



## **Operational Gas Supply Agreement (Tranche B)**

**between**

**GRTgaz Deutschland GmbH**

**and**

**[tenderer]**



This Operational Gas Supply Agreement (hereinafter referred to as (the "Agreement")) is made between:

**GRTgaz Deutschland GmbH,**

a German corporation, whose commercial registry number is HRB 91992 B (Handelsregister Berlin), having its registered office at Zimmerstraße, 56, 10117 Berlin, Germany, represented by Mr. Nicolas Delaporte, Managing Director,

hereinafter referred to as "GRTgaz D" or "Buyer",

on the first part, and

**tenderer,**

a ..., having its registered office at ..., represented by

hereinafter referred to as "... " or "Seller",

on the second part, referred to collectively or individually as the "Parties" or the "Party",

**Whereas:**

GRTgaz D, as the transport system operator of a gas pipeline system between the German-Czech border near Waidhaus and the German-French border near Medelsheim and between the German-Austrian border near Wildenranna and Schwandorf/Rothenstadt ("MEGAL Pipeline System"), asked interested parties for an offer for gas supplies to cover its operational needs and

the [tenderer] sent a respective offer and

the [tenderer] offer has been chosen by GRTgaz D as the economically most advantageous offer.



It has now been agreed between the Parties as follows :

## § 1 Definitions

The terms and expressions used with a capital letter in this Agreement shall have the following meaning or, if applicable, the meaning ascribed to the respective term and expression in further Articles of the Agreement, save if the context requires otherwise.

**Affiliated Company:** shall mean any company that is affiliated with the Seller or the Buyer within the meaning of § 15 of the German Stock Corporation Act (*Aktiengesetz*).

**Agents:** shall mean all persons engaged by the Seller or Buyer within the meaning of § 278 of the German Civil Code (*Bürgerliches Gesetzbuch*).

**Agreement:** shall mean the present agreement including all articles, attachments and schedules hereto, as the same may from time to time be amended by a written agreement executed by both Parties.

**Allocated quantity:** shall mean the quantity which has been accepted during the matching process at the Delivery Point.

**Banking Holiday:** shall mean Saturdays, Sundays, national holidays of Germany and any other day on which commercial banks in Germany are closed for business.

**Contractual Price:** shall mean the price for Natural Gas at Delivery Point during the Delivery Period.

**Day :** shall mean a period beginning at 06:00 a.m. (CET/CEST) on one day and ending at 06:00 a.m. (CET/CEST) on the next following day.

**Delivery Period:** shall mean from January, 1st 2010, 06:00 a.m. (CET/CEST) until January, 1st 2011, 06:00 a.m. (CET/CEST).

**Delivery Point:** shall mean the entry point Medelsheim Entry, Oberkappel Entry or Waidhaus Entry of the MEGAL Pipeline System where the Seller delivers Natural Gas to GRTgaz D.

**EURIBOR:** shall mean the percentage rate of interest per annum for each period of one month representing the Euro Interbank Offered Rate, as published for the relevant day.



**Euro:** shall mean the single currency of the member states of the European Union which have adopted or adopt the single currency in accordance with the Treaty establishing the European Community.

**Gross Caloric Value (GCV):** The quantity of heat, expressed in kWh/m<sup>3</sup>, which is released at constant pressure during the complete combustion of a standard cubic meter of dry gas in air, if the combustion products are cooled to the original temperature of the gas and the oxygen (+ 25° C) and returned to the original pressure of the gas and the oxygen (1.01325 bar) and the free and/or bonded water released during combustion is present in a fluid state.

**"Gross Negligence" or "Willful Misconduct":** shall mean an intentional, conscious or reckless disregard for the standard of a Reasonable and Prudent Market Participant in respect of any obligations under this Agreement by a Party, any of its respective officers or senior supervisory personnel or its Servants and Agents acting in the course of their function but shall not include any error of judgment made in the exercise in good faith of any properly exercised function, authority or discretion (even if negligent).

**Hour:** shall mean a unit of time for a duration of 60 minutes beginning at each full hour.

**Natural Gas or Gas:** shall mean the Natural Gas to be delivered under the terms and conditions of the Agreement.

**Reasonable and Prudent Market Participant:** shall mean the standard of care to be exercised by a Party performing its obligations hereunder and means the degree of diligence, prudence and foresight reasonably and ordinarily exercised by an experienced market participant engaged in the same line of business under the same or similar circumstances and conditions having due consideration to the interests of the other Party.

**Normal Cubic Meter (Nm<sup>3</sup>):** shall mean a volume of Natural Gas at 0 °C, and at an absolute pressure of 1.01325 bar.

**Servants:** shall mean all persons engaged by the Seller or Buyer within the meaning of § 831 of the German Civil Code (*Bürgerliches Gesetzbuch*).

**Transport System Operator or TSO:** shall mean the transport system operator at the Delivery Point, which is GRTgaz D.



**Week:** shall mean a period beginning at 06:00 a.m. (CET/CEDST) on Monday and ending at 06:00 a.m. (CET/CEDST) on the next Monday.

**Working Day:** shall mean a day on which commercial banks in Germany are open for general business.

## **§ 2 Purpose**

This Agreement sets out the terms and conditions under which :

- The [tenderer], as the Seller, shall sell and deliver to GRTgaz D the Contractual Quantity of Natural Gas during the Delivery Period and at the Delivery Point, as defined and agreed by both Parties in the present Agreement.
- GRTgaz D, as the Buyer, shall purchase and off-take from the Seller the Contractual Quantity of Natural Gas during the Delivery Period and at the Delivery Point,

## **§ 3 Guarantees**

Each Party guarantees that it has in place all agreements necessary for the proper fulfilment of its respective obligations under this Agreement. Each Party guarantees that it has all governmental, regulatory and other authorisations, licences, approvals and consents necessary for it legally to perform its obligations under the Agreement and that there are no rights of third parties preventing the Parties from performing its obligations under the Agreement.

## **§ 4 Primary Obligations**

### **4.1. Obligations and rights of the tenderer as the Seller**

Subject to the Buyer complying with the Delivery Operational Procedures (Article 7), the Seller undertakes to sell and make available to the Buyer at the Delivery Point on a firm basis the Contractual Quantity as defined in Article 9 during the Delivery Period.

### **4.2. Obligations and rights of GRTgaz D as the Buyer**

- (1) Subject to the Seller complying with the Delivery Operational Procedures, the Buyer shall purchase and take-off the Contractual Quantity as defined in Article 9, made

available by the Seller at the Delivery Point, on an interruptible basis during the Delivery Period.

- (2) The Buyer shall pay the Seller for the Allocated Quantity the Contractual Price in accordance with Article 13.

## **§ 5 Delivered Gas Quality and Off-Spec Gas**

- (1) The quality (including the gross calorific value and pressure) of Natural Gas to be delivered under the Agreement shall comply with the specifications of the TSO (acc. to annex 2 of the Terms and Conditions for the Tender). Quality and quantity are measured by the TSO.
- (2) In case the quality of Natural Gas supplied at the Delivery Point, or which is about to be supplied at the Delivery Point, deviates from the gas quality according to paragraph (1) ("Off-Spec Gas"), the Seller as soon as he has gained knowledge thereof, undertakes to inform the Buyer without delay of the nature and extent of such deviation and the expected duration thereof. The Seller undertakes to take such steps as are reasonably practicable to procure that Natural Gas which conforms with the gas quality according to paragraph (1) is made available as soon as reasonably practicable.
- (3) If the Natural Gas being delivered or to be delivered at the Delivery Point is Off-Spec Gas pursuant to paragraph (2), the Buyer has the option to accept or reject supply of Natural Gas in full or in part. The Buyer shall notify the Seller on its decision by telephone or in writing without delay following information by the Seller pursuant to paragraph (2). In case the Buyer accepts the Off-Spec Gas and is aware of the deviation of quality, the Buyer is not entitled to claims against the Seller on grounds of such deviation in quality.
- (4) In case the Natural Gas being delivered or to be delivered at the Delivery Point is Off-Spec Gas pursuant to paragraph (2) and the Buyer has not accepted the Off-Spec Gas pursuant to paragraph (3), Seller as failing party shall indemnify the Buyer from and against all direct loss, damage and expenses. For the purposes of this clause, direct loss, damage and expenses shall be deemed to include all such losses, damages and expenses for which the Buyer is or becomes liable as a result of such default.

## **§ 6 Delivery Point**

The Natural Gas shall be delivered at the entry point Medelsheim Entry, Oberkappel Entry or Waidhaus Entry of the MEGAL Pipeline System.

## **§ 7 Delivery Operational Procedures**

- (1) The Seller shall make available the gas quantities by an exit nomination from one of the upstream networks of GRTgaz D at the points Obergailbach Exit (France), Oberkappel Exit (Austria) or Waidhaus Exit (Czech Republic). GRTgaz D shall accept the agreed gas quantity by an entry nomination corresponding to the provisions of the Operating Agreement which still needs to be discussed between the parties at the delivery point. The required entry capacity shall be made available by GRTgaz D on an interruptible basis. GRTgaz D shall be entitled to reduce or to interrupt entry nominations if required by technical reasons of the system. In this event, no contract penalties pursuant to Article 14 Sections 1 of the Fuel Gas Delivery Contract shall apply. The Seller shall book the required exit capacity from the upstream network.
  
- (2) The contractual amount to be delivered to GRTgaz D on a daily basis within the limits of the provisions under Article 9 shall be at the discretion of GRTgaz D and shall be communicated to the Seller in advance. The operational procedure shall be set out in an Operating Agreement between GRTgaz D and the Seller, which is otherwise specified.

## **§ 8 Delivery Period**

The Delivery Period is from January, 1st 2010, 06:00 a.m. (CET/CEDST) until January, 1st 2011, 06:00 a.m. (CET/CEDST).

## **§ 9 Contractual Quantity**

The Contractual Quantity to be delivered by the Seller to GRTgaz D shall be the quantity determined to Article 7 Section 2. The Seller shall meet the following requirements when delivering the Contractual Quantity:

- Delivery of the total quantity: The total annual quantity to be delivered to GRTgaz D shall be at the discretion of GRTgaz D. The maximal total annual quantity (“Maximum Delivery Period Contractual Quantity”) may amount up to 100 GWh, whereas the minimal total annual quantity (“Minimal Delivery Period Contractual Quantity”) may amount to 0 GWh.
- The maximal hourly quantity to be delivered to GRTgaz D shall not exceed 50.000 kWh/h for the whole period of delivery (“Maximum Contractual Quantity”).

## **§ 10 Contractual Price**

The Contractual Price is:

Megawatt-hour rate  $p_2 = x * \text{NCG One Day Ahead Price Index (according to EEX)}$ .

P2 is exclusive of any applicable VAT and equivalent taxes.

## **§ 11 Transfers of title of property and risk**

The risk of loss and the title to and the property in the Natural Gas to be delivered under the terms of this Agreement shall pass immediately from the Seller to GRTgaz D at the Delivery Point at the moment of delivery.

## **§ 12 Force Majeure**

- (1) If a Party cannot fulfil part or all of its obligations due to an event of Force Majeure pursuant to paragraphs (2) and (3), then this Party shall be released from the fulfilment of its contractual obligation for the duration of such event and to the extent that such Force Majeure prevents its performance. 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 mean any event or circumstance beyond the control of the Party concerned (the “Affected Party”), which it could not have avoided or overcome, that Party acting, and having acted, as a Reasonable and Prudent Market Participant, resulting in or causing the failure or delay of the Affected Party to perform and/or fulfil any of its obligations hereunder. Without prejudice to the generality of the foregoing a Force Majeure event shall include, but shall not be limited to, natural catastrophes,



war, labour dispute, acts of governments or other bodies, breakage or breakdown of any facilities or equipment which are directly used for the implementation of this Agreement which shall include, but shall not be limited to the transportation network immediately upstream or downstream of the Delivery Point.

- (3) For the avoidance of doubt, the Seller shall be entitled to invoke Force Majeure in case of breakage or breakdown of any facilities or equipment of a pipeline network upstream to the Delivery Point in which the Seller has contracted firm transportation rights for the implementation of this Agreement, or any other circumstances beyond the control of Seller which it could not have avoided or overcome, acting, and having acted, as a Reasonable and Prudent Market Participant, actually restricting or preventing the use of such facilities or equipment by the Seller. For the avoidance of doubt, this shall include both unplanned and planned maintenance and repair works. These cases are restricted to those having a real impact on the transport capacity to the Delivery Point.
- (4) In each case, in which the Seller is released from the fulfilment of its contractual obligations as a result of Force Majeure, but is entitled to claims against a third party because of the event of Force Majeure, the Seller is obliged, on a request by GRTgaz D in writing, to assign each and all such claims to GRTgaz D.
- (5) The Party which cannot fulfil its obligations shall promptly notify the other Party of the conditions preventing it from the fulfilment of its obligations and shall use all commercially reasonable efforts to mitigate and overcome the effects of the Force Majeure as soon as possible.

### **§ 13 Billing and Payment**

- (1) Each month by the tenth (10th) calendar day, the Seller shall send to the Buyer or in the case of a penalty pursuant to Article 14 Section 1 the Buyer to the Seller a monthly invoice for the previous month ("Monthly Invoice"). The invoice for any month M shall include:
  - the price as defined in Article 10 or Article 14 Section 1,
  - the Allocated Quantity during the month.

- (2) Each Monthly Invoice shall be preceded by a monthly report stating the Allocated Quantities for each Day of the Month sent by the Seller by the third Working Day of the month, which shall have to be confirmed by the Buyer.
- (3) Payment by the Buyer to the Seller shall be made in accordance with paragraph (1), to the account notified by the Seller to the Buyer in paragraph (8), at the latest by the 24th calendar day of the month for the previous month ("Due Date"). If the Due Date is a Banking Holiday, the Due Date shall be the next Working Day.
- (4) Any payment under this Agreement shall be made by the paying Party in Euro. Payment shall be made by direct bank transfer or equivalent instantaneous transfer of funds by the Due Date to the credit of the relevant bank account specified by the respective other Party in paragraph (8).
- (5) If a payment is not made on the Due Date ("Late Payment"), the Seller, without prejudice to any further claims, shall be entitled to claim interest at a rate of three (3) percentage points above the one (1) month EURIBOR of the Due Date, from the Due Date to the date of actual payment. If such interest is lower than 100 Euros, then the penalty shall be one hundred (100) Euros. Without prejudice to Article 15 paragraph (2), these specified liquidated damages are the sole and exclusive remedy between the Parties for a Late Payment.
- (6) If a Party, in good faith, disputes the accuracy of an invoice, it shall on or before the Due Date provide a written explanation of the basis for the dispute and shall pay the undisputed amount invoiced no later than the Due Date. The Parties shall seek to settle the disputed amount as soon as possible in an amicable way. If any amount withheld under dispute is finally determined to have been due and unless otherwise agreed by the Parties, such withheld amount shall be paid by the first relevant Due Date following such determination together with interests payable on that sum from the relevant Due Date until the date of actual payment, calculated on the basis of a rate of three (3) percentage points above the one (1) month EURIBOR on the Due Date.
- (7) For information regarding billing and payment, the GRTgaz D address is stated below:

Dr. Bernd Rachlitz  
GRTgaz D GmbH



Zimmerstrasse 56  
10117 Berlin  
Germany  
Tel : +49 30 72 61 90 49 17  
Fax : +49 30 72 61 90 49 99

For information regarding billing and payment, the Seller address is stated below:

xxx

- (8) Payment shall be made by wire transfer to the bank accounts designated below:

xxx

#### **§ 14 Penalties**

- (1) In the event that the Allocated Quantity deviates from the Contractual Quantity (Article 9) GRTgaz D shall charge the Seller the following contractual penalty:
- (a) In the event that the Seller falls short of the monthly quantity, the Seller shall pay to GRTgaz D the price for excess or shortfall quantities multiplied by three (3).
  - (b) In the event that the Seller falls short of the agreed annual quantity, the Seller shall pay to GRTgaz D the average annual excess and shortfall quantities price multiplied by three (3).
  - (c) In the event that the Seller exceeds the annual or monthly or maximal hourly quantity delivered, GRTgaz D shall remunerate the Seller for the exceeding quantity with 1/3 of the contractual price (Article 10).
- (2) The Excess/Shortfall quantity price for the respective period will be published on the website from NetConnect Germany on <http://www.net-connect-germany.de>.
- (3) Any entitlement to penalties for Under-delivery or Under-acceptance under this Article is without prejudice to any rights of the Parties under Article 15.

## **§ 15 Default / Liability**

- (1) Save as otherwise provided for in paragraph (2) and in Article 14 and except in the case of Article 13 (Late Payment) and except in the case of Article 5 (remedy for damages resulting from Off-Spec Gas), the liability of the Parties under or in connection with this Agreement shall be limited to liability for Willful Misconducts and Gross Negligence.
- (2) Nothing in the Agreement operates to exclude or limit a Party's liability for intentional default, fraud, or personal injury or death resulting from the negligence of such Party, any of its officers, employees, Servants and Agents.

## **§ 16 Duration and Termination**

- (1) The Agreement shall enter into full force and effect on January 1st 2010 (the "Effective Date").
- (2) The Agreement shall remain in full force and effect until January 1st, 2011 (the "Expiration Day"). Thereafter, the Agreement shall remain legally binding on the Parties until, but only in respect of, all rights and obligations already created or existing under the Agreement prior to the Expiration Day are fully performed by both Parties.
- (3) Notwithstanding paragraph (2), if a material reason ("*wichtiger Grund*") with respect to a Party has occurred and is continuing, the other Party (the "Terminating Party") may terminate the Agreement ("Early Termination") by giving the other Party notice in writing. The right to terminate this Agreement for material reason is in addition to any other remedies available under the Agreement or at law.

A notice of Early Termination shall specify the relevant material reason for the Early Termination and shall designate a day as an early termination date (the "Early Termination Date"). The Early Termination Date may not be earlier than the day the notice is deemed to have been received under this Agreement nor later than twenty (20) calendar days after such day. If, after a material reason has occurred, notice designating an Early Termination Date is given, the Early Termination Date shall occur on the date so designated even if the applicable material reason is no longer continuing.

The Agreement may be terminated for material reason if a Party fails to make a payment or to perform any other material obligation under this Agreement (other than when such obligation is released pursuant to Article 12 (Force Majeure) provided that in the case of a failure to pay, such failure is not cured within five (5) Working Days of a written demand, or, in the case of any other failure of performance such failure is not cured within ten (10) Working Days of a written demand.

## **§ 17 Assignment**

- (1) Neither Party may assign, charge, pledge, encumber or otherwise dispose of this Agreement or any of its respective rights and obligations hereunder, without the prior written consent of the other Party. Such consent shall not be unreasonably delayed, refused or withheld.
- (2) Notwithstanding paragraph (1), each Party shall be entitled to assign and transfer the Agreement without the prior written consent of the other Party to an Affiliated Company that assumes all rights and obligations of the assigning Party provided that (i) the Affiliated Company has an equivalent or greater creditworthiness than the transferring Party immediately prior to such assignment, and (ii) the Affiliated Company is demonstrably capable of fulfilling the obligations of the assignor under this Agreement. Such assignment and transfer shall only become effective upon notice being received by the other Party.

In the event of an assignment to an Affiliated Company, the assignor shall at all times remain liable vis-à-vis the other Party to this Agreement in the event of any breach of the Agreement by the original assignee or any subsequent Affiliate assignee; such liability shall be joint and several with that of any such assignee. Furthermore, unless otherwise agreed between the Parties, in the event that the original assignee or any subsequent assignee ceases to be an Affiliated Company of the original assignor, the original assignor shall cause all rights and obligations under the Agreement to be re-assigned to it.

- (3) Any purported assignment, charge, pledge, encumbrance or disposition which does not comply with this Article 17 shall be void and of no effect. This Agreement shall be binding to the Parties and their respective successors and permitted assignees.

## **§ 18 Ineffectiveness of Provisions**

- (1) If any of the provisions of this Agreement or its Appendices/Annexes are or become invalid or unenforceable, the other provisions of the Agreement and its Appendices/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 Agreement or its Appendices / Annexes.

## **§ 19 Confidentiality**

- (1) This Agreement and all information provided there-under shall be confidential unless such information is already in the public domain otherwise than as a consequence of a wrongful act of the Party that has received such information (“Confidential Information”). For the avoidance of doubt, all information and documents on the MEGAL Pipeline System or any related documents obtained in the course of the discussions on and the performance of the Agreement shall constitute Confidential Information.
- (2) Both Parties undertake to keep confidential and not to disclose any Confidential Information to any third parties without the prior written consent of the other Party.

Said consent shall not be required for disclosure:

- (i) to directors, employees or Affiliated Companies of either Party;
  - (ii) to any government department or agency having jurisdiction over that Party;
  - (iii) to any bank or other financial institution in relation to the financing of either Party’s business activities;
  - (iv) to the extent required by any applicable laws, judicial process, order or formal request of any competent authority.
- (3) Where disclosure is made to any third party appropriate safeguards shall be made as a pre-requisite to such disclosure to prevent said third party from making any further disclosure of such information without the written consent of the Parties, and from



using such information for other purposes than the one for which such information has been disclosed.

- (4) The confidentiality obligations shall remain in force for a period of 4 (four) years after the expiry or termination of the contract concerned.
- (5) Section 9 of the Energy Industry Act (EnWG) shall remain unaffected.

## **§ 20 Applicable Law and Arbitration**

- (1) This Agreement shall be construed in accordance with and governed by the substantive law of the Federal Republic of Germany, excluding any application of the “United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980”.
- (2) Any disputes which arise out of or in connection with this Agreement, including but not limited to disputes regarding the stipulation, validity, effectiveness, interpretation and execution of this Agreement, shall be finally settled by arbitration in Berlin according to the Arbitration Rules of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary Courts of Law.
- (3) The court of arbitration shall be made up of three arbitrators, one of whom shall act as chairman of the court of arbitration. The chairman shall be fully trained and qualified to be a judge. The court of arbitration shall be formed by the Party instituting arbitration proceedings describing the matter in dispute, appointing an arbitrator and calling upon the other Party to appoint a second arbitrator, and the two named arbitrators then selecting the chairman. If either Party fails to appoint an arbitrator within a period of 4 (four) weeks, the Party that instituted the arbitration proceedings shall be entitled to request the president of the higher regional court in Berlin to propose a second arbitrator. The proposal shall be binding on the Parties. If the arbitrators have not selected the chairman within a period of 4 (four) weeks, either Party shall be entitled to request the president of the higher regional court in Berlin to propose in Berlin a chairman. The proposal shall be binding on the Parties.

## **§ 21 Notices and Communications**

Except as otherwise provided hereunder, all notices, declarations or invoices sent by one Party to the other shall be in writing and shall be delivered by letter (overnight mail or courier, postage pre-paid) or facsimile. Written notices, declarations and invoices shall be deemed received and effective:

- (i) if delivered by hand, on the Working Day delivered or on the first Working Day after the date of delivery if delivered on a Banking Holiday;
- (ii) if sent by first class post, on the second Working Day after the date of posting, or if sent from one country to another, on the fifth Working Day after the day of posting; or
- (ii) if sent by facsimile transmission and a valid transmission report confirming good receipt is generated, on the day of transmission if transmitted before 5:00 p.m. (recipient's time) on a Working Day or otherwise at 09:00 a.m. (recipient's time) on the first Working Day after transmission.

## **§ 22 Amendments**

Any amendments or additions to this Agreement shall be made only in writing signed by both Parties.

This Agreement has been duly executed in two original copies, one for GRTgaz D, one for the Seller.

At Berlin, on .....

At ..., on .....