

**DETERMINATION PURSUANT TO REGULATION 71(3)(b) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING APPEALS MADE TO THE AUTHORITY<sup>1</sup> PURSUANT TO REGULATION 70(1)(a)**

**Introduction**

1. This determination relates to appeals made by Limejump Ltd (“Limejump”) against the reconsidered decisions made by the EMR delivery body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Units (CMUs):

- (1) NBB\_03
- (2) NBB\_04
- (3) NBB\_10
- (4) NBD\_01
- (5) NBD\_02
- (6) NBD\_03
- (7) NBD\_04
- (8) NBD\_08
- (9) NBD\_09
- (10) NBD\_11
- (11) NNB\_05
- (12) NNB\_06
- (13) NNB\_07
- (14) NNB\_08

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.

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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.

3. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as Amended) (the "Regulations"), where the Authority receives an appeal notice that complies with Regulation 70, the Authority must review a reconsidered decision made by NGET
4. Limejump submitted an Appeal Notice to the Authority for each of the above CMUs under the provisions of Regulation 70(2).

### **Appeal Background**

5. Limejump submitted applications for the CMUs in paragraph 1 in respect of the 2016 Capacity Market Auctions. NBD\_11 applied for the T-4 Auction only and the remaining 13 CMUs applied for both the T-4 and the Supplementary Auction.
6. In the Notifications of Prequalification Decision dated 23 September 2016 (the "NGET Prequalification Decision"), NGET rejected the CMUs. Several grounds for rejection were cited for each CMU, including inaccurate Certificates, missing information regarding CMU Components, and missing required exhibits.
7. Limejump submitted requests for reconsideration of the initial prequalification decisions ("Dispute Notice") on 30 September 2016. Limejump was able to satisfy the reasons for rejection for each CMU at this stage.
8. NGET issued Notices of Reconsidered Decision on 14 October 2016 which continued to reject the disputes on the following grounds.

*The application remains as rejected in accordance with rules 3.2.6 and 3.2.7. The application contained one generating unit and the rules state that as a dispatch controller, the CMU must consist of a number of generating units (CMU Components).*

9. Limejump then submitted its appeals to the Authority on 21 October 2016 under Regulation 70 of the Regulations.

## Limejump's Grounds for Appeal

10. Limejump does not dispute the facts of the decision, stating *"for the avoidance of doubt, it is not disputed that it [each CMU] contains only one Generating Unit. At present Limejump is not the legal owner of that Generating Unit"*.
11. Limejump contests the interpretation of Rules 3.2.6 and 3.2.7 by NGET and argues that *"NG has misapplied rules 3.2.6 and 3.2.7 by giving them too narrow and literal an interpretation, given the broader context"* arguing that instead they should have taken a *"purposive approach"*.
12. Limejump has also submitted additional arguments for its appeal which they consider *"require rules 3.2.6 and 3.2.7 to be interpreted permitting [sic] such prequalification"*.
13. Limejump states that *"the Capacity Market regime is meant to treat Existing and New Build CMUs on equal terms as far as possible"* and that it is a requirement of the state aid clearance for the Capacity Market. *"To refuse prequalification to a Prospective Generating CMU in circumstances where it would be granted to an Existing Generating CMU is discrimination without an objective basis."*
14. The Appeal Notice calls on Ofgem *"to act in accordance with the provisions of the Electricity Act 1989 that set out its general duties"* including *"Directive 2009/72/EC (Article 36) of facilitating market access for distributed generation."*
15. Limejump claims that in interpreting Rules 3.2.6 and 3.2.7 there should be applied *"a long-established principle of EU law, which has frequently been applied by UK Courts, that national rules which are or could be construed as being in conflict with EU law should be disregarded."*
16. Limejump cites three *"common law principles of domestic statutory interpretation which can be applied in support of the interpretation of rule 3.2.6."*
17. The first common law argument is that *"if a literal interpretation of legislation would*

*produce a result contrary to the public interest and an alternative interpretation would not be detrimental to any person's legitimate interests, then the alternative interpretation should be followed.”*

18. The second common law argument holds that *“where the drafting is erroneous, an interpretation which rectifies the mistake in the words of the legislation is to be preferred.”* Limejump argues that the drafting reflects an error and *“here [sic] was no opportunity for stakeholders to point this out before the changes were made, since drafts of the amendments implementing the changes that followed the DECC consultations were not themselves the subject of consultation.”*
19. The third common law argument holds that *“there are a number of doctrines of interpretation set out in case-law to the effect that an interpretation that delivers an absurd or anomalous result should not be followed.”* Limejump suggest that NGET's current interpretation of rule 3.2.6 falls into this category because of *“the lack of policy or other support for it, and because the proposed different treatment of Existing and Prospective Generating CMUs in this way is inherently anomalous.”*

### **The Statutory Framework**

20. The Electricity Capacity Regulations 2014 were made by the Secretary of State under the provisions of s27 of the Energy Act 2013. The Capacity Market Rules were made by the Secretary of State pursuant to powers set out in s34 of the Energy Act 2013.
21. The Regulations set out the duties upon on the Delivery Body (NGET) when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
22. Regulations 68 to 72 set out the process and the powers in relation to Dispute Resolution and Appeals.

## **Capacity Market Rules**

23. Rules 3.2.6 and 3.2.7 read:

*3.2.6 Rule 3.2.7 applies where:*

- (a) a Generating CMU comprises a number of Generating Units with a Connection Capacity totalling no more than 50 MW;*
- (b) legal ownership of such Generating Units is or, in the case of a Prospective CMU, will be vested in more than one person; and*
- (c) Despatch Control with respect to each Generating Unit comprised in that Generating CMU rests or, in the case of a Prospective CMU, will rest with a single Despatch Controller (who may also be the legal owner of one or more of the Generating Units comprised in such Generating CMU).*

*3.27 Where this Rule 3.2.7 applies, the Despatch Controller (or, in the case of a Prospective CMU, the person who will be the Despatch Controller) must be the Applicant with respect to a Generating CMU and the following declarations must be submitted with the relevant Application:*

- (a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Generating CMU; and*
- (b) a Legal Owner Declaration in respect of each Generating Unit comprised in that Generating CMU signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of the relevant Generating Unit.*

## **Our Findings**

24. Rules 3.2.6 and 3.2.7 are clear and unambiguous: a Despatch Controller can only apply on behalf of a Prospective Generating CMU where “*a Generating CMU comprises a number of Generating Units*”

25. Limejump has confirmed in its Appeal Notice that each of the CMUs listed in paragraph 1 consist of only one Generating Unit of which it is not the legal owner. The Appeal Notice does not in any way suggest that the facts applied to Rules 3.2.6 and 3.2.7 are different from those applied by NGET.
26. Limejump's grounds for appeal do not contest the literal and obvious meaning of the Rules. Instead, Limejump has contested the consideration that NGET has given in determining the outcomes of Applications for Prequalification.
27. NGET's duties in assessing Applications for Prequalification are set out in Chapter 4 of the Rules. Rule 4.2.1(a) requires NGET to ensure that:
- (a) the Application has been completed and submitted in accordance with the Regulations and the Rules*
28. Regulation 71(3) of the Regulations provides that:
- (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.*
29. Limejump has raised a number of arguments about the interpretation of the Rules. In essence Limejump argues that a more expansive or purposive interpretation should be applied and the letter of Rules should not be followed. In our view, given that the language of Rules 3.2.6 and 3.2.7 is clear and unambiguous, the Rules need to be considered objectively and interpreted according to their ordinary linguistic meaning. An anomalous result is not produced by giving the particular Rules in question their ordinary meaning. Any other approach, as suggested by Limejump, is therefore inappropriate and unnecessary and would be unlawful.

30. Having carefully considered the alternative grounds submitted by Limejump in its Appeal Notices we conclude that they do not have any merit. We have though addressed each of the alternative grounds, as set out below.
31. Limejump asserts in general terms that the difference in treatment between existing and prospective CMUs amounts to unjustifiable discrimination and that this is contrary to “*EU state aid rules*”. While this has not been expressly stated we assume that this assertion is being made on the basis that the Rules should be interpreted in a way that avoids the alleged discrimination. As stated, the Rules are clear and unambiguous and need to be interpreted accordingly. While the Rules set out specific and in some cases different requirements of existing and prospective CMUs we do not consider that the Rules breach any aspect of EU law.
32. Limejump argues that the Authority must act in accordance with Article 36 of EU Directive 2009/72/EC. We presume that this reference to Article 36 relates to paragraph e) which provides that the Authority shall take reasonable measures in pursuit of the objective of :  
  
*facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources.*
33. We do not consider that this provision is directly engaged on the issue before the Authority. Notwithstanding that we do not consider that the clear application of the Rules in question, in any way contravenes paragraph e) of Article 36 or Article 36 generally.
34. We have noted that NGET did not inform Limejump in the Notification of Prequalification Decision that the CMUs did not meet the requirements laid out in Rules 3.2.6 and 3.2.7. That said we do not consider that Limejump has been prejudiced by this because Rules 3.2.6 and 3.2.7 clearly apply to the CMUs that are the subject of this decision and further, the CMUs do not meet the requirements stipulated within these Rules. We are not aware of any practicable steps (within the terms of the legislative framework), that Limejump could have taken, had they been aware of all the reasons earlier and which could have

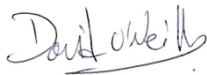
resulted in them being eligible to Prequalify when NGET made their reconsidered decision.

### **Conclusion**

35. The Authority finds that the CMUs do not comply with Rules 3.2.6 and 3.2.7 and are therefore ineligible to Prequalify. The Authority finds that NGET reached the correct decision not to Prequalify these CMUs for the T-4 and the Supplementary Auction.

### **Determination**

36. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the NGET Reconsidered Decision to Reject the Appellant is upheld in respect of the CMUs listed in paragraph 1.

A handwritten signature in cursive script that reads "David O'Neill".

**David O'Neill**

**Head of Security of Supply**

For and on behalf of the Gas and Electricity Markets Authority

**7 December 2016**