

DCP 173 Draft Legal Text – Comments received from the DCUSA Legal Advisors

From: Gus Wood
Sent: 02 October 2013 16:10
To: DCUSA
Subject: RE: DCP 173 Draft Legal Text

Hi Michael

I attach proposed drafting for the two options. I've 'refined/legalised' the language a fair bit, but I hope and think that I have retained the same intent.

We don't currently have the concepts of tariff, or LLFC or unique tariff identifiers in the main body of the DCUSA (though they obviously feature in the methodologies), nor do we have the concept of tariffs being held against MPANs in MPAS. We can obviously introduce all these things if we need to, but my hope was that the text still made sense to everyone as I have amended it - we'll see what the WG says!

The only thing I'd add is that we don't say what factors the distributor should take into account in deciding whether to (reasonably) allow the change to be backdated. Could we list what these factors are, or are we intentionally leaving this open?

Regarding the questions in your email -

1. The statutory period of limitations will not override any agreement in the DCUSA to impose a 14-month limit. The position between the customer and the supplier would be a matter for the supply contract, but for the most part I would expect the customer to be obliged to pay the charges levied under the DCUSA.

As an aside, it is important to recognise that the statutory limitation period is a limit on a person's right to bring a claim for breach of contract. Basically, if the breach was more than 6 years ago, the innocent party cannot sue the party at fault.

However, here we are concerned not with breach but with what the correct charge should have been. Under the DCUSA the suppliers are obliged to pay the correct charge. In legal theory therefore there is no limit on when the charges could be changed to reflect errors. Most supply contracts are drafted on the same basis - customers must pay the charges; if the wrong charges are billed initially, corrections can be made to bill the correct charges; there is no breach so the statute of limitations does not apply.

Of course, despite the legal theory, it is practically quite difficult (under supply contracts if not the DCUSA) to backdate charges by a great many years. Well advised customers will also seek to amend supply contracts to impose a limit (often 18 months).

Breach is relevant only as follows - if the distributor revises its charges upwards, and the supplier is unable to recover the additional charge from the customer, then the supplier can sue the distributor for breaching the DCUSA in calculating its charges incorrectly. Such a claim would be subject to the statutory period of limitations, but also to the limitations of liability under clause 53 which seek to limit liability only to physical damage.

2. There is no need legally to link either the 14-month limit or the 5/6-year limit to fault.

Finally - on a separate point - there is not currently a corresponding change for section 2B. Is this deliberate?

Kind regards

Gus

From: DCUSA
Sent: 19 September 2013 10:19
To: Gus Wood
Cc: Waymont, Peter
Subject: DCP 173 Draft Legal Text

Hi Gus,

I hope you are well.

Please find the proposed legal text, along with the CP form, for DCP 173 'Retrospective changes of Tariff (LLFC / Unique Identifier)' attached to this email.

The intent of DCP 173 seeks to define within clause 19 of DCUSA an absolute time period within which a change of Tariff (LLFC / Unique Identifier) is allowed to be retrospectively applied by a DNO party. This time period would overrule any previous retrospective periods whether laid out within previous Charging Statements, the DCUSA, Use Of System Agreements, any other such documents or not previously specified.

The Working Group note that this issue has been raised provide commonality across DNOs, as current policy since the implementation of the CDCM in 2010, which introduced new tariffs for some DNOs and changed the application rules for others. The working group has two very extreme options in order to take the issue forward:

- **Option 1** – 14 months supported by the DNOs and some suppliers – as this aligns with NHH settlements and minimises any impact on losses, under/over recovery and risk to customers of significant back bills as well as credit
- **Option 2** – 5 or 6 years in line with the Statute of Limitations, with support from a few suppliers, a consultant and end-users/customers, who want to see the maximum refunds, but have no views on the potential for high back-bills as well

The Working Group also have a couple of questions that they would like your opinion about, and these are:

1. If Option 1 - 14 months is justifiable and accepted as a pragmatic starting point – does the Statute of Limitations over-ride this in law and would it require the customer to take the supplier to court and then the supplier to seek re-dress from the DNO?
2. If Option 2 is accepted, does this need to be supported by determining whose fault it is that the wrong LLFC had applied in the first place?

Please let me know if you have any questions or if I can provide additional clarity for this CP. Could I please have your comments by **Monday, 30 September** so that I can take these to the next Working group meeting.

Thank You,

Michael

Michael Walls

Governance Services Senior Analyst