

## **DECISION NOTICE**

**Notice of Decision pursuant to section 25 of the Electricity Act 1989 (“EA”) following an investigation into whether UK Capacity Reserve Limited (“UKCR”) complied with relevant requirements (defined in section 25(8) EA) namely the requirements of Rule 5.13.1(b) of the Capacity Market Rules (“Rules”).**

### **Summary**

1. This document sets out the decision of the Gas and Electricity Markets Authority (“the Authority”) under section 25 Electricity Act 1989 into whether it is satisfied that UK Capacity Reserve Limited (“UKCR”) contravened relevant requirements (defined in section 25(8) EA) namely the requirements of Rule 5.13.1(b) of the Capacity Market Rules (“Rules”).
2. Following an investigation, the Authority is satisfied that there has been a contravention of relevant requirements, namely Rule 5.13.1(b) of the Capacity Market Rules (“CMRs”), by UK Capacity Reserve Limited (“UKCR”) owing to UKCR’s submission to the Delivery Body (the National Grid) of false and misleading information in connection with the First Full Capacity Auction of 16 December 2014.
3. UKCR admits that there was a contravention of Rule 5.13.1 (b), which it says was made as a result of an honest misinterpretation.

### **Background**

4. Electricity Market Reform (“EMR”) is a government policy implemented under the Energy Act 2013 and designed to incentivise investment in secure, low-carbon electricity, improve the security of Great Britain’s electricity supply, and improve affordability for consumers. The Capacity Market is part of EMR and will ensure security of electricity supply by providing a payment for reliable sources of capacity, alongside electricity revenues, to ensure that energy is delivered when needed.
5. The Capacity Market involves prequalification and auction processes whereby generators wishing to participate in the Capacity Market can apply for prequalification status for CMUs and, if successful, bid for Capacity Agreements. The first Auction commenced on 16 December 2014 and a quantity of 49,260MW was secured. Generators who obtain Capacity Agreements take on a Capacity ‘Obligation’ in return for Capacity Payments and must be available to deliver energy when instructed or face penalties.
6. National Grid is the Delivery Body for EMR and administers and runs the auction process on behalf of DECC. Ofgem, acting on behalf of the Authority, is responsible for enforcing compliance with the Rules.
7. UKCR submitted prequalification applications in relation to 96 CMUs. 93 of those CMUs were conditionally prequalified to participate in the first Auction. In order to fully prequalify them, UKCR was required to submit to the Delivery Body, by 21 November 2014, declarations under Rule 4.7.1 that it had obtained all Relevant Planning Consents

for those units. UKCR submitted declarations for 47 of those CMUs by 21 November 2014.

8. Ofgem's investigation was prompted by becoming aware that for 11 of its CMUs (UKCR01, 17, 30, 33, 39, 49, 51, 66, 83, 87 and 93), in respect of which declarations had been submitted, UKCR may not have obtained planning permission at the time it made the declarations.

### **Ofgem's investigation**

9. An investigation was opened by Ofgem on 15 December 2014 and considered whether UKCR provided false or misleading information to National Grid (the Delivery Body) in regard to whether it had obtained planning consent for 11 Capacity Market Units (CMUs).
10. In order to establish the facts Ofgem considered information provided by UKCR as part of the prequalification process and further to a request for information as well as publicly available information on the Capacity Market Register and relevant Planning Authority records.
11. Ofgem served its Summary Statement of Initial Findings on 4 February 2015.

### **The Capacity Auction and UKCR's actions**

12. UKCR is a participant in the Capacity Market and participated in the first Capacity Auction on 16 December 2014.
13. In relation to the 11 CMUs and in relation to the Capacity Auction, UKCR fell within the definition of a Bidder. It was therefore required to prequalify those CMUs before participating in the Auction (Rule 5.3.1).
14. In applying to prequalify the 11 CMUs, UKCR was firstly required to declare that it would obtain all Relevant Planning Consents by no later than the date falling 17 Working Days prior to the commencement of the first Bidding Window in relation to the Auction (Rule 3.7.1 (a)). The Bidding Window for the Auction opened on 16 December 2014. UKCR's Rule 3.7.1(a) declaration was therefore that it would obtain planning permissions for the 11 CMUs by 21 November 2014.
15. In relation to each of the 11 CMUs, UKCR was then required to submit to the Delivery Body, by no later than 21 November 2014, declaration(s) that it had obtained all Relevant Planning Consents for the CMU and a director's certificate confirming that UKCR could correctly make such declaration (Rule 4.7.1). UKCR submitted its declaration(s) and director's certificate(s) by 21 November 2014.
16. In the case of the 11 CMUs planning permission had not (at that time) in fact been obtained.
17. In its response dated 11 December 2014 to Ofgem's letter of 5 December, UKCR stated that it received formal written planning consents for the majority of CMUs within a

reasonable timeframe but that some were delayed, for various reasons outside of its control. UKCR said it was given assurances (either verbal or written) by the relevant local authorities such that it felt in a position to make the Rule 4.7.1 Declaration.

18. Rule 4.7.1 requires a declaration that all relevant planning consents have been obtained, not that they will be obtained at some point in the future.
19. Rule 5.3.1(a) provides that a Bidder must not participate in a Capacity Auction with respect to any CMU that is not a Prequalified CMU. Ofgem made a decision on 15 December 2014 to open an investigation into UKCR's alleged breach of the Capacity Market Rules. As the opening of the investigation constituted an enforcement decision for the purposes of Rule 7.5.1(t) Ofgem notified National Grid that an enforcement decision had been made. As a result National Grid corrected the Capacity Market Register, updating the status of the contested CMUs to 'not prequalified' and therefore disqualified under Rule 5.3.1(a). Under Rule 5.3.3 National Grid (as Auctioneer) treated the CMU as having submitted an Exit Bid at the Bidding Round Price Cap in the next Bidding Round (which had the effect of removing it from the Capacity Auction). Under Rule 5.4, the contested CMUs are excluded from participating in a Capacity Auction for that Delivery Year and for the two subsequent Delivery Years.
20. UKCR had not obtained planning permission for 11 of the CMUs at the date of its Rule 4.7.1 declaration. Therefore in making its Rule 4.7.1 declaration in relation to the 11 CMUs, UKCR submitted to the Delivery Body, in connection with the Capacity Auction, information which was false and misleading, in breach of Rule 5.13.1.
21. In its written representations<sup>1</sup>, UKCR reiterated that based on their enquires with the local planning authorities and assurances given, it was their honest belief that even where they were not in possession of written planning permissions, the sites had "obtained" planning approval and they felt able to make those declarations.
22. UKCR now accepts that the Authority requires written planning decisions to be dated prior to the declaration under Rule 4.7.1 being given. UKCR subsequently received the relevant written planning permissions.

### **The Capacity Market Rules**

23. The relevant secondary legislation implementing the Capacity Market is the Electricity Capacity Regulations 2014 ("Regulations") and the Rules.
24. Regulation 67 of the Regulations states that the requirements of the Regulations and Rules are enforceable by the Authority as if they were relevant requirements on a regulated person for the purposes of section 25 of the Electricity Act 1989 ("EA89").
25. The Rules provide as follows:
  - a) "3.7.1. Relevant Planning Consent  
Each Applicant for a New Build CMU must declare in the Application:

---

<sup>1</sup> Written representations were made on 12 February 2015

(a)that, in the case of an Application relating to the First Full Capacity Auction, it will obtain all Relevant Planning Consents by no later than the date falling 17 Working Days prior to the commencement of the first Bidding Window in relation to such Capacity Auction...”

- b) “4.7.1. An Applicant for a Prospective Generating CMU in the First Full Capacity Auction that has submitted a declaration pursuant to Rule 3.7.1(a) must submit to the Delivery Body by no later than the date falling 17 Working Days prior to the commencement of the first Bidding Window for the Capacity Auction:
  - (a) a declaration that it has obtained all Relevant Planning Consents for the CMU; and
  - (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.”
- c) “5.3.1. A Bidder must not participate in a Capacity Auction with respect to any CMU that is:
  - (a) not a Prequalified CMU”
- d) “5.3.3 If the Auctioneer becomes aware that a CMU is disqualified from a Capacity Auction pursuant to this Rule 5.3, the Auctioneer must:
  - (b) treat that CMU as having submitted an Exit Bid at the Bidding Round Price Cap in the next Bidding Round in that Capacity Auction to occur after it becomes aware of such disqualification (or the current Bidding Round if the announcement specified in Rule 5.5.18 has not been made for the next Bidding Round);”
- e) “5.4 If a CMU is withdrawn from a Capacity Auction pursuant to Rule 5.3.3 as a consequence of a breach of Rule 5.3.1 or Rule 5.3.2 (b), no Generating Unit or DSR CMU Component forming part of that CMU may form part of any CMU that participates in any other Capacity Auction relating to the same Delivery Year or either of the two subsequent Delivery Years.”
- f) “5.13.1. The following activities are prohibited in relation to the Capacity Auction:
  - (b) submitting to the Delivery Body or the Authority any information in connection with the Capacity Auction which is false or misleading;”
- g) “7.5.1 The Delivery Body must update the Capacity Market Register:
  - (t) where the Authority notifies the Delivery Body that it has made an enforcement decision against a person and that as a consequence an entry on the Capacity Market Register should be corrected, within 5 Working Days of receiving such notification;”

## **The Authority's decision**

29. False or misleading statements, made for the purposes of prequalifying for the Capacity Market, are damaging to the Wholesale Electricity Market and Capacity Market function. Prequalification for the Auction (and the proper and fair functioning of the Auction and EMR more generally) relies on participants taking care to provide accurate information. The credibility of the EMR generally will be undermined if companies participate in auctions for which they have prequalified by providing misleading information.

30. After considering all relevant information, the Authority is satisfied that UKCR was in contravention of relevant requirements (under section 25(8)) namely the requirements of Rule 5.13.1 (b) by UKCR's submission to the Delivery Body of false and misleading information in connection with the First Full Capacity Auction of 16 December 2014.

31. The information submitted was in the form of a declaration dated 21 November 2014 stating that "having made due and careful enquiry, to the best of their knowledge, information and belief" it had obtained all Relevant Planning Consents for 11 CMUs with a director's certificate confirming that UKCR could correctly make such a declaration (Rule 4.7.1). In the case of the 11 CMUs planning permission had not in fact been obtained by the date of the declaration. This breach has been admitted by UKCR.

32. The Authority notes that owing to the automatic effect of Rule 5.4 (disqualification from future bid submissions) following a breach of Rule 5. 3.1. (b), UKCR will not be able to submit any or part of the 11 CMUs in any other Capacity Auction relating to the same Deliver Year or either of the two subsequent Delivery Years.

33. The Authority acknowledges that UKCR has fully cooperated with Ofgem's investigation and provided the Authority with an early admission of breach.

34. In accordance with section 25(5A) of the EA, the Authority is satisfied that UKCR has agreed to ensure in future it will interpret Rule 4.7.1 in accordance with paragraph 22. The Authority is therefore not making a Final Order in respect of the breach found.

## **Gas and Electricity Markets Authority**

18 March 2015