

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 Harmony CTF Limited (“Harmony CTF”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (“Delivery Body”) in respect of the following Capacity Market Unit (“CMU”):

a) HCTF20 (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. Harmony CTF submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2022 T-1 Auction.

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:

"This Application has not met the requirements of the Capacity Market Rules due to the following reason(s):

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.

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.

..."

5. For the CMU listed in Paragraph 1, Harmony CTF submitted a Request for Reconsideration of the Prequalification Decision on 1 November 2021.
6. The Delivery Body issued a Notice of Reconsidered Decision on 23 November 2021 which rejected the dispute on the following grounds:

"The Delivery Body acknowledges that the Applicant has addressed the Connection Capacity as part of the request to review the Prequalification Decision, however the Applicant's justification has not been accepted because the Delivery Body considers the error or omission within the Application (i.e. Connection agreement missing and deferred for a T-1 application) is a material error under Regulation 69(5), which is therefore not correctable at Tier 1 disputes stage. In addition, after reviewing the information submitted by the Applicant in its request for the Delivery Body to review the Prequalification Decision, the Delivery Body does not view this as addressing the issue in the Application because a copy of a Connection agreement Variation without any Capacity detail has been provided. As a result, the original Prequalification Decision [to not Prequalify] has been upheld."

7. Harmony CTF then submitted an Appeal Notice to the Authority on 29 November 2021 under Regulation 70 of the Regulations.

Harmony CTF's Grounds for Appeal

8. Harmony CTF argue that the CMU referred to in Paragraph 1 already has a T-4 Capacity Agreement for the 2024/25 Delivery Year. When applying for the T-4 Auction for the 2024/25 Delivery Year, Harmony CTF state that it deferred the submission of the Distribution Connection Agreement. Harmony CTF were not aware that a Distribution

Connection Agreement could not be deferred for a T-1 Auction stating that “...we did not realize we needed to upload for it for T1 pre qualification.”

9. Harmony CTF further argue that it attempted to upload evidence of the Distribution Connection Agreement with the Request for Reconsideration to the Delivery Body. However, only the grid connection variation was uploaded. Harmony CTF highlights that “...the system only upload last document (the variation). The variation did not show the capacity. I do not understand why the other documents did not upload, but I have attached them all to this appeal.”
10. Harmony CTF provided the Authority with documentation regarding the Distribution Connection Agreement in support of its appeal.

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."

18. Rule 3.7.3(c) allows an Applicant to defer the submission of a Distribution Connection Agreement, where an applicant is not participating in a T-1 Auction, and states that:

"(c) Except in the case of an Application to participate in a T-1 Auction, an Applicant which is unable to give the confirmation referred to in Rule 3.7.3(b)(i), or the letter referred to in Rule 3.7.3(ba) may, instead of complying with Rule 3.7.3(b), or Rule 3.7.3(ba), either

(i) declare that a Distribution Connection Agreement will be in place by the date 18 months prior to the commencement of the relevant Delivery Year; or

...”

Our Findings

19. Harmony CTF argue that the CMU referred to in Paragraph 1 already has a T-4 Capacity Agreement, for a different Delivery Year, and for which the provision of the Distribution Connection Agreement was deferred. Harmony CTF state that it had not realised that evidencing the Distribution Connection Agreement could not be deferred when applying to participate in a T-1 Auction, and has provided the Authority with documentation regarding the Distribution Connection Agreement.
20. As per Paragraph 17, under Rule 3.7.3(b), Applicants who are distribution connected New Build CMUs, and applying for a T-1 Auction, are required to provide a copy of the Distribution Connection Agreement, a connection offer (with evidence of acceptance) or (where this is not possible) provide written confirmation from the Distribution Network Operator (“DNO”) confirming the registered and export capacity. The Authority notes that Harmony CTF did not comply with the requirements of Rule 3.7.3(b) in the Application for Prequalification for the CMU referred to in Paragraph 1.
21. 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)²) and that the information or evidence is capable of rectifying such an error or omission.
22. In assessing the appeal, we must first consider whether the error or omission in the Application for Prequalification meets the definition set out in Regulation 69(7). Harmony CTF state that its reason for not providing the Distribution Connection Agreement prequalification application is that it “...*did not realize they needed to upload for Connection Agreement for T1 pre qualification*”. The Authority’s view is that the assumption to defer providing a Connection Agreement as Harmony CTF had for their previous T-4 Application for Prequalification does constitute a ‘non-material error or omission’ within Regulation 69(7)(a), on the basis that it appears to amount to a manifest, and honest mistake.

² Please note this is a term defined in statute, not the ordinary meaning of word ‘non-material’

23. We therefore consider that the Delivery Body was incorrect to consider that this error was 'material' and incapable of being rectified in the Request for Reconsideration. However, we find that the evidence (a copy of a connection agreement variation) which Harmony CTF submitted in the Request for Reconsideration did not meet the requirements of Rule 3.7.3(b) in any event.
24. In the Appeal to the Authority, Harmony CTF contend that it is not aware why other evidence, which it considered capable of meeting the requirements of Rule 3.7.3(b), was not also uploaded to the EMR Portal. The Authority has discussed with the Delivery Body whether, during the period to request a Reconsidered Decision, there had been any technical difficulties with their systems or the EMR Portal. The Delivery Body confirmed that they are not aware of any evidence of outages or issues with the EMR Portal which may have prevented this evidence from being uploaded as part of the Request for Reconsideration. We note that Harmony CTF did not include in its grounds of appeal any details as to how it attempted to rectify the position to provide the necessary evidence to meet the requirements of Rule 3.7.3(b) within the Request for Reconsideration.
25. As a result, on 22 December 2021, the Authority sought further information from Harmony CTF as to whether it took any steps to rectify the omission. Harmony CTF confirmed in its correspondence with the Authority that it did not contact the Delivery Body to rectify the omission or ask for further assistance. Harmony CTF said this was because it was not aware that incomplete evidence had been submitted until it received the Notice of Reconsidered Decision from the Delivery Body.
26. Therefore, we consider that, by failing to provide sufficient evidence to meet the requirements of Rule 3.7.3(b) as part of the Request for Reconsideration, Harmony CTF did not rectify the original omission within the Application for Prequalification. As such, the Delivery Body were correct to Reject the CMU referred to in Paragraph 1 from Prequalification.

Conclusion

27. The Delivery Body reached the correct reconsidered decision to not Prequalify HCTF20 for the T-1 Auction on the basis that evidence of a Distribution Connection Agreement required

under Rule 3.7.3(b) was not provided in the Application for Prequalification, nor with the Request for Reconsideration submitted by Harmony CTF.

Determination

28. 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 Harmony CTF's for Prequalification be upheld in respect of the CMU listed in Paragraph 1 for the T-1 Auction.



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For and on behalf of the Gas and Electricity Markets Authority

25 January 2022