

## **Supplementary Terms and Conditions of Business of Fluxys Deutschland GmbH for allocating new technical capacities as of 06 March 2017**

(„STC“)

Valid as of 06 March 2017

*This document is a convenience translation of the German original. In case of discrepancy between the English and the German versions, the German version shall prevail.*

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These Supplementary Terms and Conditions of Business define provisions that supplement or differ from the General Terms and Conditions of Service of Fluxys Deutschland GmbH (“transmission system operator”) in the version dated 01 October 2016 governing new technical capacities at the cross border points listed in Appendix 1 of these Supplementary Terms and Conditions of Business in accordance with Article 2 Section 3 of Commission Regulation (EU) No. 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council, in the version applicable on October 1, 2016.

## **Article 1 General, scope**

1. In addition to the procedure for the Network Development Plan Gas 2016, the transmission system operators GASCADE Gastransport GmbH (“GASCADE”), Gasunie Deutschland Transport Services GmbH (“Gasunie”) and ONTRAS Gastransport GmbH (“ONTRAS”) jointly carried out a market survey from 21 August until 16 October 2015 under the name “more capacity” to determine the need for new transport capacities for high calorific natural gas at the boundaries of the GASPOOL market area. The aim of the market survey was to be able to estimate the future need for new cross-market-area transport capacities as early and as realistically as possible. Fluxys Deutschland GmbH has been involved in the “more capacity” project since April 2016; NEL Gastransport GmbH (“NGT”) has also been involved in it since July 2016. Offering levels have been derived from the non-binding demand for cross-market-area capacities determined on the basis of the survey. The new technical capacities determined in the above manner are to be allocated in capacity auctions.
2. The new technical capacities will not exist at the time the capacity auctions are held, and the transmission system operator has not made a final decision on network expansion measures to create the new technical capacities (hereinafter referred to as “network expansion”). Creation of the new technical capacities depends in particular on all necessary permissions for network expansion and operation of the network being obtained, as well as on the regulatory framework and the permissions required in this regard. In view of the above, Article 2 Sections 3 and 4 of the current version of the cooperation agreement and Article 1 Section 5 of the transmission system operator’s General Terms and Conditions of Service specify that the transmission system operators can conclude in their Supplementary Terms and Conditions of Business arrangements for new technical capacities which supplement or differ from their General Terms and Conditions of Service.

3. As long as no provisions that supplement or differ from the General Terms and Conditions of Service are concluded in these Supplementary Terms and Conditions of Business, the General Terms and Conditions of Service of the transmission system operator shall otherwise apply to the new technical capacities.
4. Definitions:
  - a. New technical capacities: New technical capacities at cross border points in accordance with Article 2 Section 3 of Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council, in the version applicable on 1 October 2016 (“NC CAM”).
  - b. Existing capacities: Available capacities in accordance with Article 2 Section 1 No. 20 of 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 at the time of the 2017 annual auction, not including the new technical capacities.
  - c. Performance period of the entry or exit contract: The period of time for which the contractual rights and obligations of the transmission system operator and the transport customer apply in accordance with Articles 3 and 4 of the transmission system operator’s General Terms and Conditions of Service.

## **Article 2 Marketing horizon**

1. New technical capacities shall be offered for a period of up to 25 years as of the anticipated commissioning of the underlying network expansion measures.
2. In deviation from Article 2 Section 1, new technical capacities shall be offered at cross border points in accordance with Article 11 NC CAM to the extent that a bundled capacity product is formed with the new technical capacities and this product does not represent a new technical capacity in accordance with Article 2 Section 3 NC CAM on the part of the neighboring transmission system operator.

## **Article 3 Conclusion of contracts**

1. The entry or exit contract relating to new technical capacities between the transport customer and the transmission system operator shall be formed by

allocation of the capacities in accordance with Article 1 Section 2 of the transmission system operator's General Terms and Conditions of Service. Subject to the provisions in Section 3 of this Article 3 and contrary to Article 1 Section 2 of the transmission system operator's General Terms and Conditions of Service, the entry or exit contract shall be fully effective subject to the condition precedent that the following conditions a) to e) are met cumulatively:

- a) Upon completion of the respective auctions for new technical capacities on the primary capacity platform, all offered standard capacity products of the existing capacities with an equivalent or higher quality at the cross border points have been marketed across the transmission system operators in the respective flow direction (existing capacities are booked out with priority). The existing capacities of OPAL Gastransport GmbH shall be exempt from booking out with priority.
  - b) As part of an economic assessment based on the entry and exit contracts concluded subject to the condition precedent, the transmission system operator has determined that the measures to create new technical capacities for an offering level are cost-effective.
  - c) All necessary regulatory permissions for capacity allocation for the new technical capacities have been obtained.
  - d) The costs of the expansion measures required for creating the new technical capacities have been acknowledged by the regulatory authorities.
  - e) The transmission system operator's management has agreed to the expansion of the network. Management shall not deny this consent arbitrarily or for irrelevant reasons.
2. If one or more of the conditions in Section 1 a) to e) of this Article 3 are not met by 30 June 2019 or the entry or exit contract has not been declared fully effective by the transmission system operator in accordance with Article 3, they shall be regarded as not having occurred and the entry or exit contract shall become definitively ineffective.
  3. Regardless of the occurrence or non-occurrence of one or more conditions in accordance with Section 1 a) to e) of this Article 3, the transmission system operator shall be authorized at any time to decide by 30 June 2019 that the entry or exit contract shall be fully effective.
  4. The transmission system operator shall give the transport customer written notice of the occurrence or non-occurrence of the conditions in accordance with Section 1 a) to e) or in accordance with Section 3 of this Article 3. With regard to the conditions in Section 1 a), the information shall be provided no later than 30 June 2017, with regard to Section 1 b), the information shall be provided no

later than 28 February 2018, with regard to Section 1 c), the information shall be provided no later than 31 August 2017, and with regard to Section 1 d) and Section 1 e), the information shall be provided no later than 30 June 2019.

5. The transmission system operator shall give the transport customer written notice that the entry or exit contract is fully effective immediately after the occurrence of the conditions in accordance with Section 1 a) to e) of this Article 3 or in accordance with Section 3 of this Article 3.
6. If one or more conditions in accordance with Section 1 a) to e) of this Article 3 do not occur or the transmission system operator exercises its special right of termination in accordance with Article 7 Section 1, all and any claims for liability against the transmission system operator shall be excluded.
7. The capacity allocation of the auctions shall be published by the transmission system operator in aggregated form after the end of the auctions, taking into account the need to keep business and trade secrets confidential. Transport customers who take part in the capacity auctions shall receive separate confirmations of the respective capacity allocation of the capacity auctions from the transmission system operator.

#### **Article 4 Auction process**

1. New technical capacities shall be marketed in accordance with the terms and conditions of business of the primary capacity platform. The terms and conditions of business shall be published by the platform operator on its website.
2. As part of the auctions on the primary capacity platform, multiple auctions per cross border point for similar capacity products can be held simultaneously for new technical capacities in order to present multiple offering levels. Without prejudice to the provisions in Article 3, only the entry or exit contract that corresponds to the highest offering level for which the transmission system operator has determined the cost-effectiveness of the expansion measure in accordance with Article 3 Section 1 b) shall become effective. The transmission system operator shall cancel the other allocations by giving the transport customer written notice.

#### **Article 5 Tariffs**

1. The transmission system operator shall generally charge variable tariffs for the new technical capacities in accordance with Article 5 Section 2. The transmission system operator shall examine whether and to what extent charging fixed tariffs instead of variable tariffs can be applied. Legal and regulatory permissibility, and necessary official permissions, in particular the approval of fixed tar-

iffs by the Federal Network Agency, are requirements for the potential charging of fixed tariffs by the transmission system operator. Furthermore, the charging of fixed tariffs must be at least equivalent for the transmission system operator in economic terms to charging variable tariffs. If the aforementioned requirements are met, the transmission system operator may specify by the end of 31 December 2017 for each cross border point that fixed tariffs are applied instead of variable tariffs in accordance with Article 5 Section 2. If the transmission system operator does not specify by the end of 31 December 2017 that fixed tariffs are to be applied, variable tariffs shall continue to apply in accordance with Article 5 Section 2. The transmission system operator shall notify the transport customer immediately as soon as it has been established that fixed tariffs will be charged.

2. Article 25 of the transmission system operator's General Terms and Conditions of Service shall apply both for charging variable tariffs and for charging fixed tariffs subject to the provision that the Parties
  - a) agree variable and/or fixed tariffs for the performance period of the entry or exit contract in each case from 1 October to 31 December. The tariffs as defined here are the variable and/or fixed tariffs that are formed in future in accordance with regulatory requirements or are approved in future by the regulatory authorities, as well as the other tariffs or tariff components stated in Article 25 Section 1 of the General Terms and Conditions of Service and any future cost allocations that will apply in each case on 1 October of a year in the respective performance period of the entry or exit contract according to the price sheet published on the transmission system operator's website; and
  - b) agree variable and/or fixed tariffs for the performance period of the entry or exit contract in each case from 1 January to 30 September. The tariffs as defined here are the variable and/or fixed tariffs that are formed in future in accordance with regulatory requirements or are approved in future by the regulatory authorities, as well as the other tariffs or tariff components stated in Article 25 Section 1 of the General Terms and Conditions of Service and any future cost allocations that will apply in each case on 1 January of a year in the respective performance period of the entry or exit contract according to the price sheet published on the transmission system operator's website.
  - c) Without prejudice to the provisions in Sections 2 and 3 of Article 7, Article 25 Section 3 Sentence 1 and Article 4 of the transmission system operator's General Terms and Conditions of Service shall not apply in the cases specified in a) and b) since price adjustments are not involved.
3. As part of the auction, the specific capacity tariff currently applying at the time of the auction and formed in accordance with regulatory requirements shall be used. However, use of the specific capacity tariff in accordance with Sentence

1 shall not constitute an agreement on the tariffs and shall say nothing about the level of the actually agreed tariffs to be charged for the performance period of the entry or exit contract in accordance with Section 1 of this Article 5. There is consequently no price adjustment within the meaning of Article 25 Section 3 Sentence 1 and Section 4 of the transmission system operator's General Terms and Conditions of Service.

## **Article 6 Rights and obligations of the transmission system operator and the transport customer**

1. Prior to the expiry of the deadline for the special right of termination in accordance with Article 7 Section 1, or until the transport customer prematurely waives the special right of termination in accordance with Article 7 Section 1, the transmission system operator shall not be obliged to take measures to provide new technical capacities. Following expiry of the deadline for the special right of termination in accordance with Article 7 Section 1, or after the transport customer has prematurely waived the special right of termination in accordance with Article 7 Section 1, the transmission system operator shall endeavor to take economically justifiable measures to ensure that the capacities allocated to the transport customer are made available in good time for the performance period of the entry or exit contract. In particular, the full scope of the waiver of all transport customers of the special right of termination in accordance with Article 7 Section 1, in relation to the allocated new technical capacities in accordance with Article 3 Section 1 Sentence 1 per cross border point for the respective performance periods of the entry or exit contracts, shall be taken into account in assessing whether the measures are economically justifiable within the meaning of Section 1. Overall, the transport customers' waiver of the special right of termination in accordance with Article 7 Section 1 has to occur at least to the extent that it would enable the transmission system operator to determine the cost-effectiveness of the new technical capacities of an offering level offered in the 2017 annual auction in accordance with Article 3 Section 1 b). In addition, the status of the necessary permissions under public law and the regulatory framework shall be taken into account, especially the regulatory approval of the costs of the required expansion measures needed for the creation of the new technical capacities, mandatory for the economical justification of the transmission system operator, shall be taken into consideration. To the extent that the transmission system operator is not required to endeavour to implement measures or in the case of measures not being economically justifiable, the performance period of the respective entry- or exit contract can be affected and Article 6 Section 3 will be applicable *mutatis mutandis*. If it is requested by the transport customer, the transmission system operator will re-



view possible measures to provide the new technical capacities at an earlier date to reduce the postponement of the performance period of the respective entry- or exit contract. For this purpose the transmission system operator can submit an offer to the transport customer in which the transport customer would have to accept the costs, responsibilities and risks of the measures required for the new technical capacities in case the conditions precedent in accordance with Article 3 Section 1 do not come to bear or the special right of termination in accordance with Article 7 Section 1 has been exercised by the transport customer.

2. Furthermore, the transmission system operator shall, once the entry or exit contract has become fully effective in accordance with Article 3, endeavor to take all economically justifiable measures in order to coordinate the commissioning of the infrastructure for the new technical capacities with the upstream or downstream network operators at cross border points. In particular, the necessary permissions under public law and the regulatory framework shall be taken into account in assessing whether the measures are economically justifiable within the meaning of Section 2.
3. If in the course of the network expansion that falls under the responsibility of the transmission system operator it turns out that the new technical capacities at the cross border points cannot be created to the beginning of the performance period of the entry or exit contract, in particular due to the lack of definitive permissions under public law, the transmission system operator shall notify the transport customer immediately and inform it whether and when the start of the performance period of the entry or exit contract can be expected. The delay may also cover the entire performance period of the entry or exit contract. During the delay both the transmission system operator's obligations to provide capacities and the transport customer's obligations to pay tariffs shall be suspended. Any further claims by the Parties against each other shall be excluded.
4. If transport capacities upstream or downstream of the cross border points of the transmission system operator are not available at the start of the performance period of the entry or exit contract, the transport customer shall still be obliged to fulfill the contract, in particular to pay the tariffs agreed in the entry or exit contract, and shall not be authorized to rescind or otherwise terminate the entry or exit contract.
5. In relation to Section 4, that shall mean in particular that the transport customer shall not be authorized to plead Article 313 of the German Civil Code (*BGB*) (Interference with the basis of the transaction) or Article 314 *BGB* (Termination for a compelling reason of contracts for the performance of a continuing obligation).

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## Article 7 Special right of termination

1. The transport customer and the transmission system operator shall be entitled to terminate the entry or exit contract until the end of 31 January 2018 with immediate effect ("special right of termination in accordance with Article 7 Section 1"). Provided that the transport customer prematurely waives its special right of termination in accordance with Article 7 Section 1 for all performance periods of the entry or exit contracts of new technical capacities at the respective cross border point, the provisions of Article 6 Section 1 Sentence 2 shall apply. In the event of a premature waiver of the special right of termination in accordance with Article 7 Section 1 by the transport customer, the transmission system operator shall also waive its special right of termination in accordance with Article 7 Section 1.
2. The transport customer shall be authorized to terminate the entry or exit contract, provided that variable tariffs are applied for it, after publication of the variable tariffs by the transmission system operator for the respective performance period in accordance with Article 5 Section 2 a) and b) of these Supplementary Terms and Conditions of Business with a period of notice of 10 working days to the respective start of the period as of when the tariffs apply, if the specific capacity tariff formed and agreed in accordance with Article 5 Section 2 a) and b) of these Supplementary Terms and Conditions of Business exceeds the maximum tariff limit defined for the performance period in accordance with Appendix 1 of these Supplementary Terms and Conditions of Business. The special right of termination in accordance with Sentence 1 shall exist solely in relation to the respective performance period of the entry or exit contract in accordance with Article 5 Section 2 a) and b) to which the published tariffs apply.
3. The transport customer can terminate the respective entry or exit contract in relation to the performance period that can be terminated in accordance with Section 2 in full or in part in accordance with the level of the capacity booking. A partial termination in accordance with Sentence 1 shall be permitted only as a uniform reduction of the originally booked capacity for the respective performance period in accordance with Article 5 Section 1 a) and b).