Email from Wragge & Co – 10 December 2013

Hi Michael

Thanks for this. I've responded to the two areas where the WG has requested clarification below. James or I would be happy to join a call with the WG if that would help.

Ofgem's feedback

1. Ofgem's note does not seem to differ materially from our previous advice. We are both agreed that it is legally possible to impose a 14-month limit for backdating Use of System Charges.

2. Ofgem's feedback seems to be more focussed on the merits behind the approach rather than the legality of the approach. In particular, Ofgem quite rightly focusses on the ability of the supplier to recover money from the customer under the supply contract.

3. Where our analysis does differ from Ofgem's is in relation to the likely drafting of supply contracts. Ofgem indicates that it would expect customers to be able to seek redress from suppliers in the event that the DNO was overcharging the supplier under the DCUSA. We are not sure that this will always be the case. However, this turns on the drafting of the supply contracts, not the drafting of the DCUSA.

4. In these circumstances, whether the customer is able to claim against the supplier will depend upon the definition of the charges that the customer is liable to pay. If the supply contract obliges the customer to pay the amount that the supplier is liable to pay under the DCUSA, then there is no scope for difference between the supply contract and the DCUSA. If the supply contract obliges the customer to pay the use of system charges calculated in accordance with the charging statement, then a limitation period in the DCUSA may cause a supplier to be exposed as Ofgem has described.

5. We can't provide feedback on Ofgem's first two questions without reviewing the supply contracts, and it may be more sensible to ask each supplier to provide the answer for its contracts. The subsequent questions are general issues for the WG to consider.

Revised legal text

I attach a comparison of the revised legal text against the original legal text. The reasoning for the amendments is as per my original email below: The DCUSA test does not currently recognise the concept of tariffs being held against MPANs; rather it applies Use of System Charges (based on tariffs under the CMs) to Entry/Exit Points. Regarding the limit on backdating, it seemed to us that this should be linked to the date the change would otherwise have been applied, rather than the date of the agreement (otherwise the parties spend 3 months discussing it and this eats into the time period).

The other changes are for sense – basically just to use more sentences to more clearly make the different statements. Obviously, if we've misunderstood, we can change the text, but it needs to be capable of being understood.

As I say, perhaps James or I should participate in a call to clarify the intent of the drafting.