

Representation For. 0048
"Preparation of Legal Text for Users Modification Proposals"
Version 1.0

Date of Communication: 24/10/2005
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Slant: For
Strictly Confidential: No

Abstract

Summary:-

Gemserv supports the implementation of this Modification Proposal as it will make the consultation process better informed and hence more effective and efficient.

The following comments relate to specific points raised in the Draft Modification Report (DMR).

Para 2. Better facilitation of the relevant objectives:-

Gemserv agrees that implementation of the proposal would promote efficiency in the administration of the uniform network code in accordance with Standard Special Condition A11 para. 1(f).

We also believe that provision of legal text would better facilitate 9(d) of that condition, in giving greater publicity to the proposed change by expressing it in terms that can be directly compared to the existing drafting.

However, we can foresee some potential difficulties with the quality of the legal text produced under this proposal. As the transporters "in house" legal resources produce the text there is a very high probability that any modification proposal originated by the transporters will have been discussed internally with those lawyers before it is formally published. Clearly this will not be the case for user-originated proposals. Under this proposal the legal text will ordinarily need to be prepared within the 15 days allowed for production of the DMR which may be insufficient for the transporters legal resource to be properly briefed as to the intention of the proposal and/or he/she may be unavailable for some or all of that period.

Equally, as the objective of a user proposal is often less attractive to transporters than to users the transporters legal resource may not be fully incentivised to produce polished text. In the extreme, the text may simply not work as intended which would serve to frustrate rather than facilitate the relevant objectives.

To guard against such eventualities the Panel could determine a longer period for preparation of the DMR where appropriate and Ofgem could monitor the quality of text provided. However, the most effective solution would be to have the Joint Office instruct independent legal resources for all drafting requirements, funded (as now) by the transporters. Although this suggestion goes well beyond the scope of the present proposal Gemserv believes it is a solution which should be considered further.

Para 3. Cost recovery:-

Although no argument is advanced in favour of additional cost recovery the DMR invites respondents to consider "how" the costs of providing abortive legal text should be recovered if the Panel does not ultimately recommend implementation of a proposal. Whilst the DMR is a little unclear Gemserv believes that the suggestion of cost recovery is confined to user-originated proposals.

Gemserv infers from this a belief on the part of transporters that additional costs should be recovered in the stated circumstances as provision of text will have been found inefficient. In our view such a presumption would be unsafe as it may very well be through the additional clarity in the consultation process afforded by the provision of text that the Panel is able to come to a better informed view on implementation. This view complements the opinion that this proposal further facilitates the relevant objectives.

It is interesting to note that it has tended to be historically true that user originated proposals find greater support among users than among transporters, and vice versa. So it is at least possible (if not actually likely) that if the Panel does not recommend implementation of a user proposal it will be because of abstention by transporter representatives.

It is our view that additional cost recovery is not justified in respect of this proposal.

9 Consequences on contractual obligations:-

The DMR says "A requirement for Transporters to arrange for the provision of legal text to be issued with the Draft Modification Report would have the effect of introducing an earlier obligation between Transporters and Users and Non Code Parties which would have corresponding contractual implications." This statement is slightly inaccurate as the obligation to provide legal text with the DMR in the case of transporter originated proposals already exists. As the modification rules are part of the contractual arrangements between transporters and users then this proposal inevitably has some contractual implications but the likely extent of these are difficult to judge. The proposal brings forward the need for legal text for a proportion of users proposals and introduces it where it does not presently exist for a further proportion. These seem relatively minor changes and do not distort the balance of the UNC.

Gemserv is unaware of any contractual implications for Non Code Parties.

10 Analysis of advantages/disadvantages:-

Gemserv supports the proposed advantages and would add that the proposal will make the governance process more transparent as it introduces a further degree of parity in the treatment of proposals.

The proposed disadvantage of potentially unnecessary costs is, in our view outweighed by the advantages and is in any event likely to prove relatively minor.

The DMR also quotes as a disadvantage that the voting preference of Panel members would be revealed at an early stage. This can only refer to those occasions when the Panel might determine that text is not required with the DMR. Gemserv believes that it would be wrong to see such a vote as indicative of an individual member's preference as the most probable grounds for deciding against the provision of text at an early stage would be that the proposal did not, *prima facie*, further the relevant objectives.