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Third Party Access to Infrastructure on the Norwegian Continental Shelf

*Torkjel Grondalen**

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INTRODUCTION

The Norwegian petroleum industry has been in operation for roughly fifty years. The inaugural concession round took place in 1965, with initial production commencing in the Ekofisk field in 1971.¹ Now a mature province, the Norwegian Continental Shelf (NCS) teems with about eighty producing fields and more than fifty exploration and production (E&P) companies.² New discoveries are, with some rare exceptions, generally small.³ Because of this development, third party access to existing infrastructure has become increasingly important. Third party use of facilities creates an alternative to requiring the individual license group to build its own infrastructure, thereby significantly lowering the costs connected with potential exploitation and rendering minor discoveries commercially profitable. Use of existing infrastructure provides an essential instrument for the Norwegian authorities to ensure efficient resource management of the petroleum resources remaining on the NCS.

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Editors' Note: As Mr. Grondalen is an expert in Norwegian petroleum law and the content of this article concerns third party access to infrastructure on the Norwegian Continental Shelf, several of the cited sources are not available in English. The editors of the LSU Journal of Energy Law & Resources have relied on Mr. Grondalen and Mr. Lower to verify those sources for accuracy.

1. *See Norway's oil history in 5 minutes*, GOVERNMENT.NO, <https://www.regjeringen.no/en/topics/energy/oil-and-gas/norways-oil-history-in-5-minutes/id440538/> [perma.cc/YP9P-KY93] (last updated Oct. 9, 2013).

2. *See Fact Pages*, NORWEGIAN PETROLEUM DIRECTORATE, <http://factpages.npd.no/factpages/Default.aspx?culture=en> [perma.cc/VT4R-UVAR] (last visited Dec. 15, 2015).

3. One such exception is the Johan Sverdrup field, the fifth largest discovery ever made on the NCS, where production is slated to commence in 2019.

Norwegian authorities play a significant central role in the nation's petroleum industry. Section 1-1 of the Norwegian Petroleum Act (PA)⁴ states: "The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management."⁵ As third party use of infrastructure generally leads to increased exploitation and thus higher tax revenues, the Norwegian state bears a clear interest in facilitating third party access.

Third party access is regulated in Section 4-8 of the PA, which stipulates in its first paragraph that the Ministry of Petroleum and Energy (MPE)

may decide that facilities comprised by Sections 4-2 and 4-3, and which are owned or used by a licensee, may be used by others, if so warranted by considerations for efficient operation or for the benefit of society, and the Ministry deems that such use would not constitute any unreasonable detriment of the licensee's own requirements or those of someone who has already been assured the right of use.⁶

The first paragraph of Section 4-8 further states:

Nevertheless, natural gas undertakings and eligible customers domiciled in an EEA State⁷ shall have a right of access to upstream pipeline networks⁸

PA Section 4-8 distinguishes between "facilities comprised by Section 4-2 and 4-3" and "upstream pipeline networks."⁹ For the first class of facilities, which consists of facilities for production, transportation, or exploitation of petroleum (petroleum facilities), the MPE "may" impose third party access. For the second class of facilities, which are "upstream pipeline networks," natural gas undertakings and eligible customers (shippers) "shall" have a "right of access."¹⁰

Section 4-8, Paragraph 2, sets forth that any agreement regarding third party use of petroleum facilities shall be submitted to the MPE for approval, unless otherwise decided by the MPE. That paragraph further states that the MPE—upon approving such an agreement, or pursuant to

4. The Norwegian Petroleum Act of 29 November 1996, no.72.

5. *Id.* § 1-1.

6. *Id.* § 4-8.

7. The European Economic Area (EEA) is an internal market for the free movement of persons, goods, services, and capital within the borders of the member states of the European Union and the European Free Trade Association.

8. Norwegian Petroleum Act § 4-8.

9. *Id.*

10. *Id.*

an order bearing on an upstream pipeline network according to Section 4-8, Paragraph 1—may

stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, in order to ensure that implementation of projects is carried out with due regard to considerations relating to resource management and providing the owner of the facility with a reasonable profit taking into account, among other things, investments and risks.¹¹

This article provides an overview of the legal framework governing third party access to infrastructure on the NCS. Part I explores third party access to petroleum facilities, while Part II examines the right of access to upstream pipeline networks for shippers. Part III offers a short conclusion, discussing the role of third party access in the future development of the NCS in a climate with lower oil prices.

The MPE has stipulated comprehensive regulations to PA Section 4-8 that regulate third party use in greater detail. This article focuses on those regulations, as they belie the practical scope for third party access. Nevertheless, the importance of PA Section 4-8 must not be underestimated, as it lays down the fundamental principles for third party access. Furthermore, as *Lex Superior* to any regulations, PA Section 4-8 sets the outer limits for the judicial scope of the underlying third party access regulations.

I. THE RIGHT TO USE OTHERS' PETROLEUM FACILITIES

Separate regulations expanding on PA Section 4-8 further govern third party access to petroleum facilities on the NCS. The regulations relating to the use of facilities by others (TPA Regulations)¹² apply to the “conclusion of agreements for the use of facilities by others for the production, transportation or exploitation of petroleum,”¹³ i.e. petroleum facilities. This provision also encompasses onshore facilities, provided they constitute an integrated part of the exploitation or transport of petroleum. However, facilities for exploration, like drilling rigs and upstream pipeline networks, fall outside the scope of the TPA Regulations.¹⁴

The objective of the TPA Regulations is to “ensure good incentives for licensees to conduct exploration and production activities with a view

11. *Id.*

12. Regulations Relating to the Use of Facilities by Others 20 December 2005.

13. *Id.* § 1.

14. Third party use of upstream pipeline networks is regulated in the Petroleum Regulations chapter 9 and Tariff Regulations. *See infra* Part II.

to promoting efficient resource management.”¹⁵ The TPA Regulations contain provisions that aim, *inter alia*, to contribute to effective contractual negotiations between the owner and third party user on access to petroleum facilities and ensure that all proposed agreements have well-balanced terms and conditions. The main principles of such TPA Regulations are outlined below.

A. Conditions for Duty to Negotiate and Negotiations Process

Section 4, Paragraph 1, of the TPA Regulations stipulates that “[a] user which needs to use a facility owned by another party shall, on objective and non-discriminatory terms and conditions, be entitled to such use pursuant to the rules in Section 4-8 of the Petroleum Act and these Regulations.”¹⁶ The provision explicitly refers to Section 4-8 of the PA, which requires in its first paragraph that third party use must not cause “any unreasonable detriment” to the owner’s own need to use the facility, nor may it impede the need of those E&P companies already assured a right of use.¹⁷ In considering such impediments, both the existing and future use of the owner and the current right of use holder are relevant.

Pursuant to Section 4, Paragraph 3, of the TPA Regulations, the negotiations between the owner and user “shall be organised and conducted in a spirit of integrity and good faith.”¹⁸ Furthermore, that paragraph obligates the parties to ensure that the negotiations do not provide one party with “an unreasonable advantage at the expense of the other.”¹⁹

An E&P company is often a licensee in both the license group (joint venture) that owns the facility and the license group that desires a right of use to the facility. In such situations, the licensee “shall normally participate in negotiations on the side which represents the greatest participating interest of the party.”²⁰

The negotiation process commences with a request for an overview of the facilities’ capacity, issued to the owner by an interested potential user.²¹ The owner must provide such information within fifteen days upon receipt of the

15. Regulations Relating to the Use of Facilities by Others 20 December 2005 § 2.

16. *Id.* § 4.

17. Norwegian Petroleum Act § 4–8.

18. Regulations Relating to the Use of Facilities by Others 20 December 2005 § 4. An obligation to negotiate in good faith also follows from general principles of Norwegian contract law.

19. A duty to act with loyalty towards its contractual party is also a general principle of Norwegian contract law.

20. Regulations Relating to the Use of Facilities by Others 20 December 2005 § 4.

21. *Id.* § 5.

request.²² Once the user receives the capacity information, he may then submit a request for use.²³ The request shall describe: (1) required services, such as those related to processing; (2) important milestones, including projected production commencement dates; and (3) relevant technical information, like projected production volumes.²⁴ The owner must respond to a user request within a “reasonable time,” and the reply shall reflect the content of the request.²⁵ The owner may emphasize in its reply that the third party use shall not be detrimental to the owner’s own use of the facility; he may additionally stipulate that the petroleum produced via the facility shall meet specifications reasonably consistent with the technical requirements of the facility.²⁶ If capacity is unavailable on the facility, the owner is obligated—as far possible—to make arrangements whereby additional capacity can be made available to the third party.²⁷

If the owner and user conclude that “grounds exist for initiating negotiations” on the use of the facility, they shall, as soon as possible, “agree on a progress plan with specific milestones and a time limit for completing the negotiations.”²⁸ When the parties have agreed on a progress plan, the owner is obligated to provide to the user existing agreements concerning third party use of said petroleum facility, but only insofar as the owner entered into them after the enactment of the TPA Regulations and the user has requested access thereto.²⁹

Furthermore, Section 14 of the TPA Regulations imposes upon the user comprehensive duties to provide information from the negotiations to the authorities. The MPE shall be informed of the user’s requests to the owner pursuant to Section 6 and receive the progress plan agreed to pursuant to Section 7. If the owner and the user enter into a binding agreement, the user shall submit a copy to the MPE and to the Norwegian Petroleum Directorate (NPD).³⁰ Additionally, the user shall report elements from the negotiation process and the main terms of the agreement to the NPD for publication.³¹

22. *Id.*

23. *Id.* § 6.

24. *Id.* § 6.

25. *Id.* § 6.

26. Regulations Relating to the Use of Facilities by Others 20 December 2005 § 6.

27. *Id.* § 6.

28. *Id.* § 7.

29. *Id.* § 8.

30. *Id.* § 14.

31. *Id.*

B. Terms and Conditions of the Agreement

Agreements on third party use turn on standardized contract clauses approved by the MPE.³² Deviations from the standard agreement can only be made in special cases.

The most important element of the third party agreement is the provision outlining tariffs levied on use of the facility. Section 9 of the TPA Regulations stipulates that parties shall seek consensus on tariffs that are acceptable to both the user and owner. Because third party use varies from facility to facility, stipulation of a fixed tariff is impossible. Nevertheless, the fundamental principles underlying tariff assessment can be stipulated on a general basis. Tariffs are decisive as to whether the user field will be developed or not, which generally induces stipulation of low tariffs. However, incentives should also drive owners of petroleum facilities to invest in additional capacity. In line with this, the TPA Regulations Section 9, Paragraph 1, stipulates that tariffs shall be determined in accordance with the objectives and principles memorialized in Sections 2 and 4. It follows from Section 4, Paragraph 2, that “profits from production shall primarily be earned by the producing field” and that “[t]he owner’s incentives to maintain the capacity of the facilities and to make sensible investments in additional capacity shall be safeguarded.”³³

Section 9 of the TPA Regulations further elaborates on the principles guiding the stipulation of tariffs. The basis should be rooted in the costs of the services provided, or marginal costs; the profit of the user field is irrelevant. Furthermore, the tariffs shall constitute a “reasonable profit” for the owner, considering the risk undertaken by the owner as a consequence of use of the facility by others. The last paragraph of Section 9 empowers the MPE to stipulate, on its own initiative, the tariffs on third party use to ensure “projects are carried out based on the consideration for resource management and that the owner of the facility is provided a reasonable profit based on e.g. the investment and risk.”³⁴

If a licensee of the respective license groups disagrees with the outcome of the negotiations, then the licensee in question may bring the matter before the MPE.³⁵ Any disagreement arising under the TPA Regulations between the owner and user—at any phase of the negotiation process—may also be brought before the MPE for adjudication.³⁶ The MPE may limit its decision as applicable only to certain aspects of the disagreement.³⁷

32. Regulations Relating to the Use of Facilities by Others 20 December 2005 § 10.

33. *Id.* § 4.

34. *Id.* § 9.

35. *Id.* § 11.

36. *Id.* § 13.

37. *Id.*

II. RIGHT TO USE UPSTREAM PIPELINE NETWORKS

Third party access to upstream pipeline networks is governed by a regulation that is separate from the regulation which controls petroleum facilities. The PA Section 4-8, Paragraph 1, prescribes:

Nevertheless, natural gas undertakings and eligible customers . . . shall have a right of access to upstream pipeline networks The Ministry stipulates further rules in the form of regulations and may impose conditions and issue orders relating to such access in the individual case.³⁸

The MPE has used the powers granted by Section 4-8 to stipulate further rules in the form of regulations for access to upstream pipeline networks in chapter 9 of the Petroleum Regulations (PR)³⁹ and the Tariff Regulations.⁴⁰

The NCS is home to about 8,000 kilometres of gas pipelines with a current capacity of about 120 billion cubic meters.⁴¹ The main part of the upstream pipeline network on the NCS is owned by Gassled, a joint venture established on January 1, 2003 by a merger of several joint ventures that owned pipeline infrastructure on the NCS.⁴²

The operator of Gassled is Gassco AS, a wholly state-owned company, whose main responsibility is to carry out day-to-day operations on behalf of Gassled.⁴³ Gassled's owners may instruct Gassco in this regard. In addition, Gassco is assigned an extended operator obligation pursuant to Section 4-9 of the PA. The extended operator responsibility consists of duties related to capacity management, systems operations, and infrastructure development. The Gassled owners may not instruct Gassco regarding its performance of these extended operator duties.⁴⁴

38. Norwegian Petroleum Act § 4–8.

39. Regulations to Act relating to petroleum activities 27 June 1997.

40. Regulations relating to the stipulation of tariffs etc. for certain facilities 20 December 2002.

41. *Gas exports from the Norwegian shelf*, GOVERNMENT.NO, <https://www.regjeringen.no/en/topics/energy/oil-and-gas/Gas-exports-from-the-Norwegian-shelf/id766092/> [perma.cc/N3EX-EZ8R] (last updated Aug. 22, 2014).

42. *See Gassled*, GASSCO, [HTTPS://www.gassco.no/en/about-gassco/gassled-eng/](https://www.gassco.no/en/about-gassco/gassled-eng/) [perma.cc/PL6M-FZ4E] (last visited Jan. 18, 2016).

43. *See Operator duties*, GASSCO, <https://www.gassco.no/en/about-gassco/operator-duties/> [perma.cc/R9SV-WEAS] (last visited Jan. 18, 2016).

44. Regulations to Act relating to petroleum activities 27 June 1997, § 66.

The remainder of Part II will provide an overview of the conditions for access to the upstream pipeline network and capacity booking⁴⁵ before addressing the provisions governing tariff stipulations for such use.⁴⁶

A. Chapter 9 of the PR

1. Conditions for Access

The principles governing access to upstream pipeline networks are laid out in Section 59 of the PR. That section provides:

Natural gas undertakings and eligible customers who have a duly substantiated reasonable need of transportation and/or processing of natural gas shall, on objective and non-discriminatory conditions, have right of access to upstream pipeline network⁴⁷

The “duly substantiated reasonable need of transportation and/or processing” must be fulfilled for the prospective period during which the applicant seeks capacity; however, no present need is required.⁴⁸ Shippers who have or will have production demands—or who have bought, exchanged, or will buy natural gas—are considered to have a “need” for transportation or processing.⁴⁹ For future reservations, calculating the extent of the required capacity may be difficult. In order to assure a certain level of tolerance for different contractual obligations, in which the customer may be entitled to purchase varying volumes within pre-fixed minimum and maximum limits, a company is entitled to nominate more capacity than required for a normal gas supply.⁵⁰

A further condition for access to upstream pipeline networks requires the specifications of the natural gas slated for transportation or processing to be “reasonably compatible with the technical requirements for and efficient operation of the upstream pipeline network.”⁵¹

45. *See id.* §§ 59–70.

46. Regulations relating to the stipulation of tariffs etc. for certain facilities 20 December 2002, §§ 1–8.

47. Regulations to Act relating to petroleum activities 27 June 1997 § 59.

48. Ulf Hammer et al., *Petroleumsloven*, page 331 (Oslo 2009).

49. *Id.*

50. *Id.* at page 332.

51. Regulations to Act relating to petroleum activities 27 June 1997, § 59.

After consulting with Gassled and users of the upstream pipeline network, Gassco determines what further conditions and procedures should be stipulated pursuant to Section 59.⁵² This determination could, for instance, include a condition that the user must exhibit a certain degree of financial strength. Gassco has final approval authority as to whether the conditions for access in Section 59 are met.⁵³

2. Booking in the Primary Market

Booking in the primary market is regulated in PR Section 61. The primary market consists of upstream pipelines with capacity not yet booked by another third party—in other words, pipelines with “new capacity.” Section 61 obligates Gassled to make spare capacity in the upstream pipeline network available to Gassco, who thereafter must make it available to third parties. The capacity made available shall be as high as is physically possible. Gassco allows shippers, at announced points in time, to reserve the right to use spare capacity for specified terms.⁵⁴ Booking rounds usually take place in April and September, and Gassco has published a “Booking Manual” outlining further provisions on booking of capacity in the primary market.⁵⁵

Reservations of capacity may be made on both short-term and long-term bases.⁵⁶ The right to use capacity on a long-term basis will be allocated before short-term reservations are issued.⁵⁷ If the reservations are within the limits of the available capacity, shippers will be allocated the right to use spare capacity in accordance with their reservations.⁵⁸ If the sum of reservations applied for exceeds the spare capacity for which reservation is allowed, rights to use the spare capacity shall be allocated to shippers according to a distribution formula.⁵⁹ Gassco shall apply this formula in accordance with the individual applicant’s transport and processing needs.⁶⁰

52. *Id.*

53. Are L. Brautaset, *The New Framework for Gas Transportation in Norway*, in *European Energy Law Report I 16* (Dr. Martha M. Roggenkamp & Dr. Ulf Hammer eds., 2004).

54. Regulations to Act relating to petroleum activities 27 June 1997, § 61.

55. *See Booking Manual*, GASSCO, <https://www.gassco.no/Documents/Booking%20Manual%2001.01.2016.pdf> [perma.cc/XG9E-RALU] (last visited Jan. 19, 2016).

56. Regulations to Act relating to petroleum activities 27 June 1997, § 61.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

As the owner of the upstream pipeline network, Gassled will enter into an agreement with those shippers to whom capacity is allocated. The rights and obligations of Gassled and the shipper are regulated by a standardized agreement entitled “Gassled Terms & Conditions.”⁶¹

3. *Booking in the Secondary Market*

Section 64 of the PR regulates bookings in the secondary market. The provision’s first paragraph prescribes that “the right to use capacity in an upstream pipeline network may be transferred by agreement in the secondary market.”⁶²

A party with a right to use capacity that “no longer has a duly substantiated reasonable need for all or part of that capacity” must release that portion upon request by an entity possessing such need and satisfying the requirements set forth in Section 59, Paragraph 1.⁶³ While Gassco is charged with organizing a market place for the assignment of capacity rights,⁶⁴ Gassled is not a party to the transfer agreement.⁶⁵ That contract constitutes a bilateral agreement between the assignor and assignee alone. Gassco still plays a controlling role as to the ownership to capacity rights, as it must decide whether the conditions for access are met—and thus determines whether the rights assigned by agreement shall ultimately be granted to the assignee.⁶⁶

4. *Disputes*

Disputes relating to access to an upstream pipeline network may be referred to the MPE for final decision pursuant to PR Section 68. To secure a swift process, the MPE is obliged to make a decision without undue delay after referral. The MPE recently created an independent body to deliberate such disputes.

61. See *Terms and Conditions for Transportation of Gas in Gassled*, GASSCO, <http://www.gassco.no/Global/Nedlastbart/Terms%20and%20Conditions%2001.01.2014%20incl%20Appendices.pdf> [perma.cc/M9LP-ZNEW] (last visited Jan. 4, 2016).

62. Regulations to Act relating to petroleum activities 27 June 1997, § 61.

63. Regulations to Act relating to petroleum activities 27 June 1997, § 64.

64. *Id.*

65. Ulf Hammer et al., *Petroleumsloven*, page 337 (Oslo 2009).

66. See *Terms and Conditions for Transportation of Gas in Gassled*, *supra* note 49, § 14.

B. Tariffs on Agreements in the Primary Market

The tariffs applied to agreements in the primary market are regulated in PR Section 63 and further elaborated upon in the Tariff Regulations relating to the stipulation of tariffs for certain particularized facilities.

The MPE stipulates tariffs in accordance with the fundamental underlying principle that profit should be realized through the petroleum fields and not infrastructure.⁶⁷ A system developed around this maxim generally entails low tariffs, as they reduce the overall costs of petroleum activities and thus contribute to field development in marginal fields. This result is desirable from a resource perspective, which is the primary objective behind the tariff stipulation.⁶⁸

According to Section 63, Paragraph 3, the tariff consists of two elements: the capital element and the operating element.⁶⁹ The capital element should give the owner a reasonable rate of return on the investment;⁷⁰ the operating element must be such that neither the owner nor operator sustains any loss or profit through management of the upstream pipeline network.⁷¹ The tariff must be paid irrespective of whether that capacity is actually used, a system sometimes referred to as “ship-or-pay.”⁷²

The Tariff Regulations expand upon the general regulation of tariffs for use of upstream pipeline networks and stipulate the actual tariff for the use of such facilities. Separate tariff zones divide the upstream pipeline network, with an exit and entry tariff applied to each zone.⁷³ For Areas C and E, which contain the processing facilities at Kårstø and Kollsnes, respectively, separate tariffs are levied according to the different services provided. The tariffs have been substantially reduced—the capital element being reduced by ninety percent. The new lower tariffs apply to all transportation agreements entered into after July 1, 2013 for the transportation of gas after October 1, 2016. Other transportation agreements remain unaffected by the reduction. Because of this reduction, some of Gassled’s owner took legal action against the MPE, initiating proceedings in which they alleged invalid reduction. The court hearings were held in Oslo District Court from April to through June 2015.

67. This principle has been stated in several public documents, for instance in the published comments to Regulations to Act relating to petroleum activities 27 June 1997, § 63.

68. *See, inter alia*, Regulations to Act relating to petroleum activities 27 June 1997, § 63.

69. Regulations to Act relating to petroleum activities 27 June 1997, § 63.

70. A reasonable rate of return has been stipulated to amount to 7% pre-tax on the investment.

71. Regulations to Act relating to petroleum activities 27 June 1997, § 63.

72. *Id.*

73. Regulations relating to the stipulation of tariffs etc. for certain facilities 20 December 2002, § 4.

The Court concluded that the authorities had legal basis in the Petroleum legislation for setting new lower tariffs and that neither the new tariffs nor the case procedure by the MPE constituted a breach of general principles of administrative law, the prohibition against retroactive laws in the Norwegian Constitution Section 97, or the protection of property set forth in Art. 1 of the first protocol to the European Convention on Human Rights. Thus, the court ruled in favour of the MPE. The Gassled's owners have decided to seek review in the Court of Appeal, and the appellate hearings are expected to take place over the course of the winter of 2017.

III. CONCLUSION

Third party access is one of the critical contributors to the high activity on the NCS. Likely, several of the marginal fields on the NCS would remain undeveloped if not for access to existing infrastructure. In a historical light, the regulation of third party access in Norway's body of petroleum legislation should thus be viewed as a success.

Due to the fall in oil prices from the summer of 2014, Norwegian E&P companies, and especially contractor companies, are currently being forced to reduce their investments and activities. As Norway's largest industry, this reduction has a large impact on the Norwegian economy. The Norwegian state—in collaboration with the petroleum industry—is therefore actively seeking to bolster activity on the NCS and develop new fields. Resources will likely be found through minor discoveries near existing infrastructure and discoveries in the Barents Sea. An efficient use of both existing and new infrastructure will be essential to uphold the production of hydrocarbons from the NCS, and the Norwegian State will likely take an even more active role to ensure this goal is met. However, the main parameters of the current third party access regime are likely to remain the same.