

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 Inovyn ChlorVinyls Limited ("Inovyn") against a reconsidered decision made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
 - a) CMU VID100 (T-4 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. Inovyn submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2025 T-4 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:

"Capacity Market Rule 3.4.1(f) states that if an Application is submitted by an Agent, an Agent Nomination Form (Exhibit E) must be submitted. The Agent Nomination Form submitted has missing/incorrect details (Agent signature missing, Applicant signature missing), therefore does not meet the requirements of Exhibit E.

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.

Capacity Market Rule 3.6.3(a) requires all Existing Generating CMUs that are Transmission connected to provide a copy of the Grid Connection Agreement for each Generating Unit comprised in the CMU with the Application. A Grid Connection Agreement has not been provided for this Application therefore this CMU fails to meet this rule requirement.

As per Capacity Market Rule 3.5.2(b) only a Generating Unit Forming part of all of an Existing Generating CMU which is a Distribution CMU, can be calculated using the registered capacity stated in the Distribution Connection Agreement for that Generating Unit or in the written confirmation from the Distribution Network Operator provided. As this CMU is an Existing Generating CMU connected to a Transmission Network, the method of calculation for at least one Generating Unit is invalid and fails to meet the requirements of this rule."

5. For clarity, Inovyn did provide extracts of its Connection Agreement within a cover letter at Prequalification. These extracts included details of the CMU site address, the maximum import and export capacity, and details regarding the generating plant at the site.
6. Inovyn submitted a Request for Reconsideration of the Prequalification Decisions on 2 November 2021. Attached to this Request for Reconsideration, Inovyn provided a copy of the Connection Agreement for the CMU listed in Paragraph 1.
7. The Delivery Body issued a Notice of Reconsidered Decision (the "Reconsidered Decision") on 23 November 2021 which rejected the dispute on the following grounds:

"The Delivery Body considered the error or omission within the Application (i.e. Evidence of Connection offer signed acceptance missing) is a material error under Regulation 69(5), which is therefore not correctable at Tier 1 disputes stage.

In addition, there are several elements to this case we would like to share. After reviewing the information submitted by the Applicant in its request for the Delivery Body to review the Prequalification Decision, the Delivery Body can find evidence, from the cover letter and connection agreement, that points to the CMU being Distribution and not Transmission which is contrary to the application. There is also a mention of a Private Network Letter in the cover letter but this also appears to have been omitted from the original

Prequalification Application. The conflicting information caused the Delivery Body to be unsure as to the type of connection being applied for.

Moreover, it is worth noting that a Distribution CMU can defer providing their connection agreement during Prequalification submission. However, we do not believe this was the intention of the applicant as this has not been referenced in the applicants Tier 1 Dispute rational and the applicant elected to upload a connection agreement.

Notwithstanding the Delivery Body's decision that the error or omission within the application is a material error, the connection agreement which has been provided appears to be undated so without explanation on when this document was accepted / signed, we are not able to conclude that the agreement was in place prior to the close of the PQ submission window and therefore it is our opinion this error could not have been accepted.

Please note we have also noticed an error on the replacement Agent Nomination Form [Exhibit-E] which you have submitted there is a typo in section 1.2 . We would recommend you to update the address so that there are no issues with this form going forward. Please speak to [the Delivery Body] if you have any queries."

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

Inovyn's Grounds for Appeal

9. Inovyn disputes the Reconsidered Decision on the following grounds.

Ground 1

10. Inovyn note in its Appeal that the omission of a Connection Agreement at Prequalification was a clerical error. Inovyn also notes that it included extracts of its Connection Agreement, as well as other information regarding its connection arrangement, in its cover letter included in the Prequalification Application.

Ground 2

11. Inovyn states that it had a call with the Delivery Body on 28 October 2021. Inovyn claim that during this call it *"...received guidance from EMR. The guidance from EMR stated that if Inovyn uploaded a Connection Agreement, it should resolve the matter"*.

Ground 3

12. In relation to the error noted on the replacement Agent Nomination Form by the Delivery Body in its Reconsidered Decision, Inovyn stated that this was a clerical error.

Other information included in Inovyn's appeal

13. In relation to the Delivery Body's comments that Inovyn had referred to, but not supplied, a Private Network letter as part of its Application for Prequalification, Inovyn also note that the Delivery Body did not rely on this as part of their Prequalification Decision and considered it unfair that this was raised as part of the Reconsidered Decision. In any case, Inovyn stated that this was a clerical error that could have been resolved had it been raised in the Prequalification Decision.

The Legislative Framework

14. 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

15. The Regulations set out the powers and duties of the Delivery Body when it determines eligibility. Regulation 22(a) specifies that each Application for Prequalification must be determined in accordance with the Rules.
16. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
17. 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."

18. 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."

19. 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

20. Rule 1.2 sets out definitions for relevant terms used within the Rules. In particular:

"Transmission CMU means a Generating CMU each
Generating unit of which Exports electricity to
the Transmission Network where the Metering
System for the corresponding BM Unit is
registered in the Central Meter Registration
Service in accordance with the BSC

Distribution CMU means a CMRS Distribution CMU or a
Non-CMRS Distribution CMU

CMRS Distribution CMU means a Generating CMU, each
Generating Unit of which Exports electricity to
a Distribution Network where the Metering
System for the corresponding BM Unit is
registered in the Central Meter Registration
Service in accordance with the BSC

Non-CMRS Distribution CMU means a Generating CMU,
each Generating Unit of which, Exports
electricity to a Distribution Network that is not
a CMRS Distribution CMU"

21. Rule 3.6.3 details the criteria for Existing Generating CMUs to meet with respect to demonstrating relevant connection agreements.

"3.6.3 Connection Arrangements

(a) Each Applicant for an Existing Generating CMU that is a Transmission CMU must:

(i) confirm that one or more Grid Connection Agreements have been entered into which, subject to Rule 3.6.3(b), secure Transmission Entry Capacity for the relevant Delivery Year for the Generating Units comprised in the CMU at least equal, in aggregate, to the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Grid Connection Agreement applies; and

(ii) provide a copy of the Grid Connection Agreement for each Generating Unit comprised in the CMU with the Application. [...]"

"(c) Each Applicant for an Existing Generating CMU that is a Distribution CMU must:

(i) confirm that one or more Distribution Connection Agreements have been entered into which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Distribution Connection Agreement applies to connect to the Distribution Network in the relevant Delivery Years; and

(ii) provide a copy of the Distribution Connection Agreement for each Generating Unit comprised in the CMU with the Application or, where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement 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.

(d) For an Existing Generating CMU that is not directly connected to a Distribution Network the Applicant may, instead of complying with Rule 3.6.3(c), provide a letter from the owner of the Private Network to which the CMU is connected confirming:

(i) the full output that CMU is able to Export onto that Private Network; and

(ii) that the owner of that Private Network has an agreement with the relevant Distribution Network Operator for the connection of the Private Network to, and use of, a Distribution Network.

(e) Where reference is made to a Grid Connection Agreement, Distribution Connection Agreement or connection offer for a Generating Unit these refer to the agreement or offer in force at the date on which the Application is made."

Our Findings

22. We have considered Inovyn's Grounds for Appeal, which are summarised in Paragraph 9. In order to establish whether the Delivery Body reached the correct Reconsidered Decision, we have set out our findings against the errors identified in the Reconsidered Decision. These errors are:
- a) the conflicting information around whether the CMU listed in Paragraph 1 can be classed as a Distribution or Transmission CMU;
 - b) the failure to comply with Rule 3.6.3, and specifically the failure to provide a valid Connection Agreement (or a letter from the owner of the Private Network to which the CMU is connected); and
 - c) the errors in the Agent Nomination Form.

Conflicting Information regarding the class of CMU

23. In its Application for Prequalification, Inovyn identified the CMU listed in Paragraph 1 as a Transmission CMU rather than a Distribution CMU. As the Delivery Body correctly identified in its Reconsidered Decision, this conflicted with other information contained within Inovyn's Application for Prequalification, in particular information contained within the accompanying covering letter.
24. Based on information within the Application for Prequalification (and subsequently within the appeal proceedings), we consider that the CMU listed in Paragraph 1 meets the definition of a Distribution CMU. We therefore consider that Inovyn's selection of "Transmission CMU" within the initial application was an error.
25. In support of our conclusion, we note that Inovyn states in the cover letter submitted as part of the Application for Prequalification, that it intends to apply as distribution connected. It also explains that the CMU is connected to a Private Distribution Network which in turn connects to the network of Scottish Power Manweb (SPM). SPM is the Distribution Network Operator for the area in which the CMU listed in Paragraph 1 is located. A diagram supplied as part of the cover letter demonstrates that the CMU listed in Paragraph 1 has no direct connection with the Transmission Network, instead it shows that SPM hold a connection with the Transmission Network.

26. Based on the evidence provided in the Application, that Inovyn physically exports on to SPM's network, our view is that, under the Rules, Inovyn could not be anything other than a Distribution CMU. Notwithstanding that the error of selecting "Transmission CMU" was not identified by the Delivery Body as part of its Prequalification Decision, we have considered whether the error could have been reconsidered by the Delivery Body as part of its Reconsidered Decision.
27. 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.
28. In assessing the appeal, we must first consider whether the error or omission in the Application at Prequalification meets the definition set out in Regulation 69(7). The Authority's view is that the erroneous selection of "Transmission CMU" (as opposed to "Distribution CMU") does constitute a "*non-material error or omission*" within Regulation 69(7) on the basis that it appears to be "*manifest, and either inadvertent or the result of an honest mistake*".
29. Further, we consider that this error was capable of being rectified by the cover letter which was provided as part of the Application for Prequalification, highlighted by Inovyn in its Appeal.
30. We have further considered whether the initial error had any consequential impact on the application. We note that the initial error meant that Inovyn could not select the automated declaration to confirm that a Distribution Connection Agreement will be in place for the CMU, for the relevant Delivery Year under Rule 3.6.3(c)(i). However, we consider that that Rule 3.6.3(c)(i) was nonetheless satisfied within the Application for Prequalification as Inovyn confirms in the cover letter that it has a connection agreement with SPM at a capacity higher than the de-rated capacity of the CMU. Inovyn also included excerpts from this agreement.
31. In conclusion, we consider that the error of identifying the CMU as Transmission as opposed to Distribution is a non-material error or omission, which has been rectified by Inovyn. Further, whilst it is unclear whether this formed the basis of the Delivery Body's decision to reject the Application for Reconsideration, we consider that it would have been reasonable for the Delivery Body to have taken this into account when making their Reconsidered Decision.

Failure to comply with Rule 3.6.3

32. In its Application for Prequalification, Inovyn did not comply with Rule 3.6.3 by failing to provide a Connection Agreement (or a letter from the owner of the Private Network to which the CMU is connected), instead providing extracts of the agreement in its cover letter. As noted above, the Delivery Body did not initially identify the conflicting information (with regards to whether the CMU listed in Paragraph 1 was a Distribution or Transmission CMU) within the Application for Prequalification and rejected the CMU listed in Paragraph 1 on the basis that Inovyn had failed to provide a Grid Connection Agreement (i.e. under Rule 3.6.3(a)).
33. As part of its Request for Reconsideration, Inovyn provided the Delivery Body with a copy of its Distribution Connection Agreement. In its Reconsidered Decision, the Delivery Body concluded that the failure to provide a Connection Agreement as part of the Application for Prequalification "*is a material error under Regulation 69(5), which is therefore not correctable at Tier 1 disputes stage.*" We note that Regulation 69(5) does not refer to the concept of a 'material error' and therefore construe the Delivery Body's reasoning as being that the error did not constitute a "*non-material error or omission*" (within Regulation 69(7)), which was capable of being rectified on appeal.
34. As noted above, under Regulation 69(5A) the Delivery Body may take information relating to a "*non-material error or omission*" into account in reconsidering a Prequalification Decision if it determines that the information or evidence is capable of rectifying such an error or omission.
35. In assessing the failure to upload a Distribution Connection Agreement, we must consider whether it is an error and, if so, whether the error or omission in the Application at Prequalification meets the definition set out in Regulation 69(7).
36. We consider that the failure to provide a Distribution Connection Agreement at Prequalification was indeed an error as the Connection Agreement extracts provided as part its cover letter would not have been sufficient to satisfy the requirements of Rule 3.6.3.
37. However, the Authority's view is that the failure to upload a Distribution Connection Agreement does constitute a 'non-material error or omission' within Regulation 69(7) on the basis that it appears to be "manifest, and either inadvertent or the result of an honest mistake".

38. For completeness, we also note that the Delivery Body concluded in its Reconsidered Decision that the Distribution Connection Agreement provided appeared undated and was therefore not capable of rectifying the initial omission. Whilst we recognise that it is best practice for Connection Agreements to be dated, in the circumstances, we do not consider that the absence of a date renders the Distribution Connection Agreement invalid.
39. 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, Inovyn 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.

Errors in the Agent Nomination Form

40. With regards to the missing signature in the Agent Nomination Form at Prequalification, and given the Delivery Body's comments within the Reconsidered Decision (see Paragraph 7), we sought clarification from the Delivery Body as to whether this error had been accepted as part of the Reconsidered Decision. The Delivery Body subsequently confirmed it considered the initial error rectified in its Reconsidered Decision, and further, that it had accepted the Agent Nomination Form provided by Inovyn with the Request for Reconsideration.

Conclusion

41. The Delivery Body did not reach the correct Reconsidered Decision to Reject Inovyn for the T-4 Auction on the basis that the Authority are sufficiently satisfied that the information which was missing in the original Prequalification Application, and which was subsequently provided by Inovyn within the Request for Reconsideration, constituted a non-material error or omission according to Regulation 69(5A), and was rectified by the provision of the Distribution Connection Agreement by Inovyn.

Determination

42. 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 Inovyn for Prequalification be overturned in respect of the CMUs listed in Paragraph 1 for the T-4 Auction.



Heather Stewart

For and on behalf of the Gas and Electricity Markets Authority

1 February 2022