

ENERGY REGULATORY OFFICE

Masarykovo náměstí 5, 586 01 Jihlava

File Ref. SLS-09654/2020-ERU

Ostrava, 5 May 2021

Ref. No.: 09654-15/2020-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, legally represented by Jan Basl, solicitor, Czech Bar Association number 14253, with offices at U Ladronky 30, 169 00 Praha 6, 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, in compliance with Section 67 *et seq.* and Section 87 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,

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

The project proposal for an incremental capacity project on the national border between Poland and the Czech Republic, within the meaning of 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 October 2020 by NET4GAS, s.r.o., having its registered office at Na Hřebenech II 1718/8, 140 21 Praha 4 - Nusle, Company No. (IČ): 27260364, specifically in the wording of the Application for the Approval of an Incremental Capacity Project under Article 28(1) NC CAM for the Border between Poland and the Czech Republic, including Annex 1 thereto, Contract for Provision of Gas Transmission Service, which is appended to the Ruling of this Decision and which therefore forms an integral part hereof.

Justification

I

On 30 October 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, within the meaning of 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 referred to as ‘Commission Regulation 2017/459’), under the heading Submission of an Application for the Approval of an Incremental Capacity on the National Border between the Czech Republic and Poland, a part of which was an Application for the Approval of an Incremental Capacity Project under Article 28(1) NC CAM for the Border between Poland and the Czech Republic, in Czech and in English, and also a Contract for Provision of Gas Transmission Service in Czech and in English.

The above application has shown that in its position as the exclusive transmission system operator in the Czech Republic, the party to these proceedings prepared for approval, in cooperation with the transmission system operator in Poland, GAZ-SYSTEM S.A., a joint project proposal for an incremental capacity project on the national border between the Czech Republic and Poland 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 proceeding.

It is evident from the Proposal that the purpose of the incremental capacity project is to meet the demand requests for incremental capacity from Poland into the Czech Republic at the existing Cieszyn/Český Těšín interconnection point (IP), and technical studies have been conducted in this respect. The Proposal also shows that currently, there is no technical capacity between the Polish and Czech entry-exit systems in the requested direction. The existing interconnection point between Poland and the Czech Republic at Cieszyn/Český Těšín enables firm gas transmission only in one direction, from the Czech to the Polish transmission system, with a capacity of approximately 0.5 bcm annually. If implemented, the project will turn this interconnection point into a bi-directional point under Article 5(4) of REGULATION (EU) 2017/1938 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010. The party to these proceedings also notes in the Proposal that none of the companies involved received comments during the public consultation on the draft project proposal, held from 13 January 2020 to 13 February 2020.

The Proposal then sets out, in particular, a description of this project, specifically the offer level of incremental capacity amounting to 1,143,000 kWh/h/year; the offer level can be marketed no earlier than from the 2028/2029 gas year because of the specific conditions of project implementation, the general rules and conditions for auctioning the incremental capacity, which a network user must accept to obtain the incremental capacity and which the party to these proceedings sets out in more detail in the Contract on Provision of Gas

Transmission Service and in the TSO's Network Code, the timelines of the incremental capacity projects together with the descriptions of the various projects on the Polish and Czech sides, including the time periods and technical parameters, and also the parameters defined in Article 22(1) of Commission Regulation 2017/459, provided that the economic test should be based on the present value of the binding commitments of the network users for contracting capacity, on the present value of the estimated increase in the allowed or target revenue of the TSO associated with the incremental capacity included in the respective offer level, and on the f-factor. The Proposal also shows that the party to the proceedings and GAZ-SYSTEM S.A. agree that no extended time horizon is needed. At the same time, in the Proposal the party to the proceedings is not proposing the use of any alternative allocation mechanism since the standard auction procedure will be used; and in respect of the fixed price approach it is noted that GAZ-SYSTEM S.A. will not use this mechanism and that the party to the proceedings will follow a fixed price approach in line with its obligations stemming from the Price Control Principles for the 2021–2025 Regulatory Period. As regards the Contract for Provision of Gas Transmission Service, this document was intended solely for the purpose of the consultation process, i.e. it was not a proposal for entering into a contract with any customer.

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 the 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 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.

Under Article 28(2) of Commission Regulation 2017/459, when preparing this Decision, the Energy Regulatory Office shall also consider the views of the Polish regulatory authority. If the Polish regulatory authority objects to the submitted project proposal, it shall inform the Energy Regulatory Office as soon as possible. In such a situation, both regulatory authorities shall take all reasonable steps to work together and reach a common agreement so that they can publish coordinated decisions on the matter.

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.

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. The Polish regulatory authority noted on 7 April 2021 that on their part, they had received the complete project proposal on 18 December 2020. On the basis of the information transmitted between these two authorities it was therefore possible to determine the starting date of the 6 months period at 18 December 2020.

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.”*

With regard to the foregoing 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 in the matter of the Proposal of the party to these proceedings, the subject matter of which is the approval of the Czech and Polish transmission system operators’ joint project proposal for an incremental capacity project on the national border between the Czech Republic and Poland.

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”.

In compliance with Article 28(2) of Commission Regulation 2017/459, the Polish regulatory authority provided its opinion on the Proposal on 9 April 2020. Through this opinion, the Polish regulatory authority expressed its view primarily on Article 28(1)(a), (c), (e), (f) and (g) of Commission Regulation 2017/459. In this respect, the Polish regulatory authority expressed its agreement with the offer level for the incremental capacity amounting to 1,143,000 kWh/h/year, with the submitted timeline, with the agreement that no extended time horizon or the use of an alternative allocation mechanism were required, and also with the fact that GAZ-SYSTEM S.A. would not follow the fixed price approach. It also noted that under Article 8(9) of Commission Regulation 2017/459 it would approve the setting aside of 10% of incremental technical capacity. The Polish regulatory authority did not present any disagreement with the Proposal or any other comments, suggestions etc. in its opinion.

The Energy Regulatory Office adds to the above that on its own part, it transmitted its opinion to the Polish regulatory authority on 19 March 2021. In this opinion, it primarily commented on 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. It also noted in its opinion 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.

Neither of the two relevant regulatory authorities objected to the Proposal 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 has any detrimental impacts on competition or the effective functioning of the internal gas market in the Czech Republic, and has found that the project has been designed so that it uses market 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. This project will ensure direct bi-directional transmission capacity, having a volume required by the market, between two countries and this is regarded as the primary benefit of the project.

Via the bi-directional interconnection, gas suppliers will have access to new sources of gas, in particular LNG terminals and the gas fields in the North Sea. Due to its nature, the project can help to diversify gas sources and gas transport routes. This can boost business opportunities for gas traders and gas suppliers for final customers in the Czech Republic. It can therefore be expected that thanks to its nature, the project may have an indirect positive impact in terms of effects on wholesale gas prices and, potentially, in terms of increasing liquidity at gas trading platforms in the Czech Republic. The project increases the number of 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 also be expected in cases of gas shortages or surpluses in the Czech gas system.

At the same time, the project's f-factor that the party to these proceedings has proposed in its Proposal and that has been approved in the light of the project's benefit for gas supply to the Czech Republic, guarantees project implementation and also that the costs 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: this project can have positive impacts, in particular those in terms of access to new gas sources, the number of transport routes, the wholesale gas prices, and the security and stability of gas supply.

The Energy Regulatory Office did not find any reasons for withholding its approval of the Proposal and therefore on 20 April 2021, it delivered a decision approving the Proposal. On 3 May 2021, NET4GAS, s.r.o. lodged an appeal against the decision in a proper and timely manner; the appeal was an ordinary remedy in which the company claimed that in the Ruling of the decision, the Contract for Provision of Gas Transmission Service had not been explicitly approved as Annex 1 to the Application. In this respect it sought an amendment of the Ruling in the decision, using the procedure under Section 87 of the Rules of Administrative Procedure.

The first sentence of Section 87 of the Rules of Administrative Procedure lays down the following: "*The administrative authority that has delivered the impugned decision can revoke or amend the decision if it thereby fully grants the appeal and if this cannot cause damage to any of the parties, unless all of the parties concerned have expressed their consent.*"

In respect of the above the Energy Regulatory Office notes that the conditions arising from the above-cited provision have been met, since it is evident that the amended Ruling will fully grant the appeal and no damage will be caused to any other party to the proceedings, and the Energy Regulatory Office has therefore amended the Ruling by explicitly extending it to include "*specifically in the wording of the Application for the Approval of an Incremental Capacity Project under Article 28(1) NC CAM for the Border between Poland and the Czech Republic, including Annex 1 thereto, Contract for Provision of Gas Transmission Service*".

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 submitted 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 Polish regulatory authority's opinion.

The documents on file also clearly show that in compliance with above-cited Article 28(2) of Commission Regulation 2017/459, the relevant regulatory authorities consulted on the Proposal with each other and cooperated and coordinated for the purpose of achieving an agreement on the alternative allocation mechanism proposed. They have reached an agreement in relation to the Proposal, 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.* and Section 87 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 compliance with Article 28(1) Commission Regulation 2017/459, in the wording submitted to the Energy Regulatory Office by NET4GAS, s.r.o., on 30 October 2020, specifically in the wording of the Application for the Approval of an Incremental Capacity Project under Article 28(1) NC CAM for the Border between Poland and the Czech Republic, including Annex 1 thereto, Contract for Provision of Gas Transmission Service.

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 6 months of receipt of the complete project proposal by the last of the relevant regulatory authorities. With regard to the determination of the starting date of the period 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:

- The approved wording of the Application for the Approval of an Incremental Capacity Project under Article 28(1) NC CAM for the Border between Poland and the Czech Republic, including Annex 1 thereto, Contract for Provision of Gas Transmission Service (25 sheets)

Zuzana Altmannová
Authorised Official
Adversarial and Approval Proceedings Department

To: NET4GAS, s.r.o., through its legal representative Jan Basl