

New amended Executive Order for third-party access to oil and gas facilities

A new amended Executive Order No 805 of 13 August 2019 for third-party use of facilities for production, processing and transport etc. of hydrocarbons (third party access) has been issued by the Danish Energy Agency.

The order amends and replaces the previous order No 1449 of 12 August 2017.

Background

Generally, the Danish system of third party access to pipelines and facilities in the Danish sector of the North Sea is one of negotiation with oversight by the Danish Energy Agency.

According to section 4 of the Order, a user shall on objective and non-discriminatory terms have access to use a facility in accordance with section 16 of the Subsoil Act. Non-discriminatory means that the owner of a facility does not in its terms and conditions for its service discriminate between users, which are requesting the same service.

Pursuant to section 6 of the Order, the user and the owner shall contribute to the establishment and exchange of information that may be necessary for speedy and efficient negotiations regarding agreements for third party access.

The existing Order contains relatively detailed rules, which are not affected by the amendments, on information exchange, requests for additional capacities and use of facilities, a plan for the negotiations, access to agreements already entered into, terms and conditions of access, reporting, dispute resolution and the role of the Danish Energy Agency. A more detailed appendix describes the information a potential user must submit to the owner of the facilities, in order to commence negotiations.

The amendment enters into force on 1 September 2019.

Contents of the new amendments

The most notable changes in the amended Order are:

1. In section 3, litra 5, the definition of "Licensee" has been deleted. The background is that "licensee" is already defined in the Danish Subsoil Act, section 1 a, litra 3, and is therefore superfluous in an executive order.
2. In section 5(1) the words "use of facilities" has been replaced by "third party access" which in my view makes very little if any substantial change.
3. The first of two substantial changes to the executive order is found in section 5(2) of the order. It is now expressly stated in section 5(2) that a licensee, which is both a part of the group of companies that owns a facility and a part of the group of companies that wishes to use the facility, may not participate in agreements that give the party a right to participate in both groups when the two groups negotiate. Companies must participate in the group where it holds the largest percentage interest.

WSCO

Previously this prohibition was mentioned as an example of a situation that “may” give rise to an “unreasonable advantage” for any one party.

4. The second of the substantial changes is found section 5(3), which is a new provision. This provision states that the Danish Energy Agency can allow that agreements are entered into as described in section 5(2) if considerations for the proper use of the subsoil for the state as well as for the licensee, or special circumstances, speak for an approval hereof.

Analysis and expectations

The substantial changes from the amendments to the Order are limited, however it is made clearer that a party cannot abuse its position in negotiations for third party access to facilities where the party is on “both sides of the table” but must choose where to participate.

In addition, a change has been made enabling the Danish Energy Agency to except a party from the prohibition where certain conditions apply. What these “certain conditions” may be is not clear.

There is still only limited experience of how third party access under the “new” rules in place since 2017 will play out.

It will also be interesting to see how the Agency intends to use its powers under the Order once activity picks up in the Danish sector.

----- 00 -----

For questions or comments to this newsletter or energy and offshore in general, please contact Bo Sandroos on +45 4088 5422 or bos@wsko.dk.

The information in this newsletter is for information only and cannot replace legal advice.

WSCO is a leading law firm with special expertise in energy and offshore, transportation and shipping, global trade, insurance and dispute resolution. www.wsko.dk.