

RESPONSE TO DETERMINATION REQUEST

To: Information and Communications Technology Authority (**the Authority**)

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From: DataLink, Ltd. (**DataLink**)

This is DataLink's response to the Determination Request submitted by Infinity Broadband, Ltd. (trading as C3) (**Infinity**) on 12 September 2014. In accordance with the Information and Communications Technology Authority (Dispute Resolutions) Regulations, 2003) (**the Regulations**), DataLink has 20 days to provide its Response.

Summary

Resolution of this dispute requires the Authority to make a decision about rational and efficient use of certain space on poles owned by CUC. The 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 (the **Communication Space**). The Communication Space sits 18 feet and 6 inches above the ground. This is the minimum clearance between the bottom of the Communication Space and the ground.

Above the cables in the Communication Space are electrical cables. They sit in the **Electric Space**. For safety purposes, there has to be a minimum clearance of 3 feet and 4 inches between the top of the Communication Space and the bottom of the Electric Space (the **Safety Space**).

In 2005 there were just two providers using the Communication Space (Infinity and Lime). The space was then 2 feet 8 inches deep. As 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. This 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.

As to the first of these, the Communication Space could only be increased by moving the top of the space up four inches (the bottom could not be moved because the minimum clearance space had to be respected). As to the second, 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. This was exactly what was done and the Authority is referred to the before and after illustrations in Appendix 1.

Infinity's complaint relates to the consequences of this necessary and beneficial change. Infinity wrongly complain that they have been treated unfairly and have incurred additional cost.

As can be seen, the incoming providers were assigned space between Infinity and Lime. 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. While 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.

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. That is not correct - as has been explained to Infinity with some care and as is set out below.

Each 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. In order to maintain the Safety Space it is often necessary to move the Electric Space upwards. In preparation for the attachment the Communication Space is reconfigured and, where necessary, the wires in the Electric Space are physically raised.

At the moment the cost of reconfiguration is borne by the new attacher. 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. Infinity has refused to agree to vary their agreement to incorporate these terms. That means that they would not contribute to the costs of changes from which they take a benefit and would not receive a contribution to the costs of changes that are made when they are the provider whose attachment triggers the need to reconfigure the space. They complain that they have to bear this cost while refusing to agree to contractual changes that would allow the costs to be shared.

Datalink requests the authority to use its powers to direct changes to the contract between Datalink and Infinity so that 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.

Background

On 22 November 2005, Caribbean Utilities Company, Ltd (**CUC**) entered into a Master Pole Joint Use Agreement with Infinity (**the Infinity Agreement**) for the purpose of sharing poles owned by CUC for the attachment of aerial cables and associated equipment of Infinity. Pursuant to the Infinity Agreement, Infinity was designated a space of 1 foot in the Communication Space on the Pole (see Appendix 1). At the time of entering the Agreement, there was one other attacher who had a designated space on the pole, which was Cable & Wireless (**LIME**) – having entered into its own agreement with CUC in 1996. LIME had a designated space of 1 foot, 8 inches in the Communication

Space below Infinity, bringing the total Communication Space (as decided by CUC) to 2 feet, 8 inches (or 32 inches).

To comply with legal and regulatory requirements, CUC informed the Authority that it intended to lease certain infrastructure to DataLink for sublicenses to ICT Licensees following the grant of an ICT Licence to DataLink. The Authority reviewed DataLink's ICT licence application and had various discussions with CUC throughout 2011 and 2012 in relation to Licensee demand for additional pole attachments on CUC's poles. The Authority wanted CUC to make space for four attachers on the poles (LIME, Infinity, DataLink and any additional attacher) and required it to undertake an analysis of the poles to see if this was possible. CUC confirmed it was (in a letter that confirmed that the designated communication space was between 18.5ft to 21.5ft above ground (i.e. 36 inches)). DataLink's 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).

In March 2012, in accordance with the Authority's wishes, CUC entered into a Master Pole Attachment Agreement with DataLink which contained the standards to be used to determine capacity and which referred to the communication space between 18.5ft and 21.5ft above the ground (i.e. 36 inches). This was 4 inches wider than the Communication space set out in the original agreements CUC entered with LIME and Infinity, and was necessary to allow for four attachers on the pole, allowing for a 12 inch space between each attacher.

On March 20 2012, CUC and Infinity executed the agreement to vary the terms of the Infinity Agreement. The variation was actually requested by Infinity to enable it to reserve space on the poles and was drafted by Infinity's counsel. 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). DataLink was not a party to the agreement reached between CUC and Infinity. The suggestion by Infinity that DataLink has "relegated" or "demoted" it to the worst position on the Poles is, therefore, completely incorrect. Infinity was already in the top position *before* DataLink became a party through the novation of the Infinity Agreement on 7 May 2012. On that date, DataLink simply inherited what CUC had already agreed with Infinity.

The relative placement of attachers was not, as Infinity suggests, a result of DataLink "exploiting its position as the "owner" of the poles to secure itself a better position on the Poles". Nor could DataLink be "simply willing to take the highest position itself", given the Agreement as novated to it bound DataLink to the agreement between Infinity and CUC including exactly where Infinity was to attach. Notwithstanding this point, DataLink denies that the top position is the worst position (set out in more detail below).

The Dispute

It is DataLink's position that dispute in relation to the terms of the Infinity Agreement agreed prior to DataLink being a party should not be the subject of a determination by the Authority for the following reasons:

1. CUC is not a party to this dispute resolution process;
2. Even if CUC was a party to the dispute resolution process, it is not a "licensee" and, therefore, falls outside the Regulations;
3. The agreement between CUC and Infinity for attachment at the top of the Communication Space is not a matter within the Authority's jurisdiction; and
4. The subject matter of the dispute should continue to be governed by the terms and conditions of an existing contract and, therefore, the Authority should decline to deal with the Determination Request (see section 10(i) of the Regulations).

DataLink also submits that the Determination Request is vexatious, trivial, misconceived and lacking in substance and an abuse of process, which provides further grounds on which the Authority may decline to deal with the Determination Request. It is brought by Infinity for improper means, such as:

1. Using it as a reason not to pay its outstanding debts to DataLink; and
2. Attempting to move positions on the Poles with Logic, to frustrate/stall progress made by Logic (one of its direct competitors) in attaching.

By bringing this dispute, Infinity is attempting to use the Authority to force the re-negotiation of terms it agreed with CUC back in 2012 when it has refused to negotiate terms of a replacement agreement directly with DataLink.

Logic

Logic entered into a Master Pole Joint Use Agreement with DataLink (**the Logic Agreement**) in July 2013 (over 12 months after Infinity had agreed to attach at the top of its assigned space). As at today's date, Logic are attached to over 1274 poles and Infinity are attached to over 926. The figures are likely to be significantly higher than this in circumstances where attachers were attaching to poles without valid permits. DataLink is still in the process of completing an audit on the pole attachments. If the agreements are required to be amended as per Infinity's wishes, the attachments already made will all need to be moved, which will result in significant unnecessary time and cost.

DataLink did not act unreasonably in allocating Logic the position on the poles that it did. 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. Prior to the Logic Agreement being entered into:

- DataLink had entered into an agreement with CUC whereby the Communication Space was defined to measure 3 feet (36 inches).

- Infinity was assigned the top of the Communication Space and agreed to attach at the top of its 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).
- LIME was assigned the bottom of the Communication Space (starting at 18 feet, 6 inches off the ground and occupying 1 foot) and had agreed to attach at the bottom of its assigned space.
- If LIME attached to the bottom, and Infinity attached to the top, in accordance with their agreements as novated to DataLink, DataLink was left with the centre of the Communication Space for other attachers including itself and under the configuration assigned to it by CUC the pole would comfortably (and safely) fit four attachers.

When Logic approached DataLink to share the infrastructure and keeping in mind the Authority's wishes that there be room for four attachers, DataLink agreed to share its space in the Communication Space with Logic. It did not, as alleged by Infinity, decide to place itself or Logic in a lower position on the Poles than that of Infinity.

As explained above, as at today's date, Logic has attached to 1274 poles at the bottom of DataLink's assigned space in the Communication Space. If the Authority accedes to Infinity's request, those attachments will need to be moved, which will result in significant unnecessary time and cost to Logic (and Infinity).

Infinity – Amendment

DataLink agrees that, at present, Infinity has a contractual right to attach at 254 inches. However, that measurement was determined pursuant to the Communication Space that was measured prior to the Authority requiring CUC to make room for four attachers on the pole (i.e. 32 inches). It has, as explained above, subsequently been increased to 36 inches. It is on this basis that DataLink has asked Infinity to agree to a slight upward move of 4 inches, in an effort to make the agreements between the four attachers consistent and the space between each attacher 12 inches.

DataLink originally sent a draft amended agreement to Infinity in October 2013. This was completely ignored by Infinity and Infinity made no effort to agree new terms. 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. 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). 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. 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.

Following 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. As at today's date these outstanding invoices amount to CI\$ 240,300.42.

For these reasons, DataLink submits that the dispute raised by Infinity is vexatious, trivial, misconceived and lacking in substance and an abuse of process. It is not insignificant to note that Infinity originally made allegations against DataLink for breaches of section 36 and 40 of the Information Communications Technology Law. The Authority has since expressed its views that this is a dispute between two licensees and requested that Infinity follow the procedure set out in the Regulations. Infinity has, therefore, not pursued the allegations and has, instead, prepared its case on a different basis.

If the Authority accepts DataLink's position above, DataLink requests that it takes the following steps:

1. Rule 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 18 feet, 6 inches off the ground and determine that Infinity is required to attach as close to 21 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 (set out in more detail below).
2. Require Infinity to negotiate further terms of a new agreement with DataLink in good faith.

Sharing Make-Ready Costs

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.

The Infinity Agreement does not contain this provision. DataLink included it in the draft new agreement. However, as explained above, Infinity has refused to entertain a new agreement or negotiate its terms. This means two things:

1. If Infinity makes a permit application (before Logic) and Make-Ready Work is required, Infinity will be liable for all of the Make-Ready Costs – even if Logic makes an application to attach to the same pole soon after. This is because the Infinity Agreement does not provide for a refund of Make-Ready Costs in the event of another attacher benefiting from the Make-Ready Work. This is unfair to Infinity.
2. If Logic makes a permit application (before Infinity) and Make-Ready Work is required, Logic may be liable for all of the Make-Ready Costs and there will be an inconsistency between

agreements if Infinity then makes an application to attach. The Infinity Agreement potentially means that Infinity is not required to pay anything, whereas the Logic Agreement says another attacher will contribute and Logic will receive a refund. This is unfair to Logic.

What this effectively means is that one attacher could make permit applications on all poles where another attacher has already paid the Make-Ready Costs and not have to incur any cost. This is potentially unfair to one attacher.

It is obviously in the interests of all parties for the agreements to be consistent and it is DataLink's view that a provision for the sharing of Make-Ready Costs among attachers is fair. DataLink accordingly asks the Authority to use its powers to rule that the Infinity Agreement be revised to include this provision.

Position on the Pole

It is DataLink's submission that the Authority only needs to consider the facts outlined in this Response on the question whether there is a disadvantage to being at the top or bottom of the Communication Space if it does not accept DataLink's position set out above (i.e. that it has acted reasonably and it did not relegate/demote Infinity to the worst position on the poles). If the Authority does accept DataLink's position, then Infinity will remain at the top of the pole regardless of what is set out below. If the Authority does not accept DataLink's position, then we set out below why the top position is not the worst position on the poles.

Infinity has always been at the top. It 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. Infinity submits, in its Determination Request, that "all Attaching Utilities are aware that there is a major commercial and competitive advantage to being assigned space lower down the Poles", yet 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. Infinity also knows that Logic has been attaching in the space between LIME and it for over 12 months.

DataLink has previously attempted to explain to Infinity how it determines whether or not Make-Ready Work is required and that, as a result of that process, being at the top of the Communication Space is no different to being at the bottom. Infinity asks the Authority to give consideration to the content of the various attachment agreements as they relate to Make-Ready Work, rather than looking at how DataLink claims to apply this in practice. However, how the agreements are applied in practice is entirely relevant to whether or not an attacher at the top of the Communication Space incurs additional costs to an attacher at the bottom of the Communication Space. DataLink says there is no difference, in practice. This applies to both Safety Make-Ready Costs and Strengthening Make-Ready Costs.

Infinity suggests that the agreements do not require the Communication Space and Safety Space measurements to be respected each time a permit application is made and that the Safety Space of

40 inches is measured from an attachers' designated point of contact to the Electric Space. This is incorrect and in practice these measurements are respected and this is what DataLink takes into consideration when determining whether or not Make-Ready Work is required. This is clear from the definitions contained within the agreements.

Safety Space is defined as the clearance space between the Communications Space and the Electric Space, defined in the NESC. For any calculations requiring the allocation of space, this space is assumed to be forty (40) inches.

Communication Space is defined as the space on a Pole allotted for the attachment of Communications Facilities, which begins at the minimum distance above the ground specified under the Applicable Standards where Attachments can be made.

The minimum distance above the ground is 18 feet, 6 inches. The Safety Space is 40 inches. So that leaves determining the width of the Communication Space, which was originally 32 inches, but has been increased to 36 inches following the Authority's request that there be room on the pole for four attachers.

When a permit application is made by any of the attachers, these measurements need to be respected. Therefore, whenever an attaching utility makes an application to attach to a pole and there is not 40 inches from the top of the Communication Space, then Make-Ready Work will be required to establish the entire Communication Space and to accommodate attachments. As this consequence applies regardless of which utility applies to attach there can be no disadvantage in terms of incurring Make-Ready Costs to whichever utility is at the top of the Communication Space. We refer the Authority to the attached examples, Appendix 2, of Make-Ready Work requested by both Logic and Infinity which both provide the following descriptions:

Make Ready Work to accommodate Attaching Utility's Facilities and to comply with Applicable Standards by establishing the safety zone, creating the communication space and strengthening the infrastructure, if needed.

In respect of Strengthening Make-Ready Work, the position is the same. There is no additional cost as Infinity suggests for being higher up the pole. If a pole requires Strengthening Make-Ready Work, one guy is sufficient for all four communication cables in the Communication Space. We refer the Authority to an Analysis Report, Appendix 3, demonstrating that the load on the guy and anchor in the Communication Space are well below the allowable tension (41.6%) and allowable capacity (33%) even with four communications cables attached.

Infinity makes bald 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. DataLink 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. If that is correct, then it will be of no benefit to Infinity to swap positions with Logic.

Conclusion

The Authority's requirement that there should be four attachers was capable of being accommodated only by making changes to the existing attachment arrangements. Those arrangements were in certain respects enshrined in contracts and in certain respects the existing attachers needed to show flexibility and adopt an accommodating approach to give effect to the Authority's decision, which was itself taken in the public interest. Datalink's submission is that Infinity has sought to exploit the need for accommodation for commercial advantage by making captious objections to a carefully thought out response to the Authority's requirement in order to obtain collateral commercial advantages.

For these reasons, Datalink submits that Infinity's Determination Request is vexatious, trivial, misconceived and lacking in substance and an abuse of process. It is asking the Authority to renegotiate terms it agreed with CUC over 2 years ago and on this basis, the Authority should decline to deal with Infinity's request.

As explained in this Response, DataLink has not acted improperly in determining the position of each attacher on the pole. This is especially so in circumstances where, prior to novation of the Infinity agreement to DataLink, Infinity had already contractually agreed to attach at the top of the Communication Space. All of DataLink's actions took place after agreements were in place and were a direct result of complying with the Authority's request to make room for four attachers on the pole.

DataLink has also demonstrated in this Response, and previously to Infinity, that in any event there is no such thing as the "worst position" on the pole. Each time an attacher makes a permit application, DataLink determines whether Make-Ready Work is required, which includes establishing a 36 inch Communication Space starting 18 feet, 6 inches off the ground and a 40 inch Safety Space starting 21 feet, 6 inches off the ground. It, therefore, does not matter whether an attacher is at the top of the Communication Space or the bottom when determining the necessary Make-Ready Work.

In the circumstances, DataLink asks the Authority to dismiss Infinity's complaint 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 18 feet, 6 inches off the ground and determine that Infinity is required to attach as close to 21 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 (set out in more detail below).
2. Requiring Infinity to negotiate further terms of a new agreement with DataLink in good faith.

3. Awarding costs to DataLink under section 16 of the Regulations.

Dated: 2 October 2014

Signed:

Andrew Small, President & CEO
DataLink, Ltd.