

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 appeals made by UK Power Reserve Limited ("UK Power") and Sembcorp Utilities (UK) Limited ("Sembcorp"), ("the Applicants") against decisions made by the Electricity Market Reform Delivery Body ("Delivery Body"). The relevant decisions are those made by the Delivery Body to reject requests made under Regulation 69(2) to reconsider a Prequalification Decision, on the basis that the requests were not made within the requisite timeframe.
2. The Appeals were made in respect of the following nine Capacity Market Units ("CMUs"):
 - a) 24PR01, Aberdare Power Station (T-4 auction)
 - b) 24PR02, Bridgwater Power Station (T-4 auction)
 - c) 24PR04, Solutia Power Station (T-4 auction)
 - d) 24PR05, South Cornelly Power Station (T-4 auction)
 - e) 24PR06, Styal Road Power Station (T-4 auction)
 - f) 24PR10, Cowley Hill Power Station (T-4 auction)
 - g) 24PR11, Greengate Power Station (T-4 auction)
 - h) S28G02, Sembcorp Wilton GT2 (T-4 auction)
 - i) S28G1S, Sembcorp GT1 & ST11 (T-4 auction)
3. 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 of the Prequalification Decision was rejected by the Delivery Body on the ground that it did not comply with Regulation 69(2), the affected person may appeal to the Authority.
4. This determination deals with the Appeals made in respect of the nine CMUs outlined in paragraph 2 collectively. We note that the two Applicants are related companies, and

that Sembcorp Energy UK wrote to us in respect of the Appeals on behalf of both of the Applicants.

Background

5. The Applicants submitted Applications for Prequalification for the CMUs listed in paragraph 2 in respect of the 2028-29 T-4 Auction.
6. For each of the CMUs listed in paragraph 2, the Delivery Body issued a Notification of Prequalification Decision dated 12 November 2024. In those notices, the Delivery Body rejected the Applications for Prequalification made in respect of each of the CMUs, with various grounds cited. The grounds for rejection in the Delivery Body's Prequalification Decisions are not material to this determination, and therefore have not been set out here.
7. The Applicants submitted requests for reconsideration of the Prequalification Decisions to the Delivery Body on 31 January 2025.
8. On 3 February 2025, the Delivery Body wrote to the Applicants advising them that they were unable to reconsider the rejected Prequalification Decisions on the basis that the requests for reconsideration had not been made within the timeframe specified in Regulation 69(2) of the Regulations (being the date which is 5 working days after receiving notice of the Prequalification Decision).
9. The Delivery Body provided an explanation to the Applicants as follows:

"The request must be submitted in writing to the Delivery Body within 5 working days after receiving notice of the Prequalification Decision, (for the avoidance of doubt these requests must, therefore, be received by the Delivery body by no later than 5pm on Tuesday, 19 November 2024 in case of this Prequalification round); and include, by virtue of Regulation 69(2) of the Regulations, each of the matters specified in sub-paragraphs (a) to (e) of Regulation 70(3) of the Regulations.

So sorry but the deadline for the dispute submission has passed, and we are unable to process it from our side. Please let us know if you have any follow-up questions."

10. On 5 February 2025, the Applicants submitted Appeal Notices to the Authority under Regulation 70(1)(b) of the Regulations.

The Applicant's Grounds for Appeal

11. Regulation 71(7) of the Regulations provides that where an Appeal is made to the Authority on the basis that the Delivery Body incorrectly rejected a request for reconsideration due to non-compliance with Regulation 69(2), and the Authority finds that the Delivery Body was incorrect to reject that request for reconsideration, the Authority must:
 - a) remit the request to the Delivery Body and direct the Delivery Body to reconsider the decision in accordance with Regulation 69; and
 - b) the Delivery Body must comply with the direction.
12. The role of the Authority in respect of appeals made under Regulation 70(1)(b) is to consider whether the requests for reconsideration made by the Applicant complied with Regulation 69(2). If the Authority finds the Delivery Body was incorrect to reject the request for reconsideration, the Authority will remit the request to the Delivery Body for reconsideration. It would then be the Delivery Body's role to consider the Applicants' remaining grounds for appeal, as they relate to the Prequalification Decisions.
13. Therefore, for the purposes of this determination we have limited our consideration to the Applicants' first ground for appeal, as this is the only ground of appeal which addresses the reason why the Delivery Body refused to consider the request for reconsideration and the subsequent role of the Authority in terms of the Appeal. Please note that this first ground of appeal was included in the Appeal Notices for all nine CMUs listed in Paragraph 2.

Ground 1

"An urgent Tier 2 appeal is being made to Ofgem in accordance with the provisions of regulation 70 of the Regulations, following an unsuccessful Tier 1 appeal to NESO under regulation 69(2). NESO rejected the Tier 1 appeal on the basis that the requirements of regulation 69(2) were not met in that the Tier 1 application was made outside of the 5 working day window.

Under regulation 71(3)(b) Ofgem must determine whether the reconsidered NESO decision was "correct on the basis of the information which [NESO] had when it made the decision". NESO is only able to reconsider its previous decision when the appeal falls within the requirements of 69(2). Ofgem, however, has wider powers available to it. Ofgem's assessment under regulation 71(3)(b) must take into account all of the information available to NESO when it made its reconsideration decision, this includes the original evidence that NESO's original prequalification decision was incorrect, and/or that the applicant had made a non-material error or omission which was corrected.

Under regulation 71(4)(b), if, on considering the reconsidered decision and all of the information available, Ofgem determines that NESO incorrectly decided not to prequalify the applicant for a capacity auction in respect of a CMU, it must direct NESO to register the CMU on the capacity market register as a prequalified CMU. Therefore, Ofgem's Tier 2 is a substantive appeal which must consider all of the relevant information available to it.

In addition (or as an alternative to the express powers set out above), Ofgem, as Britain's energy regulator, has wide powers in the performance of its duties, including "to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions" (Utilities Act 2000, Schedule 2, para 11). These are important powers to allow it to take reasonable and proportionate action to ensure that it is able to perform its functions as the Tier 2 appeal body and deliver its wider duties.

Ofgem has a primary duty to make markets work in the best interests of current and future consumers. Ofgem also has a secondary duty to promote effective competition wherever this represents the best means of achieving the primary duty. Under its growth duty, Ofgem also will have regard to the promotion of sustainable economic growth, through regulation that minimises energy costs, keeps supply resilient and ensures energy markets

function effectively. In deliverance of these duties, Ofgem has identified the following as a strategic priority: establishing an efficient, fair and flexible energy system.

Taking all of this into account, it is imperative that when taking regulatory decisions, Ofgem promotes effective competition, where this will help to keep energy supply resilient, secure and minimise cost to consumers. We have seen increasingly tight margins of prequalified capacity against target capacities, which suggest an undersupply of capacity compared to demand, and this is being seen in higher prices at recent capacity market auctions. By directing NESO to register this CMU as a prequalified, it will ensure that all available capacity, from a reliable asset with a proven track record, is able to participate in the forthcoming auction. This increases the competition the capacity market auctions rely on to deliver much needed capacity at the lowest efficient clearing prices.

Taken together, Ofgem therefore has express and implied powers to correct the refusal to prequalify this CMU for the forthcoming capacity market auction. Ofgem's exercise of its powers is entirely consistent with its overarching duties."

The Legislative Framework

14. 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

15. The Regulations set out the powers and duties of the Delivery Body which it must rely upon when it determines eligibility. 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(5) specifically 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."

19. Regulations 71(3) and (4) set out the obligations on the Authority with regards to a reconsidered decision, when the Authority has received an Appeal Notice that complies with Regulation 70:

"(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);*
- (b) *if the Authority determines that the Delivery Body incorrectly decided not to prequalify the applicant for a capacity auction in respect of a CMU, it must direct the Delivery Body to register the CMU on the capacity market register as a prequalified CMU (in which case regulation 73 applies);*
- (c) *in any other case, if the Authority determines that the Delivery Body's decision was incorrect it must substitute the decision that it considers the Delivery Body should have made."*

20. Regulation 71(7) provides that:

"If the Authority determines that the Delivery Body incorrectly rejected a request for reconsideration of a decision as mentioned in regulation 70(5)—

(a) the Authority must remit the request to the Delivery Body and direct the Delivery Body to reconsider the decision in accordance with regulation 69; and

(b) the Delivery Body must comply with the direction."

Our Findings

21. We have assessed the Applicants' first ground of appeal.

22. As a starting point, the Applicants' admit that they failed to submit requests for reconsideration of the Prequalification Decisions to the Delivery Body within the timeframe specified by Regulation 69(2). They submitted their requests on 31 January 2025, while the deadline for submission was 5:00pm on 19 November 2024.¹

¹ Regulation 2(4)(a) of the Regulations provides that where the Regulations requires that anything be done on a Working Day, such thing must be done by 5.00pm on that day.

23. Notwithstanding this, the Applicants have argued that the Authority has express and implied powers to both review and correct the Delivery Body's decision not to prequalify the CMUs listed in paragraph 2 for the 2028-2029 T-4 auction.

24. We do not agree with the Applicants' argument in respect of the Authority's role to review the Delivery Body's Prequalification Decisions in these circumstances and in the wider manner set out in the Applicants' first ground of appeal.

25. We note that the scope of any appeal to the Authority is clearly set out in Regulation 70(1):

*"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)."

26. Regulation 71(3) then provides that the Authority must review a *reconsidered decision* (subject to Regulation 71(4)), where the Authority has received an appeal notice that complies with Regulation 70. Because Regulations 71(3) and (4) relate to the Authority's role to review *reconsidered decisions*, it is the Authority's view that those regulations can only apply in circumstances where the Delivery Body has in fact reconsidered the relevant prequalification decision. As we have stated above, the Delivery Body is only required to reconsider a decision when they have received a request which complies with Regulation 69(2).

27. To that end, for the purposes of Regulation 71(3) an appeal notice complies with Regulation 70 when the party making the appeal has *"in accordance with Regulation 69(2), made a request to the Delivery Body to review a delivery body reviewable*

decision".² In this case, the Applicant did not make a request to the Delivery Body for a reconsidered decision that was compliant with Regulation 69(2). It is therefore not possible for the Authority to apply Regulation 71(3) or (4) as the Applicants contend.

28. Instead, the role of the Authority with regards to appeals made under Regulation 70(1)(b) is to consider whether the Delivery Body was incorrect to reject the request under Regulation 69(2). As noted above at paragraph 13, if the Authority finds that the Delivery Body was incorrect, it must remit the decision back to them under Regulation 71(7). At that stage, the Delivery Body would then reconsider the Prequalification decision. The appeal pathway under Regulation 70(1)(a) would remain open if the affected person disputed the reconsidered decision.
29. However, here the Applicants did not make a request to the Delivery Body that was compliant with Regulation 69(2). The Authority cannot reconsider the Delivery Body's prequalification decision by applying either Regulation 71(3) or any other implied powers, as this would be contrary to the specific regulatory requirements of Regulation 71(7).
30. In order for the Authority to reconsider the decision in the manner contended by the Applicants, the Applicant needed to submit a request for reconsideration to the Delivery Body in compliance with Regulation 69(2). If the Delivery Body upheld its prequalification decisions, it would be open to Applicant to appeal to the Authority and for the Authority to consider the appeal under Regulation 71(3). In the Authority's view an interpretation of the Regulations that would allow applicants to directly appeal to the Authority in relation to Prequalification Decisions would subvert the scheme of the Regulations and the statutory role of the Delivery Body to reconsider Prequalification Decisions under Regulation 69(3). The Regulations are specific as to the roles of both the Delivery Body and the Authority with regards to capacity market disputes.

² Regulation 70(1)

Conclusion

31. The Applicants did not submit valid Requests for Reconsideration of the Prequalification Decisions in accordance with Regulation 69(2) for the following reasons:

- a) The Request for Reconsideration of the Prequalification Decision was not submitted in writing to the Delivery Body within 5 working days after receiving notice of the Delivery Body's decision in accordance with Regulation 69(2).

Determination

32. 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 the Applicants' Requests for Reconsideration of the Prequalification Decisions was correct in respect of the CMUs listed in Paragraph 2.

Maryam Khan

For and on behalf of the Gas and Electricity Markets Authority

15/04/2025