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COMMISSION OPINION

of **XXX**

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC - Germany - Certification of the Operators of the Nordeuropäische Erdgas-Leitung (NEL)

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I. PROCEDURE

On 19 August 2013, the Commission received three preliminary decisions from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), concerning the certification of three candidate operators of the Nordeuropäische Erdgas-Leitung (hereafter, "NEL") as Transmission System Operators (TSO) for gas.

Pursuant to Article 3(1) Regulation (EC) No 715/2009² (hereafter, "Gas Regulation"), the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authority as to their compatibility with Article 10(2) and Article 9 of the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISIONS

The NEL connects the subsea Nordstream pipeline, which comes on land in Greifswald in Northern Germany, with the existing transmission grids in the west of Germany. It is 440 km long and has the capacity of transporting 22 bcm of natural gas per year. The construction of NEL was commenced in 2011. At present it is partially operational, expected to become fully operational in November 2013.

The NEL is fully owned by the three candidate operators: NEL Gastransport GmbH (hereafter, "NEL GT"), Gasunie Ostseeanbindungsleitung GmbH (hereafter, "GOAL") and Fluxys Deutschland GmbH (hereafter, "Fluxys Deutschland"). All three companies are part of groups that include another certified TSO in Germany.

NEL GT is a 100% daughter company of W&G Beteiligungs-GmbH & Co. KG, which is also the mother company of i.a. GASCADE, a gas TSO certified under the Independent Transmission Operator model (hereafter, "ITO"). W&G Beteiligungs-GmbH & Co. KG is on the one hand partially owned by Wintershall Erdgas Beteiligungs-GmbH (50,02%), which is in turn owned by Wintershall Holding GmbH, [BUSINESS SECRET] subsidiary of BASF SE. On the other hand, W&G is partially owned by GAZPROM Germania GmbH (49,98%), whose only shareholder is OOO GAZPROM export, which in turn is owned by OAO GAZPROM.

GOAL is a sister company of Gasunie Deutschland Transport Services GmbH, a certified ownership unbundled TSO in Germany. Both companies are ultimately daughter companies of N.V. Nederlandse Gasunie (hereafter, "Gasunie") based in Groningen, the Netherlands.

¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009.

² Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009.

Gasunie, a gas company active in gas infrastructure and not in production or supply, is owned by the Dutch state whose shareholder rights are exercised by the Dutch Ministry of Finance. Another daughter of Gasunie is Gas Transport Services B.V. (hereafter, "GTS"), an ownership unbundled TSO in the process of being certified by the Dutch regulatory authority.

Fluxys Deutschland is a daughter of Fluxys Europe B.V. which is also the owner of Fluxys TENP, a German gas TSO certified under the ownership unbundling model. Fluxys Europe B.V. in turn is part of Fluxys S.A., the holding company which also owns the Belgian gas transmission operator Fluxys Belgium, a TSO certified under the ownership unbundling model in Belgium.

Each of the three owners has the right to commercialize a proportion of the total capacity in the NEL corresponding to their relative participations: NEL GT [BUSINESS SECRET], GOAL [BUSINESS SECRET] and Fluxys Deutschland [BUSINESS SECRET]. As the NEL is a single pipeline, the technical operation cannot be exercised in isolation and hence the parties have agreed that, upon completion, it will be carried out by [BUSINESS SECRET] on the basis of a to be concluded operational agreement.

In previous certification opinions on German gas TSOs, the Commission has commented on cases whereby a single pipeline was "shared" by multiple operators.³ In such "pipe-in-pipe"-cases the Commission underlined that it is necessary to ensure that all parties co-owning the infrastructure are themselves independent TSOs and that all parties enjoy rights equivalent to those of an owner over the pipeline. The present case is comparable but not equal to a "pipe-in-pipe"-situation, whereby a special daughter company owns the pipeline and the mother companies are certified. In the case of NEL the operators are the direct owners of their portions of the infrastructure (co-ownership or "Bruchteilseigentum") whereby they are certified for their operatorship of part of a larger network. Nevertheless the principles laid down in the Opinions concerning the "pipe-in-pipe"-concept with regard the possibilities of the transmission system operators to independently operate, maintain and develop their section of the network, remain relevant also in the case of NEL as it is to be ensured that the pipeline is operated independently and in the interest of its independent owners. The Commission is satisfied that in the present case these principles are adhered to.

In order to comply with the rules on unbundling of transmission system operators, GOAL and Fluxys Deutschland have applied for certification under the ownership unbundling Model (OU), as laid down in Article 9 Gas Directive. NEL GT has chosen the ITO-model, referred to in Article 9(8)(b) Gas Directive.

Bundesnetzagentur has analysed whether and to what extent the three candidate TSOs comply with the relevant unbundling rules, as laid down in German legislation transposing the Gas Directive, i.e. the Energiewirtschaftsgesetz (hereafter, "EnWG")⁴.

Bundesnetzagentur has come to the conclusion that GOAL and Fluxys Deutschland comply with the requirements related to the ownership unbundling model, provided that they comply with the condition that they notify Bundesnetzagentur of (changes to) certification decisions by the Dutch and Belgian regulator regarding the GTS and Fluxys Belgium, respectively. The

³ See i.a.: Commission Opinion on BNetzA's draft certification decision for GRTgaz Deutschland GmbH, 6 September 2012, C(2012)6257; Commission Opinion on BNetzA's draft certification decision for jordgas, 6 September 2012, C(2012)6255; Commissions Opinion on BNetzA's draft certification decision for Gasunie Transport, 3 December 2012, C(2012)9102; Commission's Opinion on BNetzA's draft certification decision for Thyssengas, 30 January 2013, C(2013)570.

⁴ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

Commission has no comments with regard to these two candidate operators and agrees with Bundesnetzagentur's assessment.

Bundesnetzagentur has come to the conclusion that NEL GT complies with the requirements related to the ITO model, provided that a number of conditions are fulfilled. The draft certification decision of NEL GT is issued subject to the following conditions:

"a) The applicant's obligation to adhere to the BASF corporate guidelines shall cease within six months of the certification being issued.

If BASF SE does not revoke this obligation, the applicant can simply declare that it no longer applies the corporate guidelines.

b) [BUSINESS SECRET]

c) The applicant must, within six months of the certification being issued, amend the management agreements to reflect the non-application of the BASF corporate guidelines.

d) The applicant must, within six months of the certification being issued, ensure that all persons belonging to the management within the meaning of §3(33a) of the EnWG are directly employed by it.

e) The applicant must, within six months of the certification being issued, discontinue the granting [BUSINESS SECRET] to the relevant parties/persons concerned in the applicant's management. The applicant must ensure that the affected persons in the company management sell the shares [BUSINESS SECRET] by 31 March 2016.

f) [BUSINESS SECRET]

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. NEL GT's Choice of the ITO model

According to Article 9(8) Gas Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a vertically integrated undertaking (hereafter, "VIU").⁵ In its interpretative note on unbundling the Commission stated that:

"The ISO and ITO models can only be chosen for a specific TSO if on entry into force of the Directives, i.e. 3 September 2009, the transmission system belonged to a vertically integrated undertaking (Article 9(8) Electricity and Gas Directives).

*(...) New transmission systems, in particular systems which did not yet exist on 3 September 2009, will have to follow the ownership unbundling regime."*⁶

The main reason for allowing only existing TSOs to opt for the ITO-model was to prevent a situation in which VIUs would have no choice but to sell off their transmission assets. These companies could, through implementing legislation, be given the option to unbundle by means of implementing a pillar of behavioural rules in order to ensure effective independent

⁵ See in this sense, recital (14) Gas Directive as well.

⁶ The Unbundling regime, Commission staff working document, 22 January 2010, http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf

operation of their transmission assets. To future TSOs however, the legal framework is clear: they have to comply with the ownership unbundling rules.

The Commission notes that on 3 September 2009, the transmission system concerned, the NEL pipeline, did not exist yet and no final investment decision had been taken. Construction of the NEL started in March 2011 and the pipeline will become fully operational in November 2013.

In its preliminary decision, Bundesnetzagentur argues that despite the fact that the NEL was not operational on 3 September 2009, the ITO-model is still open to NEL GT because it can be regarded as an extension of the GASCADE-network. The pipeline was planned as a connection between the Nordstream pipeline and, *inter alia*, the GASCADE-network.

The Commission cannot follow this approach for two reasons. First, it appears to the Commission that if the relevant section of the NEL truly were an extension of the GASCADE network, no separate TSO would have to have been created for its ownership and operation. In that case, i.e. if the relevant section of NEL were owned and operated by GASCADE, the GASCADE certification as an ITO could have covered also the relevant section of the NEL. The Commission considers in general that extensions of existing transmission grids should be operated by the existing TSO of that grid in order to reduce the regulatory and administrative burden and ensure efficient and cost-effective operation of the system.

Secondly, as of the adoption of the Gas Directive in July 2009 and its subsequent entry into force on 3 September 2009, the applicable legal framework has been clear in stipulating that only the OU-model is available for new transmission systems. Therefore, NEL GT being a separate new TSO created after 3 September 2009 should apply for an OU instead of an ITO model.

2. Definition of VIU

Notwithstanding its abovementioned objections against the choice of the ITO model for NEL GT, for the purpose of completeness the Commission wishes to complement its commentary on the preliminary decision by raising its concerns regarding the definition of the VIU.

Article 2(20) Gas Directive provides for a definition of the concept of VIU as '*a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas*'. The definition of VIU is relevant for the application of a considerable number of provisions of the ITO model, which seeks to limit the way in which the ITO can be influenced by its parent companies.

In its Opinion on GASCADE, the Commission disagreed with Bundesnetzagentur's argumentation leading to the exclusion of the ultimate mother companies of GASCADE, BASF SE and GAZPROM OAO, from the circle of companies that formed the relevant VIUs. The Commission argued that the scope of the VIU should not be restricted geographically. In the case of BASF SE, the Commission argued that the fact that BASF SE generates limited amounts of electricity for its own consumption only, is not relevant for the determination of the scope of the VIU.

In its preliminary decision on NEL GT, Bundesnetzagentur is confronted with the same question. In the case of BASF SE, it again makes the case that only the Wintershall-group is part of the VIU, as it is the only element within the larger group that is active in the generation or supply of gas. The Commission is of the opinion that the rules of the ITO that relate to the VIU are applicable to all companies within the group that the VIU comprises,

irrespective of whether they carry out themselves activities related to supply or generation of gas or electricity. The definition of the VIU encompasses the entire economic unit or group structure to which the ITO belongs. If the scope of the VIU were limited only to those companies in the group to which also the ITO belongs, that carry out the activities related to supply or generation of gas or electricity, the unbundling rules could be circumvented easily by creating additional daughter companies that do not carry out these activities but that are merely used to influence the ITO in ways that are prohibited by the ITO-model. The Commission notes that although BASF SE may itself not have interests in influencing the decision-making within NEL GT in a way so as to favour its own interests, it does have that incentive as a co-owner of the Wintershall group. The Commission therefore underlines once more that the entire BASF group and all the companies under its control form part of the VIU and cannot exercise influence over the ITO in a way that runs counter to the applicable rules.

In the case of GAZPROM OAO, the argumentation of Bundesnetzagentur is unchanged and continues to be based on the definition of the term VIU in the German legislation which seems to exclude categorically and without apparent justification companies which are located outside the European Union. The Commission questions whether this legislation correctly transposes the Gas Directive.

In both cases however, Bundesnetzagentur makes the additional observation that it is in fact irrelevant whether both companies form part of the VIU because in practice they hardly exercise any influence over the ITO and where they do – such as in the case of the aforementioned BASF SE corporate guidelines – the conditions applied by Bundesnetzagentur prohibit that already. There are also no service agreements between BASF SE or GAZPROM OAO and the ITO.

The Commission cannot follow this argumentation. The fact that today's practice is such that no influence is formally exercised by both mother companies is not a guarantee for the future. The ITO-rules are there to ensure that the mother company, which has the incentive to influence the TSO in a way that it favours the mother company's supply or generation interests, does not have the ability to materialize that incentive. Therefore, it is important that both BASF SE and GAZPROM OAO are considered part of the VIU and thus obliged to comply with the rules applicable to VIUs, as laid down in Chapter IV of the Gas Directive.

In addition, the conditions of Bundesnetzagentur do not solve the issue in a satisfactory way. In that context the Commission wishes to repeat its comment made in the Opinion on GASCADE with regard to the abovementioned condition e) where Bundesnetzagentur stipulates that shares in the VIU held by the management of NEL and which have been acquired by the management before 3 March 2012 must be sold, but only by 31 March 2016. Bundesnetzagentur makes reference to the German transposing legislation which requires this explicitly, while for non-management staff it does not contain the requirement to sell shares in the VIU applies. The Commission questions whether the German transposing legislation is in compliance with the Gas Directive and notes that in certain cases it may undermine the effective independence of the ITO.

The Commission invites Bundesnetzagentur to require in its final decision that the possibility for the management to [BUSINESS SECRET] stops to exist immediately at the date of the final certification decision, and that the management sell their financial interests in the VIU as soon as possible, or as a minimum, give them in the hands of an independent trustee.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, Bundesnetzagentur shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification

of the operators of the NEL, and in particular NEL GT, and when it does so, shall communicate this decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis national regulatory authorities on any other notified draft measures concerning certification, or vis-à-vis national authorities responsible for the transposition of EU legislation as regards the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. Bundesnetzagentur is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels,

For the Commission

Member of the Commission