

DETERMINATION PURSUANT TO REGULATION 71(3)(b) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING AN APPEAL MADE TO THE AUTHORITY PURSUANT TO REGULATION 70(1)(a)

Introduction

1. This Determination relates to an appeal made by Drumcross Energy Storage Limited (“Drumcross”) against a reconsidered decision made by the Electricity Market Reform Delivery Body (“Delivery Body”) in respect of the following Capacity Market Unit (“CMU”):
 - a) DCCM21 (T-1 Auction)
2. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”), where the Authority¹ receives an Appeal Notice that complies with Regulation 70, the Authority must review a reconsidered decision made by the Delivery Body.

Appeal Background

3. Drumcross submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2022 T-1 Auction and sought a Maximum Obligation Period of 1 year.
4. For the CMU listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 26 October 2021 (the “Prequalification Decision”). The Delivery Body rejected the CMU on the following grounds:

“Capacity Market Rule 3.7.4, 3.8.3 or 3.10.4 requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Commitment (Exhibit ZB). As per rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully

¹ References to the “Authority”, “Ofgem”, “we” and “our” are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work.

addressed the matters set out in Exhibit ZB, specifically the Relevant CMU specification in Part 1 was missing or incorrect. Please contact the Delivery Body for more information.

Capacity Market Rule 3.7.4, 3.8.3 or 3.10.4 requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Commitment (Exhibit ZB). As per rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZB, specifically Part 2: Declarations in respect of the Relevant CMU was missing or incorrect. Please contact the Delivery Body for more information.

Capacity Market Rule 3.4.3(a)(i) requires the Applicant to provide the full postal address and postcode for all Generating Units / CMU Components. The postcode of at least one Generating Unit / CMU Component in your Application is missing without cover letter explanation, therefore cannot be verified. Please contact the Delivery Body for more information.

This Application has been Rejected in accordance with Capacity Market Rule 3.7.3, whereby Connection Agreement cannot be Deferred for T-1 Prequalification Applications.

If this Application had met the requirements for Prequalification, the Credit Cover requirement would have been £77350.00 as the CMU has yet to satisfy the following requirement(s):

Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved."

5. On 29 October 2021, Drumcross requested the Delivery Body to reconsider its Prequalification Decision ("Request for Reconsideration").
6. The Delivery Body issued a Notice of Reconsidered Decision ("Reconsidered Decision") on 23 November 2021 which rejected the dispute on the following ground:

"Regulation 69(5), as amended, only allows the Delivery Body to accept new information if the error or omission in the original Prequalification submission is not a "material error or omission". After considering the Application as a whole the Delivery Body considers the error or omission (Connection Agreement for T-1 Application not provided as the Applicant selected this to defer) is a material

error under Regulation 69(5) because in accordance with Capacity Market Rule 3.7.3, a T-1 Connection Agreement must be provided and it was not included as part of the Prequalification Application. Therefore the Delivery Body is prevented from accepting this new information and, as a result, the original Prequalification Decision has been upheld.”

7. Drumcross then submitted an Appeal Notice to the Authority on 30 November 2021 under Regulation 70 of the Regulations.

Drumcross’ Ground for appeal

8. Drumcross disputes the decision on the following ground.
9. Drumcross accepts that the Delivery Body’s decision to reject its Application for Prequalification was correct. However, Drumcross argue that the omission of the Distribution Connection Agreement from the original Application was “*human error*” and was subsequently rectified by providing the Distribution Connection Agreement during the Request for Reconsideration. Drumcross argue, therefore, that the Authority should overturn the Delivery Body’s decision.
10. Drumcross note that the Delivery Body accepts that the evidence provided with Drumcross’ Request for Reconsideration addresses the original error. Therefore, they argue that the Delivery Body’s decision not to accept this evidence due to purported materiality of the original omission is not “*a reasonable conclusion*”.

The Legislative Framework

11. The Regulations were made by the Secretary of State under the provisions of section 27 of the Energy Act 2013. The Capacity Market Rules 2014 (as amended) (“Rules”) were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

The Regulations

12. The Regulations set out the powers and duties of the Delivery Body which it must rely upon when it determines eligibility. Regulation 22(a) specifies that each Application for Prequalification must be determined in accordance with the Capacity Market Rules.
13. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.

14. In particular, Regulation 69(5) sets out the requirements for the Delivery Body reconsidering a Prequalification Decision:

"69(5) Subject to [paragraph (5A) and Regulations 29(10A) and 87(7)], in reconsidering a prequalification decision or a decision to issue a termination notice or a notice of intention to terminate, the Delivery Body must not take into account any information or evidence which—

(a) the affected person was required by these Regulations or capacity market rules to provide to the Delivery Body before the decision was taken; and

(b) the affected person failed to provide in accordance with that requirement."

15. Regulation 69(5) is subject to Regulation 69(5A), which sets out the exceptions to Regulation 69(5):

"(5A) In reconsidering a prequalification decision, the Delivery Body may take into account information or evidence if the Delivery Body determines that:

(a) the relevant application for prequalification contained a non-material error or omission; and

(b) the information or evidence is capable of rectifying such non-material error or omission."

16. Regulation 69(7) provides the meaning of a "non-material error or omission":

"(7) In this regulation-

"non-material error or omission" means an error or omission in an application for prequalification which is-

(a) manifest, and either inadvertent or the result of an honest mistake;

(b) clerical, typographical or trivial in nature; or

(c) determined by the Delivery Body to be inconsequential to the affected person's compliance with, or the enforcement of, any requirement in these Regulations or the Rules to which the error or omission relates."

Capacity Market Rules

17. Rule 3.7.3(b) provides that:

"(b) Subject to Rule 3.7.3(c) below, Applicants for a New Build CMU that is, or will be, directly connected to a Distribution Network must:

(i) confirm that there are one or more Distribution Connection Agreements or accepted connection offers which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMUs to which the Distribution Connection Agreement applies to connect to the Distribution Network in the relevant Delivery Years, and

(ii) provide with the Application a copy of any such Distribution Connection Agreement or connection offer (with evidence of acceptance), or where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement or connection offer is in effect and confirming:

(aa) the registered capacity (or inverter rating, if applicable) of that Generating Unit and where a range of values is specified for the registered capacity (or inverter rating, if applicable), the minimum value in that range; and

(bb) the capacity that such Generating Unit is permitted to export to the Distribution Network."

Our Findings

18. We have assessed Drumcross' ground for appeal, which is set out below.

19. Drumcross appealed against the Delivery Body's decision on the basis that the omission of the Distribution Connection Agreement required under Rule 3.7.3(b) was due to human error, which was subsequently rectified during the Request for Reconsideration. Drumcross assert that the Delivery Body did not reach a "reasonable" conclusion in

rejecting the Request for Reconsideration, despite acknowledging that the evidence Drumcross had provided with their Request for Reconsideration met the requirements of Rule 3.7.3(b).

20. Under Rule 3.7.3(b), Applicants who are New Build and Distribution CMUs, and applying for a T-1 Auction, are required to provide a copy of the Distribution Connection Agreement or (where this is not possible) provide written confirmation from the Distribution Network Operator ("DNO") confirming the registered and export capacity.
21. Drumcross' Application for Prequalification did not comply with Rule 3.7.3(b), as evidence of a Distribution Connection Agreement was omitted at Prequalification.
22. As set out above, under Regulation 69(5A), the Delivery Body may take into account information or evidence in reconsidering a Prequalification Decision if it determines that the error or omission in the Application for Prequalification constitutes a non-material error or omission (in accordance with the specific definition set out in Regulation 69(7)), and that the information or evidence is capable of rectifying such an error or omission.
23. In assessing the appeal, we must first consider whether the error or omission in the Application at Prequalification meets the definition set out in Reg 69(7). As referred to above, Drumcross assert that the failure to provide a Connection Agreement was human error'. The Authority's view is that the failure to upload a Connection Agreement does constitute a 'non-material error or omission' within Reg 69(7)(a) on the basis that it appears to be manifest and inadvertent, and in any event, an honest mistake.
24. We therefore consider that the Delivery Body was incorrect to consider this error to be 'material' and incapable of being rectified in the Request for Reconsideration. Further, we consider that by providing a Connection Agreement to the Delivery Body as part of their Request for Reconsideration, Drumcross has rectified its omission and that it would have been reasonable for the Delivery Body to have taken this into account when making their Reconsidered Decision.

Conclusion

25. The Delivery Body did not reach the correct Reconsidered Decision to Reject DCCM21 for the T-1 Auction on the basis that
 - a) The information which the Delivery Body considered to be missing in the original Prequalification Application is a non-material error or omission

according to Regulation 69(5A) and should have been taken into account by the Delivery Body.

Determination

26. For the reasons set out in this Determination, the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's Reconsidered Decision to Reject Drumcross for Prequalification be overturned in respect of the CMU listed in Paragraph 1 for the T-1 Auction.

A handwritten signature in black ink, appearing to read 'H Stewart', written in a cursive style.

Heather Stewart

Acting Head of GB Wholesale Markets

For and on behalf of the Gas and Electricity Markets Authority

25 January 2022