

**Preliminary agreement on the holding capacity auctions and on the submission of bids in such capacity auctions (hereinafter referred to as the “preliminary agreement”)**

between

xxx

- hereinafter referred to as the “TRANSPORT CUSTOMER” -

and

NEL Gastransport GmbH

Kölnische Straße 108-112

34119 Kassel

- hereinafter referred to as the “MORE CAPACITY TSO” -

- hereinafter referred to individually as the “Party” or jointly as the “Parties” -

*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.*

## **Preamble**

In addition to the procedure for the Gas Network Development Plan 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 caloric natural gas at the boundaries of the GASPOOL market area. Fluxys Deutschland GmbH ("Fluxys") has been involved in the "more capacity" market survey since April 2016; NEL Gastransport GmbH ("NGT") has also been involved in it since July 2016. 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. 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 on the primary capacity platform PRISMA ("PRISMA").

The new technical capacities will not exist at the time the capacity auctions are held, and the MORE CAPACITY TSO has not made a final decision on network expansion measures to create the new technical capacities ("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.

The transmission system operators GASCADE, Gasunie, ONTRAS, Fluxys and NGT intend to conclude this preliminary agreement in each case bilaterally with all interested TRANSPORT CUSTOMERS. In this preliminary agreement, the TRANSPORT CUSTOMER undertakes to submit bids to a specific amount, whereas the MORE CAPACITY TSO undertakes to market the corresponding capacities in capacity auctions. Conclusion of preliminary agreements increases planning security and is intended to enable the Parties to prepare, hold and take part in the capacity auctions. Moreover, conclusion of preliminary agreements improves the possibilities for GASCADE, Gasunie, ONTRAS, Fluxys and NGT to coordinate marketing of existing capacities at shared market area boundaries. The existing capacities that have not yet been marketed must be marketed with priority across the transmission system operators in order to ensure efficient use of the existing infrastructure before new technical capacities are created by means of network expansion.

Now, therefore, the Parties agree the following:

Article 1 Subject matter of the agreement

1. Definitions

- a. New technical capacities: New technical capacities at border crossing 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 in accordance with a.
  - c. Performance period of the entry or exit contract: The period of time for which the contractual rights and obligations of the MORE CAPACITY TSO and the TRANSPORT CUSTOMER apply in accordance with Articles 3 and 4 of the General Terms and Conditions of Service of the MORE CAPACITY TSO.
2. The TRANSPORT CUSTOMER undertakes in this preliminary agreement to submit bids in the first round of the auction ("initial bids") to the amount of the transport capacities per network point specified in Annex 1 as part of the capacities offered by the MORE CAPACITY TSO in annual or quarterly auctions on PRISMA. The MORE CAPACITY TSO shall notify the TRANSPORT CUSTOMER in writing, at least 4 weeks before the start of the auction in question, as to the specific auction in which and to what amount the initial bids are to be submitted. This notification is intended in particular to ensure that relevant reservation quotas are taken into account. The notification shall not be sent in the initial annual auction for existing capacities and new technical capacities in March 2017.
  3. If the MORE CAPACITY TSO offers multiple offering levels at one of the points specified in Annex 1, the TRANSPORT CUSTOMER undertakes to submit initial bids for all offering levels in accordance with Article 1 Section 2 of this preliminary agreement.
  4. The MORE CAPACITY TSO undertakes, for the annual auction in March 2017 and for each gas year specified in Annex 1, to upload capacities on PRISMA at least to the

amount corresponding to the total of the agreed bids to be placed under this preliminary agreement.

5. Contrary to Article 1 Section 4, the MORE CAPACITY TSO reserves the right not to offer the new technical capacities in full or for all gas years specified in Annex 1 in March 2017 if there are delays in expansion of neighboring networks. The same shall apply if expansion work in neighboring networks is canceled in full. Marketing of the existing capacity shall remain unaffected thereby. The MORE CAPACITY TSO shall give the TRANSPORT CUSTOMER written notice of its decision not to offer new technical capacities in full or at all in good time (before the auction in March 2017). In that case, the TRANSPORT CUSTOMER shall be accordingly released from its obligations under Article 1 Sections 2 and 3 of this agreement. All and any claims for damages by the Parties against each other shall be excluded in this respect, where legally permissible. If and insofar as the MORE CAPACITY TSO decides to offer the new technical capacities in full or in part, the TRANSPORT CUSTOMER remains obligated to fulfill its obligations under this preliminary agreement. In this case, 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).
6. The General Terms and Conditions of Service, including the Supplementary Terms and Conditions of Business of the MORE CAPACITY TSO for awarding new technical capacities in the version applicable at the time of the auction, shall apply to the initial bids to be issued in the auctions in accordance with this preliminary agreement.

## Article 2 Tariffs

1. The tariffs for existing capacities shall be as defined in Article 25 of the General Terms and Conditions of Service.
2. The MORE CAPACITY TSO shall generally charge variable tariffs for the new technical capacities in accordance with Article 2 Section 3. The MORE CAPACITY TSO 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 tariffs by the Federal Network Agency, are requirements for the potential charging of fixed tariffs by the MORE CAPACITY TSO. Furthermore, the charging of fixed tariffs must be at least equivalent for the MORE CAPACITY TSO in economic terms to charging variable tariffs. If the aforementioned requirements are met, the MORE

CAPACITY TSO may specify by the end of 31 December 2017 for each border crossing point that fixed tariffs are applied instead of variable tariffs in accordance with Article 2 Section 3. If the MORE CAPACITY TSO 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 2 Section 3. The MORE CAPACITY TSO shall notify the TRANSPORT CUSTOMER immediately as soon as it has been established that fixed tariffs will be charged.

3. The variable as well as the fixed tariffs for new technical capacities both shall be as defined in Article 25 of the General Terms and Conditions of Service of the MORE CAPACITY TSO, 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 variable and/or fixed tariffs as defined here are the 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 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 website of the MORE CAPACITY TSO; 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 variable and/or fixed tariffs as defined here are the 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 website of the MORE CAPACITY TSO.
  - c. Article 25 Section 3 Sentence 1 and Section 4 of the MORE CAPACITY TSO's General Terms and Conditions of Service shall not apply in the cases specified in a) and b) since price adjustments are not involved.
4. As part of the auction for new technical capacities, the specific capacity tariff currently applying at the time of the auction in question 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 2 of this Article 2. There is consequently no price

adjustment within the meaning of Article 25 Section 3 Sentence 1 and Section 4 of the General Terms and Conditions of Service.

### Article 3      Liability

1. The Parties shall be liable to each other for loss or damage in the form of death, personal injury or damage to health, unless such loss or damage was not caused by willful act or omission or negligence of the Party itself or its statutory representatives, servants, agents and employees.
2. The Parties shall be liable to each other for damage to property and financial loss, unless such loss or damage was not caused by willful act or omission or negligence of the Party itself or its statutory representatives, servants, agents and employees. A violation of a contractual obligation shall be in particular if the TRANSPORT CUSTOMER does not submit the initial bids at all or does not submit them in full. If complete or partial failure to submit the initial bid impairs the cost-effectiveness of network expansion and as a consequence the MORE CAPACITY TSO does not accomplish network expansion at all or only does so in part, the TRANSPORT CUSTOMER shall reimburse the loss or damage incurred by the MORE CAPACITY TSO in trusting that the contractual obligations would be fulfilled. The loss or damage shall be limited to 4 times the value of the agreement. The value of the agreement shall be defined on the basis of the respective specific capacity tariff that is applied at the time the agreement was concluded by the MORE CAPACITY TSO in accordance with the published price sheet for the capacity product at the respective network point. The specific capacity tariff shall be multiplied by the term and the level of the requested capacity in accordance with Annex 1.
3. Liability of the Parties under peremptory provisions of the Third Party Liability Act (*Haftpflichtgesetz*) and other legal provisions shall remain unaffected.
4. Sections 1 to 3 of this Article 3 shall also apply in favor of statutory representatives, servants, agents and employees of the Parties, where they apply to the respective Party.

### Article 4      Force majeure

1. If a Party is unable to perform its obligations because of force majeure pursuant to Section 2, said Party shall be released from its obligations. The other Party shall be

released from its corresponding obligations to the extent and as long as said first Party is prevented from performing its obligations because of force majeure.

2. "Force majeure" shall be deemed any unforeseeable external circumstance which the Party affected could not have been expected to prevent or could not have prevented in good time by applying reasonable care and measures which it would have been technically feasible and commercially viable to take. Without limitation, force majeure shall include natural disasters, terrorist attacks, power failure, failure of telecommunications connections, strikes and lock-outs, provided that the lock-outs are lawful, and legal provisions or measures by governments, courts or authorities, irrespective of whether such measures are lawful.
3. The Party affected by force majeure shall without undue delay inform the other Party thereof, stating the reasons for and likely duration of the disruption that has occurred. In any such case, the Party affected shall take all technically feasible and economically reasonable steps to resume the performance of its obligations as soon as possible.
4. If a Party uses services of a third party to fulfill its contractual obligations, an event that would constitute force majeure for the third party within the meaning of Section 2 of this Article 4 shall also be regarded as force majeure in favor of said Party.

#### Article 5      Legal succession

1. Contractual rights and/or obligations shall not be wholly or partly assigned to any third party without the prior consent of the other Party. Such consent shall not be unreasonably withheld.
2. Assignment pursuant to Article 1 of this Article 5 to an affiliated company as defined in Article 15 of the Joint Stock Corporation Act (*Aktiengesetz*) shall not require prior consent by the other Party but merely prior written notification to the other Party.

#### Article 6      Arbitration clause

1. The Parties shall endeavor to the best of their ability to settle any dispute between them in connection with this preliminary agreement amicably by means of negotiation.
2. All disputes and other matters from and in connection with this preliminary agreement shall be ruled on finally and bindingly by a court of arbitration, with any recourse to the courts of law being excluded, if one of the Parties involved in the dispute is of the view that the disputes cannot be settled by mutual agreement in accordance with Section 1 of

this Article 6. The court of arbitration shall comprise 3 arbitrators, one of whom shall act as chairperson of the court of arbitration. The chairperson shall be fully trained and qualified to be a judge.

3. The court of arbitration shall be formed by the Party instituting arbitration proceedings (“petitioner”) appointing an arbitrator and calling upon the other Party (“respondent”) to appoint a second arbitrator, and the two named arbitrators then selecting the chairperson. If the respondent has not appointed an arbitrator within 4 weeks, the petitioner can ask the Chief Presiding Judge at Frankfurt am Main Higher Regional Court to propose the arbitrator; the proposal shall be binding on the Parties involved. If the arbitrators have not appointed the chairperson within 4 weeks, any Party involved can ask the Chief Presiding Judge at Frankfurt am Main Higher Regional Court to propose the chairperson; the proposal shall be binding on the Parties involved.
4. The place of the arbitration proceedings shall be Frankfurt am Main.
5. The statutory provisions relating to arbitration proceedings shall also apply.
6. Article 31 of the Energy Industry Act (EnWG) shall not be affected.

#### Article 7 Severability clause

1. If any of the provisions of the preliminary agreement or its annexes are or become invalid or unenforceable, the other provisions of the preliminary agreement and its annexes shall remain in full force and effect.
2. The Parties undertake to replace the invalid or unenforceable provisions in an appropriate procedure by other provisions having as far as possible the same economic results. The foregoing provision shall also apply to any gaps in this preliminary agreement or its annexes.

#### Article 8 Confidentiality

1. Subject to the provisions of Section 2 of this Article 8, the Parties shall treat confidentially all information which they obtain in connection with this preliminary agreement (hereinafter referred to as “confidential information”) and shall not disclose such confidential information or make it accessible to third parties without the prior written consent of the Party affected. The Parties undertake to use the confidential information obtained exclusively for the purpose of performing this preliminary agreement.



2. Either Party shall be entitled to disclose without the written consent of the other Party any confidential information obtained from the other Party
  - a. to an affiliated company, provided that such company assumes the same confidentiality obligation and there are no statutory provisions standing in the way of that. The term “affiliated company” has the meaning defined in Article 15 of the Joint Stock Corporation Act (*Aktiengesetz*),
  - b. to its representatives, consultants, banks and insurers if and to the extent that disclosure is needed for proper performance of the contractual obligations and such persons or companies have undertaken to treat such information confidentially prior to the receipt thereof or are under a professional secrecy obligation in respect of such information; or
  - c. to the extent that the confidential information
    - i. was legitimately known to the Party receiving the information at the time it was obtained from the other Party;
    - ii. was already in the public domain or becomes publicly available other than through an act or omission of the receiving Party; or
    - iii. has to be disclosed by a Party due to a statutory provision or a court or official order or a request of the regulatory authorities.
3. The MORE CAPACITY TSO shall be entitled to disclose without the written consent of the TRANSPORT CUSTOMER any confidential information obtained from the TRANSPORT CUSTOMER
  - a. if this is required to ensure any necessary coordination between GASCADE, Gasunie, ONTRAS, Fluxys and NGT; or
  - b. if this is done in aggregated form and the published information does not reveal any indicators as to the identity of the TRANSPORT CUSTOMER.
4. The confidentiality obligations shall remain in force for a period of 5 years after this preliminary agreement has been signed.
5. Article 6a of the Energy Industry Act (EnWG) shall not be affected.

## Section 9 Term and termination of the agreement

1. This preliminary agreement shall come into effect upon being signed and shall apply until the Parties have fulfilled the obligations specified in Article 1. This shall apply in particular

to the obligation on the TRANSPORT CUSTOMER to submit initial bids and the obligation on the MORE CAPACITY TSO to offer capacities.

2. The right to ordinary termination of the preliminary agreement shall be excluded.
3. The right to terminate the preliminary agreement for good reason shall remain unaffected, without prejudice to the final sentence of Article 1 Section 5.

Section 10    Applicable law

German law shall apply, to the exclusion of any conflict of law provisions between states, unless these are binding law. The UN Convention on Contracts for the International Sale of Goods shall not apply.

Article 11    Annex

Annex 1 shall be part of this preliminary agreement.

Place, date

Place, date

Company

Company