DECISION

№ И1-P-074

of 12 January 2009

THE STATE ENERGY AND WATER REGULATORY COMMISSION

at a closed session held on 12 January 2009, having regard to the request submitted by Nabucco Gas Pipeline International GmbH for amendment of SEWRC's Decision № P-074/11.02.2008 on exemption from the provisions of the Energy Act with reference to regulated third party access, has found the following:

By its Decision № P-074/11.02.2008, SEWRC exempted Nabucco Gas Pipeline International GmbH for 25 (twenty-five) years from the provisions of Article 21, para. 1, sub-para. 6 and 9, Article 30, para. 1, sub-para. 7 and 8 and Article 172 of the Energy Act with respect to the Bulgarian section of the Nabucco gas pipeline under the following obligatory conditions:

1. The exemption from the statutory obligation to provide third party access to the network (Article 21, para. 1, sub-para 6 and 9, Article 30, para. 1, sub-para. 7 and 8 and Article 172 of the Energy Act) is limited to a maximum of 50% of the respective maximum available total technical annual capacity, but not more than 15 bcm/year in the case of the final capacity extension of 31 bcm/year.

2. For twenty years after the first construction stage of the Nabucco pipeline has been put into operation, the tariff model, an integral part of the request under consideration, shall be subject to review by SEWRC or the competent authority at that time.

3. Where, as a result of the review of the tariff model under item 2, it is found that the tariffs of the Bulgarian section of the Nabucco gas pipeline project deviate from the average tariffs of comparable transmission systems in the European Union by more than +/- 10 %, Nabucco Gas Pipeline International GmbH or its universal successor is obliged to submit for approval a revised tariff model. The new tariff model is applicable only to contracts that have been entered into after its approval by SEWRC or by the competent authority at that time has become legally effective.

4. Following the implementation of each open season procedure, Nabucco Gas Pipeline International GmbH is obliged to submit to SEWRC a list of the companies, for which capacity of the Nabucco gas pipeline has been booked.

5. The Bulgarian section of the Nabucco gas pipeline has to be put into operation no later than 5 (five) years after this Decision has become legally effective.

6. Nabucco Gas Pipeline International GmbH is obliged to submit to SEWRC its Articles of Association no later than the time the first construction stage has been put into operation, which is to include the following clause: "The Manager/Managers acts/act independently with respect to all current issues relating to the operation of the system and decides/decide independently in respect of the construction or the restructuring of gas pipelines within the approved financing plan or other relevant document in line with the applicable requirements and natural gas trading rules. Therefore, any empowerment of the Manager/Managers in this sense is limited."

Nabucco Gas Pipeline International GmbH has submitted a request for modification of Decision № P-074/11.02.2008, requesting that the obligatory condition of the exemption under item 5 of the Decision (the Bulgarian section of the Nabucco gas pipeline to be put into operation no later than 5 (five) years after this Decision has become legally effective) be replaced by the condition that the Bulgarian section of the Nabucco gas pipeline should be put into operation no later than 5 (five) years after the end of 2012 or, in other words, by 2017. The applicant has justified its request with the fact that the first construction step of the Nabucco gas pipeline (8 bcm) initially scheduled to be put into operation by 2012 has been extended until 2013. At the same time, for technical reasons, it is possible to put into operation the Bulgarian section only if the rest of the pipeline sections in Hungary, Romania, Austria and Turkey are operational. In the words of the applicant, the implementation of the project is further delayed by the lack of legal grounds for the exemption by Turkey from the rules on regulated third party access. In the opinion of Nabucco Gas Pipeline International GmbH, the putting into operation of the Nabucco gas pipeline is directly related to the availability of sources of supply of natural gas, and the start of the exploitation of the first source, the Shah Deniz II gas field in Azerbaijan, has been postponed only for the end of 2013. On the other hand, the applicant considers that linking the exemption with the condition that the Bulgarian section of the Nabucco gas pipeline be put into operation no later than 5 years after the exemption decision has become effective creates uncertainty in the talks with potential suppliers of materials and services for the construction of the pipeline as well as with the institutions that will finance the project. The latter would lead to an increase of the investment costs of the project, respectively, of the tariffs for end consumers.

Under Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas, the modification of the decision on the exemption from the regulated access rules, relating to new infrastructures which include the construction of interconnections, should be adopted after consultation with the respective EU Member States or the regulatory authorities concerned. In this regard, a meeting was held on 15 September 2008 between representatives of the European Commission, Nabucco Gas Pipeline International GmbH and the regulatory authorities concerned in order to clarify the positions and reach an agreement on the regulatory issues related to the further development of the Nabucco project. The additional reasons put forward by Nabucco Gas Pipeline International GmbH in the course of this meeting about the need of extending the decision validity until the end of 2017 concern: political reasons conditioning an unpredictable period of time for the signature of contracts with Iran- and Iraq-based sources of supply of natural gas; a delay in the start phase of natural gas production from the first source of supply of the Nabucco gas pipeline, the Shah Deniz II gas field in Azerbaijan; a delay in the talks with the commercial banks by reason of the increased pressure on the financial markets and the tightened stability and long-term condition requirements; a delay in the conclusion of an Intergovernmental Agreement between the countries along the pipeline route, which is a necessary condition to establish the national Nabucco company in Turkey, to fix the tax regime for the national Nabucco companies and to ensure that the Turkish section of the pipeline benefits from an exemption similar to the exemption according to Article 22 of Directive 2003/55/EC; inability to finalise commitments with local engineering companies selected for the detailed design by reason of the fact that not all national companies participating in the Nabucco project have been established, which on its part is a pre-condition for the delay of the overall environmental impact assessment of the project and its social effects until all building permits have been obtained; the necessity of special steel pipelines for the project implementation.

On the basis of the above factual circumstances, SEWRC has reached the following conclusions:

Under Article 99, sub-para. 2 of the Administrative Procedure Code with reference to Article 22 of Directive 2003/55/EC, the request of Nabucco Gas Pipeline International GmbH for a longer validity of the exemption should be considered in the light of the existence of new substantially significant circumstances for the grant of the exemption, which could not have been known at the time the original exemption was granted. Nabucco Gas Pipeline International GmbH has pointed out a number of events which indicate that the situation concerning its pipeline project has changed significantly since the beginning of 2008. The main facts adversely affecting the time schedule for the construction of the Nabucco project are the delay in the start of the exploitation of the Shah Deniz II gas field, the delay in the conclusion of the Intergovernmental Agreement and the considerable worsening of the present financial crisis which has started to affect Europe. Another factor, which was not known at the time of the adoption of SEWRC's exemption decision, concerns the military conflict which broke out in Georgia in August 2008 and which highlighted the political instability in the region from which the gas for the Nabucco pipeline is planned to be sourced. All these factors, for their part, are tightening the financial credit requirements of banks and increasing shippers' caution before committing to purchasing gas in the Caspian region and transporting it to the EU.

In Decision № P-074/11.02.2008 on exemption from the rules on regulated third party access, SEWRC requested that the Bulgarian section of the Nabucco gas pipeline be put into operation no later than 5 years after this decision would have become legally effective, otherwise the exemption decision would be void. SEWRC considers that Nabucco Gas Pipeline International GmbH would have legal certainty about the full exemption of the Nabucco pipeline according to Article 22 of Directive 2003/55/EC only once the regulatory authorities of all four EU Member States concerned have granted exemptions for the pipeline sections in their respective jurisdictions and once the European Commission has reviewed these decisions or the five-year validity of the Bulgarian exemption decision before the start of operations is therefore in practice shortened by later exemption dates in the other Member States. Therefore, the validity of the Bulgarian exemption decision before the start of operations should be linked to the date when the last exemption decision in any of the Member States concerned would become effective, i.e. to the date of the European Commission's approval of the respective decision.

SEWRC considers that the arguments set forth by Nabucco Gas Pipeline International GmbH for the extension of the exemption validity are justified. Furthermore, the Nabucco project is unique in that it stretches over more than 3 000 km crossing five different countries and has the potential to open up several new sources of gas for the EU. It should also be noted that the resource regions have recently been characterised by a high degree of political instability, notably Georgia which is a transit country for the gas coming from Azerbaijan. The Nabucco pipeline project thus bears technical, economic and political risks which exceed the risks of most other major infrastructure projects in the EU energy sector. In consideration of the foregoing, SEWRC considers that the request of Nabucco Gas Pipeline GmbH to extend the validity of the exemption decision is in principle justified but an extension until the end of 2017 is excessive because of which the validity should be limited to the end of 2016. On the other hand, SEWRC considers that preserving the five-year validity of the exemption is unlikely to achieve the objective of the modification of Decision № P-074/11.02.2008, which justifies an extension of the decision validity by two more years.

Consequently, taking into consideration the arguments set out above, the condition under item 5 of Decision № P-074/11.02.2008 should be modified as follows: "The Bulgarian section of the Nabucco pipeline has to be put into operation no later than seven years after the last exemption decision in any of the Member States concerned has become effective, i.e. after the European Commission's approval of the respective decision, but no later than on 31 December 2016."

In case that the date of putting into operation of the Bulgarian section of the Nabucco gas pipeline has been postponed by reason of a delay in the procedures in the remaining participating countries, Nabucco Gas Pipeline International GmbH is allowed to submit a request for the extension of the validity of the exemption decision.

In view of the foregoing and under Article 99, sub-para. 2 of the Administrative Procedure Code with reference to Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 21, para. 1, sub-para. 6 and 9, Article 30, para. 1, sub-para. 7 and 8 and Article 172 of the Energy Act,

THE STATE ENERGY AND WATER REGULATORY COMMISSION

HAS DECIDED:

It shall modify its Decision № P-074/11.02.2008 in its part relating to the obligatory condition under item 5, whereby Nabucco Gas Pipeline International GmbH has been granted an exemption for 25 (twenty-five) years from the provisions of Article 21, para. 1, sub-para. 6 and sub-para. 9, Article 30, para. 1, sub-para. 7 and sub-para. 8 and Article 172 of the Energy Act with respect to the Bulgarian section of the Nabucco pipeline, and this condition shall become as follows:

„5. The Bulgarian section of the Nabucco gas pipeline has to be put into operation no later than seven years after the last exemption decision in any of the Member States concerned has become effective, i.e. after the European Commission's approval of the respective decision, but no later than on 31 December 2016.".

This Decision is subject to appeal within 14 (fourteen) days before the Supreme Administrative Court.