North Sea Transition Authority

Guidance on Disputes over Third Party Access to Upstream Oil and Gas Infrastructure

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The document can be found on the NSTAs website.

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Enquiries to:
North Sea Transition Authority
Sanctuary Buildings
20 Great Smith Street
London
SW1P 2BT

Email: correspondence@nstauthority.co.uk

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Status and purpose of this guidance

1. The North Sea Transition Authority ("NSTA") is the operating name of the Oil and Gas Authority ("OGA"). The OGA has powers vested in legislation which include dealing with disputes over third party access to upstream petroleum infrastructure ("TPA disputes"). References to the OGA in this document should be read as references to the NSTA and vice versa.

2. This guidance sets out the form and manner in which TPA disputes may formally be referred to the NSTA and the approach that the NSTA is likely to take, taking into account that each application will be assessed on its facts, case by case. The guidance also covers those situations where the NSTA considers acting on its own initiative to intervene in TPA disputes.

3. The powers for the OGA to intervene in TPA disputes are contained in the Energy Act 2011 ("the Act"), specifically sections 82-91. Section 90 of the Act describes the scope of the legislation which includes access to services used for operating upstream petroleum pipelines and facilities. For example, the scope includes metering and allocation services and the provision by a host facility of fuel or power needed to operate third party equipment on or from such a facility. The scope includes onshore oil and gas terminals but does not extend to "downstream" pipelines and facilities which may be subject to other dispute resolution arrangements. A specific example involves the Mossmorran Natural Gas Liquids Plant and Braefoot Bay loading terminal, which are covered by the Act, whereas the Fife Ethylene Plant is not.

4. This guidance will be kept under review and will be amended as appropriate in the light of further experience and developing law and practice and of any change to the OGA's powers and responsibilities.

5. This guidance is not a substitute for any regulation or law and it is not legal advice. It does not have binding legal effect. If the NSTA departs from the approach set out in this guidance, the NSTA will explain why.

   The main differences between this version and the previous one (Version 2, May 2019) are the updating of references from OGA to NSTA, updating of references to EU legislation, reflecting that the NSTA no longer has an Enquiry phase and amending non-material matters for the purposes of clarification.

Introduction

6. A key element for developers of oil and gas fields in extracting the petroleum resources of Great Britain and the UK Continental Shelf (”UKCS”) is their ability to access upstream petroleum infrastructure. Companies seeking access to such upstream infrastructure for the purposes of transporting and/or processing their hydrocarbons must, in the first instance, apply to the relevant owner (‘the owner’)[1] of the infrastructure in question.

7. The industry has issued the Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf (‘**the Infrastructure Code of Practice’**), a voluntary code which sets out principles and procedures to guide all those involved in negotiating third party access to oil and gas infrastructure on the UKCS. The NSTA encourages all parties to follow the Infrastructure Code of Practice including the related guidance notes which describe, amongst other things, informal escalation procedures that may avoid the need to make an application to the NSTA.

8. If a third party is unable to agree satisfactory terms of access with the owner of upstream oil and gas infrastructure, the third party seeking such access (‘the applicant’) can make an application to the NSTA to require access to be granted and to determine the terms and conditions on which such access is to be granted. In the rest of this document, “terms” should where the context permits be taken to mean “terms and conditions”.

9. The NSTA encourages and expects most issues related to infrastructure access to be resolved by timely commercial negotiation and believes the potential use of its powers will act as an incentive to such an outcome. Nevertheless, those powers are there to be used if a commercial solution genuinely cannot be found within a reasonable time frame.

[1] In the rest of this document, “owner” should where the context permits be taken to include owners.

10. The third party access disputes procedure can be initiated either by the applicant making a formal application to the NSTA under section 82 of the Act for access to upstream oil and gas infrastructure,[2] or by the NSTA acting on its own initiative under section 83 of the Act to give a notice to secure rights to the applicant.

11. This document outlines the requirements and obligations on all parties involved, the approach the NSTA would normally take in handling applications, and the principles it would expect to be guided by in determining appropriate terms for access.

12. For situations where the NSTA is considering acting on its own initiative, reference should be made to paragraphs 41 to 44 below.

13. If the NSTA decides that access should be granted it may serve a notice to that effect on the parties. This may allow for such outcomes as connections to be made to the owner's infrastructure; authorise the owner to recover any necessary payments from the applicant; and set out the terms of access.

14. **In deciding the terms on which any access should be granted, one of the main issues is the need to identify the relevant costs and risks and to decide on fair and appropriate terms. These will have to be decided on a case by case basis.**

[2] In addition to the informal escalation procedures described in the guidance notes to the Infrastructure Code of Practice, NSTA officials are available to play an informal role, at the request of a party, as a facilitator in disagreements to see whether the issues can be resolved without recourse to the formal regulatory powers available under the Act.

15. In circumstances where an application relates to a pipeline which crosses international boundaries, the NSTA (on behalf of the UK Government) has a duty to consult the relevant authorities of the other Government before considering an application for dispute settlement itself and to honour any obligations resulting from any treaty covering operational and jurisdictional matters relevant to that pipeline[3]. Where companies are considering an application to settle a dispute regarding access to a particular transboundary pipeline, they are therefore advised to seek early guidance from the NSTA on the precise nature of the access provisions in the relevant inter-Governmental agreement.

16. This document describes the approach the NSTA expects to take to applications for access to existing pipelines and facilities. It does not deal with variations to pipeline works authorisations, which provide a means of seeking access to a pipeline that has not yet been built.

[3] Disputes about the various transboundary pipelines are subject to different arrangements according to the respective treaties. In particular, access to a controlled petroleum pipeline subject to the Norwegian access system by virtue of the Framework Agreement concerning cross-boundary petroleum co operation dated 4th April 2005 and made between the government of the United Kingdom and the government of the Kingdom of Norway is regulated by sections 17GA and 17GB of the Petroleum Act 1998. In some circumstances, a treaty may provide for the UK to settle a dispute in consultation with the other Government. In others, it may fall to the authorities of the other Government, rather than the UK, to address any dispute over access to the pipeline.

Context

17. Access to infrastructure and associated services on fair and reasonable terms is crucial to meeting the principal objective (section 9A(1) of the Petroleum Act 1998) to maximise the economic recovery of UK petroleum. Many fields on the UKCS do not contain sufficient reserves to justify their own infrastructure but are economic as satellite developments utilising existing infrastructure.

18. The OGA must produce one or more strategies for enabling the principal objective to be met and it must act in accordance with the current strategy or strategies when exercising functions under the Act. This guidance will therefore be considered in a way that is consistent with the current strategy or strategies; the strategy at the time of issue of this document was the OGA Strategy ("the Strategy").

19. The Strategy includes an expectation that individual companies will allocate value between them by matching risk to reward and, whilst this should deliver greater value overall, it will not be the case that all companies will always be individually better off.

20. The investment required to build the infrastructure needed to transport oil and gas from offshore oil and gas fields is characterised by significant costs, significant economies of scale and irreversibility (in that most infrastructure cannot easily be moved or changed significantly once built). This can lead to conflict between the efficient use of resources and the wish for greater competition as, for example, the efficient use of resources requires no unnecessary duplication of infrastructure while greater competition requires alternative offtake routes to be available to producers.

21. The evolution of offshore infrastructure on the UKCS has been characterised by field owners developing pipelines for sole usage, followed by ullage (i.e. spare capacity) progressively being made more available for use by third parties on payment of a negotiated tariff (i.e. a payment for transportation and processing services).

22. Field-dedicated lines are economically viable when fields are relatively large but become less viable as fields get smaller. As a consequence, there is scope for gains by all parties if the development of small fields is made viable by the owners allowing access to their existing infrastructure on fair and reasonable terms, with the infrastructure owners gaining additional revenue from the new users. Some of these gains would be lost if monopolistic behaviour were to deter the timely exploration for and development of new small fields.

23. In principle, the more mature areas of the Southern North Sea, with large amounts of part- empty infrastructure, offer good opportunities for pipe on pipe competition, though in practice this is limited by the small size of most new fields. In other regions, notably the Central North Sea, there is less spare capacity and the additional complication of relatively small gas volumes associated with oil production.

24. Throughout the UKCS there is, therefore, the potential for commercial tension between the owners of infrastructure and the owners of third party fields seeking access to that infrastructure.

Competition legislation

25. Competition law is enforced in the UK principally by the Competition and Markets Authority (CMA)[4].
26. UK competition law prohibits abuse of a dominant position. In this context, this is where an owner of infrastructure who thereby holds a dominant position in a relevant market:
    a) directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions;
    b) limits production, markets or technical development to the prejudice of consumers;
    c) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
    d) makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
27. **A dominant position essentially means that the owner is able to behave to an appreciable extent independently of competitive pressures, such as other competitors, on that market.** Market power exists where an owner can consistently charge higher prices, or supply a service of a lower quality, than they would if they faced effective competition.
28. In determining whether or not an owner is in a dominant position, the CMA will look at its market share, among other relevant factors. Generally, while an undertaking is unlikely to be considered dominant in a relevant market where it has a market share of less than 40 per cent, this does not exclude the possibility that an undertaking with a lower market share may be considered dominant and such a question will depend on whether and the extent to which it faces competitive constraints. In looking at such constraints, the CMA will consider the number and size of existing competitors in the relevant market as well as the potential for competitors to expand or for new competitors to enter that market. The CMA will also consider other factors such as the bargaining strength of customers within the relevant market.

[4] Sectoral regulators in certain industries also have concurrent powers to apply and enforce competition law.

29. The CMA has published a series of guidelines on the application and enforcement of UK competition law. Although the CMA has not issued specific guidance on the application of the Act to upstream oil and gas infrastructure access (including on the definition of any relevant markets), it is unlikely to consider that **infrastructure owners infringe the prohibition on abuse of a dominant position where they offer third parties use of their infrastructure on fair, reasonable and non-discriminatory terms.**

30. If an applicant for a right to use an owner's infrastructure covered by the Act[5] is dissatisfied with the outcome and/or progress of a negotiation with the infrastructure owner, he may as described below apply to the NSTA to require access and to set appropriate terms. If the applicant considers that there may have been a breach of competition law, he may make a complaint to the CMA – alternatively the NSTA may make such a complaint.
The CMA may then conduct a formal investigation if it has reasonable grounds to suspect an infringement; noting that simply making a complaint does not automatically trigger an investigation and the decision to conduct an investigation remains at the CMA's discretion which it exercises in line with its established prioritisation principles

[5] See sections 82 to 91 of the Energy Act 2011.

General approach of the NSTA to applications under the petroleum legislation

31. The NSTA's approach is intended to ensure that:
    - the procedure is fair and proportionate;
    - the procedure is transparent, subject to appropriate regard to commercial confidentiality; and
    - applications are dealt with consistently, effectively and expeditiously, avoiding unnecessary expense.

Making an application to the NSTA

32. There is no standard format for making a third party access application. It should, however, normally take the form of a letter and annexes with supporting evidence. More detailed guidance on submitting an application, including the essential information which should be included, is given in Annex 2.

33. To ensure efficient management of the application and to facilitate communication between the parties and the NSTA, a case officer will be assigned to each application once received. This single point of contact will be advised to both parties - i.e. applicant and owner - on receipt of an application. Should an applicant wish to withdraw their application to the NSTA at any time they should contact the case officer advised to them in the initial acknowledgement letter.

34. The NSTA may publish brief details of the scope of the dispute, potentially along with naming the relevant parties to the dispute, if the NSTA considers that such disclosure would be in the public interest.

Initial consideration of an application by the NSTA

35. Annex 1 below sets out the expected milestones in the consideration of an application. The NSTA must first establish that there is an applicable dispute (one that falls within section 82 of the Act) to consider, which includes deciding whether or not the parties have had a reasonable time in which to reach agreement. In deciding whether the parties have had a reasonable time in which to reach agreement, the NSTA will have regard to:

- whether the minimum information set out in the Act[6] was provided by the applicant to the owner and, if so, when it was provided;.
- whether the parties have negotiated in good faith - a lack of good faith might be evidenced by either the applicant or the owner drawing out the negotiations with no real intention of bringing them to a conclusion; and
- whether all parties have followed the Infrastructure Code of Practice.

36. If, having considered the factors above, and having consulted the infrastructure owner, it is clear that the parties have not had a reasonable time to reach agreement, the NSTA may not consider the case for dispute resolution.

37. While in general an application made after the parties have followed all the prior provisions of the Infrastructure Code of Practice, including the Automatic Referral Notice ("ARN") procedure and possible extensions of the timetable under that procedure, is likely to qualify for consideration, it cannot be guaranteed to do so. Equally, an application not made under the ARN procedure may still qualify for consideration.

38. The NSTA may decide to adjourn consideration of the application to allow the parties to negotiate further, in the event that it considers that allowing a set period for further negotiation is likely to lead to a successful conclusion. As part of this the NSTA may set a deadline by which it will consider intervention if the parties to a dispute have not concluded negotiations.

[6] See sections 82 to 91 of the Energy Act 2011

39. The NSTA may decide to reject an application if it believes that it does not have a significant bearing on the obligations contained within the Strategy or that it will not be able to consider the case within a reasonable period of time.

40. Alternatively, the NSTA retains the option of rejecting an application and considering the issue under other regulatory powers (including its sanctions powers) if it is appropriate in the circumstances to do so. If the NSTA does do this, then it may write to the relevant parties and request further information.

Power of NSTA to give notices on own initiative

41. Section 83 of the Energy Act 2011 provides for the NSTA to act on its own initiative to give a notice to secure rights to an applicant for access to infrastructure. In deciding to use this power, the NSTA must not only be satisfied that the parties have had sufficient time to reach agreement, it must also be satisfied that there is no realistic prospect of their doing so.

42. The NSTA envisages that this power would be exercised in only very limited circumstances, as it would override the right of a prospective user to make an application to the NSTA at the time that they see fit. Circumstances where it might be used include where the NSTA believes that the prospective user is deterred from making an application by fear of upsetting the infrastructure owner, or any party is believed to be drawing out negotiations without any intention of reaching a conclusion.

43. Before using this power, the NSTA would look into the circumstances surrounding the matter. If the outcome is that the NSTA considers it should act on its own initiative to give a notice as described in paragraph 42 above, the NSTA will inform the parties that it is so minded to act.

44. The information provided to the parties by the NSTA at this stage would take the form of a letter that would explain the reasons for the NSTA's view and the timescale in which it proposed to act. The parties would be given time to provide relevant information and make representations regarding the proposed action, and the NSTA would give careful consideration to any views expressed in order to arrive at a view on whether to act on its own initiative. The NSTA would need to gather evidence to support any decision to act; this may involve use of the power in section 87 to request information from any party when writing to the parties.

Modifications to infrastructure

45. When considering an application or acting on its own initiative, the NSTA may assess whether the pipeline or facility to which access has been requested needs to be modified so as to increase its capacity or to install a junction or other apparatus through which a pipeline of the applicant can be connected. Should such modifications appear to be necessary, the NSTA will inform the parties of its intention to issue a notice in due course that will describe the required work to be carried out. This would be a separate notice from that required to secure rights to the applicant to use the infrastructure in question.

46. The notice describing the required work must specify the sums or the method of determining the sums which the NSTA considers should be paid to the owner by the applicant for the purpose of defraying the costs of the modifications. It would also specify the period in which the modifications are to be carried out. It is anticipated that the sums to be paid would reflect the actual cost of the modifications including appropriate overhead costs but with a ceiling to limit the exposure of the applicant to cost overruns over which they have little or no control. The Strategy provides among other things that contributions made by third parties towards investment in infrastructure shall be fair and reasonable in all of the circumstances.

Inviting the parties to provide information

47. Where the NSTA concludes there is an application to consider, it will invite the owner of the infrastructure to provide information which will assist the NSTA in considering the application. This can include any further comments by the owner and/or by the applicant regarding the application. Annex 3 describes the type of information the NSTA anticipates will be required. While the NSTA will endeavour to identify at this stage all additional information it will need to make its determination, it may be necessary to require the provision of supplementary information from the applicant at this stage and from both parties as the application is being considered.

48. Information may be sought within a set timescale from a relevant person under section 87 of the Act, and the NSTA may apply certain sanctions as set out in section 87B of the Act if that request is not met. The NSTA may not disclose information that has been requested under section 87 of the Act without the consent of the person who provided it or if such disclosure is required by an obligation imposed by or under an enactment. Additionally, the NSTA is bound to comply with other relevant Acts such as the Freedom of Information Act 2000 ('**FOI**') and the Environmental Information Regulations ('**EIR**'). When an FOI/EIR request is received, the NSTA will normally disclose the information falling within the scope of the request to the relevant

persons and seek their views on whether such information can and should be disclosed.

Agreeing the facts

49. To maintain transparency in the consideration of cases and to provide an opportunity for both parties to agree as many of the facts as possible or, where appropriate, provide their own view of the negotiations, the NSTA expects each party to copy to the other party its submissions to the NSTA unless there is good reason not to do so. The NSTA encourages the parties to agree the facts of the case and, as far as possible, to focus on the issue(s) still in dispute.

Meetings with officials

50. Given the complexity of the issues, the NSTA may consider that it would be effective to hold one or more meetings or presentations to clarify and explore aspects of the information provided to it. If such meetings or presentations occur, the NSTA encourages both parties to agree to the other being present. The Act requires that the NSTA give all relevant persons the opportunity to be heard, which can be taken by way of a meeting or a written submission. In the event that one of the parties changes during consideration of the dispute, the NSTA is obliged to give the opportunity to be heard to the new party in accordance, as appropriate, with section 89A or 89B of the Act.

Sharing information with the Health and Safety Executive

51. The NSTA is under a statutory obligation to offer the opportunity to be heard to the Health and Safety Executive (HSE). This may involve some sharing of technical information and will ensure that safety is safeguarded in disputes which focus on financial matters. The NSTA will also wish to seek advice from the HSE in the case of applications where safety, for example pipeline integrity or the composition of fluids, is an element of the dispute.

Interaction with Field Development Plan approval

52. Were the NSTA to conclude that there is a case to consider for access to be granted, applicants should be aware that any determination in relation to access for a proposed field would separately be subject to the necessary development approval for that field and that obtaining a determination would not guarantee field development approval.

53. Where an application was being considered prior to field development approval, work could normally continue on the sub-surface elements of the field development plan but discussions on development options that may have a bearing on the determination outcome would be deferred until the determination process was complete.

54. The NSTA strongly encourages developers with a choice of export routes to consider carefully whether to make an application for a determination where approval of a field development plan including that route would be unlikely.

Timetable

55. Annex 1 describes the expected stages in handling an application and gives indicative timings of actions to be followed by all parties; meeting this timetable would require full co-operation of all the parties.

56. The NSTA would seek to agree a timetable with the applicant and the infrastructure owner where possible. It is hoped that the majority of determinations could be completed in 16 weeks but it may well be necessary to extend this period, possibly significantly depending on the complexity of the case; in such cases the NSTA would discuss and seek to agree

an alternative timetable with the parties as the need arises.

Form of a determination

57. In all cases, a determination requiring access to be provided is expected to comprise a comprehensive and detailed set of terms and conditions specified by the NSTA. Although the main issue in a particular case in practice is likely to be the financial terms including the tariff and risk apportionment (e.g. liabilities and indemnities), there may, of course, also be other (non-financial) aspects which the NSTA may need to settle.

58. It is envisaged that the applicant and owner will be provided with an indication of the likely outcome of the determination, in the form of terms that the NSTA is minded to set and/or draft notice(s) (the 'minded to' letter).

59. This step will allow the parties to review the completeness of the proposed terms and to identify possible difficulties with their implementation, prior to finalising notices. The Act allows either party to apply to the NSTA to vary a notice after it has been issued (this is discussed later in paragraph 62).

Implementation of a determination

60. The NSTA will specify a short period of time following a determination of terms for access during which the applicant may confirm their willingness to obtain access on those terms. If the applicant were to decline to accept the terms during that period, the owners would not be required to provide access to the applicant on those terms.

Publication of outcomes of applications

61. Section 86 of the Act allows the NSTA to publish part or all of a notice or variation of a notice, or to publish a summary of the effect of a notice (or any part of it) or variation. In this context, the NSTA is likely to publish the full text of the notice or variation, subject to appropriate confidential redactions. Before publishing anything, the NSTA must give an opportunity to be heard to the persons to whom the notice was given and to anyone else that it considers to be appropriate. Published documents are placed on the NSTA's website.

Applications to vary notices

62. Section 85 of the Act allows either party to whom a notice is given to apply for that notice to be varied. That legislation states that the NSTA may vary a notice only in order to resolve a dispute that has arisen in connection with the notice. It is expected that requests for variations would be relevant only where the notice is incomplete or deficient in some significant aspect. Section 85 of the Act also requires that the NSTA gives all relevant persons the opportunity to be heard.

Relevant factors to be considered in an application

63. The NSTA is required to act in accordance with the Strategy when exercising its functions under the Act (as described in paragraph 18 above). The NSTA is also statutorily required to (so far as relevant) take into account the following factors that are listed in section 82(7) of the Act:

a) capacity which is or can reasonably be made available in the pipeline or facility in question[7];
b) any incompatibilities of technical specification which cannot reasonably be overcome[8];

[7] The NSTA considers that owners of infrastructure are entitled to make reasonable provision of capacity for their own future use. “Reasonable” in this context is not capable of exhaustive definition and is therefore illustrated here by example. It includes:

- realistically anticipated upsides or plateau extensions from fields currently using the infrastructure

- new field developments where there is a firm plan or which are expected to be developed within a reasonable time frame or which were foreseen and were part of the reason for the original decision to install the infrastructure.

Reasonable provision would not include, for example, deliberately refusing access in order to deny market access to a competitor or to gain some other market advantage. Nor would it seem reasonable for an infrastructure owner to refuse access on the basis that the owner will have a requirement for it in time for some as yet unidentified purpose.

[8] The NSTA considers that this includes, for example, sterilising capacity to provide other services within the system (in addition to the capacity actually requested) as a result of accepting the particular request for service. Examples might be:

- where taking in a small field could reduce the ullage to the extent that a current negotiation with a large field could not be completed;

- in circumstances where a particular small field consumes all of the, say, de-propanising capacity at an oil treating facility thus preventing the use of upstream capacity which would otherwise be available;

c) difficulties which cannot reasonably be overcome and which could prejudice the efficient, current and planned future production of petroleum;[8]

d) the reasonable needs of the owner and any associate of the owner for the conveying and processing of petroleum;[7]

e) the interests of all users and operators of the pipeline or facility[9];

f) the need to maintain security and regularity of supplies of petroleum; and

g) the number of parties involved in the dispute.

64. This is not an exhaustive list and the NSTA will also take into account any other material considerations, including financial information, relevant to the dispute. The relevance of these factors will vary from case to case and will be influenced by the Obligations and Safeguards contained in the Strategy. Existing users are given further protection by sections 82(9) and (10) of the Act, which require that the reasonable expectations of owners and the rights of other users are not prejudiced unless they are compensated.

- where a sour gas field would, by coming in, preclude the owners from a future opportunity to operate the system sweet.

However, the NSTA emphasises that the primary consideration when determinations are required to consider these issues will be the facts of a particular case.

[9] The NSTA considers that this includes the need to honour all existing contractual commitments – since it is essential for business that an environment in which contracts which were freely entered into are respected – and to take account of the effect on existing users; for example, accommodating a new user may cause compression suction pressure to rise which would have a material detrimental impact on the deliverability of the existing fields. There may be situations where existing contractual commitments work against maximising economic recovery and the NSTA will consider using its other powers such as those under the Energy Act 2016 to seek an improved outcome.

NSTA objectives

65. The maturity of the UKCS means that an increasing proportion of production comes from new fields which are too small to support their own infrastructure to shore. Access to infrastructure services on a fair basis is necessary for their development. At the same time, more production is coming from incremental investment in older fields. Such fields can rely on ageing infrastructure which may be economic to maintain only with the income from transportation of third party production. There is also some new investment in pipelines which may be used in future for third party production.

66. The NSTA would normally seek to ensure that the development option chosen by the prospective developer of a new field does not lead to the permanent loss of resources which could otherwise be recovered economically. This might, for example, happen if gas produced in association with oil from a new field would be flared although its market value exceeded the resource cost of bringing it to market. That might be the result if the least cost export option for the gas was to use ullage (i.e. spare capacity) in an existing pipeline, but - perhaps in the absence of pressure from pipe-on-pipe (or pipe-within-pipe) competition - the pipeline owner were to abuse a position of market power and seek too high a tariff to justify the new field owner paying for a connection. In such circumstances, the new field owner might ask the NSTA to set a lower, cost-reflective tariff, which would bring the best commercial option into line with the best economic option.

The NSTA's Guiding Principles on setting transportation and processing terms

67. While acknowledging that it is reasonable for owners to safeguard capacity for their own reasonably anticipated production, the NSTA supports the principle of non-discriminatory negotiated access to upstream infrastructure on the UKCS, encourages transparency and promotes fairness for all parties concerned since it is important that prospective users have fair access to infrastructure at competitive prices.

68. This is confirmed in the Strategy which expects that access to infrastructure will be allowed on fair and reasonable terms. At the same time, the NSTA is of the view that any terms that it imposes should reflect a fair payment for the costs and risks faced by the owner and for any opportunities forgone as a result of the provision of such access.

69. The NSTA recognises that, for example, spare pipeline capacity has a commercial value and that the owner, having borne the cost and risks of installing, operating and maintaining the pipeline system, should normally be entitled to derive appropriate consideration for that value.

70. Where, as in upstream oil and gas processing and transportation, there are so many technical, economic and commercial variables, any attempt to be too prescriptive in setting out guidance on whether to grant a third party access to an owner's processing facilities or pipeline infrastructure and on what terms is likely either to overlook an important factor or to introduce a factor which, in some circumstances, might be entirely inappropriate.

71. There is, for example, a balance to be struck between setting terms which reward past investment in infrastructure (to maintain the attractiveness of the UKCS for continued investment) and allow owners to take on risks which a field developer may not be able to bear alone, while ensuring that the terms set by the NSTA are attractive enough to encourage exploration for, and development of, new fields. The relative weight to place on these factors would vary from case to case and this guidance is therefore, of necessity, in general terms.

72. **The main issue is the need to identify the relevant costs and risks and to decide on fair and appropriate terms.**

73. When considering the appropriateness of the requested access and related terms, the NSTA would also expect that[10]:

- the owner would not be financially worse off through the admission of the applicant;

- the owner would have all of its associated costs reimbursed, including any direct additional capital costs arising from the admission of the applicant together with any indirect costs (e.g. the cost of interruption to the owner's throughput during modification to enable third party use);

- the tariff is to be set so that the applicant would bear a fair share of the total running costs incurred after his entry[11]; and,

- unless the supply in question were marginal or the owner had already made other sufficient arrangements to recover the full capital costs, the financial arrangements proposed would normally be expected to take account of the basic capital costs as well as the costs arising from the entry of the applicant, although this would not prevent any NSTA determinations from including an apportionment of overall risk to the owner in return for an appropriate level of reward.

74. In most cases, the terms that would be determined by the NSTA are likely to be in line with those that would be offered by infrastructure owners were they to face effective competition from other infrastructure owners who also have sufficient spare capacity to accommodate the hydrocarbons in question. That does not mean that where there has been competition between infrastructure owners the NSTA will refrain from making a determination or be guided by the terms already offered. There are practical limitations on the extent to which in practice competition between UKCS infrastructure owners can be effective.

75. The NSTA recognises that infrastructure owners have a key role to play in ensuring maximum economic recovery of the UK's petroleum resources and that too narrow a focus on setting terms on a cost-reflective basis could potentially reduce the incentive for them to bear risk, keep their infrastructure in operation and available, invest in innovative solutions and offer added value services.

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[10] Noting a House of Lords Committee on oil and gas infrastructure sharing (dated 15 October 1975). See the debate from 5.20pm onwards as reported at http://hansard.millbanksystems.com/lords/1975/oct/15/petroleum-and-submarine-pipe-lines-bill-1.

[11] See paragraph 76.

76. Noting that the OGA's discretion to exercise the powers in sections 82 to 91 of the Energy Act 2011 cannot be constrained by published guidance, the following five bullets aim to provide owners and applicants with more detail on the NSTA's likely approach in various circumstances:

- **Terms for infrastructure built as part of an integrated field development project**
  When spare capacity can be made available to an applicant in infrastructure for which provision has already been made by the owner for its capital costs (including ongoing costs) to be recovered, it is anticipated that the NSTA would normally set terms for the applicant that reflect the incremental costs and risks imposed on the owner that are associated with transportation and/or processing.

  The provision for costs that has already been made by the owner may include a reasonable return taking account of the risks incurred and expected. It is acknowledged that it may in practice not be easy to determine whether provision has already been made for the capital costs of a specific piece of infrastructure to be recovered.

- **Terms for infrastructure built, oversized or maintained with a view to taking third party business**
  In order to retain an incentive for further such investment, in infrastructure constructed, oversized or maintained with a view to taking third party business, the terms set by the NSTA would normally provide for recovery of an appropriate share of the capital costs incurred in the expectation of third party business. This is likely to be achieved by setting the tariff at a level just sufficient, taking into account the risks involved, to earn the owner a reasonable return on costs incurred by him in the anticipation of such third party use if the tariff were applied to the third party throughput expected at the time of the decision to invest, recognising the uncertainty inherent in projections of future third party usage. This tariff may well be higher than the level that the owner would offer if prospective users have alternative export options available in infrastructure with sufficient capacity for the hydrocarbons in question and would, in general, be above the level required simply to reflect incremental costs and risks.

- **Terms for infrastructure associated with a field at or near the end of its economic life**
  In the case of infrastructure associated with a field at or near the end of its economic life, the prospective tariff for third party access may need to be set above incremental costs to provide that the infrastructure is maintained and remains available for third party use.

The terms set by the NSTA are likely to need to include appropriate cost sharing or recovery arrangements in such circumstances, including a mechanism for determining the date from when or circumstances in which they should operate. More guidance on the operation of cost sharing or recovery arrangements is given in paragraphs 77 and 78. Provision may be made for the applicant to pay other than a throughput-based share of costs if that can be afforded and if it will keep the infrastructure and fields from ceasing operation.

- **Terms where there is competition for limited capacity**
  On occasion, there may be prospective third party users competing for access to the same limited capacity in the owner's infrastructure. In such circumstances, the NSTA is unlikely to require the owner to make the capacity available to an applicant who values the capacity less than the other prospective users - for example, as evidenced by the tariffs they are willing to pay - and thus does not offer a better deal for the owner.

- **Terms set to cover costs of displacement of own production or contractual commitments**
  For infrastructure with insufficient ullage to accommodate an applicant's requirements, given the owner's rights and existing contractual commitments, the terms would need to reflect at least the cost to the owner of backing off their own production and/or another party's contracted usage to accommodate the applicant's (i.e. be based on the concept of opportunity cost).

Cost sharing or recovery arrangements

77. At some point it may be appropriate to switch from a tariff per unit of throughput to a cost sharing arrangement. If it is expected that such a point will be reached during the period for which a determination is made, the NSTA will determine a mechanism for deciding a date from which cost sharing will be effective. If an operating cost share arrangement applies, the applicant would normally pay a throughput-based share of the operating costs of the facilities used to transport and process his hydrocarbons. Operating costs would normally include, for example, costs of replacing outdated metering equipment with new equipment necessary to maintain the services required by existing users of the host facility but would not include any capital expenditure that the infrastructure owners elect to spend to attract/win future third party business or future equity production.

78. Cost sharing may be on an individual facilities basis (e.g. water injection, gas conditioning, oil production) or it could be based on the cost of the total facilities. The cost sharing arrangement would take account of all operating and

maintenance modes e.g. extended shutdowns when there is no throughput. Owners' overheads and risks e.g. in relation to ongoing liabilities would be captured as identified element of cost rather than as an uplift on costs. The determined cost share arrangements would normally include a provision for the infrastructure owner to provide regular projections of unit costs to allow decision making by users. If costs escalate beyond those anticipated at the time of a determination the determination would allow for the applicant to terminate his use of the facilities having given a reasonable notice period.

Compensation, Liabilities and Indemnities during the construction and tie-in phase

79. In the case of periods of shut-downs required for the sole purposes of the tie-in or modification, the applicant would be likely to be required to pay a reasonable level of liquidated damages to cover losses arising from the loss or deferral of production. These damages may be calculated on an hourly or daily basis and would normally be subject to a reasonable cap. In deciding how much should be paid to the owner by the applicant for the purpose of defraying the cost of the modifications, the NSTA would be likely to make provision for the cost of interruption to the owner's throughput while a pipeline is modified to enable third party use. That requires an assessment of whether the owner's production would be lost or deferred and, in the latter case, the difference in timing and price. Allowance may also need to be made for any incremental benefit from the modification accruing to the owner for his own or third party production.

80. Except in cases of wilful misconduct of the infrastructure owner, the NSTA would normally require applicants to indemnify owners against liabilities and losses arising out of tie-in or modification activity but with caps on their maximum liability exposure. These caps would be reasonable and have regard to the realistic exposure of the infrastructure owners and the risk/ reward balance of the overall determination.

81. The NSTA would normally be as specific as possible as to the types and categories of non- physical loss recoverable under any indemnity with a view to avoiding subsequent disputes on the extent of recovery under the indemnity and helping the placement of any insurance for the risk. In general, the NSTA would require that specific insurance arrangements be put in place to cover tie-in or modification activity.

Liabilities and Indemnities during the transportation and processing phase

82. The liability and indemnity (L&I) regime forms an important part of the overall risk/reward balance with consequent impact on reward levels. It is the intention of the NSTA that in the determination the applicant and the owner should each bear appropriate risks having regard to the respective rewards which each is expected to enjoy. A fundamental presumption is that the applicant and owner will both mitigate their losses when seeking recovery from each other. The L&I terms that would be determined by the NSTA would have regard to the terms prevailing with existing users of a system and by the specific circumstances of each case: every deal is different, as is the overall risk/reward balance and the final liability and indemnity regime.

83. The NSTA would normally expect there to be a mutual hold harmless regime in respect of losses of property, death or injury to people and pollution from the respective facilities and consequential losses, usually subject to exclusions in the case of wilful misconduct by the party seeking to rely on the indemnity. This regime would typically extend to contractors.

Off-specification deliveries during the transportation and processing phase

84. The terms determined by the NSTA would make provision during the production period (i.e. post completion of the tie-in phase) for recovery by the infrastructure owner from the applicant of documented incremental costs and/or expenses incurred as a result of the delivery by the applicant, whether or not accepted by the owner, of off specification hydrocarbons. The applicant would normally be expected to indemnify and hold the owner harmless from and against direct losses, costs, damages and/or expenses caused as a result of such off-specification delivery of hydrocarbons.

85. In determining the appropriate liability and indemnity regime to apply to off-specification deliveries, the NSTA would be likely to consider, among other things:
    i. whether the indemnities given by the applicant to the owner are to be capped;
    ii. what were the consequences to the owner and the other users of the system, and whether the nature of the service being offered should have a bearing on which party retains liability for off-specification contamination for various events;
    iii. whether blending arrangements are included, and which party retains liability for blending failure leading to off-specification contamination;

iv. whether the off-specification event was a previously known occurrence or whether it was unexpected, whether the user was aware of an event, and whether the owner was aware and had given consent in advance;

v. the quality and availability of the data input stream to the infrastructure owners and the owners' ability to control the system;

vi. that the identity of the off-specification user in a multi-user system may never be satisfactorily proved;

vii. whether an existing cross–user liability agreement (or other inter–user agreement) regulates inter–user liabilities and is applicable; the NSTA would usually require the applicant to adhere to any existing inter–user agreement; and

viii. whether the applicant is proposing to deliver a contaminant into a commingled stream on a planned, long-term basis (on the proposition that a downstream processor will clean up the commingled stream).

Annex 1

Minimum Timetable for applications to the NSTA: indicative timings of actions to be followed by all parties

Milestones	The NSTA will endeavour to	Applicant / Owner actions
Receipt of an application	assign and notify to the parties contact details of a case officer who will be responsible for managing consideration of the application	
Establishing that there is a dispute to consider	advise the parties of receipt of the application and of whether the dispute will be considered or, whether the dispute will be adjourned or rejected **within a maximum of 6 weeks from receipt of the application – note that in normal circumstances the NSTA will aim to complete this phase within 10 working days**	**Applicant** provides information set out in **Annex 2** to enable the NSTA to establish if there is an applicable dispute to consider. This information will also inform consideration of the dispute.
Submitting information to inform consideration of the dispute	allow **at least 10 working days** for full submissions to be made	**Owner** should submit information to the NSTA within the deadline requested which will normally be **at least 10 working days but unlikely to be more than 20 working days.** **Applicant** may be asked to supplement their initial submission to assist the NSTA's consideration.

During the consideration of the dispute	allow **at least 5 working days** for companies to respond to requests for further information	**Owner** and **Applicant** should submit supplementary information to the NSTA within the deadline requested, which will be **at least 5 working days but not likely to be more than 10 working days**.
Meetings with officials during the consideration of the dispute	normally give at least 5 working days' notice of any meeting with officials to explore the information provided and at the same time notify companies of the issues for discussion. Several meetings may be needed for complex disputes.	
Provide the parties with an indication of the likely terms of the determination (the 'minded to' letter and/or draft notice)		**Owner/Applicant** to respond with comments on completeness and ease of implementation within 10 working days.
Advising the parties of the determination	advise both parties of the determination within 16 weeks of receipt of the application	
Applicant to make decision		Within the time period specified by the NSTA, the **Applicant** will decide whether or not to proceed to obtain access under the determined terms.

Annex 2

Submitting an application to the NSTA

1. There is no standard format for an application. It should, however, normally take the form of a letter/ Annexes with supporting evidence included.

2. Applicants should send one hard copy of written applications and an electronic version (preferably in Word, PowerPoint and/or Excel) to:

Disputes and Sanctions, North Sea Transition Authority, Sanctuary Buildings, 16-20 Great Smith Street, London SW1P 3BT

email: disputesandsanctions@nstauthority.co.uk

telephone: +44 (0)300 020 1010

3. Applications must be signed and dated by the applicant or their legal representative. Where the application is made on behalf of a group of companies acting under a joint venture agreement, the application should be submitted by the lead negotiator and include contact details of representatives of all other participants in the joint venture.

4. Applicants should include the following information in their request:

    - the legislative provision(s) under which the application is made;

    - the applicant's name and address and, if different, an address for service in the UK;

    - details (name, location) of the infrastructure which is the subject of the dispute;

    - the name and address of the owner of the infrastructure which is the subject of the dispute;

    - details of the negotiations to date including:

    i. the request to the owner of the infrastructure; and,

    ii. details (including dates) of the negotiations to date including any indicative information provided by the owner; and

    - all specific information on the service requested with all relevant supporting evidence, to include but not be limited to:

    i. broad outline of the service requested (e.g. firm or reasonable endeavours) and a description of the field development; the range of production profiles that have been the subject of the request for processing and transportation;

    ii. the range of compositions of the fluids that have been the subject of the request for processing and transportation;

    iii. period for which service has been requested;

iv. any additional services requested e.g. blending; and,

v. any additional terms requested e.g. priority in the case of capacity restrictions, special terms for transport, incremental production, flexibility in nominations.

5. Applications should include details of the composition and quantity of products to be processed or conveyed and the period during which the service is to be provided. The NSTA considers that this information should have already been provided to the owner as part of the initial request for access.

6. It is expected that this information will enable the NSTA to establish whether there is an applicable dispute for it to consider and inform its consideration of that dispute if there is. The NSTA will not base its decision solely on the information provided as part of this process, it may also be necessary for the NSTA to seek supplementary information from the parties during the NSTA's consideration of the dispute.

Annex 3

Information required from owners

1. Where the NSTA concludes there is an applicable dispute to consider under the dispute resolution provisions, it will invite the owner of the infrastructure in question to comment on the application and also provide information to assist it in considering the dispute.

2. Owners will be asked to confirm their ownership or joint ownership of the infrastructure in question and where applicable the details of other joint owners. In the case of jointly owned infrastructure the representative responding to the NSTA's request should confirm that he has the agreement of all owners to act on their behalf. Owners will also be asked to provide details of existing third party users.

3. Owners should expect to provide, as appropriate, a demonstration of the technical and commercial issues that led them to calculate the tariff and arrive at the terms that they have offered or the reasons for refusing to provide a service. These may include but are not limited to:

    i. a summary of the technical reviews or studies that were undertaken for the proposed service, including any incompatibilities of specification or other difficulties that could prejudice the efficient current and planned future use of the infrastructure;

    ii. a statement of the capacity that is or can reasonably be made available, including a forecast of available capacity in the relevant period in processing facilities and pipelines, detailing current and future committed throughput from third party users or equity production and future equity production that may reasonably expect to use the infrastructure, identifying individual field profiles within the overall profile;

    iii. details of the feasibility of and costs for any incremental capacity e.g. whether additional equipment or processing facilities would be required to meet the services requested by the applicant – including a summary of the means by which costs have been determined;

    iv. where the owner considers that there is insufficient capacity to take the applicant's production without backing out any other production, a description of the associated opportunity cost and any incremental cost;

    v. details of any interests or contractual constraints that could affect the access and services requested by the applicant, e.g. the rights of existing users to increase production nominations;

vi. estimates of the incremental costs on an annual basis of accommodating the applicant's production, including separately any one-off costs (e.g. of tying-in);

vii. estimates of the business risks associated with accommodating the applicant's production, including separately any one-off risks (e.g. of tying-in); and

viii. if the infrastructure was built or oversized to take third party throughput, an indication of the incremental capital costs and of the owner's expectations of such throughput at the time of the decision to invest, giving an indication of the risks then associated with different projections of throughout.

4. The NSTA is not likely to base its decision solely on information provided as part of this process and may wish to seek supplementary information as the case is considered. This could include a detailed assessment of the costs and risks caused by the applicant's production over the lifetime of the infrastructure in question, as well as consideration of any benefits that may accrue to the applicant or owner.

5. Information may also be sought about the possible impact of unplanned future events or performance or regulatory changes on all users of the infrastructure, along with the likelihood of such occurrences.

North Sea Transition Authority

The North Sea Transition Authority is the business name for the Oil & Gas Authority, a limited company registered in England and Wales with registered number 09666504 and VAT registered number 249433979. Our registered office is at Sanctuary Buildings, 20 Great Smith Street, London, SW1P 2BT.