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[...] (2013) **XXX** draft

**COMMISSION OPINION**

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC - Spain - Certification of Enagás Transporte, S.A.U. (ETN gas network)**

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### I. PROCEDURE

On 1st August 2013, the Commission received a notification from the Spanish National Regulatory Authority, Comisión Nacional de Energía (hereafter, "CNE"), in accordance with Article 10(6) of Directive 2009/73/EC (hereafter, "Gas Directive"), of a draft decision on the certification of the company Enagás Transporte, S.A.U. (hereafter "Enagás Transporte") as Independent System Operator (ISO) for the gas transmission system owned by Enagás Transporte del Norte, S.L. (hereafter, "ETN").

Pursuant to Article 3(1) Regulation (EC) No 715/2009 (hereafter, "Gas Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of the Gas Directive.

### II. DESCRIPTION OF THE NOTIFIED DECISION

In its draft decision, CNE reviews whether all requirements for certifying a company as an ISO are met in this case, in the light of the provisions of the Spanish Law 34/1998 on the Hydrocarbon sector (hereafter, "Hydrocarbons Law"), as amended, implementing the Gas Directive.

Enagás Transporte is the owner of a network of about 10,000 km of gas pipelines and was certified as a TSO under the ownership unbundling model by decision of the CNE of 26 July 2012. Enagás Transporte was segregated from its mother company – Enagás, S.A. - to comply with a legal obligation in the Hydrocarbons Law.

ETN owns a gas pipeline network of 258 km of different diameters and with a pressure between 72 and 89 bar. This network is linked to a regasification plant and includes a cross-border interconnection to France, through Irún. The network is part of the Spanish main gas network (the so-called "red troncal") and therefore its system operator needs to be certified, either under the ownership unbundling model or under the ISO-model. The Hydrocarbon Law does not provide for the possibility of certification under the Independent Transmission Operator (ITO) model.

After assessment, the CNE concludes that all requirements are met for certifying Enagás Transporte as an ISO for ETN's gas pipeline network.

Article 9 Gas Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8) therein provides that, where on 3 September 2009 the transmission system belongs to a vertically integrated undertaking, a Member State may decide not to apply paragraph 1, provided that the Member State concerned designates an independent system operator in accordance with Article 14 of the Directive.

CNE concludes that Article 9(8) Gas Directive is applicable, because of the company's shareholders structure on 3 September 2009. To this end, CNE examines the situation of the owner of ETN's assets – Naturgas Energía - on that date:

- 66% EDP - Energias de Portugal, S.A., vertically integrated group active in power generation and in distribution and supply of power and gas,
- 30% EVE (Ente Vasco de la Energía), Energy agency of the Bask region, which in that date had interests in a vertically integrated gas company,
- 4% City Council of San Sebastián.

According to the draft decision, the company owning the network was re-named Naturgas Transporte, S.A.U. in 2012 and was then owned by EDP (90%) and EVE (10%). As from June 2013, following some statutory changes and capital increases, the company became Enagás Transporte del Norte, following the acquisition of 90% of the company by Enagás Transporte, while EVE holds the remaining 10%.

EVE is at present shareholder in several power generation companies, including among others the following:

- Bahía de Bizkaia Electricidad, S.L., owner of a 785 MW combined cycle gas fired power plant and of a regasification plant. EVE, Shell, Iberdrola and BP hold, each of them, 25% of the company (totalling 100%).
- Naturgás Energía Grupo, S.A. (10%), active in power generation and supply of electricity and gas.

In its preliminary decision, CNE concludes that Enagás Transporte and ETN satisfy the requirements of the ISO model. CNE considers that Enagás Transporte, as a certified ownership unbundled TSO, is in principle sufficiently independent to fulfil the requirements related to the system operator under the ISO model. CNE has also analysed whether the system owner – ETN – complies with the requirements applicable to a system owner under the ISO model. On this basis, CNE submitted its preliminary decision to the Commission requesting for an opinion.

### **III. COMMENTS**

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

#### **1. The Choice of the ISO-model**

The Commission notes that the present case, in which the Independent System Operator is to a very large degree owned and controlled by the same person as the System Owner, does not represent the typical background for which the ISO model was established, namely a situation whereby a vertically integrated energy company that was reluctant to sell its transmission assets could place their operation in the hands of a completely separate operator, thus preventing any conflicts of interests with regard to the network operation. This separation is absent in the present case.

The Commission is of the view that in the present situation a solution would be preferable whereby the remaining minor stake of EVE is transferred to Enagás Transporte, allowing for incorporation of the ETN Network into the larger Enagás Transporte network and operated by the ownership unbundled Enagás Transporte. This would result in lower administrative costs and a lower regulatory burden. The following comments should be seen against this background.

#### **2. Enagás Transporte as an ISO**

According to Article 14(2)(a) Gas Directive, the candidate independent system operator has to demonstrate that it complies with the requirements of Article 9(1)(b), (c) and (d) Gas Directive on ownership unbundling.

The Commission notes that CNE's draft certification decision does not analyse whether Enagás Transporte complies with such unbundling requirements, but limits itself to referring to the prior certification of this company under the ownership unbundling regime, which concerned the situation of its mother company and sole shareholder - Enagás, S.A. - and which imposed a number of changes to be made by 3 October 2012 at the latest in order to remove situations incompatible with the necessary independence of the TSO. CNE notified to the Commission a decision (“acuerdo”) adopted in April 2013 on the supervision of these requirements, according to which CNE is satisfied with the measures undertaken so far.

According to the draft decision, Enagás, S.A. shareholder structure on 1 July 2013 was as follows: Sociedad Estatal de Participaciones Industriales (“SEPI”) (5%), Oman Oil (5%), BBK (5%) and the remaining corresponds to floating capital. The decision does not explain in particular why BBK is referred to as a shareholder - replacing Kutxabank - and whether this has any impact in practice.

The Commission agrees with CNE that in principle the fact that a candidate ISO is already a certified ownership unbundled TSO is relevant for the assessment of its suitability as an ISO. However, in view of the changes that the Enagás-group has undergone over the past months, the Commission advises CNE to include in its final certification decision a detailed analysis of the present situation of Enagás Transporte and of its sole shareholder (Enagás, S.A.), including their possible participations in third companies.

Article 14(2)(b) of the Gas Directive determines that the candidate operator, *in casu* Enagás Transporte, must have at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 Gas Directive. Concerning the compliance by Enagás Transporte with the requirements in Article 14(2)(b) Gas Directive, the draft decision relies strongly on the undisputed experience of Enagás, S.A. as a TSO, making detailed reference to the financial resources of this group, as resulting from its aggregated financial statements for year 2012. The Commission is aware that, following the reorganization of Enagás group, the human and financial resources necessary for the transport business were transferred to the new company Enagás Transporte. For the sake of legal certainty and transparency towards ETN, the Commission considers it necessary for the final CNE decision to provide detailed figures on the resources and assets that were transferred to Enagás Transporte after its segregation from Enagás, S.A. and to the resources that this company intends to devote to the operation of ETN network.

### **3. The service contract between ETN and Enagás Transporte**

CNE considers that the draft service contract seems to satisfy the requirements imposed on the network owner by Article 14(5) Gas Directive, but reserves its final assessment, which will be made in a separate administrative procedure for approval of the service contract. Under the ISO model the terms and conditions of the contract between the system operator and the system owner is of fundamental importance as it determines the competences and tasks of the operator and hence the extent of its independence. Moreover, it can be deduced from the contract whether the system owner is obliged to honour all the requirements of Article 14(5) Gas Directive. The draft contract has not been shared with the Commission in the context of the certification procedure. The Commission therefore relies on CNE's assessment of the contract and strongly urges CNE not to take a final decision on the certification before the assessment of the draft contract has been finalised.

#### **4. Legal and functional unbundling of ETN**

Under Article 15(1) Gas Directive, where an independent system operator has been appointed, the transmission system owner shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage. Article 15(2) lays down some minimum criteria to guarantee such independence, which refer to the decision making process and the obligation for the transmission system owner to establish a compliance programme aiming at excluding discriminatory conduct. The Commission notes that the draft decision of CNE does not assess ETN's compliance with Article 15 Gas Directive, which should however be addressed in the final certification decision.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) Gas Regulation, CNE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Enagás Transporte, S.A.U., 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. CNE 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*