

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 appeals made by [REDACTED] against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Units ("CMUs"):

[REDACTED]

2. This decision deals with all of the appeals listed above as they are substantively in respect of the same issue and differ only in so far as concerns the identity of the respective CMUs.
3. 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

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.

Regulation 70, the Authority must review a reconsidered decision made by the Delivery Body.

Appeal Background

4. [REDACTED] submitted an Application for Prequalification for the CMUs listed in Paragraph 1 in respect of the 2023 T-4 and 2022 T-3 Auctions.

5. For the CMUs listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 25 October 2019 (the "Prequalification Decision"). The Delivery Body Conditionally Prequalified the CMUs on the following Ground:

"Application is Conditionally Prequalified for the following reason(s): Financial Commitment Milestone: As per Capacity Market Rule 6.6, the

Financial Commitment Milestone has not been achieved; therefore, this Application is Conditionally Prequalified and will need to provide Credit Cover as above.

Credit Cover is not required during the standstill period as per Regulation 59(1)(C) but should you wish to post Applicant Credit Cover, please contact the CM Settlement Body accordingly. Further information on Credit Cover requirements will be provided by the Delivery Body in accordance with Chapter 17: Rule 4.12 dependent on a "Deferred Capacity Payment Trigger Event" occurring."

6. On [REDACTED], the Delivery Body published a version of the Capacity Market Register, relating to the 2020 Auctions, confirming the status of the CMUs listed in Paragraph 1 as 'Not Prequalified'.
7. [REDACTED] submitted a Request for Reconsideration of the Prequalification Decisions on 8 January 2020.

8. The Delivery Body issued a Notice of Reconsidered Decision ("Reconsidered Decision") on 15 January 2020 which rejected the dispute on the following Ground:

" following the failure to provide Credit Cover by the prescribed deadline.

...

Details of the rationale for our decision are uploaded under Other Documents in the EMR Portal"

9. In addition to the Reconsidered Decision, the Delivery Body uploaded a letter to the EMR Delivery Body Portal on 15 January 2020 which provided "Supplementary Information in Relation to Dispute":

" Applicants who defer their obligation to post Credit Cover at the point of submitting their Pre- Qualification Application are required to post Credit Cover within 15 working days of Prequalification Results Day (PQRD) as per 4.6.1 of the Capacity Market rules 2014 (As Amended). For the 2019 Prequalification round PQRD was the 25th of October 2019.

In this case, the requirement to meet your Credit Cover obligation was highlighted in the Prequalification results letter issued to your companies Main Admin via the EMR Portal on 25th October 2019.

In addition to the Prequalification results letter, the Delivery Body shared associated Credit Cover guidance and issued timely email reminders ahead of the Credit Cover deadline to ensure the obligation was met. All email communication and reminders were sent to your companies declared Main Admin.

It is the Delivery Bodies view that Regulation 56 (2) provides for, if the Applicant posts the incorrect amount of Credit Cover by the Credit Cover deadline, it will have 5 working days once being notified of that rejection to make good that mistake.

On that basis the EMR Settlement Body (EMRS) may provide for a further 5 working days in order that the Applicant can make good that mistake, which I understand they extended to you on this occasion.

In relation to your interaction with the EMRS, it is the Delivery Body's understanding that you made 3 applications to lodge Credit Cover between the 15th of November 2019 and the 3rd of December 2019 and received 3 separate Notices of Unapproved Credit Cover. However, following each of these Notices, the correct amount was not lodged leading to rejection of the associated applications.

My understanding is that EMRS communicated to you that the final deadline they required Applicants to meet their Credit Cover obligation was 17:00 on the 10th of December 2019 which in this case was not met.

As per rule 4.6.4 of the Capacity Market rules 2014 (As Amended), if the Settlement Body has not provided, the Delivery Body by 32 working days after the PQRD (deadline 10th of December) with a copy of the Notice to an Applicant that it has approved the Applicant Credit Cover provided by the Applicant, then that Applicant is Not Prequalified.

The Delivery Body did not receive this Notice and therefore was obliged, under rule 4.6.4, to set your Prequalification Application to Not Prequalified."

10. [REDACTED] then submitted an Appeal Notice to the Authority on 22 January 2020 under Regulation 70 of the Regulations.

[REDACTED] Grounds for appeal

11. [REDACTED] disputes the decision on the following summarised grounds:

Ground 1

Failure by NGESO to issue formal notice of the Prequalification Decision made on [REDACTED] in compliance with the Capacity Market Rules 2014 (as

amended). The Applicant in its appeal noted that it did not receive a formal notice from the Delivery Body setting out that the CMU had not prequalified, as per Rules 4.6.4 and 1.6.

Ground 2

Failure by the Delivery Body to apply proper procedural fairness in consideration of what [REDACTED] consider to be unique extenuating circumstances, that it was misled by the EMR Settlement body in regards to the date of the Prequalification Results Day, and subsequently the dates when applicant credit cover should be provided.

Ground 3

Failure by the Delivery body to provide strong justifications its Reconsidered Decision.

The Legislative Framework

12. 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

13. The Regulations set out the duties upon the Delivery Body when it determines eligibility. Regulation 22(a) specifies that each Application for Prequalification must be determined in accordance with the Rules.
14. Regulation 56 sets out the requirements for the maintenance of Applicant credit cover, insofar as they relate to cash deposits²:

56 (1) A must maintain credit cover equal to or more than the required amount at all times during the credit obligation period.

² Provisions in these Regulations relating to the provision of a letter of credit have not been included as it is not relevant in this case.

(2) If the Settlement Body gives notice to A that any credit cover provided by A is not approved, A must within 5 working days provide additional credit cover so that the total amount of credit cover provided (excluding credit cover which is not approved or has been drawn down) is equal to or more than the required amount.

15. Regulation 59 establishes the definition of Applicant Credit Cover, and are laid out here insofar as they apply to this case³.

59.—(1) Subject to paragraph (1B), and (1C) an applicant to prequalify for a capacity auction in respect of a CMU ("CMU i") must, if the applicant receives from the Delivery Body a conditional prequalification notice under capacity market rules, provide applicant credit cover in the amount determined in accordance with paragraph (2).

...

(2) Subject to paragraphs (2A) and (2B), the amount of applicant credit cover to be provided is—

(a) in the case of an application to prequalify for a T-4 auction or a T-1 auction—

(i) if CMU i is an unproven demand side response CMU, an amount equal to £5,000 per MW of the de-rated capacity of CMU i; and

(ii) if CMU i is not an unproven demand side response CMU, an amount equal to £10,000 per MW of the de-rated capacity of CMU i;

...

(3) If A is required to provide credit cover under paragraph (1), A must do so within 15 working days after receiving the conditional prequalification notice unless paragraph (5A) applies

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

³ Paragraphs omitted: 1B, 1BA, 1BB, 1C, 2A, 2B, 4, 5, 5A & 6.

17. In particular, Regulation 71 provides the remit for the Authority when considering an appeal:

(3) Upon receiving an appeal notice which complies with regulation 70, and any information requested from the Delivery Body, the Authority must—

(a) subject to paragraph (4), review the reconsidered decision;

(b) determine whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision.

(4) In a determination under paragraph (3)(b)—

(a) the Authority must uphold the reconsidered decision if the Authority determines that it was correct on the basis described in paragraph (3)(b);

Capacity Market Rules

18. Rule 1.2 defines Prequalification Results Day (PQRD) as:

means, for any Capacity Auction, the Working Day on which the Delivery Body notifies each Applicant of the matters set out in Rule 4.5.1 in accordance with that Rule

19. Rule 1.5 identifies and establishes a hierarchy of relevant documents:

In the event of any conflict or inconsistency between the Regulations, the Rules and any Auction Guidelines, the following order of precedence must apply:

(a) the Regulations prevail over the Rules and any Auction Guidelines; and

(b) the Rules prevail over any Auction Guidelines

20. Rule 1.6.1 sets out the format by which the Delivery Body must provide notice.

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.

21. Rule 2.2.1 defines the term 'Auction Guidelines'.

The Delivery Body must, prior to the opening of the Prequalification Window, publish auction guidelines that will include further specific details as to the running of each individual Capacity Auction (the "Auction Guidelines").

22. Rule 4.5.1 places an obligation on the Delivery Body to notify applicants of their Prequalification decision on PQRD.

On the Prequalification Results Day, the Delivery Body will notify each Applicant other than a Secondary Trading Entrant, the Secretary of State, the CM Settlement Body and the Authority of the following information:

(a) the Prequalification Decision for each CMU for which it has made an Application...

23. Rule 4.6.1 sets out when an Applicant must provide credit cover.

An Applicant that, in relation to a CMU, receives notice from the Delivery Body under Regulation 73(2)(b) or Rule 4.5.1(b)(ii), (iii), (iv) or (iva) of its conditional Prequalification must, within fifteen Working Days of such notification, provide Applicant Credit Cover to the CM Settlement Body in accordance with the Regulations.

24. Rule 4.6.4 places an obligation on the Delivery Body to notify applicants, in the event that it does not receive a notice from the EMRS Settlement Body approving credit cover.

If the Delivery Body has not received a copy of a notice in accordance with Rule 4.6.2 within 32 Working Days of providing notice under Rule 4.5.1(b) (ii), (iii) or (iv) (as applicable), the Delivery Body must within five Working Days notify that Applicant that it has not Prequalified.

Our Findings

25. We have assessed [REDACTED] Grounds for appeal, which are set out below:

Ground 1

26. Rule 4.6.4 requires the Delivery Body, in certain circumstances, to notify an Applicant that it has not Prequalified. The Delivery Body must provide this notice, within five Working Days of the deadline passing for receiving notification from the CM Settlement Body that an applicant's credit cover has been approved and no approval notice has been received. The Applicant, in its appeal, stated that it received no such notice from the Delivery Body.
27. The Delivery Body, having not received such a notice from the CM Settlement Body by 10 December 2019 (32 Working Days after PQRD, see Rule 4.5.1.(b)), was required to notify the Applicant of the change in status. It is our understanding that the Delivery Body published a version of the Capacity Market Register on [REDACTED], indicating that the Applicant's status had been set to 'Not Prequalified'. Therefore we find that the Delivery Body did not meet its obligations under Rule 4.6.4.
28. However, we are not of the view that this has a material impact on the substance of the appeal as to whether or not credit cover was provided in accordance with the Regulations and Rules. Nor has [REDACTED] made any suggestion that this has impacted its ability to raise either a request for reconsideration, or a subsequent appeal.

Ground 2

29. In its appeal, [REDACTED] claimed the Delivery Body failed to take into account, in its Reconsidered Decision, the circumstances of [REDACTED] situation as to why it had failed to provide sufficient credit cover. In its request for reconsideration [REDACTED] noted that the Capacity Market Auction Guidelines (published 22 July 2019 by the Delivery Body) had led it to understand that the PQRD was 22 November 2019 and, taking this together with the Delivery Body's Operational Plan (version 1.2 published July 2019) and the CM Settlement Body's Working Proactive ("WP") 35 document (revision 12), had led [REDACTED] to

conclude that the final date for providing credit cover was 10 January 2020.

30. In its appeal [REDACTED] stated it was notified by the CM Settlement Body on the 25 November that the correct date for final payment is the 10 December 2019, which [REDACTED] claim that due to financing timescales made it unable to lodge sufficient credit cover before this deadline.

Our findings in respect to the Rules and Regulations

31. PQRD is defined in the Rules, as per Paragraph 18. Rule 4.5.1 places a requirement on the Delivery Body to notify applicants of certain relevant information, including the Prequalification Decision for each CMU for which it has made an Application. In this application cycle the PQRD was 25 October 2019. The Delivery Body met this obligation in relation to the CMUs listed in Paragraph 1.
32. The Applicant was notified of the Delivery Body's decision to 'Conditionally Prequalify' the relevant CMUs on 25 October 2019. The Applicant therefore was under notice that it had until 15 Working Days after this time (15 November 2019) to post Applicant Credit Cover, as per Rule 4.6.1 (see Paragraph 23) and Regulation 59(3) (see Paragraph 15), to the level of the required amount as per Regulation 59(2). The Applicant failed to post the full amount of credit cover required by this deadline.
33. Regulation 56(2) permits an applicant, who fails to post the required amount of credit cover, 5 Working Days from the receipt of notice of unapproved credit cover to rectify this situation. Regulation 56(2) is clear that, upon receipt of such a notice, an applicant *"...must within 5 working days provide additional credit cover so that the total amount of credit cover provided (excluding credit cover which is not approved or has been drawn down) is equal to or more than the required amount."*
34. The CM Settlement Body provided a notice of unapproved credit cover on 18 November 2019 to the relevant CMUs. [REDACTED] failed to meet the requirements of Regulation 56(2) by submitting less than the required amount on 25 November 2019. At this point, the relevant CMUs had failed to meet their obligations, as conditionally prequalified CMUs.

35. Rule 1.5 (see Paragraph 19) sets out the hierarchy of documents in relation to the Capacity Market. Rule 2.2.1 (see Paragraph 21) defines 'Auction Guidelines'.
36. The guidance relied upon by [REDACTED] (see Paragraph 29) do not take precedence over the Regulations, the Rules or the Auction Guidelines. We note that all three documents referred to by [REDACTED] contain caveats to this end.⁴
37. In our view, the Regulations and Rules specify that credit cover for CMUs set to 'Conditionally Prequalified' on PQRD should be posted by relevant parties, within 15 Working Days of PQRD. Regulation 56(2) acts to provide those that are do not provide the required credit cover, one additional chance to rectify an error.
38. Therefore, the Delivery body was correct to set the status of the relevant CMUs to 'Not Prequalified', on the basis that the relevant credit cover was not provided to the CM Settlement body by the required time, and as such the Delivery Body did not receive a notice of approved credit cover pursuant to Rule 4.6.4.
39. Regarding the fact that the Applicant believes it has been reasonably misled by the Delivery Body, and the EMRS, it is not within the Authority's remit to provide an opinion on such matters. Regulation 22 sets out the Delivery Body's requirements when considering a Request for a Reconsidered Decision, as per Paragraph 13, to "*determine each application for prequalification that is made to it in accordance with capacity market rules*". Ofgem's obligations, when considering an appeal of a Reconsidered Decision, are laid out in Regulation 71(3)(b), as per Paragraph 17 to "*determine whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision.*". As such, we have reviewed the relevant Regulations and Rules, which take precedence above any guidance, and determined that the Applicant did not provide the required Credit Cover by the necessary time.

Ground 3

⁴ Both the Auction Guidelines and WP35 document indicate that they should be read in conjunction with the Rules and Regulations. The Operational Plan states that the Rules and Regulations take precedence in the event of a conflict or inconsistency.

40. The Applicant noted in its Appeal to the Authority that the Delivery Body did not address its extenuating circumstances in its notification of a Reconsidered Decision. It also stated that the Delivery Body failed to give full reasons for its Reconsidered decision.
41. The Delivery Body has a duty to disclose its reasoning to the Applicant, when making a Reconsidered Decision (as per Regulation 69(3)(b)(ii)). In this instance, we note that the Delivery Body did provide reasoning to the Applicant: in the Notice of Reconsidered Decision, going into further detail via a supplementary letter, sent to [REDACTED] through the EMR Delivery Body Portal (see Paragraphs 8 and 9 above).

Conclusion

42. The Delivery Body reached the correct Reconsidered Decision to not Prequalify the CMUs listed in Paragraph 1 for the T-3 and T-4 Auctions, on the basis that [REDACTED] failed to provide the required credit cover by the timings set out in the Regulations and the Rules.

Determination

43. 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 [REDACTED] for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the T-4 and T-3 Auctions.



Mark Carolan

For and on behalf of the Gas and Electricity Markets Authority

08 April 2020