

## **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 Greenergy Renewables UK Ltd (“Greenergy”, “the Applicant”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (“Delivery Body”) in respect of the following Capacity Market Units (“CMUs”):
  - a) GRSP01 (2028/29 T-4)
  - b) GRFB02 (2028/29 T-4)
2. This decision deals with all of the appeals listed above collectively, as they are substantively in respect of the same issue and differ only in respect of the identity of the relevant 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 the reconsidered decision made by the Delivery Body and determine whether the reconsidered decision was correct on the basis of the information before the Delivery Body when it made its decision.

### **Appeal Background**

4. The Applicant submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2025 T-4 Auction and sought a Maximum Obligation Period of 15 years.

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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. For each of the CMUs listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 12 November 2024 (the "Prequalification Decision"). The Delivery Body Conditionally Prequalified the CMUs on the following grounds:

*C4-1 Deferred Connection Agreement:*

*Deferred Distribution Connection Agreement: As per CM Rule 3.7.3(c), the Distribution Connection Agreement has been deferred; therefore, this Application is Conditionally Prequalified and Credit Cover is required.*

*C10-1 FCM Deferred: Financial Commitment Milestone:*

*As per CM Rule 6.6, the Financial Commitment Milestone has not been achieved; therefore, this Application is Conditionally Prequalified and Credit Cover is required.*

*C12-2 Deferred Relevant Planning Consents (T-4):*

*As per CM Rule 3.7.1(a)(i), Relevant Planning Consents have been deferred; therefore, this Application is Conditionally Prequalified. The deadline for submitting Relevant Planning Consents for the T-4 Auction is 7 February 2025.*

6. The Delivery Body confirmed that the Credit Cover required by Rule 3.7.3(c) and Rule 6.6 were met by the relevant deadline. However, the Delivery Body notified the Applicant on 11 February 2025 that the Prequalification status of the CMUs had been changed from Conditionally Prequalified to Rejected because the documents required to fulfil the requirements of Rule 4.7.1 had not been provided to the Delivery Body by the 7 February deadline (22 working days before the T-4 auction).
7. The Applicant submitted a request for reconsideration of the Prequalification Decisions on 17 February 2025.

8. The Delivery Body issued a Notice of Reconsidered Decision in respect of each of the CMUs listed in paragraph 1 on 19 February 2025 which upheld the decision to reject the Application on the following grounds:

*"We acknowledge that the Delivery Body does have discretion in certain circumstances under Regulation 69.5(a) to accept information or evidence if it determines that the Application contains a non-material error or omission. However, the missing information in this case is fundamental to the prequalification process, and as such, failure to provide by the deadline cannot be overlooked. We also acknowledge that under Regulation 69.5(a) of the Capacity Market Regulations, the Delivery Body has the discretion to accept further information in the event of an honest mistake. Nonetheless, given the critical nature of the missing information, the Delivery Body has decided to uphold its decision to reject the Application.*

*Finally, in accordance with Capacity Market Rules 3.12.1 and 4.7.1, all required information must be submitted accurately and on time, which ensures the integrity and fairness of the prequalification process. Therefore, we are upholding our decision to reject the Application to maintain the integrity of the prequalification process and compliance with the relevant Capacity Market Rules and Regulations."*

9. The Applicant then submitted an Appeal Notice to the Authority on 26 February 2025 under Regulation 70 of the Regulations.

## **Greenergy's Grounds for Appeal**

10. The Applicant disputes the Delivery Body's decisions on the following grounds.

In each of the Appeal Notices, the Applicant states:

### Ground 1

11. *Due to third party failure by the relevant planning authorities the required documents could not be uploaded to the Delivery Body portal by the relevant date. It is expected*

*that planning will be approved imminently, and that the applicant will be able to make all required declarations necessary to comply with Rule 4.7.1.*

#### Ground 2

12. The Applicant states that, in accordance with Regulation 69(5A) & 69(7), the omission of the documents required to fulfil the requirements of Rule 4.7.1 is *"a non-material omission that is inconsequential to the applicant's compliance with the Rules and Regulations, as planning consents and all documentation required under Rule 4.7.1 will be in place prior to the award of any Agreement. The omission is capable of rectification by the provision of all documents required by Rule 4.7.1 prior to the award of any Agreement."*

## **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:

*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):

*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”:

*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.*

19. Regulation 71(3)(b) 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—*

- (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

20. Rule 3.12.1 requires all documents provided alongside an Application must be 'true and correct' and states that:

*"A person submitting an Application or an Opt-out Notification must ensure and confirm in the Application or the Opt-out Notification that:*

*(a) in all material respects, the Application or Opt-out Notification and, in the case of an Application, all Additional Information submitted by the Applicant; and*

*(b) in all respects, each of the specific declarations referred to in Rules 3.4 to 3.11 (where relevant),*

*is true and correct (or, to the extent that the Additional Information is a copy document, that it is a true and correct copy) and that the Application and Additional Information has been authorised by the board of directors of the Applicant or the person submitting the Opt-out Notification (as applicable)."*

21. Rule 4.7.1 requires the provision of valid Planning Consents at least 22 Working Days prior to the commencement of the first auction bidding window and states that:

*"An Applicant for a Prospective Generating CMU that has submitted a declaration pursuant to Rule 3.7.1(a)(i) must submit to the Delivery Body by no later than the date falling 22 Working Days prior to the commencement of the first Bidding Window for such Capacity Auction:*

*(a) a declaration that it has obtained all Relevant Planning Consents for the CMU and has the Legal Right to use the land on which the CMU is or will be located;*

*(b) a director's certificate (or certificate by two officers, in the case of an Applicant other than a company) confirming that the Applicant can correctly make such declaration; and*

*(c) the maximum allowable capacity granted under the Relevant Planning Consents."*

## Our Findings

22. We have assessed the Applicant's Grounds for Appeal, which have summarised above.

Ground 1

23. Rule 4.7.1 requires that the Applicant provides a declaration that it has obtained all Relevant Planning Consents, a director's certificate confirming that the Applicant can correctly make such a declaration, and the maximum allowable capacity granted under the Relevant Planning Consents no later than 22 Working Days prior to the commencement of the first bidding window for the auction.
24. In their Appeal Notice, the Applicant acknowledges that they were unable to provide all the documents required to fulfil the requirements of Rule 4.7.1 due to "*third party failure by the relevant planning authorities.*" The Authority accepts that the relevant planning authorities in respect of both CMUs listed in Paragraph 1 have not issued their planning decisions pursuant to the 13-week statutory deadline for planning decisions.
25. The Applicant did not provide the documents required to fulfil the requirements of Rule 4.7.1 to the Delivery Body within the required deadline under Rule 4.7.1 of 22 Working Days prior to the first auction bidding window nor in their requests for reconsideration of the Prequalification Decisions to the Delivery Body. At the time of the Applicants' requests for reconsideration of the Prequalification Decisions, the relevant planning authorities had not issued their planning decisions in respect of the CMUs. It is our view that a failure to provide information or evidence by the requisite deadlines set by the Rules cannot be remedied by specifying that it will be provided at an indeterminate date in the future. Therefore, we believe that the Delivery Body was correct in changing the CMUs Prequalification status from Conditionally Prequalified to Rejected.
26. In addition to the above, for CMU GRFB01, in their Appeal Notice, the Applicant provided a recording of a Planning Committee meeting which included verbal indication that planning consent would be granted and a link to the planning authority's website tracking the status of the planning application. Although the Town and Country Planning Act 1990 does not specify what action by the local planning authority constitutes the grant of planning permission, the consistent interpretation by the courts is that a verbal grant of planning consent by a planning committee does not constitute a valid form of planning permission. Permission is not granted until a notice in writing of the decision

has been issued.<sup>2</sup> Additionally, a resolution by a local planning authority to grant planning permission does not constitute the grant of planning permission.<sup>3</sup> This is further indicated by the status on the planning authority's website indicating that planning permission is pending for this CMU. For CMU GRSP01, in their Appeal Notice, the Applicant provided a link to the planning authority's website tracking the status of the planning application which indicates the status to be "awaiting decision" for this CMU. In conclusion, planning permission must be formally granted by the local planning authority and documented appropriately through a written notice. The requirement for a written notice ensures that there is a formal record of the decision, which is necessary for legal and procedural transparency. This further supports our decision that the Delivery Body was correct in changing the CMUs Prequalification status from Conditionally Prequalified to Rejected.

#### Ground 2

27. The Applicant's second ground was that their non-provision of the documents required to fulfil the requirements of Rule 4.7.1 was "*a non-material omission that is inconsequential to the applicant's compliance with the Rules and Regulations, as planning consents and all documentation required under Rule 4.7.1 will be in place prior to the award of any Agreement.*" The Applicant believes that the omission is capable of rectification by the provision of all documents prior to the award of any Agreement.
28. In accordance with Regulation 69(5), when reconsidering the Prequalification Decision, the Delivery Body must not take into account any information or evidence which the Applicant was required by the Rules and Regulations to provide and failed to produce to the Delivery Body before the decision was taken. Under Regulation 69(5A) the Delivery Body accepts that they have discretion in certain circumstances to accept information or evidence from the Applicant in their request for reconsideration of the Prequalification Decisions, but only if the Delivery Body determines that an Application contains a non-material error or omission and the information or evidence provided by the Applicant is capable of rectifying the non-material error or omission. We agree with the Delivery Body's interpretation that failure to provide the documents required to fulfil the

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<sup>2</sup> R. v Yeovil BC (1971) 23 P. & C.R. 39

<sup>3</sup> [R Gardner and Co \(Lancaster\) Ltd v Lancaster City Council, \[2020\] UKUT 0327 \(LC\)](#)[3] and R. v West Oxfordshire DC Ex p. Pearce (C.H.) Homes (1986) J.P.L. 523



requirements of Rule 4.7.1 cannot be considered a non-material error or omission pursuant to Regulation 69(7). As per Regulation 69(7)(c), failure to provide the documents required to fulfil the requirements of Rule 4.7.1 is not *"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"*. This is because a fundamental requirement for compliance with Rule 4.7.1 is that all the required documents must be submitted no later than 22 Working Days prior to the commencement of the first bidding window for the auction.

29. Furthermore, Regulation 69(5A) only allows the Delivery Body to take into account information or evidence to remedy non-material errors or omissions if that information or evidence is submitted as part of the Applicant's request for reconsideration of the Prequalification Decision. It is not sufficient for the Applicant to state that the Relevant Planning Consents *"will be in place prior to the award of any Agreement"*.
30. We consider that the Applicant failed to provide the evidence required to meet the requirements of Rule 4.7.1 pursuant to their conditional Prequalification. As such the Delivery Body was correct in changing the CMUs Prequalification status from Conditionally Prequalified to Rejected.

## Conclusion

31. The Delivery Body reached the correct reconsidered decision to change the CMUs' Prequalification status from Conditionally Prequalified to Rejected on the basis that:
  - a) At the Prequalification stage, the documents required to fulfil the requirements of Rule 4.7.1 were not provided by the relevant deadline. Rule 4.7.1 does not allow for these documents to be submitted after this deadline.
  - b) At reconsideration of Prequalification Decision stage, the relevant planning authorities still had not issued their planning decisions and therefore the Applicant was unable to provide this information to the Delivery Body.
  - c) In accordance with Regulation 71(3), 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.

## **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 change the prequalification status from conditionally prequalified to not prequalified be upheld in respect of the CMUs listed in Paragraph 1 for the T-4 Auction.

Maryam Khan

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

Date 15 April 2025