst the Safety Make-Ready work is carried out” while the “second consequence relates to the increased costs of the Make-Ready work which will fall upon a higher Attaching Utility”.
66. Infinity claimed that as “**the highest of the Attaching Utilities, Infinity will also suffer higher Strengthening Make-Ready costs than any other Attaching Utility**” [emphasis added] and it submitted that “the Strengthening Make-Ready required as a result of a new attachment increases the higher up the Pole that the attachment is to be made” for two reasons: (1) “the wind speed is higher the further above ground one goes” and “[h]igher wind speed increases the wind-load calculation and means that more work needs to be done in order to adequately strengthen the Pole to take the new attachment”; and (2) “the wind-load calculation needs to take into account the height above the Pole’s base at which the cable is to be attached” and that this “results in more work being required in order to strengthen the Pole to take a higher attachment than would be required to take a similar, but lower, attachment.”
67. Infinity also claimed that “there is a further (and very simple) issue with being higher up on the Poles”, noting that “[a]fter Infinity entered into the Original Agreement, it took a decision to invest in ladders rather than “bucket trucks”” and that “Infinity determined that ladders were sufficient to allow them to make the Pole attachments at the allocated height”. Infinity therefore submitted that “by attempting to require Infinity to attach further up the Poles, it is questionable as to whether ladders will still be sufficient to make attachments, or whether Infinity now has the additional expense and delay caused by the purchase of bucket trucks (and the associated training implications of staff).”
68. Infinity also submitted that “[i]nvestment in bucket trucks would involve Infinity in significant and previously unforeseeable capital expenditure and would be an unwelcome development for the business” and that “[w]hilst this further imposed increase is only four inches, there does come a point at which ladders are not a viable solution for Infinity’s attachments.”
69. Infinity stated that it is “aware that DataLink may seek to convince the Authority that a higher attachment position on the Poles is not a worse position”, noting that “Infinity strongly disagrees with any such suggestion” because “[t]o date, we have

*only seen arguments on this basis relating to the Safety Make-Ready” and “[w]e have seen nothing in relation to the Strengthening Make-Ready.”*

70. Infinity, therefore, submitted its request for *“the Authority to act as adjudicator to dispute and to determine the following:”*
- (1) *“whether DataLink presently has the legal right to require to attach at 258 inches above ground (or whether Infinity presently has a contractual right to attach at 254 inches above ground)”*;
  - (2) *“the height at which each of Infinity, Logic and DataLink should attach to the Poles, taking into account the foregoing explanation of how the order of attachments was determined”*; and
  - (3) *“whether there are any changes required to the Master Pole Joint Use Agreements of any of the Attaching Utilities in order to resolve the issues outlined in this determination request”*.
71. Infinity also submitted that it seeks from the Authority:
- (i) *“a declaration that it currently has a contractual right to attach to the Poles at a height above ground of 254 inches, rather than the 258 inches asserted by DataLink”*;
  - (ii) *“a declaration that DataLink acted unlawfully in its allocation of space to itself and to Logic”*; and
  - (iii) *“a declaration by the Authority that Infinity should be entitled to attach at 234 inches above ground, in the space immediately above that assigned to Lime”* noting that *“[t]his declaration should relate to all Poles, including those to which DataLink and/or Logic are currently attached”*.

#### *Response to the Dispute Determination Request, 2 October 2014*

72. DataLink submitted that *“[r]esolution of this dispute requires the Authority to make a decision about rational and efficient use of certain space on poles owned by CUC”*, noting that *“[t]he space in question is a vertical length of the pole 3 feet deep from top to bottom, within which four providers of communications services attach their cables to the pole”*. This space is defined as the “Communication Space” and, as DataLink noted, it *“sits 18 feet and 6 inches above the ground”* which is *“the minimum clearance between the bottom of the Communication Space and the ground.”*
73. DataLink further noted that *“[a]bove the cables in the Communication Space are electrical cables [which] sit in the Electric Space”*, and that ***“there has to be a minimum of 3 feet and 4 inches between the top of the Communication Space and the bottom of the Electric Space”*** [emphasis added], which is an area defined as the ***“Safety Space”*** [emphasis added].
74. DataLink submitted that *“[i]n 2005 there were just two providers using the Communication Space (Infinity and Lime)”* and that the *“space was then 2 feet 8 inches deep”*. DataLink also submitted that, *“[a]s the needs of the Island evolved, there was pressure for more providers to be accommodated within the Communication Space and in 2011 the Authority asked that matters be arranged so that four providers could attach to the pole within the Communication Space”*.

DataLink further submitted that “[t]his was feasible if (1) the depth of the Communication Space itself was increased by 4 inches and (2) Infinity and Lime ceased to occupy the whole of the Communication Space.”

75. DataLink provided further background on the earlier discussions between the Authority and CUC around the possibility for CUC to make space available for four attachers on the poles. DataLink submitted that its licence “was approved subject to the Authority being satisfied that the Pole Attachment Agreement properly referred to CUC’s confirmation as the basis upon which CUC will determine the pole load capacity of its poles (i.e. being suitable for four attachers).”
76. DataLink further submitted that “CUC and Infinity executed the agreement to vary the terms of the Infinity Agreement” on 20 March 2012, and that the “variation included the requirement that Infinity install its attachment at the top of its Assigned space (i.e. at the top of its 1 foot designated space)”, noting that “DataLink was not a party to the agreement reached between CUC and Infinity”, that “Infinity was already in the top position before DataLink became a party through the novation of the Infinity Agreement on 7 May 2012”, and that “DataLink simply inherited what CUC had already agreed with Infinity”.
77. DataLink also submitted that “the Agreement as novated to it bound DataLink to the agreement between Infinity and CUC including exactly where Infinity was to attach.”
78. DataLink explained that “the Communication Space could only be increased by moving the top of the space up four inches”, noting that “the bottom could not be moved because the minimum clearance space had to be respected”. DataLink further noted that “**four providers could be accommodated if Infinity attached its communication cable at the top of the Communication Space and Lime yielded some of the space that it currently occupied by attaching its communication cable at the bottom of the Communication Space**” [emphasis added].
79. DataLink then submitted that “[t]his was exactly what was done”, that “Infinity’s complaint relates to the consequences of this necessary and beneficial change”, and that “Infinity wrongly complain that they have been treated unfairly and have incurred additional cost”.
80. DataLink noted that “Infinity refers to the fact that in its contract the space is occupied by only two providers and the top of the space allocated to it is four inches lower than the top of the Communication Space allocated to DataLink by CUC under the new arrangements”, and it submitted that “[w]hile without merit, that point is technically correct and DataLink invites the Authority to use its powers under the law to require the Infinity contract with DataLink to be varied to be consistent with the new arrangements”.
81. DataLink further noted that “Infinity also complain that their position as the uppermost of the providers involves them in cost that they would not experience if they were in a lower position”, and it submitted that “[t]hat is not correct – as has been explained to Infinity with some care”.
82. As DataLink explained that “[e]ach time there is an application for new attachment to a pole, make-ready needs are assessed including work necessary to establish

*the Communication Space and the Safety Space”, and “it is often necessary to move the Electric Cables upwards.”*

83. DataLink submitted that when *“DataLink negotiated the Logic Agreement, it included a provision for the sharing of Make-Ready Costs on the basis that this appeared to be the fairest method between attachers”*, noting that the *“Infinity Agreement does not contain this provision.”*
84. DataLink also submitted that *“[a]t the moment the cost of reconfiguration is borne by the new attacher”, that “DataLink wish to have arrangements in place with all attachers where those who benefit from the reconfiguration by attaching later (within twenty four months) in the same space make a contribution to the original cost of reconfiguration thus leading to proportional reimbursement of the original attacher”, and that “Infinity has refused to agree to vary their agreement to incorporate these terms”.*
85. DataLink, therefore, submitted its request for *“the Authority to use its powers to direct changes to the contract between DataLink and Infinity so that Infinity contribute to the costs of the changes and receive reimbursement of the costs of the changes on the same footing as other attachers.”*
86. DataLink submitted that *“[a]s at today’s date, Logic are attached to over 1274 poles and Infinity are attached to over 926”, further noting that “[t]he figures are likely to be significantly higher than this in circumstances where attachers were attaching to poles without valid permits” and that “DataLink is still in the process of completing an audit on the pole attachments.”*
87. DataLink submitted that it *“did not act unreasonably in allocating Logic the position on the poles it did” and that it “needed to make a decision as to where the required fourth attacher was going to be able to attach to the Poles, keeping in mind that **the first attachment should be 18 feet 6 inches off the ground, each attachment should be 12 inches from the next, and the Safety Space between the top attachment and the Electric Space should be 40 inches**” [emphasis added].*
88. DataLink further submitted that *“Infinity was assigned the top of the Communication Space and agreed to attach at the top of is assigned space (there being **an obvious discrepancy between the Communication Space as defined in the Infinity Agreement (at 32 inches) and the Communication Space as defined in the other attachment agreements (at 36 inches)**” [emphasis added].*
89. DataLink submitted its view as to *“why the top position is not the worst position on the poles”, noting that “Infinity has always been at the top” and that Infinity “was at the top when there were only two attachers, and it contracted to remain at the top before any other attachers were assigned a space for attachment”.*
90. DataLink further refers to Infinity’s submission that *“all Attaching Utilities are aware that there is a major commercial and competitive advantage to being assigned space lower down the Poles”, noting that “**Infinity contractually agreed to attach at the top of its assigned space (which it knew was at the top of the Communication Space) and has only sought to raise a dispute about the point 2 years after the event**” [emphasis added] and that it “also knows that Logic has been attaching in the space between LIME and it for over 12 months.”*

91. DataLink further submitted that “[i]n respect of Strengthening Make-Ready Work” there is “no additional cost as Infinity suggests for being higher up on the pole,” noting that “one guy is sufficient for all four communication cables in the Communication Space.” DataLink submitted that “Infinity makes bold assertions that this is not the case and that it is severely disadvantaged by being at the top of the pole, with no evidence to support its case”, and it “invites the Authority to audit poles on which Logic has paid for Make-Ready Work so that it can demonstrate that, in each case, the Communication Space is established at 36 inches and the Safety Space is established at 40 inches”, noting that if “that is correct, then it will be of no benefit to Infinity to swap positions with Logic.”
92. DataLink also submitted that the “current dispute, and recent exchange of correspondence between DataLink and Infinity has actually come about as a result of DataLink identifying a number of breaches of the Infinity Agreement and violations of Applicable Standards”, noting that “Infinity, until recently, maintained the position that a red band appearing on a pole meant that Infinity had the right to attach to that pole (without a permit)”, and that “Infinity has now accepted that doing so amounts to a breach of the Infinity Agreement and any attachment made to poles without permits are unauthorised attachments.”
93. DataLink further submitted that “Infinity’s breaches have meant that DataLink has had to spend a significant amount of resources on auditing the poles around the island to determine whether permits have been issued for attachments, or unauthorised attachments have been made”, and that “[f]ollowing the safety and contractual breaches being identified by DataLink, Infinity then started to raise a number of concerns in respect of the attachment height and has withheld payment of a number of DataLink’s invoices issued in accordance with the Infinity Agreement.”
94. DataLink, therefore, asked the Authority to “dismiss Infinity’s complaints and deal with the matters raised by:”
- (1) “Ruling that the contract between DataLink and Infinity must be revised to:
    - a. provide for the allocation of space and position on the pole represented by current arrangements (i.e. that the Communication Space is 36 inches wide, starting at 18 feet, 6 inches (or 258 inches) off the ground as possible); and
    - b. require Infinity to agree to share the cost of the Make-Ready Work with other attachers, as set out in the draft agreement provided to Infinity in October 2013...”
  - (2) “Requiring Infinity to negotiate further terms of a new agreement with DataLink in good faith”; and
  - (3) “Awarding costs to DataLink under section 16 of the Regulations”.

## AUTHORITY'S REQUESTS FOR INFORMATION

95. On **26 June 2015**, upon consideration that the matter of the dispute between Infinity and DataLink may be relevant to other licensees, the Authority sent requests for information to Infinity, Logic and LIME (individually as the '**Attacher**' and together the '**Attachers**'), as well as to DataLink, with the intention to investigate the matter of the dispute in more detail.
96. The Authority received the responses to those information requests on 2 July 2015 (Infinity), 7 July 2015 (Logic), 21 July 2015 (DataLink) and 31 July 2015 (LIME).
97. Based on the information provided by the Attachers in response to the Authority's request for information of 26 June 2015, it is estimated that several hundreds of kilometres of communication cables, including fibre optic cables, have been deployed across Grand Cayman by relying on infrastructure sharing agreements for the attachment of communication cables on electricity poles owned by CUC. Such extensive use of CUC's electricity poles, for the purpose of facilitating deployment of ICT networks in Grand Cayman, suggests that pole sharing agreements constitute a form of infrastructure sharing of significant importance for the efficient and harmonised utilisation of infrastructure in the Cayman Islands.
98. On **26 August 2015**, after reviewing the responses submitted by the Attachers and DataLink to the Authority's request for information of 26 June 2015, the Authority sent additional requests for information, seeking clarifications and further information from the Attachers and DataLink to inform the Authority about various aspects of pole sharing arrangements as specified and implemented through the relevant pole sharing agreements between DataLink and/or CUC and the Attachers.
99. The Authority received the responses to those additional information requests on 2 September 2015 (Infinity), 3 September 2015 (Logic), 16 September 2015 (DataLink) and 22 September 2015 (LIME).

## THE AUTHORITY'S ANALYSIS

100. The Dispute covers a range of issues related to the attachment of the ICT Licensees' fibre optic cables in the allocated space on CUC's electricity poles (the '**Communications Space**'), which need to be carefully assessed in accordance with, among other things, their likely effects on the efficient and harmonised utilisation of infrastructure and/or the promotion of competition in the provision of ICT services or ICT networks in the Cayman Islands (noting the Authority's functions in this regard).<sup>32</sup>
101. As background, and as referenced in the **CUC Restraining Order application against Logic**, prior to 2012 it was CUC itself that made the arrangements for receiving applications to attach in the Communications Space, reviewing them and granting permits. However, upon DataLink (a wholly owned subsidiary of CUC) being licenced by the Authority, that function is now performed by DataLink.
102. The prior mentioned agreement between CUC and DataLink, dated 20 March 2012, (see paragraph 4 above, referring to the **CUC-DataLink Pole Sharing Agreement**) sets out a framework within which DataLink can apply for and obtain permission to attach to CUC's poles aerial cables and other associated equipment for the purposes of communication and data transmission, and pursuant to which DataLink may grant sub-licences allowing other Licensees to attach to the poles in the Communication Space (i.e. the Attachers).
103. The **CUC Restraining Order application against Logic** referenced the affidavit of Mr. Watler (Vice President, Transmission and Distribution, employed by CUC), who stated that a review of the **CUC-DataLink Pole Sharing Agreement** "*shows that CUC has retained all of its rights of ownership in the Communication Space and has granted DataLink a mere license to attach in that space, coupled with a power to grant sub-licenses to others.*" Pursuant to that arrangement, DataLink has entered into agreements with the Licensees under which those communication providers may seek permission to attach to the poles by submitting applications with a view to permission to attach being granted, as follows:
- the **Infinity-CUC-DataLink Novation Agreement**, executed on 7 May 2012;
  - the **LIME-CUC-DataLink Novation Agreement**, executed on 9 November 2012; and
  - the **DataLink-Logic Pole Sharing Agreement**, executed on 18 July 2013.
104. The Authority considers that the various pole sharing agreements, which define the commercial relationship between, on the one side CUC, as the owner of electricity poles, and/or DataLink, as an entity licensed by the Authority to provide ICT infrastructure to third parties (i.e. access to the Communications Space on CUC's electricity poles), and on the other side the Attachers, as ICT licensees who have requested access to CUC's electricity poles in order to facilitate the deployment of their ICT networks, must be established and managed in a manner which facilitates the efficient and harmonised utilisation of infrastructure in the Cayman Islands.

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<sup>32</sup> See section 9 of the Law.

105. The Authority further considers that a successful rollout of fibre networks by the Licensees strongly relies on the efficient, economic and harmonised utilisation of the Communication Space allocated on the electricity poles owned by CUC, and managed by DataLink under its ICT Services Licence for Type 11 Service (the provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee).
106. The Authority notes the specific issues set out by Infinity for the Authority to determine under the Dispute:
- (1) *whether DataLink presently has the legal right to require Infinity to attach at 258 inches above ground (or whether Infinity presently has a contractual right to attach at 254 inches above ground);*
  - (2) *the height at which each of Infinity, Logic and DataLink should attach to the Poles, taking into account the foregoing explanation of how the order of attachments was determined; and*
  - (3) *whether there are any changes required to the Master Pole Joint Use Agreements of any of the Attaching Utilities in order to resolve the issues outlined in this determination request.*

Addressing each of these in turn:

- (1) *Allocation of position in the Communication Space for the attachment of communication cables by Infinity*

*International standards*

107. The Authority notes that, in the USA, the rule for vertical spacing between cables on electricity poles is the following:<sup>33</sup>
- minimum 4 inches where the span length is 0-150 ft (0-45 m);
  - minimum 6 inches where the span length is 150-200 ft (45-60 m);
  - minimum 8 inches where the span length is 200-250 ft (60-75 m); and,
  - minimum 12 inches where the span length is 250-300 ft (75-90 m).
108. However, it seems that the above specifications refer to midspan minimum spacing requirements. For example, an industry document from Orcon (an electricity transmission and distribution service provider in Texas)<sup>34</sup> indicates that the clearance at the pole between communication cables is 12 inches, while the minimum clearance at midspan is 4 inches. Other documents specify the same clearance (12 inches) at the pole while the clearance at midspan (or in span) is 6 inches.<sup>35</sup>

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<sup>33</sup> See Rule 235G3 on page 129 of IEEE C2: National Electrical Safety Code, available at <https://law.resource.org/pub/us/cfr/ibr/004/ieee.c2.1997.pdf>

<sup>34</sup> See 103-227 on page 14 for the clearance at the pole and 103-228 on page 15 for the clearance at midspan, available at <http://www.oncor.com/EN/Documents/About%20Oncor/Construction%20Development/Overhead%20Construction%20Manual%20-%20Joint%20Use.pdf>

<sup>35</sup> For example, see City of San Marcos (Texas) - "City of San Marcos Technical Specifications for Pole Attachments", paragraph 11 on page 2, available at <http://www.ci.san-marcos.tx.us/modules/showdocument.aspx?documentid=6151>

109. In relation to other jurisdictions, the Authority notes, for example, that the following minimum distance rules apply in New Zealand:<sup>36</sup>
- a) a minimum distance of a telecommunications line from a high voltage conductor that is not insulated shall not be less than 1.6 m (i.e. approximately 63 inches);
  - b) a minimum distance of a bare telecommunications line from a bare low voltage conductor shall not be less than 1.2 m (i.e. approximately 47 inches);
  - c) a minimum distance of a covered telecommunications line from a bare low voltage conductor shall not be less than 0.6 m (i.e. approximately 24 inches); and
  - d) for insulated conductors, and/or covered low voltage conductors, and covered telecommunications conductors, the distance shall not be less than 300 mm (i.e. approximately 12 inches).
110. Based on the international standards referred to above, the Authority considers it reasonable that there be a requirement for a 12-inch clearance between communication cables, which accords with DataLink’s submissions on this issue. The Authority also notes Infinity’s submission that “*it is desirable to have a 12 inch “gap” between each Attaching Utility’s cables*” (see paragraph 58 above).

*Attaching positions*

111. The Authority, however, notes that if 12 inches is required as clearance between each communication cable on CUC’s electricity poles, and given that the Communication Space, which is now defined as 36 inches (see paragraph 88), is to be shared by up to four attachers, it follows that the space occupied by each Attacher in the Communication Space (the “**Space occupied by the Attachment**”), which is one of the parameters used to determine the incurring charges for attachment of communication cables to CUC’s electricity poles (the “**Annual Attachment Fee**”, as defined in the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**), would need to be amended to 9 inches (36 inches of the Communication Space shared by 4 attachers) and not:
- one foot (12 inches), which is currently specified in the Annual Attachment Fee formula applied in the **CUC-Infinity Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**; or,
  - six inches, which is currently specified in the Annual Attachment Fee formula applied in the **DataLink-Logic Pole Sharing Agreement**.

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or  
Electricity service provider PPL (Pennsylvania) – “*Requirements for the Attachment of Communication Cable Facilities on PPL Poles*”, paragraph 9, available at <https://www.pplelectric.com/~media/pplelectric/at%20your%20service/docs/contractors-and-builders/pole-attachments/spec6-01-140.pdf>

<sup>36</sup> See <http://www.pncc.govt.nz/content/6927/NZElectricalCodeofPracticeElectricalSafeDistances.pdf>

This assumption is based on, in order to have an equal allocation of the individual space, the total space available (in this case 36 inches) being divided by the number of the users of that total space (in this case 4). The result is, therefore, 9 inches of the individual space within the total space of 36 inches (note that the above does not refer to the position on the pole of each Attacher but, simply, the appropriate space allocation for determination of the rental charges).

112. The Authority further notes that CUC wrote to DataLink on 1 February 2012 stating that:<sup>37</sup>

*The space reserved for communication cable and equipment is limited to 36 inches which practically limits the number of attachments on any pole.*

...

*[A] second limitation of utmost importance that will be considered prior to the granting of pole attachment permits is whether the wind loading effect of the proposed attachment will exceed the load bearing capability of the pole.*

...

*CUC will not permit attachments to its poles that will cause the [wind] loading to exceed 100% of capacity. The results show that generally CUC will permit a maximum of four half (1/2) inch cables to be attached to certain of its existing poles in the designated communication space between 18.5ft to 21.5ft above ground.*

113. However, nearly a month and a half after sending the 1 February 2012 letter, CUC entered into an agreement with Infinity on 20 March 2012 (the **CUC-Infinity Deed of Variation**), whereby CUC and Infinity agreed that Infinity would "*install its Attachment at the top of the Assigned Space*", with the Assigned Space being set at 254 inches (under 21.2ft) above ground, rather than 258 inches (21.5ft) which would be the top of the Assigned Space as referenced in the 1 February 2012 letter.
114. The Authority notes that, as part of the **CUC-Infinity Deed of Variation**, Infinity agreed that the **CUC-Infinity Pole Sharing Agreement** be varied by adding a new paragraph E in Item 1 as follows: "*E. Attaching Utility shall install its Attachment at the top of the Assigned Space*" [emphasis added].
115. The Authority further notes that the 1 February 2012 letter was signed by the VP Transmission & Distribution at CUC, who soon after became the President and CEO of DataLink when DataLink was licensed by the Authority, which the Authority considers clearly demonstrates that both CUC and DataLink would have been well aware of the adjustments required to be made in all the relevant pole sharing agreements in relation to the newly defined Communication Space.
116. The Authority also notes that the pole sharing arrangements between CUC and Infinity were then novated to DataLink on 7 May 2012 (see paragraph 7 referring to the **Infinity-CUC-DataLink Novation Agreement**), without making any adjustments in the attachment requirements in the Communication Space.

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<sup>37</sup> See the copy of the letter from CUC to DataLink dated 1 February 2012, attached to the ICT Licence granted to DataLink on 28 March 2012, available at [http://www.icta.ky/upimages/licencedocument/ViewLicencedocument\\_1417650665.pdf](http://www.icta.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf)

117. Based on the above, the Authority considers that CUC, and DataLink, had an opportunity to set out the height at which Infinity was to attach in the Communications Space to 258 inches, but did not do so. Given this, the Authority holds the view that CUC, and DataLink, both failed to consider and resolve in an efficient manner the contractual arrangements with Infinity relating to the attachment of Infinity's communication cables in the newly defined Communication Space on CUC's electricity poles.
118. Therefore, the Authority concurs with Infinity's statement that "*DataLink is taking unilateral steps to require Infinity to attach at 258 inches above ground*" (see paragraph 55 above), noting that Infinity's agreement to attach "*at the top of the Assigned Space*" (see paragraph 114 above) cannot be interpreted to be an agreement to attach at the top of the newly defined Communication Space, contrary to the reading DataLink makes of Infinity's agreement (see paragraph 90 above).
119. The Authority, however, for the reasons set out herein, considers that a decision to allow Infinity to continue attaching its communication cables at the current height of 254 inches above the ground would mean that the Communication Space designated on CUC's electricity poles would be limited to a maximum of three attachers rather than four as is currently intended. Such a decision would, in effect, limit the ability of another ICT Licensee to roll out its fibre networks.
120. The Authority, therefore, considers that the assigned position in the Communication Space for the attachment of communication cables by Infinity should be adjusted in such a way to allow the Communication Space on CUC's electricity poles, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**, to accommodate up to four Attachers.
121. The purpose of such reallocation of assigned attaching position in the Communication Space is, among other things, to facilitate the efficient and harmonised utilisation of infrastructure in the Cayman Islands. The Authority considers that, if Licensees were constrained to build separate pole infrastructure for the purpose of rolling out their communication cables, this would lead to an inefficient duplication of ICT infrastructure. On the other hand, the reallocation of assigned attaching position is deemed to promote competition in that it provides for an additional Licensee to have access to the existing poles infrastructure, which in turn provides additional competitive pressure on the pricing and services of the other Licensees. It can, therefore, be presumed that the competition in the provision of ICT Services in the Cayman Islands is likely to be enhanced if the number of Licensees who are able to attach communication cables to CUC's electricity poles is increased from three to four, which will be achieved by the reallocation of assigned allocation position of Infinity in the Communication Space. For the avoidance of doubt, the new height for attachment of communication cables by Infinity should be set at 258 inches.
- (2) *The height at which each of Infinity, Logic, LIME and DataLink should attach their respective communication cables on electricity poles*
122. As discussed above, on the basis of Infinity's agreement under the **CUC-Infinity Deed of Variation** to attach at the top of its Assigned Space, the Authority considers it appropriate for Infinity to attach at the top of the Communication

Space, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**.

123. Regarding Infinity's request for the Authority to determine the height at which the other Attachers – Logic, LIME and DataLink - should attach, the Authority notes that an order of attachments to CUC's electricity poles is given in the Attachment A to Appendix C of the **DataLink-Logic Pole Sharing Agreement**, as reproduced in **Annex 1** to this decision. As a working assumption, the Authority, therefore, assumes that the order of attachments, which is reproduced in **Annex 1**, reflects the current arrangements between the *Attachers* and CUC/DataLink for an efficient use of the Communications Space on CUC's electricity poles. Accordingly, the respective heights should be based on the newly designated Communication Space on CUC's electricity poles, as shown in Annex 1 to this decision, taking into account the required clearance of 12 inches between each communication cable.
- (3) *Whether there are any changes required to any of the pole sharing agreements in order to resolve the issues outlined in the Determination Request*
124. The Authority considers that all the pole sharing agreements between DataLink and Infinity, LIME and Logic need to be amended in order to reflect the order and height of the attachments in the newly designated Communication Space, as discussed above.
125. For example, this means that Attachment A to the **CUC-Infinity Pole Sharing Agreement** should be amended to reflect the changes in the Communication Space that are introduced with Attachment A in the **CUC-DataLink Pole Sharing Agreement**.
126. Further, the relevant changes to the existing pole sharing agreements are also required in relation to the designation of the Occupied Space in each of the Pole Attachment Agreements in determination of the Space Factor that is used for calculation of annual rental charges. For example, this means that the "*Space Factor*" in Appendix A to the **CUC-Infinity Pole Sharing Agreement** should be amended to reflect the changes in the number of Attachers (i.e. from three to four) and the space occupied by the Attachment (see paragraph 111 above) in the newly designated Communication Space, as defined in Attachment A to the CUC-DataLink Pole Sharing Agreement.

*Other issues raised in the Dispute*

127. In addition to the matters discussed above, which relate directly to the relief requested by Infinity, other issues have also been brought to the Authority's attention in the Dispute Determination Request.
128. First, the Authority notes Infinity's claim that (1) "[a]t the time of the Original Agreement, Infinity's space ran from 242 inches above ground to 254 inches above ground"; (2) "Infinity were granted the right to attach to the Poles anywhere within their assigned space"; (3) "relegation of Infinity to a higher position on the Poles is, in Infinity's submission, going to result in (i) considerably higher costs for Infinity in getting its cable onto the Poles, and (ii) significant delays for Infinity in getting its cables onto the Poles"; (4) "Infinity has not agreed to this further increase in the height of its attachments but it appears that DataLink is performing Make-Ready, and expecting Infinity to attach, at 258 inches and not 254 inches";

(5) “[t]his is in clear violation of the express terms of the Agreement”; (6) “the highest of the Attaching Utilities, Infinity will also suffer higher Strengthening Make-Ready costs than any other Attaching Utility”; and (7) “the Strengthening Make-Ready required as a result of a new attachment increases the higher up the Pole that the attachment is to be made”.

129. The Infrastructure Sharing Regulations state at Regulation 6 and Regulation 10 that, in this case, DataLink's charges for infrastructure sharing should be non-discriminatory and cost-orientated as set out therein. Part of this principle is that those parties who benefit from a service should pay their equal share and they should not be disadvantaged by having to incur higher costs for accessing the same service that other parties consume.

130. For example, the United States Code states that:<sup>38</sup>

*A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.*

...

*Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.*

...

*An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).*

131. Infinity submitted that it is disadvantaged by being on the highest position in the Communication Space (258 inches), to the extent that the highest position in the Communication Space results in higher attaching and maintenance costs relative to the lower positions in which other Licensees are allowed to attach their communication cables.

132. For example, Infinity claimed that “the Strengthening Make-Ready required as a result of a new attachment increases the higher up the Pole that the attachment is to be made” for two reasons: (1) “the wind speed is higher the further above ground one goes” and “[h]igher wind speed increases the wind-load calculation and means that more work needs to be done in order to adequately strengthen the Pole to take the new attachment”; and (2) “the wind-load calculation needs to take into account the height above the Pole’s base at which the cable is to be attached” and that this “results in more work being required in order to strengthen the Pole to take a higher attachment than would be required to take a similar, but lower, attachment.”

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<sup>38</sup> See the U.S. Code, Title 47 - Telecommunications, Chapter V - Wire or Radio Communication, Subchapter II – Common Carriers, Part I – Common Carrier Regulation, Section 224. Pole attachments, available at <http://uscode.house.gov>

133. In response to Infinity's claims, DataLink submitted that "*Infinity wrongly complain that they have been treated unfairly and have incurred additional cost*". DataLink further noted that "[a]t the moment the cost of reconfiguration is borne by the new attacher", that "*DataLink wish to have arrangements in place with all attachers where those who benefit from the reconfiguration by attaching later (within twenty four months) in the same space make a contribution to the original cost of reconfiguration thus leading to proportional reimbursement of the original attacher*", and that "*Infinity has refused to agree to vary their agreement to incorporate these terms*"
134. The Authority considers this issue to be separate from *where* on the poles each Licensee should attach: the relevant issue here being what an attacher should pay for the attachment of its communication cables to CUC's electricity poles, given the order of attachment and, therefore, the relevant height at which the cables are positioned.
135. The Authority considers it necessary to establish appropriate costings and costing principles relating to cable attaching and maintenance costs, which may take into account any necessary adjustments to the existing charges based on the relevant position of each Attacher in the Communication Space. To this end, and as referenced at paragraphs 198 to 229 below, the Authority is consulting on the charges and charging principles relating to the attachment of communication cables to CUC's electricity poles. The consultation will gather the views from the interested parties on various charges that apply in pole sharing agreements, such as charges determined for "**Annual Attachment Fee**" or for "**Make-Ready Work**".
136. Second, Infinity referred to in its submission "*a number of anti-competitive / abusive practices by [DataLink]*" and that Infinity's "*concerns all arise from the fact that DataLink has a monopoly on the electrical poles... which [Infinity] (and others) require in order to install a fibre optic cable network in the Islands.*" The consideration of such allegations by Infinity is likely to require the opening of an investigation by the Authority into whether or not DataLink holds a dominant position within the Cayman Islands, as specified in Section 40 of the Law, and if so, whether or not specific actions by DataLink preceding the Dispute, as well as any subsequent actions, would be considered an abuse by DataLink of the alleged dominant position, a conduct which is prohibited by the Law if it is likely to affect the trade in ICT networks and ICT services within the Cayman Islands.
137. However, the Authority is of the view that opening an investigation into the alleged anticompetitive / abusive practices by DataLink, which are prohibited under Section 40 of the Law, is unwarranted at this stage given, in particular, the consultations the Authority has commenced on reservation fees (see paragraphs 156 to 168) and charging principles relating to the attachment of communication cables to CUC's electricity poles (see paragraphs 198 to 229).
138. Nevertheless, the Authority reserves its position in this matter and may decide, at a later stage, to proceed with an assessment of competition in the provision of such things as the access to passive infrastructure, which would include access to poles and ducts, which is expected to facilitate the efficient and harmonised utilisation of infrastructure and the promotion of competition in the provision of ICT services in the Cayman Islands.

## THE AUTHORITY'S DECISION

139. Based on the Authority's analysis of the Dispute, the Authority determines that:
- the **CUC-Infinity Pole Sharing Agreement** be amended to define and reflect the allocation position for the attachment of communication cables by Infinity to be at the top of the Communication Space, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**. For the avoidance of doubt, and in accordance with the Authority's view expressed in paragraphs 120 and 121 above, Infinity shall attach its communication cables at 258 inches above the ground.
  - each party to bear its own costs in the bringing of and responding to the Dispute Determination Request, as the Authority does not consider there is sufficient evidence of bad faith, or unreasonableness, in the conduct of the proceedings such that it would award costs in the Dispute pursuant to Regulation 16 of the Dispute Regulations.
140. Therefore, for the reasons set out herein, the Authority declines Infinity's request, as set out at paragraph 71, to make declarations regarding Infinity having "*a contractual right to attach to the Poles at a height above ground of 254 inches*", "*DataLink acted unlawfully in its allocation of space to itself and to Logic*"; and, "*Infinity should be entitled to attach at 234 inches above ground, in the space immediately above that assigned to Lime.*"
141. Finally, in accordance with the Authority's analysis of the correct order of attachment on CUC's electricity poles (see paragraph 123 above), the Authority holds the view that the following heights, at which the Licensees attach their respective communication cables on electricity poles, are likely to satisfy the conditions for an efficient use of the Communication Space on CUC's electricity poles:
- a) 222 inches above the ground for communication cables attached by LIME;
  - b) 234 inches above the ground for communication cables attached by Logic;
  - c) 246 inches above the ground for communication cables attached by DataLink; and
  - d) 258 inches above the ground for communication cables attached by Infinity.

# **ICT Consultation 2016-1 – cost of reattaching of Infinity Broadband Ltd.’s communication cables to CUC’s electricity poles**

## **BACKGROUND**

142. Following on from the Authority’s determination as set out above, *ICT Decision 2016-1*, that Infinity’s fibre should be moved to 258 inches, is the related issue as to which party should pay the cost of that move. As this issue was not considered as part of the Dispute Determination Request, the Authority considers it appropriate to give Infinity and DataLink, as well as any other interested parties, the opportunity to provide their submissions on this issue.

## **PROPOSAL**

143. In this regard, and subject to consultation, the Authority considers that the cost of reattachment - of Infinity’s communication cables currently deployed on CUC’s electricity poles, to the new height of 258 inches - should normally be borne by the party initiating the request for reattachment, which would, in this case, be DataLink, unless the parties agree otherwise.
144. Such an approach is based on relevant economic cost-recovery principles<sup>39</sup> for which the Authority considers the starting point is the question:
- (1) **how the costs are incurred** (i.e. cost causation principle, which requires the costs to be recovered from those whose actions cause the costs to be incurred at the margin),

while other principles may also be relevant, for example:

- (2) **distribution of benefits** (i.e. it is relevant to determine whether or not the benefits are equally distributed between the relevant parties),
- (3) **effective competition** (i.e. the effect of any cost recovery mechanism should be competitively neutral),
- (4) **reciprocity** (i.e. where services are provided reciprocally, charges should be reciprocal), and
- (5) **practicability** (i.e. the cost recovery mechanism needs to be practical and relatively easy to implement).

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<sup>39</sup> See for example, Annex H -

[http://stakeholders.ofcom.org.uk/binaries/consultations/nts\\_ic\\_condoc/summary/nts\\_charging.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/nts_ic_condoc/summary/nts_charging.pdf)

145. Indeed, the Authority considers that CUC and DataLink had every opportunity to set out clearly their intent that Infinity should attach its communication cables at 258 inches, and not at 254 inches, in the amendment to the **CUC-Infinity Pole Sharing Agreement** made by CUC on 20 March 2012 (the **CUC-Infinity Deed of Variation**), subsequently novated to DataLink on 7 May 2012 (the **Infinity-CUC-DataLink Novation Agreement**); but did not. Therefore, the Authority considers that the request for the reattachment of Infinity's communication cables from the current height of 254 inches to 258 inches above the ground should be deemed to be a new amendment to the existing pole sharing arrangements between Infinity and DataLink, for which Infinity can legitimately seek to avoid the costs of implementation.
146. That said, the Authority notes that Section VI.A of the **CUC-Infinity Pole Sharing Agreement** states, among other things, that the "*Attaching Utility shall not install any new Attachments, Overlash existing Attachments or perform Substantial Construction or Modification on any Pole without first applying for and obtaining a Permit pursuant to the applicable requirements of Appendix B.*" Based on the information provided in response to the Authority's request for information of 26 June 2015 (see paragraph 15 above), the Authority understands that Infinity has attached its communication cables on a significant number of CUC's electricity poles without having first received the appropriate pole attachment permits from DataLink (referred to as '**unauthorised attachments**' in this decision).

### Proposal A

147. Therefore, in the Authority's view, and subject to consultation, for any case where reattachment of Infinity's communication cables to the new height of 258 inches above the ground would be required, the Authority proposes that DataLink should be held liable for the full recovery of the costs related to that reattachment *but only* where a pole attachment permit for the relevant pole had previously been issued by DataLink.
148. The Authority's view as set out above is based on the cost causation principle, which requires the costs to be recovered from the party whose action causes the costs to be incurred, noting that (1) DataLink is the party requesting the reattachment; and (2) the current arrangement that Infinity attaches at 254 inches (rather than at 258 inches) is confirmed in the amendment to the **CUC-Infinity Pole Sharing Agreement**, subsequently novated to DataLink (**Infinity-CUC-DataLink Novation Agreement**).

### Proposal B

149. On the other hand, for the poles to which Infinity has made *unauthorised attachments*, the Authority proposes that Infinity should be held liable for recovery of the costs related to the reattachments to the new height of 258 inches above the ground. The Authority's proposal is based on the cost causation principle which, in the case of unauthorised attachments, would require to establish whether or not DataLink should also be held liable for the recovery of the costs related to the reattachment, when the decision to attach at the height of 254 inches above the ground, in the first instance, is made by Infinity without prior authorisation by DataLink in form of attachment permits. The Authority considers that Infinity's initiative to proceed with attachments without receiving attachment permits, should

effectively exempt DataLink from the liability for cost-recovery under the cost-causation principle.

## Proposal C

150. The Authority also considers that, following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches above the ground on each relevant pole, DataLink should grant the relevant pole attachment permits under Article VI of the **CUC-Infinity Pole Sharing Agreement**.
151. In this regard, the Authority proposes that, if there is any delay by DataLink of more than thirty (30) days for issuing the relevant pole attachment permits following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches, DataLink should then not be exempted from the liability for cost-recovery related to the relevant reattachments, and it should therefore bear the costs related to any such reattachments.
152. The Authority's proposal, in paragraphs 150 and 151 above, that DataLink should grant the relevant pole attachment permits to Infinity under Article VI of the **CUC-Infinity Pole Sharing Agreement**, following the completion of the reattachment of Infinity's communication cables on poles with previously unauthorised attachments, is intended to ensure that there is an understanding that such reattachments effectively comply with the applicable safety provisions and any other principles, as required by the permit application process governing pole sharing agreements between DataLink/CUC and the Attachers.
153. The Authority considers that the combination of principles proposed in paragraphs 149 to 151 above, should create incentives for both Infinity and DataLink to act in a timely manner to ensure that Infinity's communication cables are reattached at a new height of 258 inches above the ground, and that any such reattachment is properly authorised.

## CONSULTATION QUESTIONS

154. Therefore, based on the above, the Authority invites all interested parties to submit their comments, with supporting evidence, on:

**QUESTION 1: Provide your view as to whether or not the proposed cost-recovery principles, and the relevant liabilities for the recovery of the costs related to the reattachment of Infinity's communication cables, as discussed above under Proposal A and Proposal B, are appropriate and why.**

**QUESTION 2: Provide your view as to whether or not DataLink should grant the relevant pole attachment permit to Infinity under Article VI of the CUC-Infinity Pole Sharing Agreement at the same time as completion of the relevant reattachment.**

**QUESTION 3: Provide your view on the proposed due date of thirty (30) days for issuing the relevant pole attachment permits following the completion of the reattachment of Infinity's communication cables to the new height of 258 inches above the ground, after which dataLink would then be liable for the recovery of the costs related to the reattachments to the new height of 258 inches above the ground.**

**QUESTION 4: Provide your view on any other matters you consider relevant to this consultation.**

155. Responses to the public consultation on the above questions relating to which party should pay the cost of the reattachment of Infinity's communication cables to CUC's electricity poles are due by **28 May 2016**.

# ICT Consultation 2016-2 – pole attachment reservation fees, permits application process and charging principles

## A: CONSULTATION ON THE APPROPRIATENESS OF THE RESERVATION FEES RELATING TO THE ATTACHMENT OF COMMUNICATION CABLES TO CUC'S ELECTRICITY POLES

### BACKGROUND

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

*The Authority, in order to promote an efficient, economic and harmonised utilisation of infrastructure, may – [...] (b) inquire into and require modification of any agreement or arrangements entered into between a licensee and another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.*

157. Section 68 (1) and (3) of the Law requires the costs for infrastructure sharing to be “based on cost-orientated rates that are reasonable and arrived at in a transparent manner.” Further, Regulations 6 and 10 of the Infrastructure Sharing Regulations state that, among other things, charges for interconnection or infrastructure sharing shall be “non-discriminatory” and “determined in a transparent manner.”

158. The Authority notes Infinity’s reference to the payment of “reservation fees in respect of the Poles since 2012” (see paragraph 59).

159. The Authority further notes that “reservation fees” do not feature in CUC’s pole sharing arrangements with LIME (**CUC-LIME Pole Sharing Agreement** and **LIME-CUC-DataLink Novation Agreement**) and DataLink (**CUC-DataLink Pole Sharing Agreement**), neither are they stated in the **CUC-Infinity Pole Sharing Agreement**.

160. The Authority understands that “reservation fees” (defined as the “**Quarterly Reserved Space Payment**”) have been introduced in the relevant pole sharing agreements applicable to Infinity (by the **CUC-Infinity Deed of Variation**) and Logic (Appendix C of the **DataLink-Logic Pole Sharing Agreement**) in order to allow for Infinity and Logic to secure exclusive use of what is defined as the “**Reserved Space**” in the Communication Space which is designated for

attachment of the Licensees' communication cables to CUC's electricity poles. Such exclusive use is, however, limited in time to what is defined as "**Build-Out Period**", and which has the following expiry dates of:

- (1) 31 December 2014 in the **CUC-Infinity Deed of Variation**; and
- (2) 31 December 2018 in the **DataLink-Logic Pole Sharing Agreement**.

161. The Authority notes that the introduction of the terms and conditions relating to the "**Reserved Space**" and the "**Quarterly Reserved Space Payment**" by CUC and DataLink in the relevant pole sharing agreements applicable to Infinity and Logic, including the specification of the guaranteed "**Total Minimum Annual Payments**", likely call into question the appropriateness of such charges considering that infrastructure sharing services are to be provided:

*at reasonable rates, on terms and conditions which are no less favourable than those provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder and shall be of no less favourable quality than that provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder" (see paragraph 43).*

162. Not least, on their face, such charges are likely to be discriminatory as they are not, and have not been, applied to either DataLink or LIME in relation to the provision of the same infrastructure sharing service. In addition, subject to consultation, the Authority does not consider there to be any objective reasons to explain the difference in treatment between the Attachers as highlighted.

163. Indeed, the Authority's initial view is that the operation of the:

**"Reserved Space"**;

**"Quarterly Reserved Space Payment"**; and,

**"Total Minimum Annual Payments"**,

in the relevant pole sharing agreements applicable to Infinity and Logic, limits the promotion of competition in the provision of ICT services or ICT networks, primarily because the costs related to the "**Reserved Space**" are not incurred by DataLink and LIME, as competitors to Infinity and Logic in the provision of ICT services or ICT networks in the Cayman Islands. In effect, Infinity and Logic experience higher costs relative to DataLink and LIME, in relation to the attachment of their communication cables to CUC's electricity poles, thereby placing them at a competitive disadvantage against DataLink and LIME. This further translates into slimmer profit margins for Infinity and Logic – as a main consequence of certain cost factors applied to Infinity and Logic, and not to DataLink and LIME.

164. In addition, the operation of the "**Total Minimum Annual Payments**" may also act as a disincentive for DataLink to issue pole attachment permits to Infinity and Logic in a timely manner, because the revenue earned by DataLink from such payments appears to be guaranteed irrespective of whether any permit has been granted by DataLink or not. Such mechanism for earning the revenue based on guaranteed payments irrespective of the actual activities being carried out by DataLink, with respect to the provision of pole sharing services, creates a disincentive for DataLink to act efficiently in the provision of its ICT networks and ICT services.

This may also have the effect of restricting the ability of Infinity and Logic to roll out their fibre networks in a timely manner, and therefore reduce the intensity of competition between the Licensees in the provision of ICT networks and ICT services in the Cayman Islands.

## PROPOSAL

165. Therefore, subject to consultation, the Authority proposes that all references to the:

**“Reserved Space”**;

**“Quarterly Reserved Space Payment”**; and;

**“Total Minimum Annual Payments”**,

in the pole attachment agreements of Infinity and Logic be struck out, as follows:

- Article 1(f) of the **CUC-Infinity Deed of Variation** (pages 2 through 4), except subsections 1(f)2 and 1(f)3 on page 4;
- Article F under Item 2 – Other Mutual Agreements in Appendix C to the **DataLink-Logic Pole Sharing Agreement**, except subsections F2 and F3.

166. In addition, the Authority holds the initial view, subject to consultation, that where the **“Total Minimum Annual Payments”** made by Infinity or Logic in a given year exceed the total annual payments relating to the **“Quarterly Pole Rental Fees”** paid by Infinity or Logic respectively (the **“exceeding amount”**), the **CUC-Infinity Deed of Variation** and the **DataLink-Logic Pole Sharing Agreement** should be amended to provide for DataLink to reimburse the *exceeding amount*, preferably in form of a credit allowance that is claimed back from the future payments by Infinity and Logic to DataLink for the charges relating to the **“Annual Attachment Fee”**, unless the parties agree otherwise. As stated in paragraph 164 above, the Authority considers that, subject to consultation, the operation of the **“Total Minimum Annual Payments”** creates inefficiencies which are likely to prevent the promotion of competition in the provision of ICT services and ICT networks. The proposal as set out in this paragraph, is aimed at reducing such inefficiencies by removing the referenced disincentive.

## CONSULTATION QUESTIONS

167. Therefore, based on the above, the Authority invites all interested parties to submit their comments, with supporting evidence, on:

**QUESTION A1: Provide your view as to whether or not the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of DataLink’s relevant charging principles relating to the attachment by Licensees of communication cables to CUC’s electricity poles.**

**QUESTION A2: If the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of DataLink’s relevant charging principles relating to the attachment by Licensees of communication cables to CUC’s electricity poles, provide your view as to whether such charges should apply to all the Attachers of communication cables.**

**QUESTION A3: If your view is that the reservation fees, being the *Quarterly Reserved Space Payment*, should not apply to all the Attachers, provide the reason and justification for not applying such charges to all the Attachers.**

**QUESTION A4: If your view is that the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of relevant charging principles relating to the attachment of communication cables to CUC's electricity poles, provide your view as to what appropriate pricing formula should apply for such charges, including reasons as to why such proposed pricing formula is appropriate.**

**QUESTION A5: Provide your view on any other issues relating to the operation of the "*Reserved Space*" and the "*Quarterly Reserved Space Payment*" in the pole sharing agreements, including, but not limited to, the reference to the "*Total Minimum Annual Payments*".**

**QUESTION A6: Provide your view on the appropriate approach to the possible reimbursements by DataLink of the payments made by Infinity and Logic in relation to the "*Total Minimum Annual Payments*", as discussed in paragraph 166 above.**

**QUESTION A7: Provide your view on any other matters you consider relevant to this consultation.**

168. Responses to the public consultation on the above questions relating to the reservation fees, as part of relevant charging principles relating to the attachment of communication cables to CUC's electricity poles, are due by **28 June 2016**.

## B: CONSULTATION ON THE PERMIT APPLICATION PROCESS, INCLUDING MAKE-READY WORK, FOR THE ATTACHMENT OF COMMUNICATION CABLES TO CUC'S ELECTRICITY POLES.

### BACKGROUND

169. Section 65 (3) of the Law stipulates that a:

*licensee to whom [an infrastructure sharing] request is made ... shall, in writing, respond to the request within a period of one month from the date the request is made to him and ... provide the interconnection service in a reasonable time.*

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

*The Authority, in order to promote an efficient, economic and harmonised utilisation of infrastructure, may – [...] (b) inquire into and require modification of any agreement or arrangements entered into between a licensee and a another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.*

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

172. The Authority notes DataLink’s claims that: (1) “*current dispute, and recent exchange of correspondence between DataLink and Infinity has actually come about as a result of DataLink identifying a number of breaches of the Infinity Agreement and violations of Applicable Standards*”; (2) “*Infinity, until recently, maintained the position that a red band appearing on a pole meant that Infinity had the right to attach to that pole (without a permit)*”; (3) “*Infinity has now accepted that doing so amounts to a breach of the Infinity Agreement and any attachment made to poles without permits are unauthorised attachments*”; (4) “*Infinity’s breaches have meant that DataLink has had to spend a significant amount of resources on auditing the poles around the island to determine whether permits have been issued for attachments, or unauthorised attachments have been made*”; (5) “*[a]s at today’s date, Logic are attached to over 1274 poles and Infinity are attached to over 926*”; (6) “*[t]he figures are likely to be significantly higher than this in circumstances where attachers were attaching to poles without valid permits*”; and, (7) “*DataLink is still in the process of completing an audit on the pole attachments.*”

173. In addition, the Authority notes DataLink’s submission as part of its response to the Authority’s 26 June 2015 information request, that:<sup>40</sup>

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<sup>40</sup> <http://www.icta.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>

*“Since receiving its ICT Licence in 2012, DataLink has attempted to negotiate a replacement Master Joint Use Pole Agreement with LIME and Infinity with a view to ensuring essentially the same terms and conditions for all attaching ICT Licensees.”*

174. The Authority further notes that, as referenced in the **CUC Restraining Order application against Logic** judgment (see paragraph 22 above), it was stated by Ms. Byron, Logic’s Technical Project manager, in support of Logic’s position, that *“DataLink was, and remains, extremely slow in responding to Logic’s application for permits [...]”* and that *“it has not been uncommon for DataLink to issue a permit well over a year after the application was made [...]”*. Further, in Logic’s Notice of Grievance (see paragraph 24), Logic expressed its concerns about, among other things, the pole attachment permit application process managed by DataLink, noting that *“some agreements need to be reached that will allow permits to be processed in a reasonable period.”*

## PROPOSAL A

175. Subject to consultation, the Authority considers that DataLink should make all reasonable efforts to commit its resources in performing the tasks required for processing the pole attachment permit applications in an efficient and timely manner. The Authority considers that the apparent lack of adequate planning and coordination with the relevant Licensees of the pole attachment process, as referenced by the example in paragraphs 173 and 174 above, is likely to result in an inefficient use of resources and create processing delays giving rise to a significant backlog of unprocessed permit applications. The Authority considers that such a backlog, which delays the Attachers’ access to poles, is detrimental to the efficient roll-out of communication cables across the Cayman Islands which, in turn, detrimentally impacts competition in the provision of ICT networks and ICT services.
176. In addition, the Authority considers that an efficient provider of access to poles operating in a hypothetically competitive market would strive to speed up the permit application process, rather than delay it, given that provider’s opportunities to maximise its revenues by receiving quarterly pole rental payments earlier rather than later. In general, an efficient access provider would ensure that the appropriate allocation of resources is made for the timely processing of permit applications.
177. Further, the Authority notes the FCC’s view on this that:<sup>41</sup>

*“... the establishment of timelines has expedited the make-ready process considerably in states where timelines have been implemented.*

*...*

*Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services. Therefore, to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable.*

*...*

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<sup>41</sup> See paragraphs 5, 6 and 21 in *“In the Matter of Implementation of Section 224 of the Act, Report & Order and Order on Reconsideration”*, WC Docket No. 07-245, FCC 11-50, released April 7, 2011, available at <http://fcc.us/dK05BR>

*...adopting a specific timeline for processing pole attachment requests will give necessary guidance to both pole owners and attachers. Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays. Moreover, having a specific timeline offers certainty to attachers and allows them to make concrete business plans. Beyond generalized problems caused by utility lack of timeliness from initial request through completion, the record shows pervasive and widespread problems of delays in survey work, delays in make-ready performance, delays caused by a lack of coordination of existing attachers, and other issues...*

178. Currently, the pole sharing agreements refer to the following timelines relating to permit applications or consents for pole attachments:
- (1) Article VI.C in the **CUC-DataLink Pole Sharing Agreement**, the **CUC-Infinity Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**, states that  
*“Owner Utility shall review and respond to “Minor” Permit Applications – less than ten (10) Attachments/Poles – within ten (10) days of receipt. Owner Utility shall review and respond to “Major” Permit Applications – ten (10) or more Attachments/Poles – within fifteen (15) days of receipt”*; while
  - (2) Clause 1.1 (iv) in Article I: Licensee’s Covenants of the **CUC-LIME Pole Sharing Agreement** states, among other things, that  
*“...The Owner agrees to respond to written requests for consent within twenty one (21) days of receipt and agrees further that such consent shall not be withheld unreasonably.”*
179. The Authority notes that the above mentioned section/clause referring to the timelines relating to permit applications or consents for pole attachments, may lead to different interpretations of the relevant process, including the timing for DataLink issuing pole permits for the attachment of communication cables to CUC’s electricity poles.
180. For example, in DataLink’s Response to Logic’s Notice of Grievance (see paragraph 27), DataLink contended, among other things, the following:  
*“Step 1 is the requirement for the application for and the grant of Permits prior to attachment to the infrastructure. This is a fundamental requirement. DataLink agrees that there is a Review Period of 15 days for pole applications exceeding 10 or more attachments/Poles as outlined in Article VI C. However, Article VI B. notes that this period begins after two things have occurred. The receipt of a properly executed Application for Permit [...] and in addition the Pre-Permit Survey. There is no time limit set in the agreement for the receipt of an application or a Pre-Permit Survey, however, it is clear that an application for a permit is not complete and ready for review (as required in the time limit in VI C.) without both. Pre-Permit Surveys include analysis of all work or operations required by the Applicable Standards or reasonably required by CUC or DataLink to determine the make-ready work necessary to accommodate the attachments applied for [...]. DataLink therefore disagrees [...] that it has 15 days after the receipt of the Permit Application [...] to review and*

respond. The timing begins when the required Pre-Permit Survey is complete.

*Step 2 is a requirement to review and respond. Step 2 does not mandate anything except a response. It does not mandate the issuance of a permit within any time frame or require a permit to be issued if no make ready work is required within a particular time. DataLink's timing obligation in respect of the reviews arises by implication of a term that it will use reasonable diligence in reviewing and responding, not under a specific term imposing a time limit. What this means is that the time for responding to a permit application will depend on a number of factors prevailing at the time the application is made...*

181. Subject to consultation, the Authority considers that the current timelines, referred to in paragraph 178 above, are inadequate for an efficient and timely completion of the permit application process and an amendment to the relevant sections of the pole sharing agreements is appropriate in order to enable the development of competition in the provision of public ICT networks and public ICT services in a timely manner. Such an amendment would require DataLink to process all the current and future pole attachment permit applications in a timely and efficient manner.

182. Therefore, the Authority proposes that Article VI (*"Permit Application Procedures"*), paragraphs B (*"Review of Permit Application"*) and C (*"Review Period"*) of the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**, be replaced as follows (a representative diagram of the timetable is set out at **Annex 2**):

*"B. Review of Permit Application.*

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

*C. Review Period.*

- *On receipt of a complete Permit Application, as referenced above under Review of Permit Application, the Owner Utility shall undertake and complete the Pre-Permit Survey within **fifteen (15) days**.*
- *If the Owner Utility is not able to complete the Pre-Permit Survey within fifteen (15) days, or earlier by agreement between the Owner Utility and the Attaching Utility, the Attaching Utility shall be allowed to perform any required work itself or employ a qualified contractor to perform such work, with the objective to complete the Pre-Permit Survey in a timely manner. The costs relating to the performance of Pre-Permit Survey by the Attaching Utility of a qualified contractor employed by the Attaching Utility, shall be borne by the Owner Utility.*

- *After completing the Pre-Permit Survey, as referenced above, the Owner Utility shall review and respond to:*
  - o *a) “Minor” Permit Applications – less than ten (10) Attachments/Poles – within **ten (10) days of receipt**; or,*
  - o *b) “Major” Permit Applications – ten (10) or more Attachments/Poles – within **fifteen (15) days of receipt**,*

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

183. The Authority considers that the proposed additional step, that the *Owner Utility* responds to a *Permit Application* within 5 days of receipt, is reasonable, given that it involves a straightforward process of verifying whether all the required information, as specified in Attachment A to Appendix B of the **CUC-DataLink Pole Sharing Agreement** (entitled “*Application to Install Private Attachments on Caribbean Utilities Poles*”), Attachment A to Appendix B of the **CUC-Infinity Pole Sharing Agreement** (entitled “*Joint Use Permit Request*”) and the **DataLink-Logic Pole Sharing Agreement** (entitled “*Application to Install Attachments on CUC Poles*”), has been provided (or not).
184. Further, the Authority considers that it is reasonable that the *Owner Utility* commit to undertake and complete the *Pre-Permit Survey* within 15 working days, as the *Owner Utility* should have in place appropriate field inspectors and the relevant administrative processing arrangements to deal with the production of such surveys in a timely manner.
185. Indeed, the Authority notes that there is a provision in the pole sharing agreements for the *Owner Utility* to review and respond to *Permit Applications* within five (5) days of receipt (albeit the *Owner Utility* reserves the right to charge the *Attaching Utility* for any overtime or other applicable costs as a consequence)<sup>42</sup>.
186. In addition, the Authority notes that the section relating to “*Permit Application Procedures*” does not exist in either the **CUC-LIME Pole Sharing Agreement** or the **LIME-CUC-DataLink Novation Agreement**. Instead, the following rules appear to govern the duties and responsibilities relating to, amongst others, new attachments by LIME of its communication cables to CUC’s electricity poles, as stated in clause 1.1(iv) of the **CUC-LIME Pole Sharing Agreement**:

*“...not to place on any poles designated by such Permit or Permits any attachments in addition to the attachments covered by the Permits except with the prior written consent of the Owner, but the Licensee may add a single drop wire attachment on any of the said poles in order to serve an adjacent subscriber of the Licensee, and maintain the said attachments and replace any of them that become defective. The Owner agrees to respond to written requests for consent within twenty one (21) days of receipt and agrees further that such consent shall not be withheld unreasonably. With respect to drop wire attachments, the Owner shall also permit such attachments without its prior consent, provided that the*

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<sup>42</sup> See Article VI, paragraph D (“Expedited Review”) in the CUC-Infinity Pole Sharing Agreement, CUC-DataLink Pole Sharing Agreement and the DataLink-Logic Pole Sharing Agreement.

Owner receives written notification of the attachment within twenty one (21) days of such attachment.”

187. The Authority, therefore, proposes that the wording in Article VI (“Permit Application Procedures” of the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**, as amended and set out in paragraph 182 above, replace the above referenced clause 1.1(iv) of the **CUC-LIME Pole Sharing Agreement/LIME-CUC-DataLink Novation Agreement** where relevant.
188. On that basis, all the Attachers would have the same timetable for processing permit applications set out in their pole sharing agreements with DataLink.

## PROPOSAL B

189. The Authority notes that the FCC proposed in its 2010 rules<sup>43</sup> regarding, among other things, the use of independent contractors to perform survey and make-ready work, as well as the attachment of facilities on poles. The FCC noted<sup>44</sup> that

*“...although the Local Competition Order established a general principle that attachers may rely upon independent contractors, that order did not differentiate between two different types of work: (a) surveys and make-ready; and (b) post-make-ready attachment of lines. As a result, there have been ongoing disagreements regarding the ability of attachers to use contractors to perform survey and make-ready work under existing law.*

...

*...with respect to surveys and communications make-ready work, we propose that: **attachers may use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline**, or as otherwise agreed to by the utility. As discussed above, we propose a pole access timeline based in significant part on the approach taken in New York. Within that regulatory framework, the New York Commission gives utilities the option of using their own workers to do the requested work, or to hire outside contractors themselves, or to allow attachers to hire approved outside contractors. Under our proposed approach, utilities likewise would be entitled to rely on their own personnel unless they are unable to complete work within the timeline. If the utility decides to deploy its workforce on other projects or otherwise is unable to meet the deadline, the prospective attacher would be free to use contractors that are approved and certified by the utility.*

...

*With respect to actual attachment of facilities to poles, we propose to retain our existing rules. The make-ready process is designed to address the utilities’ safety, reliability and engineering concerns prior to a new attachment. So when that process is complete and facilities are ready to be attached, the utility’s concerns are less pressing, and an attacher’s interest in rolling out properly permitted facilities is proportionally larger.*

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<sup>43</sup> FCC, Order and Further Notice of Proposed Rulemaking, 20 May 2010, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-84A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-84A1_Rcd.pdf)

<sup>44</sup> Ibid., paragraphs 58-60.

*Therefore, for the post-make-ready attachment of facilities, we retain the existing standard of “same qualifications, in terms of training, as the utilities’ own workers,” and continue to deny utilities the right to pre-designate or co-direct an attachers’s chosed contractor.” [emphasis added]*

190. The Authority, subject to consultation, considers that the possibility for Attachers to use qualified contractors for performing various tasks relating to pole attachment process where timelines in the pole attachment process, as set out in paragraph 182, are not met by DataLink, is likely to contribute to a faster rollout of ICT networks and ICT services in the Cayman Islands. Therefore, the Authority proposes that the following paragraph should be added to *Article VI - Permit Application Procedures* in the relevant agreements between the Attachers and DataLink, and to the relevant amended article in the **CUC-LIME Pole Sharing Agreement/LIME-CUC-DataLink Novation Agreement**, as noted in paragraph 187 above:

*“Where the timelines as set out above are not met by DataLink, [the Attacher] may use a third-party contractor to perform the required work.”*

## PROPOSAL C

191. Further, the Authority notes that the **LIME-CUC-DataLink Novation Agreement** added a new article (*‘Article XVI’*) to the **CUC-LIME Pole Sharing Agreement**, entitled *“Make Ready Work/Installation”*, which specifies the principles relating to the following:

- (1) *Estimate for Make-Ready Work.*
- (2) *Payment of Make-Ready Work.*
- (3) *Required Timing of Make-Ready Work.*
- (4) *Scheduling of Make-Ready Work.*
- (5) *Licensee’s Installation/Removal/Maintenance Work.*
- (6) *Time is of the Essence.*

192. The Authority notes that the article relating to *“Make Ready Work/Installation”* also exists in the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**.

193. However, the relevant principles specified in the article referring to *“Make Ready Work/Installation”* somewhat differ between all the existing pole sharing agreements, as explained below:

- *“Estimate for Make-Ready Work”* section varies between the agreements, except between the **CUC-Infinity Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**.
- *“Payment of Make-Ready Work”* section varies between the agreements, except between the **CUC-Infinity Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**.

- “*Required Timing of Make-Ready Work*” section is applicable only in the **LIME-CUC-DataLink Novation Agreement**).
- “*Who May Perform Make-Ready Work*” section is applicable in the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement** .
- “*Scheduling of Make-Ready Work*” section is applicable in all the existing pole sharing agreements.
- “*Licensee’s Installation/Removal/Maintenance Work*” section varies between the **CUC-LIME Pole Sharing Agreement**, on one side, and the **CUC-Infinity Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**, on the other side (these two agreements make reference to “*Attaching Utility’s Installation/Removal/Maintenance Work*”), while the **DataLink-Logic Pole Sharing Agreement** makes no reference to any such section.
- “*Time is of the Essence*” section is applicable only in the **LIME-CUC-DataLink Novation Agreement**.
- “*Refund of Make-Ready costs*” section is applicable only in the **DataLink-Logic Pole Sharing Agreement**.

194. In order to standardise across all the existing pole sharing agreements various sections of the relevant article referring to *Make Ready Work/Installation*, as itemised above, the Authority proposes to amend all the existing agreements by inserting/amending, where required, the appropriate wording in the following sections:

- “*Estimate for Make-Ready Work*”, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
- “*Payment of Make-Ready Work*”, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
- “*Required Timing of Make-Ready Work*”, to be based on the existing wording used in the **LIME-CUC-DataLink Novation Agreement (Article XVI)**;
- “*Who May Perform Make-Ready Work*”, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
- “*Scheduling of Make-Ready Work*”, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
- “*Attaching Utility’s Installation/Removal/Maintenance Work*”, to be based on the existing wording used in the **CUC-DataLink Pole Sharing Agreement (Article VII)**;
- “*Time is of the Essence*”, to be based on the existing wording used in the **LIME-CUC-DataLink Novation Agreement (Article XVI)**; and
- “*Refund of Make-Ready costs*”, to be based on the existing wording used in the **DataLink-Logic Pole Sharing Agreement (Article VII)**.

195. The Authority considers that such amendments to the existing pole sharing agreements are appropriate because they are likely to guarantee that DataLink's infrastructure sharing services are provided "*on terms and conditions which are no less favourable than those provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder and shall be of no less favourable quality than that provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder*" (Regulation 6 (d) of the Infrastructure Sharing Regulations).

## CONSULTATION QUESTIONS

196. Therefore, based on the above, the Authority invites all the interested parties to submit their comments, with supporting evidence, on:

**QUESTION B1: Provide your view on what is the relevant process for issuing permits for the attachment of communication cables to CUC's electricity poles, including what do you consider to be a reasonable time period in which an entity such as DataLink should process the permit applications.**

**QUESTION B2: Provide your view on whether or not the proposed amendments to the permit application process as set out at paragraph 182 above are appropriate for issuing permits for the attachment of communication cables to CUC's electricity poles.**

**QUESTION B3: Provide your view on whether or not the Attachers should be allowed to perform relevant tasks relating to the *Pre-Permit Survey* and *Make-Ready Work*, in cases where timelines in the pole attachment process are not met by DataLink.**

**QUESTION B4: Provide your view on whether or not the Attachers should be allowed to use qualified contractors for *Pre-Permit Survey* and *Make-Ready Work*, in cases where timelines in the pole attachment process are not met by DataLink, and if so, provide detailed specification of the relevant process for the use of such qualified contractors.**

**QUESTION B5: Provide your view on whether or not the principles governing the permit application process, including any relevant *Make-Ready Work*, as noted and discussed in paragraphs 178 to 195 above, should be standardised and applied across all the existing, and future, pole sharing agreements.**

**QUESTION B6: Provide your view on whether or not the relevant sections in the article referring to *Make Ready Work/Installation*, as specified in the existing pole sharing agreements, need to be amended and, if so, provide your view on the proposed amendments in the relevant article referring to *Make Ready Work/Installation* for each of the existing pole sharing agreements, as discussed in paragraphs 191 to 195 above.**

**QUESTION B7: Provide your view on any other matters you consider relevant to this consultation.**

197. Responses to the public consultation on the above questions relating to DataLink's process for issuing permits for the attachment of communication cables to CUC's electricity poles, including the principles governing the performance of the *Pre-Permit Survey* and *Make-Ready Work*, are due by **28 June 2016**.

# C: CONSULTATION ON CHARGING PRINCIPLES RELATING TO THE ATTACHMENT OF COMMUNICATION CABLES TO CUC'S ELECTRICITY POLES

## BACKGROUND

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

*The Authority, in order to promote an efficient, economic and harmonised utilisation of infrastructure, may – [...] (b) inquire into and require modification of any agreement or arrangements entered into between a licensee and a another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks.*

199. Further, section 66 (5) of the Law states that:

*Where parties cannot agree upon interconnection [and infrastructure sharing] rates, the Authority may impose such rates.*

200. Section 68 (1) and (3) of the Law requires that the costs for infrastructure sharing be “based on cost-orientated rates that are reasonable and arrived at in a transparent manner [...]”. Noting the aforementioned obligation, and that infrastructure sharing services “shall be provided by the responder to the requestor at reasonable rates” (see Regulation 6 (c) of the Infrastructure Sharing Regulations) and shall be “cost-orientated and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder’s fixed and common costs” (see Regulation 6 (h) of the Infrastructure Sharing Regulations), the Authority is consulting on what the appropriate costs for the attachment of communication cables to CUC’s electricity poles more generally are, as provided by the various pole sharing agreements between CUC/DataLink and the *Attachers*.

201. In addition, the Authority notes DataLink’s submission as part of its response to the Authority’s 26 June 2015 information request, that:<sup>45</sup>

*“Since receiving its ICT Licence in 2012, DataLink has attempted to negotiate a replacement Master Joint Use Pole Agreement with LIME and Infinity with a view to ensuring essentially the same terms and conditions for all attaching ICT Licensees.”*

## PROPOSALS

202. Based on the Licensees’ responses to the Authority’s requests for information of 26 June 2015 and 26 August 2015,<sup>46</sup> it appears that, subject to consultation, the applicable charges relating to the attachment of communication cables to

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<sup>45</sup> <http://www.icta.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>

<sup>46</sup> See paragraphs 95 through 99.

electricity poles, as specified and implemented through the relevant pole sharing agreements between CUC/DataLink and the Attachers, are unlikely to satisfy the obligations set out in the the Law and applicable regulations (see for example above at paragraph 200).

*Applicable charges - summary*

203. For example, the definition of “**Annual Attachment Fee**”, as specified in Appendix A of both the **DataLink-Logic Pole Sharing Agreement** and the **CUC-Infinity Pole Sharing Agreement**, is calculated based on two different formulae, which in the Authority’s view cannot be reconciled.
204. The Authority also notes that the definition of “**Space Factor**”, which according to Appendix A of both the **DataLink-Logic Pole Sharing Agreement** and the **CUC-Infinity Pole Sharing Agreement** “*represents an allocation of the total pole height based on the actual space used by the Attachment plus an allocated portion of the unusable space on the pole*”, is derived from a number of factors whose values differ between the two pole sharing agreements, as follows:
- a) “*The space occupied by the Attachment*” is specified as “*one foot*” (or 12 inches) in the **CUC-Infinity Pole Sharing Agreement**, “*six inches*” (or 0.5ft) in the **DataLink-Logic Pole Sharing Agreement** and “*one foot (on a per foot basis)*” in the **CUC-DataLink Pole Sharing Agreement**;
  - b) “*The number of Attachers*” is specified as “*three*” in the **CUC-Infinity Pole Sharing Agreement**, “*four*” in the **DataLink-Logic Pole Sharing Agreement** and “*one (on a per attachment basis)*” in the **CUC-DataLink Pole Sharing Agreement**; and
  - c) “*The weighted average height of wood poles*” is specified as “*38.5 feet*” in the **CUC-Infinity Pole Sharing Agreement**, and “*38.0 feet*” in the **DataLink-Logic Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement**.
205. Further, the Authority notes that the following formula for calculation of the **Space Factor** applies in the **CUC-Infinity Pole Sharing Agreement**, the **DataLink-Logic Pole Sharing Agreement** and the **CUC-DataLink Pole Sharing Agreement** but not in the **CUC-LIME Pole Sharing Agreement**:<sup>47</sup>

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

206. In addition, one of the main components of the formula specified for calculation of the “**Annual Attachment Fee**” is the “**Net Cost of a Bare Pole**”, which is based on “*the net book value of poles as of the most recent annual financial statements of the Owner Utility divided by the number of poles as of the most recent fiscal year end*”. The Authority notes that the value specified as “**Net Cost of a Bare Pole**” varies between the **CUC-Infinity Pole Sharing Agreement**, the **CUC-DataLink Pole Sharing Agreement** and the **DataLink-Logic Pole Sharing Agreement**.

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<sup>47</sup> *Unusable Space* is specified as 24.5 feet in all three pole sharing agreements.

207. The difference in “**Net Cost of a Bare Pole**” may be due to the different financial years for which the values were calculated at the time the aforementioned pole sharing agreements were executed (November 2005, March 2012 and July 2013 respectively), in which case it may be reasonable to assume that the “**Annual Attachment Fee**” would vary each year in accordance with the change in the net book value of poles in subsequent annual financial statements.
208. However, based on the information received from the Licensees in response to the Authority’s requests for information of 26 June 2015, it appears that the attachment fees did not vary over time, although one would expect it to change if the “**Annual Attachment Fee**” were adjusted in accordance with the change in the net book value of poles. Accordingly, the lack of clarity around the calculation of “**Net Cost of a Bare Pole**” and its variation over time is likely, subject to consultation, lead to the view that the relevant specifications of “**Annual Attachment Fee**” do not comply with Regulations 6 and 10 of the Infrastructure Sharing Regulations.
209. Finally, based on the Licensees’ responses to the Authority’s requests for information of 26 June 2015 and 26 August 2015, the Authority notes that the “**Quarterly Attachment Fee**”, which Licensees are required to pay to DataLink as a recurring charge applicable for attachment of the Licensees’ communication cables to CUC’s electricity poles, differ significantly between the Licensees.
210. The Authority considers that any difference in the “**Quarterly Attachment Fee**”, which is a recurring charge, should be based on transparent and non-discriminatory principles. However, subject to consultation, the difference in values that are specified for the components used in calculation of the “**Space Factor**”, as referenced in paragraphs 204 and 205 above, appears, on its face discriminatory because the Attachers are being charged differently for the provision of the same service, which calls into question the compliance of that charging principle with Regulations 6 and 10 of the Infrastructure Sharing Regulations.
211. The Authority also notes that the **CUC-LIME Pole Sharing Agreement** refers to the “**Attachment Rental**” which is set at “*CI\$2.84 per quarter or part thereof*” and which “*shall be payable from the date of approval by the Owner of the permit granting permission to make the attachment to the said pole*”.<sup>48</sup> The **CUC-LIME Pole Sharing Agreement** further specifies that the “[v]ariation to the attachment rental may be effected by the Owner from any anniversary of the effective date of this agreement by submitting to the Licensee a new rate calculated from the following formula and supported by documents evidencing the changes in base rates claimed by the Owner”.
212. The Authority notes that the formula applicable to the variation of the “**Attachment Rental**” in the **CUC-LIME Pole Sharing Agreement** appears, on the face of it, and subject to consultation, to have no relationship with the formula applicable to calculation of the “**Annual Attachment Fee**” in the **CUC-Infinity Pole Sharing Agreement** and **DataLink-Logic Pole Sharing Agreement**.

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<sup>48</sup> See clause D of Schedule B in the CUC-LIME Pole Sharing Agreement, available at [http://www.icta.ky/upimages/agreement\\_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf](http://www.icta.ky/upimages/agreement_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf)

*Appropriate charging principles*

213. In relation to the appropriate charging principles for the calculation of pole attachment fees in the **CUC-Infinity Pole Sharing Agreement** and **DataLink-Logic Pole Sharing Agreement**, the Authority further notes that the approach to calculating the “**Quarterly Attachment Fee**” is not based on a forward-looking long-run incremental cost (*FLLRIC*) methodology, which is provided for by Regulation 10 of the Infrastructure Sharing Regulations. This is because the **Net Cost of a Bare Pole**, as the main component in the pricing formula, is “*based on the net book value of poles as of the most recent annual financial statements of the Owner Utility divided by the number of poles as of the most recent fiscal year end*” [emphasis added], as specified in paragraph B of Item 4 – Determination of Annual Attachment Fee in Appendix A of the **DataLink-Logic Pole Sharing Agreement**. The **Net Cost of a Bare Pole** is, therefore, determined using a historic (i.e. backward-looking) costing approach and not a forward-looking costing approach as provided for by Regulation 10 of the Infrastructure Sharing Regulations.
214. The Authority notes that, in reference to Regulation 10 (f) of the Infrastructure Sharing Regulations, a “*forward-looking long-run incremental cost methodology*” has yet to be “*established by the Authority following a public consultative process.*” That said, the Authority considers that the *FLLRIC* methodology may not be the most appropriate cost methodology to use for calculating the relevant charges applicable to pole attachments in any event. For example, section 224d(1) of the US Communications Act of 1934,<sup>49</sup> relating to pole attachments, states that “*a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way*”. In other words, section 224d(1) describes two possible costing principles, on the lower end, incremental costs and, on the upper end, fully allocated costs.
215. The Authority notes, in this regard, that the costing methodology implemented by the FCC is based on historical or embedded costs (often referred to as fully allocated costs or **FAC**) and not on forward-looking costing principles (such as *FLLRIC*) or replacement costs. A backward-looking costing methodology such as *FAC*, which is used for calculating the relevant charges applicable to pole attachments, will take in to consideration direct actual costs of the labour, capital and materials used exclusively for, and a portion of the indirect or overhead costs associated with, in this case, the provision of the pole sharing service. The forward-looking costing methodology such as *FLLRIC*, on the other hand, is based on the current cost of the modern equivalent asset deployed with the most efficient technology by a hypothetical efficient operator. *FLLRIC* charges would therefore be set on the basis of an efficient cost benchmark, rather than on the Owner Utility’s embedded costs.

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<sup>49</sup> <https://www.law.cornell.edu/uscode/text/47/224>

216. Further, the Authority understands that:

*“...the FCC rejected the use of replacement costs and reaffirmed its historical approach. The FCC indicated that the continued use of historical costs accomplishes key statutory objectives of assuring just and reasonable rates for pole attachments while at the same time adding certainty and clarity to negotiations. Furthermore, the FCC rebuffed the suggestion that the agency should strive for consistency between its pole attachment and interconnection policies. According to the FCC, its rules on local competition interconnection agreements utilise forward-looking economic costs because this is the best approach to effectuate the objectives of the 1996 Act “These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a local telecommunications market.” In this context, the FCC had found the use of a forward-looking cost methodology particularly important, because firms typically compare forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.”<sup>50</sup>*

217. Similar to the views expressed by the FCC, the Authority considers that the charging principles relating to the attachment of communication cables to CUC’s electricity poles do not necessarily need to encourage an efficient build or buy decision by an access seeker (i.e. attaching utility), considering the risk that an encouragement to erect new poles, as opposed to the choice of sharing the space available on the existing poles, may result in an inefficient duplication of pole infrastructure. Given that one of the Authority’s functions, as set out in section 9 (3) of the Law, is “to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure”, the Authority holds the view that an encouragement for the Licensees to erect new poles, as opposed to the choice of purchasing access to existing pole infrastructure, may be contrary to that objective.
218. Noting the above, the Authority considers that, in relation to pole attachments, as long as the charging principles relating to the attachment of communication cables to CUC’s electricity poles are cost-orientated, and therefore comply with the requirements set out at section 68 (3) of the Law and Regulation 6 of the Infrastructure Regulations (see paragraph 200 above), it may not be necessary to establish a *FLLRIC* methodology for the purpose of determining the “**Quarterly Attachment Fee**”.
219. However, it remains open for consultation whether or not the values determined for the **Net Cost of a Bare Pole** in the various pole sharing agreements (see paragraph 205 above) are cost-orientated.
220. The Authority also notes Infinity’s concerns in relation to other charges Infinity has paid and/or will be required to pay in the future, in relation to the pole sharing arrangements that are governed by the **CUC-Infinity Pole Sharing Agreement** and the **CUC-Infinity Deed of Variation**. In particular, Infinity makes reference to the payment for “**Make-Ready Work**” which Infinity divides into “two different types of work: (i) that which is required to strengthen the Pole to take a new attachment

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<sup>50</sup> See page 10 in <http://www.publicpower.org/files/Member/BallerHerbstPrimerPoleAttachments.pdf>

(*Strengthening Make-Ready*); and (ii) that which is required to make the Pole to take the attachment (*Safety Make-Ready*)”.

221. The Authority understands that the costs relating to “**Make-Ready Work**” are non-recurring costs for which DataLink seeks compensation as a result of the work done in preparation for the planned new attachment of communication cables. As such costs are project-specific, and therefore may not be accurately predicted in advance in order to be included in the recurring charge, it appears not to be appropriate to incorporate those costs in the pricing formula for calculating “**Quarterly Attachment Fee**”.
222. However, the Authority considers that, in accordance with Section 68 of the Law, the charging principles relating to “**Make-Ready Work**” should be (1) based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and (2) sufficiently unbundled such that the Attacher requesting a new pole attachment does not have to pay for network components that are not required for the service to be provided.
223. Make-ready costs represent a large part of the costs which may be passed on indirectly by the attacher to the end users of ICT services. A method consisting in defining the price to pay for make-ready work on a per pole basis, may be considered compatible with Regulation 6 and Regulation 10 of the Infrastructure Sharing Regulations, provided that the price is fixed on the basis of the make-ready costs in such a way that Attachers are not dissuaded from making use of pole infrastructure sharing.
224. However, as noted in paragraph 131 above, Infinity claimed that the highest position in the Communication Space results in higher attaching and maintenance costs relative to the lower positions in which other Licensees are allowed to attach their communication cables. The Authority considers that, subject to consultation, it may be appropriate to establish appropriate costing principles relating to attaching and maintenance costs, which may take into account any necessary adjustments to the existing charges based on the relevant position of each *Attacher* in the Communication Space.
225. In this respect, it is also noted that there may be advantages for the Attacher to be at the top of the Communications Space in that, for example, its communication cable is not potentially subject to interference or damage by other Attachers’ cables potentially ‘dropping down’ or because an Attacher is unlikely to reach, and accidentally damage, the cables at a higher position when it is effectively attaching and maintaining the cables at a lower position. Accordingly, it may be that the top position for the attachment in the Communication Space is the least exposed to the risk of accidental damage as a result of other Attachers’ exercising their rights to attach and maintain their communication cables within the Communication Space.
226. Finally, the Authority considers that DataLink, as an Attacher utilising the Communication Space on CUC’s electricity poles in accordance with its ICT licence granted by the Authority, and as provided for in legislation,<sup>51</sup> should be subject to the same terms and conditions relating to the pole sharing arrangements, including the relevant charging principles, as they apply to all the other Attachers. This principle would ensure that DataLink, as an ICT licensee, is

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<sup>51</sup> See, for example, Regulation 6 of the Infrastructure Sharing Regulations.

not treated by CUC more favourably than other ICT licensee in pole sharing arrangements for attachment of communication cables to CUC's electricity poles.

## CONSULTATION QUESTIONS

227. Therefore, based on the above, the Authority invites all the interested parties to submit their comments, with supporting evidence, on:

**QUESTION C1: Provide your view on whether or not the current pricing formula for calculation of the “Annual Attachment Fee” is appropriate, in particular whether it leads to cost-oriented rates for pole rental services and whether it is in compliance with the FAC costing methodology.**

**QUESTION C2: Provide your view on whether each of the relevant components of the pricing formula for calculation of the “Annual Attachment Fee”, including but not limited to:**

- **“Net Cost of Bare Pole”** - defined as *“the net book value of poles as of the most recent annual financial statements of the Owner Utility divided by the number of poles as of the most recent fiscal year end”*,

- **“Space Factor”** – defined as an *“allocation of the total pole height based on the actual space used by the Attachment plus an allocated portion of the unusable space on the pole”*, including the following parameters which are used for calculation of the relevant *“Space Factor”*:

- *“Unusable space on the pole”*,

- *“Space occupied by the Attachment”*,

- *“Number of Attachments”*; and,

- *“Weighted average height of all poles”<sup>52</sup> or “Weighted average height of wood poles”<sup>53</sup>*

- **“Annual Carrying Charge Rate”<sup>54</sup> or “20 year Levelized Fixed Charge Rate”<sup>55</sup>**,

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

**QUESTION C3: Provide your view on what charging principles should be implemented in order to ensure that the costs relating to “Make-Ready Work” are cost-oriented and in compliance with the FAC costing methodology.**

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<sup>52</sup> As specified in the DataLink-Logic Pole Sharing Agreement.

<sup>53</sup> As specified in the CUC-DataLink Pole Sharing Agreement and the CUC-Infinity Pole Sharing Agreement.

<sup>54</sup> As specified in the DataLink-Logic Pole Sharing Agreement and and the CUC-Infinity Pole Sharing Agreement.

<sup>55</sup> As specified in the CUC-DataLink Pole Sharing Agreement.

**QUESTION C4: Provide your view on whether or not pole attachments charges relating to attaching and maintenance costs should take into account any necessary adjustments based on the relevant position of each Attacher in the Communication Space, and if so, what charging principles should be adopted.**

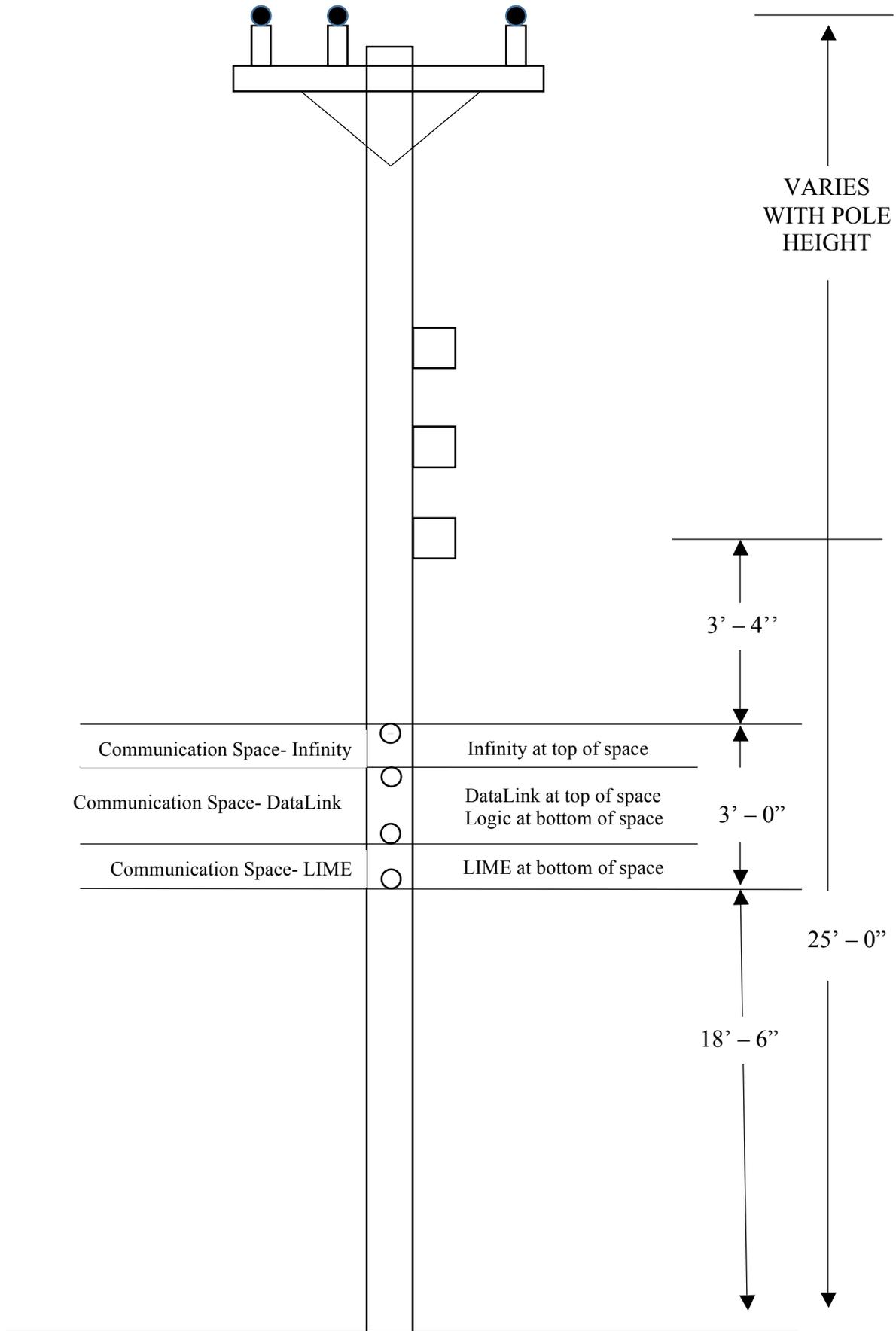
**QUESTION C5: Provide your view on any other issues relating to the appropriate charges for and charging principles applied to the attachment of communication cables to CUC's electricity poles.**

**QUESTION C6: Provide your view on whether or not DataLink should be subject to the same terms and conditions relating to the pole sharing arrangements for attachment of its communication cables to CUC's electricity poles, including the relevant charging principles, as they apply to all the other Attachers.**

**QUESTION C7: Provide your view on any other matters you consider relevant to this consultation.**

228. Responses to the public consultation on the above questions relating to the charging principles applied to the attachment of communication cables to CUC's electricity poles, are due by **28 June 2016**.
229. Pending the outcome of the consultation relating to the charging principles applied to the attachment of communication cables to CUC's electricity poles, the Authority directs that, if not already done, all the concerned parties keep detailed records of pole attachment charges, including all the related billing parameters.

# ANNEX 1 – POLE ATTACHMENT POSITIONS



## ANNEX 2 – PERMIT APPLICATION TIMELINES

(This is for representational purposes only and should not be relied on as representing the actual proposed timelines – Please see paragraphs 182 for the proposed Permit Application Timelines)

