



Oil & Gas  
Authority

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

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OGA's guidance for the handling of third party access  
disputes under Chapter 3, Energy Act 2011

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## Status and purpose of this guidance

1. This guidance sets out the form and manner in which third party access dispute applications should be made and the approach that the OGA is likely to take in considering such disputes, taking into account that each application will be assessed on its facts, case-by-case.
2. This guidance is not a substitute for any regulation or law and is not legal advice.
3. This guidance will be kept under review and 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.
4. This guidance sets out the OGA's general approach to dispute resolution. It does not have binding legal effect. If the OGA departs from the approach set out in this guidance, the OGA will explain why.

## Introduction

5. 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 13 below). Companies seeking access for their hydrocarbons to such infrastructure must apply in the first instance to the relevant owner (**'the owner'**)<sup>1</sup> of the infrastructure in question.
6. 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 Oil and Gas Authority (**'OGA'**) 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 OGA.
7. 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 OGA to require access to be granted and to determine the terms and conditions on which such access is to be granted<sup>2</sup>. In the rest of this document, "terms" should where the context permits be taken to mean "terms and conditions".
8. The OGA encourages and expects most issues related to infrastructure access to be resolved in 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 can genuinely not be found within a reasonable time frame.

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

<sup>2</sup> The relevant legislation is contained in sections 82 to 91 of the Energy Act 2011, as amended by sections 70 and 71 of the Energy Act 2016. The scope of the legislation extends to access to services used for operating upstream petroleum pipelines and facilities – 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 to "downstream" pipelines and facilities, which may be subject to other dispute resolution arrangements. As an example, while the Mossmorran Natural Gas Liquids plant and Braefoot Bay are covered by the legislation referenced above, the Fife Ethylene Plant is not.

- 9. This document sets out how the OGA intends to handle formal applications under the Energy Act 2011 for access to upstream oil and gas infrastructure<sup>3</sup>. It outlines the requirements and obligations on all parties involved, the approach the OGA would normally take in handling applications, and the principles it would expect to be guided by in determining appropriate terms of access<sup>4</sup>.**

If the OGA decides that access should be granted it may serve a notice to that effect on the parties. This may allow for such things 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.

- 10. 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.**

- 11. In circumstances where an application relates to a pipeline which crosses national boundaries, the OGA (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<sup>5</sup>. 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 OGA on the precise nature of the access provisions in the relevant inter-Governmental agreement.

- 12. This document describes the approach the OGA 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.**

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<sup>3</sup> In addition to the informal escalation procedures described in the guidance notes to the Infrastructure Code of Practice, OGA 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 relevant legislation.

<sup>4</sup> This Guidance is compliant with the eight rules of good guidance in the Code of Practice on Guidance on Regulation (BIS, October 2009).

<sup>5</sup> 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

13. In summary, 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 paragraph 51–52 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.

14. The specific objective of maximising economic recovery was given by the Government to the OGA through amendments to the Petroleum Act 1998 introduced by the Infrastructure Act 2015 and the Energy Act 2016. In connection with this, a Strategy for maximising economic recovery ('the Strategy') was laid before Parliament in accordance with section 9G of the Petroleum Act 1998 and came into force on 18 March 2016. Section 9B(c) of the Petroleum Act 1998 requires that the OGA acts in accordance with the Strategy when exercising its powers under Chapter 3 of Part 2 of the Energy Act 2011.

This Guidance will therefore be considered in a way that is consistent with that Strategy. Section 9C of the Petroleum Act 1998 also requires that various persons must act in accordance with the Strategy when carrying out relevant activities.

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.

15. 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.
16. 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).

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.

17. 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

18. In general, UK and European Union ('EU') competition law applies to activities on the UKCS. More specifically, EU competition rules apply to activities which may have an appreciable effect on trade between Member States of the EU, and the same rules have also been extended to trade within the European Economic Area ('EEA'), which includes Norway and Iceland.

The opening of the gas interconnectors to Ireland, Belgium, The Netherlands and Norway means that there is now considerable inter-state trade in this expanded geographic area.

19. 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. The Competition Act 1998 introduced into UK law similar prohibitions modelled on those in Articles 101 and 102 (the 'Chapter 1' and 'Chapter 2' prohibitions respectively).

20. Competition law is enforced in the UK principally by the Competition and Markets Authority (CMA)<sup>6</sup>. In applying the Competition Act 1998 prohibitions, both the courts and the CMA are required so far as is possible to deal with any questions arising in relation to competition in a manner that is consistent with EU competition law.

21. Both EU and UK competition law prohibit abuse of a dominant position. In summary, this is where, in this context, an owner of infrastructure that 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.

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<sup>6</sup> Sectoral regulators in certain industries also have concurrent powers to apply and enforce competition law.

- 22. 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.
23. 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.
24. The CMA has published a series of guidelines on the application and enforcement of UK and EU 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 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.
25. If an applicant for a right to use an owner's infrastructure covered by the relevant legislation<sup>7</sup> is dissatisfied with the outcome and/or progress of a negotiation with the infrastructure owner, he may as described below apply to the OGA 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 OGA may make such a complaint. However, 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.

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<sup>7</sup> See sections 82 to 91 of the Energy Act 2011.

# General approach of the OGA to applications under the petroleum legislation

26. The OGA'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.

## Making an application to the OGA

27. 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. 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 OGA, a case manager 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 at any time they should contact the case manager advised to them in the initial acknowledgement letter.

## OGA consideration of an application

28. Annex 1 below sets out the expected milestones in the consideration of such an application. The OGA must first establish that there is an applicable dispute (one that falls within section 82 of the Energy Act 2011) 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 OGA will have regard to:

- Whether the minimum information set out in the legislative provisions<sup>8</sup> 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.

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<sup>8</sup> See sections 82 to 91 of the Energy Act 2011.

29. 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 OGA may not 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 made under the ARN procedure may still qualify for consideration. The OGA has a further option to adjourn consideration of the case 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. The OGA 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.

### Power of OGA to give notices on own initiative

30. Section 83 of the Energy Act 2011 provides for the OGA to act on its own initiative to give a notice to secure rights to an applicant. In deciding to use this power, the OGA 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.

31. The OGA envisages that 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 OGA at the time that they see fit. Circumstances where it might

be used include where the OGA 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.

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

### Modifications to infrastructure

33. When considering an application or acting on its own initiative, the OGA 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 OGA 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 to that required to secure rights to the applicant to use the infrastructure in question.

34. The notice describing the required work must specify the sums or the method of determining the sums which the OGA 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

35. Where the OGA concludes there is an application to consider, it will invite the owner of the infrastructure to provide information which will assist the OGA in considering the application. This can include any further comments by the owner regarding the application. Annex 3 describes the type of information the OGA anticipates will be required. While the OGA 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.
36. Information may be sought within a set timescale from a relevant person under section 87A of the Energy Act 2011, and the OGA may apply certain sanctions as set out in section 87B if that request is not met. The OGA may not disclose information that has been requested under section 87 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 OGA is bound to comply with other relevant Acts such as the Freedom of Information

Act 2000 ('FOI') and the Environmental Information Regulations ('EIA'). When an FOI/EIA request is received, the OGA will normally circulate a draft of the proposed information to be released to the relevant persons for comment.

### Agreeing the facts

37. 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 OGA expects each party to copy to the other party its submissions to the OGA unless there is good reason not to do so. The OGA 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

38. Given the complexity of the issues, the OGA 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 OGA encourages both parties to agree to the other being present. The legislation requires that the OGA 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 OGA is obliged to give the opportunity to be heard to the new party in accordance, as appropriate, with section 89A or 89B of the Energy Act 2011.

### Sharing information with the Health and Safety Executive

39. The OGA 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 OGA 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

40. Were the OGA 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.
41. 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.
42. The OGA 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

43. 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 OGA 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 OGA would discuss and seek to agree an alternative timetable with the parties as the need arises.

### Form of a determination

44. 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 OGA. 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 OGA may need to settle.
45. 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 OGA 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 OGA to vary a notice after it has been issued; this is discussed later.

### Implementation of a determination

46. The OGA 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**

47. Section 86 of the Energy Act 2011 allows the OGA 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 OGA is likely to publish the full text of the notice or variation, subject to appropriate confidential redactions. Before publishing anything, the OGA 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 OGA's Third Party Accessweb page. A list of all applications made under the Energy Act 2011 and earlier legislation is given at

the same location.

### **Applications to vary notices**

48. 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 OGA 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. The legislation requires that the OGA gives all relevant persons the opportunity to be heard.

## Relevant factors to be considered in an application

49. The OGA is required to act in accordance with the Strategy when exercising its functions under the Energy Act 2011, as described in paragraph 14. The OGA is also statutorily required to (so far as relevant) take into account the following factors that are listed in section 82(7) of the Energy Act 2011:

- a) capacity which is or can reasonably be made available in the pipeline or facility in question;<sup>9</sup>
- b) any incompatibilities of technical specification which cannot reasonably be overcome;<sup>10</sup>
- c) difficulties which cannot reasonably be overcome and which could prejudice the efficient, current and planned future production of petroleum;<sup>10</sup>
- d) the reasonable needs of the owner and any associate of the owner for the conveying and processing of petroleum;<sup>9</sup>
- e) the interests of all users and operators of the pipeline or facility;<sup>11</sup>
- f) the need to maintain security and regularity of supplies of petroleum; and
- g) the number of parties involved in the dispute.

50. This is not an exhaustive list and the OGA 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 Energy Act 2011, which require that the reasonable expectations of owners and the rights of other users are not prejudiced unless they are compensated.

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<sup>9</sup> The OGA 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.

<sup>10</sup> The OGA 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, depropanising 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 OGA emphasises that the primary consideration when determinations are required to consider these issues will be the facts of a particular case.

<sup>11</sup> The OGA 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 OGA will consider using its other powers such as those under the Energy Act 2016 to seek an improved outcome.

## OGA objectives

51. 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.

52. The OGA 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 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 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 OGA to set a lower, cost-reflective tariff, which would bring the best commercial option into line with the best economic option.

## The OGA's Guiding Principles on setting transportation and processing terms

53. While acknowledging that it is reasonable for owners to safeguard capacity for their own reasonably anticipated production, the OGA 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.

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 OGA 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.

The OGA 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.

54. 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 OGA 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.

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

55. When considering the appropriateness of the requested access and related terms, the OGA would also expect that:<sup>12</sup>

- the owner would not be financially worse off through the admission of the applicant;
- the owner would have all 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;<sup>13</sup> 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,

though this would not prevent any OGA determinations from including an apportionment of overall risk to the owner in return for an appropriate level of reward.

56. In most cases, the terms that would be determined by the OGA 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 OGA 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.

57. The OGA 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.

58. Noting that the OGA's discretion to use 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 more detail on the OGA'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 (including a reasonable return taking account of the risks incurred and expected and acknowledging that it may

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<sup>12</sup> 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>.

<sup>13</sup> See paragraph 58.

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 OGA 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.

- **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 OGA 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 OGA 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<sup>14</sup>. 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.

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<sup>14</sup> 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 OGA 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 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 OGA 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).

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

59. 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 OGA would thus 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.

60. Except in cases of wilful misconduct of the infrastructure owner, the OGA 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 OGA 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 OGA 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

61. 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 OGA 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 OGA 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.

62. The OGA would normally expect 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

63. The terms determined by the OGA 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.

64. In determining the appropriate liability and indemnity regime to apply to off-specification deliveries, the OGA 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 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 OGA 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

Milestones	The OGA will endeavour to	Applicant and owner
<b>Receipt of an application</b>	assign and notify to the parties contact details of an official who will be responsible for managing consideration of the application	
<b>Establishing that there is a dispute to consider</b>	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 <b>within 10 working days of receipt of the application</b>	<b>Applicant</b> provides information set out in <b>Annex 2</b> to enable the OGA to establish if there is an applicable dispute to consider. This information will also inform consideration of the dispute.
<b>Submitting information to inform consideration of the dispute</b>	allow <b>at least 10 working days</b> for full submissions to be made, where the dispute is to be considered	<b>Owner</b> should submit information to the OGA within the deadline requested which will normally be <b>at least 10 working days but unlikely to be more than 20 working days. Applicant</b> may be asked to supplement their initial submission to assist the OGA's consideration.
<b>During consideration of the dispute</b>	allow <b>at least 5 working days</b> for companies to respond to requests for further information	<b>Owner and applicant</b> should submit supplementary information to the OGA within the deadline requested, which will be <b>at least 5 working days but not likely to be more than 10 working days.</b>

## Annex 1

Milestones	The OGA will endeavour to	Applicant and owner
<b>Meetings with officials during consideration of the dispute</b>	normally give <b>at least 5 working days</b> 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.	
<b>Provide the parties with an indication of the likely terms of the determination</b>		<b>Owner and applicant</b> to respond with comments on completeness and ease of implementation <b>within 10 working days.</b>
<b>Advising the parties of the determination</b>	advise both parties of the determination <b>within 16 weeks of receipt of the application</b>	
<b>Applicant to make decision</b>		Within the time period specified by the OGA, the <b>applicant</b> will decide whether or not to proceed to obtain access under the determined terms.

## Annex 2

# Submitting an application to the OGA

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

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

**Robert White**

Infrastructure Manager  
Oil and Gas Authority  
21 Bloomsbury Street  
London WC1B 3HF

**Email:** robert.a.white@oga.gsi.gov.uk

**Telephone:** +44 (0)3000 671601

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

## Annex 2

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

## Annex 3

# Information required from owners

1. Where the OGA 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 OGA'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 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),

## Annex 3

**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 OGA 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.

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.