

ENERGY REGULATORY OFFICE

Masarykovo náměstí 5, 586 01 Jihlava

File Ref. SLS-10036/2020-ERU

Ostrava, 30 September 2021

Ref. No.: 10036-42/2020-ERU

DECISION

In respect of the application of NET4GAS, s.r.o., having its registered office at Na Hřebenech II 1718/8, 140 21 Praha 4 - Nusle, Company No. (IČ) 27260364, for the approval of a project proposal for an incremental capacity project under Article 28(1) of COMMISSION REGULATION (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, and in compliance with Section 67 *et seq.* of Act No 500/2004, the Rules of Administrative Procedure, as amended, and under Article 28(1) and (2) of COMMISSION REGULATION (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, the Energy Regulatory Office, having its registered office at Masarykovo náměstí 5, 586 01 Jihlava, as the relevant competent administrative authority under Article 28(1) of COMMISSION REGULATION (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (hereinafter also ‘Commission Regulation 2017/459’),

h a s d e c i d e d a s f o l l o w s :

***‘Project Proposal for Incremental Capacity between Entry/Exit Systems of the Czech Republic (CZ) and Austrian Market Area East (AT)’*, under Article 28(1) of COMMISSION REGULATION (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, is hereby approved in the wording submitted to the Energy Regulatory Office on 30 June 2021 by NET4GAS, s.r.o., having its registered office at Na Hřebenech II 1718/8, 140 21 Praha 4 - Nusle, Company No. (IČ): 27260364. The approved proposal is appended to the Ruling of this Decision and therefore forms an integral part hereof.**

Justification

I

On 5 November 2020, the Energy Regulatory Office received an application (hereinafter also referred to as ‘the Proposal’) of NET4GAS, s.r.o., having its registered office at Na Hřebenech II 1718/8, 140 21 Praha 4 - Nusle, Company No. (IČ): 27260364, under the heading Submission of an Application for the Approval of Incremental Capacity on the National Border between the Czech Republic and Austria, a part of which was an Application for the Approval of an Incremental Capacity Project on the National Border between the Czech Republic and Austria (*‘Project Proposal for Incremental Capacity between Entry/Exit Systems of the Czech Republic (CZ) and Austrian Market Area East (AT)’*), the Project Proposal being in Czech and in English, and also a *‘Contract for Provision of Gas Transmission Service’* in Czech and in English, which was marked as Annex 1 to the Proposal.

The above application showed that in its position as the exclusive transmission system operator in the Czech Republic, the party to these proceedings had prepared for approval, in cooperation with Gas Connect Austria GmbH, the transmission system operator in Austria, a joint project proposal for an incremental capacity project on the national border between the Czech Republic and Austrian market area East under Article 28(1) of Commission Regulation 2017/459 in the extent of the above-cited Article and in respect of the portion concerning the implementation of the project proposal in the Czech Republic by the party to these proceedings.

It is evident from the Proposal that the purpose of the incremental capacity project is ‘to physically link the entry/exit systems of CZ and AT by constructing a pipeline system between Břeclav and Baumgarten’, the party to these proceedings and Gas Connect Austria GmbH having carried out ‘technical design studies’ in this connection.

The Proposal then sets out, in particular, a description of this project, primarily in terms of the technical parameters (‘Technical Solutions 1 and 2’), the offer levels of bundled capacity at the interconnection point with a priority for ‘Offer Level 1’ capacity, the general rules and conditions for the binding capacity allocation phase, the timeline of the project, the parameters defined in Article 22(1) of Commission Regulation 2017/459 (the economic test), and the fixed payable price mechanism based on Article 24(b) of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised tariff structures for gas (NC TAR). In the Proposal, the party to these proceedings does not propose the use of any exceptionally extended time horizon or any alternative allocation mechanism within the meaning of Article 30 of Commission Regulation 2017/459.

Under the first sentence of Section 45 (1) of the Rules of Administrative Procedure: *“The application must contain the details set out in Section 37 (2) and must clearly show what the applicant requests or seeks.”*

Article 28(1) of Commission Regulation 2017/459 reads as follows: *“... the project proposal shall include at least the following information:*

- a) *all offer levels, reflecting the range of expected demand for incremental capacity at the relevant interconnection points as a result of the processes provided for in paragraph 3 of Article 27 and Article 26;*
- b) *the general rules and conditions that a network user must accept to participate and access capacity in the binding capacity allocation phase of the incremental capacity process, including any collaterals to be provided by network users and how possible delays in the provision of capacity or the event of a disruption to the project are dealt with contractually;*
- c) *timelines of the incremental capacity project, including any changes since the consultation described in paragraph 3 of Article 27, and measures to prevent delays and minimise the impact of delays;*
- d) *the parameters defined in Article 22(1);*
- e) *whether an exceptionally extended time horizon for contracting capacity for an additional period of up to 5 years beyond the allocation of up to 15 years after the start of the operational use may be required, in accordance with Article 30;*
- f) *where applicable, the proposed alternative allocation mechanism including its justification pursuant to Article 30(2) as well as the conditions approved by the transmission system operator for the binding phase pursuant to Article 30(3);*
- g) *where a fixed price approach is followed for the incremental capacity project, the elements described in Article 24(b) of Regulation (EU) 2017/460.”*

In this context, the Proposal has been found to be complete and containing all the details required in Sections 37 and 45 of the Rules of Administrative Procedure and in Article 28(1) of Commission Regulation 2017/459.

Under Section 17e (2) (e) of Act No 458/2000 on the Conditions of Business and State Administration in Energy Industries and Amending Certain Laws (the Energy Act), as amended, in exercising its competences the Energy Regulatory Office shall consult its additional proposals for measures or procedures if the consultation obligation is laid down in the Energy Act, in a different piece of legislation, or in a directly applicable legislative act of the European Union or if the Energy Regulatory Office so decides.

With regard to the foregoing, specifically the fact that Commission Regulation 2017/459 does not set out an obligation of consultation at the national level, and to the nature of the Proposal, the Energy Regulatory Office did not decide on an obligation of consultation within the meaning of Section 17e of the Energy Act. The Energy Regulatory Office also refers to the fact that before submitting its proposal, the party to the proceedings shall conduct a design phase under Article 27 of Commission Regulation 2017/459, when the concerned transmission system operators conduct a joint public consultation on the draft project proposal to ensure cross-border coordination while closely cooperating with the involved national regulatory authorities. The actual project proposal shall then take into account the results of such consultation.

On 22 March 2021, the party to these proceedings supplemented its proposal by supplying the Energy Regulatory Office with a document containing arguments justifying the incorporation of the so-called capacity cannibalisation effect into the economic evaluation of the project, a document containing a description and structure of the project costs, a document in support of

investment in the hydrogen standard of the gas pipeline, and a document containing a project risk assessment study.

On 16 April 2021, the Energy Regulatory Office provided the Austrian regulatory authority with its view on the various provisions of Gas Connect Austria GmbH's proposal.

Further to the Energy Regulatory Office's request to meet the requirement in Article 28(2) of Commission Regulation 2017/459, under which, when preparing this Decision, the Energy Regulatory Office shall also consider the Austrian regulatory authority's view, on 20 April 2021 the Office received the Austrian regulatory authority's communication that raised no objections to or comments on the Proposal. It was also clear from the Austrian regulatory authority's communication that the authority was not in a position to issue a decision within the set period, because it still did not have its Regulatory Commission that was responsible for setting tariffs. In this respect, it was suggested to follow the procedure under Article 6(10) of REGULATION (EU) 2019/942 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, and jointly apply for an extension by six months of the period for issuing the decision.

The Austrian regulatory authority sent the application for the extension to the European Union Agency for the Cooperation of Energy Regulators (ACER) on 27 April 2021 and the Energy Regulatory Office did so on 4 May 2021. The party to these proceedings was notified thereof and it then sent its own opinion on the potential procedure for the approval of the project in question.

In relation to the extension of the period, ACER then requested the two regulatory authorities to provide additional information and later also invited them to provide their comments on its preliminary findings. None of the regulatory authorities raised exceptions to or comments on the preliminary findings. On 23 July 2021, the Energy Regulatory Office received ACER's decision, under number 09/2021, granting the joint application for an extension of the period for issuing the decision and reasoning that ACER considered this approach to be appropriate in order to allow the two regulatory authorities to reach an agreement on the project at hand. Thus, by granting their application ACER extended the period for the Energy Regulatory Office and the Austrian regulatory authority to issue a decision in the approval procedure on the project proposal for incremental capacity on the national border between the Czech Republic and Austria by six months until 5 November 2021.

In the meantime, on 28 May 2021, the Austrian regulatory authority informed the Energy Regulatory Office that the relevant Regulatory Commission had been set up and that it was therefore able to continue in the approval process, also noting that it had requested Gas Connect Austria GmbH to update their application, including a change of the *long stop date* to make it possible to have the project ready for the yearly capacity auction in 2022. The Office then received the modified version of the proposal and promptly forwarded it to the party to these proceedings.

On 8 June 2021, the Energy Regulatory Office requested the party to these proceedings to coordinate the Proposal. With regard to the submission by Gas Connect Austria GmbH of

modifications to the project proposal, the Energy Regulatory Office concluded that analogous modifications also had to be made on the part of the party to these proceedings in order for the two proposals to be regarded as coordinated within the meaning of Article 28(1) of Commission Regulation 2017/459. In the request, the Energy Regulatory Office also set out its view on the potential withdrawal of the proposal by Gas Connect Austria GmbH, noting, *inter alia*, that in its opinion no new proposal had been submitted on 28 May 2021 but solely the original proposal had been updated. The Austrian regulatory authority holds the same view as follows from, primarily, e-mail communication between the two regulatory authorities on 8 June 2021.

On 30 June 2021, the party to these proceedings submitted to the Energy Regulatory Office an updated proposal for incremental capacity on the national border between the Czech Republic and Austria, which primarily reflected the postponement of the expected date of the incremental capacity auction to 2022 and the submission of the updated proposal by Gas Connect Austria GmbH.

Thus, the Proposal specifically contained adjusted estimates of the costs on the Austrian side for both of the technical solutions outlined in the section on the description of the project, shifted gas years related to the offer levels of bundled capacity at the interconnection point, and, in particular, changed milestones in the timeline for implementing the incremental capacity project. Additional changes were made to reference prices (changed values of exit and entry), to the Expected Inflation Adjustment, and to the values of the estimated increase in target revenues, which had been reduced. Certain changes were also made in the section on the fixed payable price mechanism.

On 8 July 2021, the updated Proposal of the party to these proceedings was referred to the Austrian regulatory authority for its view, if any. No view was received. On 7 September 2021, the Energy Regulatory Office advised the Austrian regulatory authority that it had already gathered all information for issuing the decision and requested it again to provide comments or communicate its view. In response thereto on 9 September 2021, the Austrian regulatory authority communicated that it had no comments on the project proposal and did not want to raise any additional view.

II

Section 9 of the Rules of Administrative Procedure reads as follows: “*An administrative proceeding is a procedure followed by an administrative body in order to issue a decision whereby a specifically named person’s rights or obligations in a certain matter are established, amended or revoked or which declares in a certain matter that such person has or does not have rights or obligations.*”

Under Section 67 *et seq.* of the Rules of Administrative Procedure it applies, *inter alia*, that through its decision the administrative body establishes, amends or revokes a specifically named person’s rights or obligations in a certain matter or declares in a certain matter that such person has or does not have rights or obligations. As a rule, such decisions are made in writing and contain the actual decision (i.e. the ruling), justification, and advice to the parties.

Article 28(1) of Commission Regulation 2017/459 sets out: *“Following the consultation and finalisation of the design phase for an incremental capacity project in accordance with Article 27, the involved transmission system operators shall submit the project proposal for an incremental capacity project to the relevant national regulatory authorities for coordinated approvals.”* Under Article 28(2) of the above Regulation, the decision shall include justifications.

In the light of the above the Energy Regulatory Office notes that, to the extent of the powers vested in it by Commission Regulation 2017/459, it is competent to decide on the Proposal of the party to these proceedings since the subject matter thereof is the approval of the Czech and Austrian transmission system operators’ joint project proposal for incremental capacity on the national border between the Czech Republic and Austria.

Under Article 28(2) of Commission Regulation 2017/459, the national regulatory authorities shall inform each other of the receipt of the project proposal and its completeness, because the coordinated decisions shall be published by them within 6 months of receipt of the complete project proposal by the last of the relevant regulatory authorities. On the basis of the information transmitted between these two authorities it was therefore possible to determine the starting date of the six-month period at 5 November 2020. The foregoing is not affected by the fact that Gas Connect Austria GmbH and the party to these proceedings sent new proposals, because it is evident that these were only adjustments and additions to the original proposals resulting from, in particular, the extension of the period for issuing the decision and the necessary coordination of both proposals.

Article 3(1) of Commission Regulation 2017/459 defines ‘incremental capacity’ as a possible future increase via market-based procedures in technical capacity or possible new capacity created where none currently exists that may be offered based on investment in physical infrastructure or long-term capacity optimisation and subsequently allocated subject to the positive outcome of an economic test in specified cases.

Paragraph 3 of the cited Article sets out that *“‘alternative allocation mechanism’ means an allocation mechanism for offer level or incremental capacity designed on a case-by-case basis by the transmission system operators, and approved by the national regulatory authorities, to accommodate conditional demand requests”*.

Paragraph 9 of the cited Article sets out that *“‘incremental capacity project’ means a project to increase the amount of technical capacity at an existing interconnection point or to establish a new interconnection point based on capacity allocation in the preceding incremental capacity process”*.

As mentioned above, the Energy Regulatory Office found the Proposal, including its updated wording, to be complete and containing all the required details. The Office also concluded that the Proposal was not in conflict with the applicable legislation. As regards its subsequent update, it can be concluded that the update was made in accordance with the Office’s request to coordinate the Proposal with the Austrian side. In this respect, adjustments were then made in connection with, primarily, changes of the relevant values due to it objectively being not feasible to keep the six-month period for issuing the decision and thus, in connection with

this, it being not feasible to participate in the incremental capacity auctions at the new Reintal interconnection point on 5 July 2021. Certain changes made in the section on the fixed payable price might perhaps be regarded as extending beyond what was actually needed but it can be noted that these changes are beneficial for the project because they can, *pro futuro*, prevent any difficulties related to interpretation and application.

Article 28(2) of Commission Regulation 2017/459 also sets out: *“When preparing the national regulatory authority’s decision, each national regulatory authority shall consider the views of the other national regulatory authorities involved. In any case national regulatory authorities shall take into account any detrimental effects on competition or the effective functioning of the internal gas market associated with the incremental capacity projects concerned. If a relevant national regulatory authority objects to the submitted project proposal, it shall inform the other involved national regulatory authorities as soon as possible. In such a situation, all the national regulatory authorities involved shall take all reasonable steps to work together and reach a common agreement. Where the relevant national regulatory authorities cannot reach an agreement on the proposed alternative allocation mechanism within the 6 months period referred to in the first subparagraph, the Agency shall decide on the alternative allocation mechanism to be implemented, following the process set out in Article 8(1) of Regulation (EC) No 713/2009.”*

In compliance with Article 28(2) of Commission Regulation 2017/459, the Energy Regulatory Office provided its view on the joint project for incremental capacity on 16 April 2021. Through this view, the Energy Regulatory Office commented primarily on Article 28(1)(a), (c), (e), (f) and (g) of Commission Regulation 2017/459, specifically commenting on, in particular, the volume of incremental capacity that would be offered, and also referred to the key milestones of the project and the parameters of the economic test. The Energy Regulatory Office also noted in its view that it had not identified any detrimental impacts on competition or the effective functioning of the Czech gas market associated with the incremental capacity project, and had no objections to the project submitted by the party to these proceedings or the one of Gas Connect Austria GmbH. The Energy Regulatory Office did not raise any objections to or comments on the updated proposals.

As regards the view or any objections on the part of the Austrian regulatory authority, the Energy Regulatory Office notes that the Austrian regulatory authority has received the original proposal and its updated wording and that it has been provided with all cooperation in order to achieve a common agreement. The Energy Regulatory Office notes on the above that the Austrian regulatory authority has not expressed, through its view, any disagreement with the Proposal or any other comments, objections, suggestions etc., including in respect of the subsequent update thereof, apart from notifying the necessity of its requirement to apply for an extension of the period for issuing the decision and the adjustments to the proposal on the Austrian side related to the need to coordinate the two proposals. In this respect it can be concluded that on 9 September 2021, the Austrian regulatory authority noted that it had no comments on the project proposal and did not want to provide any additional view.

In this respect the Energy Regulatory Office therefore considers that during the administrative proceedings on the approval of the project proposal for incremental capacity on the national

border between the Czech Republic and Austria, the two relevant regulatory authorities have reached a common agreement since neither of them have objected to or commented on the proposals and their updated versions within the meaning of Article 28(2) of Commission Regulation 2017/459.

As regards the requirement in Article 28(2) of Commission Regulation 2017/459 that the authorities take into account any detrimental effects on competition or the effective functioning of the internal gas market associated with the incremental capacity projects concerned, the Energy Regulatory Office notes the following:

The Energy Regulatory Office has assessed whether or not the project described by the party to these proceedings in its Proposal, including the update thereof, has any detrimental impacts on competition or on the internal gas market in the Czech Republic, and has found that the project has been designed so that it uses market-based and transparent principles arising from the applicable European legislative framework. The implementation of the project is not expected to pose risks to competition or cause negative social impacts on the final gas consumers in the Czech Republic.

The project will provide direct transmission capacity between two countries with well developed wholesale gas markets. The project can therefore be expected to have a direct positive impact at least on the Austrian gas market in terms of effects on wholesale gas prices. The project diversifies the direct transport routes to the Czech Republic, and its positive effect on the stability and security of gas supply to customers in the Czech Republic can therefore be expected in cases of gas shortages or surpluses in the Czech gas system.

The project's f-factor, which the promoter has proposed in its application and which has been approved in view of the project's benefits for gas supply to the Czech Republic, guarantees that the project will be implemented and that its costs, increased by the potential impacts of the cannibalisation of the project, will be recouped on a commercial basis. Cost socialisation or direct or indirect detrimental effects on final gas consumers in the Czech Republic are therefore not expected.

In the light of the above it can therefore be concluded that within the meaning of Article 28(2) of Commission Regulation 2017/459, no detrimental impacts on competition or the effective functioning of the internal gas market in the Czech Republic have been identified; quite the opposite: the project can have positive impacts, in particular those in terms of access to a number of transport routes, and the security and stability of gas supply.

III

When deciding on this matter, the Energy Regulatory Office took into account the documents and evidence included in the administrative case file: documents submitted by the party to these proceedings as well as the documents that the Energy Regulatory Office had obtained *ex officio*. In the administrative proceedings, the Energy Regulatory Office assessed the documents, in particular evidence, at its discretion, specifically each piece of evidence separately and all pieces of evidence interlinked, taking into consideration all that transpired in the proceedings, including the statements made by the party to the proceedings.

The Energy Regulatory Office is satisfied that the Proposal, in the updated wording, is not contrary to laws and regulations and that the approval of the Proposal will not be to the prejudice of the application of competition rules, primarily in terms of the restriction of competition or abuse of a dominant position; that is, the approval of the Proposal will not have any detrimental impacts on competition or the effective functioning of the internal gas market associated with the incremental capacity projects concerned. When preparing this Decision, the Energy Regulatory Office also took into account the Austrian regulatory authority's view and any detrimental effects on competition or the effective functioning of the internal gas market within the meaning of Article 28(2) of Commission Regulation 2017/459.

It is therefore evident that in compliance with above-cited Article 28(2) of Commission Regulation 2017/459, the relevant regulatory authorities consulted on the Proposal, including the modifications thereof, with each other and cooperated and coordinated for the purpose of achieving a common agreement on the alternative allocation mechanism proposed, and ACER therefore will not have to decide on the alternative allocation mechanism to be implemented following the process set out in Article 8(1) of Regulation (EC) No 713/2009.

On the basis of the above facts, in compliance with Section 67 *et seq.* of the Rules of Administrative Procedure the Energy Regulatory Office has decided as set out in the Ruling of this Decision, and approved the proposed incremental capacity project, in the wording submitted to the Energy Regulatory Office by NET4GAS, s.r.o., on 30 June 2021, in compliance with Article 28(1) of Commission Regulation 2017/459.

In conclusion, the Energy Regulatory Office refers to the fact, already mentioned above, stemming from the first sentence of Article 28(2) of Commission Regulation 2017/459, which sets out: *“Within 6 months of receipt of the complete project proposal by the last of the relevant regulatory authorities, those national regulatory authorities shall publish coordinated decisions on the project proposal defined in paragraph 1 in one or more official languages of the Member State and to the extent possible in English.”*, which makes it clear that the relevant decision must be published within six months of receipt of the complete project proposal by the last of the relevant regulatory authorities. Nevertheless, since this period was extended by six months by ACER's decision of 23 July 2021 under number 09/2021, it can be noted that the period for publishing the decision has been kept.

Advice on remedy

An appeal against this Decision can be lodged with the Board of the Energy Regulatory Office within 15 days of the day of the service hereof, by way of submitting the appeal to the Energy Regulatory Office.

The period for lodging an appeal starts to run on the day following the day on which the Decision was served, however, not later than upon the passage of the tenth day of the day on which the undelivered and deposited Decision was ready for collection. The appeal must specify the extent to which the Decision is being challenged and also the claimed conflict with legislation or inaccuracy of the Decision or incorrectness of the proceedings. Under Section

85 (1) of the Rules of Administrative Procedure, an appeal has a suspensive effect. An appeal against the justification only is not permissible.

Annex to the Ruling of the Decision:

- *'Updated Project Proposal for Incremental Capacity between Entry/Exit Systems of the Czech Republic (CZ) and Austrian Market Area East (AT)', including Annex 1 thereto, 'Contract for Provision of Gas Transmission Service' (19 sheets)*

Zuzana Altmannová
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To:
NET4GAS, s.r.o.