

## **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 SUSI EELPOWER FORDTOWN LIMITED ("Fordtown") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
  - a) FORD22 (T-4 Auction)
2. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the "Regulations"), where the Authority<sup>1</sup> receives an Appeal Notice that complies with Regulation 70, the Authority must review a reconsidered decision made by the Delivery Body.

### **Appeal Background**

3. Fordtown 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

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

*Capacity Market Rule 3.7.3(b) requires all New Build Generating CMUs that are Distribution connected to provide a copy of the Grid Connection Agreement, or*

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<sup>1</sup> 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.

*connection offer (with evidence of acceptance) for each Generating Unit comprised in the CMU with the Application, or if not possible, a written confirmation from the Network Operator to confirm the registered capacity of the Generating Unit and that the capacity of the Generating Unit is permitted to export to the Distribution Network. The Distribution Connection Agreement / Connection Offer provided for at least one Generating Unit has not been signed, therefore fails to meet the requirements of the rule.*

*If this Application had met the requirements for Prequalification, the Credit Cover requirement would have been £49890.00 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. We note that in the grounds of its Prequalification Decision, the DB have incorrectly referred to Rule 3.7.3 (b) by referencing Grid Connection Agreements. The Rule instead concerns Distribution Connection Agreements. This error does impact the outcome of this Determination.
6. On 28 October 2021, Fordtown requested the Delivery Body to reconsider its Prequalification Decision (“Request for Reconsideration”).
7. The Delivery Body issued a Notice of Reconsidered Decision on 23 November 2021 which rejected the dispute on the following grounds:

*“The Delivery Body considers 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, 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 the uploaded copy of the Connection Agreement, provided with the dispute, has an acceptance signature date of 30th September 2021 which clearly shows extra time was used, post the submission deadline, to make a material change. As a result, the original Prequalification Decision to not prequalify has been upheld.”*

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

## **Fordtown's Grounds for Appeal**

9. Fordtown disputes the decision on the following ground.
10. Fordtown argues that the upload of the unsigned Distribution Connection Agreement "*was mistakenly uploaded (as clerical error) as part of the original prequalification submission*". Fordtown notes that it has an option under Rule 3.7.3(c) to defer submission of the Distribution Connection Agreement and that this option should have been selected in its Application for Prequalification.
11. Fordtown accepted in its Request for Reconsideration that the signed Distribution Connection Agreement submitted was dated after the closure of the Prequalification Window. However, in its Request for Reconsideration, Fordtown refers to correspondence with the Delivery Body who, it states, instructed it to upload a Distribution Connection Agreement. The Authority notes that Fordtown did not provide a copy of any correspondence with the Delivery Body in its appeal. In any event, the purpose of this appeal is to consider the correctness of the Delivery Body's Reconsidered Decision on the evidence before it, not the correspondence between the Delivery Body and Appellant. The Authority did not, therefore, consider it was necessary to request this information in order to reach a decision.
12. Fordtown is of the view that since Rule 3.7.3(c) allows the deferral of the Distribution Connection Agreement, the Delivery Body decision should be overturned and its appeal allowed.

## **The Legislative Framework**

13. 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**

14. 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.

15. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.

16. 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."*

17. 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."*

18. 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**

19. 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."*

20. 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**

21. We have assessed Fordtown’s Grounds for Appeal, which are summarised below.
22. Fordtown states that as it applied to participate in a T-4 Auction, it should be able to defer its Distribution Connection Agreement submission by up to 18 months prior to the Relevant Delivery Year. Fordtown asserts that at the time of the closure of the Prequalification Window, it was not required to submit evidence of a Distribution Connection Agreement as Rule 3.7.3(c) was applicable and that the submission of the unsigned Distribution Connection Agreement was a “clerical error”. Fordtown have requested that, on this basis, it wishes to exercise deferral of the Distribution Connection Agreement.
23. Under Rule 3.7.3(b), Applicants who are New Build and Distribution CMUs 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. Alternatively under Rule 3.7.3(c), Applicants who are New Build and Distribution CMUs applying for a T-4 Auction in particular, may instead of submitting a Distribution Connection Agreement under Rule 3.7.3(b), declare that a Distribution Connection Agreement will be in place 18 months prior to the commencement of the Relevant Delivery Year.
24. The Delivery Body found that evidence of a Distribution Connection Agreement was required under Rule 3.7.3(b) and that, as a result, Fordtown had not complied with Rule 3.7.3(b) as the required evidence was omitted and no declaration under Rule 3.7.3(c)(i) was made. The Delivery Body noted that Fordtown did not exercise the option to defer submission of the Distribution Connection Agreement under Rule 3.7.3(c)(i).
25. Fordtown argues that the submission of the unsigned Distribution Connection Agreement was “*mistakenly uploaded*” as part of its original Prequalification Application and that it should have instead elected to defer the submission of the Distribution Connection Agreement, by way of the appropriate declaration. As referred to above, when Fordtown provided a signed Distribution Connection Agreement as part of its Request for Reconsideration, this was then rejected on the basis that the original failure to provide

the Distribution Connection Agreement was “a material error under Regulation 69(5)”.

26. 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.
27. 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). In this case the error was, as stated by Fordtown, its failure to make a declaration under Rule 3.7.3(c)(i) that a Distribution Connection Agreement would be in place by the date 18 months prior to the commencement of the relevant Delivery Year.
28. The Authority’s view is that the failure to provide the declaration under Rule 3.7.3(c)(i) constitutes a ‘non-material error or omission’ within Regulation 69(7)(c) on the basis that it appears to be inconsequential to the affected person’s compliance with the requirements of the Rules.
29. 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. Further, we consider that by asserting that it would have made the relevant declaration as part of their Request for Reconsideration, Fordtown has rectified this omission and as such remedies the non-compliance Rule 3.7.3(c)(i)
30. The Authority finds that the Delivery Body should have considered the further declaration made by Fordtown. The Delivery Body was not correct to reject Fordtown’s appeal for Reconsideration of the Prequalification Decision. Fordtown should be able to defer the submission of the Distribution Connection Agreement pursuant to Rule 3.7.3(c).

## **Conclusion**

31. The Delivery Body did not reach the correct Reconsidered Decision to Reject FORD22 for the T-4 Auction on the basis that
  - a) the Authority are sufficiently satisfied that 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).

## **Determination**

32. 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 Fordtown for Prequalification be overturned in respect of the CMU listed in Paragraph 1 for the T-4 Auction.



Heather Stewart

Acting Head of GB Wholesale Markets

**For and on behalf of the Gas and Electricity Markets Authority**

25 January 2022