

## **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 Kiwi Power Ltd ("Kiwi Power") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Units ("CMUs"):
  - a) KPEG47 (T-4 Auction)
  - b) KPEG48 (T-4 Auction)
  - c) KPEG49 (T-4 Auction)
  - d) KPST57 (T-4 Auction)
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 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**

4. Kiwi Power submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2026 T-4 Auction.
5. The Delivery Body rejected the CMUs on the following grounds:

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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.

6. For the CMUs listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 1 November 2022 (the "Prequalification Decision").

*"Capacity Market Rule 3.6.5 requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Declaration (Exhibit ZA) in its Application (CMUs: KPEG47, KPEG48, KPEG49). The Applicant for this Application did not provide a Fossil Fuel Emissions Declaration (Exhibit ZA), as required by rule 3.6.5. Also, the Emission Declaration 'No Fossil Fuel Component' or 'Fossil Fuel Emissions Declaration Exemption under Rule 3.6.5(d)' have not been ticked to confirm Fossil Fuel Emissions Declaration (Exhibit ZA) was not required for this Application."*

*"Capacity Market Rule 3.6.5 requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Declaration (Exhibit ZA) in its Application (CMU: KPST57). The Applicant for this Application did not provide a Fossil Fuel Emissions Declaration (Exhibit ZA), as required by rule 3.6.5, but has instead ticked the Emission Declaration 'Fossil Fuel Emissions Declaration Exemption under Rule 3.6.5(d)', despite the Application not being for a Pre-2024 T-1 Auction and each relevant Fossil Fuel Component comprised in this CMU has a Commercial Production Start Date which is after 4 July 2019. Please note, the Connection Capacity for the CMU was amended in assessment as the Connection Capacity entered is higher than Historic Output. Historic Output values used to apply de-rating factor; therefore, it is 6.958MW before de-rating."*

7. Kiwi Power submitted a request for reconsideration of the Prequalification Decisions on 08 November 2022.
8. The Delivery Body issued a Notice of Reconsidered Decision on 29 November 2022 which rejected the dispute on the following grounds:

*"The Delivery Body has reviewed the Prequalification Decision in accordance with the request to review the original Prequalification result. The reconsidered outcome is that the original Prequalification Decision is valid and will be upheld. Regulation 69(5A) allows the Delivery Body to take into account information or evidence when reconsidering a Prequalification Decision where there is a non-material error or omission in the original Prequalification submission. After considering the Application as a whole the Delivery Body considers the error or omission (missing Exhibit ZA and missing Emission Declaration) is a non-material error under Regulation 69(5A) which could have been corrected at Tier 1 Disputes. However, the updated Exhibit ZA provided has an incomplete Part 5. Therefore, the non-material error has not been rectified and as a result, the original Prequalification Decision has been upheld."*

9. Kiwi Power Ltd then submitted an Appeal Notice to the Authority on 05 December 2022 under Regulation 70 of the Regulations.

## **Kiwi Power's Grounds for Appeal**

10. Kiwi Power disputes the decision on the following grounds.

*"This CMU is an existing CMU with existing agreements. The Delivery Body is aware that the CMU is above 1MW. The form ZA was submitted as part of the Tier 1 appeal. The Delivery Body says that part 5 was incomplete. We (Kiwi Power) dispute this, as Part 5 was completed, although "not applicable" was incorrectly added. An updated Exhibit ZA is attached to this appeal (Tier 2)."*

*"The Applicant acknowledges that a clerical error occurred in failing to tick the Emissions Limit Declaration and the Fossil Fuel Component in the CMU Component Section and as such the omission with regards to Exhibit ZA form. The applicant believes that as a clerical error, regulation 69(7) applies with regards to this Application and under Regulation 69*

*this issue can be corrected due to this non-material error and omission.”*

## **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.*

*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.*

15. 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.*

16. Regulation 71(3) sets out the Authority’s obligations when receiving an Appeal Notice:

*“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.”*

## **Capacity Market Rules**

17. Rule 3.6.5 sets out the requirement for an applicant to provide a Fossil Fuel Emissions Declaration, and states that:

*"(a) Subject to Rule 3.6.5(b) and Rule 3.6.5(d), an Applicant for an Existing Generating CMU must provide to the Delivery Body a Fossil Fuel Emissions Declaration if the CMU comprises of at least one Fossil Fuel Component or at least one Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component 65 (each a "relevant Fossil Fuel Component").*

*(b) The Applicant is not required to provide a Fossil Fuel Emissions Declaration under this Rule 3.6.5 if the Applicant confirms in the Application that (inter alia):*

- (i) after the coming into force of the Capacity Market (Amendment) (No. 2) Rules 2020, a Fossil Fuel Emissions Declaration has been provided to the Delivery Body in respect of the CMU (a "previous Fossil Fuel Emissions Declaration"), and it is not a Fossil Fuel Emissions Declaration specified in Rule 3.6.5*
- (ii) there has been no Emissions Related Material Change to the CMU or a relevant Fossil Fuel Component since the previous Fossil Fuel Emissions Declaration was provided; and*
- (iii) the previous Fossil Fuel Emissions Declaration did not specify the Fossil Fuel Yearly Emissions of any relevant Fossil Fuel Component.*

*(c) A Fossil Fuel Emissions Declaration specified in this Rule 3.6.5(c) is:*

- (i) a Transitional Fossil Fuel Emissions Declaration; or*
- (ii) where the Application is in respect of the Delivery Year commencing on 1 October 2024 or any subsequent Delivery Year, a Pre-2024 T-1 Fossil Fuel Emissions Declaration.*

*(d) The Applicant is not required to provide a Fossil Fuel Emissions Declaration under this Rule 3.6.5 if the Applicant confirms in the Application that:*

- (i) the Application is in respect of a Pre-2024 T-1 Auction; and*

*(ii) each relevant Fossil Fuel Component comprised in the CMU has a Commercial Production Start Date which is before 4 July 2019.”*

18. Rule 4.4.2(j) provides the Delivery Body must not Prequalify a CMU where a Fossil Fuel Emissions Declaration is not provided: :

*"Subject to Rule 3.8.1A(c)(ii), the Delivery Body must not Prequalify a CMU where:*

...

*(j) the Applicant is required to provide a Fossil Fuel Emissions Declaration under Rule 3.6.5 or Rule 3.9.5, but has not done so or has provided a Fossil Fuel Emissions Declaration which the Delivery Body considers does not fully address the matters set out in Exhibit ZA...”*

19. Exhibit ZA, Part 5, requires the Relevant Person to provide declarations in respect of relevant Fossil Fuel Components with an Installed Capacity below 1MW which includes,

*The Relevant Person hereby confirms that:*

*(d) where the Relevant Delivery Year is the Delivery Year that commences in 2024 or a subsequent Delivery Year:*

*(i) the Relevant CMU does not comprise of any relevant Fossil Fuel Component which has an Installed Capacity of less than 1MW;*

*(ii) in the event that the Relevant CMU will, after making this Declaration, comprise of at least one relevant Fossil Fuel Component with a Commercial Production Start Date on or after 4 July 2019 and which has an Installed Capacity of less than 1MW, such relevant Fossil Fuel Component will not exceed the Fossil Fuel Emissions Limit; and*

*(iii) in the event that the Relevant CMU will, after making this Declaration, comprise of at least one relevant Fossil Fuel Component with a Commercial Production Start Date which is before 4 July 2019 and which has an Installed Capacity of less than 1MW, each relevant Fossil Fuel Component will not exceed both the Fossil Fuel Emissions Limit (except that, where it exceeds the Fossil Fuel Emissions Limit, it will not exceed the Fossil Fuel Yearly Emissions Limit).*

## **Our Findings**

20. We have assessed Kiwi Power`s Grounds for Appeal, which are summarised below.

21. As set out in paragraph 19 of this determination, Part 5 (d) of Exhibit ZA requires declarations in respect of relevant Fossil Fuel Components with an Installed Capacity below 1MW.

22. Kiwi Power appealed against the Delivery Body`s decision on the basis that the required Exhibit ZA form and other information for Part 5 of Exhibit ZA were omitted through “clerical error” in its Application for Prequalification. Kiwi Power subsequently attached the missing Exhibit ZA form to its Request for Reconsideration to the Delivery Body but incorrectly selected “not applicable” in Part 5 of the updated Exhibit ZA. Kiwi Power accepts that it failed to provide the required data for the purpose of Part 5 of Exhibit ZA in its Application for Prequalification.

23. Rule 4.4.2(j) provides that the Delivery Body must not Prequalify a CMU where the Fossil Fuel Emissions Declaration submitted does not fully address the matters set out in Exhibit ZA. Thus, in accordance with Rule 3.6.5 and Rule 4.4.2(j), the data and other information declared as being provided under Part 5 of Exhibit ZA should have been submitted in the Application for Prequalification or rectified in Tier1 appeal.

24. 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.



25. 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). Kiwi Power states that its reason for omitting Part 5 of Exhibit ZA in its T-4 Prequalification Application was due to clerical error. The Authority's view is that this omission does constitute a 'non-material error or omission' within Regulation 69(7)(a), on the basis that it appears to be manifest and an inadvertent or honest mistake.

26. We therefore consider that the Delivery Body was correct to consider that omitting Exhibit ZA and Emission Declaration in the original Prequalification Application are non-material errors or omissions which could have been corrected in the Request for Reconsideration. However, we find that the additional evidence (Part 5 of the updated Exhibit ZA) provided in the Request for Reconsideration did not meet the requirement of Rule 3.6.5(a) in any event as Kiwi Power incorrectly selected "not applicable" in Part 5 of the updated Exhibit ZA which was submitted in the Request for Reconsideration.

27. Therefore, we consider that, by failing to provide the evidence to meet the requirement of Rule 3.6.5(a) as of the Request for Reconsideration, Kiwi Power did not rectify the original omission within the Application for Prequalification. As such the Delivery Body was correct to reject the CMUs referred to in Paragraph 1 from Prequalification.

## **Conclusion**

28. The Delivery Body reached the correct reconsidered decision to not Prequalify KPEG47, KPEG48, KPEG49 and KPST57 for the 2026 T-4 Auction the basis that:

- a) Kiwi Power LTD should have provided a Fossil Fuel Emissions Declaration in its application. Rule 3.6.5 requires that an applicant for an Existing Generating CMU must provide to the Delivery Body a Fossil Fuel Emissions Declaration if the CMU comprises of at least one Fossil Fuel Component or at least one Storage Facility which has part or all of its electricity.
- b) The updated Fossil Fuel Emissions Declaration Exemption (Exhibit ZA) form provided in its Tier 1 Appeal had an incomplete Part 5. Rule 4.4.2(j) provides that the Delivery Body must not Prequalify a CMU where the Fossil Fuel

Emissions Declaration provided does not fully address the matters set out in Exhibit ZA;

- c) Part 5 of Exhibit ZA requires that specific data and other information are provided in the Application for Prequalification to evidence or verify the Fossil Fuel Emissions declared under Part 5 of Exhibit ZA;

29. Kiwi Power only submitted the Exhibit ZA form in its Tier 1 Appeal and the other information as Part 5 of Exhibit ZA form was incomplete at this stage. In accordance with Regulation 71(3) (b) of the Regulations, the Authority must determine whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision. Since the Delivery Body did not have a complete Part 5 of Exhibit ZA form either at the prequalification submission or after the applicant requested a reconsideration, the Authority determines that the Delivery Body was correct to reject the application in accordance with Rule 4.4.2 (j).

## **Determination**

30. 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 Kiwi Power for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the 2026 T-4 Auction.



Grendon Thompson, Head of Wholesale Market Arrangements

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

January 2023