Regulation of the Minister of Economic Affairs, Agriculture and Innovation of ...., no. WJZ.........................., amending the Regulation on gas tariff structures and conditions

The Minister of Economic Affairs, Agriculture and Innovation

CONSIDERING section 12 of the Gas Act;

Decrees that:

Article I

The Regulation on gas tariff structures and conditions shall be amended as follows:

A

A new article shall be inserted after article 5, as follows:

Article 5a

The tariff structures, referred to in section 12a of the Act, can provide the method how the differences between estimated and realised revenue arising from the reserved amount of cross-border gas transport capacity for a period of one year of less, based on article 18b, 2, have to be taken into account in the calculation of tariffs for the transport of gas.

B

Article 16 is repealed

C
A new paragraph shall be inserted after paragraph 3.4, as follows:

§ 3.5. Conditions relating to cross-border capacity

Article 18a
1. The conditions, referred to in section 12b, 1, a, of the Act, provide that, when applying article 16.5 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 (OJ EU L 211), an open season procedure shall be used to determine the demand for cross-border capacity.
2. The conditions include rules on the harmonisation of investments to benefit cross-order capacity with gas transport network operators in other countries, with whom harmonisation is necessary to improve opportunities for the import, export and transit of gas.
3. The open season procedure as referred to in (1) above shall be elaborated in the conditions, to ensure that it:
a. is accessible to network users in a transparent and non-discriminatory manner and objectively implemented;
b. is geared to the conclusion of an agreement with the network users participating in an open season procedure for cross-border capacity.
4. The conditions can stipulate how frequently an open season procedure as referred to in (1) above should be held.

Article 18b
1 The conditions, referred to in section 12b.1.(a) of the Act, include rules on determining the technical and available cross-border capacity for the transport of gas and the allocation of such capacity.

2. The conditions shall provide that in due course at least five per cent of the technical cross-border capacity for the transport of gas shall be reserved for contracts lasting one year or less.
3. The conditions shall provide that, in relation to the allocation of the cross-border capacity for the transport of gas which is reserved on the basis of (2) above, at least ten per cent shall be reserved as firm capacity for contracts lasting less than a year and shall be offered for sale by auction by or on the instruction of the operator of the relevant gas network.
4. With regard to the auction referred to in (3) above, the conditions may also stipulate the time within which the reserved capacity shall be auctioned, and set reserve prices below which the capacity will not be sold.

Article 18c
1. The conditions, referred to in section 12b, 1, a, of the Act, shall stipulate that network users, having nominated the firm cross-border capacity contracted by them, can subsequently re-nominate that contracted capacity in accordance with a procedure to be specified in those rules.
2. The procedure, referred to in (1) above, is based on the principle that in the event of congestion at an interconnection point, the network users' option to re-nominate a day ahead shall be limited.
3. In restricting the option to re-nominate as referred to in (2) above, account is taken of the total demand for cross-border capacity, if necessary geared to each interconnection point, the market share of the various network users at that point and the demand of those users.

Article 18d
1. The conditions, referred to in section 12b.1.\(a) of the Act, shall contain rules concerning the auctioning of that part of the contracted cross-border capacity for the transport of gas which cannot be re-nominated by network users once they have exercised their right to nominate.
2. The rules on auctions as referred to in (1) are based on the principle that:
a. capacity as referred to in (1) shall be auctioned as firm capacity by or on the instruction of the operator of the relevant gas network which has the capacity available;
b. in respect of the auctioned capacity, network users receive part of the revenue of the auction in proportion to their share in the auctioned capacity, after deduction of costs.

Article II

This regulation shall enter into force at a time to be determined by royal decree, and may be determined differently for different articles or parts of articles.

This regulation will be published with the explanatory notes in the Government Gazette.

Signed at The Hague,

The Minister of Economic Affairs, Agriculture and Innovation

EXPLANATORY NOTES

I. GENERAL

1. Introduction
The Dutch wholesale market for gas does not yet operate satisfactorily. Measures have therefore been announced to improve the operation of this market (Parliamentary papers II 2007/08, 29 023, no. 48). Most of these measures are included in the 1998 Gas and Electricity Acts Amendment Bill, to strengthen the operation of the market in gas, improve the security of supply, and containing rules concerning priority for sustainable electricity and various other amendments to these Acts (Parliamentary papers I 2009/10, 31 904 A hereafter: Gas and Electricity Acts Amendment Bill). The measures are intended to create a single domestic market for gas instead of separate smaller markets for low and high calorific gas (quality conversion), so that all parties to

the market can contribute to maintaining the equilibrium of the gas transport network (market-based balancing regime) and gas purchasers can decide what to do with the gas, (either using it or selling it on (gas tradability). The fourth measure concerns improving the availability of cross-border transport capacity, and that is the subject of this regulation.
Firm cross-border transport capacity is often booked for a long period. In current practice market players have to commit to long contracts. This gives the gas network operators the necessary assurance that their investments in new infrastructure will ultimately pay for themselves. However, as a result it can be difficult or even impossible to book this capacity for the short term or at short notice. For newcomers and foreign providers it is thus difficult to offer gas temporarily or quickly to the Dutch market. This limits the supply, and with it the competition in the Dutch gas market. To improve this situation this regulation makes amendments to the Regulation on gas tariff structures and conditions. To improve the availability of (short term) cross-border transport capacity, this regulation establishes a coherent package of measures, which involve:

- determining demand and allocating extra cross-border transport capacity on the basis of an open season procedure to be held at regular intervals,
- reserving and auctioning of a part of the available cross-border transport capacity for short contracts, and
- auctioning of a part of the firm but unused transport capacity.

The aim of the last measure is to improve the market situation in which network users contract for more cross-border transport capacity than they will ultimately use, while there is a real demand for use of that capacity on the part of other network users. This group of measures makes more cross-border transport capacity available, specifically short-term capacity. These measures make it easier for market players and foreign providers to supply foreign gas temporarily to the Dutch market. This is important for the smooth operation of the Dutch gas market. The measures are explained individually below.

2. Periodic open seasons
In current practice the operator of the national gas transport network carries out a periodic assessment of demand for cross-border capacity by holding "open seasons". An "open season" is a period in which clients can contract transport capacity. Based on this the operator of the national gas transport network builds new infrastructure to deliver this extra capacity.
The regulation builds on this practice and provides that an open season procedure must be used to assess the demand for cross-border capacity. It is important to regularly quantify demand among market players for (extra) transport capacity, so that their requirement for cross-border transport capacity can be met in good time. However, it is only worthwhile expanding this interconnection capacity on the Dutch side if that expansion can be properly linked to foreign networks. It is therefore advisable for the network operator organising an open season to coordinate this with the network operator on the other side of the border. If necessary for coordination purposes, it is possible to depart from a fixed frequency.

3. Reserving and auctioning of cross-border transport capacity for short-term contracts
Cross-border transport capacity is often fully booked in the long term, leaving little if any capacity available for short-term contracts. Currently market players sometimes have to commit to contracts of up to 15 years. This gives the network operator the necessary assurance that investments in new infrastructure will pay for themselves. The disadvantage of the current "open season" model is that it is often impossible to book any firm capacity at short notice, or for short periods (of a year or less). This problem is overcome by requiring that gas conditions include rules which mean that in due course at least 5% of the total (technical) cross-border transport capacity will be reserved for contracts of one year or less. Setting this goal was a conscious choice, as contracts currently tend to be of long duration. Under this system, capacity for short-term contracts need only be reserved when these current contracts lapse, or this capacity becomes available by some other means. A distinction is made between technical and available capacity. "Available capacity" is defined in the Regulation (715/2009) as: the part of the technical capacity that is not allocated and is still available to the system at that moment, (less the sold cross-border capacity). The aim of reserving a part of the total (technical) capacity for short term contracts is to enlarge this available capacity. The available capacity can be determined for each interconnection point. The regulation provides that the gas conditions must include rules on determining and expanding this available capacity. To conform to the planned European guidelines for the allocation

of capacity in European transmission networks, the gas conditions must include rules providing that at least 10% of the available cross-border transport capacity must be reserved as firm capacity for contracts lasting less than a year. This capacity is offered for sale by auction. This is a market-based allocation method, which reflects the market requirement and achieves an economically optimum price. Additionally, capacity which is reserved for year contracts but is not sold, will be auctioned. This capacity will become available for contracts shorter than one year (cascade). The total cross border capacity (entry plus exit) is, after rounding, 20 million m3/hour by January 1, 2011. Of that capacity, in due course between 100.000 (0,5%) and 1 million m3/hour will become available for auctioning of short term capacity. The procedure can also include rules on the minimum and maximum periods between the auction and the start date of the transport. The aim is that short-term capacity can also be booked at short notice and is not all sold out years in advance.

The requirement to reserve part of the transport capacity for short-term contracts presents a financial risk – after all it is not known whether or how much of such reserved capacity can ultimately be sold, or for what price. The tariff structures must facilitate a tariff correction in the event of under or over-estimation of the return. To limit tariff corrections it is possible to set a reserve (minimum) price for this capacity at auction. This concerns capacity that has not yet been sold. Setting a reserve limits the price risk. In that case it is only necessary to correct the tariff if sales of short-term cross-border transport capacity were substantially greater or smaller than anticipated.

4. Auctioning unused firm cross-border transport capacity
Cross-border capacity is often fully contracted. Demand for firm transport capacity regularly outstrips available technical capacity. This is called contractual congestion. There is usually no physical problem, as part of the firm contracted capacity is unnominated. A day before the transport the party entitled to this firm cross-border capacity nominates how much capacity he will actually use. The remaining amount is then *in principle* available for other market players, who can contract for this capacity on an interruptible basis. *In principle*, because the primary holder can still re-nominate the volume of his transport up to the maximum of his previously booked transport until two hours before the actual transport. As a result market players who have booked interruptible capacity still risk it being interrupted. In practice the primary holder often does not exercise the right to re-nominate to the maximum of his previously booked firm capacity. Consequently part of this firm capacity remains unused by him, while other market players can only use that capacity as interruptible capacity, with the associated uncertainties. The option of re-nomination for all contracted firm cross-border capacity is thus also a threat to the other market players, who run the risk of having to rebalance their portfolio within two hours on either side of the border, as they will have too much gas in one country and too little in the other, and hence an imbalance in both. Many market players consider this risk too great, and are therefore not prepared to supply gas to the Dutch market. This limits supply and with it, competition in the Dutch gas market. An October 2009 consultation by the Netherlands Competition Authority (NMa) among market players confirmed that the current situation is in any case unsatisfactory. The Gas and Electricity Acts Amendment Bill includes a specific amendment to reduce the problems associated with contractual congestion. It stipulates among other things that the gas conditions must include rules concerning the method of allocation of capacity in a cross-border gas transport network which is not taken up by the network user. The method may entail auctioning or other market-based allocation of the capacity (section 12b, 2, b, of the Gas Act). More detailed rules on this matter must be formalised by ministerial decree (Section 12.1 of the Gas Act). It will thus be compulsory to redistribute unused cross-border capacity using a market-based method. This regulation provides that the conditions shall include rules on day-ahead auctioning of part of the unused firm cross-border transport capacity, and that as firm capacity. The volume of gas that can be re-nominated at an interconnection point, where there is congestion on that interconnection point, will be determined according to a procedure laid down in the conditions. This provision takes account of the overall demand for firm transport capacity, if necessary per connection point, the market share of the capacity holders, and the needs of these and other network users. It is possible that European congestion management procedures will set a maximum percentage for re-nomination. This percentage will then be taken as the basis. With regard to existing contracts, on the proportionality principle, the original capacity holder will receive the profits from the auction of

firm capacity, less the auction costs. The regulation stipulates that this must form the basis for the conditions. For the same reason the regulation does not exclude the possibility that the original capacity holder can also bid for the released capacity. This forces market players to decide what this capacity is worth to them, considering the need to have free use of this capacity.

5. European developments
The measures must be seen in the context of developments at European level, and particularly the entry into force on 2 March 2011 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 (OJ EU L 211). Regulation (EC) No 715/2009 replaces Regulation (EC) No 1775/2005 and includes among other things directly applicable rules on principles of capacity-allocation mechanisms and congestion-management procedures concerning transmission system operators (article 16 of the Regulation). Among other things the rules concern the implementation and publication by transmission system operators of non-discriminatory and transparent congestion-management procedures which facilitate cross-border exchanges in natural gas on a non-discriminatory basis (article 16, para.3, of the Regulation). In the event of contractual congestion, the transmission system operator shall offer unused capacity on the primary market at least on a day-ahead and interruptible basis. On this point the Regulation states that: "Given the large proportion of existing contracts and the need to create a true level playing field between users of new and existing capacity, those principles should be applied to all contracted capacity, including existing contracts" (recital 21). The proposed measure for this purpose, to set rules in the gas conditions about auctioning a part of the unused firm transport capacity, is in line with EU Commission proposals which specify the guidelines that are part of the Regulation. A conscious decision was made to use this Regulation to give an extra boost to cross-border exchanges in gas via the Dutch wholesale market. The aim and scope of Regulation EC 715/2009 are not incompatible with this more radical step, since it is the intention of the Regulation is to promote cross-border exchanges in gas as part of (contractual) congestion management. The principles of non-discrimination and free competition are respected.
Likewise the measure to set rules in the gas conditions on holding 'open seasons' should be read in the context of the Regulation. Article 16, para.5 of the Regulation stipulates that transmission system operators shall regularly assess market demand for new investment, including when they are planning new investments. Including rules in the gas conditions about an open season procedure to be followed for new expansion investments can be regarded as an interpretation of this, and ties in with existing practice.

6. NMa consultation and recommendations
PM

7. Administrative burden
The Regulation on gas tariff structures and conditions establishes a framework for policy which is determined by the body of network operators in the tariff structures and conditions. The amendments to the regulation concern the relationship between operators of gas networks and network users, and do not contain any direct obligation to provide information to the government. Consequently the amendments do not give rise to any administrative burden.

8. Notification
Since the regulation does not contain any technical requirements in respect of products, nor any provisions regarding electronic commerce, it is not necessary to notify the European Commission under Directive 1998/34/EC of the European Parliament and the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations, and of rules on Information Society services (OJ L 217), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ L217). Nor is notification required in respect of services as referred to in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L376), as this regulation does not concern these services.

II. ARTICLES

Article I, part A
In the case of short term contracts for the transport of gas, the tariffs are calculated before it is known how much of the capacity available in the short term will ultimately actually be contracted or at what price. This uncertainty can lead to differences in the estimated and realised return on this capacity, which can have consequences for the tariffs. This article is designed to ensure that in any case the gas conditions include a method whereby these differences can be taken into account in the tariffs set by the board of the NMa.

Article I, part B
This article is repealed since article I, part C, provides for the new articles 18c and 18d which concern the allocation of unused capacity specifically intended for cross-border gas transport capacity.

Article I, part C
A new paragraph 3.5 is inserted after paragraph 3.4, which is specifically aimed at cross-border capacity. *Article* 18a of this paragraph concerns the use of an open season procedure with a view to determining the requirement for cross-border capacity. The conditions must include rules on this, which meet the requirements formulated in the third paragraph. These requirements offer scope for continuing the current practice of "open seasons", subject to the provisions of Regulation EC 715/2009. The second paragraph also relates to that current practice, where it concerns the harmonisation of an "open season" with network operators from other countries.
Article 18b, first paragraph, relates to determining the technical and available transport capacity at interconnection points, so that the capacity is known. The second paragraph concerns the allocation of technical capacity and the third paragraph concerns the allocation of available capacity.

For the technical transport capacity this will in due course entail at least 5% being reserved for contracts of a year or less. For the reserved transport capacity this means that at least 10% will be reserved for contracts lasting less than a year. The conditions must contain rules about offering this available transport capacity by auction (third para.). The regulation sets no further requirements concerning the way in which the auction should be conducted. The percentages referred to are minimum percentages, and may be raised in the conditions, as long as this is compatible with Section 10 of the Gas Act.
Article 18c relates to restricting the right to re-nominate unnominated cross-border transport capacity. This article stipulates, among other things, that the gas conditions must include a procedure which restricts the right to re-nominate, while taking account of a number of matters. It is possible that Europe will also set minimum percentages. The aim of the regulation is that majority of the firm cross-border transport capacity can be offered on a 'day-ahead' basis as firm capacity, and not just as interruptible capacity. This capacity is auctioned. It follows from article 18d that more detailed rules are needed on the auctioning of this capacity. The network user receives pro rata income from the auctioned capacity, after deduction of costs (second paragraph, part b).
The terms firm capacity, technical capacity, available capacity, nomination and re-nomination are not defined in the regulation. The meaning of these terms follows directly from Regulation EC 715/2009.

Article II
Section 12.3 of the Gas Act stipulates that the regulation enters into force at a time specified by royal decree. Article II implements this clause. It leaves open the option of allowing certain articles, or parts thereof, to enter into force at a later date.

The Minister of Economic Affairs, Agriculture and Innovation