



June 16, 2017

Utility Regulation and Competition Office
85 North Sound Road
P.O. Box 2502
Grand Cayman KY1-1104

INDUSTRY WORKING GROUP – DATALINK RESPONSE PAPER

RE: Provision of ICT Infrastructure to 3rd Parties – installing and maintaining attachments of communication cables to CUC’s electricity poles

Introduction

DataLink, Ltd (“DataLink”), welcomed the opportunity to participate with the Industry Working Group meetings with Cable and Wireless (Cayman Islands) Limited (‘CWCIL’), Digicel (Cayman) Limited (‘Digicel’), Infinity Broadband, Ltd. (‘Infinity’) and WestTel Limited T/A Logic (‘Logic’). DataLink is also pleased to review and comment on the Industry Working Group (“IWG”) responses to assist in the consideration of the process and where it has resulted in consensus among the Licencees and the issues that remain for potential determination. DataLink will address the points in the order set out by the Office of the Regulator (‘OfReg’) and then seek to address additional points raised in the reports submitted to OfReg by other Licencees.

DataLink wants to reiterate the very important fact that Caribbean Utilities Company, Ltd (“CUC”) is the owner of this infrastructure. CUC incurred significant expense in developing an island wide infrastructure, on which it is entitled to receive income for sharing (at rates negotiated with commercial parties in arm’s length transactions). These poles are not public property to which any other entity has an automatic right of use. Nor are they property on which a particular licensee can demand use at rates dictated by them, or without paying for use at all. The sharing of the infrastructure is regulated because it has the potential to provide consumers (residents of the Cayman Islands) with access to information and communications technology. Regulation is needed (and welcomed) to ensure the promotion of competition in the provision of those services so that consumers have access to options in the supply of that technology. Licensees have been offered access to share CUC’s infrastructure at reasonable rates (negotiated with commercial parties in arm’s length transactions) and on the same (or similar) terms and conditions. There has been no breach of the Information and Communications Technology Authority Law (2016) (“the ICTA Law”) or Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (“the Regulations”) in these commercial dealings, which we set out in more detail below.



DataLink comments provided are intended to illuminate the issues in good faith and as a means to bring about an end to any friction and to facilitate progress towards a more collaborative industry environment. It is our aim to safely and efficiently provide infrastructure sharing for the industry so that the people of the Island may benefit from the provision of service while DataLink maintains a sensible and sustainable business model and the pole infrastructure owner, Caribbean Utilities Company, Ltd (“CUC”), remains in compliance with its Transmission and Distribution Licence conditions, reliability and safety requirements and also protects the structural integrity of the electrical infrastructure.

DataLink notes that two out of three of the ICT Licensees (that currently share the infrastructure owned by CUC) expressed support, during the IWG process and in their final reports, for the existing infrastructure sharing relationship and the standard contract negotiated with them. The negotiations of those agreements were concluded on a commercial basis, in line with the principals clearly expressed in the Regulations. DataLink believes the best outcome of this process (the reasons for which are set out in more detail below) will be for all Licensees to enter into a standardized contract in the draft submitted, which contains the same (or similar) terms to those already negotiated with commercial parties in arm’s length transactions. This, in DataLink’s submission, will result in the efficient and harmonized utilization of the infrastructure and the promotion of competition in the provision of ICT services. DataLink believes that a process whereby OfReg sets the rates, prices and terms and conditions of commercial contracts primarily on the basis of a complaint from one licensee would not be in the interests of the parties, or the public.

Infrastructure Sharing

While the IWG process apparently evolved from the consideration of matters raised in Determination Requests and general complaints made to the Authority against DataLink, it is worthwhile to note that some of the issues raised and discussed covered matters that stretch beyond the infrastructure sharing responsibility of DataLink under its ICT Licence and the Law. The legal requirements for DataLink, in terms of its agreements and relationship with other ICT Licensees, relate to the facilitation of the sharing of existing infrastructure (of property owned by CUC). DataLink notes that some comments by IWG participants assume a duty or responsibility that exceeds the requirements of the Law and Regulations. DataLink does not propose to address each and every question or comment raised in the submitted reports, unless they relate to obligations of infrastructure sharing found within the Law or Regulations or as directed by the regulator.

DataLink and CUC have made considerable efforts to negotiate standard agreements on similar terms with all ICT Licensees and to accommodate requests for the sharing of the infrastructure where there is *existing* sufficient capacity as required under the law. DataLink has also committed to make necessary changes to overcome technical and engineering difficulties that can reasonably be addressed in preparing room for the communications space on the existing infrastructure. It is clear to all that the infrastructure was designed and built over a long period of time and under the terms and conditions of Government or



Regulatory Licences that place (placed) relevant requirements and restrictions on the construction of the network and those requirements did not include the automatic provision of space for ICT Licensees.

Digicel have claimed that the infrastructure sharing process is overly complicated and benefits DataLink and CUC in that it shields them from competition or may offer them a competitive advantage over entrants to the industry. DataLink believes that the process is necessary and provided for in the Law and Regulations and will elaborate on this in discussion on Issue Three. The assumption that the process shields DataLink or CUC from competition is incorrect and reveals a continued misunderstanding of DataLink's positioning. DataLink exists to manage the infrastructure sharing arrangements in the communications space on the infrastructure owned by CUC and will benefit from the organized and optimal utilization of the infrastructure by the ICT Licensees including the ability to charge the related pole attachment fees. As stated in previous submissions, DataLink's business model is not one of direct competition with the other Licensees for end use ICT customers. As an infrastructure sharing provider, DataLink's interest lies in progressing the safe and structurally sound attachment of the network of other Licensees who in turn respect and operate in good faith within the terms and conditions of the negotiated agreement. The position of CUC is to protect the integrity of its infrastructure, the safety of all personnel working on the infrastructure, the reliability of electrical service to the people of the Island and compliance with its Licence requirements. CUC is not in competition with ICT Licensees at all. It is simply offering Licensees access to the infrastructure it owns at rates it believes (and some Licensees agree) are reasonable. This is entirely within the provisions of the Law and the Regulations.

DataLink continues to assert that it does not hold a monopoly position in the ICT Industry, its main function is infrastructure sharing to facilitate that industry. Neither DataLink, nor CUC, presently offer the same services as those of the other ICT Licensees, so it is incorrect as both a matter of interpretation and a matter of law to suggest that it holds a monopoly position. All Licensees have infrastructure that may assist the others in developing their ICT networks by sharing. Pole attachment to the infrastructure owned by CUC is not the only method of fibre roll out and neither CUC nor DataLink are the sole organization with permission to plant a pole network or with the ability to manage all of the infrastructure in use for ICT Networks locally. DataLink agrees that connection with the communications space on the existing pole infrastructure is in the interests of the Island generally and is also the least cost option for other licencees over trenching or building a pole network of their own. The reality of this does not, however, impose an obligation on DataLink to go beyond the requirements of the Law or Regulations, nor does it result in the automatic transfer of ownership or rights to the public use of CUC's infrastructure. As set out above, CUC incurred significant expense in planting a pole network, on which it is entitled to receive income. The fact that CUC recovers some of the pole costs from its own business (the supply of electricity), does not mean that other businesses can make use of its infrastructure as a leg up to start their own businesses without having to negotiate reasonable terms for access to it. That is not what was intended by the Law or the Regulations.



Issue One - Standard Pole Attachment Contracts

DataLink has consistently maintained the desire to negotiate a standard set of terms and conditions with other Licensees, as provided in its Licence Application to the Information and Communications Technology Authority (“the Authority”) and as required by the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (“the Regulations”). The DataLink standard pole attachment agreement (Master Pole Joint Use Agreement) has not materially altered from the legal framework document submitted with the application to the Authority to become an ICT Licensee, which terms and rates were acceptable at that time. Various additional commercial terms have been negotiated with other Licensees over time, including attachment fees, make-ready timelines and sharing of make-ready costs (refunds). These terms have differed in some respects, simply due to the amount of time that has passed between agreements, the competition in the ICT space at the relevant time and change in market rates. However, DataLink has sought to negotiate equivalent terms with all Licensees with an agreement for infrastructure sharing of the communications space.

DataLink notes that the Regulations and the Information and Communications Technology Authority Law (2016) (“the ICTA Law”), require Licensees to share their infrastructure, unless certain circumstances prevent sharing. However, the Regulations specifically impose the obligation for the negotiation of a formal agreement between the parties (see Regulation 6). DataLink maintains that an agreement (preferably a standard one) is therefore required to be negotiated and maintained between the parties and that the provision and use of such services should always be in accordance with those agreements, subject to the Dispute Regulations and related directives by OfReg that are within its powers established under the Law and Regulations. The Law and Regulations do not provide for interconnection or infrastructure sharing without an agreement between the parties.

DataLink notes that there is apparent consensus on the issue of the requirement for a standard agreement from Logic, CWCIL and Digicel. Logic and CWCIL note that they both have successfully negotiated agreements that are operating sufficiently. DataLink agrees with this position. Digicel has no agreement and has not yet approached DataLink for the continued negotiation of one however there is clear acknowledgement that such agreements are necessary and common in practice.

Infinity currently has the benefit of a negotiated agreement with DataLink. Notwithstanding this and the general obligation found within the Law and Regulations that the relationship between the parties in an infrastructure sharing relationship are to be subject to the terms and conditions of such an agreement, Infinity exhibits no good faith or respect for the terms and conditions of that agreement that it negotiated and signed with DataLink. This is evidenced by the lack of payment of recent attachment fees, a large proportion of make-ready fees and the continued practice of attachment to the infrastructure without applying for or receipt of permits. This led to Infinity providing an undertaking to the Grand Court of the Cayman Islands on 30 July 2015 not to make any attachments or carry out any work on CUC’s poles



without a valid permit. The Authority also issued a directive in ICT Consultation 2016 – 2 which clearly requires the receipt of a permit prior to attachment to the infrastructure (including payment for any necessary make-ready).

DataLink notes that Infinity has now requested that OfReg nullify its negotiated agreement with DataLink and has demanded that OfReg permit it to continue to take advantage of infrastructure sharing and to permit a third party contractor to continue with the build out of Infinity’s network using infrastructure that neither the contractor nor Infinity owns, until a determination is made by OfReg related to their complaints. DataLink submits that this requested regulatory directive is not provided for or supported by the ICTA Law or Regulations. Nullification of the negotiated agreement would remove the ability for Infinity to use infrastructure sharing services from DataLink and prevent the use by them of the infrastructure owned by CUC. Infinity’s demands are unfortunately consistent with their approach to this entire process and the repetitive filing of Determination Notices, all of which have the aim of trying to achieve access to infrastructure that it does not own to benefit its own business. This is despite two other Licensees rolling out their own networks on the same or similar terms.

Several issues were raised in discussion of the Standard Agreement during the IWG process and in the submissions, however, few practical solutions were offered by the other Licensees. DataLink will address the main issues below and reiterate the suggested solutions offered by DataLink for consideration during the process.

Issue Two - Pole Attachment Specification Standards

Throughout the IWG and ICT Consultation processes DataLink sought to provide a thorough explanation of the standards for poles in the infrastructure owned by CUC and the change in those standards over time. Neither Logic nor CWCIL expressed any concern in the area of standards in general in their submissions.

The standards are applicable to the infrastructure sharing and are in compliance with requirements of safety codes, particularly the NESC and applicable laws, and therefore to the other Licensees, only to the extent that it correctly defines the telecommunication space on the pole from the top of the safety space and below.

Infinity suggested that *“a “Standard Utility Pole” be defined and agreed to ensure all calculations and models are equally conformed and distributed fairly communicating the appropriate activity, allocation of space and identification of attachee.”* DataLink notes that the Authority has already issued a directive in ICT Decision 2016 – 1 that clearly states the attachment points for each attaching telecom and also the allocation of space. DataLink has included these in the new draft standard agreement. Infinity also suggested that the definition of a standard pole should include automatic provision for the attachment of



“all four Licences”. While DataLink agrees that this would add to efficiency on a go forward basis and the matter was discussed at length during the IWG process, for this to occur a change in either CUC’s Licence and/or the negotiation of payment of proportionate costs upfront would be required. A suggested addition to this effect is also included in the new draft standard Pole Attachment Agreement submitted by DataLink as part of its final position paper on the IWG proceedings.

Digicel’s comments that *“In CUC’s case, the attachment of telecommunications cables causes no incremental requirement to augment the poles in terms of either height or strength”* and *“The capital cost of the entire height of the pole is attributable to CUC’s electricity business”* are based on the entirely incorrect assumption that the attachment of ICT Licensees to the existing infrastructure does not impact the strength or integrity of that infrastructure nor does the provision of a communications space in the network require a pole longer than that required for the provision of electrical service alone.

DataLink submits that there is general consensus that the communications space should be provided for and that the real issue outstanding is the responsibility for the costs related to making that space available, while preserving the overall integrity and strength of the pole network, on both a retroactive and an ongoing basis. DataLink addresses these points under Issue Five.

Digicel and Infinity address the issue of the cost of a pole that is designed to carry electrical infrastructure and suggest that poles designed for use by ICT Licensees only would be less. While “telco only” poles may be less expensive, DataLink is not in the business of providing telco only infrastructure. It is managing and facilitating the infrastructure sharing requests on the existing electrical infrastructure it built out and owns. Where additional poles are planted (mid-span poles) they are required for the integrity of the pole network infrastructure generally due to the addition of the ICT Licensee requirement for infrastructure sharing on the existing network. As such the suggestion to add a definition of a “telco only” pole in the agreement governing infrastructure sharing between DataLink and another ICT Licensee is inappropriate and the request to charge rates equivalent to those for telco only poles is unreasonable.

Issue 2 - Make ready Resource Certification

Throughout the IWG and ICT Consultation processes DataLink has sought to provide a thorough explanation of the requirements for the make-ready work necessitated by infrastructure sharing requests. The obligation on CUC, and by extension DataLink, to protect the integrity of the infrastructure and to ensure that applicable standards in planning, construction and safety are followed at all times during such work is strict. The Law and the Regulations do not require a responder to an infrastructure sharing request to accept those that, in the view of the regulator, risk damage to property, endanger life or safety or threaten the integrity, security or interoperability of the network. Nor do the Regulations require a Licensee to allow another ICT Licensee to perform any adaptation or ‘make-ready’ works to accommodate them in or on the infrastructure (which is owned by CUC). DataLink submits that requiring or permitting



unsupervised third party contractors to perform work on the CUC owned infrastructure is not within the Authority's powers under the Law or the Regulations, would not be in the public interest and most certainly could lead to a breach of standards contained in the licences to which CUC would be held accountable and increase the risk of serious safety infractions. Similarly, the standard of materials used for make-ready on CUC's infrastructure must meet CUC standards to preserve the integrity of the system. The poles are the property of CUC. They are to be maintained by CUC. Licensees can gain access to that property, but there is no basis (in contract or in law) upon which they can undertake their own work on the poles to accommodate their own attachments.

Infinity's various requests for further evidence of accreditation, supervision, insurance and certification to work on the infrastructure owned by CUC and the "*approved accredited regulated vendors*" who supply the materials for CUC are misguided. CUC and its regulator agree the standards required to provide the reliable electrical service to the Island.

DataLink suggests that there is general agreement with the issue of the utilization of approved third party contractors under strict supervision of CUC. The only apparent dissention from this opinion is indicated by the Digicel proposal in the form of a suggested '*project based approach*' using (off Island) resources assembled to perform a '*make-ready deployment*'. Digicel refers to a single local third party contractor as evidence to support the viability of the suggestion, however, the justification used by Digicel fails to address the following issues noted by DataLink:

- Sufficient resources to provide such a project based approach are not available locally and certainly not within the approved third party contractor in use under CUC supervision currently.
- A project based approach would be a major undertaking that would inevitably result in an adverse impact on the supply of electrical service to customers. This must be minimized and recognized as an inevitable result so that no regulatory impact or fines could be imposed on CUC for lower than expected reliability performance due to the interruptions of power supply for make-ready reasons. Even if forgiveness of regulatory fines for electric service reliability was granted, CUC would experience brand damage if forced to provide electric service at a lower than acceptable reliability level, and would therefore oppose any such action that would create this unnecessary situation. Even if forgiveness of regulatory fines for electric service reliability was granted, CUC would experience brand damage if forced to provide electric service at a lower than acceptable reliability level, and would therefore oppose any such action that would create this unnecessary situation.
- A project based approach could only be achieved under the requirement of supervision by CUC, with fair payment upfront from all ICT Licensees attaching to the infrastructure, and would require regulatory agreement to enforce this. DataLink is not required to finance the costs for infrastructure sharing under the Law or Regulations nor will it agree to do so, yet this appears to be requested, although unreasonable, from both Digicel and Infinity.



Issue Three – Permit Application Process

The IWG participants generally agree that timeframes for the permit application process should be defined. DataLink has proposed those close to or quicker than FCC guidelines in place in North America. These guidelines are based on experience of make-ready challenges in diverse areas including some similar to the market in the Cayman Islands. The pole structure, safety regulations and make ready guidelines are similar and so very applicable to the local market. DataLink did not seek to reinvent the wheel by choosing an international standard as a guide, the choice is appropriate and justifiable and takes into account common issues and challenges with make-ready timelines. If anything, the Cayman Islands market is more challenged than those in North America due to the nature of the Island, the difficulty, time constraints and expense of shipping, the lack of available local resources and the challenge with private property and permissions. (DataLink notes that it has a Memorandum of Understanding in place with Logic that sets these timelines out as targets for make ready work. This was negotiated in good faith to resolve timing and processing issues. DataLink also notes that in the one year of operating under this MOU with Logic that it has been able to meet these make-ready timelines in accordance with the terms in the MOU.) The same terms have been offered to the other Licensees.

Infinity provided some more detailed comments on the permit application process that require addressing. Beginning with the issue of calendar or business days Infinity noted: *“To expedite the permit application process C3 requests Calendar Days, although assurance from DataLink would be required to not incur additional over-time costs applicable to weekend labour”*. DataLink believes this to be unreasonable and maintains that a business day approach is appropriate for the timelines as included in the new draft standard agreement, however, should calendar days be the adopted standard then the timelines should be increased accordingly or over-time allowed in accordance with the Labour Law and general safe practice.

Please see the proposed new standard contract for greater detail on the suggested permit process amendments agreeable to DataLink.

Issue Four - Planned Roll Out Timelines

There was no apparent consensus on the issue of the establishment of a boundary line beyond which a universal roll out should be pursued, most agree that market forces should dictate the roll out speed and open up the opportunity for the provision of services by alternative technology.

Despite the negativity expressed by particular ICT Licencees, DataLink believes that with good faith commitment to the terms and conditions of the infrastructure sharing agreement including the permit process and receipt of the required payments for services, it will be able to retain resources sufficient to meet the 36 month deadline. For convenience, DataLink will make all comments related to pricing/costing and payments under Issue Five.



Unfortunately, Infinity has made a number of comments that are both inflammatory and inappropriate for a process that is intended to be approached in good faith and DataLink so does not propose to address them all. DataLink believes it will be in the interests of all parties if the Authority takes the same approach in relation to such comments. However, Infinity did raise the question of why DataLink had not strategically 'planned' provision of make-ready ahead of the receipt of specific applications to attach. DataLink notes that the laws and regulations around infrastructure sharing do not contain a requirement that an ICT Licensee pro-actively build infrastructure for other ICT Licensees nor to accommodate their requirements before requests for infrastructure sharing are received. This also makes no business sense whatsoever as it would result in unnecessary expenditure for which DataLink may receive no return. In accordance with the agreement, Infrastructure sharing requests of DataLink occur in two parts. First the general terms and conditions related to sharing the pole infrastructure is negotiated and second, the permit application and approval process represents a vital part of the specific infrastructure sharing request in that it identifies the specifics of the infrastructure sharing request including the location, technical aspects, etc.

The Regulations provide at 6 (k) *“interconnection and infrastructure sharing services shall be provided by the responder to the requestor at any technically feasible point on terms and conditions that are just, reasonable and non-discriminatory and in accordance with an interconnection or infrastructure sharing agreement between the two parties”*

In addition Regulation 4 (3) *states that A responder shall not refuse to provide infrastructure sharing services except where –*

- (a) There is insufficient capacity, taking into account its reasonably anticipated requirements; or*
- (b) Such provision would create a technical or engineering difficulty that could not be reasonably addressed.*

For DataLink to assess infrastructure as required, individual permit applications are necessary and the poles must be reviewed individually. Viewing the entire pole network as a single point for infrastructure sharing is not only impractical, it could also result in a justified refusal due to the known technical and engineering issues in accommodating a communications space Island-wide. In addition, every ICT Licensee is not expected nor required to attach to every individual pole in the existing infrastructure. It is therefore illogical for the assumption to be made that the general infrastructure sharing agreement automatically covers the entire network of poles at the time a general access agreement is signed.

DataLink is also not required to finance the costs for infrastructure sharing under the Law or Regulations nor will it agree to do so, yet this would have been required for DataLink to perform the necessary make-ready Island-wide in the event that any or every ICT Licensee could possibly attach. There are many areas that the ICT Licensees have used alternative methods of roll-out, even before the issuance of an ICT



Licence to DataLink, these include the use of shared infrastructure with other ICT Licensees such as ducts, etc., and trenching.

Issue Five - Pricing/Costing elements applicable in the Pole Sharing Agreements

As noted by the IWG participants and OfReg, the service required from DataLink is infrastructure sharing. The negotiation and provision of an agreement and of the specific infrastructure sharing services are subject to the ICTA Law and Regulations. Regulation 6 sets out the general principals, which include the responsibility for Licensees to negotiate an agreement in good faith and also the right for a Licensee to refer to the Authority if a dispute arises during the negotiation of an agreement. As set out in DataLink's previous responses to the Authority, DataLink believes that the calculation of its fees are determined in a transparent manner and are reasonable. Both Logic and CWCIL have negotiated agreements as required by the Regulations and have expressed their support of the commercial agreements. Digicel does not currently have an agreement and has not reinitiated negotiations with DataLink.

Although Infinity has an agreement with DataLink, it does not include equivalent terms and conditions as those negotiated by Logic and CWCIL. In particular, Logic and CWCIL have agreed to a term for the sharing of make-ready costs – which makes commercial sense to all parties. Infinity have refused to negotiate those updated, fair and equivalent terms, even though a number of them are in their favour. Infinity's refusal to negotiate or attend mediation as provided for in the agreement was unreasonable and their behavior has on many occasions amounted to a default of the agreement. Instead of approaching a negotiation in good faith, Infinity launched a number of Determination Requests with the Authority which has, according to the evidence established by their behavior, given them a sense of entitlement to ignore the terms and conditions of the original agreement, including the payment of current attachment fees, make-ready costs, the submission of permit applications for each pole that they require attachment to and refraining from attachment to the infrastructure without a permit being issued. This behavior is not in line with the Law or the Regulations least because it is not fair to the other Licensees who are following the procedure of submitting permit applications and paying fees as they fall due.

DataLink is of the opinion that the issue of costs and pricing lacks consensus and remains an outstanding issue although CWCIL and Logic have expressed agreement with the terms established within their negotiated agreements. DataLink submits that the best outcome would be for all Licensees to enter into agreements on those same terms.

Make-ready

The Regulations and the Law provide for the recovery of costs related to infrastructure sharing and interconnection. It does not provide for a responder to an infrastructure sharing request to be obliged to accept third party contractors to perform any required adjustments to the infrastructure to provide for



infrastructure sharing. Nor does it require the responder to fund or subsidize the request. Despite this, Digicel and Infinity both request the ability to make payments directly to third party contractors to directly work on CUC infrastructure and they contend that charges by third parties will represent a savings to them. DataLink not only objects but also believes the assumption of great savings to be erroneous. In the event that contractor fees could be lower coming from a third party then DataLink is of the opinion that the quality may not be equivalent to that required by CUC. As previously stated, DataLink and CUC will not entertain third parties working on the electrical infrastructure (owned by CUC) without them being under the direct supervision and control of CUC.

All IWG Participants expressed a desire for the refund period for make-ready costs paid within the standard contract to be increased from the two years originally stated. DataLink is amenable to a change extending this period and has indicated this in the new draft standard agreement submitted for consideration, however, we do not believe that a period beyond the reasonable life of a pole is appropriate.

Reservation Fees

Reservation fees were negotiated as part of each contract and tied intrinsically to minimum annual payments and to the roll out schedule provided by the attachers. The fees were instituted to provide an incentive to attachers to refrain from committing to a contractual obligation if intentions regarding an immediate roll out were not genuine. In DataLink's view, a failure to require compensation for the right of attachment would have opened the door to the possibility of anticompetitive practices where attachers locked up an attachment point on a pole and did not use it. The fees also provided the necessary funds for the administrative costs of recruiting and hiring additional staff to address the additional work load of a steady and swift make ready process and planning and design necessary for this to occur. At the time that DataLink received its ICT Licence there were at least 5 other telecommunication companies potentially seeking to use the one available space. DataLink submits that this reservation of the space was of value to the attachers as it provided assurance that no other telecommunication company would be given the right to one of the limited attachment sites before a full roll out could occur or a business decision was made by the attaching entity to surrender their rights to specific poles. The decision to reserve an attachment point for one specific entity was also logistic in nature as multiple entities at the same attachment height in varying locations was not operationally feasible

No consensus was reached on this issue, Infinity disagreed with the calculation and Logic noted this practice is not followed elsewhere. DataLink continues to support its assertion that the institution of reservation fees were fair and necessary, DataLink also submits that it has always been transparent that the methodology of other jurisdictions has been used as a base for its pricing model, however amendments have been made where necessary to meet the requirements of the local jurisdiction and its members.



Minimum (True Up)

Past experience regarding failure to progress with respect to network roll out, as originally anticipated, led DataLink to the awareness that there was no incentive in place for a Licensee to attach under the contract terms. For example, 8 years passed from the time that Infinity signed its original attachment agreement until they made their first attachment of fiber. When their contract was amended in 2012, Infinity accepted Minimum (True Up) charges in their agreement so that DataLink would have a form of performance security and could cover its costs of operating the company in preparation for the works anticipated to come from Infinity for pole attachments.

The minimum annual fee was intrinsically tied to the roll out schedule provided by an attacher. The roll out schedule was decided based upon the attachers expressed business needs and the ICT License requirements instituted by the Authority. DataLink submits that, at the time of the RFP, multiple parties sought an infrastructure sharing agreement with DataLink. In hindsight, DataLink concedes that the terms should have been drafted to consider a change in roll out schedule whereby reservation fees and minimum fees should have extended until roll out was actually completed by an attaching utility as opposed to the original roll out deadline in the attacher's licence.

DataLink submits that the fees remain an incentive to roll-out and a deterrent to anticompetitive space holding practices. Similarly, these same terms were part of the agreement with Logic, which Logic has submitted their agreement to in their response to the IWG. These terms were agreed by commercial parties in arm's length transactions. It would have been open to DataLink to offer the space on the pole to another entity. Infinity did not want that to happen, hence the minimum fee was agreed by them when they executed their Pole Attachment agreement amendment in 2012.

Attachment Fees

DataLink is of the belief that its attachment fees are in compliance with the terms of the Regulations for infrastructure sharing. The fees are in fact cost based, transparent, and equivalent for all attaching utilities with the exception of Infinity for the reasons explained previously.

Both Digicel and Infinity submitted comments regarding pole cost calculations:

Infinity stated -

"OfReg should not allow CUC to factor the bare cost of all poles or even a standard utility pole, CUC poles were clearly installed for their services. A standard pole for the Telco attaching utilities to carry all four attaching utilities should be used as a cost for which all calculations are based. OfReg should consider the following as standard bare pole for Telco attachers, it must be high enough to meet the standard space allocation as per CUC recommendation of 9-inches between each attaching utility (in this case 4



attachers), that would therefore suggest the pole should only be 21 feet tall from ground to the top of the pole. A typical Telco pole would be a 25-foot Class 7 to 9 pole, CUC typical pole is 35 to 45 feet and is a Class 2 or 3 pole. These poles are required to carry CUC infrastructure and are not required for Telco poles.”

Infinity continues its assertion declaring that within the calculation, the “*Net Cost of a Bare Pole is overstated*”. DataLink notes that the pole values are as per the CUC asset register which has been reviewed by the Company’s independent auditor, accordingly there is no basis for this assertion by Infinity.

The infrastructure to which the various entities seek to attach has been constructed for the purpose of the transmission of electricity. The cost incurred for the actual poles used within this infrastructure is the basis for the fee and the expected incremental value to the telecoms is then calculated. This ensures that the fee is in fact cost based. The cost of a bare pole is a portion of the very detailed calculation. DataLink has, in previous correspondence, provided comprehensive explanations for the attachment fee calculation which utilizes data from the audited financial statements of CUC for ease of reference and transparency.

DataLink notes the suggestions of various methodologies for the calculation of the pole attachment fee from the other IWG participants. However, DataLink submits that each suggestion appears to include an element of DataLink and/or CUC subsidizing the telecommunication roll out and thus DataLink believes that they are not equitable. The pole height required for electricity service only, despite assertions to the contrary, does differ from the pole height required for the inclusion of a 3 foot communication space. The cost of poles vary by material type and height. The initial pole cost, transport cost and installation costs, increase incrementally with additional height.

Digicel claims that “*The costs associated with the poles are already entirely recovered within CUC’s regulated prices for electricity. These costs are recovered whether or not there is any pole sharing.*”

DataLink would clarify that any earnings from DataLink that are passed on to DataLink’s parent company, CUC, augment CUC’s earnings and in turn lower CUC fee calculations. DataLink would refer all telecommunication attachers to the Transmission and Distribution licence held by CUC, section 25, for additional reference.

DataLink feels the fee structure is fair and transparent and recommends the fee structure implemented and agreed upon by Logic and Flow be accepted as provided within the new draft standard contract.

Recommendation for the way forward.

In conclusion, DataLink believes that OfReg should mandate that all parties have the same pole attachment agreement. DataLink requests OfReg support for DataLink’s revised draft standard contract for pole attachments as set out in its IWG response and the facilitation of a make-ready process that takes



into account all market stakeholders' needs including ICT Licensees, electric consumers, ICT consumers, CUC and DataLink.

DataLink also requests that OfReg mandate the payment of all outstanding fees receivable under the terms of the existing pole attachment agreements with DataLink within a reasonable period following the determination of the matter.

OfReg invited the IWG participants to comment on whether OfReg should address the outstanding issues by continuing the ICT Consultation 2016 – 2 or by adopting another procedure. DataLink believes that OfReg should progress with the Determination process and, in line with its mandate under the Law and Dispute Resolution Regulations, issue a decision expeditiously so as to allow the industry to move forward proactively.