

# 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 an appeal made by British Sugar plc (BSP) against the reconsidered decision made by the EMR delivery body (National Grid Electricity Transmission plc (“NGET”)) in respect of the Capacity Market Unit (CMU):

(1) BSWI17

2. 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.

## Appeal Background

3. BSP submitted an application for BSWI17 in respect of the 2016 Transitional Auction (TA).
4. In the Notification of Prequalification Decision dated 23 September 2016 (the "NGET Prequalification Decision"), NGET rejected BSWI17 on the following grounds:

*The application has been rejected for prequalification as the technology class of the application is prohibited as per rule 11.3.2A(a)*

5. BSP submitted a request for reconsideration of the initial prequalification decision (“Dispute Notice”) on 30 September 2016. They noted:

*“Rule 11.3.2A was released in May 2016 and British sugar [sic] were not aware of this rule change, as we were unaware of the amended rules being released...”*

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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.

*...The only reason for rejection is the error of applying for the TA auction when an application for the T-1 auction and/or T-4 Auction [sic] is now required given the rule changes associated with the TA Auction for 2017 delivery.”*

6. NGET issued a Notice of Reconsidered Decision on 13 October 2016 which continued to reject the dispute on the following grounds.

*“We have not accepted your dispute. Rules 3.3.4 and 3.3.6 require that the Applicant submit a separate application for each auction in which the Applicant wishes to prequalify the CMU. There was no Application received for either the T-4 or T-1 auctions during the Prequalification Window (Rule 3.3.7).”*

7. BSP then submitted an appeal to the Authority on 21 October 2016 under regulation 70 of the Regulations.

#### **British Sugar’s Grounds for Appeal**

8. BSP states they had re-submitted the documentation which had allowed it to enter the previous TA auction. They argue that this had been done in good faith as they allege that were unaware of Rules changes which no longer allowed them to Prequalify. BSP noted the applications should have been for the Supplementary Auction<sup>2</sup> and the four-year-ahead (T-4) auction.
9. BSP stated in their appeal that they had worked with NGET to resolve matters but that NGET did not have the power to authorise a retrospective change from the TA to the Supplementary Auction or T-4 auctions.
10. BSP also stated that both BSP and NGET believed *“that Ofgem does have that capability/authority.”*

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<sup>2</sup> The definition of Supplementary Auction has been inserted into the Regulations by SI 2016/742 amending regulation 2(1)(b) thus: *‘after the definition of “storage facility” insert— “supplementary auction” has the meaning given in regulation 10(1)(ba);’* and adding to regulation 10(1) as follows: *‘(ba) by 1st August 2016, whether a T-1 auction is to be held in the auction window starting on 1st September 2016 (a “supplementary auction”)*’

## The Legislative Framework

11. The Electricity Capacity Regulations 2014 were made by the Secretary of State under the provisions of s27 of the Energy Act 2013.
12. The Capacity Market Rules were made by the Secretary of State pursuant to powers set out in s34 of the Energy Act 2013.
13. Section 41 of the Energy Act 2013 sets out the procedure for making the Capacity Market Rules and specifically requires that they must be laid before Parliament. In particular s41(9) requires that any amendment to the Rules is also subject to this process ahead of their publication<sup>3</sup>.
14. The Regulations set out the duties upon on the Delivery Body (NGET) when it determines eligibility. Regulation 20 provides that the Delivery Body must exercise the functions conferred on it by Chapter 4 of the 2014 Regulations and the Capacity Market Rules in accordance with the Regulations and the Rules. Further, regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.

## The Capacity Market Rules

15. Rule 3.3.6 provides that:

*“For each CMU for which an Applicant wishes to Prequalify, **and for each Capacity Auction**, the Applicant must:*

- (a) Submit a separate application form and the required Additional Information to the DB;*
- (b) Comply with the requirements of the Application Process; and*
- (c) Cooperate with the DB and other Admin Parties in the execution of their duties.”*  
*(Bold added)*

16. Rule 3.3.7 provides that:

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<sup>3</sup> S41(9) provides that *“In relation to any exercise by the Secretary of State or the Authority of a power to make capacity market rules, the person making the rules must, as soon as reasonably practicable after they are made, lay them before Parliament and publish them”*

*“An Application will not be considered or accepted unless it is submitted:*

*(a) During the prequalification window; and*

*(b) In accordance with:*

*(i) the Regulations and the Rules.*

*(ii) the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction;”*

17. The Prequalification Window is defined in rule 1.2 (page 29) as *“for any Capacity Auction, the period specified in the Auction Guidelines within which applications for prequalification are to be made.”*

18. Rule 4.4.1 provides that:

*“The Delivery Body must, for each CMU for which an Application has been received, determine whether the CMU has prequalified for **the** Capacity Auction.” (Bold added)*

19. Rule 11.3.2A was added as part of The Capacity Market (Amendment) Rules 2016, which were made by the Secretary of State on 21 July 2016, following a consultation in March 2016.<sup>4</sup>

20. Rule 11.3.2A(a) requires that in the Second Transitional Capacity Auction:

*(a) the following CMUs must also be prohibited (and an Applicant must not submit an Application for the Second Transitional Capacity Auction in relation to any such CMU):*

*(i) any Non-CMRS Distribution CMU with a De-rated Capacity of 50MW or less; and*

*(ii) any DSR CMU that provides DSR Capacity by using a Generating Unit;*

### **Our Findings**

21. BSWI17 is a 41.4MW Generation Unit and therefore would fail to meet the requirements of 11.3.2A(a). BSP acknowledges in its Dispute Notice to the Authority that it had *“incorrectly submitted an application for BSWI17 into the TA for 2017/18.”*

22. There is no dispute in respect of the decision by NGET not to Prequalify BSWI17 for the auction for which it applied. The basis of the dispute is whether NGET was able to rely on

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<sup>4</sup> <https://www.gov.uk/government/consultations/consultation-on-reforms-to-the-capacity-market-march-2016>

additional information provided to it under regulation 69(5) thereby allowing it to change its application from the TA to the Supplementary Auction.

23. BSP, in its Tier 1 Dispute Notice to National Grid requested that the *“oversight with regard to the incorrect application should be viewed as a genuine administrative error and BS Wisington should be treated as if it had applied to the T-1 and T-4 Auction”*. However, NGET noted it was unable to Prequalify BSWI17 for these auctions as this would require a new Application and pursuant to rule 3.3.7(a) an Application must be submitted during the prequalification window.
24. The operation of rule 3.3.6(a) effectively means that prequalification is a specific exercise for each auction. During this year’s prequalification process, while prequalification for the TA, T-4 and Supplementary Auction was run concurrently, applicants were required to submit separate Applications for a particular CMU in respect of each auction.
25. The operation of rule 3.3.7 effectively prevents BSP from changing the type of Auction that their original Application was submitted under by requesting the Delivery Body to take into account additional information. While NGET can take into account information submitted when the applicant makes a request for reconsideration, BSP cannot provide information which has the effect of allowing BSP to effectively submit a new application outside of the Prequalification Window.<sup>5</sup>
26. The Authority considers that the Delivery Body’s analysis is correct and that a new Application would be necessary in order to Prequalify for the Supplementary Auction or T-4 Auction as the Application is auction specific.
27. BSL believed that Ofgem does have the ability to allow a new Application. However, this is not relevant to our Determination which is a review of the reconsidered decision made by NGET.

## **Conclusion**

28. A CMU is only able to Prequalify if it has submitted an Application during the Prequalification Window. In the case of BSWI17 no application for the Supplementary Auction or T-4 auction was submitted during the prequalification window and therefore NGET could not Prequalify the CMU for either of these auctions.

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<sup>5</sup> As defined by rule 1.2.1 of the Capacity Market Rules 2016

**Determination**

29. 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 for prequalification under rule 11.3.2A(a) be upheld in respect of BSWI17

A handwritten signature in cursive script that reads "David O'Neill". The signature is written in black ink and is positioned above the printed name.

**David O'Neill**

**Head of Wholesale Markets Policy**

For and on behalf of the Gas and Electricity Markets Authority

**2 December 2016**