

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

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Introduction

1. Access for developers of offshore oil and gas fields to upstream infrastructure for the purpose of transporting and processing hydrocarbons is a key element in the process of extracting the UK's petroleum resources (see paragraph 9 below). Companies seeking access for their hydrocarbons to such infrastructure must apply in the first instance to the relevant owner¹ of the infrastructure in question.

2. There is a voluntary industry [Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf](#) (the "Infrastructure Code of Practice") which sets out principles and procedures to guide all those involved in negotiating third party access to oil and gas infrastructure on the UK Continental Shelf (UKCS). The Department encourages all parties to follow the Infrastructure Code of Practice² including the related guidance notes³ which describe informal escalation procedures.

3. 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 Secretary of State to require access to be granted and to determine the terms on which it is to be granted.⁴

4. The Department encourages and expects most issues related to infrastructure access to be resolved in timely commercial negotiation and believes the potential use of the Secretary of State's powers will act as an incentive to such an outcome. Nevertheless, those powers are there to be used in the overall national interest if a commercial solution can genuinely not be found within a reasonable time frame.

5. This document describes how the Department proposes to handle formal applications under the Energy Act 2011.⁵ It sets out the requirements and

1. In the rest of this document, "owner" should where the context permits be taken to include owners.

2. <http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/ICoP%20revised%202013.pdf>.

3. <http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/OP080.pdf>.

4. The relevant legislation is contained in sections 82 to 91 of the [Energy Act 2011](#). The scope of the legislation extends to access to services used for operating upstream petroleum pipelines - for example, metering or allocation services and the provision by the host facility of fuel or power needed to operate third party equipment on or from such a facility. It does not extend "downstream" so, for example, while the Mossmorran Natural Gas Liquids plant and Braefoot Bay *are* covered, the Fife Ethylene Plant is *not*.

5. In addition to the informal escalation procedures described in the guidance notes to the Infrastructure Code of Practice, DECC officials are available to play an informal role, at the request of a party, as a mediator/facilitator in disputes to see whether the issues can

obligations on all parties; the approach the Department would take in handling applications; and the principles it would expect to be guided by in determining terms of access.⁶ If the Secretary of State decides that access should be granted he may serve a notice to that effect on the parties. This may allow for 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.⁷

6. In deciding the terms on which access should be granted, the main issue 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.

7. In circumstances where an application relates to a pipeline which crosses national boundaries, the Secretary of State has a duty to consult the relevant authorities of the other Government before considering an application for dispute settlement himself and to honour any obligations resulting from any treaty covering operational and jurisdictional matters relevant to that pipeline.⁸ 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 Department on the precise nature of the access provisions in the relevant inter-Governmental agreement.

8. This document describes the approach the Department expects to take to applications for access to existing pipelines and facilities. Variations to [pipeline works authorisations](#) provide a means of seeking access to a pipeline that has not yet been built.

be resolved by agreement without recourse to the formal regulatory powers available under the relevant legislation.

6. This Guidance is compliant with the eight rules of good guidance in the [Code of Practice on Guidance on Regulation](#) (BIS, October 2009).

7. In the rest of this document, "terms" should where the context permits be taken to mean "terms and conditions".

8. 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 Secretary of State 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 Secretary of State, to address any dispute over access to the pipeline.

Context

9. The Government's main objective in operating its petroleum legislation is to ensure the recovery of all economic hydrocarbon reserves taking into account the environmental impact of hydrocarbon development and the need to ensure secure, diverse and sustainable supplies of energy for business and consumers at competitive prices (see paragraphs 45–46 below for more detail). Access to infrastructure and associated services on fair and reasonable terms is crucial to maximising the economic recovery of the UK's oil and, particularly, gas because many fields on the UKCS do not contain sufficient reserves to justify their own infrastructure but are economic as satellite developments utilising [existing infrastructure](#).

10. 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. This can lead to conflict between the efficient use of resources and the wish for greater competition. The efficient use of resources requires no unnecessary duplication of infrastructure while greater competition requires alternative offtake routes to be available to producers. Effective regulatory action may be necessary to prevent the exploitation of local monopoly positions where competition does not exist.

11. 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 tariff (i.e. a payment for transportation and processing services). 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.

12. 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. 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

13. In general, competition law applies to activities on the UK Continental Shelf. European Union competition rules apply to activities which may have an appreciable effect on trade between Member States of the European Union. The same rules have also been extended to trade within the European Economic Area, which includes Norway and Iceland. The opening of the gas interconnectors to Ireland and Belgium means there is now considerable inter-state trade in this area. Article 101 of the Treaty on the functioning of the European Union prohibits anti-competitive agreements, decisions and concerted practices. Article 102 prohibits abuse of a dominant position.

14. Competition law is enforced in the UK principally by the Office of Fair Trading (OFT).⁹ The [Competition Act 1998](#) introduced into UK law similar prohibitions modelled on those in Articles 101 and 102 (the "Chapter I" and "Chapter II" prohibitions). These concern anti-competitive agreements, decisions and concerted practices and abuse of a dominant position that may affect trade within the UK. In applying these provisions of the Competition Act 1998, both the courts and the OFT are required to follow the relevant jurisprudence of the Court of Justice of the European Union and to have regard to decisions of the European Commission.

15. Both EU and UK competition law prohibit abuse of a dominant position. The following list is not exhaustive, but broad categories of business behaviour within which abusive conduct may be found include:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making 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.

16. **A dominant position essentially means that the business is able to behave to an appreciable extent independently of competitive pressures, such as other competitors, on that market.** Market power exists where a business can consistently charge higher prices, or supply a service of a lower quality, than they would if they faced effective competition.

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

17. In determining whether or not a business is in a dominant position, the OFT will look at its market share among other relevant factors. Generally, a business is unlikely to be considered dominant if it has a market share of less than 40 per cent. But this does not exclude the possibility that an undertaking with a lower market share may be considered dominant depending on whether and the extent to which it faces competitive constraints. In looking at such constraints the OFT will consider the number and size of existing competitors as well as the potential for competitors to expand or for new competitors to enter the market. The OFT will also consider other factors such as the bargaining strength of customers.

18. The OFT has published a series of [guidelines](#) on the application and enforcement of UK and EU competition law. Although the OFT has not issued specific guidance on the application of the Act to upstream oil and gas infrastructure (including on the definition of the relevant market), it considers that **infrastructure owners are unlikely to infringe the Chapter II prohibition on abuse of a dominant position where they offer third parties use of their infrastructure on fair, reasonable and non-discriminatory terms.**

19. If a third party applicant for a right to use a third party's infrastructure covered by the relevant legislation¹⁰ is dissatisfied with the outcome and/or progress of a negotiation with the infrastructure owner, he may as described here apply to the Secretary of State to require access and to set appropriate terms. (If the procedures of the Infrastructure Code of Practice are being followed, the third party will have undertaken to do this at a pre-determined point in accordance with the Automatic Referral Notice provisions of that Code.) If the applicant considers that there may have been a breach of competition law, he may [make a complaint to the OFT](#). However, the OFT may conduct a formal investigation only if it has reasonable grounds to suspect an infringement; simply receiving a complaint does not automatically trigger an investigation and the decision to conduct an investigation remains at the OFT's discretion.

General approach of the Department to applications under the petroleum legislation

20. The Department's approach is intended to ensure that:

- the procedure is fair;
- the procedure is transparent, subject to appropriate regard to commercial confidentiality; and
- applications are dealt with consistently, effectively and expeditiously, avoiding unnecessary expense.

10. See sections 82 to 91 of the [Energy Act 2011](#).

Making an application to the Secretary of State

21. There is no standard format for an application. It should, however, normally take the form of a letter with supporting annexes. Fuller guidance on submitting an application, including the essential information which should be included, is given in Annex 2. To ensure efficient management of the application and to facilitate communication between the parties and the Department, a case manager will be assigned to each application. 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 at any time they should contact the case manager advised to them in the initial acknowledgement letter.

Departmental consideration of an application

22. Annex 1 sets out the expected milestones in the consideration of an application. The Secretary of State must first establish that there is a case to consider. In deciding whether the parties have had a reasonable time in which to reach agreement, the Department will have regard to:

- Whether the minimum information set out in the legislative provisions¹¹ 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.

23. If, having considered the factors above, it is clear that the parties have not had a reasonable time to reach agreement, the Secretary of State cannot consider the case for dispute resolution. 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 triggered by the ARN procedure may qualify for consideration. The Secretary of State has a further option to adjourn consideration of the case to allow the parties to negotiate further.

Modifications to infrastructure

24. When considering an application, the Secretary of State will assess whether the pipeline or facility 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's can be connected. Should such modifications appear to be necessary, the Secretary of State

11. See sections 82 to 91 of the [Energy Act 2011](#).

will inform the parties of his intention to issue a notice in due course that will describe the required work to be carried out. This would be a separate notice to that required to secure rights to the applicant to use the infrastructure in question.

25. The notice describing the required work must specify the sums or the method of determining the sums which the Secretary of State 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.

Inviting the owner to provide information

26. Where the Secretary of State concludes there *is* a case to consider, he will invite the owner of the infrastructure to provide information which will assist him in considering the application. Annex 3 describes the type of information the Department anticipates will be required. While the Department will endeavour to identify at this stage all additional information it will need to conclude the case, it may be necessary to require the provision of supplementary information from the applicant at this stage and from both parties as the case is being considered.

Agreeing the facts

27. 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 Department expects each party to copy to the other party its submissions to the Department unless there is good reason not to do so. The Department encourages the parties to agree the facts of the case and, as far as possible, to focus on the issue(s) for determination by the Secretary of State.

Meetings with officials

28. Given the complexity of the issues, the Department 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 Department will encourage both parties to agree to the other being present.

Sharing information with the Health and Safety Executive

29. The Secretary of State is under a statutory obligation to take relevant advice from the Health and Safety Executive (HSE). This ensures that safety is safeguarded in disputes which focus on financial matters. The Secretary of State 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

30. Were the Secretary of State 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.

31. 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.

32. Although the Secretary of State would not decline to make a determination solely on the grounds that the proposed development would not be one which the Department would be likely to approve, the Department would strongly encourage 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

33. 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. The Department would wish to agree a timetable with the applicant and the infrastructure owner. With limited practical experience of applications to date, it is difficult to be sure how long the process would take. The Department hopes 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 Department would discuss and seek to agree an alternative timetable with the parties as the need arises.

Form of a determination

34. 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 Secretary of State. 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 Secretary of State may need to settle.

35. 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 Secretary of State is minded to set and/or draft notice(s). 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 legislation allows either party to apply to the Secretary of State to vary a notice after it has been issued; this is discussed later.

Implementation of a determination

36. The Secretary of State would normally 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

37. Section 86 of the Energy Act 2011 allows the Secretary of State to publish part or all of a notice, or to publish a summary of the effect of a notice or any part of it. Before publishing anything, the Secretary of State must give an opportunity to be heard to the persons to whom the notice was given and to anyone else that he considers to be appropriate. In practice, it is expected that a summary would be prepared in the same format required for completed negotiations by Annex H of the Infrastructure Code of Practice, unless there are good reasons to the contrary. The summary would be published on the DECC web site.

Power of Secretary of State to give notices on own initiative

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

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

40. Before using this power, the Secretary of State would inform the parties that he was minded to act. This would take the form of a letter that would explain the reasons for his view and the timescale in which he proposed to act. The parties would be given time to make representations regarding the proposed action, and the Secretary of State would give careful consideration to any views they expressed. The Secretary of State 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.

41. If this power is invoked, the process described in paragraphs 24–37 above will be followed.

Applications to vary notices

42. Section 85 of the Energy Act 2011 allows either party to whom a notice is given to apply for that notice to be varied. The legislation requires that the Secretary of State 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. It is not expected that this would extend to challenging the terms of a notice that are clearly stated without room for reasonable misunderstanding. The legislation requires that the Secretary of State give all relevant persons the opportunity to be heard. Section 86 of the Energy Act 2011 allows the Secretary of State to publish a variation or a summary of the effect of it, or the notice as varied.

Relevant factors to be considered in an application

43. The Secretary of State is statutorily required to (so far as relevant) take into account:

- a) capacity which is or can reasonably be made available in the pipeline or facility in question;¹²
- b) any incompatibilities of technical specification which cannot reasonably be overcome;¹³
- c) difficulties which cannot reasonably be overcome and which could prejudice the efficient, current and planned future production of petroleum;¹⁰
- d) the reasonable needs of the owner and any associate of the owner for the conveying and processing of petroleum;⁹

12. The Department 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.

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

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

- e) the interests of all users and operators of the pipeline or facility;¹⁴
- f) the need to maintain security and regularity of supplies of petroleum; and
- g) the number of parties involved in the dispute.

44. This is not an exhaustive list and the Secretary of State will also take into account any other material considerations, including financial information, relevant to the dispute. Existing users are given further protection by sections 82(9) and (10) of the Energy Act 2011, which require that the reasonable expectations of owners and the rights of other users are not prejudiced unless they are compensated.

The Government's objectives

45. As stated in paragraph 9 above, the Department's main objective in operating its petroleum legislation is to ensure the recovery of all economic hydrocarbon reserves. The Government has sought to avoid the unnecessary proliferation of pipelines and other infrastructure. Access to existing infrastructure on fair and reasonable terms is therefore important for third parties. It is also important that the integrity of that existing infrastructure is maintained. More generally, the Government is committed to promoting greater competitiveness in energy markets. In determining the basis for access, it is therefore necessary to balance a variety of different interests and objectives.

46. 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.

47. The Department seeks to ensure that the development option chosen by the prospective developer of a new field does not lead to the permanent loss of reserves 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

14. The Department 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.

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 Secretary of State to set a lower, cost-reflective tariff, which would bring the best commercial option into line with the best economic option.

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

48. While acknowledging that it is reasonable for owners to safeguard capacity for their own reasonably anticipated production, the Department 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. At the same time, the Department is of the view that any terms determined by the Secretary of State should reflect a fair payment to the owner for real costs and risks faced and for opportunities forgone. It 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 be entitled to derive a fair commercial consideration for that value.

49. 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. 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 Secretary of State 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. This guidance is therefore, of necessity, in general terms.

50. In a Lords Committee debate on 15 October 1975,¹⁵ the Government of the day gave the following assurances on the use of the Secretary of State's powers to require access and to set a tariff (which were seen very much as a long stop):

- it was not the intention that, in those cases where the Secretary of State was called upon to intervene, the owner of a pipeline would be financially worse off ("in any way out of pocket") through the admission of a third party;¹⁶
- accordingly, pipeline owners would have all costs reimbursed, including direct additional capital costs arising from a third party's entry and indirect costs (e.g. the cost of interruption to the owner's throughput while a line is modified to enable third party use);
- the tariff would be set so that the third party would bear a fair share of the total running costs incurred after his entry;¹⁷
- unless the supply in question were marginal or the pipeline 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 third party.

51. If called on to resolve a dispute over access to infrastructure on the UKCS, it should be assumed that the Secretary of State would normally adopt an approach which continues to reflect the assurances given in the Lords debate in 1975.¹⁸ **The main issue in this approach 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.**

15. 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>.

16. While this was seen as a fundamental, basic safeguard in such cases, the Department now takes the view that it should be seen on an *ex ante* (forward-looking) not an *ex post* (backward-looking) basis and would thus not prevent determinations from including an apportionment of overall risk to the owner in return for an appropriate level of reward.

17. See paragraph 53.

18. It was noted during the Lords debate that assurances "can be given fully only in terms of the Government who make them. It is a commitment by the Government. One hopes that the spirit of the legislation will be followed through by subsequent successive Secretaries of State; but it cannot, of course, be fully binding. I can only say in this case that laws also can be repealed." While the assurances do not have the force of law they are helpful guidance and, as with any guidance, need to be reviewed in the circumstances pertaining at the time. For example, we would not see the assurances as binding the Secretary of State so as to produce an outcome that was not fair and appropriate.

52. The Department 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 would reduce the incentive for them to bear risk, keep their infrastructure in operation and available, invest in innovative solutions and offer added value services. It anticipates that the Secretary of State would consider these factors in making a determination.

53. Although the Secretary of State's discretion to use the powers in sections 82 to 91 of the Energy Act 2011 cannot be constrained by published guidance, he would in general be guided by the principles set out below, which amplify the general principles set out above, for what are thought to be the four most likely (not mutually exclusive) scenarios:

- **Terms for infrastructure built as part of an integrated field development project**

When spare capacity can be made available to a third party applicant in infrastructure for which provision has already been made for its capital costs (including ongoing costs) to be recovered (including a reasonable return taking account of the risks incurred and expected and acknowledging 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), it is anticipated that the Secretary of State would normally set terms reflecting the incremental costs and risks imposed on the infrastructure owner.

- **Terms for infrastructure built, oversized or maintained with a view to taking third party business**

On equity grounds and 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 Secretary of State would normally provide for recovery of capital costs incurred in the expectation of third party business. This would 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 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 ensure that it is maintained and remains available for third party use. The terms set by the Secretary of State would need to provide for 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.¹⁹

- **Terms where there is competition for limited capacity**

On occasion, prospective third party users may be competing for access to the same limited capacity in infrastructure. In such circumstances, the Secretary of State is unlikely to require the owner to make the capacity available to an applicant who values the capacity less than 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.

19. 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 Secretary of State 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. 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 sharing arrangements would normally include a provision for the infrastructure owner to provide regular projections of unit costs to aid 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.

- **Terms set to cover costs of displacement of own production or contractual commitments**

For infrastructure with insufficient ullage to accommodate a third party's requirements, given the owner's rights and existing contractual commitments, the Secretary of State is unlikely to require access to be provided. If he were to do so, the terms would need to reflect at least the cost to the infrastructure owner of backing off their own production and/or another party's contracted usage to accommodate the third party's (i.e. be based on the concept of opportunity cost).

54. Accordingly, in most cases the terms that would be determined by the Secretary of State 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 Secretary of State 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.

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

55. In the case of periods of shut-downs required for the sole purposes of the tie-in or modification, the applicant would be required to pay a reasonable level of liquidated damages to cover losses arising from 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 Secretary of State would thus 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.

56. Except in cases of wilful misconduct of the infrastructure owner, the Secretary of State 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. The Secretary of State would 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 Secretary of State 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

57. 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 Department that in the determination the applicant and the owner should each bear appropriate risks having regard for 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 Secretary of State 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.

58. The Department 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

59. The terms determined by the Secretary of State would normally 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 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.

60. In determining the appropriate liability and indemnity regime to apply to off-specification deliveries, the Secretary of State would consider, *inter alia*:

- 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 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 Secretary of State 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).

Minimum timetable

Milestones	The Department will endeavour to ...	Applicant and owner
Receipt of an application	assign and notify to the parties contact details of an official who will be responsible for managing consideration of the application	Applicant provides information set out in Annex 2 to enable the Secretary of State to establish if there is a case to consider. This information will also inform consideration of the case.
Establishing there is a case to consider	advise the parties of receipt of the application and of whether the case will be considered or, whether the case will be adjourned or rejected within 5 working days of receipt of the application	
Submitting information to inform consideration of the case	allow at least 10 working days for full submissions to be made, where the case is to be considered	Owner should submit information to the Secretary of State within the deadline requested which will 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 Secretary of State's consideration.
During consideration of the case	allow at least 5 working days for companies to respond to requests for further information	Owner and applicant should submit supplementary information to the Secretary of State within the deadline requested which will be at least 5 working days but not likely to be more than 10 working days .

Milestones	The Department will endeavour to ...	Applicant and owner
Meetings with officials during consideration of the case	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 cases.	
Provide the parties with an indication of the likely terms of the determination		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 Secretary of State, the applicant will decide whether or not to proceed to obtain access under the determined terms.

Submitting an application to the Secretary of State

1. There is no standard format for an application. It should, however, normally take the form of a letter with supporting annexes. Applicants should send 2 hard copies of written applications and an electronic version (preferably in Word, PowerPoint and/or Excel) to:

Robert White
Infrastructure Manager
Department of Energy and Climate Change
3 Whitehall Place
London SW1A 2AW

email:
robert.a.white@decc.gsi.gov.uk

Telephone:
+44 (0)3000 686056

2. 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.

3. 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 negotiation to date including:
 - i) the request to the owner of the infrastructure
 - ii) details (including dates) of the negotiations to date including any indicative information provided by the owner.
- all specific information on the service requested, 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

- ii) the range of production profiles that have been the subject of the request for processing and transportation
- iii) the range of compositions of the fluids that have been the subject of the request for processing and transportation
- iv) period for which service has been requested
- v) any additional services requested e.g. blending
- vi) any additional terms requested e.g. priority in the case of capacity restrictions, special terms for transport, incremental production, flexibility in nominations

4. 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. This information will have already been provided to the owner as part of the initial request for access.

5. It is expected that this information will enable the Secretary of State to establish there is a case to consider and inform his consideration of the case. The Secretary of State will not solely base his decision on information provided as part of this process. It may also be necessary to seek supplementary information from the applicant during consideration of the case.

Information required from owners

1. Where the Secretary of State concludes there is a case to consider under the dispute resolution provisions, the Department will invite the owner of the infrastructure in question to provide information to assist him in considering the case.
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 Secretary of State'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
 - 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 costs
 - 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)
 - 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 throughput.
4. The Secretary of State will not base his 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. 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.