DECISION

№ И2-Р-074

of 14 May 2009

THE STATE ENERGY AND WATER REGULATORY COMMISSION

at a closed session held on 14 May 2009, having regard to the letter reference E-04-00-59 of the European Commission and the proposals contained therein 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."

With reference to the request of Nabucco Gas Pipeline International GmbH 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, by its decision No И1-P-074/12.01.2009, the SEWRC has amended its exemption decision, 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.

On 19.02.2009, the European Commission requested SEWRC to provide the full application of the Nabucco Gas Pipeline International GmbH, as well as additional information in support of the amended exemption decision. On 24.02.2009, the SEWRC replied to the request of the European Commission for additional information and on 09.03.2009 and 19.03.2009 provided all relevant documents.

After review and analysis of the information submitted by letter with reference № E-04-00-59/22.04.2009, under Article 22, paragraph 4 of Directive 2003/55/EC concerning common rules for the internal market in natural gas (the "Directive"), the European Commission requested an amendment to the exemption decision № R-074/11.02.2008, giving the following reasons:

The Bulgarian section of the Nabucco pipeline represents an interconnector within the meaning of Art. 2, paragraph 17 of the Directive. The pipeline crosses the border between the EU Member States, Bulgaria and Romania, with the sole aim to link the national transmission systems of these Member States. The European Commission recommends the 25 years' exemption period to be bound by the date of entry into service of the first phase of construction, rather than the date of entry into force of the Bulgarian exemption decision in order to increase the overall legal certainty of the project.

The European Commission has assessed the exemption criteria and takes the view that the exemption under the provisions of the SEWRC decision does not satisfy the first criterion of Article 22, paragraph 1 of the Directive on natural gas, namely: the investment should encourage competition in gas supply. As regards imports, the Bulgarian natural gas market is characterized by a high level of dependence on one source, namely from Russia. These imports account for about 98 % of gas consumption in the country. The existing gas network has only one entry point for the implementation of import, which is fully reserved by Bulgargas EAD for imports from Russia. At this stage, there is no clarity on the amount of gas transported by the Nabucco pipeline to Bulgaria or of the market participants, which will have capacity. This will become clear after the procedures for allocating capacity are implemented. Therefore, the Commission attaches particular attention to the most unfavourable option, developed in the exemption decision, i.e. participant with a dominant market position receiving all or part of a large capacity for the supply of gas in the Bulgarian exit point of the Nabucco pipeline. In this worst option, it cannot be considered that the Nabucco gas pipeline will promote competition.

SEWRC accepts the considerations laid down in the letter of the European Commission and in order to remove concerns regarding competition the following is needed:

1. **Limiting the proportion of the annual capacity, which can be reserved by an undertaking with dominant market position up to 50% (hereinafter referred to as "capacity ceiling) in all exit points of the Bulgarian section**

The capacity ceiling provides to market participants at least half the Bulgarian output capacity of the Nabucco pipeline and thus promotes competition in the downstream markets. Therefore, the capacity ceiling will fulfil the condition that generally no exemption can be applied when it leads to the emergence or strengthening of a dominant market position or where the granting of exemption reduces the possibility of weakening of the existing dominant position.

In applying the capacity ceiling, account should be taken of the specific business relationships between the company operating in the downstream supply markets and its upstream supplier. With regard to the Bulgarian gas market, both the downstream supplier and the upstream supplier have a dominant position and long-term business relationships. Given that Gazprom and its related companies are almost exclusive suppliers to Bulgargas EAD and that Russia, in respect of which Gazprom has a monopoly on exports, is almost entirely the sole source of supply (either produced in Russia or transit natural gas), the likelihood of Gazprom and its related companies to really compete with Bulgargas EAD is significantly low. In this situation, if Bulgargas EAD owns 50% of the Bulgarian output capacity and Gazprom or related its companies hold the remaining 50%, or in practice each extra share, which together with the share of Bulgargas EAD will exceed 50%, then it would not have a beneficial impact on competition. Therefore, until Bulgaria starts to receive less than 50% of its gas supplies from or through Russia or until Gazprom loses its monopoly on exports of Russian or transit gas, it is necessary for the ceiling of the shares of capacity of Gazprom and Bulgargaz EAD to be determined jointly.

It is not clear from the rules submitted by Nabucco Gas Pipeline International GmbH what would happen in case of excess reserve within the general open season. The related risk is that a third party may receive all of the output capacity not reserved by Bulgargas EAD, even if other third parties are interested in acquiring capacity. This could have an adverse impact on competition as a result of which in Bulgarian markets duopoly will be established. To avoid this risk, it is necessary to introduce a rule according to which the allocation of capacity will be done in a transparent and non-discriminatory manner, for example, on a pro-rata basis, which will ensure that every participant in the auction will be allocated a minimum part of capacity.

The capacity ceiling described above may prevent the expansion of capacity, if for example third parties fail to agree on sufficient quantities of gas with the upstream suppliers and therefore are not interested in booking capacity of the pipeline. As a result, the positive overall impact of the extension of the pipeline on market liquidity cannot be realized. Moreover, the possibility cannot be excluded that as a result of the capacity ceiling part of the pipeline will remain unused after its construction. Because of this, it is necessary to allow for derogation from the capacity ceiling in case of insufficient interest of third parties other than the undertaking wth a dominant position from the reservation of capacity. In this case, the undertaking with a dominant position can be allowed to acquire extra output capacity above the capacity ceiling. However, the undertaking should be requested to offer on the market additional volumes of gas through an open, transparent and non-discriminatory procedure, subject to approval by the regulatory authority.

It is possible due to the variable conditions of demand and supply in the market for a gap to appear between the share of reserved capacity and the actually imported quantity of natural gas over the Nabucco pipeline. Therefore, it is in the interest of the respective undertaking to bind the quantity of gas which will be offered on the market with its share of reserved capacity, rather than its share of the total quantity, which depends on the actions of the other companies involved in transmission. Therefore, it is proposed to calculate the quantity as follows: the percentage points of reserved annual capacity in excess of 50% (e.g. at 55% - 5%) should be divided by the total share of the annual capacity reserved by the respective company (in this case 55%). The resulting value (in this case 9.09%) shall be multiplied by the total quantity of natural gas, which the company imports over the Nabucco pipeline in Bulgaria in a given year. These amounts are adjusted annually according to the quantities imported in the previous year. In the first period, an expected rate of capacity utilization should be adopted, which is negotiated between the undertaking on which a capacity ceiling is imposed and the regulatory authority, while the difference established ex post between the estimated and actual amount should be added or deducted from the quantities released in the following year.

2. Obligation to expand capacity according to demand

Nabucco Gas Pipeline International GmbH has presented informational only regarding its plans with respect to the timing and stages of construction.

The above planning indeed may only be informative, since neither the precise origin or the destination of natural gas were known as at the time of application, and at this time. The exact entry and exit points will be determined only at a later stage when the outcomes of the procedure for allocation of capacity are known. Flexibility in building entrance or exit points along the pipeline shows that the pipeline project and may in fact need to be adapted to the various quantities of natural gas for transmission in the different sections of the pipeline.

Furthermore, the additional phases of expansion of the capacity, for example, from 8 to 15.7 bcm/year and from 15.7 to 25.5 bcm/year represent very large amounts of gas, which are expected to exceed the total annual consumption of natural gas in Bulgaria (according SEWRC forecasts: 4.2 bcm/year in 2010). Experience with other pipelines shows that far smaller stages of expansion than those of Nabucco Gas Pipeline International GmbH may be technically and economically feasible.

As with other projects for pipeline, the capacity of the Nabucco gas pipeline may be increased by very small quantities, not only through the construction of new gas pipelines along the entire pipeline system. Instead, along the various sections of the pipeline at smaller gradual steps, different in size compressor stations may be installed to increase pressure and therefore the flow of the natural gas for transmission. In other European gas pipelines, the capacity at the final exit point is increased only by connecting the separate sections of the gas system, located at a significant distance from the final exit point by an additional pipeline.

Because of these, the aforementioned four stages of expansion of capacity are not the only technically and economically feasible phases of construction. It is necessary to have more technical and economic flexibility to adapt the transmission capacity of the Nabucco pipeline to the binding procedure of capacity booking. More flexibility in adjusting the capacity to market demand is crucial to ensure that the Nabucco pipeline promotes competition and security of supply in all markets concerned. Regarding competition, there is a danger that the informative formulation of the stages of construction would contribute to the ordering of a large part of the capacity by the major market players at the expense of smaller players in the market and thus this would have a significant impact on the development of competition in the Bulgarian natural gas markets. The entry in the market of one or more competitors of the companies with dominant position on the Bulgarian markets of natural gas may be significantly delayed or even precluded, if these competitors choose to enter with a quantity less than that specified by Nabucco International in the further stage of expansion of the capacity (although this expansion would still be technically feasible and economically viable for Nabucco Gas Pipeline International GmbH).

Furthermore, there is a risk that the small markets along the Nabucco pipeline may not be serviced and therefore the Nabucco pipeline may not improve competition and security of supply in the markets concerned. This can happen as the major phases of construction will probably help to consolidate supply in order to serve only the major downstream markets. In addition, the implementation only of large-scale stages of construction poses a risk of unduly hindering the improvement of competition and security of supply. The pipeline will be expanded only if there are binding applications for capacity throughout the whole additional stage of construction, while meanwhile, in a period of several years, there may be applications for the necessary binding capacity of the interim expansion of the pipeline, whose realization is technically and economically feasible and which would contribute positively to the security of supply.

Based on these considerations, the obligation of Nabucco Gas Pipeline International GmbH to expand the capacity under binding capacity applications should not be restricted to the four phases of construction, respectively, 8, 15.7, 25.5 and 31 bcm/year.

SEWRC adopts that the minimum reserved capacity for starting the Nabucco project shall amount to 8 bcm/year. Due to the size of this initial investment, this minimum critical mass is required in order to allocate the costs of the initial investment to a sufficiently large transmission amount in order to ensure a profitable transmission rate. It is necessary to obligate Nabucco Gas Pipeline International GmbH to examine the technical and economic feasibility of all interim binding applications within the above four stages of construction.

The obligation should apply only if the amount of the binding applications made reaches the additional combined transmission capacity of the Nabucco pipeline of 1.0 bcm/year. The amount of 1.0 bcm/year corresponds to the expected share of the Bulgarian market in natural gas of about 24% in 2010 and may therefore have a significant impact on competition if the additional amount be partly or fully booked for the Bulgarian exit points. In addition, given the above measures for marginal increase of the transmission amount of the pipeline, the capacity expansion by 1.0 bcm/year may *prima facie* be considered to be technically and economically justified.

Consequently, in the case of aggregated interim binding applications within the above four stages of construction, the amount of which reaches at least 1.0 bcm/year, Nabucco Gas Pipeline International GmbH should have the obligation to expand the capacity of the pipeline in line with binding applications for capacity, unless it can demonstrate to the SEWRC that the expansion of capacity is not technically or economically feasible. This does not affect the obligation of Nabucco Gas Pipeline International GmbH to distribute the entire capacity through a non-discriminatory and transparent procedures and, respectively, to inform the SEWRC.

3. Change in share participation

If a company with a dominant position in Bulgaria or on a natural gas market including Bulgaria, which has a capacity of the Nabucco pipeline, acquires a controlling share from a partner in Nabucco Gas Pipeline International GmbH or from any other owner of Nabucco pipeline capacity, this could potentially have a negative impact on competition, in particular if this leads to the emergence of aggregate share participation exceeding the capacity ceiling for undertakings with a dominant position. It is therefore essential that the SEWRC should be informed by Nabucco Gas Pipeline International of any such change in the share participation in Nabucco Gas Pipeline International or in a partner in Nabucco Gas Pipeline International or in owners of capacity rights in Nabucco Gas Pipeline International. Based on this information and in order to ensure that the Nabucco gas pipeline continues to foster competition, the SEWRC will ensure compliance with the provisions laid down in the exemption decision relating to the capacity ceiling for undertakings with a dominant position.

Limiting the share of the annual capacity, which can be reserved by an undertaking with a dominant market position to 50% (hereinafter referred to as “capacity ceiling”) at all exit points of the Bulgarian section, the obligation to expand capacity according to demand and any change in the share interest of Nabucco Gas Pipeline International GmbH are the minimum restrictive conditions that can be imposed to ensure that the exemption fulfils the conditions laid down in Article 22 of the Directive on natural gas and does not exceed what is necessary to achieve this result.

In view of the foregoing, under Article 99, sub-para. 2 of the Administrative Procedure Code, 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 amend its Decision № Р-074/11.02.2008 to exempts the Bulgarian section of the Nabucco pipeline project from the third party regulated access rules, amended by Decision № И1-Р-074/12.01.2009, with the following obligatory conditions:

1. The 25-year period of exemption starts from the date of putting into operation the first stage of construction of the Nabucco pipeline.

2.1. The undertaking which has a dominant position on at least one of the respective upstream or downstream gas markets is not allowed to book more than 50% of total capacity in the exit points of the Bulgarian section of the Nabucco pipeline. For the purposes of calculating the capacity ceiling, the undertakings which belong to one group shall be considered together. For the purposes of calculating the capacity ceiling, the upstream suppliers and the downstream suppliers, which have a dominant position, shall be considered together. Nabucco Gas Pipeline International GmbH should inform the SEWRC about the outcome of the procedures for allocation of the capacity.

2. 2. In the case of excess booking, the allocation of the capacity should be carried out under the rule that provides the capacity to be allocated through a non-discriminatory and transparent procedure, for example on a pro rata basis, and which must ensure that each participant in the auction will be allocated a minimum part of the capacity.

2. 3. When due to the lack of interest from other parties the capacity ceiling hinders the expansion of the pipeline or leads to non-use of the existing capacity, a possibility shall be implemented to apply a derogation from the rule of the capacity ceiling, provided that the respective company offers on the market a quantity of natural gas that corresponds to the capacity owned by it exceeding the ceiling of 50% through an open, transparent and non-discriminatory procedure, subject to approval by the competent regulatory authority. The amount of natural gas which will be marketed shall be calculated as follows: the percentage points of the reserved annual capacity in excess of 50% (e.g. in case of 55% - 5%) should be divided by the total share of the annual capacity booked by the respective undertaking (in this case, 55%). The resulting value (in this case, 9.09%) shall be multiplied by the total quantity of natural gas, which the undertaking imports through the Nabucco pipeline in Bulgaria in a given year, while an estimate of this value shall be made in the beginning and adjustments shall be made in the following periods.

3. In case of change of the partners in Nabucco Gas Pipeline International GmbH as compared to the situation described in the application or in the case of acquisition of

an existing partner by another undertaking owning capacity of Nabucco or in the case of a merger between two companies having the right of capacity of Nabucco, Nabucco Gas Pipeline International GmbH shall inform the SEWRC about this change.

4. Nabucco Gas Pipeline International GmbH shall be obliged to build additional capacity at the Bulgarian exit points in the case of binding capacity applications, which are intermediate to the stages of construction described in the application of 23 February 2007, provided that such expansion is technically feasible and economically profitable and that the binding capacity applications amount to at least 1.0 bcm/year. In this context, Nabucco International shall allocate capacity in a transparent and non-discriminatory manner and shall inform the regulatory authority of the results of this procedure. If, despite the existence of such binding capacity applications, Nabucco Gas Pipeline International GmbH considers that the extension of the pipeline is not technically possible and economically profitable, Nabucco Gas Pipeline International GmbH shall be obliged to notify and justify its decision to the SEWRC.

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

CHAIRMAN:
/Prof. Eng. Konstantin Shushulov, D.Sc./

CHIEF SECRETARY:
/Eng. A. Ilieva/