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| 1 | JUS5412 exam V21 - Information and Part 1 | Filoplasting |
| 2 | JUS5412 exam V21 - Part 2 | Filoplasting |

1 JUS5412 exam V21 - Information and Part 1

Please answer **both parts** of the exam.

The answer to both parts should not exceed 3,000 words in total. The two parts (1,500 words each) weigh equally (50% each).

PART 1 - maximum 1500 words

Write an individual short dissertation on the topic of your choice, but which relates to one of the learning requirements for the course. The topic could be theoretical, practical, on legislation or contracts, a national case study in your home country, a commentary to a court judgment or an administrative decision, etc. The dissertation must be a legal analysis of the chosen topic. It should not be a summary, but should try to identify an interesting question offering a personal reflection on a matter covered by the course.

In case you have prepared your assignment in advance, you can upload it here.



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² JUS5412 exam V21 - Part 2

Part 2 - maximum 1500 words

Answer both questions.

1. Give a brief overview of the definition and main objective of a “third party access” (TPA) regime to energy infrastructures, and describe and analyse the main principles and instruments of the TPA regime to upstream natural gas pipeline network in Norwegian law.
2. Draw the parallel to the access regime for electricity grid infrastructures in Norwegian legislation by mentioning and analysing the objectives, principles and instruments of such a regime.



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Revision of hydropower license in Norway; To what extent do the authorities have the power to revise existing licenses?

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1 Introduction

The models for exploration of natural resource vary with the legal traditions and regulatory system. In Norway, the resource management of hydropower is based on a complex concession model. Different concessions under different laws are required. To mention some, the licensee may need property rights, the right to build and the right to exploit the hydro resources. For some hydropower plants a right to intervene in watercourses is necessary, which is regulated in The Watercourse Regulation Act (WRA). The topic of this paper is the governments access to revise existing concessions under WRA Section 8.

2 Topicality and the Scope of the Paper

WRA Section 8 first paragraph states that «[t]he terms and conditions for the licence may be brought up for general revision after thirty years», and the last paragraph states that «[i]n any case, all licenses can be revised after 19th of June 2022». This makes revision of watercourse regulation licenses highly relevant in the years to follow.

This paper aims to discuss the material changes that can be made to the license in accordance with The Water Regulation Act Section 8. Revision provisions in other laws fall outside the scope of this paper. In addition, the paper will not address of the rules of procedure nor the rules of competence. The main focus will be revision of environmental terms set out in the concessions and how the revision rule contributes to meet environmental goals.

To avoid any misunderstandings, the words «license» and «concession» are used interchangeably, as the Norwegian law does not distinguish between the meaning of these words.

3 Resource Management of Hydropower in Norway – a Short Introduction

The public ownership model has been a guiding principle in Norwegian legislation since the so called “panic act” in 1906¹. For a long time, the system was based on different concession periods for private (time limited) and public owners (time unlimited). Since 2007 only public actors, including state, county and municipality, are allowed to own large-scale waterfalls in

¹ Law of June 12, 1906, no. 12

Norway. Private actors are only allowed to own 1/3 of the shares, to ensure majority of the

ownership to the state-owned companies.² The change was implemented after the EFTA Court in Case no. E-2/06 indicated that only allowing for public ownership would not be in breach with the EEA-Agreement.

The revision rule for watercourse regulation concessions was adopted in 1959.³ Even though the rule has been modified, the essence is kept. Both private and public owned concessions can be revised, as the concessions given to private owners before the law amendment in 2007 may still be in force.

4 The Watercourse Regulation Act Section 8

4.1 The Subject for Revision

WRA Section 8 states that the «terms and conditions for the licence» are subject for revision. The wording indicates a limit against revision of the concession itself, while the wording is silent about how drastic changes that can be made during a revision.

The different terms and mitigating measures that can (or must) be set to award concessions are regulated in Chapter 4 of the WRA, both economic and environmental. For example, Section 14 imposes the licensee to pay a fee, while Section 20 grants the authority to set requirements to limit damages on the nature, for example by releasing fish to remedy the decline in the fish stock (letter c). The requirements are individually decided, as the authorities are given a margin of appreciation. Some requirements are added based on the challenges in that specific area.⁴

4.2 Purpose and Relevant Considerations

According to the preparatory work, the main purpose of the revision is to grant the authority a possibility to improve the environmental impact of hydropower plants.⁵ This is repeated in the Guidelines for Revision of License Condition for Watercourse Regulations⁶, which is drafted by the Ministry of Petroleum and Energy (MPE).

² Ot.prp. nr. 61 (2007-2008) p. 5

³ Prop. 117 L (2016–2017) chapter 5.4

⁴ Ministry of Petroleum and Energy (2012) p. 6

⁵ Ot.prp. nr. 50 (1991–92) p. 47

⁶ Ministry of Petroleum and Energy (2012)

The Guidelines further states that potentially new terms added in revision have to be weighed against the purpose of the license; power generation. This means, firstly, that new terms have to be suitable for achieving the purpose of improving the environmental condition in the watercourse. This necessitates an evaluation of the affected area, as well as an assessment of the effects of the proposed measures. Secondly, the benefits from the calculated improvements have to outweigh the disadvantages they may impose the power production. This includes security of power supply, the need for renewable energy, the cost of the measure for the licensee and so on.⁷ Therefore, one can argue that terms aiming to achieve other goals is outside the power invested in the provision.

The preparatory work draws some guidelines of what to consider in a revision assessment. Which new terms or changed conditions to consider depends on several factors, such as new legislation, changes in public perception, conflicts of interest, damages or inconveniences, and ecological, hydrological and/or economic conditions in the specific area.⁸ The question of revision must be assessed for each case individually. Administrative law will in this context constitute a counter in the exercise of power.

It should be mentioned that the impact exploitation of hydropower has on the ecosystems was not as emphasized when older concessions were granted, as it is today. Revision of older concessions to modernize or update the license terms will often, when complied, provide environmental improvements.⁹

To facilitate the work, ensure unambiguous practice within the administration and grant predictability for the licensees, standard terms have been prepared. These standard terms will prevent many of the damages and inconveniences caused by the exploitation of hydropower. The standard terms in force at the time of the revision, will therefore be introduced.¹⁰

⁷ Ibid p. 24

⁸ Ot.prp. nr. 50 (1991-92) p. 47

⁹ Ministry of Petroleum and Energy (2012) p. 24

¹⁰ Ministry of Petroleum and Energy (2012) p. 25

4.3 European Influence

The resource management of natural resources is a matter of the state. However, since the concession terms is related to environmental issues, EU environmental law is also relevant.

The EU Water Framework Directive (WFD) was in 2007, due to the EEA-Agreement, implemented as a part of Norwegian law and constitute The Water Regulation. The purpose of the regulation is «to provide a framework for the determination of environmental goals that will ensure the most comprehensive protection and sustainable use of water resources», cf. § 1.¹¹ This will impact the revision of concessions, as hydropower plant is an encroachment on nature that causes various disadvantages for the area.

To meet the obligations in the EU directive, Norwegian authorities adopt management plans for the use of areas, based on thorough research. As new information emerges, the authorities gain knowledge of which measures that need to be introduced in the license terms or which terms that need to be adjusted to become suitable. Additionally, the research regarding management plans will be quite similar to the assessments that has to be done to revise concessions, and can, therefore, provide input for suitable changes.¹²

Another European influence on the matter is the development of integrated power markets in Europe and an increased focus on climate change. There is a larger demand for renewable energy the revision of concession terms must be assessed in light of evolved environmental, climate and energy regimes.¹³

5 Closing Remarks

The access to revise existing hydropower licenses under the Water Regulation Act, enables the concessions given earlier to be adjusted in accordance with today's requirements, due to

¹¹ My translation

¹² Ministry of Petroleum and Energy (2012) p. 17

¹³ Ibid. p. 25

changes in social perception, new knowledge and international influence. But the revisions cannot be carried out at the expense of the need of power generation nor conflict with the mentioned limitations.

Even though the exploration of hydropower is not increasing, hydropower will still remain an important energy source in Norway in the future, as 99% of all electricity production in Norway today comes from hydropower.¹³ Additionally, reservoir hydropower is currently the only way to ‘store’ electricity, giving Norwegian power producers an advantage in the power markets for times where production from other (whether depended) sources is low.¹⁵ This indicates that hydropower will keep playing an important role also for the years to follow. At the same time, we observe an increased focus on environmental sustainability, making measures, like the competence to revise concessions, important to ensure hydropower as a sustainable electricity source.

¹³ NOU 2019: 16 chapter 3 ¹⁵

Statskraft.

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| 1917 | Lov om regulering og kraftutbygging i vassdrag (vassdragsreguleringsloven) <i>Translation: The Watercourse Regulation Act</i> |

| | |
|----------------------------|---|
| 2006 | Forskrift om rammer for vannforvaltning av 15.12.2006 (vannforskriften) <i>Translation: The Water Regulation</i> |
| Directive 2000/60/EC | Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy |
| NOU 2019: 16 | Skattlegging av vannkraftverk <i>Translation: Taxation of hydropower plants</i> |
| Ot.prp. nr. 50 (1991-92) | Lov om endringer i vassdragsreguleringsloven m.fl. <i>Translation: Law about changes in the Watercourse Regulation Act an others.</i> |
| Ot.prp. nr. 61 (2007-2008) | Om lov om endringer i lov 14. desember 1917 nr. 16 om erverv av vannfall, bergverk og annen fast eiendom m.v. (industrikonsesjonsloven) og i lov 14. desember 1917 nr. 17 om vassdragsreguleringer (vassdragsreguleringsloven) <i>Translation: Law about changes in the Industrial Licensing Act and the Watercourse Regulation Act</i> Unofficial translation of the Law is used and found here: https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19900629050-eng.pdf |
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Translation: Ministry of Petroleum and Energy. Guidelines for revision of license conditions for watercourse regulations, 2012.

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1.1 TPA Regime

The right of ownership imply that the owner of the energy infrastructure has the exclusive right to utilize it, unless decided otherwise by law or agreement. A ‘third party access’ (TPA) regime is an exception from this ownership right used in energy sectors and requires owners of infrastructures that may be considered as natural monopolies, to grant access for third parties to utilize the installations. TPA regimes ensure access on non-discriminatory, fair, equal and transparent terms, to ensure more efficient competition and use of resources in a socioeconomical manner.¹⁴ The regime is typically found in the oil and gas sector, where it allows for third parties to have access to already establish facilities. The purpose is to achieve efficient use of existing installations and pipelines to ensure exploration and extraction of petroleum. This reasoning can be generalized to other energy infrastructures, such as the access to electrical grids. In EU competition law, a similar concept is referred to as ‘Essential Facilities Doctrine’.²

TPA regimes as a management tool is either negotiated or regulated.³ Under a regulated scheme, the commercial terms for the use of the facility are regulated in laws and regulations. When negotiated, the owner is required by the government to open the facility for use by third parties, while the commercial terms are left to negotiation between the parties. The negotiated terms must, however, be in line with the principles of fairness, non-discrimination and equality.¹⁵

1.2 TPA to Upstream Natural Gas Pipeline Network in Norway

Upstream natural gas pipeline network means pipelines that transport gas from the field installation to treatment plants, onshore terminals or final landing point, see definition in the Petroleum Act (PA) Section 1-6 letter m. On the Norwegian continental Shelf (NCS), upstream natural gas pipelines are primarily owned by Gassled joint venture, while operated by the state-owned company Gassco AS.

The third party access to upstream natural gas pipelines in Norway is regulated in PA Sections

¹⁴ Bjørnebye (2019) p.

113 ² Banet, lecture 4 ³

Ibid.

¹⁵ Banet, lecture 4

4-8, influenced by the EU gas market legislation.¹⁶ The provision authorizes the Ministry of Petroleum and Energy (MPE) to decide that approved installations pursuant to the law shall be open to third party access, covering both upstream natural gas pipelines and other approved installation. For TPA to natural gas pipelines, the system in Norway is a regulated access regime for the biggest part of the network (Gassled) and a negotiated TPA scheme for other parts of the pipeline network. A more detailed regulation is governed by the Petroleum Regulation, the Tariff Regulation and the Infrastructure Regulation.¹⁷

PA Section 4-9 enables MPE to point out an Independent System Operator (ISO) to secure an “overall operation”⁷ of the pipelines. Gassco AS is appointed, and is therefore, in addition to be obligated under private law as an operator for Gassled, obligated under public law. Section 4-9 second paragraph states that the operator shall ensure neutrality and non-discrimination, and that the management shall be in accordance with “prudent technical and sound economic principles”⁸. This reflects the immediate objectives of the TPA regime, which is to ensure effective resource management through a competitive, transparent and non-discriminatory access.¹⁸

TPA is an instrument for ensuring competition, as the energy transport industry often is in a situation of natural monopoly, due to the need for pipeline transportation. Access for third parties to pipelines contributes to effective use of existing facilities by utilizing spare capacity. This applies especially in modern field, where the pipelines are well developed and adapted for maximum exploitation level. It further creates an incentive for increasing capacity in established pipelines and avoidance of double investments.¹⁰ Additionally, it contributes to avoid the abuse of dominant positions. Especially where the TPA is governed by the Tariff Regulation, as the access is given on standard terms and pricing based on tariffs.

¹⁶ Bjørnebye (2019) p. 113

¹⁷ Ibid. p. 115 ⁷

My translation ⁸

Ibid.

¹⁸ Banet, lecture 4

¹⁰ Ibid.

In this context, it is relevant to mention the gas sales market, as most of the natural gas from the NCS is exported. Pipelines are crucial prerequisite for delivering gas to customers, and TPA facilitates for new entrants in the gas market and free choice of supplier. Therefore, the TPA can be considered an instrument that contributes to a competitive internal gas market in the EU.¹⁹

TPA is beneficial for the market but is, at the same time, a controversial concept. The TPA as a regulated access regime in Norway limits the parties' contractual freedom and the owner's property rights. The discussion in EU regarding the 'Essential Facilities Doctrine' illustrate the controversies.¹²

As a closing remark, the TPA regime can, together with unitisation agreements and the joint development of several deposit,²⁰ consist a measure that contributes to the fulfilment of the resource management rule pursuant to PA Section 1-2. The Provision states that "petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole"²¹ and in that way contribute to both welfare for the people and strengthening of Norwegian trade and industry.

2 Question 2

The production and sales of electricity in Norway is subject for competition, as the Energy Act is based on the principle of a market-based power trading.²² The electrical grid infrastructure, on the other hand, is concession based and constitutes a natural monopoly. The main reason is the high expenses related to the development of grids, and that the average cost related to the grid infrastructures are sinking as the capacity is maximized.¹⁶ The organization as a monopoly activity shall ensure that transmission and distribution takes place in a socially rational manner, in line with the purpose pursuant to the Energy Act (EA) section 1-2.

¹⁹ Banet, lecture 4 ¹²

Ibid.

²⁰ Ibid.

²¹ My translation

²² Ministry of Petroleum and Energy ¹⁶

Ibid.

The grid is organized at three levels. The first level, with the highest voltage, is the transmission grid. The second level is the regional grid, while the lowest voltage level is the distribution grid.²³ At the transmission level, Norwegian law allows for only one Transmission System Operator (TSO). The TSO in Norway is Statnett SF, a public owned company. Similar to Gassco, Statnett is the appointed responsible system operator, cf. EA Sections 3-1 and 6-1. At the distribution level there are approximately 150 different Distribution System Operators (DSO). The majority of the DSOs are publicly owned, and the seven biggest companies represent about 60% of the total connected customers.¹⁸

Similar to access to natural gas pipeline networks, an overall principle in the electricity grid infrastructure is grid access for customers at non-discriminatory, transparent and fair terms, see both EA Section 4-1 and the NEM Regulation (NEM) Section 4-6. Access is crucial important, due to the role energy consumption play in society. The rules applicable to the grid companies shall ensure a rational operation, utilization and development of the network.²⁴

Two main instruments to avoid abuse of the monopoly positions, is the yearly income frames and the transportation tariffs. As a monopolist does not have incentives to manage the infrastructure in a cost-effective manner, the law sets a maximum yearly income. The grid owner cannot receive earning above the sat level. Additionally, the grid costumers pay a transportation tariff, including all prices and financial remuneration for connection to and use of the grid, based on non-discriminatory and objective point tariffs, see EA Section 4-1 and NEM Section 4-4. The tariff system has parallels to the tariff rules applicable for the TPA to upstream natural gas pipelines owned by Gassled.

Furthermore, the monopoly regulation means that costumers cannot choose a grid company. To contribute to a fair and competitive power sales market, the legislation sets rules for unbundling. The TSO, Statnett, are ownership unbundled due to its long history as a separate company, while the DSOs from this year is required to be legally and functionally unbundled from the power sale companies.²⁵ This shows that the infrastructure management affect the

²³ Banet, lecture 9 ¹⁸

Ibid.

²⁴ Ministry of Petroleum and Energy

²⁵ Banet, Lecture 6

connected power sales marked, just like the TPA regime to upstream gas pipeline networks affect the gas sales marked. Additionally, the unbundling rules make the grid operators neutral in their role as monopolists, similar to the Gassco's role as Independent System Operator. Thus, the unbundling rules are not absolute. The Norwegian Water Resources and Energy Directorate (NVE), a directorate under the MPE, is given the authority to grant exemptions pursuant to NEM.

A difference between the mentioned TPA regime and the grid access infrastructure, is that consumer considerations are relevant in the power market, making the rules for effective competition relevant for a larger group of customers. The access to energy is a vital necessity in today's society, and the grid operators has a large responsibility to make sure there is a balance in the grid between supply and demand at all times.²⁶

²⁶ 21 Ibid.

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