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Publishing date: 28/01/2013

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OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS No 01/2013

of 25 January 2013

ON THE NETWORK CODE ON GAS BALANCING OF TRANSMISSION NETWORKS

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (hereinafter referred to as the 'Agency')[1], and, in particular, Articles 6(4) and 17(3) thereof;

HAVING REGARD to 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[2], and, in particular, Article 6(7) thereof;

HAVING REGARD to the Agency's Framework Guidelines FG-2011-G-002 on Gas Balancing in Transmission Systems of 18 October 2011;

HAVING REGARD to the favourable opinion of the Board of Regulators of 24 January 2013, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

1) Since 2003, gas balancing rules have been identified as a priority topic by the European Commission, stakeholders and regulators at several Madrid Fora. The Agency became operational on 3 March 2011 and, having received the European Commission's invitation on 13 April 2011, started the formal process for developing the Framework Guidelines on Gas Balancing in Transmission Systems[3] (the 'Framework Guidelines'), that were adopted by the Agency on 18 October 2011.

2) On 4 November 2011, the European Commission, in consideration of the Framework Guidelines' contribution to non-discrimination, effective competition and the efficient functioning of the gas market, invited the European Network of Transmission System Operators for Gas (ENTSOG) to establish a Network Code on gas balancing in transmission systems within 12 months.

[1] OJ L 211, 14.8.2009, p.1
[2] OJ L 211, 14.8.2009, p.36
[3] FGB-2011-G-002

3) In drafting the Network Code, ENTSOG has endeavoured to involve stakeholders extensively and in a transparent process by organising several "Stakeholders Joint Working Sessions" (SJWS), workshops, and public consultations.

4) Throughout the whole process, ENTSOG has closely cooperated with the Agency. ENTSOG published a draft Network Code on gas balancing in transmission systems for public consultation on 13 April 2012. To assist ENTSOG in the finalisation of the Network Code, the Agency evaluated the draft Network Code's compliance with the Framework Guidelines and informally submitted a detailed preliminary Reasoned Opinion to ENTSOG on 14 June 2012. In its letter of 2 October 2012 to ENTSOG, the Agency reiterated ten main areas in respect to which the meanwhile amended draft Network Code was not fully compliant with the general objectives of Regulation (EC) No 715/2009 and with the Framework Guidelines.

5) ENTSOG officially submitted the Network Code on Gas Balancing of Transmission Networks (the 'Network Code') to the Agency and to the European Commission on 26 October 2012, in which ENTSOG addressed also most of the Agency's concerns expressed in the letter of 2 October 2012.

6) According to Paragraph 1.2 of the Framework Guidelines, the Network Code has been evaluated on the basis of the degree of compliance with the Framework Guidelines and the fulfilment of the objectives as set out in Chapter 1.3 of the Framework Guidelines. These include the promotion of harmonised balancing regimes in order to encourage and facilitate gas trading across systems and to support the development of competition in the EU, both between Member States and within each Member State, and thereby to move towards greater market integration. The Framework Guidelines' objectives also refer to Article 21 of Regulation (EC) No 715/2009 which requires that balancing regimes are market based,

HAS ADOPTED THE PRESENT REASONED OPINION:

The Network Code on Gas Balancing of Transmission Networks submitted by ENTSOG to the Agency on 26 October 2012 shows a high degree of compliance with the Agency's Framework Guidelines (FG-2011-G-002) on Gas Balancing in Transmission Systems of 18 October 2011, since the fundamental principles of the Framework Guidelines have been further elaborated and implemented in the Network Code. Notably, the introduction of a market-based and harmonised daily balancing regime, the clearly set out and shared balancing responsibilities between transmission system operators (TSOs) and network users, the TSO neutrality principle, the harmonised regimes for (re-)nominations, imbalance charges, within-day obligations and information provision are important steps to facilitate cross-border gas trade and the further development of competitive and efficient gas wholesale markets in Europe.

The stakeholder engagement process carried out by ENTSOG has been commendable with regard to transparency and comprehensiveness. ENTSOG's efforts in this process to align the

Network Code to the Framework Guidelines taking most of the Agency's and stakeholders' views and expectations into account are much appreciated.

Notwithstanding the above, some particular articles of the Network Code could be brought further into line with the provisions of the Framework Guidelines as well as with the objectives set out therein or in Regulation (EC) No 715/2009.

1. Partial acceptance of (re)nominations (Art. 23 / 24)

Section 4.3 of the Framework Guidelines specifies that "If not covered by other legal obligations, the network code on gas balancing shall set out criteria for nomination and renomination procedures to be harmonised at both sides of the border at interconnection points and consistently across Europe". During the Network Code development process, the Agency clarified (on 2 February 2012) that "given its significance, [the] stakeholder feedback and [the fact] that the harmonisation of nomination regimes has not been covered in other legal obligations, [the Agency] invites ENTSOG to include nomination rules in the Balancing [Network Code]", and that the Agency "would expect this to result in a proposal for harmonised renomination and nomination rules and lead times."

The Network Code contains provisions for a harmonised nomination regime. Additionally, Article 23(4) and 24(2 b) of the Network Code provide the TSO the right to amend the gas quantity requested to flow (or reject the submitted nominations and re-nominations). In Article 23(4) the only restriction is that this curtailment/amendment must be in accordance with national rules or legally binding agreements between the TSO and Network Users.

As these provisions may undermine the firmness of capacity as well as the goal of cross-border consistency and may therefore negatively impact on the promotion of competitive markets and, most importantly, security of supply, such curtailment should in principle only take place in exceptional circumstances, when there is an evident danger to system security and stability. If curtailment of (re)nominations takes place, compensation may also be considered in certain cases.

Although the Network Code complies with the Framework Guidelines as well as the Agency's further clarification, the Agency is of the view that any such (national) rule or legally binding agreements between the TSO(s) and Network Users, under which TSOs are allowed to amend (re)nominations, should reflect the above-mentioned principles. If amendments of such rules or agreements (including compensation arrangements) are deemed necessary by a TSO or National Regulatory Authority (NRA), the respective TSOs shall consult stakeholders and submit a proposal to the concerned NRAs for approval, ensuring thus that no barriers to cross-border trade are created.

2. Principles of neutrality mechanism: Efficiently incurred costs (Art. 35)

Section 3 of the Framework Guidelines states that "TSOs shall be cost neutral in relation to their balancing activities, i.e. any net costs or revenues arising from TSO balancing and financial settlement of network user imbalances shall be passed on to network users, although NRAs may incentivise TSOs to procure efficiently by allowing them to receive a payment if

balancing costs are minimised to a certain level, or require them to make a payment if these are above a certain amount". Article 42 of Directive 2009/73/EC[4] states that "In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities."

The Network Code states in Article 35(2) that "TSOs shall pass to Network Users

a) any costs or revenues arising from Daily Imbalance Charges, Within Day Charges and other charges related to its Balancing Activities; and
b) Efficiently Incurred Costs and Revenues."

The Agency is of the view that not necessarily any costs should be eligible to be passed through to Network Users, as in some Member States National Regulatory Authorities have first to assess if costs are economically and efficiently incurred. The current wording, and in particular the separation of a) and b), is unclear and imprecise, as one interpretation could lead to inefficiently incurred costs being passed on to Network Users and "inefficiently" accrued revenues not being passed on to Network Users.

Therefore, Article 35(2) should be amended in such a way to reflect that TSOs shall pass onto Network Users any costs that are economically and efficiently incurred from Balancing Activities and any revenues arising from the Balancing Activities undertaken by the TSOs. The amendment shall also appropriately take into account that if the costs arising from TSO's Balancing Activities are assessed on an ex-post basis, the NRAs shall decide upon whether such costs are economically and efficiently incurred, taking utmost account of the information, time and tools available or the assumptions reasonably made by the TSO at the time the decision was taken, as well as any other obligations the TSO may need to comply with in relation to the Network Code.

In addition, Annex 1(21) and Article 35(3) seem to define what costs shall be deemed to be efficiently incurred costs as follows:

Annex 1(21): "Efficiently Incurred Costs and Revenues' means all costs and revenues arising from the TSO's Balancing Actions undertaken in accordance with Article 13, unless an appropriately educated, experienced and trained party would consider these costs and revenues as incurred inefficiently having assessed the prevailing circumstances at the time the TSO decided on a Balancing Action."

Article 35(3): "Where National Rules prescribe the TSO's Balancing Actions or where incentives are implemented to promote efficient undertaking of Balancing Actions, then any such costs or revenues arising from such Balancing Actions shall be deemed to be Efficiently Incurred Costs and Revenues."

This definition is both inappropriate and unclear, as it confuses costs and revenues and illegitimately assumes efficient costs in too wide a spectrum, e.g. in case of incentives being implemented for efficient undertaking of Balancing Actions or in presence of (any) national rules on TSO's balancing actions.

[4] 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 L211, 14.8.2009, p.94.

As it is in the realm of the NRAs to define and decide on what costs are efficiently and economically incurred, the definition in Annex 1(21) and the provision in Article 35(3) shall be deleted.

3. Other issues

a) Transitional measures for (re)nominations (Art. 25)

The Framework Guidelines provide for specific interim steps. The Network Code includes the possibility for additional interim steps to apply. The Agency has previously argued that the use of interim steps should be minimised in order to ensure a rapid implementation of the balancing target model. In particular, the Agency is of the opinion that the introduction of an interim step on nomination rules as set out in Article 25 is not justified. Therefore, Article 20 shall be removed.

b) Information provision on within-day obligations (Art. 32)

The Framework Guidelines set out that "within-day obligations shall only be adopted once network users are provided with sufficient information to enable them to comply with the obligations". The Network Code provides, in its Article 32(2), a set of common criteria to be applied for any Within Day Obligation (WDO), including that "a Within Day Obligation shall only be applied where the Network Users are provided with adequate information in a timely manner regarding their Inputs and/or Off-takes and have reasonable means to respond to manage their exposure" (Article 32(2.b)). It may be inefficient for information that is already available to the Network User to be provided again by the TSO or provided to those users who do not even need or who are not able to process such data. Additionally, some stakeholders requested to further specify the phrase "in a timely manner".

The Agency therefore takes the view that the Network Code should require that adequate information, as referred to in Article 32(2.b), is provided under the following principles:

(a) before a charge is applied,
(b) on an ongoing basis to those network users who have made a one-off request, and
(c) if information is already provided to network users, such a one-off request should not be necessary.

c) Definitions related to "paper traders" (Annex 1 (45))

According to the Network Code, trade notifications can only be submitted by a Network User to a TSO to allow exchange of gas between two portfolios. There is a risk that the definition of Network User excludes non-physical traders ("paper traders"). This risk was identified and highlighted late in the process. Neither the Agency nor ENTSOG intended to exclude non-physical traders from the definition of Network User.

The Agency therefore proposes to amend the relevant parts of the Network Code in such a way that it sufficiently clarifies that non-physical traders (since they often do not have a

transport contract with a TSO) are not inhibited or excluded from participating in the balancing market.

Possible ways to address this issue include an amendment of the definition of "Portfolio" as provided in Annex 1(45) which reflects the inclusion of Network User's disposing and acquiring trade notifications. Further, as the term Network User is already defined in Regulation (EC) No 715/2009 (as "customer or a potential customer of a transmission system operator"), the Network Code needs to reflect that widened notion of Network User for the purpose of the Network Code itself. This could be achieved, for example, by introducing a definition of "paper trader" (e.g. "customer of a trading platform holding a legally binding agreement defining the respective rights and obligations related to the exchange of gas between portfolios") and referring both to Network Users and Paper Traders in the relevant sections of the Network Code. Alternatively, a new definition of a common "User Group" ("shippers") involving both Network Users and "paper traders" could be developed for this purpose.

d) Minimum information provision in (re)nominations (Art. 19)

Article 19 of the Network Code specifies which information shall be contained in (re)nominations provided by Network Users to the TSOs. In particular, paragraph 1.d) sets out that the Network User's Counterparty identification or, if applicable, its Portfolio identification shall be provided. Annex 1(40) specifies that " 'Network User's Counterparty' means the Network User who delivers gas to or receives gas from a Network User at an Interconnection Point". In case of bundled capacity being (re)nominated, there should be no gas delivered to or received from another Network User at the Interconnection Point (no "flange trade").

Article 18(3) and/or Article 19(1.d) therefore need to clearly specify the exact "destination" identification for both cases, i.e. unbundled and bundled capacity nominations. In the case of bundled capacity (re)nominations, the Counterparty identification would be the same as for the Network User, or, if applicable, the "destination" portfolio identification at the destination hub of the same Network User.

e) NRA decision making (Art. 33)

Regulatory issues are out of the scope of the Network Code, as defined in the Framework Guidelines. However, Article 33 of the Network Code contains provisions falling into national legislation or the EU rules, going beyond the scope and the purpose of the Network Code.

Article 33(4) refers to the right of an NRA to seek an opinion or a recommendation from the Agency "during the process of approval" (it is therefore clear that this provision does not refer to Article 7(4) of Regulation (EC) No 713/2009, which clearly applies to "decision taken by a regulatory authority"). Despite the opposite impression given by the wording of that Article ("based on the provisions of the Agency Regulation"), there are no provisions in Regulation (EC) No 713/2009 on the basis of which a TSO may seek a recommendation from the Agency, especially during the process of regulatory decision making at the national level.

The following provision of that same Article (33(5)) adds to the confusion by making reference to the previous paragraph ("where Art. 33(4) applies") in a contradicting manner, by placing new obligations on the Agency ("ACER shall monitor the balancing provisions") and creating new competences with unclear legal consequences ("the Agency […] may request the competent national regulatory authority to review any obligation it approved that does not comply with the criteria referred to in Article 32(2)"). This is clearly changing essential elements of Regulation (EC) No 713/2009 by reinventing existing processes, by distorting both their scope of application and the legal consequences.

Finally, Article 33(6) inappropriately places an obligation on the NRAs, elaborating on how they should act on their competences. This, apart from serving no obvious purpose, is clearly beyond the scope of the Network Code. In general, obligations of the NRAs towards the TSOs fall within the remit of national legislation.

Therefore, Article 33(4) and 33(5) should be replaced by a simple reference to Article 7(4) of Regulation (EC) No 713/2009 (i.e. repeating the text of the Framework Guidelines, without further elaboration), while Article 33(6) should be deleted in its entirety.

f) Balancing neutrality cash flows: Level of detail of neutrality provisions (Art. 36)

Article 36(5) of the Network Code sets out that in case Variant 2 is applied (i.e. the Balancing Neutrality Charge (BNC) is based on forecasted costs and revenues), the TSO's methodology for BNCs shall provide rules for a separate BNC with respect to Non-Daily Metered Off-takes.

The Agency would favour that all three variants ("Base Case", "Variant 1" and "Variant 2") were dealt with provisions at a similar level of detail. Moreover, it appears that greater detail on the TSO's methodology for BNCs neither contributes to any further harmonisation of balancing regimes nor promotes cross-border trade.

In addition, Article 36(6) already provides flexibility for introducing rules for the division of the BNC components and apportionment amongst Network Users (split pot). Therefore, Article 36(5) may be redundant.

Done at Ljubljana on 25 January 2013.

For the Agency:

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Director

ACER

Agency for the Cooperation of Energy Regulators

Publishing date: 28/01/2013

Document title:

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