

**Determination Request (for the purposes of the Information and Communications Technology Authority (Dispute Resolutions) Regulations, 2003) (the Regulations)**

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

FAO: Russell Richardson ([russell.richardson@icta.ky](mailto:russell.richardson@icta.ky))

From: Infinity Broadband, Ltd. (trading as C3) (**Infinity**)

**Respondent Identity and Address**

DataLink, Ltd. (**DataLink**)

457 North Sound Road, P.O Box 38, Grand Cayman KY1-1101, Cayman Islands

**Details of all ICT networks and / or ICT services (if applicable) to which the issue relates**

The ICT service to which this determination request relates is the provision of broadcast, internet and other similar services, to be delivered by Infinity using fibre optic cables, which require use of DataLink's ICT network (see below). "ICT service", for this purpose, is defined as including broadcast service and internet service plus "any other similar service".

The ICT network to which this determination request relates is therefore the network of electrical poles (**Poles**) across Grand Cayman, to which DataLink allows fibre optic cables to be attached (within an area referred to as the Communication Space), for payment of a fee. "ICT network", for this purpose, is defined as any network used in connection with the provision of an ICT service.

**Summary of the issues in dispute and any associated issues that have been agreed by the parties**

In this determination request, references to **the Law** are references to the Information and Communications Technology Authority Law (2013 Revision).

Infinity has raised a number of grievances with DataLink in recent months. 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. A copy of that letter appears at tab 3 of exhibit RM1, for ease of reference. 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.

Full details of the issues to which this determination request relate are set out below. Infinity has notified DataLink of this dispute in writing. Copies of some of the correspondence between Infinity and DataLink appear at tabs 4 and 5 of exhibit RM1 to this determination request. Other correspondence arising as a result of the settlement discussions is not reproduced here, on the basis that the parties met, and subsequently corresponded, on a "without prejudice" basis.

In addition to attempts to resolve matters through correspondence, representatives of Infinity have also met with representatives of DataLink at DataLink's office's on July 15, 2014, and at Ogier's offices on Friday 5 September 2014. Despite Infinity's good faith and reasonable efforts, the dispute remains unresolved.

In light of the above, Infinity requests that the Authority considers this dispute and assists in its resolution.

This determination request was initially submitted to the Authority as an application under sections 36 (Agreements, etc. preventing, restricting or distorting competition) and 40 (Abuse of dominant position) of the Law and was re-submitted in this form at the request of the Authority.

### **Background to the creation of the relevant agreements**

Before providing an overview of the dispute, it is important to define some key terms that will be used throughout this determination request.

On November 22, 2005, Caribbean Utilities Company, Ltd (**CUC**) entered into a Master Pole Joint Use Agreement (the **Original Agreement**) with Infinity. By a deed of variation, dated March 20, 2012 (**Deed of Variation**) the Original Agreement was amended by the parties. By a novation agreement, dated May 7, 2012 (**Novation Agreement**), the Original Agreement, as amended by the Deed of Variation, was novated from CUC to DataLink, who thereby stepped into CUC's shoes for all purposes under the Original Agreement, as amended by the Deed of Variation.

We understand that DataLink is a wholly owned subsidiary of CUC. We consider that DataLink occupies a monopoly position in respect of the Poles. Cable & Wireless were the first Attaching Utility. They are now Lime, and we will refer to this entity as Lime throughout this document, for ease of reference. References to **Logic** are references to Westtel Limited trading as Logic.

Copies of the Original Agreement, Deed of Variation and Novation agreement appear at tabs 6, 7 and 8, respectively, of exhibit RM1 to this determination request. The Original Agreement as amended by the Deed of Variation and the Novation Agreement shall be referred to herein as the **Agreement**.

In the following, references to **Attaching Utility** are references to a party who has a right to attach to the Poles. Infinity is an Attaching Utility, along with Lime, Logic and DataLink itself.

### **Overview of the Problem**

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. Associated to this issue is the question of the order of attachments as between the four Attaching Utilities.

At the time of the Original Agreement, Infinity's attachment position was immediately above the space allocated on the Poles to Lime. At that time, Infinity was the second Attaching Utility. The

directors believed (and still believe) that this gave Infinity the second best position on the Poles at which to attach. The directors reasonably believed that Infinity would always occupy the second best position on the Poles.

At some time after Infinity entered into the Original Agreement, it was determined that DataLink and Logic should also become Attaching Utilities. We will explore this in a lot more detail, below.

Both DataLink and Logic were somehow allocated space on the Poles (by DataLink) below Infinity's space, rather than above it. This 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.

The order of attachments for the Attaching Utilities is now (from lowest to highest): Lime, Logic, DataLink, Infinity (subject to some comments, later, about uncertainty about this order). Infinity now considers that it has the worst position on the Poles.

Infinity also believes 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). This is covered in more detail below. In support of this assertion is the fact that the red "banding" on many Poles to which Infinity proposes to attach is being applied at a height of 258 inches and not 254 inches. It is not clear the legal basis on which DataLink is seeking to impose these changes. Infinity has not agreed to attach at this level on the Poles and the Agreement does not require Infinity to do so.

Infinity disputes that DataLink is able to (i) unilaterally attempt to move Infinity to a higher position on the Poles than that which it was allocated under the Agreement (acknowledging the implications of the Deed of Variation), and (ii) considers that DataLink's decision to place itself and Logic in a lower position on the Poles than that of Infinity is unlawful and should be overturned by the Authority. Infinity was not involved in that discussion, did not consent to the changes, and was not even notified about those changes until they had been implemented.

### **Is a higher position on the Poles a worse position?**

In asking the Authority to consider the issues to which this determination request relates, it is important that we are able to demonstrate to the Authority that a higher position on the Poles is a worse position (and that, correspondingly, a lower position is a better position). It is also important that the Authority appreciates that one of the Attaching Utilities who is now in a better position on the Poles than Infinity is DataLink itself. That DataLink was willing and able to exploit its position as the "owner" of the Poles to secure itself a better position on those Poles than Infinity is central to Infinity's grievance. It is even more important that the Authority takes into account that Infinity had an attachment agreement with DataLink well before DataLink (and Logic) decided to become Attaching Utilities.

*If DataLink does not agree that a higher position on the Poles is a worse position on the Poles, Infinity questions why DataLink is not simply willing to take the highest position itself (and why it did not do so from the outset).*

## Height of Infinity's assigned space

In order to put the significance of Infinity's grievance into context, we explain below the importance of the height at which Infinity is required to attach to the Poles.

It is 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. The main reasons are summarised below.

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. In our submission, 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 safe to take the attachment (**Safety Make-Ready**).

When we look at the implications of a higher attachment, it is essential to consider both of these types of work. We refer to Strengthening Make-Ready and Safety Make-Ready collectively as **Make-Ready**. We return to these two concepts several times in the following. Please note that the Agreement (and the other attachment agreements) do not make this distinction between Strengthening Make-Ready and Safety Make-Ready and we introduce this distinction to aid the Authority's understanding of the issues.

### Safety Make-Ready

When working on the Poles, with a view to attaching fibre optic cables, there is a need to keep a safe distance away from the electrical installations that are already located on the Poles (**Safety Zone**). In most cases the Safety Zone needs to be at least 40 inches from top to bottom, in order to comply with Applicable Standards (as referred to in the Agreement).

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. As Infinity is the highest Attaching Utility it has the highest probability of falling within the Safety Zone. In fact it is not possible for any other Attaching Utility to fall within the Safety Zone without Infinity also falling within the Safety Zone. Conversely, there is considerable scope for Infinity's attachment height to fall within the Safety Zone and for all other Attaching Utilities (or some of them, at least - depending on the height of the Pole under consideration) to fall outside of it.

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. As a result, 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. This has 2 immediate consequences.

**Delay:** 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. In many cases we understand that the older Poles need to be physically "extended" using something called a "Pole Topper". After the Pole is physically extended, the electrical equipment on the Pole needs to be moved upwards. We further understand that this often requires that two DataLink crews are involved and often requires that the power is turned off in the affected area. In Infinity's experience, this delay can extend for several weeks, if not months, after the making of a Permit application. Even where a Pole does not require physical extension in order to allow for the Safety Zone, the task of moving the electrical equipment up on the Poles is still significant and takes considerable time.

**Cost:** The second consequence relates to the increased costs of the Make-Ready work which will fall upon a higher Attaching Utility. If Infinity falls within the safety Zone, Infinity needs to pay the cost of the Safety Make-Ready which is required to prepare the Pole for Infinity's attachment. Since Infinity will fall within the Safety Zone more often than any other Attaching Utility, it must follow that Infinity will pay more for the Safety Make-Ready than any other Attaching Utility. Safety Make-Ready is extremely expensive, and potentially prohibitively so, particularly if Infinity are required to attach at 258 inches (as to which, see below).

### **Strengthening Make-Ready**

As the highest of the Attaching Utilities, Infinity will also suffer higher Strengthening Make-Ready costs than any other Attaching Utility.

When a cable is attached to a Pole, consideration needs to be given to the interaction between the cable and the wind to which it will be exposed. As the wind blows against the cable, this creates pressure, which puts a strain on the Poles to which the cable is attached (in the same way that wind blowing against a sail creates pressure in the sail, which puts pressure on the boat's mast):

Each time a cable is to be attached to a Pole, DataLink carries out a mathematical calculation to establish the additional "wind-load" imposed by that new cable. In some cases, the additional wind-load that will be added by the new attachment is such that the Pole needs to be strengthened before the Pole can take the extra cable. The strengthening, including the "guying" of the Pole, is included in the term Strengthening Make-Ready.

It is Infinity's submission 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. This is for 2 reasons.

The first reason is that the wind speed is higher the further above ground one goes. Higher 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. The second reason is that the wind-load calculation needs to take into account the height above the Pole's base at which the cable is to be attached. This is because the greater the distance between the attachment and the base of the Pole, the more pressure will be put on the Pole by the same amount of wind. This also 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.

It therefore follows from the above that (i) Infinity, as the highest Attaching Utility will be required to pay more than all other Attaching Utilities in respect of Strengthening Make-Ready, and (ii) the higher Infinity is required to attach to the Poles (in absolute terms) the greater their cost of Strengthening Make-Ready.

**Practical issues:** In addition, there is a further (and very simple) issue with being higher up on the Poles. After Infinity entered into the Original Agreement, it took a decision to invest in ladders rather than "bucket trucks". Infinity determined that ladders were sufficient to allow them to make the Pole attachments at the allocated height. Ladders remained a viable option when Infinity agreed to attach at the top of its space, as it did within the Deed of Variation. However, 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 for staff). Investment in bucket trucks would involve Infinity in significant and previously unforeseeable capital expenditure and would be an unwelcome development for the business. Whilst 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.

### **General Background to the Dispute**

At 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. Lime was entitled to 1 foot 8 inches of space on the Poles (from 222 inches above the ground to 242 inches above the ground). Infinity was allocated 1 foot of space immediately above that of Lime. At the time of the Original Agreement, Infinity's space ran from 242 inches above ground to 254 inches above ground. A diagram showing the assigned space of each of Lime and Infinity appears as attachment A to appendix C of the Original Agreement.

Under the Original Agreement 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). Under 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). Whilst this point was previously the subject of some discussion between the parties, this is not a point which Infinity requires the Authority to address.

Following the signing of the Original Agreement, it became clear that DataLink wished to enter into further infrastructure sharing agreements with other Attaching Utilities. Subsequent to Infinity's agreement being concluded, attachment rights were granted to Logic and DataLink.

A redacted version of the Master Joint Pole Use Agreement between DataLink and Logic (the **Logic MPJUA**) appears on the Authority's website. A copy of the Logic MPJUA appears at tab 9 of exhibit RM1. The Logic MPJUA was entered into on July 18, 2013, after Infinity had entered into the Deed of Variation.

## Current Order and Height of Attachments

Appendix C of the Logic MPJUA sets out Logic's assigned space on the Poles. Under the terms of the Logic MPJUA, Logic was assigned a space of 1 foot (appendix C; item 1, C) (between 234 and 246 inches above the ground) and Logic was required to install its attachments "at the top of the Assigned Space" (appendix C; item 1, E). This means that Logic should be attaching at 246 inches above the ground.

The position set out in the previous paragraph is at odds with the diagram contained at attachment A to appendix C of the Logic MPJUA, which shows that Logic was required to install its attachments at the bottom of the assigned space, i.e. 234 inches above the ground.

Attachment A to appendix C of the Logic MPJUA also shows that DataLink themselves had already been assigned space on the Poles and were to attach at the top of the Logic assigned space, i.e. 246 inches above the ground.

To summarise this position, we appear to have the following attachment heights:

Attaching Utility	Attachment Height (Inches above ground)
Infinity	254 (as contractually provided for in the Agreement)
Logic / DataLink	246
Logic / DataLink	234

The Authority should note that the distance between Infinity's attachment height and that of the Attaching Utility immediately below (whether that is DataLink or Logic) is only 8 inches (254 inches - 246 inches). DataLink requires that this "gap" between Attaching Utilities be increased to 12 inches and have proposed to achieve this by moving Infinity a further 4 inches up the Poles - *imposing an attachment height on Infinity of 258 inches*. 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. This is in clear violation of the express terms of the Agreement.

Further changes were negotiated or imposed on other Attaching Utilities (namely Lime) in order to accommodate the Logic and DataLink attachments. The space allocated to Lime was *reduced* from 1 foot 8 inches to 1 foot (the extra 8 inches being taken from the top of Lime's space, creating a "gap" of 8 inches between the top of Lime's space and the bottom of Infinity's space). We do not know whether this reduction in Lime's space was carried out with their consent or in consultation with them.

If the 8 inches gained from this reduction in Lime's space is added to the 4 inches by which DataLink has purported to move Infinity further up the Poles, this creates a new space of 1 foot between Lime (at the bottom) and Infinity (at the top). This would result in a 36 inch "Communication Space", containing 4 attachments, each being 12 inches from the neighbouring attachment.

Infinity does not dispute that it is desirable to have four Attaching Utilities on the Poles. Infinity does not dispute that it is desirable to have a 12 inch "gap" between each Attaching Utility's cables. Infinity appreciates that someone needs to be at the top of the Poles. What 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.

At this stage, it remains unclear to Infinity whether DataLink or Logic has the higher attachment position. It appears that DataLink is attaching above Logic, and Infinity can only assume that the order of attachments has now been resolved within the various contracts. However, this uncertainty does need to be clarified as it is relevant as to the outcome that Infinity is seeking. Infinity initially sought to swap positions on the Poles with DataLink, which would put Infinity below both Logic and DataLink. However, if Logic has a lower attachment position than DataLink, Infinity does not believe that simply swapping positions with DataLink would be a sufficient remedy here. This is addressed again later.

Had 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.

We have been given no information from DataLink confirming the basis on which it was determined by DataLink that Logic and DataLink themselves should receive assigned space on the Poles beneath that of Infinity. We were not consulted by DataLink in the making of this decision and were not invited to make any representations on the issue.

Our view is that Infinity was the second company to enter into a master pole joint use agreement with CUC (after Lime) and so its assigned space on the Poles ought to remain as second lowest (which, on our submission, is the second best position) on the Poles (after Lime).

At the very least, Infinity ought to be able to attach at 254 inches above ground, which is the contractual entitlement enshrined in the Agreement. If that is no longer possible (perhaps due to the need to amend the attachment levels to accommodate all the Attaching Utilities), then Infinity ought to have been given the assigned space currently occupied by Logic or DataLink. Again, since Infinity's space was immediately above Lime's space, we feel that the status quo should have been maintained and that Logic and DataLink should occupy assigned space on the Poles above that of Infinity. We find it incredulous and completely unjust and unfair that Infinity's assigned space on the Poles has unilaterally been raised in order to accommodate space for Logic and DataLink, particularly when you consider that DataLink are the operators of the Poles.

**Arguments that a higher attaching position on the Poles does not result in higher Make-Ready costs**



We are aware that DataLink may seek to convince the Authority that a higher attachment position on the Poles is not a worse position. Infinity strongly disagrees with any such suggestion, for the following reasons. To date, we have only seen arguments on this basis relating to the Safety Make-Ready. We have seen nothing in relation to the Strengthening Make-Ready.

DataLink's position (and we are confident that they will articulate this in their response to this determination request - this summary is simply set out to allow Infinity to express the counter-argument, at this stage) appears to be as follows.

Under the various attachment agreements, with the Attaching Utilities, no Attaching Utility will be permitted to attach to the Poles until the Communication Space on that Pole is prepared and the Pole is made ready to accommodate the attachments of all Attaching Utilities. In other words, if Logic makes an attachment request, DataLink will refuse that request and will perform all of the Make-Ready work required in order to prepare that Pole for attachment not only by Logic (who has made the attachment request), but also by DataLink and by Infinity (who may not have made an attachment request at that time).

Whilst this may be a fairer position (provided that all Attaching Utilities are then required to share the Make-Ready cost) it is not the position within Infinity's Agreement and does not appear to be the position within the other agreements which we have seen. Furthermore, it does not appear to be the case that DataLink is requiring all Attaching Utilities to meet the cost of the Make-Ready work. It appears that Logic and Infinity are bearing this cost, and that DataLink and Lime are exempt from this obligation.

Infinity disputes DataLink's analysis of this issue, for the following reasons and believes that a higher position on the Poles does result in an increase in Safety Make-Ready costs for the highest Attaching Utility. Within the Agreement, Make-Ready is defined as follows:

**"Make-Ready Work:** means all work, as reasonably determined by Owner Utility after reasonable consultation with the Attaching Utility, required to accommodate Attaching Utility's Facilities and/ or to comply with all Applicable Standards. Such work includes, but is not limited to, rearrangement and/or transfer of Owner Utility's Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes), pole replacement or construction as it relates to the express purpose of the Make-Ready Work."

When Infinity makes a Permit request, DataLink must determine whether any Make-Ready work is required. The Make-Ready work must be required for one of two reasons, as expressed in that clause:

1. to accommodate Attaching Utility's Facilities; and/ or
2. to comply with all Applicable Standards.

A non-exhaustive list of things which may fall within those headings is then set out in the remainder of the definition.

Taking numbered point 1, Attaching Utility's Facilities means Infinity's "Facilities" in this context. Facilities is defined as either Communications Facilities or Electric Facilities or both. In this context only Communications Facilities is relevant. That term is defined as "wire, or cable facilities including but not limited to fiber optic, copper and/ or coaxial cables or wires owned by either Utility and utilized to provide Communications Service including any and all associated equipment." Under numbered point 1, this means that DataLink can only insist on Make-Ready where that work is required in order to accommodate Infinity's fiber optic cables and associated "Facilities". Nothing within this section allows DataLink to consider the requirements of other Attaching Utilities in determining whether Make-Ready work is required. Had the parties intended to provide that a Pole must be ready to take all Attaching Utilities' attachments, before any attachments could be made, point 1 would have referred to Attaching *Utilities'* Facilities, which it does not.

Turning to numbered point 2, this appears to be a little wider than point 1, but it is not wide enough to be interpreted in the way suggested by DataLink. "Applicable Standards" is defined as "all applicable engineering and safety standards governing the installation, maintenance and operation of facilities and the performance of all work in or around the Electric Facilities and includes the most current versions of National Electric Safety Code ("NESC"), the National Electrical Code ("NEC"), each of which is incorporated by reference in this Agreement, and/ or other reasonable safety and engineering requirements of a Utility or other authority with jurisdiction over the Facilities. In all instances of conflict between standards the stricter standard shall be applied unless specifically waived in writing by the Owner Utility."

Our interpretation of point 2 is that the required determination, following receipt of a Permit request from Infinity, is whether any Make-Ready work is required in order to accommodate *Infinity's attachment only*. If, and only if, the accommodation of Infinity's attachment (not that of any other Attaching Utility) would itself violate "Applicable Standards" then DataLink is able to charge Infinity for Make-Ready work under point 2. If Infinity's attachment request can be accommodated without breaching Applicable Standards then Infinity is not responsible for paying towards that Make-Ready work. There is no breach of Applicable Standards unless and until a higher attachment is made and that higher attachment does not comply with the NESC or the NEC requirements.

There is nothing within this clause which supports an argument that the Communication Space plus the Safety Space must all be ready before any Attaching Utility is able to attach to a given Pole.

The above comes from an analysis of the definition of "Make-Ready Work". Turning to clause VI.E of Infinity's Agreement, we have the following:

**"Performance of Make-Ready Work.** If Make-Ready Work is required to *accommodate Attaching Utility's Attachments*, Owner Utility or its contractors shall perform such work pursuant to Article VII." [emphasis added]

This clause only anticipates the performance of Make-Ready work where it is "required to accommodate Attaching Utility's Attachments". This concept is repeated again in VII.B, VII.C, and VII.D. It is clear from the repeated use of this phrase / concept that the parties did not anticipate that one Attaching Utility would be required to pay for the Make-Ready work required to allow all

Attaching Utilities to be able to attach, before a Permit would be issued in respect of a Pole. Whilst this may be something which DataLink wishes it has negotiated in the Agreement, it is simply not there.

We ask that the Authority gives consideration to the content of the various attachment agreements as they relate to Make-Ready work, rather than looking at the how DataLink claims to apply this in practice.

### **Other matters relevant to the Determination Request**

This submission is the "written account", addressing the matters required by regulation 5(d) of the Regulations. Dates and copies of all correspondence, setting out the efforts that have been taken by the parties to this dispute, are enclosed with this submission. Some of the correspondence arising as a result of the settlement discussions is not reproduced here, on the basis that the parties met, and subsequently corresponded, on a "without prejudice" basis.

This determination relates to a grievance under regulation 3(1) of the Regulations.

As required by regulation 6(1) of the Regulations, Infinity has provided a copy of this determination request to DataLink on the same date on which it has submitted this determination request to the Authority.

### **Issue for the Authority to determine**

In this detailed determination request, we have outlined the facts involved in this dispute and have addressed some of the technical issues that it creates. We have explained how Infinity was the second Attaching Utility to obtain a right to attach to the Poles, and how DataLink and Logic came along later than Infinity and managed to secure better positions on the Poles. We have also explained how DataLink is now seeking to require Infinity to attach even higher on the Poles, despite the terms of the Agreement. We have explained why a higher attachment position on the Poles is a worse position and have detailed how this will cause losses to Infinity.

In view of the above, we respectfully ask the Authority to act as adjudicator of the dispute and to determine the following:

- 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);
- 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
- 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.

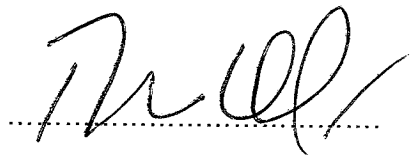
### **Relief sought**

Infinity seeks 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.

Infinity also seeks a declaration that DataLink acted unlawfully in its allocation of space to itself and to Logic and asks the Authority to intervene in determining the rightful order of attachments. In this respect, Infinity seeks 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. This declaration should relate to all Poles, including those to which DataLink and / or Logic are currently attached.

Dated: 12 Sept 2014

Signed for and on behalf of Infinity (trading as C3):

A handwritten signature in black ink, appearing to read 'Randy Merren', written over a horizontal dotted line.

Name: Randy Merren

Position: Director