



85 North Sound Rd. | Alissta Towers, 3rd Floor
P.O. Box 2502 | Grand Cayman KY1-1104
CAYMAN ISLANDS
Main: +1 (345) 946 4282
Fax: +1 (345) 945 8284
www.icta.ky

Mr. Victor Salgado
Acting Chief Executive Officer
Cable & Wireless (Cayman Islands) Limited

Mr. Sacha Tibbetts
Chief Executive Officer
DataLink, Ltd.

Mr. Martin Bould
Chief Executive Officer
Digicel (Cayman) Limited

Mr. Randy Merren
Managing Director
Infinity Broadband, Ltd.

Mr. Rob McNabb
Chief Executive Officer
WestTel Limited

(Collectively referred to as '**Licenseses**')

Via email

9 December 2016

Dear Licenseses

INDUSTRY WORKING GROUP - Provision of ICT Infrastructure to 3rd Parties – installing and maintaining attachments of communication cables to CUC's electricity poles

A. Summary

1. By this letter, the Information and Communications Technology Authority (the '**Authority**' or '**ICTA**') forms the Pole Attachment Industry Working Group - to consider various issues related to the installing and maintaining of attachments of communication cables to the electricity poles owned by Caribbean Utilities Company, Ltd ('**CUC**') (the '**Industry Working Group**').

2. The Industry Working Group has been set up by the Authority with the intention of facilitating open, honest and genuine collaboration between Licensees, in discussing those issues related to the duties and responsibilities involved in the lifecycle of the pole attachment process, including appropriate terms and conditions.
3. The Industry Working Group will be managed through regular meetings of the relevant representatives of the Licensees, and will convene its 'kick-off' meeting on **Tuesday, 20 December 2016**, with all such meetings to be held at the ICTA's offices.
4. It is envisaged that subsequent meetings, as starting from **Friday, 13 January 2017**, will be facilitated under the authority of the newly formed Utility Regulation and Competition Office ('**URCO**' or the '**Office**'), of which you are aware.
5. A detailed schedule of the Industry Working Group meetings is presented in **ANNEX 1** to this letter.

For noting, any correspondence related to this Industry Working Group should be sent to the Authority via consultations@icta.ky, and copied to all other Licensees, unless otherwise indicated.

B. Background

6. The ICTA considers that an effective process (which includes appropriate contractual terms and conditions) relating to the installing and maintaining of attachments of communication cables to the electricity poles owned by CUC is fundamental for the timely rollout of ICT networks across the Cayman Islands, which is necessary for the promotion of competition in the provision of ICT services and ICT networks.
7. The Authority's principle functions under the Information and Communications Technology Authority Law (2011) ('**ICTA Law**') include, among other things:
 - a. *to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;*¹
 - b. *to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;*²
 - c. *to license and regulate ICT services and ICT networks as specified in this Law and the Electronic Transactions Law (2003 Revision);*³

¹ Section 9(3)(a) ICTA Law.

² Section 9(3)(c) ICTA Law.

³ Section 9(3)(e) ICTA Law.

- d. to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;⁴ and*
- e. to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure.⁵*
8. The Authority notes that the same functions are set out in the (soon to be) amended Information and Communications Technology Law (2011) (**ICT Law**).⁶
9. Additionally, when the powers and responsibilities of the ICTA are transferred to the Office, the Office's principal functions will include, among other things:
- (b) to promote effective and fair competition;*
- (c) to protect the interests of consumers in relation to utility services and in so doing – [...] (ii) ensure that utility services are satisfactory and efficient and that charges imposed in respect of utility services are reasonable and reflect efficient costs of providing services [...];*
- as stated at section 6 of the Utility Regulation and Competition Bill 2016 (**URC Law**).⁷
10. A more detailed summary of the ICTA Law, ICT Law and URC Law legal frameworks relevant to this matter is set out in **ANNEX 3** to this letter.
11. The Authority's initiative to form this Industry Working Group arises from a long list of outstanding issues and various disputes observed over a number of years between Cable and Wireless (Cayman Islands) Limited (**CWCIL**), Digicel (Cayman) Limited (**Digicel**), Infinity Broadband, Ltd. (**Infinity**) and WestTel Limited T/A Logic (**Logic**), on the one hand, and DataLink, Ltd. (**DataLink**), on the other hand, which has resulted, in the Authority's view, in a highly inefficient process and substantial delays relating to the installing and maintaining of attachments of communication cables to the electricity poles owned by CUC.
12. A detailed background on the outstanding issues and disputes is presented in **ANNEX 2** to this letter.

⁴ Section 9(3)(g) ICTA Law.

⁵ Section 9(3)(h) ICTA Law.

⁶ References to the ICT Law, are to the 5 September 2016 draft Cabinet version.

⁷ Section 6 (1) (c) URC Law - references to the URC Law, are to the 5 September 2016 draft Cabinet version.

C. The Issues under Consideration

13. The Authority considers that there are five issues that underpin the aforementioned inefficiencies, as discussed below (the '**Issues**').

1. Issue One – Standard Pole Attachments Contracts

14. The Authority notes that the existing agreements for the attachment of communication cables to CUC's electricity poles, which have been negotiated and implemented over different time periods, provide disparate terms and conditions for the Licensees who have entered into agreement with CUC and/or DataLink to gain access onto CUC's electricity poles for attachment of their communication cables.

15. As a general example, and as noted in the Authority's ICT Consultation 2016-2 (A), Infinity and Logic have historically been required to pay "*Reservation Fees*" to DataLink in order to secure exclusive use of the "*Assigned Space*" in the "*Communication Space*" designated for attachment of the Licensees' communication cables onto CUC's electricity poles, while no such charges applied to the contracts which allowed CWCIL and DataLink to attach their communication cables to CUC's electricity poles. In addition, the Authority noted that the contracts of Infinity and Logic included requirements to make "*Total Minimum Annual Payments*" under their pole sharing agreements with CUC and/or DataLink, which may have acted as a disincentive for DataLink to issue pole attachment permits to Infinity and Logic in a timely manner.⁸

16. Further, as noted in ICT Consultation 2016-2 (B), the relevant sections in the pole sharing agreements referring to the timelines for permit applications or consents for pole attachments may lead to different interpretations of the relevant process, including the timing for DataLink to issue pole permits for the attachment of communication cables to CUC's electricity poles.⁹

⁸ As specified in **CUC-DataLink Pole Sharing Agreement:**

Assigned Space: means either the Communications Space or the Electrical Space, which means space on Poles that, can be used, as defined by the Applicable Standards and the Agreement, for the attachment of Facilities for the provision of Communications Service or Electric Service, respectively.

Communication Space: means the space on a Standard Utility 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 and as illustrated in Attachment A of Appendix C.

For further consideration, see paragraphs 156 to 168 at -

<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

⁹ See, for example, paragraphs 178 and 186 at -

<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

17. Also, as discussed in ICT Consultation 2016-2 (C), the Authority has noted that the charges relating to the attachment of communication cables to CUC's electricity poles, as specified and implemented through the relevant pole sharing agreements between CUC/DataLink, are unlikely to satisfy the obligations set out in the ICTA Law (ICT Law) and applicable regulations.¹⁰
18. Industry is tasked with, among other things, considering whether there should be an Industry-standard Pole Sharing Agreement and, if so, what the terms and conditions of such an Agreement should be. (It is worth noting that the discussion of Issues Two to Five will feed into the discussions on Issue One.)

2. Issue Two – Pole Attachment Specification Standards, including minimum standard pole and certification for Make Ready resources

19. Currently, there are no industry agreed specification standards relating to the principles supporting the attachment of the communication cables to CUC's electricity poles: such as to the qualifications of those undertaking the attachments or make-ready work and the specifications of the electricity poles themselves.
20. Industry is tasked with, among other things, considering whether or not there should be such agreed specification standards and, if so, what those standards should be.

3. Issue Three – Permit Application Process

21. The efficient and timely processing of the required permits by DataLink for attachment of communication cables onto CUC's electricity poles appears to be under considerable challenge, given the resources necessary to do all the required work relating to the pole attachment process, including but not limited to *Pre-Permit Survey*, *Post-Installation Survey* and *Make-Ready Work*.¹¹ This is a particularly

¹⁰ See paragraphs 202-209 at

<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

¹¹ As specified in **CUC-DataLink Pole Sharing Agreement**:

Pre-Permit Survey: means all work or operations required by Applicable Standards or reasonably required by Owner Utility to determine the potential Make-Ready Work necessary to accommodate Attaching Utility's Facilities on a Pole. Such work includes, but is not limited to, field inspection and administrative processing.

Post-Installation Survey: means all work and inspections required by Utility to determine and verify that the Attachments have been made in accordance with Applicable Standards and the Permit.

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

important issue considering the commitments by the Licensees to roll out fibre networks in the Cayman Islands within the timelines specified in their licences (for which, see paragraph 25 *et seq.* below).

22. In this regard, the Authority notes the submission by DataLink¹² in response to the Authority's ICT Consultation 2016-2, which includes a copy of the Memorandum of Understanding between Logic, DataLink and CUC, which states, among other things, that:

*Logic acknowledges that the **resources available to DataLink only provide it with the capacity to process Permit applications and perform work on a total of three hundred (300) poles per month in response to Permit applications from all entities with contractual rights to attach to poles** (emphasis added).*¹³

23. The Authority further notes that it has been suggested that Licensees other than DataLink could arrange for the Make-Ready Work to be done, provided that such Make-Ready Work is done by properly certified persons (such specifications/certifications would also be part of the discussions under Issue Two).
24. Industry is tasked with, among other things, considering whether such limitations in the capability of DataLink to ensure an efficient and timely processing of all the pole attachment permits applied for could be remedied by allowing appropriately certified independent contractors to perform the tasks related to the pole attachment process that have been, until now, exclusively performed by DataLink/CUC or their appointed contractors.

4. Issue Four – Planned Roll Out Timelines

25. The Authority notes that the following commitments by the Licensees to roll out fibre networks in the Cayman Islands are unlikely to have been met as of the date of this letter :
- a. **DataLink:** On 28 March 2012, the Authority issued a licence to DataLink stipulating a rollout schedule (Annex 1A) for deployment of DataLink's

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.

¹² <http://www.icta.ky/upimages/commonfiles/147922079012July2016DataLinkresponse.pdf>

¹³ See paragraph 10 at

<http://www.icta.ky/upimages/commonfiles/147924571512July2016DataLinkresponseDataLinkLogicMoU.pdf>

fibre optic cable sufficient to enable ICT services to be provided to 100% of the resident population of Grand Cayman by **31 December 2015**.¹⁴

- b. **Digicel:** On 19 April 2012, the Authority issued Amendment No. 20 to the licence of Digicel which required Digicel to complete its fibre network rollout sufficient to enable the provision of ICT Services to 100% of the resident population of Grand Cayman by **31 December 2015**.¹⁵
- c. **Infinity:** On 15 January 2013, the Authority issued Amendment No. 6 to the licence of Infinity in which Infinity proposed a rollout schedule for its fibre optic cable network to make available all its ICT services to 100% of the resident population of Grand Cayman by **31 December 2015**.¹⁶ (The rollout schedule was updated on 27 March 2014, but the end rollout date was unchanged.¹⁷)
- d. **Logic:** On 9 February 2012, the Authority issued Amendment No. 18 to the licence of Logic in which Logic proposed a rollout schedule for its fibre network to enable the provision of ICT services to 100% of the resident population of Grand Cayman by **8 February 2017**.¹⁸ (The rollout schedule was updated on 27 March 2014 with Amendment No. 22 to the licence of Logic, but the end rollout date was unchanged.¹⁹)

On 27 March 2014, the Authority issued Amendment No. 16 to the licence of WestStar T.V. Ltd. ('**WestStar**') which required from WestStar to complete its fibre network rollout sufficient to enable the provision of ICT Services to 100% of the resident population of Grand Cayman by **9 October 2018**.²⁰ In this regard, it is relevant to note that, on 15 August 2014, the Authority gave its consent to the transfer of all of the outstanding and issued shares in WestStar to Logic.²¹ WestStar's commercial offering of ICT Services is now provided by Logic.

26. Industry is tasked with, among other things, considering and commenting on the above rollout schedules, and proposing either collectively or individually a rollout timetable that represents a workable and achievable rollout of their fibre networks in a timely and efficient manner, taking into account the discussions related to the

¹⁴ http://www.icta.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf

¹⁵ http://www.icta.ky/upimages/licencedocument/ViewAmendment20_1417640423.pdf

¹⁶ http://www.icta.ky/upimages/licencedocument/ViewAmendment6_1417648282.pdf

¹⁷ http://www.icta.ky/upimages/licencedocument/ViewAmendment10_1417648311.pdf

¹⁸ http://www.icta.ky/upimages/licencedocument/ViewAmendment18_1417646354.pdf

¹⁹ http://www.icta.ky/upimages/licencedocument/ViewAmendment22_1417646387.pdf

²⁰ http://www.icta.ky/upimages/licencedocument/ViewAmendment16_1417651811.pdf

²¹ <http://www.icta.ky/upimages/commonfiles/141727969320140814ICTAtoBOTCATHoldingsLtdretransfershares.pdf>

permit application process - which can then, where considered appropriate by the Authority, form the basis of Licence amendments to the above rollout obligations.

27. Separately, and for the avoidance of doubt, the Authority reserves its position to take appropriate action, including enforcement action, under its statutory powers regarding the above.

5. Issue Five – Pricing/Costing elements applicable in the Pole Sharing Agreements

28. Finally, in the Authority's view, various charges related to the installing and maintaining of the attachments of communication cables to CUC's electricity poles appear to be determined on principles that are unlikely to comply with the ICTA Law (ICT Law), and/or the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the '**Infrastructure Sharing Regulations**'),²² as expressed in ICT Consultation 2016-2.²³

29. Industry is tasked with, among other things, considering the appropriateness of various charges, including but not limited to *Make-Ready Work* charges, *Annual Attachment Fee*, and *Reservation Fees* as set out in the Pole Sharing Agreements - all within the framework of the ICTA law and, when relevant, the ICT Law.

D. ICT Consultation 2016-2

30. The Authority notes that it is currently consulting on most of the above Issues, as set out in its ICT Consultation 2016-2. In order to allow the Licensees themselves an opportunity to resolve the matters being considered by that consultation process, the Authority puts that consultation process on hold for the duration of the Industry Working Group (subject to paragraph 31 below).

31. Further, to encourage an honest and open discussion within the Industry Working Group on the various outstanding issues, including but not limited to the five Issues identified above, any views and comments expressed during the Industry Working Group discussions on the issues relevant to ICT Consultation 2016-2 will not be made available as part of that consultation. That said, the position papers of the Industry Working Group, as reported by the Licensees involved in this process and described in paragraphs 41 to 43 below, will be so made available.

²² <http://www.icta.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>

²³ See, for example, paragraphs 198 to 229 of -
<http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

E. Terms of Reference: the Industry Working Group

Aim of the Industry Working Group

32. The Industry Working Group has been set up by the Authority in an attempt to facilitate open, honest and genuine collaboration between Licensees, and provide Licensees with an opportunity to resolve the identified commercial Issues themselves.

Attendance

33. As the Authority considers the setting up of and participation in the Industry Working Group to be fundamental to support the efficient and timely rollout of ICT networks across the Cayman Islands, as set out above, the Authority requires the attendance at the Industry Working Groups meetings of those persons able to speak on behalf of the Licensee on the matters under discussion and bind each of the Licensees, with a maximum of two persons attending each meeting on behalf of the separate Licensees.²⁴
34. While the Authority notes that participation in the Industry Working Group requires time and personnel commitments from Licensees, the Authority considers that such use of resources will likely provide benefits for each of the Licensees. If, for whatever reason, a Licensee cannot ensure that its duly authorised representative(s) will be attending the meeting, that Licensee must so inform the Authority, via consultations@icta.ky, prior to the relevant meeting.
35. The Authority will provide a private break-out room for Licensees to discuss any of the issues raised during the meetings.

The Authority's general points

36. In order to generate and facilitate discussions among the participants of the Industry Working Group, the Authority will provide at the initial **16 December 2016** meeting general points on the Issues raised. Such points are not intended to set out the Authority's final views on the Issues raised but, rather, are intended to be non-binding general points to frame the Industry Working Group's discussions.

²⁴ Section 10 of the ICTA Law provides the Authority with the power to "summon witnesses" and to "do anything which is related or incidental [to that]."

37. To facilitate Licensees' time to prepare for the Industry Working Group, a month will be provided for between that initial 'launch' meeting on the **16 December 2016** and when the Licensees are to start to present their general responses to the Issues under consideration (as from **13 January 2017**). This period is to allow for preparation by all the participants, for contribution to the Industry Working Group.

Secretariat Services

38. The Authority will use its good offices to facilitate the Industry Working Group, including providing the secretariat services. The Authority will chair the discussions.
39. The Authority will set up a DropBox account for the keeping of any documents related to the Industry Working Group.

Meeting Agenda

40. At each meeting:
- the Authority will take up to **20 minutes** to introduce the Issue under consideration (those Issues as set out at **ANNEX 1** below);
 - Licensees will then be provided with **20 minutes** each to present their views/thoughts/opinions on those Issues; and,
 - after which time, there will be a **45 minute** period for open discussions (no more than **5 minutes** per response, though the same person can make more than one response).

Position Papers

41. Further, the Authority will not take minutes of each meeting, but instead will require each Licensee to prepare and submit an *interim position paper* at the end of the consideration of each Issue (preferably one page in length), which sets out that Licensee's current views on the Issue considered, such paper to be submitted within one week following the last meeting relevant to the Issue considered. (As an example, **10 February 2017** is the last meeting date to discuss Issue Two, and such *interim position paper* is to be submitted to the Authority by **17 February 2017**.)
42. The *interim position papers* will be provided, for information only, to all the Licensees involved in the process. The Authority, and all the Licensees involved in the process, acknowledge that a Licensee may amend each of its *interim position papers* before the conclusion of the Industry Working Group process.

43. Each Licensee will prepare and submit its *final position paper* on **14 April 2016**, which will be a summary of that Licensee's views on all the Issues under consideration. The *final position paper* will be provided, for information only, to all the Licensees involved in the process.

Next Steps

44. It is the Authority's hope that as part of this process the Licensees achieve consensus on each of the Issues under consideration. Where they do, the Authority will review the consensus and, where it considers it appropriate, issue a determination approving it.
45. If no consensus has been obtained on the Issues (or some of the Issues) under consideration, as identified in section C above, the Authority will consider how to use its powers under the ICT/URC Law, including continuing with the ICT Consultation 2016-2 procedure, to address any outstanding Issues. As noted above, the outcomes of this Working Group process as provided for in paragraphs 41 to 43 above can be referenced in the ICT Consultation 2016-2 procedure where continued, or any other follow-up procedure, and the Authority can take them into account in reaching determinations on any of the outstanding Issues.

F. Conclusion

46. On a personal note, and to conclude, I hope that all Licensees enter into this Industry Working Group in the spirit it is intended, to work collectively to resolve the various commercial issues which have delayed greatly the rollout of ICT Networks - thus denying customers in the Cayman Islands access to the ICT Services provided over such Networks and the work, investment and social opportunities that come with such access.

Yours sincerely,



Mr. Alee Fa'amoe
Managing Director

ANNEX 1 – Schedule

- **Meeting # 1 – Tuesday, 20 December 2016, 2 pm to 5 pm**

The ICTA to present outlines/drafts for each of the matters, to facilitate discussions

- **Meeting # 2 - Friday, 13 January 2017, 2 pm to 5 pm**

All Licensees present their responses on the outlines/drafts, no discussion

- **Meeting # 3 – Friday, 20 January 2017, 2 pm to 5 pm**

Issue Two: Discussion on Pole attachment standards and minimum standard pole

- **Meeting # 4 – Friday, 27 January 2017, 2 pm to 5 pm**

Issue Two: Discussion on Pole attachment standards and minimum standard Pole

- **Meeting # 5 – Friday, 3 February 2017, 2 pm to 5 pm**

Issue Two: Discussion on Make Ready resource certification

- **Meeting # 6 – Friday, 10 February 2017, 2 pm to 5 pm**

Issue Two: Discussion on Make Ready resource certification

- **Meeting # 7 – Friday, 17 February 2017, 2 pm to 5 pm**

Issue Three: Permit Application Process

- **Meeting # 8 – Friday, 24 February 2017, 2 pm to 5 pm**

Issue Three: Permit Application Process

- **Meeting # 9 – Friday, 3 March 2017, 2 pm to 5 pm**

Issue Four: Pricing & Costing Components

- **Meeting # 10 – Friday, 10 March 2017, 2 pm to 5 pm**

Issue Four: Pricing & Costing Components

- **Meeting # 11 – Friday, 17 March 2017, 2 pm to 5 pm**

Issue Five: Roll Out Obligations

- **Meeting # 12 – Friday, 24 March 2017, 2 pm to 5 pm**

Issue Five: Roll Out Obligations

- **Meeting # 13 – Friday, 31 March 2017, 2 pm to 5 pm**

Issue One: Common Contract

- **Meeting # 14 – Friday, 7 April 2017, 2 pm to 5 pm**

Issue One: Common Contract

- **Meeting # 15 – Friday, 14 April 2017**

Declaration of position on each area by each Licensee

- **Meeting # 16 – Friday, 21 April 2017**

Complete results document for publishing

ANNEX 2 – Background

1. Since **22 April 2011**, by amendment to section 23 of the Law, 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].*"²⁵
2. 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*".²⁶
3. On **20 March 2012**, CUC and DataLink entered into a Master Pole Joint Use Agreement (the '**CUC-DataLink Pole Sharing Agreement**')²⁷, 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.
4. On **20 March 2012**, CUC and Infinity executed a Deed of Variation (the '**CUC-Infinity Deed of Variation**')²⁸ amending and supplementing the terms of a Master Pole Joint Use Agreement, dated 22 November 2005 (the '**CUC-Infinity Pole Sharing Agreement**'), which allows Infinity to attach its communication cables to CUC's electricity poles.²⁹
5. 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 provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee*" ("**Provision of ICT Infrastructure to 3rd Parties**").³⁰
6. 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

²⁵ <http://www.icta.ky/upimages/commonfiles/1417276774ICTAamendmentLaw2011.pdf>

²⁶ <http://www.icta.ky/upimages/commonfiles/141727998220110517CUC-DataLinkNotice.pdf>

²⁷ http://www.icta.ky/upimages/agreement_documents/ICTACUCDataLinkAgreement_20March2012_1458325766.pdf

²⁸ http://www.icta.ky/upimages/agreement_documents/1417708388DeedofVariationCUCInfinityBroadband.pdf

²⁹

http://www.icta.ky/upimages/agreement_documents/1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf

³⁰ http://www.icta.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf

Agreement and the CUC-Infinity Deed of Variation, from CUC to DataLink (the '**Infinity-CUC-DataLink Novation Agreement**').³¹

7. On **9 November 2012**, CWCIL, CUC and DataLink executed a Novation and Amendment Agreement (the '**CWCIL-CUC-DataLink Novation Agreement**')³² which amended, and novated and/or transferred all of CUC's rights and obligations under the Agreement for Licensed Occupancy of CUC Poles by CWCIL made on 5 November 1996 (the '**CUC-CWCIL Pole Sharing Agreement**'),³³ to DataLink.
8. On **12 February 2013**, Digicel notified the Authority of a dispute determination request relating to the allocation of communications space access by DataLink (that determination request was subsequently withdrawn).
9. On **18 July 2013**, 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**').³⁴
10. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the '**Dispute Regulations**'),³⁵ Infinity submitted a dispute determination request to the Authority contending that a dispute had arisen 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.³⁶
11. 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 the relevant Licensees³⁷ with the intention to investigate in more detail the matter of the dispute.

³¹ http://www.icta.ky/upimages/agreement_documents/NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED_1458325571.pdf

³² http://www.icta.ky/upimages/agreement_documents/1417708190NovationAgreementCUCDataLinkLIMENov2012executed.pdf

³³ http://www.icta.ky/upimages/agreement_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf

³⁴ http://www.icta.ky/upimages/agreement_documents/141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf

³⁵ <http://www.icta.ky/upimages/commonfiles/1417277080ICTA-DisputeResolutionRegulations.pdf>

³⁶ <http://www.icta.ky/upimages/commonfiles/141726659620140912C3DeterminationRequest.pdf>

³⁷ DataLink (<http://www.icta.ky/upimages/commonfiles/143836666320150626ICTAtoDataLinkrepoledispute.pdf>); Infinity (<http://www.icta.ky/upimages/commonfiles/143836669520150626ICTAtoInfinityrepoledispute.pdf>); Logic (<http://www.icta.ky/upimages/commonfiles/143836676620150626ICTAtoLogicrepoledispute.pdf>); and CWCIL (<http://www.icta.ky/upimages/commonfiles/143836672520150626ICTAtoLIMerepoledispute.pdf>)

12. On **10 July 2015**, Appleby (Cayman) Ltd., acting on behalf of CUC, informed the Authority that CUC commenced proceedings before the Court against Infinity and Logic, seeking orders restraining Infinity and Logic, as well as their service agents or independent contractors from:
- ascending any pole owned by CUC;
 - making any attachment to any pole owned by CUC; and
 - carrying out any work of any nature on any pole owned by CUC.
13. On **26 August 2015**, as a follow-up to the submissions³⁸ received in response to the Authority's request for information of 26 June 2015, the Authority sent additional requests for information³⁹ in order to clarify certain responses provided by Infinity and Logic, and to make further progress on the investigation of the Dispute. Responses from Infinity⁴⁰ and Logic⁴¹ were received, respectively on 2 and 3 September 2015.
14. 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 CUC's electricity poles.
15. On **27 April 2016**, the Authority issued a decision (**'ICT Decision 2016-1'**)⁴² relating to the dispute between Infinity and DataLink, in which the Authority determined that the **CUC-Infinity Pole Sharing Agreement** shall 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**.⁴³
16. Following from the determination made in ICT Decision 2016-1, the Authority also issued:

³⁸ DataLink (<http://www.icta.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>); Infinity (<http://www.icta.ky/upimages/commonfiles/14595195658July2015InfinityresponsetoICTA.pdf>); Logic (<http://www.icta.ky/upimages/commonfiles/145951962817July2015LogicresponsetoICTA.pdf>); and CWCIL (<http://www.icta.ky/upimages/commonfiles/145951959831July2015LIMEresponsetoICTA.pdf>)

³⁹ <http://www.icta.ky/upimages/commonfiles/145952021226August2015ICTAtoLogicfollow-up.pdf>
<http://www.icta.ky/upimages/commonfiles/145952018126August2015ICTAtoLIMEfollow-up.pdf>

⁴⁰ <http://www.icta.ky/upimages/commonfiles/14595202892September2015InfinityresponsetoICTA.pdf>

⁴¹ <http://www.icta.ky/upimages/commonfiles/14595203193September2015LogicresponsetoICTA.pdf>

⁴² <http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

⁴³ <http://www.icta.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

- a. public consultation (**ICT Consultation 2016-1**) seeking views from interested parties on the relevant cost recovery principles relating to the reattachment of Infinity's communication cables onto CUC's electricity poles, from the current height of 254 inches to the new height of 258 inches above the ground, and
 - b. public consultation (**ICT Consultation 2016-2**) seeking views from interested parties on the (A) appropriateness of the reservation fees relating to the attachment of communication cables to CUC's electricity poles; (B) permit application process, including Make-Ready Work, for the attachment of communication cables to CUC's electricity poles; and (C) charging principles relating to the attachment of communication cables to CUC's electricity poles.
17. On **5 May 2016**, pursuant to the Dispute Regulations, CWCIL submitted a dispute determination request to the Authority contending that a dispute had arisen between CWCIL and DataLink relating to a Master Pole Joint Use Agreement proposed by DataLink to supplant the **CUC-CWCIL Pole Sharing Agreement**, noting that CWCIL and DataLink had been negotiating the new agreement "*in fits and starts for a couple of years*".
18. On **12 July 2016**, in response to ICT Consultation 2016-2, DataLink stated amongst other things that "[t]he FLOW [CWCIL] agreement will reach its final expiry date in November 2016 and as such FLOW [CWCIL] must negotiate a new agreement prior to that date or remove its attachments."
19. On **30 September 2016**, the Authority issued a decision (**ICT Decision 2016-2**) relating to ICT Consultation 2016-1 on cost recovery for the reattachment of Infinity's communication cables onto CUC's electricity poles.⁴⁴
20. On **4 October 2016**, the Authority wrote to DataLink, that in the event the CUC-CWCIL Pole Sharing Agreement expires before the parties have concluded a new agreement – DataLink should "...not remove CWCIL's attachments from DataLink's poles, other than in the normal course of business..." and to "...refrain from issuing a notice, or exercising any rights under sub-clause 8.1(ii) of the 1996 Agreement." The Authority also directed DataLink and CWCIL to report to the Authority on all steps taken by the two parties, including all material dates, in the past twenty-four (24) months to negotiate and conclude a new agreement, if not already so reported, by 24th October 2016.

⁴⁴ <http://www.icta.ky/upimages/commonfiles/147924640920160930ICTDecision2016-2.pdf>

21. On **24 November 2016**, DataLink submitted to the Authority a newly executed master pole joint use agreement between DataLink and CWCIL (the '**DataLink-CWCIL Pole Sharing Agreement**')⁴⁵ that had been signed by both parties on 18 November 2016.

⁴⁵ http://www.icta.ky/upimages/agreement_documents/MasterPoleJointUseAgreement_1480965308.pdf

ANNEX 3 – Legal Framework

A – The Information and Communications Technology Authority Law (2011)

1. In accordance with **section 9 (1) of the Law**, the Authority:

has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.

2. **Section 9 (3) of the Law** specifies the principal functions of the Authority, including the following:

(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;

[...]

(k) to carry out such other functions as are conferred on the Authority by or under this Law or any other law.

3. **Section 9 (4) of the Law** states that:

The Authority may regulate the rate, prices, terms and conditions of any ICT service or ICT network that is required to be licensed where the Authority is of the opinion that it is in the interests of the public to do so.

4. **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.

5. 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 –

(c) 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;

6. 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.

B – Information and Communications Technology Law (based on 5 September 2016 Cabinet version)

7. Section 67A. (1) states that:

(1) The Office may decide, on its own initiative, to consider and determine a dispute between any persons concerning the potential or

actual operation of an ICT network or provision of an ICT service and in so doing shall notify all parties to the dispute that it is doing so.

(2) The Office shall include in any notification under subsection (1), a timetable for considering and determining the dispute and may give directions with which the relevant persons to the dispute are to comply in order to enable the Office to carry out its functions, responsibilities and duties.

(3) The Office's determination shall be one which it considers will enable the dispute to be resolved in a way which best contributes to the fulfilment of its functions, responsibilities and duties, and may include any one or more of the following -

(a) the making of a declaration setting out the rights and obligations of the parties to the dispute;

(b) the giving of a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) the giving of a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by the Office;

(d) for the purpose of giving effect to a determination by the Office of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, the giving of a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment; and

(e) such other course of action as the Office considers necessary to resolve the dispute.

(4) The procedure for considering the dispute and making a determination is the procedure that the Office is required, by Law, to follow.

(5) Where the Office makes a determination under this section, the Office shall publish the determination.

C – The Utility Regulation and Competition Law 2016 (based on 5 September 2016 Cabinet version)

8. Section 61 states that:

(1) The Office may, as soon as reasonably practicable after this section comes into force, establish one or more alternative dispute resolution schemes for disputes between licensees and between licensees and consumers or approve a scheme proposed by licensees under subsection (4).

(2) In establishing alternative dispute resolution schemes, the Office shall request and take into account proposals from licensees.

(3) Alternative dispute resolution schemes may be comprised of -

(a) mediation, whether conducted by the Office, persons appointed by the Office or persons appointed by the parties to a dispute or a third party;

(b) arbitration of specific identified matters having limited scope by an expert appointed by the Office or the parties or a third party; or

(c) such other methods of alternative dispute resolution as the Office may determine.

(4) The Office may approve an alternative dispute resolution procedure proposed by licensees if it is -

(a) fair, transparent and non-discriminatory;

(b) administered by persons who are independent of the licensees to whom the alternative dispute resolution scheme applies;

(c) administered in compliance with the policy objectives; and

(d) designed to ensure that individuals to be employed under the alternative dispute resolution scheme as mediators, adjudicators, arbitrators or such other roles as may be contemplated have qualifications and experience to carry out such functions.

(5) The Office may require those responsible for the management and operation of an approved alternative dispute resolution scheme to report to the Office regarding its functioning, and it shall withdraw its approval if the alternative dispute resolution scheme ceases to meet any of the conditions in subsection (4).

(6) An alternative dispute resolution scheme established under subsection (3)(b) may provide for binding decisions, including interim and conservatory measures.

(7) An alternative dispute resolution scheme established under this section shall not prejudice any rights under any other provision of this Law or any other Law.

9. Section 70 states that:

(1) Any conduct on the part of one or more licensees which amounts to the abuse of a dominant position in a market or sector for which the Office has responsibility is prohibited but an authorization holder that has been issued with a licence pursuant to the Electricity Regulatory Authority Law (2010 Revision) shall be entitled to protect its legitimate business interests subject to this Law and any other relevant Law.

(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;

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

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and

(e) using revenues attributed to a particular service or activity to cross subsidize unfairly or affect competition for another service or activity.

(3) A licensee which is in a dominant position shall be deemed to have significant market power.

(4) In this section - "dominant position" means a dominant position within the Islands.