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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(6) of Directive
2009/73/EC - Germany - Certification of Open Grid Europe GmbH**

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I. PROCEDURE

On 31 July 2013, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of Open Grid Europe GmbH (hereafter, "OGE") as a Transmission System Operator (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 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

OGE operates an 11.400 km long gas transmission network covering large parts of Germany. In September 2012, OGE was sold by the then vertically integrated energy incumbent E.ON to a consortium under the name of 'Vier Gas Holding S.à.r.l.', which, via various subsidiaries, is the full owner of OGE. The Vier Gas consortium is led by the Australian investor Macquarie Group Limited and MEAG Munich ERGO Investments (together holding 42.9% of the shares), Infinity Investments from Abu Dhabi (24.9%) and finally, the British-Columbian Investment Management Corporation (32.2%).

In order to comply with the applicable rules on unbundling of transmission system operators, OGE has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to OGE under the German legislation transposing the Gas Directive, i.e. the Energiewirtschaftsgesetz (hereafter, "EnWG")³.

Article 9 Gas Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009 the transmission system belonged to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter IV, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

Bundesnetzagentur has analysed whether and to what extent OGE complies with the unbundling rules of the ITO model as laid down in the EnWG. Bundesnetzagentur has come to the preliminary conclusion that OGE complies with these requirements, provided that

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.

³ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

fourteen conditions are fulfilled. The draft certification decision of OGE is hence issued subject to the following conditions:

"a) No later than six months after certification is issued, the applicant is obliged to ensure that it is given either direct or indirect ownership of the Thyssengas GmbH Longerich measurement and control plant, the capacities of which it uses in accordance with the agreement of 18 October/24 October 2001, or that it is given such control over the property transferred to it that its status is comparable to that of an owner, i.e. the agreements are worded in such a way that the applicant is able to act both legally and *de facto* in a manner comparable to that of an owner.

b) By 31 December 2013, the applicant is obliged to ensure that it is granted, by means of a contract, either direct or indirect ownership of the Heidenau-Achim pipeline of Gasunie Deutschland Transport Services GmbH, or that it is given such control over the property transferred to it that its status is comparable to that of an owner, i.e. the agreements are worded in such a way that the applicant is able to act both legally and *de facto* in a manner comparable to that of an owner.

c) By 31 December 2013, the applicant is obliged to ensure that it is given either direct or indirect ownership of the Thyssengas GmbH pipeline sections, the capacities of which it uses and markets in accordance with the agreement of 14 February/23 February 2012 or that it is given such control over the property transferred to it that its status is comparable to that of an owner, i.e. the agreements are worded in such a way that the applicant is able to act both legally and *de facto* in a manner comparable to that of an owner.

d) By 31 December 2013, the applicant is obliged to ensure that it is granted, by means of a contract, either direct or indirect ownership of the Emsbüren-Rheine pipeline of Gasunie Deutschland Transport Services GmbH, or that it is given such control over the property transferred to it, so that its status is similar to that of an owner, i.e. the agreements are worded in such a way that the applicant is able to act both legally and *de facto* in a manner comparable to that of an owner.

e) The applicant is obliged not to extend the existing usage agreement of 5 August/6 August 2008 it has with E.ON Gas Storage GmbH for the Etzel-Emden pipeline beyond 31 December 2018, the date on which the contract may be terminated.

f) The applicant is obliged not to extend the existing usage agreement of 28 September 2007 it has with Stadtwerke Karlsruhe GmbH for the Badenwerk pipeline beyond 30 September 2014, the date on which the contract may be terminated.

g) The applicant is obliged to terminate the transport agreement of 29 March/3 November 2005 it has with Erdgastransportgesellschaft Thüringen-Sachsen mbH no later than 1 October 2018.

h) By 31 December 2014, the applicant is obliged to cancel the capacity reservations it has with N-ERGIE Netz GmbH, Gas-Union Transport GmbH, Gasunie Deutschland Transport Services GmbH, Thyssengas GmbH, Stadtwerke Delmenhorst GmbH and Stadtwerke Neustadt am Rübenberge GmbH & Co. KG, as referred to in Section 3.1.4(c) of the agreement of 19 September 2012.

i) The provision in the second paragraph of Section 1 of the profit and loss transfer agreement between the applicant and Vier Gas Transport GmbH under which revenue reserves may be released at the request of Vier Gas Transport GmbH

and the provision in the third paragraph of Section 1 of the profit and loss transfer agreement under which the formation of revenue reserves requires the consent of Vier Gas Transport GmbH must be deleted within six months of certification being issued.

j) Within six months of certification being issued, the rule in Section 6.2(b) of the applicant's company agreement must be revoked in so far as it authorises the supervisory board to appoint authorised representatives in respect of the business' entire operations. Furthermore, the rule in Section 9.4 of the applicant's company agreement authorising the supervisory board to adopt rules of procedure for the management of the applicant is to be removed within six months of certification being issued.

k) The applicant's compliance officer is obliged to participate in the shareholders' committee meetings as well as the briefings for the individual supervisory board meetings. Minutes, a summary record or similar proof of the matters covered by the shareholders' committee meetings and briefings for the individual supervisory board meetings should be drafted following each meeting or briefing and submitted directly to the ruling chamber.

l) Within six months of certification being issued, the applicant is obliged to submit the financial plans for 2013 and 2014, duly approved by the supervisory board in accordance with the second paragraph of Section 10(d) EnWG, and the investment plans for the years 2013 to 2017 as proof that resources are guaranteed for the transport network in the short to medium term.

m) Within six months of certification being issued, the applicant is obliged to provide evidence that the remuneration of the two authorised signatories is not dependent on the economic success or, in particular, on the operating result of the vertically integrated energy utility or any of its subsidiaries, with the exception of the independent transport network operator.

n) The applicant is obliged to nominate a new compliance officer by 31 August 2013 and to submit this appointment and the remit or terms of employment to the ruling chamber for approval. Alternatively, the full power of attorney of the current compliance officer is to be surrendered by 31 August 2013 and his/her remit or terms of employment are to be submitted for approval."

On this basis, Bundesnetzagentur has submitted its draft 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. 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"). The Commission agrees with Bundesnetzagentur that in the present case the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Ownership of the network

Article 17(1)(a) Gas Directive requires that the TSO owns the assets necessary for the activity of gas transmission, including the transmission system it operates. It appears from Bundesnetzagentur's draft decision that OGE owns the largest part of the transmission system it operates, with the exception of a number of pipelines or parts of pipelines that it co-owns with other network operators.

The Commission has taken the view that under certain circumstances, co-ownership ("Bruchteilseigentum") of a pipeline may be sufficient to comply with Article 17(1)(a) Gas Directive. However, if the co-owner of the pipeline does not have the same degree of independence from production and supply interests as the TSO which co-owns the pipeline and which seeks to be certified as an ITO, compliance with Article 17(1)(a) Gas Directive cannot be ensured.

The partner operators of OGE have to a large extent already been certified by Bundesnetzagentur over the last year and the Commission has commented on the compliance of the various ownership structures in multiple opinions.⁴ However, in the following cases, the Commission finds that additional comments are necessary.

The Etzel-Emden Pipeline

The Etzel-Emden pipeline connects the interconnection point of Emden with the gas storage facility of Etzel. The pipeline is currently owned by the operators of the Etzel gas storage facility: E.On Gas Storage GmbH [BUSINESS SECRET], Statoil Deutschland Storage GmbH [BUSINESS SECRET] and Total Etzel Gaslager GmbH [BUSINESS SECRET]. OGE currently leases the usage rights from E.On Gas Storage for the use of the approximately 75% of the pipeline. The leasing contract runs until 31 December 2018. The remaining usage rights are held by Statoil Deutschland Storage GmbH and Total Etzel Gaslager GmbH. In summary, at present a situation exists in which OGE operates, together with other parties not being TSOs, a transmission pipeline which it does not own, but which is part of its transmission grid.

According to the preliminary decision by Bundesnetzagentur however, it is envisaged by the parties involved that in the near future a durable solution is found whereby OGE would acquire ownership over the portion of the pipeline it currently leases and Statoil Deutschland Storage GmbH would become the owner of the remaining part of the pipeline forming a co-ownership ("Bruchteilseigentum") with OGE.

In its preliminary decision Bundesnetzagentur takes the view that the envisaged future solution, whereby a storage system operator and a transmission system operator co-own and operate a transmission line, is in principle compatible with the unbundling rules as laid down in the EnWG. Should the envisaged solution fail, then Bundesnetzagentur orders that condition e) as quoted above enters into force, obliging OGE not to extend its usage agreement beyond 31 December 2018.

The Commission takes the view that the current set-up is not in line with the requirements of Article 17(1)(a) Gas Directive. As underlined by the Commission in other certification

⁴ See:

- 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

opinions, co-ownership of a pipeline may be sufficient to comply with Article 17(1)(a) Gas Directive, provided, however, that the co-owners are at least as independent as the applicant TSO.⁵ Moreover, the Commission does not agree with Bundesnetzagentur that the envisaged future set-up which would result in a co-ownership between Statoil Deutschland Storage GmbH and OGE would be compatible with the ITO-model. The Commission recalls that the framework ensuring the unbundling and independence of operators of storage facilities (the respective parts of Article 15 Gas Directive) is not as strict as it is for transmission system operators. Moreover, in the present case the proposed co-owner is part of the same group of undertakings that is responsible for the production of gas that enters Germany through this very pipeline and that owns and operates a significant proportion of the Etzel gas storage facility. The Commission therefore also disagrees with the condition imposed by Bundesnetzagentur which allows the status quo to persist until 2018.

The Commission calls upon Bundesnetzagentur, in cooperation with the relevant private actors, to pursue a solution whereby the ownership of the Etzel-Emden pipeline is transferred to certified TSOs only. The Etzel-Emden pipeline is a regulated pipeline that is part of an entry-exit zone and its users should be treated equally. Where existing contracts are in place, a solution needs to be found that is in line with the current legal framework, as well as proportionate and reasonable with regard to holders of existing contracts.

The Ronneburg-Vitzeroda Pipeline

Similar to the situation of the Etzel-Emden pipeline, also in the case of the Ronneburg-Vitzeroda Pipeline Bundesnetzagentur allows a situation to persist until 2018 whereby OGE merely uses this pipeline which is owned by Erdgastransportgesellschaft Thüringen-Sachsen mbH (hereafter, "ETG"). Despite the fact that efforts are being made between the two parties to agree on the acquisition of the pipeline by OGE, disagreements on the selling price have so far obstructed a purchase agreement.

The Commission notes that ETG is not a certified TSO and that hence the present situation is in violation of the ITO-rules. A solution needs to be found whereby either OGE acquires ownership over the pipeline or whereby the current owner obtains operatorship in accordance with the unbundling rules. It is not acceptable to allow the current situation to remain in place until the end of 2018. A solution must be found that is compatible with the legal framework and at the same time proportionate and reasonable with regard to holders of existing contracts.

3. Contracts for services provided to the ITO by other parts of the VIU

Article 17(1)(c) Gas Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not dependent on other parts of the VIU, contracting of services to the ITO by any other part of the VIU is prohibited by the Gas Directive. In its opinion on French gas TSO GRTgaz⁶, the Commission considered that in view of the general prohibition of services provided to the ITO by other parts of the VIU, a derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO, could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional

⁵ Commission Opinion on BNetzA's draft certification decision for GRTgaz Deutschland GmbH, 6 September 2012, C(2012)6257

⁶ Commission Opinion of 25.11.2011 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - France - Certification of GRTgaz

nature, limited in time. In addition, it should be ensured that transactions between other parts of the VIU and the ITO occur at arm's length in order to avoid cross subsidisation.

In the present case, Vier Gas Services GmbH & Co. KG carries out two services for OGE: the high-precision verification and calibration of gas meters and the help with outages. Vier Gas Services GmbH & Co. KG is the 100% mother company of Vier Gas Transport GmbH, which in turn is the 100% mother of OGE. Vier Gas Services GmbH & Co. KG is a 100% daughter company of Vier Gas Holding S.à.r.l., the shares in which are ultimately held by the four parties forming the consortium.

Bundesnetzagentur considers these services permissible because Vier Gas Services GmbH & Co. KG should be seen as part of a pure holding company that does not carry out any of the functions of generation or supply of natural gas or electricity and, hence, falls outside of the definition of the VIU. The Commission disagrees with this approach. The ITO-model is based on the assumption that specific governance and behavioural rules ensure the independent operation of a specific part of the VIU, the ITO, which carries out the transmission activity and which owns the transmission system. The rules also make sure that the VIU is limited in its possibilities to interfere with the transmission business, which are essentially confined to the overseeing powers of the Supervisory Body. Thus, the definition of the VIU encompasses the entire economic unit or group structure to which the ITO belongs. This is also evident from the definition of a "vertically integrated undertaking" in Article 2(20) Gas Directive which includes, in a broad manner, a "group of gas undertakings". If this were not the case, the unbundling rules could be easily circumvented by creating daughter companies to which the unbundling rules would not apply.

The Commission is of the view that Vier Gas Services GmbH & Co. KG is hence part of the VIU and is in principle not allowed to carry out services for OGE. It does not become clear from the preliminary decision what the reasons are for Vier Gas Services GmbH & Co. KG carrying out these services and, therefore, it is not possible to assess whether a derogation of the general rule could be justifiable in the present case. In principle however, tasks that are not closely related to the transmission activity raise less of a concern, because in such cases the risk of compromising the independent network operation is small. In the present case, this means that it is especially relevant to assess the support with outages that Vier Gas Services GmbH & Co. KG provides to OGE. The Commission invites Bundesnetzagentur to assess what the reasons are for OGE not being able to carry out this task and on the basis of that decide whether or not a derogation from the general rule can be considered.

4. Independence of the ITO

Article 18(1)(a) Gas Directive provides that the ITO shall have effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain and develop the transmission system. According to Article 18(4) Gas Directive, the overall management structure and corporate statutes of the TSO should ensure its effective independence. In particular, any other part of the vertically integrated undertaking is not allowed to determine, directly or indirectly, the competitive behaviour of the ITO in relation to the day-to-day activities and management of the network, or in relation to activities of the ITO necessary for the preparation of the ten-year network development plan (Article 18(4) Gas Directive).

In this context, the so-called Shareholder Coordination meetings, which are held regularly between OGE and the VIU, are to be closely monitored by the compliance officer and the Bundesnetzagentur as such meetings have the potential of compromising the independence of the ITO's management and increase the risk of unlawful interference of the VIU with the transmission activity. The Commission considers that the appropriate forum for meetings

between the ITO and the VIU is the Supervisory Body. Article 20 Gas Directive provides that the decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day-to-day activities of the ITO and management of the network, as well as those related to activities necessary for the preparation of the ten-year network development plan.

The Commission agrees with Bundesnetzagentur's approach in this matter which is laid down in condition k) quoted above. It in short obliges the compliance officer to participate in such meetings and to submit minutes and briefings for such meeting to Bundesnetzagentur. The Commission invites Bundesnetzagentur however to make clear what the consequences will be when the discussions in the Shareholder Coordination meetings go beyond what is acceptable under the ITO-rules.

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 OGE, 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