

DETERMINATION PURSUANT TO REGULATION 46 OF THE CONTRACTS FOR DIFFERENCE (ALLOCATION) REGULATIONS 2014 FOLLOWING AN APPEAL MADE TO THE AUTHORITY PURSUANT TO REGULATION 43

1. This determination relates to an appeal made by OSPRE (Croydon) Limited (“OSPRE”) against a non-qualification determination made by the Delivery Body (National Grid Electricity Transmission plc – “NGET”) in respect of a prospective Contracts for Difference (“CfD”) unit of the same name.

Appeal Background

2. On 30 October 2014, OSPRE submitted an eligibility qualification application for a CfD Unit, in order to participate in the 2014 CfD allocation round (the “CfD application”).
3. As part of that application, OSPRE submitted a Connection Offer (i.e. an offer to carry out the contestable and non-contestable works necessary for OSPRE to connect to the relevant distribution system) that it had received from UK Power Networks (“UKPN”) (the “Connection Offer”).
4. The Connection Offer provided that if OSPRE wished to proceed it would need to ensure that by 5 pm on 8 January 2015, UKPN had received:
 - (a) A signed and dated acceptance of notice form (appended to the Connection Offer);
 - (b) The sum stated in the acceptance of notice form, into its bank account in cleared funds.
5. At the time of submission of its CfD application, OSPRE had not yet signed and returned the acceptance of notice form, and had not transferred the specified funds.
6. On 31 October 2014, NGET contacted OSPRE to notify it that its CfD application contained some errors, including the absence of an installation date in the relevant Connection Offer.
7. OSPRE allege that this was followed by a conversation in which they discussed the Connection Offer with NGET and that as part of that discussion OSPRE observed that this would oblige OSPRE to pay the specified sums to UKPN. OSPRE alleges that NGET stated that OSPRE did not need to undertake to make any payment, only provide the installation date.

8. In a notification of its CfD qualification determination dated 13 November 2014 (the “non-qualification determination”), NGET determined that OSPRE’s application had failed to meet the relevant qualification criteria. NGET made this determination on grounds that no applicable Connection Agreement had been provided with OSPRE’s application, as required by Regulation 25 of the Contracts for Difference (Allocation) Regulations 2014 (the “regulations”). NGET found that while OSPRE had provided a Connection Offer from the operator of the relevant Distribution System Operator (“DSO” - in this case UKPN), this did not meet the evidence requirements of a Connection Agreement required by Regulation 25 of the Regulations and Rule 4 of the Contracts for Difference: Final Allocation Framework for the October 2014 Allocation Round (the “Allocation Framework”).

9. In a review notice from OSPRE to NGET dated 19 November 2014 (the “review notice”) OSPRE requested a review of the non-qualification determination. At this point OSPRE also provided a copy of the signed acceptance of notice form, this signature being dated 20 November 2014.

10. In a non-qualification review notice dated 4 December 2014 (“non-qualification review notice”) NGET informed OSPRE that, having conducted the review, it had upheld the non-qualification determination (“non-qualification review determination”). NGET provided the following reasons for this decision:
 - i) under Regulation 25 of the Regulations, Applicants must provide a copy of each of the Connection Agreements of the relevant CfD Unit. This requirement is further clarified in Rule 4 of the Allocation Framework which states the definition of “Connection Agreement” includes a countersigned offer made to an Applicant by the operator of the Transmission System or relevant Distribution System.

 - ii) no applicable Connection Agreement had been provided with OSPRE’s CfD application. The Connection Offer provided as part of that application had not been countersigned by OSPRE and thus failed to meet the evidential requirements of Regulation 25 of the Regulations and Rule 4 of the Allocation Framework.

 - iii) the non-countersigned version was not acceptable evidence as UKPN’s commitment was conditional on acceptance of the offer and payment of a fee, neither of which had been done at the time of the application.

iv) the copy of the signed Connection Offer dated 20 November 2014 had been signed after the application window closing date and therefore did not provide the evidence required.

11. In an Appeal Notice submitted on 11 December 2014, OSPRE submitted an application to the Authority disputing NGET's non-qualification review determination and requesting that the Authority determine that dispute.

12. Pursuant to Regulation 46, where the Authority receives a qualification appeal notice that complies with Regulations 43 and 44, the Authority must determine that appeal.

Reasons for appeal

13. OSPRE argues that, for a number of individual reasons (which they state should be considered on both an individual and a cumulative basis), the application should be determined to be a qualifying application. The basis of these arguments are set out in the appeal notice, however we set out below a summary of the main reasons for the appeal.

Issue 1: Connection Agreement

14. OSPRE argues that the (unsigned) Connection Offer submitted with its CfD application constitutes a Connection Agreement within the definition of Regulation 25(6) of the Regulations and Rule 4 of the Allocation Framework. Its arguments in support of that position refer to the drafting of the relevant provisions. In addition, it argues that the only rational condition implicit in the relevant requirement is to ensure there is a binding commitment to make the relevant grid connection, which it submits it had.

Issue 2: Exercise of discretion

15. OSPRE argues that this is a case in which discretion should be exercised, on the basis that:

- a. Submission of an unsigned Connection Offer was a "rational reliance" on their interpretation of the view expressed by a representative of NGET on 31 October 2014; and
- b. That the error in question was a mere "foot-fault", which had subsequently been cured, such that there was no resulting prejudice.

Our Findings

Issue 1: Connection Agreement

16. Regulation 25(2) of the Regulations provides that *“Where a direct connection or a partial connection applies or is to apply to the relevant CfD unit, the applicant must provide a copy of each of the connection agreements applicable to the relevant CfD unit which allows such connection.”* Connection Agreement is defined in Regulation 25(6) as *“...an agreement to connect to: (a) the national transmission system for Great Britain; or (b) the distribution system, entered into by the operator of the relevant system”*.
17. The requirement under the above Regulation is for the provision of a Connection Agreement.
18. In order to enter into a Connection Agreement, OSPRE was required to accept the relevant Connection Offer by signing and returning the notice of acceptance form attached to that Connection Offer. At the time of submitting its CfD application, OSPRE had not done this and as such the document that it submitted with that application constituted a Connection Offer only, not a Connection Agreement.
19. Had DECC¹ intended for a Connection Offer, rather than agreement, to be sufficient it would have reflected this in the drafting.
20. That this was not what was intended is supported by the fact that DECC appear to have actively considered and dismissed the option of a Connection Offer as part of the consultation process. A number of respondents to DECC’s consultation on the relevant drafting suggested that the requirement should be limited to submission of a Connection Offer, in light of the costs associated with securing a signed agreement². However, the position ultimately reached by DECC, having taken these responses into account, was to retain the requirement for an agreement between the relevant parties.

¹ The Department of Energy and Climate Change.

² see para 3.8 *Electricity Market Reform – Contract for Difference: Contract and Allocation Overview* (August 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/233004/EMR_Contract_for_Difference_Contract_and_Allocation_Overview_Final_28_August.pdf), pages 34 and 126 *Electricity Market Reform: Consultation on proposals for implementation* (October 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255254/emr_consultation_implementation_proposals.pdf), pages 13 and 14 Government response to consultation on proposals for implementation of Electricity Market Reform (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324170/Government_Response_to_EMR_implementation_consultation.pdf)

21. Rule 4 of the Allocation Framework specifies that, for the purpose of that Rule, a Connection Agreement includes a countersigned offer (or offers) made to an Applicant. The intention behind this drafting is clarified at question 9 of DECC's publicly available CfD FAQs³, which sets out the following question and answer:

Q: Is it a connection agreement or countersigned offer?

A: The final Allocation Framework has now clarified that for purposes of evidencing applicable grid connection agreements; this also includes countersigned offer(s) between an applicant and the relevant operator of the Transmission System or Distribution System.

This clarification reflects the variance in wording of connection documents across the transmission and distribution levels.

22. There is nothing in the drafting of Rule 4 to suggest that a Connection Offer which had not been countersigned could similarly be construed as an agreement. If the intention was that a Connection Offer made by the DSO, whether or not it had been accepted by the applicant, alone was acceptable then this would have been reflected in the drafting. There would have been no need for Rule 4 to qualify that a Connection Offer is only admissible where it has been countersigned.

23. OSPRE argues that *"it would be irrational (and purely formalistic) to contemplate that an applicant should simply sign a copy of the Grid Connection Offer (adding no more informational value) and provide it to the CfD team at National Grid - but avoid any obligation to pay by not providing it to the issuer (UKPN). A countersigned (but unsent) offer is legally irrelevant and does not create any obligation"*. However this confuses the two issues of i) existence of a Connection Agreement and ii) evidence of the same. The Rules have established that a proportionate check on the existence of a Connection Agreement between both parties is through submission of a countersigned Connection Offer.

24. The issue of whether signing the Connection Offer and returning the same to the DSO created an obligation to make a payment to the DSO is not, in our view, directly relevant to the decision NGET had to make. The documentary checks set out in Schedule 4 of the Rules do not oblige NGET to investigate whether the Countersigned Offer had been returned to the DSO with the appropriate fee, or indeed returned to the DSO at all.

However it is reasonable to conclude that the requirement for a Connection Agreement to be in place for all applications was included in the Regulations precisely because it does place an obligation on the applicant to have in place a Connection Agreement to which both parties have agreed and have established legal obligation on both sides.

Issue 2: Discretion

25. NGET was under no obligation to check the details of the application prior to the deadline for receipt of applications. A publicly available guidance document notes that NGET would be reviewing applications and verifying associated documents⁴. However, that document makes clear that the responsibility ultimately lay with the applicant. As such, OSPRE was specifically put on notice in advance that the onus was on it to ensure that its application was correct, including that the document it had submitted constituted a Connection Agreement.
26. As set out above, OSPRE submitted a countersigned Connection Offer with its review notice. Regulation 20(2)(c) states that a review notice must “*not contain any documentary evidence which was not provided to the delivery body in support of the application which is the subject of the non-qualification determination*”. It was not therefore open to NGET to accept the signed copy of the agreement provided by OSPRE with its review notice as evidence that a valid Connection Agreement was in place. NGET could only rely on the unsigned copy of the Connection Offer which, for reasons set out above, is not sufficient evidence to determine that the application was a qualifying one.
27. OSPRE argues that for the reasons set out at paragraph 14 above, this is a case in which discretion should be exercised.
28. However, NGET and Ofgem both have a duty to act consistently in the application of the Regulations and Allocation Framework within what is a competitive process and there is no scope to apply those provisions in the flexible way suggested. Exercising any discretion

⁴ Question number 6 of DECC’s CfD FAQs says: “*The Delivery Body will be reviewing applications and verifying associated documentation. However, no error rectification mechanic has been built in to the application window to allow applicants or the Delivery Body to correct errors in submitted applications. This is to ensure the Delivery Body is fair and consistent in its assessment across all applications, and to maintain the tight eligibility window timelines.....Ultimately, the onus is on applicants to ensure the data is correct on submission and we encourage applicants to review the Allocation Framework and eligibility requirements and start to compile their evidence now.*”
⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353094/Contracts_for_Difference_-_FAQs_FINAL.pdf

would clearly be unfair on those participants who submitted the correct evidence, or those who may have been unsuccessful for the same reasons as OSPRE.

Conclusion

29. We conclude that NGET was correct to determine that OSPRE's application was not a qualifying application as no Connection Agreement was provided.

Determination

30. For the reasons set out in this decision letter the Authority hereby determines pursuant to Regulation 46 that the non-qualification determination made by NGET be upheld.

A handwritten signature in black ink that reads "David O'Neill". The signature is written in a cursive style with a horizontal line underneath the name.

David O'Neill

**Head of Wholesale Markets Policy: Electricity Market Reform
For and on behalf of the Gas and Electricity Markets Authority**

19 January 2015