

## **DETERMINATION PURSUANT TO REGULATION 71(3)(b) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING REJECTION OF REQUEST FOR RECONSIDERATION BY THE DELIVERY BODY ON THE GROUND THAT THE REQUEST DID NOT COMPLY WITH REGULATION 69(2).**

### **Introduction**

1. This determination relates to a request made by Warrington Renewables (Hull) LTD (“Warrington Renewables”) that the Authority<sup>1</sup> consider the decision made by the Electricity Market Reform Delivery Body (“Delivery Body”) to not reconsider the Prequalification Decision in respect of the following Capacity Market Unit (“CMU”):
  - a) CMU BILT01 (T-1 Auction)
2. Pursuant to an Appeal to the Authority under Regulation 70(1)(b) of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”), where a Request for Reconsideration was Rejected by the Delivery Body on the ground that it did not comply with Regulation 69(2), by virtue of Regulation 70(5) the affected person may submit evidence to the Authority that the request did comply with that Regulation.
3. This determination determines whether Warrington Renewables submitted a Request for Reconsideration to the Delivery Body, which was compliant with the relevant Regulations, as well as the relevant Capacity Market Rules 2014 (as amended) (the “Rules”). Further, we set out whether the Delivery Body should reconsider the Decision to Reject Warrington Renewables’ Prequalification Application.

### **Background**

4. Warrington Renewables submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2022-23 T-1 Auction.

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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.

5. On 29 September 2021, during the Prequalification Assessment Window, Warrington Renewables sent an email to a Delivery Body email address: [emr@nationalgrideso.com](mailto:emr@nationalgrideso.com) ("Email Address 1"), which contained the following message:

*"We are struggling to enable document upload for this. We submitted ZB at prequalification. Please can you confirm ZA is not required for this CMU (which as declared has no fossil fuel component).*

*If it is required, please can you advise how we should upload. Due to signatory holidays this may not get uploaded until Monday."*

6. The Delivery Body responded to Warrington Renewables' email on 29 September 2021 with the following message:

*"I can see BILT01 is a New Build with a T-1 2021 & T-4 2024 Agreement made up of Solar and Battery storage components which, as you mention below, are not Fossil Fuel Components.*

*I can confirm you have no requirement to provide a ZA following your ZB declaration at Prequalification.*

*The only scenario you would ever need to provide a ZA for this CMU going forwards is if there were to be a change at the site that impacted the Emissions output (i.e. an Emissions Related Material Change) which seems unlikely for this CMU. Everything is in order."*

7. Following this email exchange, 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 for the following reasons:

*"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). The Applicant for this Application has not provided a Fossil Fuel Emissions Commitment (Exhibit ZB); therefore, this application is not in accordance with the Capacity Market Rules."*

8. On 27 October 2021, Warrington Renewables sent an email to the Delivery Body using a different email address to Email Address 1: emr.prequal@nationalgrideso.com ("Email Address 2"), stating:

*"Our prequal was rejected because Exhibit ZB was missing from the portal. As you can see from the attached ZB was signed in August 2021. This was overlooked as CMU BOSCO1 did not request upload of a ZB and this got confused across the two CMUs.*

*We would ask that you review and amend your pre-qualification rejection with this exhibit now to hand."*

9. The Delivery Body did not review the decision to not Prequalify Warrington Renewables. Regulation 71(1)(b) provides the Authority with the ability to request information from the Delivery Body, relevant to the Appeal (see Paragraph 20 below). As such, on 29 November 2021, we requested information relating to this decision, and on the same the Delivery Body informed Ofgem that:

*"We did not receive a Dispute from the Applicant during the Disputes Submission window. However we received an email from the Applicant following the release of Tier 1 Disputes asking why they had not responded to their Dispute. They confirmed they had emailed in a Dispute, however it was not to our email address but to an inactive account. We tested the account address they provided and it does send an autoreply confirming it is not active."*

10. As alluded to by the Delivery Body above, Warrington Renewables sent a further email to a Delivery Body email address (different from Email 1 and Email 2): box.EMR.Prequal@nationalgrideso.com ("Email Address 3") on 23 November 2021:

*"We received notice that disputes results [are] available on the portal. There is no dispute letter on [the] portal.*

*AT1-2022 CMU ID – BILT01 was rejected at [Prequalification], we appealed with email below and attachment on 27th October.*

*We had previously been told that ZA [was] not required (see email attached that everything [is] in order in September) as we had submitted ZB but rejection said we had not provided ZB. We followed up with ZB as email below. Can you confirm dispute is resolved and that we are prequalified?"*

11. On 26 November 2021, the Delivery Body responded to Warrington Renewables' email of 23 November 2021:

*"Following your email and our phone calls yesterday and today, I was sorry to hear of the issues you have experienced.*

*Our Tier 1 Disputes process has now closed, and we did not receive a Dispute in the portal for Application A-T-1-2022-BILT01-00001. To raise a Dispute, a Disputes notice must be entered into the EMR Portal within the Dispute application window.*

*I do appreciate that you sent an email to the email address [emr.prequal@nationalgrideso.com](mailto:emr.prequal@nationalgrideso.com) however this is not an active email account and if emailed it does send an auto reply to confirm it is not an active account which you should have received. Therefore we did not have awareness of your emailed Dispute. If we had received your email we would have clarified that Disputes can only be raised via the EMR Portal.*

*Thank you for the copies of the email sent to my colleague [name redacted] on the 29<sup>th</sup> September, [name redacted] responded specifically about the T-1 2021 & T-4 2024 Agreements that would have been processed in Prequalification 2020. At this time the 2021 Prequalification Submission window had closed and the Prequalification Results for 2021 were not yet available. I am sorry if this was not made clear to you at the time. I will certainly feed this back to the team as part of our Prequalification Review process.*

*As confirmed in the Application Prequal Result Letter dated 26<sup>th</sup> October 2021, the Prequalification results decision for BILT01 was Rejected, as 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). A 2021 Fossil Fuel Emissions*

*Commitment (Exhibit ZB) was not provided; therefore, the Application did not meet the rule requirements. Exhibits that are required but not provided are classed as a "Material" failure.*

*We have now completed our Prequalification and Disputes part of the process, however I can appreciate that had your Dispute been in our system you would have the right to take that to Ofgem at Tier 2. With that in mind if you did want to contact Ofgem to discuss, their email address is EMR\_DR@ofgem.gov.uk NB The Tier 2 Dispute window closes on Tuesday 30<sup>th</sup> November at 5pm."*

12. Warrington Renewables appealed to the Authority under Regulation 70(1)(b) and also submitted evidence to the Authority on 29 November 2021 under Regulation 70(5) of the Regulations, to assess whether the Request for Reconsideration to the Delivery Body did comply with Regulation 69(2).

## **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 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 Rules.
15. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
16. Specifically, Regulation 69(2) sets out how an applicant should submit a request for reconsideration to the Delivery Body:

*"The request must-*

*(a) be submitted in writing to the Delivery Body within 5 working days after receiving notice of the decision; and*

*(b) include each of the matters specified in sub-paragraphs (a) to (e) of regulation 70(3)."*

17. Further, Regulation 70(1) provides that:

*"An affected person who has, in accordance with regulation 69(2), made a request to the Delivery Body to review a delivery body reviewable decision, may appeal to the Authority if—*

*(a) the affected person disputes the reconsidered decision; or*

*(b) the request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2)."*

18. Regulation 70(3) sets out what information the Appeal Notice must contain.

19. Regulation 70(5) provides that an applicant may submit evidence to the Authority if the Delivery Body do not consider a Request for Reconsideration:

*"Where a request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2), the affected person may submit evidence to the Authority that the request did comply with that regulation."*

20. Regulation 71(1) provides that

*"The Authority—*

*(a) must notify the Delivery Body when it receives an appeal notice under regulation 70; and*

*(b) may request the Delivery Body to provide it with any information relating to the disputed decision which the Authority considers necessary to enable it to determine the appeal."*

## **Capacity Market Rules**

21. Rule 1.6.1 sets out how communications by or to the Delivery Body should be made and states that:

*"All notices, submissions and other communications by, or to, the Delivery Body, pursuant to the Regulations or the Rules must be in writing and:*

*(a) where pursuant to Rule 5.6 or Rule 5.10, submitted via the IT Auction System; and*

*(b) for all other purposes, submitted via the EMR Delivery Body Portal."*

22. Rule 1.6.3 provides that the Delivery Body is not obligated to respond to communications received which are not in accordance with Rule 1.6.1 and states that:

*"Neither the Delivery Body nor the Auctioneer has any obligation to respond to, or otherwise act upon, any notice, submission or other communication received by it other than in accordance with Rule 1.6.1 or Rule 1.6.2 (as applicable) which it will be deemed not to have received for any purposes under the Regulations or the Rules."*

## **Our Findings**

23. We have assessed the evidence submitted to us by Warrington Renewables. Warrington Renewables sent a Request for Reconsideration to what we understand to have been an inactive email account (Email Address 2) during the appeal submission window, as defined by Regulation 69(2). As set out in Rule 1.6.1(b) of the Rules, all notices, submissions or other communications to the Delivery Body should be submitted via the EMR Delivery Body Portal ("EMR Portal"). Warrington Renewables did not submit a Request for Reconsideration via the EMR Portal, and therefore failed to meet the requirements of this Rule.

24. One of the key reasons behind the Rules requiring communication through the EMR Portal is to make sure that the Delivery Body receives the relevant communication. In this instance, the Request for Reconsideration was sent to Email Address 2, which we have been informed was an out of service email address at the time. As such, and as per Paragraph 25 below, the Request for Reconsideration cannot therefore be properly considered as having been received by the Delivery Body.
25. In addition, Rule 1.6.3 provides that where any notice, submission or other communication is received by it other than in accordance with Rule 1.6.1, the Delivery Body is not obligated to respond to that communication, or otherwise act upon any such requests made. As per Paragraph 9, we have been informed that the email address that Warrington Renewables sent its Request for Reconsideration to (Email Address 2) was inactive at the time of the request. As such, the Delivery Body state in their email of 23 November 2021 that it did not receive the Request for Reconsideration and therefore were unaware of the request. The Delivery Body further noted in their email of 23 November 2021, that had they received the email, they would have clarified with Warrington Renewables that Disputes can only be raised via the EMR Portal. According to Rule 1.6.3, there is no requirement that the Delivery Body provide this clarification, and nevertheless the Delivery Body was unable to do so within the relevant timeframe (see Paragraph 26 below) as it was not made aware of the email until after the Reconsidered Decisions had been issued.
26. Regulation 69(2)(a) provides that a Request for Reconsideration must be submitted in writing to the Delivery Body within 5 working days after receiving notice of the Prequalification Decision. While Warrington Renewables did submit a request in writing within 5 working days of receiving the Delivery Body's Prequalification decision, the request was not made in accordance with the Rules as it was not submitted via the EMR Portal and it was submitted to an inactive email account.
27. It is however possible that, had Warrington Renewables sent a Request for Reconsideration to an active email account, the Delivery Body may have advised Warrington Renewables to submit the Request via the EMR Portal. However, the Delivery Body did not become aware of Warrington Renewables request until after Reconsidered Decisions had been issued. Therefore, the timeframe within which Warrington Renewables could submit a Request for Reconsideration, as set out in Regulation 69(2)(a), had passed.



## Conclusion

28. Warrington Renewables did not submit a valid Request for Reconsideration in accordance with Regulation 69(2) for the following reasons:
- a) The Request for Reconsideration was not submitted to the Delivery Body via the EMR Portal in accordance with Rule 1.6.1(b).
  - b) The Request for Reconsideration was not submitted in writing to the Delivery Body via the EMR Portal within 5 working days after receiving notice of the Delivery Body's decision in accordance with Regulation 69(2).
29. For the reasons set out in this Decision, the Authority hereby determines that pursuant to Regulation 71(3)(b) that the Delivery Body's Decision not to review Warrington Renewables' Request for Reconsideration was correct in respect of the CMU listed in Paragraph 1.



Mark Carolan

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

13 January 2022