

## **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 GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, and GSF205 Enderby (together “GSF”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (“Delivery Body”) in respect of the following Capacity Market Units (“CMUs”):
  - a) GSF202 Ferrymuir (T-1)
  - b) GSF203 Stony A (T-1)
  - c) GSF204 Stony B (T-1)
  - d) GSF205 Enderby (T-1)
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.

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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.

## Appeal Background

4. GSF submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2024 T-1 Auction.
5. For the CMUs listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 31 October 2023 (the "Prequalification Decision"). The Delivery Body rejected the CMUs on the following grounds:

**GSF202 Ferrymuir, 203 Stoney A, GSF204, Stoney B, GSF205 Enderby:**

*"Capacity Market Rules 3.7.4, 3.8.3 and 3.10.4 require, an Applicant to provide a Fossil Fuel Emissions Commitment (Exhibit ZB). As per Rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZB, specifically the Exhibit ZB provided for this Application has mandatory contents amended/deleted. Please contact the Delivery Body for more information.*

*Capacity Market Rules 3.7.4, 3.8.3 and 3.10.4 require, an Applicant to provide a Fossil Fuel Emissions Commitment (Exhibit ZB). As per Rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZB, specifically Part 2: Declarations in respect of the Relevant CMU was missing or incorrect. Please contact the Delivery Body for more information.*

*Capacity Market Rules 3.7.4, 3.8.3 and 3.10.4 require, an Applicant to provide a Fossil Fuel Emissions Commitment (Exhibit ZB). As per Rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZB, specifically Part 3: Declaration in respect of Emissions Related Material Changes was missing or incorrect. Please contact the Delivery Body for more information."*

6. GSF submitted a request for reconsideration of the Prequalification Decisions on 2<sup>nd</sup> November 2023 ("Request for Reconsideration").
7. The Delivery Body issued GSF with a Notice of Reconsidered Decision on 28<sup>th</sup> November 2023 which upheld the original Prequalification Decisions on the following grounds:

**GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, GSF205 Enderby:**

*"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.*

*The Delivery Body considers the error or omission with the Application's Fossil Fuel Emissions Commitment (Exhibit ZB) is a non-material error under Regulation 69(5), which is therefore correctable at Tier 1 disputes stage. However 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. As per Rule 4.4.2(i) the Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZB, specifically the Exhibit ZB provided for this Application has mandatory contents amended/deleted. As a result, the original Prequalification Decision has been upheld."*

8. GSF then submitted an Appeal Notice in respect of each of the CMUs listed in paragraph 1 to the Authority on 4<sup>th</sup> December 2023 under Regulation 70 of the Regulations.
9. GSF disputes the decision on the following ground:

*"This dispute acknowledges that there was an involuntary omission in the original submission. We believe the EMR did not highlight all issues with the Exhibit Zb [sic] in the Original Prequalification decision notice.*

*We had addressed all highlighted issues in the Prequalification Decision Notice (omissions in Part 2 and Part 3) in the Tier 1 Dispute submission.*

*Following submission, the EMR identified a further issue in the document which has led to rejection under Tier 1 Dispute Process which was not previously highlighted."*

*"The EMR DB has identified the Tier 1 Dispute error in Exhibit Zb [sic] as "a non-material error under Regulation 69(5)". This error had not been pointed out within the Prequalification Decision Notice; all other aspects of the application are accepted. We have*

*not since been granted the opportunity to resubmit Exhibit Zb[sic].”*

*“As highlighted by the EMR in the Tier 1 Dispute response, this error is non-material, and does not have an impact on the meaning or intention of Exhibit Zb.”*

## **The Legislative Framework**

10. 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**

11. 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.
12. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
13. 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.*

14. Regulation 69(7) sets out the definition of “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.*

15. Regulation 71(3) sets out the Authority’s obligations when receiving a request:

*(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.*

## Capacity Market Rules

16. Rule 3.7.4 sets out the requirement for an applicant to provide a Fossil Fuel Emissions Commitment, and states that:

*"Each Applicant for a New Build CMU must provide to the Delivery Body a Fossil Fuel Emissions Commitment signed by two directors (or two officers, in the case of a body other than a company), and in such declaration, an Applicant for a CMU which will or may comprise of at least one Fossil Fuel Component or Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component (each a **"relevant Fossil Fuel Component"**) must declare any of the following where applicable (emphasis added):*

*(a) that the Applicant intends to apply the Fossil Fuel Emissions CCUS Formula to determine the Fossil Fuel Emissions of a relevant Fossil Fuel Component which will be equipped with CCUS equipment;*

*(b) that the Applicant intends to apply the Design Efficiency CHPQA Formula to determine the Design Efficiency of a relevant Fossil Fuel Component which will be in the Combined Heat and Power (CHP) Generating Technology Class; and/or*

*(c) that the Applicant will apply the Fossil Fuel Emissions Mixed Fuel Formula or intends to apply the Fossil Fuel Emissions Composite Formula to determine the Fossil Fuel Emissions of a relevant Fossil Fuel Component that will use more than one fuel to produce electricity"*

17. Rule 4.4.2(i) provides that the Delivery Body must not Prequalify a CMU where a Fossil Fuel Emissions Commitment is not provided or where a Fossil Fuel Emissions Commitment has been provided and the Delivery Body determines that such Fossil Fuel Emissions Commitment has not fully addressed the matters contained within Exhibit ZB:

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

- (i) *The Applicant is required to provide a Fossil Fuel Emissions Commitment under Rule 3.7.4, Rule 3.8.3 or Rule 3.10.4, but has not done so or has provided a Fossil Fuel Emissions Commitment which the Delivery Body considers does not fully address the matters set out in Exhibit ZB.*"

18. Exhibit ZB sets out details as to the scope of the declarations to be provided within the form. The declarations are to be provided: i) by directors of the applicant; ii) with respect to the Relevant CMU; iii) in respect to Relevant Fossil Fuel Component and in respect of a Relevant Delivery Year, as follows:

*"The following declarations are made by Directors<sup>31</sup> of [NAME OF APPLICANT] (the "**Relevant Person**")<sup>32</sup> with respect to:*

*[Description of CMU to be inserted] (the "**Relevant CMU**");*

*and with respect to each Fossil Fuel Component or Associated Fossil Fuel Component by which a Storage Facility has part or all of its electricity requirements met (each a "**relevant Fossil Fuel Component**") which comprises or may comprise the Relevant CMU, and*

*any Delivery Year in respect of which a Capacity Obligation awarded in the Relevant Capacity Auction to the Relevant CMU may apply (a "**Relevant Delivery Year**");*

*When completing the remainder of this Declaration, delete or strikethrough content in "[ ]" where not applicable"*

19. Part 2 of the Exhibit contains the declarations in respect of the Relevant CMU. This includes the following paragraph which is a mandatory element of the form and cannot be deleted:

*(c) in the event that the Relevant CMU comprises of at least one relevant Fossil Fuel Component:*

*(i) the Relevant Person will make a Fossil Fuel Emissions Declaration in accordance with the relevant deadline (in Rule 8.3.11(b)(i) in respect of a New Build CMU, Rule 8.3.11(b)(ii) in respect of a Refurbishing CMU (including where a Capacity Agreement is awarded to the Pre-Refurbishment CMU) and Rule 8.3.11(b)(iii) in respect of an Unproven DSR CMU);*

*(ii) where the Relevant Delivery Year is the Delivery Year that commences in 2022 or a subsequent Delivery Year, in the event the Relevant CMU comprises of at least one relevant Fossil Fuel Component with a Commercial Production Start date on or after 4 July 2019, the Fossil Fuel Emissions of that relevant Fossil Fuel Component will not exceed the Fossil Fuel Emissions Limit; and*

*(iii) where the Relevant Delivery Year is the Delivery Year that commences in 2024 or is a subsequent Delivery Year, in the event the Relevant CMU comprises of at least one relevant Fossil Fuel Component with a Commercial Production Start Date which is before 4 July 2019, where the Fossil Fuel Emissions of that relevant Fossil Fuel Component exceed the Fossil Fuel Emission Limit, it will not exceed the Fossil Fuel Yearly Limit.*

20. Part 3 sets out the declaration in relation to Emissions Related Material Changes. It provides:

*"An Updating Fossil Fuel Emissions Declaration will be provided to the Delivery Body if, following making a Fossil Fuel Emissions Declaration in respect of the Relevant CMU, there is an Emissions Related Material Change to the Relevant CMU or to a Fossil Fuel Component comprised in the Relevant CMU."*

## **Our Findings**

21. We have assessed GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, GSF205 Enderby Grounds for Appeal, which are summarised in below.
22. We have assessed the ground for appeal, which are summarised below.



23. As set out in paragraphs 18 and 19 of this determination, Exhibit ZB requires declarations in respect of Fossil Fuel Emissions Commitment including with respect to the “relevant CMU” and “relevant Fossil Fuel Components”. The definition of relevant Fossil Fuel Components is set out at the start of the form – it includes both Fossil Fuel Components and Associated Fossil Fuel Components by which a Storage Facility has part or all of its electricity requirements met. The definition of relevant Fossil Fuel Component is also included in Rule 3.7.4 (see paragraph 16 above). Part 2 (paragraph c) of Exhibit ZB requires certain declarations in the event that the Relevant CMU comprises of at least one relevant Fossil Fuel Component.
24. As set out in paragraph 20 of this determination, Part 3 of Exhibit ZB requires that following a Fossil Fuel Emissions Declaration in respect of the Relevant CMU or a Fossil Fuel Component comprised in the Relevant CMU, if there is an Emissions Related Material Change, an Updating Fossil Fuel Emissions Declaration must be provided to the Delivery Body.
25. GSF appealed against the Delivery Body’s decision not to prequalify its CMUs on the basis that the errors identified by the Delivery Body were an omission on its part and did not result from an attempt to subvert the meaning of Exhibit ZB. GSF submitted an updated Exhibit ZB alongside its Request for Reconsideration. The updated Exhibit ZB under each application corrected the errors (identified by the Delivery Body) in relation to Part 2 and Part 3 of the form but failed to address the first error identified by the Delivery Body (that the form had mandatory contents amended /deleted).
26. GSF states that the updated Exhibit ZB submitted alongside its Request for Reconsideration was an old version of the form. In particular, the wording at the start of the exhibit (which sets out the scope of the declaration to be in respect of Relevant Fossil Fuel Component and contains the relevant definition of relevant Fossil Fuel Component) was missing. Specifically, the updated Exhibit ZB did not contain the following:

*"and with respect to each Fossil Fuel Component or Associated Fossil Fuel Component by which a Storage Facility has part or all of its electricity requirements met (each a*

**"relevant Fossil Fuel Component")** which comprises or may comprise the Relevant CMU, and "

27. GSF considered that the Delivery Body had not highlighted this error in the Prequalification Decisions and as such, it had not been given the opportunity to correct the non-material error or omission. It also stated that it did not have an impact on the meaning of the form.
28. The Delivery Body in rejecting the original Prequalification Application noted that the requirements of the Rules "had not been met due to the following reasons". It then listed three matters, specifically:
  - a) mandatory contents had been amended / deleted;
  - b) Part 2: Declarations in respect of the Relevant CMU was missing or incorrect;
  - c) Part 3: Declaration in respect of Emissions Related Material Changes were missing or incorrect.
29. Rule 4.4.2(i) provides that the Delivery Body must not Prequalify a CMU where the applicant is required and has failed to provide a Fossil Fuel Emissions Commitment which the Delivery Body considers does not fully address the matters set out in Exhibit ZB. The form of Exhibit ZB provided should have included the contents highlighted in paragraph 26 above in the Application for Prequalification or rectified in the Tier 1 appeal.
30. 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.
31. 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). The applicant states that its reason for omitting the mandatory wording was due to an involuntary omission. 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.

32. We therefore consider that the Delivery Body was correct to consider that the three different errors identified in the Exhibit ZB in the original Prequalification Application were non-material errors or omissions which could have been corrected in the Request for Reconsideration.
33. We find that the Exhibit ZB submitted in the Request for Reconsideration failed to include all of the wording at the start of the exhibit, in particular that the scope of the declarations were also in respect of the relevant Fossil Fuel Components. However, upon review of the substantive scope of the declarations set out in Parts 1 – 4, we find that the version of Exhibit ZB provided by GSF at the Tier 1 dispute stage did fully address the matters set out in Exhibit ZB. The omission of that wording did not, in our view, change the scope of the declarations provided.
34. Specifically, in relation to Part 2, paragraph c which refers to relevant Fossil Fuel Component we are of the view that the interpretation that would be afforded to that term would be identical (without the missing wording) as it is set out in Rule 3.7.4 itself i.e. the obligation in the Rules to provide a Fossil Fuel Emissions Declaration. In relation to Part 3, which itself contains no reference to “relevant Fossil Fuel Component”, we believe that the interpretation of the declaration would not be affected as a result of the missing words.
35. Therefore, we consider that, the Delivery Body was not correct to reject the CMUs referred to in Paragraph 1 from Prequalification on the basis that the version of the Exhibit ZB provided by the applicant did not fully address the relevant matters. As such, Rule 3.7.4 was satisfied and Rule 4.4.2(i) did not apply.
36. The applicant’s failure to use the correct version of Exhibit ZB was unhelpful despite the Delivery Body making available the correct version of Exhibit ZB and the same being found in the Rules. Similarly, its failure to correct each of the three errors at the Tier 1 stage, despite having the ability to reach out to the Delivery Body if clarification was needed. This unnecessarily created questions around the scope of the declarations provided by the directors of the applicant. As set out above, however, we have

concluded that in practice the scope of the declarations are consistent with the requirements of Exhibit ZB.

## Conclusion

37. The Delivery Body did not reach the correct reconsidered decision to not Prequalify GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, GSF205 Enderby for the T-1 Auction on the basis that:
- a) GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, and GSF205 Enderby, provided a Fossil Fuel Emissions Commitment, the wording of which was not fully consistent with Exhibit ZB. In particular, it omitted wording to make it clear that the scope of the declarations were being given in relation to relevant Fossil Fuel Components (as well as Relevant CMUs.
  - b) Notwithstanding, the updated Exhibit ZB provided by each of GSF202 Ferrymuir, GSF203 Stony A, GSF204 Stony B, and GSF205 Enderby did in our view fully address the matters set out in Exhibit ZB as the scope of the declarations provided were (in practice) the same. As such, the Delivery Body was not correct to apply Rule 4.4.2(i) to decide not to Prequalify the CMUs
38. 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 its decision. Since the Delivery Body did have a Fossil Fuel Emissions Commitment which fully addressed the matters set out in Exhibit ZB after the Tier 1 stage, the Authority determines the Delivery Body was not correct to reject the application in accordance with Rule 4.4.2(i).

## Determination

39. For the reasons set out in this Determination, the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's Reconsidered Decision be overturned in respect of the CMUs listed in Paragraph 1 for the T-1 Auction and pursuant to Regulation

71(4) direct the Delivery Body to register the CMUs on the Capacity Market Register as a Prequalified CMU.



Maryam Khan

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

5 February 2024