



**April 21, 2017**

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

**INDUSTRY WORKING GROUP – DATALINK POSITION PAPER**

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

**Background**

DataLink, Ltd (“DataLink”) welcomed the opportunity to attend the Industry Working Group meetings as it has provided an opportunity to explain the standard contract used by DataLink in greater detail to the group and to explain its position on the various issues of contention that have arisen between the parties in the Working Group over time.

DataLink has sought to co-operate with and facilitate helpful conversations, to seek agreement where possible and to explain where it is not able to accommodate demands that would place DataLink or its parent company Caribbean Utilities Company, Ltd (“CUC”) in contravention of the obligations within the Licences issued to them by the relevant regulatory authorities and under the relevant law. Although these reasons were presented and discussed during the meetings, these points will also be addressed in this summary report, along with DataLink’s response to the discussion questions posed in the initial letter introducing the ‘Industry Working Group’ and the various discussion papers issued by the Office of the Regulator (‘OfReg’) (previously the ICTA). DataLink also refers its responses to the ICTA issued Consultations 2016 – 1 & 2 previously submitted to the Authority. DataLink notes the similar questions raised in the Working Group Discussions as those raised in the 2016 Consultations and has attached the responses to the Consultations to this report for reference. Relevant responses already submitted to the Authority will be noted in response to the Discussion Questions posed to the Working Group.

DataLink notes the Authority’s claim that the initiative to form the Industry Working Group arose 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’. DataLink notes that, at the time that the process was initiated by the Authority, there remained only one active and outstanding complaint against DataLink, that of C3 (previously Infinity Broadband).



DataLink disagrees with the Authority's assertion, in its letter of December 9, 2016, that the existing agreements "provide disparate terms and conditions for the Licensees who have entered into agreement with CUC and/or DataLink". As at the date of that letter, all but one attaching utility were party to an agreement with materially the same terms provided to the ICTA in support of the application for DataLink's licence granted on March 28, 2012.

All participants in the Working Group had been offered and two of three attaching utilities had accepted a standard agreement on materially the same terms and conditions. DataLink also notes that the attachment agreement in place with C3/Infinity Broadband, as modified by the novation and variation agreements with CUC, contains the majority of the terms and conditions in place with other attaching utilities, however, there are some material differences in C3's agreement such as prices for services and the make ready refund process as an example. Digicel had also initiated negotiations with a view to the arrangement of a standard contract with DataLink should an attachment space become available. For the avoidance of doubt, DataLink has constantly maintained its position that, to satisfy all of the requirements of the law, all attaching utilities require an agreement on materially the same terms and conditions.

During the Working Group Meetings DataLink noted the Transmission and Distribution Licence obligations of parent company CUC, i.e. Electricity Transmission and Distribution Licence 2008, Condition 7.1 and in general, and also the Electricity Regulatory Authority (Standard of Performance) Rules, 2012. Compliance with regulatory obligations, by necessity, results in some restrictions on the ability of CUC and, by extension, DataLink to perform make-ready. CUC must remain compliant with reliability and other performance requirements and also with the obligation to assign the charges related to non-electrical uses, outside of those purely necessary to provide electrical service, to attaching telecoms.

## **The Issues**

### **1. Issue One**

#### **Standard Pole Attachments Contracts**

As noted previously, DataLink has long maintained the desire to execute a Standard Pole Attachment Agreement with each attaching utility. A draft was included in the various applications submitted to the ICTA (in 2009 and 2011) and that draft was materially the same as the version offered to the attaching utilities and already executed with Logic and CWICL.

DataLink has considered the discussions in the Working Group meetings and has included a new draft with this response that includes options discussed with participants.

In summary, the standard agreement seeks to include Terms and Conditions that are fair and non-discriminatory to all, provide achievable timelines for the permit process including make-ready, to support



realistic roll out goals while providing fair compensation for make ready expenses necessitated solely by addition of ICT attachments to the infrastructure and to support the additional resources necessary to reach stated timelines.

New proposed amendments for increased efficiency for the standard attachment contract include the following:

1. The introduction of timelines, clearer permit application processes and maximum numbers of pole applications, see Section VI. These timelines have been in place with Logic since June 2016 and have proven to provide efficiencies for the make ready process.
2. The introduction of a resource availability deposit and fixed initial costs for permit applications, see additions to Section VII B. This allows DataLink & CUC to commit further resources to a high volume of make ready work with less risk and therefore lower costs and greater efficiencies.
3. Provision for an equal automatic charge for each new pole planted for all attaching utilities to avoid the additional cost of remedial make-ready at the time of a permit application process, see addition to Section VII E. There are a number of benefits to this feature.
  - 3.1. The cost of making communications space at the outset are less than retrofitting the space into an existing line.
  - 3.2. CUC remains compliant with its licence as the licence disallows CUC to take on this communications utility expense at cost of the electric consumer.
  - 3.3. Permit application process for these new poles will be significantly more efficient.
4. Provision for the implied applications for required mid-span poles including payment for the same see addition to Section VII B. Mid-span poles are necessary to maintain structural integrity of the pole line to accommodate four telco attachments. CUC's infrastructure was initially designed to accommodate only one telco attachment as at the time Cable & Wireless was the only telco in the market.
5. Extension of the refund period for make-ready costs see addition to Section VII D. DataLink has received feedback from it's customers that the 2 year period prescribed in Flow's and Logic's agreements is too short. DataLink proposes to extend this time to five years which is fair as it substantially encapsulates current make ready work and the proposed 36 months for the remainder of the roll-out period as suggested by OfReg.

## **2. Issue Two**

### **Pole Attachment Specification Standards**

*1. Consider whether the current definition of "Standard Utility Pole" is appropriate.*

Confining the definition of a "standard" utility poles to a length of 40 feet only is no longer accurate. Standards described in the Pole Attachment agreement only refer to telecommunication space on the



pole from the top of the safety space and below. Owner Utility has several standards relevant to how the pole is constructed above this space, however these are irrelevant to Attaching Utilities.

*2. Should the Industry consider adopting a definition that is based on the minimum clearance for electrical facilities of 25 feet, instead of the absolute length of the pole?*

This proposed standard is only applicable to poles where telco utilities have paid for make ready or for the incremental cost of the required space to facilitate the telco space for 4 attaching utilities at the time of pole installation. However, we note that the minimum clearance for electrical facilities is actually 25'10". Note: If there are not telco utilities needing to attach to a pole, CUC would have electric facilities much lower than 25'10" while maintaining NESC compliance.

*3. Consider the implications of retaining the current definition.*

The current definition is not an accurate definition but more reasonably describes a typical pole with telecommunications space made ready. However, the current definition does adequately describe the required details with respect to the telco utilities and therefore can remain. It should be noted that CUC has several utility pole standards to meet various requirements for electric supply. The portion of the pole that is allocated for telco space is universal among all of these standards and is the version that is appended to the Pole Attachment agreements.

*3.1. Should an Attaching Utility be required to pay for replacement poles which are shorter or taller than the 40-foot pole referenced in the definition of "Standard Utility Pole", if a new pole is required in order to accommodate the Attaching Utility's requirements?*

An attaching utility should be required to pay if the new pole is required to facilitate the attaching utilities telco attachment. It should be noted that existing pole lines are there to serve electric consumers and any modifications needed to facilitate make ready for telco attachments must preserve the electric facilities function and structural integrity. Therefore it is entirely possible that telco's will be required to pay for poles of varying heights as prescribed by the appropriate standard for the existing electric utility service. Standards have changed over time, however, CUC's infrastructure has not automatically been universally upgraded to match the current stated standards as and when these changes have occurred. Retrofits to accommodate new standards have been conducted on an as needed (typically at the time of replacement) basis in order to manage expenses for the electric consumers.

Due to the requirement in CUC's T&D Licence that it may not build infrastructure for non-electrical purposes, Attaching Utilities *must* pay for any modifications required *solely* in order to accommodate them on the infrastructure. Where an existing pole may be outside the current standard in place for CUC, modifications required, over and above the provision of the communications space, are payable by CUC



regardless of whether they occur in advance of or at the time that modifications required to add the communications space are implemented.

*4. Consider the implications of adopting a new definition.*

Adoption of a new definition with communications space automatically provided should only be included if there is also provision for an automatic payment to account for the expense of the extra length of pole required.

*4.1. What proportion of the cost of a new pole should an Attaching Utility pay, if a new pole is required in order to accommodate the Attaching Utility's requirements but if the pole is taller than required for the Attaching Utility's specific requirements?*

See response to 3.1

*4.2. In the event that there are electrical facilities located below 25 feet on a pole, should an Attaching Utility be required to pay Make-Ready Charges associated with moving those electrical facilities?*

Yes because these electrical facilities would have been located there before there was a need for unused space up to 25' 10" to accommodate telecommunications space.

*4.3. How should the change in minimum clearance in 2014 be addressed?*

This has been addressed in the work process for all future make ready works. In the case of weatherheads that are below 23'6" CUC pays 65% and the attaching utility pays 35%. In the case of weatherheads above 23'6" the attaching utility pays 100% of the weatherhead relocation costs.

**Issue 2**

**Make ready Resource Certification**

*1. What are the qualifications or certifications that CUC's or DataLink's third-party contractors must have in order to perform work for CUC or DataLink on CUC's utility poles?*

To work on CUC's infrastructure in close proximity to the electrical space requires power line technician training and CUC control and supervision.

*1.1. Are they held by the contractor or by the contractor's employees or both?*

*Each person working in close proximity to the electrical space requires power line technician training.*



*2. How do these contractors obtain these qualifications or certifications?*

Through professional certified power line technician training courses, offered internationally and as apprentices to approved electric utilities.

*2.1. Does CUC offer or require any internal training courses or orientation programs before these contractors or their employees are permitted to work on CUC's utility poles?*

CUC offers safety awareness orientation training to contractors however this does not equate to power line technician training or apprenticeship.

*3. Are there any other stipulations which are imposed by CUC or DataLink on these contractors, for example, types of insurance or types of tools or other equipment they must use?*

Yes, CUC contracts with Line Contractors directly utilizing CUC's standard contract requirements.

*4. Do these contractors or their employees have to obtain any other authorisations or permits in order to perform work on CUC's utility poles (other than the usual trade and business licensing or immigration and work permits)?*

CUC requires third party contractors to work on its infrastructure under CUC control and supervision. This ensures that work is done in accordance with CUC's safety and operational requirements and also allows CUC to manage its service reliability performance for which it has regulatory performance standards to meet.

*5. Who supplies the materials that the contractors use to do work for CUC or DataLink?*

CUC procures its materials from its regular vendors for pole line hardware etc and then bills the materials to DataLink as they are used.

*5.1. If the contractors supply their own materials, does CUC or DataLink stipulate the use of certain suppliers, or does CUC or DataLink specify the standards for such materials?*

Contractors do not supply their own materials for make ready.

**3. Issue Three – Permit Application Process**



*1. Consider whether the timeframes in the permit application process should be expressed in Business Days or calendar days.*

The actual number of days will be changed dependent on the choice made. The timelines suggested by DataLink, which are based of FCC guidelines or less, are quoted in business days for ease of calculation. Use of strict periods defined in calendar days may be unnecessarily restrictive during holiday periods.

*2. Consider whether the timeframes in the permit application process should only apply to applications with a maximum number of attachments.*

Timeframes are only possible with a maximum number of applications due to finite resources. See proposed new standard contract for details.

*2.1. If so, what should be the maximum number of permits per application be?*

Permits should be applied for in batches of no more than 25 poles each with a maximum total of 300 Poles applications per month. This limit is an aggregate limit for all attaching utilities. See proposed new standard contract for details.

*3. What other requirements (if any) should the proposed permit process include?*

Other requirements that the proposed permit process should include are:

- ) Timelines included in standard agreement based on FCC guidelines.
- ) Upfront payment for required make-ready to ensure availability of resources.
- ) Sufficient allowance to provide for obtaining necessary wayleaves which cannot be controlled by DataLink.

Please see the proposed new standard contract for greater detail.

#### **4. Issue Four**

##### **Planned Roll Out Timelines**

*1. Consider the appropriate location of the boundary line.*

DataLink is of the opinion that the boundary line should be placed as far West as possible. This will allow for greater area served by a universal service which will reduce the space needed on the pole from 4 to 2 attachers, thereby increasing efficiencies for roll out of the fiber optic service to the territory.

*2. Consider whether 36 months is an appropriate length of time to complete the pole make-ready and fibre optic network roll-outs west of the boundary line.*



The timeline for DataLink will be dependent on receipt of prompt payments for make-ready work, efficient prioritization of applications and compliance with permit applications by attaching utilities. Based on the suggested timelines by DataLink the 36 months may be achievable but the planning of the make-ready will occur over the period as it is not possible to plan the entire make-ready within the suggested timeline (120 days) in the discussion paper without considerable additional resources.

*3. Consider whether the deadlines set out under the common pole make-ready roll-out process are reasonable and appropriate.*

The suggested timelines the make ready process leading up to the 36 month deadline are not practical in the view of DataLink. DataLink has found great efficiencies in processing make ready requests in small batches and has included its detailed suggestions for the process in the draft standard agreement and believes that compliance with these can result in a roll-out over the 36 month period desired.

*3.1. What information is reasonably required by DataLink from licensees in order to determine any necessary make-ready work and costs?*

Full information as set out in the permit application form attached to the standard contract. The infrastructure must be reviewed (pre-permit survey) for current attachments (authorized and unauthorized) on each pole and necessary make-ready planned for each location.

*4. Determine the factors which should be considered in developing the pole make-ready payment schedule.*

Payments should be received in advance to ensure availability of resources, such as in the fixed fee included in the draft standard pole attachment agreement.

*5. Consider whether the new attachment roll-out obligation and associated deadlines for areas west of the boundary line are reasonable and appropriate.*

Refer to response to Issue Four Section 2.

*6. Consider the factors the Industry should consider in determining whether Make-Ready Work is caused by the common pole make-ready process or by an individual licensee's request.*

It is DataLink's strong preference to manage the individual licensee's requests internally with CUC's finite make ready resources, payments received for make ready and the requirement to share infrastructure on an even basis among all providers taken into consideration.





*7. Consider whether the allocation of DataLink's resources between common pole make-ready work and ad hoc make ready work is reasonable and appropriate.*

DataLink has proposed a process for large scale make ready in the detail included in the draft new standard agreement. The suggested process is already in practice with Logic and has resulted in improved efficiency. In addition, DataLink has proposed a resource reservation deposit for attachers to elect to pay in order to "reserve" make ready resources to respond to their make ready requests. This fee would be deducted from actual make ready costs if sufficient permits are applied for by the attaching utility. In the event that CUC's resources are over-subscribed by the resource reservations, DataLink proposes to award each attaching utility their proportionate share of resources considering CUC's maximum resource capability of 300 permits per month and the amount the attaching utility applied for.

Example: if 3 attaching utilities applied for a reservation of resources for 200 permits per month that would equate to 600 permits and twice the capability of CUC. Under this circumstance, DataLink would issue reservations of 100 permits per month to each attaching utility.

*7.1. Consider in particular the impact of the proposal to use qualified third- party contractors where DataLink cannot meet a deadline under the Master Pole Joint Use Agreement, if that proposal is adopted at the conclusion of the Working Group process, on the allocation of DataLink's resources to the common pole make-ready process.*

CUC already contracts with two third party line contractors, there is no need for further contractors. Furthermore, the construction portion of the work is only a small part of the process that is required for Make Ready. Adding more contractors would only result in contractors sitting on standby while other non-construction processes are completed such as make ready design, switching procedures for isolation of work areas, mapping of as-builts in CUC's systems etc.

## **5. Issue Five**

### **Pricing/Costing elements applicable in the Pole Sharing Agreements**

Pricing and Costing elements applicable in the agreements, including Reservation Fees, were extensively covered in DataLink's responses to ICT Consultation 2016 – 2 attached to this letter for reference. We therefore refer the regulator to our responses in ICT Consultation 2016 – 2 for full understanding of DataLink's position on this issue.

#### **A. Net Cost of a Bare Pole**

*1. The net book value of poles and the number of poles in the calculation of the Net Cost of a Bare Pole is said to include all poles:*



*1.1. Consider whether the factoring of all poles, which would include various pole types – i.e. wooden, aluminum, etc. – and poles that may be unable to take attachments, is appropriate.*

All poles except aluminium poles should be considered. All other pole types are currently attached to by at least one attacher.

**B. Space Factor**

*2. Consider whether the methodology and values used in the calculations of each component of the Space Factor formula, are specified correctly, in particular:*

*2.1. Clarity on whether the Space Occupied is per Attachment (in which case there could be multiple attachments within the assigned 9-inch space) or Attaching Utility (in which case the variable would be 9 inches).*

All contracts must be standardized to specify the space available to be occupied as 9 inches (as per the decision by the Authority issued in response to ICT Consultation 2016 - 1). Total communications space of 36 inches divided by four (attaching utilities). It should be noted that attaching utilities are not assigned a 9 inch space, but rather a specific attachment point on the pole that is separated from other attaching utilities facilities by 12 inches.

*2.2. The calculation of the Unusable Space.*

DataLink has defined the unusable space to be from the end point (within the ground) of the pole to the bottom of the communications space. This is the portion of the pole that is supporting all of the attachments and is therefore used by all attaching utilities and the owner utility. This calculation is the equivalent of the calculation used in the FCC methodology.

*2.3. The calculation of the Weighted Average Pole Height.*

This is the average height of the pole population minus Aluminum Poles and is included in the standard agreement.

*2.3.1. Which pole heights can actually allow for attachments, and is this accounted for in the calculation of the weighted average pole height?*

To allow space for 4 attachers a minimum pole height of 40 feet is required. All poles and pole heights are considered in the calculation of the weighted average. DataLink can remove the 30' and 35' wood



poles from the weighted average pole height if it is determined to be necessary as these poles are not large enough to accommodate telecommunication attachments.

*2.4. Is the 2/3 (two-thirds) allocation factor in the space factor formula (by which the unusable space is multiplied) an appropriate fraction to allocate to Attaching Utility, given the weighted average pole height, the actual communication space and the use of the pole for non-communication uses?*

Yes, the result of the application of this factor is that each attacher pays for just under 17% of the unusable space while CUC pays the largest share at 33%. DataLink applied the 2/3 allocation factor based on precedence set from a determination made by the FCC.

*2.5. What impact (if any) should attachments on the pole, other than CUC's electricity supply or an ICT Licensee's use of the communications space – i.e. street lighting or CCTV – have on the space factor formula or any other element of the formula for the calculation of the annual pole attachment fee?*

None. Street lighting is part of CUC's electrical system and CCTV attachments fall outside of the telecommunications space.

#### *C. CUC's Annual Carrying Charge Rate*

*3. Are there any factors within the Annual Carrying Charge Rate formula (such as depreciation, management and overhead allowance) that may already be taken into account in the calculation of the Net Cost of a Bare Pole?*

No, the Net Cost of a Bare Pole is the average book value of ONE pole. The calculation is: Net investment in poles divided by the number of poles. Net investment in poles = Gross Pole investment less Accumulated Depreciation. With an average life of 25 years and a cyclical ongoing replacement process the figure represents the depreciated cost of a pole 12.5 years in the past.

*4. Consider whether the methodology used to calculate the Annual Carrying Charge Rate is based on appropriate principles:*

*4.1. Are there factors within the Annual Carrying Charge Rate formula that are already accounted for in the calculation of factors within the Annual Attachment Fee formula – i.e. administrative expenses and depreciation?*

The Annual Carrying Charge Rate is a component of the Annual Attachment Fee Formula, carrying charges are the costs incurred by the utility in relation to owning and maintaining poles regardless of the presence



of pole attachments. The net cost of a bare pole is multiplied by the carrying charge rate to determine the annual cost of a pole. The Annual Carrying Charge Rate is based on CUC's actual costs and is calculated with the formula utilized by the FCC. Please refer to our response to ICTA Consultation 2016-2 question C2.

*4.2. Have any of the expense factors within the Annual Carrying Charge Rate formula already been recovered by way of CUC's charges to its electricity consumers?*

The costs that are considered as part of the Annual Carrying Charge Rate formula are increased due to the existence of telco attachers and the formula adequately captures these increased costs and applies them as a multiplier of the net cost of a bare pole. Once again DataLink utilized an approved FCC formula for this calculation as it has already been determined to be a fair allocation of costs in North American markets. See response to question C2 in DataLink's response to the ICTA Consultation 2016-2 for further details.

*4.2.1. Consider whether CUC's administration, maintenance and depreciation expenses are correctly allocated to the Annual Carrying Charge Rate.*

The calculation is fair, proportionate, measurable and transparent see 4.2 above.

*4.3. Return on Equity is used as a measure of the return on capital:*

This is the process DataLink has chosen to calculate its margin. The calculation is fair, reasonable, transparent and measurable.

*4.3.1. Is ROE an appropriate measure for the required return on capital in this instance, and if so, what is an appropriate value to accept as a reasonable ROE?*

This is the process DataLink has chosen to calculate its margin. The calculation is fair, reasonable, transparent and measurable.

*4.3.2. Should ROE be replaced by the cost of capital for CUC's regulated business, as agreed with the ERA and reviewed annually, and if not, what is the reason why the required return on capital should defer when the relevant assets (i.e. poles) are used for both CUC's regulated business and for attachment of Communications Facilities?*

*4.3.2.1. Is there another measure that should be considered?*



ROE is the process DataLink has chosen to calculate its margin. The calculation is fair, reasonable, transparent and measurable.

*D. Inflation Adjustment*

*4.4. Is an inflation adjustment factor an appropriate component in the Annual Attachment Fee formula?*

Under the proposed methodology, historical costs for a calendar year form the basis for the Annual Pole Attachment Fee that would apply for the period from six months to 18 months following the end of that calendar year. Therefore, an inflation adjustment to escalate those costs by one year is reasonable. To improve transparency and accountability, the proposed Inflation Adjustment would be specified to be the same as the inflation calculation reported by CUC to the Electricity Regulatory Authority. The CUC inflation calculation is used in determining rate adjustments effective June 1 and is based on the most recent calendar year. Please also refer to the response to question 3.

*4.4.1. Consider whether the impact of inflation has already been taken into account in the calculation of other elements of the Annual Attachment Fee formula, such as in the Net Cost of a Bare Pole, as well as factors in the Annual Carrying Charge Rate formula.*

The response to question 3 shows that inflation is not considered in the net cost of a bare pole. The opposite is instead true. All other elements are proportionate allocations of historical costs and as such do not take into consideration the inflationary impact.

*4.4.2. Is the ROE (or the cost of capital) determined at nominal or real values, and if so, determine whether there is a double-counting for inflation in the proposed Annual Attachment Fee formula.*

ROE is the process DataLink has chosen to calculate its margin. The calculation is fair, reasonable, transparent and measurable.

*E. Management and Overhead Allowance*

*4.5. Consider the appropriate percentage of management and overhead allowance to be factored into the calculation of the Annual Attachment Fee formula.*

DataLink has proven by displaying the similarity to the FCC model that the pricing mechanism chosen is fair and reasonable and comparable to similar jurisdictions. The management and overhead allowance is a unique requirement due to the regulatory framework in the Cayman Islands which requires DataLink to



be a separate company from its parent. DataLink respectfully submits that the applied management and overhead allowance adequately and fairly captures these costs in a transparent cost based manner.

*4.5.1. Consider whether management and overhead costs have already been factored into other elements of the Annual Attachment Fee formula – i.e. administrative expense as an element of the Annual Carrying Charge Rate.*

The elements of the Annual Carrying Charge Rate are related to the costs of maintaining the poles. **Not** the costs for managing the licensing, permitting, and attachment process borne by DataLink.

*5. Consider whether or not the Reserved Space Payment is an appropriate charging principle to be applied to the Attaching Utility.*

DataLink's view is that the reservation fees are appropriate. In addition to the below responses please refer to our responses to Questions A1-A5 of the ICT Consultation 2016-2 (paragraphs 22-32).

*5.1. Upon what basis is such charging principle reasonable and justifiable (or unreasonable and unjustifiable)?*

DataLink's view is that it is appropriate for reservation fees to apply to interconnecting attaching utilities that have an agreement for pole attachment with a schedule for roll-out as part of an ICTA issued licence and do not have a mature network in place. The Reservation Fees are applied and justifiable for the following reasons:

- ) They provide the attaching utility with exclusive rights to apply to attach to the same attachment point on all poles in advance of the attaching utility completing their required roll out. Essentially, DataLink is providing the right to attach to the space in advance of any permit being applied for. This allows the attaching utility to have certainty that they have an attachment point across the territory to allow them to roll out their network as per their licence requirements. DataLink notes that all attaching utilities with Reservation Fees in their agreement had the option to give up their rights to a subset of poles if they wished to not pay reservation fees. No attaching utilities took this option.
- ) Reservation fees promote a faster roll out period as they are no longer charged once an attaching utility has a permit to attach to a pole.
- ) Reservation fees were agreed to by all parties with access to legal advice when executing their pole attachment agreements.
- ) At the time that reservation fees were introduced, there were more requests for pole attachment agreements from prospective attaching utilities that there was space available on the poles. Therefore the concept of reservation fees was also introduced to discourage an attaching utility from using a pole attachment agreement to just hold up infrastructure from their competitors.



- ) DataLink incurs costs to manage and administer pole attachment agreements in good faith. Without reservation fees, DataLink would be operating at a loss in cases where an attaching utility does not utilize their attachment agreement rights.

*5.1.1. What is the basis for the sections related to the Reserved Space Payment and the Total Minimum Annual Payments to apply to Communications Utility but not to DataLink, as an Attaching Utility?*

DataLink's position is not the same as the Attaching utilities and it should not be subject to an identical regime. DataLink pays management and other charges to CUC and it pays a set fee for every attachment made to the pole regardless of whether that attachment is its own or is placed by an Attaching utility. DataLink is effectively in the position of an owner utility in regard to the communications space, which means that it is not appropriate to require it pay itself or CUC identical charges to those levied on the Attaching utilities.

We ask that the regulator refer to our response provided to consultation 2016-2 question C2.

*5.2. If the Reserved Space Payment is an appropriate charging principle, consider the appropriate formula to be used in calculating such fee.*

Reservation fees are charged to attaching utilities based on a percentage of the pole attachment fee as agreed by all parties at the time of executing the pole attachment agreements. This fee is appropriate to be charged on a per pole basis for all poles that the attaching utility is not attached to. Reservation fees represent a portion of the opportunity cost to DataLink in holding the space for a single attaching utility and adds an incentive for an attacher to utilise the contracted space as intended. They are appropriate to be charged to the attaching utility until such time as one of the below conditions is met.

- (1) The attaching utility has a substantially complete network i.e. it is in compliance with its roll-out requirements under its licence with the Authority (by pole attachment or otherwise).
- (2) The attaching utility relinquishes its right to attach to any poles to which it is not already attached.

*5.2.1. If the Reserved Space Payment is considered to be an appropriate charging principle, should the Attaching Utility be required to pay such fees in relation to poles which do not currently meet the definition of a "Standard Utility Pole"?*

Yes it is appropriate if the pole location is required to facilitate the attaching utilities attachment and roll out obligations. The reservation fee gives the attaching utility the right to apply to attach in the location of the pole regardless of whether the pole needs make ready or not.



*5.3. Consider if the accumulated Reserved Space Payments should be deducted from the Annual Attachment Fee, once an Attaching Utility makes an attachment, and therefore, fully utilizes the Reserved Space.*

Administrative and overhead costs are being incurred by DataLink prior to attachment. Reservation fees ensure that electricity customers, as per the T&D License, do not carry the cost of offering infrastructure to telecommunication companies. If and when the attachment is made, the costs incurred prior to the attachment and covered by the reservation fee are sunk. Therefore the reservation fees cannot be credited to the Annual Attachment Fee which recovers future costs.

*6. Consider whether or not the Total Minimum Annual Payment is an appropriate charging principle to be applied to the Attaching Utility.*

*6.1.1. Upon what basis is such a charging principle reasonable and justifiable (or unreasonable and unjustifiable)?*

At the time that DataLink was considering Pole Attachment agreements, DataLink negotiated with attaching utilities in a fair and open manner. The intention was to reinforce the proactive roll-out of the network by the attaching utility and to discourage potential anticompetitive actions such as holding an agreement for attachment to the infrastructure without utilizing the space. These fees were based on roll out projections from the attaching utilities and were agreed upon by both parties as commercial terms of the contract while maintaining access to legal advice.

The reasoning for the minimum payments was to ensure that sufficient permit requests were made to engage the resources provided for the make-ready process and to encourage the attaching utilities to continue their roll-out in accordance with planned minimums. Had the affected attaching utilities submitted permit applications to support their roll out in an organized and timely manner, the minimum annual payments would have at the very least been less. Datalink credited back to the attaching utilities the fees related to the attachment applications that were received by Datalink but not completed. DataLink acknowledges that a failure in the process arose through the unanticipated volume of applications put in over a very short period and delays were exacerbated by the failure of the attaching utilities to pay for the make-ready work once it was completed.

We ask that the regulator refer to our response provided to consultation 2016-2 question A5.