

ICT 2017-1 – Determination Pole Attachment Reservation Fees



**UTILITY REGULATION AND COMPETITION OFFICE
THE CAYMAN ISLANDS**

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ICT 2017-1 – Determination – Pole Attachment Reservation Fees

1. Background

1. The Utility Regulation and Competition Office (**'OfReg'** or the **'Office'**) is the independent regulator established by section 4 of the Utility Regulation and Competition Law 2016 (the **'URC Law'**) for the electricity, information and communications technology (**'ICT'**), water, wastewater and fuels sectors¹ in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain. The scope of the Office's duties includes the regulation of the sharing of ICT infrastructure in the Cayman Islands and the resolution of disputes among ICT licensees.
2. The Office considers that an effective process (which includes appropriate contractual terms and conditions) relating to the installation and maintenance of attachments of communication cables to the electricity poles owned by Caribbean Utilities Company, Ltd. (**'CUC'**), a process in effect managed by DataLink, Ltd. (a wholly owned subsidiary of CUC) (**'DataLink'**),² is fundamental for the timely rollout of ICT networks across the Cayman Islands, which in turn is necessary for the promotion of competition in the provision of ICT services and ICT networks.
3. There has been, however, a long list of outstanding issues and various disputes over a number of years between Cable and Wireless (Cayman Islands) Limited, doing business as Flow (**'Flow'** or **'Cable & Wireless'**), Digicel (Cayman) Limited (**'Digicel'**), Infinity Broadband Ltd., doing business as C3 (**'Infinity'** or **'C3'**) and WestTel Limited doing business as

¹ The legislation giving OfReg jurisdiction in the water, wastewater and fuels sectors came into force on 22 May 2017.

² DataLink was granted an ICT licence on 28 March 2012 - http://www.icta.ofreg.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf

Logic ('**Logic**'), on the one hand, and DataLink on the other hand. This has resulted, in the Office's view, in a highly inefficient process and substantial delays relating to the installation and maintenance of attachments of communication cables to the electricity poles owned by CUC. These issues and disputes have led the Office's predecessor, the Information and Communication Technology Authority (the '**Authority**'), to publish ICT Consultation 2016-2,³ among others, and to establish an industry working group to consider and address the various issues and disputes.⁴

4. A detailed background on the outstanding issues and disputes is provided in **Appendix 1** to this Determination.
5. In this document, ICT 2017 – 1 – Determination, the Office addresses the issues raised in Part A of the ICT Consultation 2016-2, "*Consultation on the Appropriateness of the Reservation Fees Relating to the Attachment of Communication Cables to CUC's Electricity Poles.*" The Office notes that the issues raised in the other parts of ICT Consultation 2016-2 will be addressed separately at a later date.
6. Certain of CUC's utility poles contain an area designated for the attachment of communications cables of ICT licensees (the '**communications space**'). The communications space has been licensed by CUC to DataLink to manage and sub-licence to other ICT licensees, including C3, Logic and Flow.
7. DataLink has stated that "**reservation fees**" (defined as the "**Quarterly Reserved Space Payment**") have been introduced in the relevant pole sharing agreements (which are described at Appendix 2) applicable to C3 (by the **CUC-C3 Deed of Variation**),⁵ to Logic (by Appendix C of the

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

⁴ The record relating to various pole attachment issues can be found at <http://www.icta.ofreg.ky/infinitydatalink-pole-attachment-dispute> and <http://www.icta.ofreg.ky/announcements/icta-forms-pole-attachment-working-groupon>

⁵ The initial pole sharing agreement between CUC and C3 did not contain any provision relating to "reservation fees".

DataLink-Logic Pole Sharing Agreement) and to Flow (by Appendix C of the **DataLink-Flow Pole Sharing Agreement**)⁶ in order to allow C3, Logic and Flow to secure exclusive use of what is defined as the “**Reserved Space**” in the communication space which is designated for attachment of the Licensees’ communication cables to CUC’s electricity poles. In its July 2016 submission in response to Part A of ICT Consultation 2016-2, DataLink noted “*[the reservation] fees were payments in return for a benefit conferred by DataLink, namely exclusivity rights to attach at the prescribed position within the communication space on all CUC poles for the attaching utility.*”⁷ The relevant contractual clauses are provided in **Appendix 2** to this Determination.⁸

8. Such exclusive use is, however, limited in time to what is defined as “**Build-Out Period**” in those agreements, and which has the following expiry dates:
 - a. 31 December 2014 in the **CUC-C3 Deed of Variation**;
 - b. 31 December 2018 in the **DataLink-Logic Pole Sharing Agreement**; and
 - c. a period of six (6) months after installation of a new pole, in the **DataLink-Flow Pole Sharing Agreement**.

2. Legal Framework

9. In making the decision regarding the appropriateness of the reservation fees relating to the attachment of communication cables to CUC’s

⁶ The **DataLink-Flow Pole Sharing Agreement** (implemented in November 2016) introduced the reference to “reservation fees”, which did not exist in the previous pole sharing agreement between CUC and Flow.

⁷ DataLink 12 July 2016 submission in ICT Consultation 2016-2, at paragraph 10.
<http://www.icta.ofreg.ky/upimages/commonfiles/147922079012July2016DataLinkresponse.pdf>

⁸ The **CUC-Flow Pole Sharing Agreement** as novated by the **Flow-CUC-DataLink Novation Agreement**, the **CUC-C3 Pole Sharing Agreement** as amended by the **CUC-C3 Deed of Variation** and novated by the **C3-CUC-DataLink Novation Agreement**, **CUC-DataLink Pole Sharing Agreement**, the **DataLink-Logic Pole Sharing Agreement** as supplemented by the DataLink-Logic MOU, and the **DataLink-Flow Pole Sharing Agreement** shall be referred to collectively as the ‘**Pole Sharing Agreements**’.

electricity poles, the Office is guided by its statutory remit, in particular as set out in the URC Law, the Information and Communications Technology Law (2017 Revision) (the '**ICT Law**')⁹ and the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the '**Infrastructure Sharing Regulations**').¹⁰ The ICT Law is a revision of the previous Information Communications and Technology Law (2011 Revision) (the '**ICTA Law**').¹¹

10. The following provisions are of particular relevance.
11. Section 6 of the URC Law sets out the principal functions and powers of the Office. These include:

6. (1) The principal functions of the Office, in the markets and sectors for which it has responsibility, are -

[...]

- (b) to promote appropriate effective and fair competition;*
- (c) to protect the short and long term interests of consumers In relation to utility services and in so doing -*
 - (i) supervise, monitor, and regulate any sectoral provider, in accordance with this Law, the regulations and sectoral legislation and any general policies made by Cabinet in writing;*
 - (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 the services; and*

⁹ <http://www.gov.ky/portal/pls/portal/docs/1/12420370.PDF>

¹⁰ <http://www.icta.ofreg.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>

¹¹ The ICTA Law was also revised in 2016.

[...]

(d) to promote innovation and facilitate economic and national development.

(2) In performing its functions and exercising its powers under this or any other Law, the Office may -

[...]

(d) make administrative determinations, decisions, orders and regulations;

[...]

(u) review and, as appropriate, approve, reject or modify tariffs filed by a sectoral provider governing the provision of covered services;

(v) establish and enforce quality of service standards applicable to covered services;

[...]

(cc) resolve disputes between sectoral providers, and between sectoral providers and sectoral participants;

[...]

(gg) take appropriate enforcement action, including the imposition of administrative fines, in any case where a sectoral participant has contravened this Law, the regulations and any sectoral legislation or any administrative determination;

(hh) take any other action, not expressly prohibited by Law, that is necessary and proper to perform its duties under this Law and sectoral legislation;

12. Section 9 (3) of the ICT Law states, among other things, that:

[...] the principal functions of the Office are -

(a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;

(b) 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;
[...]

13. Section 65 of the ICT Law states, among other things, that:

(1) Subject to this section, a licensee that operates a public ICT network shall not refuse, obstruct or in any way impede another licensee in the making of any interconnection with its ICT network or the sharing of any infrastructure and shall, in accordance with this section, ensure that the interconnection or infrastructure sharing provided is made at technically feasible physical points.

[...]

(5) Any interconnection or infrastructure sharing provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to -

- (a) any non-affiliated supplier;*
- (b) any subsidiary or affiliate of the licensee; or*
- (c) any other part of the licensee's own business.*

(6) Without prejudice to subsection (5), the Office shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnections will be determined.

14. Section 66 of the ICT Law states, among other things, that:

(5) Where parties cannot agree upon interconnection or infrastructure sharing rates, the Office may impose such rates.

15. Section 67A of the ICT Law states, among other things, that:

67A (1) The Office may decide, on its own initiative, to consider and determine what, in its view, is 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.

[...]

(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 and 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 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.*

16. Section 68 of the ICT Law states, among other things, that:

68. (1) The cost of making any interconnection or infrastructure sharing to the ICT network of another licensee shall be borne by the licensee requesting the interconnection or infrastructure sharing.

[...]

(3) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting the interconnection or infrastructure sharing service does not have to pay for network components that are not required for the interconnection or infrastructure sharing service to be provided.

17. Section 69 of the ICT Law states, among other things, that:

(2) The Office, 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 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.

18. Section 2 of the ICT Law defines "**infrastructure sharing**" as:

the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the utilisation of a public ICT network; and for the purposes of this definition -

*(a) "tangibles" include lines, cables or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, **poles**, landing stations, huts, lands, buildings or facilities; ..."*
[emphasis added]

19. 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; [...]

(j) interconnection and infrastructure sharing services shall be provided in a manner that –

(i) maximises the use of public ICT networks and infrastructure;

[...]; and

(iii) enables the development of competition in the provision of public ICT networks and public ICT services in a timely manner;

20. 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.

21. Regulation 10 of the Infrastructure Sharing Regulations states the following:

(1) A responder's charges for interconnection or infrastructure sharing shall be-

(a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;

(b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;

...

(e) such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and

(f) based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.

22. Regulation 22 of the Infrastructure Sharing Regulations states the following:

(2) The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of licence, relevant regulations, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe.

3. ICT Consultation 2016-2, Part A

23. The ICT Consultation 2016-2, Part A, paragraphs 156 and 158, referenced the following:

Section 69 (2) of the [then ICTA] 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."

Section 68 (1) and (3) of the [then ICTA] Law requires the costs for infrastructure sharing to be "*based on cost-orientated rates that are reasonable and arrived at in a transparent manner.*" Further, Regulations 6 and 10 of the Infrastructure Sharing Regulations state that, among other things, charges for interconnection or infrastructure sharing shall be "*non-discriminatory*" and "*determined in a transparent manner.*"

24. At paragraphs 163 and 164 of the ICT Consultation 2016-2, Part A, consultation document, the Authority expressed the initial view that the operation of the "**Reserved Space**", "**Quarterly Reserved Space Payment**" and "**Total Minimum Annual Payments**" in the relevant pole sharing agreements applicable to C3 and Logic limits the promotion of competition in the provision of ICT services or ICT networks. The Authority considered that this was primarily because the costs related to the "**Reserved Space**" are not incurred by DataLink and Flow,¹² who compete with C3 and Logic in the provision of ICT services and ICT networks in the Cayman Islands. In effect, C3 and Logic experience higher costs relative to DataLink and Flow in relation to the attachment of their communication cables to CUC's electricity poles, thereby placing them at a competitive disadvantage *vis-à-vis* DataLink and Flow. This further translates into slimmer profit margins for C3 and Logic as a main consequence of certain cost factors being applied to C3 and Logic and not to DataLink and Flow.
25. In addition, the Authority considered that the operation of the "**Total Minimum Annual Payments**" may also act as a disincentive for DataLink to issue pole attachment permits to C3 and Logic in a timely manner, because the revenue earned by DataLink from such payments appears to be guaranteed irrespective of whether any permit has been

¹² As noted in paragraph 7 above, the reference to "**Reserved Space**" was introduced in November 2016 in new **Flow-DataLink Pole Sharing Agreement**. Accordingly, the assessment discussed in Part A of ICT-Consultation 2016-2 relates to the situation prior to November 2016, when only C3 and Logic were subject to contractual requirement to make payments for the "**Reserved Space**".

- granted by DataLink or not. Such a mechanism could create a disincentive for DataLink to act efficiently in the provision of its ICT networks and ICT services, which may also have the effect of restricting the ability of C3 and Logic to roll out their fibre networks in a timely manner, thereby reducing the intensity of competition between the licensees in the provision of ICT networks and ICT services in the Cayman Islands.
26. The Authority, therefore, proposed that, subject to consultation, all references to the “**Reserved Space**”, “**Quarterly Reserved Space Payment**” and “**Total Minimum Annual Payments**” in the pole attachment agreements of C3 and Logic be struck out, as follows:
- Article 1(f) of the **CUC-C3 Deed of Variation** (pages 2 through 4), except subsections 1(f)2 and 1(f)3 on page 4;
 - Article F under Item 2 – Other Mutual Agreements in Appendix C to the **DataLink-Logic Pole Sharing Agreement**, except subsections F2 and F3.
27. In addition, the Authority proposed that, subject to consultation, DataLink reimburse C3 and/or Logic, preferably in form of a credit allowance against future payments by C3 and Logic to DataLink, for the charges relating to the “**Annual Attachment Fee**”, where the “**Total Minimum Annual Payments**” made by C3 or Logic in a given year exceed the total annual payments relating to the “**Quarterly Pole Rental Fees**” paid by C3 or Logic respectively (the “**exceeding amount**”), unless the parties agree otherwise.
28. The Authority then posed a number of questions regarding the above proposals.

4. Responses to ICT Consultation 2016-2, Part A

29. The Authority received responses to Part A of the ICT Consultation 2016-2 from Digicel,¹³ Flow,¹⁴ C3¹⁵ and Datalink.¹⁶ Generally, Digicel agreed with

¹³ <http://www.icta.ofreg.ky/upimages/commonfiles/147922082412July2016Digicelresponse.pdf>

¹⁴ <http://www.icta.ofreg.ky/upimages/commonfiles/147922085512July2016Flowresponse.pdf>

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- the Authority's observations, but did not provide specific responses to the Authority's questions in Part A. Flow, C3 and Datalink provided detailed comments, a summary of which will be set out below the applicable question.
30. Prior to addressing the Authority's specific questions, DataLink provided a number of general comments, beginning by noting that the Authority came to a number of conclusions in ICT Consultation 2016-2 without the benefit first of DataLink's views on the matters.
31. DataLink then noted that the reservation fees were introduced in 2012 after the Authority requested that up to four operators be accommodated on the utility poles. At the time, there was only one space left on the pole, Cable & Wireless, C3 and DataLink having been allotted the other three, yet there were three formal requests for access to that space. DataLink noted that it was concerned that allowing attaching utilities to hold the space without using it could be interpreted as anti-competitive, i.e. by blocking the competition from expanding their coverage. In Datalink's view, the introduction of the reservation fees:
- a. provided an incentive for attaching utilities to communicate their actual requirements so that other poles could be released and made available to other parties;
 - b. provided an incentive for attaching utilities to enter into an agreement based on their true needs as opposed to holding the space to prevent it being provided to a competitor; and
 - c. promoted an efficient, economic and harmonized use of the pole infrastructure by C3 and Logic, as compared to a first-come-first-served arrangement involving (at the time) seven licensees.
32. DataLink submitted that the reservation fees were payments in return for a benefit conferred by DataLink and freely agreed to by the parties who knew that, if they were dissatisfied with the terms of the agreement, they could appeal to the Authority for a resolution. DataLink, therefore,

¹⁵ <http://www.icta.ofreg.ky/upimages/commonfiles/147922089212July2016Infinityresponse.pdf>

¹⁶ <http://www.icta.ofreg.ky/upimages/commonfiles/147922079012July2016DataLinkresponse.pdf>

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- considered it had a legitimate expectation that the terms of the agreements would be upheld and performed.
33. DataLink noted that the same requirement for reservation fees did not apply to Cable & Wireless. That company had a mature network in place for which it was already paying attachment fees and there was not the same need to stimulate network roll-out. It also considered that it was also almost certain Cable & Wireless would have resisted altering their contract to introduce reservation fees.
 34. DataLink submitted as well that it (DataLink) is in a unique position, as it manages the communications space on the CUC infrastructure. As such, it does not contract with itself for pole attachments or pay itself for reserved space and DataLink's agreement with CUC reflects this unique position.
 35. Finally, DataLink submitted that the Authority does not have the power under section 68(9)(b) of the Law to require a rebate of past payments. In particular, it argued that section 68 does not grant the power to modify the contract with retrospective effect, nor can section 69(2) be used to do this as it is limited to promoting an efficient, economic and harmonized use of infrastructure, which cannot be done retrospectively. Nor, it argued, is the purpose of that section to require DataLink to subsidize attaching utilities. It was DataLink's opinion that the use of section 69(2) to compel rebates would therefore be unlawful.
 36. Datalink further submitted that, if the provisions for reserved space and minimum charges are considered to be discriminatory because they are absent from some contracts, they should be introduced to those contracts and not removed from the contracts with Logic and C3.

4.1 Question A1

Provide your view as to whether or not the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of DataLink's relevant charging principles relating to the attachment by Licensees of communication cables to CUC's electricity poles.

37. Flow commented that, based on economic theory, charging a reservation fee is appropriate where a provider believes that the reserved asset can generate a positive return in an alternative use. The company declined,

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- however, to comment on the appropriateness of the magnitude of the reservation fee.
38. C3, on the other hand, supported the view that the **Quarterly Reserved Space Payment** and the **Total Minimum Annual Payments** are discriminatory and encourage inactivity on the part of DataLink. The company noted there is no objective justification for these fees and they should be removed from the C3 and Logic agreements. However, C3 suggested that DataLink provide a cash payment instead of a credit against future payments. Finally, C3 stated that DataLink does not actually have the right to consider any space reserved, as DataLink can only allow C3 to attach to a pole if CUC approves Datalink's application for a permit.
39. Datalink submitted that the reservation fees are appropriate.

4.2 Question A2

If the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of DataLink's relevant charging principles relating to the attachment by Licensees of communication cables to CUC's electricity poles, provide your view as to whether such charges should apply to all the attachers of communication cables.

40. Flow noted that, where an exclusivity arrangement imposes an opportunity cost on a provider, it is appropriate for that provider to recover such costs from the person causing those costs. Conversely, if opportunity costs are zero, there would not appear to be an appropriate basis for charging a reservation fee. The company noted that this would appear to explain why a reservation fee was not included in its contract with DataLink. Finally, Flow submitted that whether a reservation fee should be charged ought to be the provider's decision and not determined by regulatory edict.
41. C3 reiterated its view that reservation fees are inappropriate. However, if such fees were to continue to be permitted, all attachers must make similar payments since these payments otherwise put C3 at a competitive disadvantage.
42. Datalink considered that it is appropriate for reservation fees to apply to attaching utilities that have an agreement for pole attachment with a

schedule for roll-out as part of an Authority-issued licence and that do not have a mature network in place.

4.3 Question A3

If your view is that the reservation fees, being the *Quarterly Reserved Space Payment*, should not apply to all the attachers, provide the reason and justification for not applying such charges to all the attachers.

43. Both Flow and C3 referred to their answers to Question A2.
44. Datalink noted that Cable & Wireless has an established network and no apparent licence requirement for continued roll-out. Because of this, there is no need to introduce reservation fees, even though Cable & Wireless might attach to additional poles from time to time.
45. Datalink also noted that, under the terms of its contract with Cable & Wireless, the latter pays a fee for additional height for each new pole installed to accommodate its attachments. Datalink considered this new pole fee in lieu of a reservation fee to be fair for the incumbent ICT licensee, and proposed that such a fee be introduced in all pole attachment contracts going forward. A new pole fee of this type could significantly reduce necessary make-ready work required on newly installed infrastructure by pro-actively preparing the poles.
46. Finally, Datalink submitted that the owner of infrastructure should not have to charge itself for interconnection to its own services.

4.4 Question A4

If your view is that the reservation fees, being the *Quarterly Reserved Space Payment*, are appropriate as part of relevant charging principles relating to the attachment of communication cables to CUC's electricity poles, provide your view as to what appropriate pricing formula should apply for such charges, including reasons as to why such proposed pricing formula is appropriate.

47. Flow submitted that the appropriate pricing formula should generate a charge comparable to the expected foregone revenue or return the reserved pole space would have generated in its most lucrative alternative use.
48. C3 did not support the continued charging of the fees. C3 also commented that its roll-out and business plans depend on C3 gaining access to the entire pole network. The concept of a reservation fee suggests that without such a reservation someone else might take over that space. If this were to happen, C3 would be prevented from fulfilling its roll-out commitments and an island-wide roll-out would be problematic.
49. DataLink submitted that reservation fees were appropriate and should apply until an attaching utility has a substantially complete network or it has relinquished its right to attach to any poles to which it is not already attached. Datalink's fees, it claims, are a percentage of the pole attachment fee and represent a portion of the opportunity cost for DataLink in holding the space for a single attaching utility.

4.5 Question A5

Provide your view on any other issues relating to the operation of the *"Reserved Space"* and the *"Quarterly Reserved Space Payment"* in the pole sharing agreements, including, but not limited to, the reference to the *"Total Minimum Annual Payments"*.

50. Flow noted that it had repeatedly asked DataLink to explain the basis for setting the reservation fee, but Datalink had only responded that the fee was not relevant to Flow. Flow submitted that, if the fee were an arbitrary

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- figure wholly unrelated to DataLink's costs, it would be contrary to the Infrastructure Sharing Regulations.
51. C3 submitted that attaching utilities should not be required to guarantee revenue to a company that was not ready to process attachment requests in a timely manner. Removing the reservation fee would, in its view, *"remove the possibility of DataLink benefiting from their own delay and incompetence of administration."*
 52. DataLink noted that the reservation fees were based on the expectations of the relevant attachers within the parameters of their respective ICT licence roll-out obligations. C3 has not been charged reservation fees since the expiry of their roll-out period as it existed at the time of novation of its agreement with CUC to DataLink, and C3 has not negotiated an extension.
 53. Datalink submitted that the intent of the Minimum Annual Payments was to encourage proactive roll-out of networks and to discourage potential anti-competitive actions such as holding an agreement for pole space without using that space. DataLink disagreed that these payments are a disincentive to its efficient processing of applications: if attachers had submitted applications in an organised and timely manner, the payments would have been less than the cost of submitted permit applications. DataLink acknowledged that there was a failure in the process caused by an unanticipated volume of applications made over a short period of time, exacerbated by the failure of attaching utilities to pay for completed make-ready work. In support of this, DataLink included a summary of the applications submitted by Logic, C3 and Cable & Wireless from 2013 through 2015. Datalink also acknowledged that there have been challenges in providing sufficient resources to keep up with the make-ready work created by these permit applications, and by the need for DataLink to consume additional resources to address repeated breaches of procedures by attachers.

4.6 Question A6

Provide your view on the appropriate approach to the possible reimbursements by DataLink of the payments made by C3 and Logic in relation to the "Total Minimum Annual Payments", as discussed in paragraph 166 above.

54. Flow disagreed with the Authority's premise that the reservation fee creates inefficiencies and prevents the promotion of competition, and therefore that a reservation fee is *per se* inefficient. The Authority's proposed approach to reimbursement may, it submitted, therefore be unnecessary.
55. C3 supported the notion of a refund of amounts paid in the past for fees the Authority determines to be discriminatory. However, C3 urged the introduction of an immediate cash refund system. If the payments were discriminatory, they would have acted to distort competition and, in C3's view, only a cash-refund system could be sufficient to start repairing the damage the fees have had on C3's business.
56. C3 also noted that a credit would not prevent DataLink from pursuing C3 for fees and charges currently unpaid and disputed by C3. C3 requested that the Authority make clear in its determination that if an amount is due from C3 in respect of a payment type declared by the Authority to be discriminatory and that amount is unpaid at the date of the determination, DataLink has no right to continue to pursue the payment of that amount.
57. DataLink disagreed with the Authority's proposal, as it would deprive DataLink of sums that were, in its opinion, properly charged and a direction to require rebates would, it submitted, be unlawful.

4.7 Question A7

Provide your view on any other matters you consider relevant to this consultation.

58. C3 commented that it agreed to the reservation fees at a time when the sector was more lightly regulated and they were seen as commercially necessary to gain access to the poles. However, as a result of the

Authority's requirement for island-wide roll-out and for competition on a level playing field, the fees need to be removed, as C3 is otherwise at a significant competitive disadvantage.

59. DataLink commented that it had sought to apply the same terms and conditions to all attaching utilities, and supported the use of the same charging principles for all, where relevant. It considered the format of the agreement with Logic to be the most fair to all parties. It acknowledged that its pre-existing agreements with Cable & Wireless and C3 have different terms and expiry dates. DataLink noted it faced resistance from Cable & Wireless and C3 to the negotiation of new agreements and, despite its good faith efforts, its agreements do not possess identical terms.

5. Working Group Position Papers

60. In December 2016, the Authority established a Pole Attachment Industry Working Group (the '**Working Group**') consisting of representatives of C3, DataLink, Digicel, Flow and Logic.¹⁷ In order to allow the members an opportunity to resolve the matters being considered by the ICT Consultation 2016-2, including the questions relating to reservation fees, the Authority put that consultation process on hold for the duration of the Working Group.
61. The Authority noted that, where the members of the Working Group achieved consensus on an issue under consideration, the Authority would review it and, where it considered it appropriate, issue a determination approving it. Where no consensus was achieved, the Authority would consider how to use its powers under the ICT Law and the URC Law, including continuing with the ICT Consultation 2016-2 procedure, to address any outstanding issues. In such an event, any final positions expressed by the members of the Working Group could be referenced in any follow-up procedure and the Authority could take them into account in reaching determinations on any of the outstanding issues.

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<http://www.icta.ofreg.ky/upimages/commonfiles/149729612220161207PoleAttachmentIndustryWorkingGroupLetter.pdf>

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62. In April 2017, the members of the Working Group submitted their final position papers on the issues they discussed. Only C3,¹⁸ DataLink¹⁹ and Logic²⁰ directly addressed the matters relating to reservation fees. Both Digicel and Flow submissions focused on other issues relating to pole attachments.
63. C3 stated that the *"Reserved Space Payment is inappropriate and unnecessary."* While the company considered the reservation fee payments could have been reasonable and justifiable if they had been applied to future make-ready work, they were not used for that purpose and therefore provided no value to C3.
64. DataLink submitted that reservation fees are in fact appropriate for attaching utilities which had an attachment agreement, no mature network in place, and a network roll-out schedule included in their ICT licence. The reservation fee provides the right to apply to attach to a pole, whether or not the pole needed make-ready, and recovers a portion of the opportunity cost of holding an attachment point for a single attacher. By covering DataLink's administrative and overhead costs, the reservation fee also ensures that electricity customers do not carry the cost of offering infrastructure to telecommunications operators. DataLink also submitted that, since costs incurred prior to actual attachment are sunk costs, reservation fees cannot be credited to future annual attachment fees.
65. In its view, a reservation fee is also appropriate because it provides DataLink the resources for the make-ready process, and gives attachers an incentive to roll out their networks in accordance with planned

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<http://www.icta.ofreg.ky/upimages/commonfiles/1495201977201704InfinityWorkingGroupResponse.pdf>

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<http://www.icta.ofreg.ky/upimages/commonfiles/149520178520170421DatalinkWorkingGroupResponse.pdf>

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<http://www.icta.ofreg.ky/upimages/commonfiles/149520188420170421LogicWorkingGroupResponse.pdf>

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- minimums [sic].²¹ DataLink further submitted, however, that it should not be subject to the same charge as other attachers because it is effectively the owner of the communications space *vis-à-vis* the other attachers.
66. Logic stated explicitly that it would continue to honour its contractual commitments (which include the payment of reservation fees) and declined to comment on whether minimum annual fees may have acted as a disincentive to network roll-out. It expressed the view, though, that additional fees such as the reservation fee would only make sense if the carrier receives an additional actual benefit, not merely a theoretical benefit under a contract. It also noted that its position on reservation fees might change if its network build-out requirements and timelines were to change, as a limited build-out requirement changes the value of a fee to reserve a space on all poles on the island. Logic also noted that, internationally, reservation fees do not appear to be a common feature of contractual or regulatory obligations between utilities, and that a reservation fee might not be the most effective method of encouraging investment in infrastructure.
67. On 1 June 2017, the Office invited the members of the Working Group to submit comments on each other's final position papers, as well as on whether there was consensus among the members of the Working Group on any issues, and on whether the Office ought to address the outstanding issues, if any, by continuing with the ICT Consultation 2016-2 procedure or by adopting another procedure.²² DataLink,²³ Digicel,²⁴

²¹ See section 6.1.1. of DataLink's 21 April 2017 Working Group final position paper.
<http://www.icta.ofreg.ky/upimages/commonfiles/149520178520170421DatalinkWorkingGroupResponse.pdf>

²²
<http://www.icta.ofreg.ky/upimages/commonfiles/149729618520170601OfficelettertoPoleWorkingGroupnextsteps.pdf>

²³
<http://www.icta.ofreg.ky/upimages/commonfiles/149805226120170616DatalinkWorkingGroupResponse.pdf>

²⁴
<http://www.icta.ofreg.ky/upimages/commonfiles/149805229520170616DigicelWorkingGroupResponse.pdf>

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- Flow²⁵ and Logic²⁶ responded on 16 June 2017. C3²⁷ responded on 20 June 2017.
68. Digicel, Flow and Logic noted they had no comments in addition to those already provided in their final position papers. While Digicel and Flow took the opportunity to reiterate a number of positions taken in their final position papers, the Office notes these did not relate directly to reservation fees.
69. DataLink stated that reservation fees were negotiated and tied to an attachers's roll-out schedule. DataLink further stated that the reservation fees provided an incentive for attachers to use their attachment point on the pole and provided DataLink with the funds to hire additional staff to address the workload of a steady and swift make-ready process. DataLink submitted that at the time it received its ICT licence there were at least 5 other entities potentially seeking to use the one available attachment point. DataLink submitted that reservation of an attachment point was of value to attachers as it ensured no other entity would use that attachment point before a full roll-out could occur or a decision to surrender rights to a specific pole could be made. DataLink noted that reserving an attachment point for one specific entity was also a logistic decision as "*multiple entities at the same height in varying locations was not operationally feasible.*"
70. DataLink further noted that "*[n]o consensus was reached on this issue, Infinity disagreed with the calculation and Logic noted this practice is not followed elsewhere.*" DataLink reasserted that "*the institution of reservation fees were fair and necessary*" and that it had always been transparent with respect to the methodology of its pricing model.

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<http://www.icta.ofreg.ky/upimages/commonfiles/149805234020170616FlowWorkingGroupResponse.pdf>

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<http://www.icta.ofreg.ky/upimages/commonfiles/149805238020170616LogicWorkingGroupResponse.pdf>

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<http://www.icta.ofreg.ky/upimages/commonfiles/149805241620170620IBLWorkingGroupResponse.pdf>

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71. With respect to 'minimum annual fees', DataLink stated that its experience was that attachers had no incentive to attach under the contract terms. DataLink submitted that the 'minimum' fees provided DataLink with a form of performance security and with funds to cover operating costs. DataLink further submitted that the minimum fees, which were agreed by commercial parties in arm's-length transactions, "*remain an incentive to roll-out and a deterrent to anticompetitive space holding practices.*"
72. C3 noted that DataLink had billed reservation fees based on all of their poles, questioned the purpose of these fees, and recommended that the funds "*be allocated to future Make-Ready being more efficient and effective.*"
73. Based on the foregoing, the Office notes there was no consensus among the members of the Working Group regarding in this context the appropriateness of reservation fees.
74. On 30 June 2017, the Office notified the parties that it was recommencing the consultation process in order to make determinations in respect of the issues which were not resolved by the Working Group process and placing the final position papers and reply comments submitted at the conclusion of the Working Group on the record of ICT Consultation 2016-2.²⁸

6. The Office's Analysis

6.1 General matters

75. Before proceeding to its consideration of the main issues relating to reservation fees and minimum annual payments, the Office considers that, while Flow did not address the matter of reservation fees directly, the Office needs to address some of the comments made by Flow following the conclusion of the Working Group, specifically that "*the process of*

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<http://www.icta.ofreg.ky/upimages/commonfiles/149885071020170630OfReglettertoPoleWorkingGroupprere-launchof2016-2.pdf>

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- procuring and securing pole attachments from DataLink is a commercial process," that the parties "clearly indicated to the Office that this process had been completed to the parties' satisfaction," and that "until there is a clear indication of market failure, we do not believe there is a need for regulatory intervention or a regulatory 'solution' to these issues."*
76. The preceding summary of the positions of C3, DataLink and Logic clearly shows that the parties did not reach a consensus on matters relating to reservation fees during the Working Group. The Office also notes they did not reach a consensus on most other matters discussed by the Working Group. In addition, under its statutory powers the Office can intervene on its own initiative where it considers that there is such a need, for example there may be commercial relationships in which certain providers feel unable to complain to the Office about behaviours in a market for fear of commercial retribution.
77. Further, and contrary to Flow's position, there remains a large number of issues to be resolved relating to access to CUC's utility poles and there is indeed a need for regulatory intervention by the Office. The fact that Flow completed its negotiations with DataLink to Flow's satisfaction does not necessarily mean that all parties did so, that such negotiations are in line with the general principles set out in the URC Law and the ICT Law and regulations, or that there is no other market failure which the Office needs to address.
78. Based on the summary of ICT Consultation 2016-2 (in particular, in relation to matters in Part A) and the Working Group, the Office has identified the following main issues to be addressed in relation to the appropriateness of the Pole Sharing Agreements and reservation fees:
- a. Does the Office have the jurisdiction to require changes to the pole sharing agreements and/or to require a rebate of the difference between the **"Total Minimum Annual Payments"** and the payments for pole attachment rentals?
 - b. Is the operation of **"Reserved Space"**, **"Quarterly Reserved Space Payments"** and **"Total Minimum Annual Payments"** unreasonable, harmful to competition, or otherwise inappropriate?

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- c. If so, should DataLink be required to rebate the difference between the **“Total Minimum Annual Payments”** and the payments for pole attachment rentals? If they should be so required, should the rebate be in the form of cash or credit towards future payments?
- d. What is the appropriate methodology for determining the quantum of the charges for **“Reserved Space”**?
79. The Office will address each of these in turn below.
80. The Office notes DataLink’s proposal that all pole sharing agreements be modified to include a provision such as existed in the 1996 **CUC-Flow Pole Sharing Agreement** which would require all attachers to share the cost of installing new, higher poles in order to accommodate their attachments. It is not necessary for the Office to consider this proposal as part of a determination regarding reservation fees and, accordingly, will address it at a later date.

6.2 Jurisdiction to Require Changes to Agreements

81. The ICTA Law²⁹ required the Authority, and the ICT Law now requires the Office, to perform certain functions. These include promoting competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so (section 9(3)(a)), licensing and regulating ICT services and ICT networks (section 9(3)(e)) and promoting and maintaining the efficient, economic and harmonised use of ICT infrastructure (section 9(3)(h)).
82. In support of these functions, the ICT Law grants the Office certain powers. Of particular relevance to the matters considered in ICT Consultation 2016-2 (including Part A), is the power outlined in section 69(2)(b) to:

(b) inquire into and require modification of any agreement or arrangements entered into between a licensee and another

²⁹ The Information and Communications Technology Authority Law, originally enacted in 2002.

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.

83. In other words, if the Office determines that an agreement or arrangement for the sharing of infrastructure 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, the Office is empowered to require changes to that agreement or arrangement.
84. The Office notes that Flow, in response to Question A2, submitted that "*whether a reservation fee should be charged ought to be the provider's decision and not determined by regulatory edict.*" With respect to Flow's submission that whether a reservation fee should be charged ought to be the service provider's decision, the Office notes that any charge for infrastructure sharing services must comply with, in particular, the ICT Law and Infrastructure Sharing Regulations.
85. As has been referenced above, the ICT Law and the Infrastructure Sharing Regulations impose a number of obligations directly on licensees with respect to their infrastructure sharing agreements and arrangements. These include the obligations not to refuse to share infrastructure except on reasonable, technical grounds (section 65(1)), and not to discriminate in the provision of infrastructure sharing services, whether in respect of rates or terms and conditions (section 65(5)). These obligations have existed since the ICTA Law came into force in 2002 and the Infrastructure Sharing Regulations were enacted in 2003 – clearly well before the introduction of the concept of reservation fees into the pole sharing agreements applicable to C3, Flow and Logic.
86. In this case, there is no dispute that DataLink's ICT service, allowing ICT licensees to attach their facilities to CUC's utility poles, is a form of infrastructure sharing. This service falls squarely within the definition of infrastructure sharing "*tangibles*" in section 2 of the ICT Law (see paragraph 18 above). The powers granted to the Office by the ICT Law and its regulations in respect of infrastructure sharing therefore apply to

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- DataLink's service. The Office also notes that DataLink holds Type 11³⁰ and 11a³¹ ICT service licences.
87. In light of the foregoing, the Office concludes that it clearly has the power under the ICT Law, in particular sections 65(6) and 69(2)(b), to modify or remove from DataLink's pole sharing agreements those provisions relating to reservation fees including where the Office determines that:
- a. they have 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; and/or
 - b. they do not comply with the principles of non-discrimination and the requirement for rates, terms and conditions to be reasonable.
88. The Office also concludes that, contrary to DataLink's submissions on the question, the Office has the power to require repayment of fees and charges previously paid to DataLink if required in the specific circumstances. In particular, section 69(2)(b) of the ICT Law does not limit the type of modification "*of any agreement or arrangements entered into between a licensee and another person*" the Office can require, provided that it is for an Office function, including "*in order to promote an efficient, economic and harmonised utilisation of infrastructure.*" Further, section 67A of the ICT Law authorises the Office to give directions where there is a dispute "*requiring repayment of sums by way of an adjustment of an underpayment or overpayment.*"
89. The Office does not agree with DataLink's position that these are "*retrospective measures*" which do "*nothing to promote an efficient, economic and harmonised use of infrastructure.*"³² This is not a retrospective measure, as the obligations set out to ensure, for example, that access to the infrastructure is provided on "*reasonable rates, terms and conditions which are not less favourable*", infrastructure sharing rates

³⁰ The provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee.

³¹ The provision, by lease or otherwise, of dark fibre to a Licensee.

³² Paragraph 19 of DataLink's 12 July 2016 submission in ICT Consultation 2016-2. Emphasis in original.

- be "*cost-orientated*", and that infrastructure sharing rates be "*non-discriminatory*", were in place and applicable (long) before the implementation of the relevant agreements.³³ In other words, the agreements should have reflected the regulatory obligations that were already in place. Therefore, the relevant Laws and Regulations, including the fundamental underlying principles of cost recovery and charging, applied at the time all the relevant Pole Attachment Agreements were being negotiated and signed.
90. In any event, if it were the case that the ICT Law and/or URC Law did not allow the Office to require, in the appropriate circumstances, a recovery of monies improperly charged for infrastructure sharing services, contrary to Laws and Regulations already in place, the Office could be frustrated in performing the functions assigned to it under those Laws, in particular those of promoting competition where reasonable or necessary to do so, and of promoting and maintaining an efficient, economic and harmonised use of ICT infrastructure. DataLink's interpretation in this regard is not a reasonable one.
91. Further, and more generally, both the ICT Law and the URC Law grant the Office the power to require in the appropriate circumstances the recovery of monies improperly charged. Section 9(1) of the ICT Law gives the Office "*the power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.*" Section 6(2)(hh) of the URC Law authorises the Office to "*take any other action, not expressly prohibited by Law, that is necessary and proper to perform its duties under this Law and sectoral legislation*" and section 6(2)(gg) of the URC Law dispels any doubt in this matter by permitting the Office to "*take appropriate enforcement action, including the imposition of administrative fines, in any case where a sectoral participant has contravened this Law, the regulations and any sectoral legislation or any administrative determination.*"

³³ See, for example, sections 44-48 in the Information and Communications Technology Authority Law, 2002 (available at <http://www.icta.ofreg.ky/upimages/commonfiles/1417277159ICTALaw2002.pdf>), and Regulation 4 in the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing Regulations), 2003 (available at <http://www.icta.ofreg.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>)

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92. While the imposition of fines is one of the potential enforcement actions the Office may take, it is not the only one and the Office considers that, in the appropriate circumstances, the range of potential enforcement actions available to it certainly includes requiring the repayment of monies overcharged contrary to statutory obligations that were *already* in place prior to the overcharging.

6.3 Are Reservation Fees Unreasonable, Harmful to Competition or otherwise inappropriate?

93. The Office considers that the reservation fees, as provided for in the Pole Sharing Agreements, in particular - limit the efficient and harmonised utilisation of infrastructure, limit the promotion of competition in the provision of ICT services or ICT networks, and were provided at rates, terms and conditions which were not reasonable.

A) Opportunity Cost

94. According to DataLink, its reservation fees were intended to recover the opportunity cost incurred by DataLink by keeping in the communication space a specific attachment point reserved by an ICT licensee but not occupied.
95. The Office notes that "*opportunity cost*" is a key concept in economics, expressing the relationship between scarcity and choice. In its general interpretation, it represents the value of a best alternative use that was foregone or sacrificed. Where the resources available to economic agents are limited or scarce, the allocation needs to be made in an optimal manner so that the total utility or satisfaction derived from the use of such limited or scarce resources cannot be increased by using them in any other alternative way.
96. Based on such general economic principles relating to an efficient allocation of scarce resources, the Office considers keeping an attachment point reserved but not occupied is likely to create an opportunity cost for DataLink insofar as there is value that could otherwise be derived from

making that attachment point available to be occupied by another ICT licensee.

97. Accordingly, the Office notes that the introduction of reservation fees may be viewed, *in principle*, as an appropriate means to ensure an efficient allocation of the relevant costs related to the use of the communication space which is made available to ICT licensees on utility poles in Grand Cayman, where the demand for attachment points exceeds the number of attachment points available.
98. The Office notes that the parties were divided on whether DataLink's reservation fees were appropriate.

B) Introduction of Reservation Fees in Pole Sharing Agreements

99. Having noted the foregoing discussion about the term "*opportunity cost*", and as set out by Flow above,³⁴ the Office agrees that, under the 1996 contract between CUC and Cable & Wireless, i.e. the **CUC-Flow Pole Sharing Agreement**, the opportunity cost for CUC's pole sharing arrangements was zero at that time as there were no other entities potentially requesting access to CUC's poles except for Flow.
100. Further, the absence of any reference to reservation fees in the **CUC-C3 Pole Sharing Agreement** may be also explained by the limited demand for attachment points at the time the agreement was negotiated, i.e. by the non-existence of an opportunity cost for CUC of making the attachment point available to another ICT licensee.
101. The Office further notes that the reservation fees were initially introduced by CUC, and not by DataLink, and were specified as the "*Quarterly Reserved Space Payment*" in the **CUC-C3 Deed of Variation**. The "*Quarterly Reserved Space Payment*" applied until 31 December 2014 and was calculated as the product of a percentage of the *Annual Attachment Fee* and of the total number of poles owned by CUC in Grand Cayman less any poles already attached to by C3.

³⁴ See paragraph 40 above.

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102. As the **CUC-C3 Deed of Variation** was agreed on 20 March 2012, at a time when CUC would have known of ICT Licensees other than C3 potentially interested in attaching to CUC's communications space,³⁵ the opportunity cost of making the attachment point available to another ICT licensee existed for CUC when it negotiated the terms of the **CUC-C3 Deed of Variation** with C3. In such circumstances, C3 accepted such new contractual arrangements with the understanding that, without such a reservation, someone else might take over the available attachment points, which would affect C3's ability to roll out its fibre network in Grand Cayman.³⁶
103. The Office notes that these contractual arrangements between C3 and CUC occurred at the same time as CUC finalised its decision to outsource its business operation relating to the sharing of its distribution supporting structures³⁷ with other parties - for the attachment of the other parties' aerial cables and associated equipment - namely to meet the prospective demand from ICT licensees for the attachment points in the communications space on CUC's electricity poles. For that reason, CUC established DataLink as a separate company, fully-owned by CUC, and it entered into an agreement with DataLink under which DataLink would have custody and control of the designated communications space on CUC's electricity poles, and it would be duly authorised to utilise that space in accordance with its ICT licence granted by the Authority. (The Office notes that the **CUC-C3 Deed of Variation** is dated **20 March 2012** while DataLink's ICT Licence was issued on **28 March 2012**.)
104. Further, the Office notes that, through the **C3-CUC-DataLink Novation Agreement** executed on **7 May 2012**, all the responsibilities for invoicing and receiving payments relating to C3's use of the communications space on CUC's electricity poles, including for the "*Quarterly Reserved Space Payment*", were transferred from CUC to DataLink.

³⁵ For more details on the background, see Appendix 1.

³⁶ See paragraphs 48 and 58 above.

³⁷ In effect, its utility poles.

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105. The Office also notes that similar principles which related to the **Quarterly Reserved Space Payment** were later implemented by DataLink in the **DataLink-Logic Pole Sharing Agreement** and, more recently, in the **DataLink-Flow Pole Sharing Agreement**.
106. However, the Office notes that the **Flow-CUC-DataLink Novation Agreement**, dated **9 November 2012**, did not contain any reference to “reservation fees” despite the fact that, at the time of this agreement, the demand for attachment points exceeded the actual number of attachment points available (i.e. the “opportunity cost” was not zero).

C) Role of DataLink

107. Based on the above, the Office considers that DataLink ‘stands alone’ from CUC, as DataLink is the ICT Licensee and has custody and control of the designated communications space on CUC’s electricity poles. Therefore, DataLink should be required to demonstrate that all reservation fees charged as the “*Quarterly Reserved Space Payment*” are directly related to DataLink’s costs incurred as a result of keeping an attachment point reserved but not occupied. In other words, DataLink should demonstrate that the removal of reservation fees would result in a net loss for DataLink, when assuming such attachment points could be otherwise occupied and generate revenues for DataLink through pole attachment rental fees. Any such loss could not and should not be transferred to CUC (and ultimately to electricity users).
108. The Office also notes DataLink’s comments that a pole access regime which allowed attachers to occupy but not use a scarce and important resource like space on a utility pole would be problematic and that a regime which encourages network roll-out is desirable.³⁸ The Office notes that DataLink, in so stating, is purporting to apply statutory public policy considerations as provided for under the ICT Law and URC Law, which is not a DataLink role nor should it be a consideration in determining the relevant opportunity cost in this case. As has been set out above, DataLink should demonstrate that the removal of reservation fees would result in a net loss for DataLink, and thus the charging of such fees is appropriate.

³⁸ See paragraph 8 of DataLink’s 12 July 2016 submission in ICT Consultation 2016-2.

D) Effect of DataLink's Reservation Fees

109. In any event, even if one accepts DataLink's proposition that the introduction of reservation fees is justified because it encourages network roll-out, the Office has not received sufficient evidence to demonstrate that such goals have been achieved in Grand Cayman through the implementation of reservation fees. On the contrary, it appears that the reservation fees, as implemented in some, if not all, of the existing Pole Sharing Agreements, have caused disruption in the planned network roll-out schedules. In relation to the specific Pole Sharing Agreements,³⁹ the Office considers that the way the reservation fees work in those agreements, in particular:

- a. has had the effect of limiting both the efficient and harmonised utilisation of infrastructure and the promotion of competition in the provision of ICT services or ICT networks as provided for under the ICT Law (see e.g. section 69 (2) (b) ICT Law); and
- b. constitutes a breach of section 65 (5) of ICT Law (see also Regulations 6 and 10 of the Infrastructure Sharing Regulations), which states that *"[a]ny interconnection or infrastructure sharing provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to –*
 - (a) any non-affiliated supplier;*
 - (b) any subsidiary or affiliate of the licensee;⁴⁰ or*
 - (c) any other part of the licensee's own business."⁴¹*

³⁹ See footnote 8.

⁴⁰ In this matter, this is CUC. An "Affiliate" as defined at Licence Condition 1.1 of DataLink's Licence includes *"any holding company of the Licensee [...]"*. The Office notes that CUC holds 100% of the shares in DataLink.

⁴¹ In this matter, this includes the provision of fixed telephony and dark fibre services by DataLink under their Type 1 and 11a licences.

E) Disincentives to the efficient and harmonised utilisation of infrastructure

110. The Office considers that the use of reservation fees in the specific way set out in the Pole Sharing Agreements has served to enable the very behaviour about which DataLink expressed concern. By paying the reservation fees, both C3 and Logic could be confident that no third-party competitors would be able to access the poles managed by DataLink even if their respective network roll-outs slowed down or stopped completely.
111. DataLink stated in its submission that, in 2012, three parties were seeking access to the last attachment point on the poles.⁴² The Office notes that Logic ultimately secured that last attachment point. It is possible that one of those other two parties might have been able to roll out their own network if it had been able to access poles in areas where neither Logic nor C3 were rolling out their networks. If this had happened, competing fibre networks and competing ICT services likely would have been available earlier across a wider area of Grand Cayman. In such a case, consumers would have benefited from this competition and DataLink would have been generating more revenues from pole attachment fees.
112. Instead, the Office considers that DataLink is likely to have felt reduced pressure to licence the right to attach to utility poles to third parties because it knew it would be receiving revenue even if C3 and Logic did not roll out their networks in a timely manner. In this way, DataLink would have been disincentivised to ensure that it enabled the efficient and effective rollout of C3's and Logic's ICT networks, such that their services would be made available to customers across Grand Cayman. The Office notes that several of the issues between the parties concerned attachments to CUC's utility poles made without permits from DataLink,⁴³ and considers that these issues may have been less significant if DataLink had been more effectively incentivised to process applications for attachments quickly and to make poles ready to accommodate them.

⁴² See paragraph 6 of DataLink's 12 July 2016 submission in ICT Consultation 2016-2.

⁴³ These are set out in detail in the "Background" section of *ICT Decision 2016-1 – Dispute Determination relating to the allocation of Infinity Broadband Ltd.'s position on CUC electricity poles*, 27 April 2016.

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

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113. Because third parties were prevented from accessing the underutilised poles, and because Logic, C3 and DataLink do not appear from the information before the Office (e.g. the Licensees' quarterly fibre rollout reports) to have completed the roll-out of their fibre networks, there are currently many poles across Grand Cayman not being used to their fullest potential. C3 and Logic would have known that no other Licensees could enter the market because of the limited nature of the attachments to the communications space and that they had reserved those slots for a period of time. Therefore, the incentives for C3 and Logic to roll out their respective fibre networks in a timely manner across Grand Cayman is likely to have been significantly reduced. Also, and as discussed above at paragraph 112, DataLink knew that it already had revenue coming in based on reservation fees, which meant that it likely felt no urgency to be properly resourced to fulfil the demand on its resources from C3 and Logic requesting access to poles that had to be made ready for such access. Had Logic, C3 or DataLink had a stronger incentive to use their space on the poles in a timely manner, or had third parties been able to access the poles, fewer poles would have been underutilised and the use of the pole infrastructure in this way would have been more economic and effective.
114. Therefore, based on the evidence regarding the number of permit applications processed and the time required to do so⁴⁴, the Office considers that the reservation fees as specified in the Pole Sharing Agreements have acted and continue to act as a disincentive to efficient processing of permit applications, and therefore the reservation fees did and do not promote an efficient, economic and harmonised utilisation of utility pole infrastructure. The reservation fees in this way have not enabled the development of competition in the provision of public ICT networks and services in a timely manner.
115. Further, the Office considers that the evidence does not support DataLink's assertions that the failure of the attachment process was the result of either the attaching utilities not submitting applications "*in an*

⁴⁴ See, for example, page 9 of DataLink's July 2016 submission to ICT Consultation 2016-2. See also the 2015 Grand Court Decision – CUC Ltd. v WestTel Ltd. T/A Logic – <http://www.icta.ofreg.ky/upimages/commonfiles/1458327054CUCLtdvWestelLtdTALogic.pdf>

- organised and timely manner" or "unanticipated demand".⁴⁵ To the contrary, DataLink was in full possession of the other attaching utilities' anticipated pole needs, based on each licensee's fibre roll-out obligations. In any event, given that the reservation fees have been specified as the "Quarterly Reserved Space Payment" which is derived from the total number of poles owned by CUC in Grand Cayman, there is no ground for DataLink to claim that the submission of a great number of permit applications was an "unanticipated demand".*
116. Accordingly, the Office considers that the scope of reservation fees, i.e. the total number of relevant poles to which the *"Quarterly Reserved Space Payment"* makes reference, should be directly related to the forecast or anticipated demand for pole attachments, i.e. permit applications, by ICT licensees. In other words, any lack of resources with DataLink in processing permit applications from ICT licensees should have been reflected in the scope of reservation fees, i.e. the relevant terms of the *"Quarterly Reserved Space Payment"*.
117. For example, if DataLink's capability to process permit applications is limited to issuing permits for a maximum of 300 poles per Licensee per quarter, it is then reasonable to assume that the scope of reservation fees would be limited to 300 poles, instead of *"all Poles owned by the Electric Utility in Grand Cayman"*⁴⁶ or *"all Poles in Grand Cayman that DataLink owns or has the right to attach to"*.⁴⁷
118. Looking at each of the Pole Sharing Agreements in turn:
- i) CUC-C3 Pole Sharing Agreement*
119. When CUC and C3 executed the **CUC-C3 Deed of Variation** on 20 March 2012, the parties were aware that C3 had a licence obligation to roll out a fibre network sufficient to make available all its ICT services to 100% of the resident population of Grand Cayman by 31 December

⁴⁵ Paragraph 30 of DataLink 12 July 2016 submission in ICT Consultation 2016-2.

⁴⁶ **CUC-C3 Deed of Variation.**

⁴⁷ **DataLink-Logic Pole Sharing Agreement** and **DataLink-Flow Pole Sharing Agreement.**

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- 2014.⁴⁸ This same date was the end of the reservation period, or "*Build-Out Period*" as it was termed in the **CUC-C3 Deed of Variation** relating to the **CUC-C3 Pole Sharing Agreement**, both of which being novated to DataLink through the **C3-CUC-DataLink Novation Agreement**.
120. Under the terms of the **CUC-C3 Deed of Variation**, C3 was required to pay a reservation fee (i.e. the "*Quarterly Reserved Space Payment*") during the "*Build-Out Period*", in respect of all of CUC's poles, stated to be approximately 15,000 as at 22 November 2005 (i.e. the date of the **CUC-C3 Pole Sharing Agreement**), less any poles already occupied by C3. The Office considers it is reasonable to assume that a substantial majority of those poles would be required to serve "*100% of the resident population of Grand Cayman*". This means CUC and later Datalink could reasonably have anticipated the number of applications for pole permits that C3 would be submitting.

ii) DataLink-Logic Pole Sharing Agreement

121. When Logic and Datalink executed the **DataLink-Logic Pole Sharing Agreement** on 18 July 2013, the parties were aware that Logic had a licence obligation to complete a fibre network sufficient to enable the provision of ICT services to 100% of the resident population of Grand Cayman by 8 February 2017, and set 31 December 2018 as the end of Logic's "*Build-Out Period*". Under its agreement with DataLink, Logic has been paying a reservation fee (i.e. the "*Quarterly Reserved Space Payment*") in respect of all of CUC's poles, stated to be approximately 16,500 as at 18 July 2013 (i.e. the date of the **DataLink-Logic Pole Sharing Agreement**), less any poles already occupied by Logic. Again, it is reasonable to assume that a substantial majority of those poles would be required to serve "*100% of the resident population of Grand Cayman*." The Office considers that, in such circumstances, Datalink could reasonably have anticipated the number of applications for pole permits that Logic would then be submitting over the 3½ year period of Logic's licensed roll-out obligation. In other words, the demand for poles clearly was not "*unanticipated*."

⁴⁸ This was subsequently extended to 31 December 2015 by Amendment No. 10 to C3's ICT Licence – http://www.icta.ofreg.ky/upimages/licencedocument/ViewAmendment10_1417648311.pdf

122. According to the information submitted by Datalink, Logic began submitting permit requests in the same calendar quarter as the parties executed the **DataLink-Logic Pole Sharing Agreement**. Again, this could clearly have been anticipated by DataLink. By the end of June 2015, DataLink's submission shows Logic had submitted 4,455 permit requests.⁴⁹ Of these, 3,700 remained outstanding, according to the evidence submitted by Logic as referenced in the **CUC Restraining Order application against Logic** judgment.⁵⁰ The Office notes DataLink's comments that "*the evidence was not tested by the court*" and that a "*significant number of the applications identified in Logic's evidence as delayed or outstanding were instances where payment for make ready work was sought and not pre-paid for*". However, in the result, DataLink's success at issuing permits amounted to approximately 17%⁵¹ of applications filed. Even taking into account that some of the delay in issuing permits was due to non-payment of make-ready charges, this result does not suggest DataLink was processing permit applications efficiently, while Logic continued to pay the reservation fees.
123. Subsequent to the publication of ICT Consultation 2016-2, Logic, CUC and Datalink executed a Memorandum of Understanding in June 2016 in relation to pole permit processing and pole attachment matters (the '**CUC-DataLink-Logic MOU**'). Under this agreement, DataLink agreed to use "*best efforts*" to process up to 200 permit applications per month until the expiry of the agreement on 31 December 2018. These best efforts may be limited by applications received from other parties, as DataLink stated it can process no more than 300 applications per month for all

⁴⁹ See the table of permit requests at paragraph 31 of the DataLink 12 July 2016 submission in ICT Consultation 2016-2.

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

⁵⁰ The relevant date for the balance relating to outstanding permit requests is not specified (see paragraph 41 of the **CUC Restraining Order application against Logic** judgment), however the Office notes that the relevant affidavit was filed on 17 July 2015.

<http://www.icta.ofreg.ky/upimages/commonfiles/1458327054CUCLtdvWestelLtdTALogic.pdf>

⁵¹ This figure is based on the 755 permits estimated to have been issued to Logic around the end of June 2015 (4,455 permit requests less 3,700 requests outstanding) divided by the 4,455 permit requests submitted by the end of June 2015.

- attachers.⁵² In addition, under the **CUC-DataLink-Logic MOU**, Logic acknowledged that the submission of new permit requests will affect DataLink's ability to process the backlog of outstanding permit requests, and agreed to pay a fixed fee for make-ready for all poles.
124. The term of the **CUC-DataLink-Logic MOU** is 18 months. During this time, DataLink therefore agreed to process a maximum of 3,600 permit requests⁵³ for Logic, including all outstanding requests as well as any new requests to address unauthorised attachments and any additional poles. The Office notes that this could be sufficient to address the 3,700 backlog noted previously. However, Logic agreed to pay a fixed fee per permit request as well as the reservation fee during this same time. In other words, by the end of term of the **CUC-DataLink-Logic MOU** on 31 December 2018, Logic is unlikely to have attached to substantially more poles than it had applied for by the end of 2015, notwithstanding the payment of substantial fees to DataLink.
125. Accordingly, the Office considers that the payment by Logic of the required reservation fee, as per the terms of the **DataLink-Logic Pole Sharing Agreement**, has acted as a disincentive to the efficient processing of permit requests by DataLink.

iii) DataLink-Flow Pole Sharing Agreement

126. The Office notes that the foregoing discussion relates principally to the reservation fees included in DataLink's Pole Sharing Agreements with C3 and Logic. The Office also notes that neither the 1996 **CUC-Flow Pole Sharing Agreement** nor the 2012 **Flow-CUC-DataLink Novation Agreement** included a reservation fee to be paid by Flow. However, after the expiry of the **CUC-Flow Pole Sharing Agreement**, the reservation fee (i.e. the "*Quarterly Reserved Space Payment*") was introduced in the 2016 **DataLink-Flow Pole Sharing Agreement**.

⁵² See page 9 of DataLink's Working Group final position paper: "... *CUC's maximum resource capability of 300 permits per month ...*" (<http://www.icta.ofreg.ky/upimages/commonfiles/149520178520170421DatalinkWorkingGroupResponse.pdf>). See also clause 10 of the **CUC-DataLink-Logic MOU**.

⁵³ 200 permits per month times 18 months.

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127. The Office further notes that reservation fees in the C3 and Logic Pole Sharing Agreements apply to all CUC's poles for which those companies have not been granted a permit at the start of the relevant calendar quarter period, for the purposes of calculating the "*Quarterly Reserved Space Payment*", and such reservation fees are levied during a "*Build-Out Period*". According to DataLink, because Flow is not building out a new network like C3 and Logic, DataLink and Flow agreed to different contractual terms.
128. The reservation fees in the **DataLink-Flow Pole Sharing Agreement** apply instead to any new poles installed by DataLink, and are levied only for a period of six (6) months following installation of the new pole. The **DataLink-Flow Pole Sharing Agreement** does not define the term "new pole" and the Office considers that the term includes both new poles installed in new neighbourhoods being served by CUC ("*greenfield*" poles) as well as "*mid-span*" poles installed by CUC in established neighbourhoods in order to manage wind loading issues created by the attachment of additional telecommunications facilities on existing poles.
129. DataLink submitted that, "*[i]f the provisions are considered to be discriminatory because they are absent from some contracts, then they should be introduced into those contracts and not removed from the contracts with Logic and C3.*"⁵⁴ The Office considers that DataLink's proposal would be ineffective in resolving the discrimination.
130. Both Flow and C3 are past their respective initial roll-out periods, the former because it has been in operation for many years and the latter because its deadline for island-wide network roll-out has now passed. DataLink's initial form of reservation fee was designed to be, in effect, only during that initial network roll-out period and, at the present time, would only apply to Logic, even if it were inserted into all pole sharing agreements. The Office considers that this would be discriminatory against Logic (as noted above, in breach of the ICT Law and of the Infrastructure Sharing Regulations) and put Logic at a competitive disadvantage as against the other attachers.

⁵⁴ Paragraph 21 of DataLink's 12 July 2017 submission in response to ICT Consultation 2016-2. <http://www.icta.ofreg.ky/upimages/commonfiles/147922079012July2016DataLinkresponse.pdf>

131. Further, the Office considers that DataLink's revised form of reservation fee, contained in the **DataLink-Flow Pole Sharing Agreement**, is also discriminatory as it does not apply to DataLink's own business. In other words, DataLink's proposal, if adopted, would be in breach of section 65 (5) of ICT Law and Regulation 10(1)(b) of the Infrastructure Sharing Regulations because it would not "*ensure that [DataLink] applies equivalent conditions in equivalent circumstances in providing equivalent services, as [DataLink] provides to itself ...*."

F) Infrastructure not provided at reasonable rates, terms and conditions

132. The Office notes that the total number of poles owned by CUC in Grand Cayman, as reference for calculating the "*Quarterly Reserved Space Payment*", was estimated by CUC, and then DataLink, at the following levels listed chronologically:

- On 22 November 2005 there were approximately 15,000 poles owned by CUC in Grand Cayman, as specified in the **CUC-C3 Deed of Variation**;
- On 18 July 2013 there were approximately 16,500 poles owned by CUC in Grand Cayman, as specified in the **DataLink-Logic Pole Sharing Agreement**;
- On 18 November 2016 there were approximately 17,475 poles owned by CUC in Grand Cayman, as specified in the **DataLink-Flow Pole Sharing Agreement**.

133. Accordingly, the reservation fees, as a means to ensure an efficient allocation of scarce resources, were determined by CUC and DataLink based on the assumption that the opportunity cost incurred by DataLink by keeping an attachment point in the communication space reserved but not occupied, relates to *all* the poles owned by CUC in Grand Cayman, regardless of whether and when any of those poles will be made available for attachment by ICT licensees.

134. However, the Office notes DataLink's claim that the resource capability available to CUC and DataLink for processing and issuing permits for attachment of communication cables on utility poles is limited to a maximum of 300 permits (i.e. poles) per month on an aggregated level for *all* attaching utilities, noting that, presumably within that number, DataLink has contracted with Logic to use "*best efforts*" to process up to

- 200 permit applications per month⁵⁵ (which, in effect, means that the other attachers would have to share the remaining 100 permits between them each month).
135. Further, and given that there are currently four ICT licensees sharing the communication space on CUC's electricity poles, all potentially requiring CUC's and/or DataLink's resources to process and issue permit applications, including performing any make-ready work if and when necessary, it is reasonable to assume that a maximum of 900 utility poles can be reserved in any given quarter for all four ICT licensees, including DataLink, for attachment of their communication cables.⁵⁶
136. If the demand for permits or accessing poles is the same across all the attaching utilities (though noting for example the discussion in paragraph 134 above), it can be assumed that, on average, each of the four ICT licensees would be granted the permits for attachment of communication cables on up to 225 utility poles in each quarter on average. If so, for fairness, it would be reasonable to assume that a maximum of 225 utility poles could be reserved on average each quarter by an ICT licensee for attachment of its communication cables which, as discussed above, is not the factual case here.
137. Indeed, the Office notes that the charging principles for the "*Quarterly Reserved Space Payment*" for reservation of attachment point on CUC's electricity poles did not take into account what was actually achievable. Instead the fee is based on the total number of reserved poles (i.e. all poles owned by CUC in Grand Cayman), less any poles for which the licensee already has permits, times a percentage of the Annual Attachment Fee. In light of the discussion above, this exceeds the maximum number of poles available for attachment in a given quarter, and therefore constitutes a form of infrastructure sharing charges which the Office considers is not reasonable.

⁵⁵ Clause 12 of the **CUC-DataLink-Logic MOU**.

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

⁵⁶ The limit of 900 utility poles that can be reserved by all four ICT licensees in any given quarter is based on the assumption that DataLink is capable of processing permit applications up to a maximum of 300 poles per month (i.e. 900 poles per quarter).

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138. First, this in effect assumes that the licensee would necessarily request access to *all of* CUC's utility poles. Such an assumption is not reasonable unless it is specifically asked for by the licensee, as it ignores that the licensees may have alternatives to CUC utility poles in some areas (i.e. underground ducts).
139. It is also premised on the idea that an ICT licensee must attach to 100% of CUC's utility poles in order to comply with its licence obligation to provide ICT services to 100% of the resident population of Grand Cayman. As DataLink, and CUC before it, has provided pole attachment services to Flow for many years, the Office considers that DataLink would have known whether or not this was a reasonable premise.
140. Either of these two factors would reduce the proportion of CUC utility poles to which a licensee would reasonably need access. In these circumstances, the Office considers that basing a reservation fee on a requirement for access to *100%* of CUC's utility poles is not reasonable.
141. Second, the reservation fee was set as a percentage of the **Annual Attachment Fee**, without reference to DataLink's actual costs. This means it is not possible to assess whether the reservation fees determined in such way are directly related to DataLink's costs incurred as a result of keeping an attachment point reserved but not occupied. Nor is it possible to assess whether the offer presented to ICT licensees to keep attachment points reserved but not occupied is provided at reasonable rates.
142. Third, the reservation fees as specified in the C3 and Logic Pole Sharing Agreements assumed that DataLink would be able to provide access to the reserved poles (i.e. all poles owned by CUC in Grand Cayman) within a reasonable period of time, and certainly no less time than was specified for the Build-Out Period in the respective Agreements. When C3 agreed to the reservation fees in the **CUC-C3 Deed of Variation**, this would have covered more than 15,000 poles⁵⁷ in less than three years' time, from 20 March 2012 to 31 December 2014, or approximately 450 per month on

⁵⁷ Given that the volume of 15,000 poles was an estimate as at 22 November 2005 and that CUC's utility pole infrastructure would have increased since 2005, it is reasonable to assume that by 20 March 2012 (i.e. the date of the **CUC-C3 Deed of Variation**) CUC had more than 15,000 poles across Grand Cayman.

- average. Later, when Logic entered into the **DataLink-Logic Pole Sharing Agreement**, this would have covered approximately 16,500 poles in less than five and a half years' time, from 18 July 2013 to 31 December 2018, or approximately 250 per month on average, noting that in the period from July 2013 through December 2014, DataLink would have had to satisfy the combined demand for permit requests from both C3 and Logic.
143. However, the evidence submitted by DataLink in these proceedings states that DataLink can process a maximum of 300 poles per month for *all* licensees requesting attachments combined.⁵⁸ Moreover, this appears to be a recent development, as it is first mentioned in the **CUC-DataLink-Logic MOU** which was executed in July 2016. In fact, there is no evidence that DataLink had resourced itself to process the referenced 300 pole permit applications per month, let alone 450⁵⁹ in March 2012 or a further 250⁶⁰ in July 2013. In any event, whether or not DataLink was capable of providing access to the reserved poles within the timeframes suggested by the Pole Sharing Agreements, it did not provide this.⁶¹
144. Further, as in the **DataLink-Logic Pole Sharing Agreement**, the reservation fees in the **DataLink-Flow Pole Sharing Agreement** are also based on the total number of poles owned by CUC in Grand Cayman, as estimated at the date of the agreement, less the poles Flow identifies to be excluded from being reserved.⁶² The Office understands that,

⁵⁸ See footnote 52 above.

⁵⁹ See paragraph 142 above.

⁶⁰ See paragraph 142 above.

⁶¹ In its 2 October 2014 answer to C3's 12 September 2014 determination request regarding the height of the attachment point on the pole assigned to C3, DataLink noted that Logic had attached to 1,274 poles as of that date. This amounted to approximately 100 poles per month on average since DataLink and Logic entered into the **DataLink-Logic Pole Sharing Agreement** in July 2013.

<http://www.icta.ofreg.ky/upimages/commonfiles/141726651120141002DataLinkResponse.pdf>

Note, however, the discussion at paragraph 122 above concerning the number of permits issued (i.e. not, "attachments made") by June 2015. If DataLink had issued 755 permits to Logic by that date, this would amount to approximately 31 permits per month on average over the period from July 2013 to June 2015.

⁶² Clause F of Item 2 of Appendix C of the **DataLink-Logic Pole Sharing Agreement** and of the **DataLink-Flow Pole Sharing Agreement** provide Logic and Flow, respectively, with an

although Flow is attached to far fewer than 100% of CUC's poles, its network is largely built out and Flow would reasonably only require access to incremental CUC poles which might be installed, for example, in new neighbourhoods or as 'mid-span' poles required to strengthen adjacent poles when new communications cables are attached to them. However, as no new poles installed by CUC after October 2016 would include a communications space,⁶³ any new poles to which Flow would seek to attach would need to be replaced and made ready, and would be subject to DataLink's limitation of a maximum of 300 poles per month for *all* licensees combined.⁶⁴

145. Therefore, under the circumstances explained above, C3, Logic and Flow were paying to reserve access to infrastructure that DataLink could not reasonably provide for use within the timeframes set out in their respective Pole Sharing Agreements.
146. Accordingly, for the reasons set out above, the Office considers that the offer presented by DataLink to other licensees to keep their respective attachment points reserved but not occupied was provided at rates, terms and conditions that were and are not reasonable.

G) Discriminatory provisions

147. The Office notes, as set out above, that the provisions establishing the rights to keep an attachment point in the communication space reserved but not occupied are materially different between various Pole Sharing Agreements.
148. Also, the Office notes that DataLink continues to be exempt from any obligation to pay reservation fees in respect of the attachment point in the communications space to which DataLink has the right to attach. In other words, DataLink continues to provide its own business with the option to keep DataLink's attachment point reserved but not occupied at rates,

"option to exclude any Pole or collection of Poles from the Reserved Space by notice to DataLink."

⁶³ Unless another ICT licensee has paid for the communications space.

⁶⁴ The Office notes that paragraph 31 of its 12 July 2016 submission, DataLink stated that Flow submitted 469 and 540 permit applications in Q3 2015 and Q4 2015, respectively

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- terms and conditions that are more favourable than those provided to other licensees, namely to C3, Logic and Flow, without there being an objective justification for doing so.
149. The Office considers that such behaviours are contrary to the provisions of the ICT Law, in particular section 65 (5), and Infrastructure Sharing Regulations, in particular Regulations 6 (a) and 10 (1) (b).

i) Horizontal discrimination

150. The imposition of reservation fees on attachers who were in the earliest period of their network roll-out (Logic and C3), and not on attachers who had largely completed their roll-out (Flow), was discriminatory. Flow's fixed line network might not be in a high-growth phase like Logic's or C3's, but it is reasonable to assume that it would also be expanding to the extent that the population expands and new neighbourhoods are developed. Flow, therefore, has the same interest as Logic and C3 in knowing space would be reserved and available for it on the utility poles.⁶⁵
151. However, Flow was not charged any reservation fees by DataLink prior to November 2016, and is currently being charged for the Reserved Space on terms and conditions which appear to be more favourable than those applied to either C3 or Logic, as explained below.
152. First, the '**Build-Out Period**' in the **DataLink-Flow Pole Sharing Agreement** does not have a set sunset date and only features a reference to '**END OF ROLL OUT**', which suggests the attachment point allocated to Flow may be reserved for exclusive use by Flow for a significantly longer period of time compared to the period of exclusive use granted to C3 and Logic.
153. Second, after the '**END OF ROLL OUT**' period, Flow will be granted automatically the '**Reserved Space**' for newly installed poles for a

⁶⁵ The table at paragraph 31 of the DataLink 12 July 2016 submission in ICT Consultation 2016-2 shows that Flow has been submitting an increasing number of permit requests. It is not clear whether these are for new or existing poles but it is reasonable to assume some of these are for new poles, for example, in new residential developments.

maximum of six months. Such option to have any newly installed poles automatically reserved is not available to either C3 or Logic.

154. Also, as noted in paragraph 144 above, Flow has the possibility, under the **DataLink-Flow Pole Sharing Agreement**, to exclude any number of poles from the '**Reserved Space**',⁶⁶ which, combined with the term of the '**Build-Out Period**', suggests the reservation fees that Flow is now required to pay to DataLink under the new agreement may be related to Flow's actual demand for accessing new poles additional to the existing poles occupied in accordance with its previous agreement. This same combination of terms, and therefore ability to relate reservation fees to actual demand, is not available to C3 or Logic.
155. The Office, therefore, considers that the Agreement entered into by DataLink with Flow to keep its attachment point reserved, but not occupied, is provided at rates, terms and conditions that are more favourable than those provided by DataLink to C3 and Logic, without there being an objective justification for such horizontal discrimination.

ii) Self Preference

156. Noting, among other obligations, section 65 (5) ICT Law, which references that infrastructure sharing services shall be provided on "*not less favourable*" terms and conditions (including rates) than those provided to "*any subsidiary or affiliate of the licensee [...] any other part of the licensee's own business,*" the Office considers that DataLink has treated itself materially more favourably than other licensees.
157. To expand, DataLink also has an obligation in its ICT licence, similar to that in the C3 and Logic ICT licences, to have "*installed additional fibre optic cable sufficient to enable ICT Services to be provided to 100% of the*

⁶⁶ Once Flow has chosen to exclude a pole from the '**Reserved Space**', the pole would no longer be counted when calculating the reservation fees - see clause F of Appendix C of the **DataLink-Flow Pole Sharing Agreement** (provided below in Appendix 2 to this Determination): "*Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space the Pole shall no longer be taken into account when calculating the Quarterly Reserved Space Payment (as defined below) from the next quarterly payment date onwards.*"

resident population Grand Cayman" by 31 December 2015.⁶⁷ It too has the same interest as Logic and C3 in knowing space would be available for it on the utility poles to comply with its rollout obligation. DataLink submitted, however, that it "*does not pay itself for reserved space*,"⁶⁸ which effectively relieved the company of the expense or burden of a reservation fee. In this regard, the Office notes that DataLink holds a licence to provide a Type 11a ICT Service ("*the provision, by lease or otherwise, of dark fibre to a Licensee*") and a Type 1 ICT Service ("*Fixed Telephony*") and that, as has been reported to the Office, DataLink does provide a wholesale fibre-based data service to another ICT licensee which is an ICT Service provision that is in direct competition with those attaching in the communication space it manages on CUC's behalf.

158. The Office notes DataLink's assertion that "*it is in a unique position compared to the other attaching utilities in regard to the communications space.*" DataLink does in fact play a dual role in respect of the communications space on the poles, as it both manages access to that space by other attaching utilities and uses that space in competition with other attachers. This dual role, however, does not grant permission to ignore the obligations in the ICT Law and the Infrastructure Sharing Regulations to provide access to infrastructure on a non-discriminatory basis. In fact, the non-discrimination provisions in the ICT Law and in the Infrastructure Sharing Regulations were created specifically to address the situation of such 'vertically integrated' licensees who are both suppliers to and competitors with other licensees. By imposing a reservation fee on Logic, C3 and Flow but not on itself, DataLink has clearly discriminated in its own favour.
159. In this regard, this principle of such undue preference has been applied in other jurisdictions. For example, the Office notes the recent consultation of the UK ICT regulator (Office of Communications ('**Ofcom**')) in relation to the terms and conditions under which the incumbent ICT provider, British Telecommunications plc ('**BT**'), provides access to its passive infrastructure (e.g. its communications poles) (through a wholly-owned

⁶⁷ See Annex 1 of the DataLink ICT Licence. Each of the licensees has a different deadline for rolling out a fibre optic network capable of serving the entire resident population of Grand Cayman.

⁶⁸ Paragraph 13 of DataLink 12 July 2016 submission in ICT Consultation 2016-2.

subsidiary of BT, called Openreach,⁶⁹ which manages BT's local access network). BT also plays a dual role in respect of the communications space on the poles, as it both manages access to that space by other attaching providers and uses that space in competition with other providers.⁷⁰ Ofcom stated at paragraph 6.201 of that consultation that the relevant terms and conditions must set out (as a minimum) "*conditions for reserving capacity that shall apply equally to BT and Third Parties.*"

160. The Office considers that, by providing itself with materially more favourable terms and conditions than those provided to competing licensees without any objective justification for doing so, DataLink acted contrary to its obligations under the ICT Law and the Infrastructure Sharing Regulations, as referenced.

H) Conclusion

161. Therefore, based on the above, the Office considers that the operation of "**Reserved Space**", "**Quarterly Reserved Space Payments**" and "**Total Minimum Annual Payments**" is contrary to sections 65 (5) and 69 (2) (b) of the ICT Law and Regulations 6(a), 6(j) and 10(1)(b) of the Infrastructure Sharing Regulations.
162. In support, and as set out above, the operation of the Pole Attachment Agreements has, in particular:
- a. impeded the efficient utilisation of pole infrastructure, contrary to Regulation 6(j)(i) (as described in section 6.3 E) above);
 - b. harmed competition in the Cayman Islands for ICT networks and for ICT services, contrary to Regulation 6(j)(iii) (as described in section 6.3 E) above);

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<https://www.btplc.com/UKDigitalFuture/Agreed/CommitmentsofBTPlcandOpenreachLimitedtoOfcom.pdf>

⁷⁰ *Wholesale Local Access Market Review - Consultation on Duct and Pole Access remedies* (consultation document – published 20 April 2017) – https://www.ofcom.org.uk/_data/assets/pdf_file/0008/101051/duct-pole-access-remedies-consultation.pdf

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- c. been provided at rates, terms and conditions which were not reasonable, contrary to section 65 (5) ICT Law and Regulation 6(a) (as described in section 6.3 F) above); and
 - d. been discriminatory (both at horizontal level and with self-preference), contrary to section 65 (5) ICT Law and Regulations 6(a) and 10(1)(b) (as described in section 6.3 G) above).
163. In reference to section 69 (2) (b) of the ICT Law, the Office considers it appropriate, for achieving the objective to promote "*an efficient, economic and harmonised utilisation*" of the pole attachment infrastructure, to modify those parts of the Pole Attachment Agreements which have had the effect of limiting (a) the efficient and harmonised utilisation of infrastructure, and (b) the promotion of competition in the provision of ICT services or ICT networks.
164. Further, as referenced above, the Office has the power under section 65 (6) of the ICT Law to prescribe the cost and pricing standards on which the reasonableness of the rates, terms and conditions of infrastructure sharing will be determined. In particular, the Office considers that DataLink has not provided infrastructure sharing services in accordance with section 65 (5) of the ICT Law.

6.4 Should DataLink Give Affected Attachers a Rebate?

165. In Part A of ICT Consultation 2016-2, the Authority proposed that, subject to consultation, DataLink reimburse C3 and/or Logic, preferably in the form of a credit allowance against future payments by C3 and Logic to DataLink for the charges relating to the "**Annual Attachment Fee**", where the "**Total Minimum Annual Payments**" made by C3 or Logic in a given year exceed the total annual payments relating to the "**Quarterly Pole Rental Fees**" paid by C3 or Logic respectively, unless the parties agree otherwise. DataLink opposed this proposal, while C3 supported the proposal but suggested that the rebate take the form of a cash payment.
166. The Office considers that, however, the issues of the quantum and form of compensation were not addressed in sufficient detail during either the ICT Consultation 2016-2 or the Working Group for such issues to be considered fairly by the ICT licensees. Therefore, and noting the Office's obligation under section 6 (4) (b) of URC Law to rely on self-regulation

- where appropriate to do so, the Office considers that the ICT licensees should be given the commercial opportunity to agree how such fees and the quantum of those fees should be recovered, prior to any exercise of powers in this regard by the Office.
167. As DataLink's invoices and the corresponding payments made by the licensees relate to various items billed by DataLink, including but not limited to "**Reserved Space Charge**", "**Attachment Fee**", "**Unauthorized Attachments Audit**", "**Late charge on outstanding invoices**" and "**Make-Ready Work**", the Office considers that the matters relating to the quantum and form of compensation should be properly addressed by the parties within the framework of their respective Pole Sharing Agreements, while taking into account this Determination.
168. If no such agreement is reached within **two (2) months** from the publication of this Determination, the Office will then consider whether, among other things, it is appropriate for the Office to commence an "*own initiative*" dispute investigation under section 67A ICT Law in relation to the matters still to be agreed.
169. Accordingly, the Office is setting out in Section 8 below the procedures to be followed by DataLink, C3, Logic and Flow to address these and related issues.

6.5 Charging Principles for Reservation Fees

170. In light of the Office's conclusions in sections 6.3 and 6.4 above, it is not necessary for the Office to consider the appropriate level of the reservation fees as they were specified in the Pole Sharing Agreements.
171. In the future, the Office notes that DataLink may seek to reintroduce rates, terms and conditions for the reservation of attachment points in the communications space on CUC utility poles. In this event, the Office notes that such rates, terms and conditions must, among other things, comply with the terms of the ICT Law and the Infrastructure Regulations. They should also take into account the Office's conclusions in section 6.3 of this Determination.

172. The Office has included, as **Attachment 3** to this Determination, guidance on the appropriate charging principles for general infrastructure reservation fees, based on underlying economic principles. The Office notes, though, that this guidance does not replace the requirement that such fees comply with the ICT Law and the Regulations. For example, the reservation fees, if any, must be applied on a non-discriminatory basis. This guidance would also be relevant where other infrastructure sharing providers are providing access to their infrastructure.

7. Determinations

173. Accordingly, for the reasons set out above, pursuant to sections 65 (5), 68 (3) and 69 (2) (b) of the ICT Law, and Regulation 22 of the Infrastructure Sharing Regulations, the Office **directs** that DataLink, C3, Flow and Logic:

(a) remove all references to, including the effects of, the:

"Reserved Space";

"Quarterly Reserved Space Payment"; and

"Total Minimum Annual Payments";

in the Pole Attachment Agreements of C3, Logic and Flow, as follows:

- Clause 1(f) of the **CUC-C3 Deed of Variation** (pages 2 through 4), except subsections 1(f)2 and 1(f)3 on page 4;
- Article F under Item 2 – Other Mutual Agreements in Appendix C to the **DataLink-Logic Pole Sharing Agreement** and in the **DataLink-Flow Pole Sharing Agreement**, except subsections F2 and F3; and

(b) confirm to the Office **within thirty (30) calendar days** from the date of this Determination that the obligation in paragraph 173 (a) above has been fulfilled.

8. Follow-Up Procedures

174. As noted in Section 6.4 above, whether during the ICT Consultation 2016-2 or in the Working Group, the parties to this proceeding did not comment in detail on:
- a. the form of any repayment of overcharged sums to be provided by DataLink; and,
 - b. what the quantum of such repayment to be provided should be;
- with respect to reservation fees already paid.
175. The Office, therefore, requires DataLink to consider and agree separately with each of C3, Logic and Flow, the type and quantum of the reservation fees to be repaid by DataLink to C3, Logic and Flow respectively. Such agreements are to be concluded **by 5 p.m., within sixty (60) calendar days** of the date of this Determination.
176. The Office advises DataLink in these considerations to be mindful of the requirements of the relevant Laws and the Infrastructure Sharing Regulations, including, but not limited to, the requirement to be non-discriminatory in the provision of ICT Networks and Services to itself and third-parties.
177. Within **five (5) calendar days** of the conclusion of each negotiation as set out in paragraph 175 above, DataLink is required to report to the Office on the substance of each of the aforementioned agreements.

Appendix 1

– Background

1. On **22 November 2005**, Infinity Broadband, Ltd. trading as C3 (**'Infinity'** or **'C3'**) and Caribbean Utilities Company, Ltd. (**'CUC'**) entered into a Master Pole Joint Use Agreement, which allows C3 to attach its communication cables to the electricity poles owned by CUC (the **'CUC-C3 Pole Sharing Agreement'**).⁷¹
2. On **22 April 2011**, by amendment to section 23 of the Information and Communications Technology Authority Law (2011 revision) (the **'ICTA Law'**),⁷² 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].*"⁷³
3. 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*".⁷⁴
4. On **20 March 2012**, CUC and Datalink, Ltd. (**'DataLink'**) entered into a Master Pole Joint Use Agreement, 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 (the **'CUC-Datalink Pole Sharing Agreement'**).

⁷¹http://www.icta.ofreg.ky/upimages/agreement_documents/1417708344MasterPoleJointUseAgreementCUCInfinityBroadbandRedacted.pdf

⁷² <http://www.icta.ofreg.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

⁷³ <http://www.icta.ofreg.ky/upimages/commonfiles/1417276774ICTAAmendmentLaw2011.pdf>

⁷⁴ <http://www.icta.ofreg.ky/upimages/commonfiles/141727998220110517CUC-DataLinkNotice.pdf>

5. On **20 March 2012**, CUC and C3 executed a Deed of Variation relating to the Master Pole Joint Use Agreement, dated 22 November 2005, which amended and supplemented the terms of the CUC-C3 Agreement (the '**CUC-C3 Deed of Variation**').⁷⁵
6. 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, namely Type 11 ICT Service specified as "*the provision, by lease or otherwise, of ICT infrastructure other than dark fibre to a Licensee*", Type 11a ICT Service specified as *the provision, by lease or otherwise, of dark fibre to a Licensee*" and Type 1 ICT Service specified as "*Fixed Telephony*".⁷⁶
7. On **7 May 2012**, C3, CUC and DataLink executed an agreement which novated and transferred all the rights and obligations under the CUC-C3 Pole Sharing Agreement and the CUC-C3 Deed of Variation, from CUC to DataLink (the '**C3-CUC-DataLink Novation Agreement**').⁷⁷
8. On **9 November 2012**, Cable and Wireless (Cayman Islands) Limited, now trading as Flow ('**Flow**' or '**Cable & Wireless**'), CUC and DataLink executed a Novation and Amendment Agreement (the '**Flow-CUC-DataLink Novation Agreement**')⁷⁸ which amended, and novated and/or transferred all of CUC's rights and obligations under the Agreement for Licensed Occupancy of CUC Poles by Flow made on 5 November 1996 (the '**CUC-Flow Pole Sharing Agreement**'),⁷⁹ to DataLink.

⁷⁵http://www.icta.ofreg.ky/upimages/agreement_documents/1417708388DeedofVariationCUCInfinityBroadband.pdf

⁷⁶ http://www.icta.ofreg.ky/upimages/licencedocument/ViewLicencedocument_1417650665.pdf

⁷⁷http://www.icta.ofreg.ky/upimages/agreement_documents/NovationAgreementInfinityBroadband-CUC-Datalink-EXECUTED_1458325571.pdf

⁷⁸http://www.icta.ofreg.ky/upimages/agreement_documents/1417708190NovationAgreementCUCDatalinkLIMENov2012executed.pdf

⁷⁹http://www.icta.ofreg.ky/upimages/agreement_documents/1417708148CableWirelessAgreementforLicensedOccupancyofCUCPoles1996Redacted.pdf

9. On **18 July 2013**, WestTel Limited trading as Logic (**'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'**).⁸⁰
10. In a letter to DataLink, dated **16 July 2014**, C3 raised a number of contentious issues with DataLink in relation to the implementation of the **CUC-C3 Pole Sharing Agreement** and the **CUC-C3 Deed of Variation**, as novated through the **C3-CUC-DataLink Novation Agreement**, including, among other things, the initiative made by DataLink establishing a new form of agreement with C3 to replace the existing agreements, which in C3's view was "*biased in favour of DataLink*", and the allegations made by DataLink that C3 breached the existing agreements with certain unauthorised attachments to CUC's electricity poles.
11. In a letter to the Authority, dated **5 August 2014**, C3 expressed its concerns in relation to the decisions made by DataLink regarding the height above ground at which the various attaching parties must attach their communication cables to CUC's electricity poles. C3 requested that the Authority commence an investigation under Section 41 of the ICTA Law⁸¹ to establish whether DataLink has infringed Section 36 or Section 40 prohibitions of the Law.
12. On **12 September 2014**, pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the **'Dispute Regulations'**),⁸² C3 submitted a dispute determination request to the Authority (the **'Dispute Determination Request'**)⁸³ contending that a dispute had arisen between C3 and DataLink relating to the allocation of communications space used by C3

⁸⁰http://www.icta.ofreg.ky/upimages/agreement_documents/141770785920130718DataLinkWestTelMasterPoleJointUseAgreement.pdf

⁸¹ <http://www.icta.ofreg.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

⁸² <http://www.icta.ofreg.ky/upimages/commonfiles/1417277080ICTA-DisputeResolutionRegulations.pdf>

⁸³ <http://www.icta.ofreg.ky/upimages/commonfiles/141726659620140912C3DeterminationRequest.pdf>

- for attachment of its communication cables on CUC's electricity poles managed by DataLink (the '**Dispute**').
13. On **2 October 2014**, DataLink submitted its response to the Dispute Determination Request ('**Response to the Dispute Determination Request**').⁸⁴
 14. On **21 October 2014**, considering it appropriate to invite submissions from any interested parties on the issues addressed in each of the filings made by C3 and DataLink, the Authority opened a public consultation relating to the Dispute.⁸⁵ Interested parties were invited to present any such submissions by 5 November 2014. However, the Authority received no submissions to that public consultation. Indeed, CUC replied to the Authority on 5 November 2014 stating that "*CUC does not intend to provide submissions in respect of the pole attachment services dispute between C3 and DataLink.*"
 15. On **26 June 2015**, upon consideration that the matter of the Dispute between C3 and DataLink may be relevant to other Licensees, the Authority sent requests for information to DataLink,⁸⁶ C3,⁸⁷ Logic,⁸⁸ and Flow,⁸⁹ with the intention to investigate in more detail the matter of the Dispute.
 16. On **2 July 2015**, C3 submitted its response to the Authority's request for information of 26 June 2015.⁹⁰

⁸⁴ <http://www.icta.ofreg.ky/upimages/commonfiles/141726651120141002DataLinkResponse.pdf>

⁸⁵ <http://www.icta.ofreg.ky/C3datalink-pole-attachment-dispute>

⁸⁶ <http://www.icta.ofreg.ky/upimages/commonfiles/143836666320150626ICTAtoDataLinkrepoledispute.pdf>

⁸⁷ <http://www.icta.ofreg.ky/upimages/commonfiles/143836669520150626ICTAtoC3repoledispute.pdf>

⁸⁸ <http://www.icta.ofreg.ky/upimages/commonfiles/143836676620150626ICTAtoLogicrepoledispute.pdf>

⁸⁹ <http://www.icta.ofreg.ky/upimages/commonfiles/143836672520150626ICTAtoLIMerepoledispute.pdf>

⁹⁰ <http://www.icta.ofreg.ky/upimages/commonfiles/14595195658July2015C3responsetoICTA.pdf>

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17. On **7 July 2015**, Logic submitted its response to the Authority's request for information of 26 June 2015.⁹¹
 18. On **21 July 2015**, DataLink submitted its response to the Authority's request for information of 26 June 2015.⁹²
 19. On **31 July 2015**, Flow submitted its response to the Authority's request for information of 26 June 2015.⁹³
 20. On **26 August 2015**, as a follow-up to the submissions received in response to the Authority's request for information of 26 June 2015, the Authority sent additional requests for information in order to clarify certain responses provided by the Licensees, and to make further progress on the investigation of the Dispute.⁹⁴
 21. On **2 September 2015**, C3 submitted its response to the Authority's additional request for information of 26 August 2015.⁹⁵
 22. On **3 September 2015**, Logic submitted its response to the Authority's additional request for information of 26 August 2015.⁹⁶

⁹¹<http://www.icta.ofreg.ky/upimages/commonfiles/145951962817July2015LogicresponsetoICTA.pdf>

⁹²<http://www.icta.ofreg.ky/upimages/commonfiles/145951952621July2015DataLinkresponsetoICTA.pdf>

⁹³<http://www.icta.ofreg.ky/upimages/commonfiles/145951959831July2015LIMEresponsetoICTA.pdf>

⁹⁴ <http://www.icta.ofreg.ky/upimages/commonfiles/145952021226August2015ICTAtoLogicfollow-up.pdf> and <http://www.icta.ofreg.ky/upimages/commonfiles/145952018126August2015ICTAtoLIMEfollow-up.pdf>

⁹⁵<http://www.icta.ofreg.ky/upimages/commonfiles/14595202892September2015C3responsetoICTA.pdf>

⁹⁶<http://www.icta.ofreg.ky/upimages/commonfiles/14595203193September2015LogicresponsetoICTA.pdf>

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23. On **11 September 2015**, the Authority received a letter from Ogier, a law firm acting on behalf of C3, urging the Authority to expedite the processing of the Dispute Determination Request.
 24. On **16 September 2015**, DataLink submitted its response to the Authority's additional request for information of 26 August 2015.⁹⁷
 25. On **22 September 2015**, Flow submitted its response to the Authority's additional request for information of 26 August 2015.⁹⁸
 26. On **27 April 2016**, the Authority issued a decision ('**ICT Decision 2016-1**') relating to the Dispute, in which the Authority determined that the **CUC-C3 Pole Sharing Agreement** shall be amended to define and reflect the allocation position for the attachment of communication cables by C3 to be at the top of the Communication Space, as defined in Attachment A to the **CUC-DataLink Pole Sharing Agreement**.⁹⁹
 27. Following from the determination made in ICT Decision 2016-1, the Authority issued a public consultation ('**ICT Consultation 2016-1**')¹⁰⁰ seeking views from interested parties on the relevant cost recovery principles relating to the reattachment of C3's communication cables to CUC's electricity poles, from the current height of 254 inches to the new height of 258 inches above the ground.
 28. The Authority also issued a public consultation ('**ICT Consultation 2016-2**')¹⁰¹ seeking views from interested parties on (A) the appropriateness of the reservation fees relating to the attachment of

⁹⁷<http://www.icta.ofreg.ky/upimages/commonfiles/145952035118September2015DataLinkresponsetoICTA.pdf>

⁹⁸<http://www.icta.ofreg.ky/upimages/commonfiles/145952038322September2015LIMEresponsetoICTA.pdf>

⁹⁹<http://www.icta.ofreg.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

¹⁰⁰<http://www.icta.ofreg.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

¹⁰¹<http://www.icta.ofreg.ky/upimages/commonfiles/146179030020160427ICTDecisionConsultationsPoleAttachmentsFINALFORPUBLICATION.pdf>

- communication cables to CUC's electricity poles; (B) the pole attachment permit application process, including make-ready work, for the attachment of communication cables to CUC's electricity poles; and (C) the charging principles relating to the attachment of communication cables to CUC's electricity poles.
29. On **5 May 2016**, pursuant to the Dispute Regulations, Flow submitted a dispute determination request to the Authority contending that a dispute had arisen between Flow and DataLink relating to a Master Pole Joint Use Agreement proposed by DataLink to supplant the CUC-Flow Pole Sharing Agreement, noting that Flow and DataLink had been negotiating the new agreement "*in fits and starts for a couple of years*".
 30. On **15 June 2016**, CUC, DataLink and Logic executed a Memorandum of Understanding dated 21 June 2016 (**'CUC-DataLink-Logic MOU'**) regarding, among others, the make-ready process applicable to Logic attachment permit applications.
 31. On **12 July 2016**, Flow, Digicel, C3 and DataLink submitted comments in response to ICT Consultation 2016-2. DataLink stated amongst other things that "*[t]he FLOW agreement will reach its final expiry date in November 2016 and as such FLOW must negotiate a new agreement prior to that date or remove its attachments.*"
 32. On **30 September 2016**, the Authority issued a decision (**'ICT Decision 2016-2'**)¹⁰² determining the cost recovery principles for the reattachment of C3's communication cables onto CUC's electricity poles to the new height of 258 inches above the ground.
 33. On **4 October 2016**, the Authority wrote to DataLink, that in the event the CUC-Flow Pole Sharing Agreement expires before the parties have concluded a new agreement – DataLink should "*...not remove CWCIL's [Flow'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 Flow to report to the Authority on all steps taken by the two parties, including all material dates, in the past twenty-

¹⁰² <http://www.icta.ofreg.ky/upimages/commonfiles/147924640920160930ICTDecision2016-2.pdf>

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- four (24) months to negotiate and conclude a new agreement, if not already so reported, by 24th October 2016.
34. On **24 November 2016**, DataLink submitted to the Authority a newly executed master pole joint use agreement between DataLink and Flow (the '**DataLink-Flow Pole Sharing Agreement**') that had been signed by both parties on 18 November 2016.
 35. On **9 December 2016**, the Authority formed the Pole Attachment Industry Working Group (the '**Working Group**'), consisting of representatives from Flow, DataLink, Digicel, C3 and Logic, to consider various issues relating to the installing and maintaining of attachments of communications cables to the electricity poles owned by CUC (the '**Working Group Letter**').¹⁰³
 36. In order to allow the members of the Working Group an opportunity to resolve the matters being considered by the ICT Consultation 2016-2 process, the Authority put that consultation process on hold for the duration of the Working Group. Further, to encourage an honest and open discussion within the Working Group on the various outstanding issues, including but not limited to the five issues identified in the Working Group Letter, the Authority specified that any views and comments expressed during the Working Group discussions on the issues relevant to ICT Consultation 2016-2 will not be made available as part of that consultation. However, the final position papers of the members of the Working Group at the conclusion of the Working Group would be so made available.
 37. On **16 January 2017**, the Authority was dissolved and all of its functions and powers were transferred to OfReg.
 38. The Working Group met nine (9) times between **16 December 2016** and **17 March 2017**. On **21 April 2017**, C3, DataLink, Digicel, and Logic submitted final position papers on the issues discussed by the Working

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<http://www.icta.ofreg.ky/upimages/commonfiles/149729612220161207PoleAttachmentIndustryWorkingGroupLetter.pdf>

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- Group. Flow submitted its final position paper on the issues discussed by the Working Group on **26 April 2017**.
39. On **1 June 2017**, the Office invited the members of the Working Group to submit comments on each other's final position papers, as well as on whether there was consensus among the members of the Working Group on any issues, and on whether the Office ought to address the outstanding issues, if any, by continuing with the ICT Consultation 2016-2 procedure or by adopting another procedure.¹⁰⁴
40. DataLink,¹⁰⁵ Digicel,¹⁰⁶ Flow¹⁰⁷ and Logic¹⁰⁸ responded on **16 June 2017**. C3¹⁰⁹ responded on **20 June 2017**.
41. On **30 June 2017**, the Office notified the parties that it was recommencing the consultation process in order to make determinations in respect of the issues which were not resolved by the Working Group process and placing the final position papers and reply comments

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<http://www.icta.ofreg.ky/upimages/commonfiles/149729618520170601OfficelettertoPoleWorkingGroupnextsteps.pdf>

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<http://www.icta.ofreg.ky/upimages/commonfiles/149805226120170616DatalinkWorkingGroupResponse.pdf>

106

<http://www.icta.ofreg.ky/upimages/commonfiles/149805229520170616DigicelWorkingGroupResponse.pdf>

107

<http://www.icta.ofreg.ky/upimages/commonfiles/149805234020170616FlowWorkingGroupResponse.pdf>

108

<http://www.icta.ofreg.ky/upimages/commonfiles/149805238020170616LogicWorkingGroupResponse.pdf>

109

<http://www.icta.ofreg.ky/upimages/commonfiles/149805241620170620IBLWorkingGroupResponse.pdf>

submitted at the conclusion of the Working Group on the record of ICT Consultation 2016-2.¹¹⁰

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<http://www.icta.ofreg.ky/upimages/commonfiles/149885071020170630OfReglettertoPoleWorkingGrouprere-launchof2016-2.pdf>

Appendix 2

Reservation Fee Contractual Clauses

CUC-C3 Deed of Variation

F. The Communication Space allocated to the Communications Utility as illustrated in the drawing in Attachment A, on all Poles owned by the Electric Utility in Grand Cayman shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each Pole owned by Electric Utility:

- (i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and
- (ii) 31 December 2014,

((i) and (ii) together the "**Build-Out Period**").

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1 the Communications Utility shall pay the following in relation to all Poles owned by the Electric Utility in Grand Cayman (i.e., approximately 15,000 Poles as at the date of this Agreement) :

- (i) of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., of the Annual Attachment Fee = = Poles = a Quarterly Reserved Space Payment of for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);
- (ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;
- (iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee amount (i.e., per annum. as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly instalments, being (as may be adjusted on the adjustment of the Annual

Attachment Fee) (the "**Quarterly Pole Rental Fee**") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;

- (iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:
- a. Quarterly Reserved Space Payment =
 - b. Quarterly Pole Rental Fee =
 - c. Total Payment to Electric Utility for each quarter =

Where:

- x = all Poles owned by Electric Utility in Grand Cayman
y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

- (v) at the end of each quarter period the Electric Utility will update and notify the Communications utility of the current number of Poles it owns in Grand Cayman;
- (vi) notwithstanding the foregoing, Communications Utility guarantees the following minimum total annual payments ("**Total Minimum Annual Payments**") to the Electric Utility
- a. 2012:
 - b. 2013:
 - c. 2014:

and at the end of each calendar year above, Communications Utility shall calculate the total actual payment owed to the Electric Utility, by way of the aggregate of the Quarterly Reserved Space Payments and the Quarterly Pole Rental Fees for each relevant calendar year (the "**Total Annual Payments**") as compared to the relevant Total Minimum Annual Payment above, and in the event that the Total Annual Payments are less than the Total Minimum Annual Payment owed Communications Utility shall calculate the difference and pay the same to the Electric Utility by January 31 in the following calendar year;

- (vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Electric Utility's Poles.

DataLink-Logic Pole Sharing Agreement

- F. The Communication Space allocated to the Communications Utility as illustrated in the

drawing in Attachment A, on all Poles in Grand Cayman that DataLink owns or has the right to attach to (i.e., approximately 16,500 Poles as at the date of this Agreement) shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each such Pole:

- (i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and
- (ii) 31 December 2018,

((i) and (ii) together the "**Build-Out Period**") ..

The Communications Utility shall have the option to exclude any Pole or collection of Poles from the Reserved Space by notice to DataLink. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space the Pole shall no longer be taken into account when calculating the Quarterly Reserved Space Payment (as defined below) from the next quarterly payment date onwards. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space, the Communications Space on that Pole shall no longer be reserved for the Communication Utility's exclusive use - from that point onwards DataLink shall be free to grant another party a permit to use the Communications Space on such Pole, in which event it would no longer be available for the Communication Utility's use.

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1. the Communications Utility shall pay the following in relation to all Poles on which the Reserved Space is located:

- (i) % of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., % of the Annual Attachment Fee (CI\$) x % = CI\$; CI\$ /4 = CI\$; CI\$ x 16,500 Poles = a Quarterly Reserved Space Payment of CI\$ for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);
- (ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;
- (iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee

amount (i.e., CI\$ per annum, as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly installments, being CI\$ (as may be adjusted on the adjustment of the Annual Attachment Fee) (the "**Quarterly Pole Rental Fee**") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;

(iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:

a. Quarterly Reserved Space Payment = $\frac{(x - y)}{4}$ x CI\$

b. Quarterly Pole Rental Fee = $(y \times \text{CI\$}) - \text{Quarterly Reserved Space Payment}$

c. Total Payment to DataLink for each quarter = $\text{Quarterly Reserved Space Payment} + \text{Quarterly Pole Rental Fee}$

Where:

x = all Poles owned by Electric Utility in Grand Cayman less the poles Communication Utility identifies to be excluded from being reserved, as outlined in Item 2F.

y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

(v) at the end of each quarter period DataLink will update and notify the Communications Utility of the current number of Poles it owns or has the right to attach to in Grand Cayman and of the number of Poles on which the Reserved Space is located;

(vi) notwithstanding the foregoing, Communications Utility guarantees the following minimum total annual payments ("**Total Minimum Annual Payments**") to DataLink (in respect of the cumulative total of Quarterly Reserved Space Payments and Quarterly Pole Rental Fees) in each of the following calendar years:

- a. 2013: CI\$
- b. 2014: CI\$
- c. 2015: CI\$
- d. 2016: CI\$
- e. 2017: CI\$
- f. 2018: CI\$

and at the end of each calendar year above, Communications Utility shall calculate the total actual payment owed to the Owner Utility, by way of the aggregate of the Quarterly Reserved Space Payments and the Quarterly Pole Rental Fees for each relevant calendar year (the "**Total Annual Payments**") as compared to the relevant Total Minimum Annual Payment above, and in the event that the Total Annual Payments are less than the Total Minimum Annual Payment owed Communications Utility shall calculate the difference and pay the same to the Owner Utility by January 31 in the following calendar year;

- (vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Owner Utility's Poles.

DataLink-Flow Pole Sharing Agreement

F. The Communication Space allocated to the Communications Utility as illustrated in the drawing in Attachment A, on all Poles in Grand Cayman that DataLink owns or has the right to attach to (Le., approximately 17,475 Poles as at the date of this Agreement) shall be reserved (the "**Reserved Space**") for Communication Utility's exclusive use until the earlier to occur of the following in respect of each such Pole:

- (i) a grant or refusal of a Permit to the Communications Utility (in accordance with the terms of this Agreement) in respect of the Reserved Space on each relevant Pole; and
- (ii) [END OF ROLL OUT), after which Reserved Space will automatically be granted for newly installed poles for a maximum period of six (6) months.

((i) and (ii) together the "**Build-Out Period**").

The Communications Utility shall have the option to exclude any Pole or collection of Poles from the Reserved Space by notice to DataLink. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space the Pole shall no longer be taken into account when calculating the Quarterly Reserved Space Payment (as defined below) from the next quarterly payment date onwards. Once the Communications Utility notifies DataLink that it wishes to exclude a given Pole from the Reserved Space, the Communications Space on that Pole shall no longer be reserved for the Communication Utility's exclusive use - from that point onwards DataLink shall be free to grant another party a permit to use the Communications Space on such Pole, in which event it would no longer be available for the Communication Utility's use.

In consideration of, and further to, the Reserved Space being reserved for the Communications Utility during the Build-Out Period, the Parties agree as follows:

1 the Communications Utility shall pay the following in relation to all Poles on which the Reserved Space is located:

- (i) % of the Annual Attachment Fee for all the Poles which Communication Utility has not been granted a Permit for at the start of the relevant calendar quarter period in respect of the Reserved Space (the "**Quarterly Reserved Space Payment**"), such Quarterly Reserved Space Payment to be calculated and paid on a quarterly basis (i.e., % of the Annual Attachment Fee (CI\$ x = CI\$; CI\$ = CI\$; CI\$ x 17,475 Poles = a Quarterly Reserved Space Payment of CI\$ for the relevant quarter period) (all such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A);
- (ii) the first Quarterly Reserved Space Payment shall be paid immediately upon, or as soon as reasonably practicable following, the date of this Agreement; thereafter, the Quarterly Reserved Space Payment shall be made no later than the 5th business day after the beginning of the relevant calendar quarter;
- (iii) any Poles that Communications Utility obtains a Permit for during the relevant quarter period will be charged at the full Annual Attachment Fee amount (i.e., CI\$ per annum, as may be adjusted from time to time in accordance with Item 4 of Appendix A) payable in quarterly installments, being CI\$ (as may be adjusted on the adjustment of the Annual Attachment Fee) (the "**Quarterly Pole Rental Fee**") less any Quarterly Reserved Space Payment (if any) made in relation to such Poles in the relevant quarter period;
- (iv) in each quarter period, the Quarterly Reserved Space Payment and the Quarterly Pole Rental Fee payable will be calculated as follows:
 - a. Quarterly Reserved Space Payment = $(x - y) \times \text{CI\$}$
 - b. Quarterly Pole Rental Fee = $(y \times \text{CI\$}) - \text{Quarterly Reserved Space Payment}$
 - c. Total Payment to DataLink for each quarter = Quarterly Reserved Space Payment + Quarterly Pole Rental Fee

Where:

x = all Poles owned by Electric Utility in Grand Cayman less the poles Communication Utility identifies to be excluded from being reserved, as outlined in Item 2F.

y = all Poles attached to by Communications Utility;

(All such amounts shall be subject to adjustment on the adjustment of the Annual Attachment Fee in accordance with Item 4 of Appendix A.)

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- (v) at the end of each quarter period DataLink will update and notify the Communications Utility of the current number of Poles it owns or has the right to attach to in Grand Cayman and of the number of Poles on which the Reserved Space is located;
 - (vi) [Not Used]
 - (vii) at the end of the Build-Out Period Communications Utility shall have no further obligation to pay the Reserved Space Payment in respect of any of the Owner Utility's Poles.

Appendix 3

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Charging Principles for Reservation Fees

1. As discussed in ICT 2017 – 1 – Determination – Pole Attachments Reservation Fees,¹¹¹ the Office considers that reservation fees for infrastructure sharing, where charged, should be related to the opportunity cost, in this case, of DataLink keeping an attachment point reserved but not occupied for itself and other ICT Licensees, and such costs should be determined in a way that they are directly related to the costs incurred as a result of keeping the attachment point reserved but not occupied.
2. The Office has considered the question of the charging principles which apply in other jurisdictions in relation to the reservation of space or capacity for attachment of communication cables on poles. The most recent example is found in Ofcom's¹¹² regulatory proceedings on developing remedies for passive infrastructure access (i.e. 'PIA') in the United Kingdom, namely in relation to access to passive infrastructure managed by Openreach.¹¹³
3. As Ofcom noted in its consultation document on '*Initial proposals to develop an effective PIA remedy*':¹¹⁴

6.29 Currently under PIA, a telecoms provider incurs rental charges from the date at which it orders capacity in

¹¹¹ See paragraphs 94 - 97, 116 - 117 and 132 - 146 above.

¹¹² Ofcom is the 'Office of Communications', the electronic communications regulator in the United Kingdom.

¹¹³ Openreach is the access network provider in the United Kingdom, a wholly-owned subsidiary of BT which manages BT's local access network – see more about these Ofcom's regulatory proceedings at <https://www.ofcom.org.uk/consultations-and-statements/category-2/wholesale-local-access-market-review-proposals-PIA>

¹¹⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0024/95109/Wholesale-Local-Access-Market-Review.pdf

*Openreach's infrastructure and this capacity is reserved.
[...]*

6.30 However, in cases where an order includes a requirement to build additional capacity, a telecoms provider will not be able to fully deploy its network (and generally not be able to offer services) until the additional capacity is provided. In such circumstances, and where Openreach has the responsibility for completing the build work, we consider it may be more appropriate for rental charges to become payable only on completion of the PIA order including delivery of the additional capacity. This would mean that a telecoms provider would only incur rental charges from the point at which it is able to fully deploy its network relating to the order.

*6.31 In addition, our initial view is that there would be benefits of enabling telecoms providers to start deploying their networks (i.e. occupying the infrastructure that is immediately available) without incurring rental charges whilst waiting for Openreach to provide the additional capacity requested in other parts of the local access area included in that order.
[emphasis added]*

4. In a subsequent consultation on '*Duct and Pole Access Remedies*', Ofcom has proposed the following:¹¹⁵

6.98 We consider that where a telecoms provider places an order for PIA that includes a requirement to build additional capacity, it will not generally be able to fully deploy its network (and therefore offer services over that network) until the additional capacity is provided.

6.99 Therefore, where Openreach is responsible for completing build works, our view is that Openreach should only be able to commence charging rental for PIA relating to any part of a single PIA order when all build works is

¹¹⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0008/101051/duct-pole-access-remedies-consultation.pdf

completed for that order, including making poles ready for use (i.e. the telecoms provider incurs rental charges for the infrastructure from when that infrastructure is 'ready for use' to deploy its network).

*6.100 We consider that **this will provide the following benefits:***

- **Telecoms providers will incur rental charges at the point that they are able to deploy their networks (and therefore potentially be in a position to earn revenues from offering services to their customers with that network); and***
- **It will provide an incentive for Openreach to complete build works in a more timely manner (since Openreach will forego PIA rental revenues until the build works are complete).***

6.101 We recognise that a limit will need to be set in relation to the size of an order (and therefore the scope of Openreach's obligation). Absent such a limit, a telecoms provider could place a single PIA order (including a request for build works) over a significant geographic area comprising a number of regions. As such, any uncompleted build works in one particular region may have little bearing on its ability to deploy a network in other regions where it can start offering services but without incurring any PIA rental charges. In contrast, where a limit is set too tightly, a telecoms provider will be impeded from deploying its network using PIA and the incentives on Openreach to complete build works (through lost PIA rental revenues) will be weaker.

[emphasis added]

5. The Office considers that the views expressed by Ofcom, as cited above, in relation to charging principles for reserving capacity on passive infrastructure, including poles, provide valuable insights on the best practice to setting reasonable rates, terms and conditions relating to the reservation of space or capacity for infrastructure sharing, including the provision of access to utility poles.
6. The Office further notes that eircom's Wholesale Pole Access service also includes a reservation fee, which is tied to a specific application for access to poles and limited to a twelve-month period. The eircom Wholesale Pole

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- Access Product Description document states that "*[i]f an Operator wishes to reserve the route, a pole reservation charge will apply and the pole route will be reserved for up to 12 months.*"¹¹⁶
7. The Office notes that section 65 (5) of the ICT Law requires interconnection and infrastructure sharing services to be provided at reasonable rates, terms and conditions.
 8. For the reservation of attachment points to be offered at reasonable rates, the Office considers that a reservation fee ought to be determined by reference to the opportunity cost associated with, in this case, the number of poles that DataLink can effectively make ready and available for attachment within a reasonable period of time, which is directly related to the foregone revenue from pole attachment rental fees (i.e. revenue which could be normally earned by charging a licensee an attachment fee for occupying the poles).
 9. Given DataLink's stated limitation of being able to process no more than 300 permit applications per month, DataLink manifestly could not make available its entire network of poles (currently stated to be 17,475)¹¹⁷ and a reservation fee based on the entire network of poles is not reasonable. The Office notes that, at 300 permit applications per month, DataLink would be able to make available a maximum of 3,600 poles to C3, Logic and Flow in a twelve-month period.
 10. However, if DataLink is unable to process all the permit applications in a given quarter, for which a reservation fee is paid in advance by a licensee, the Office considers that DataLink (or any other licensee in similar circumstances) should reimburse the amount corresponding to the number of poles that had been reserved but not made ready for use by the licensee.
 11. For example, if a licensee submitted permit applications for 300 poles to be made available within a period of one quarter, and the licensee has

¹¹⁶ www.openeir.ie/WorkArea/DownloadAsset.aspx?id=2624

¹¹⁷ See Appendix C of the **DataLink-Flow Pole Sharing Agreement**.
http://www.icta.ofreg.ky/upimages/agreement_documents/MasterPoleJointUseAgreement_14809_65308.pdf

been charged the "*Quarterly Reserved Space Payment*" based on those 300 poles being reserved, but DataLink was only able to process and grant the permits for 200 poles, the licensee should be reimbursed the amount equivalent to the reservation fee for 100 poles.