

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

Introduction

1. This determination relates to appeals made by Equivalence Energy Limited (“EEL”) against reconsidered decisions made by the EMR delivery body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (“CMU”):

(1) IPSW-B

2. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as Amended) (the “Regulations”), where the Authority¹ receives an appeal notice that complies with regulation 70, the Authority must review a reconsidered decision made by NGET.

Appeal Background

3. EEL submitted an application for IPSW-B in respect of both the Supplementary Auction² and the 2016 T-4 Auction.
4. In a Notification of Prequalification Decision dated 23 September 2016 (the “Prequalification Decision”), NGET rejected IPSW-B from both auctions on the following grounds:

“This application has been rejected as incorrect company details were on the application submitted.

¹ 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.

² 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”)’.

This application has been rejected as the Prequalification Certificate and the Certificate of Conduct both dated in the previous year was submitted without an accompanying letter. Rules 3.12.3 and Rule 3.12.4 require a Prequalification Certificate and Certificate of Conduct to be submitted with every application. Rule 1.2 defines the Prequalification Certificate as in the form set out in Exhibit A, and the Certificate of Conduct as in the form set out in Exhibit C. The form set out in Exhibits A and C includes a requirement to date/sign the certificate.

The application has been rejected as the information required by Rule 3.4.3(a)(i) regarding the Ordnance Survey Grid Reference is invalid."

5. EEL submitted a request for a review of the Prequalification Decision (the "Dispute Notice") on 27 September 2016. In this notice EEL corrected the Ordnance Survey Grid Reference and through discussions with NGET concluded the 'incorrect company details' statement on the Notification of Prequalification Decision were made in error. Therefore, the remaining issue was the incorrect Prequalification Certificate and Certificate of Conduct (the "Certificates"). This Determination only concerns the incorrect Certificates.

6. In relation to the Certificates, EEL said in its Dispute Notice:

"The Prequalification Certificate and Certificate of Conduct are dated 2015... Discussion with EMR 'Rules Expert' during the dispute window indicates that the need for an "accompanying letter" is waived if we resubmit re-dated certificates... While nothing has changed since 2015, we attach 2016 dated Certificates to this dispute as suggested."

7. NGET issued a Notice of Reconsidered Decision at 11:34 on 14 October 2016 which continued to reject EEL's application on the following grounds.

"The Application is "Rejected" as the completed certificates do not meet the requirements of Rule 1.2, which define that certificates should be in the form set out in Exhibit A and Exhibit C. The forms include a requirement to provide the "Name of the Applicant" and the "Registered No", which do not match with the Applicant details."

8. Following the issuing of the Notice of Reconsidered Decision, EEL sent the correct Certificates to NGET at 12:01 on 14 October 2016. In an email response by NGET to EEL at

16:26 on 14 October NGET said it was not able to consider the new Certificates, and that EEL's only option is to raise a dispute with the Authority.

9. EEL submitted an Appeal Notice to the Authority on 18 October 2016 under Regulation 70 of the Regulations.

EEL's Grounds for Appeal

10. EEL are disputing NGET's decision on the basis that they sent the 2016 Certificates to NGET "before the final close date of 14 October 2016". EEL also state that the requirement to update the dates on the Certificates is unclear in the Rules and are of the view that the 2016 Certificates were not really required as there is nothing fundamentally different between the 2015 and 2016 Certificates.
11. EEL acknowledges that they supplied the incorrect Certificates, for another company, with the Dispute Notice. EEL also acknowledges they did not supply the correct Certificates for the request for a review of the Prequalification Decision by NGET until "after the dispute window had closed."

The Statutory Framework

12. 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.
13. The Regulations set out the duties upon on NGET when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
14. Regulations 68 to 72 set out the process and the powers in relation to Dispute Resolution and Appeals.

Our Findings

Late submission of the correct Certificates

15. EEL did submit the correct Certificates at 12:01 on 14 October 2016, however this was after NGET had issued its Notice of Reconsidered Decision. On that basis, we are of the view that NGET did not have the power to revisit its decision and take the correct Certificates into account.
16. In summary, this is because Regulation 69(6) provides:

“Subject to regulations 70 to 72, the reconsidered decision is final”

17. Similarly, there is nothing in the Rules that suggests that NGET may revisit a Reconsidered Decision. Accordingly, we are of the view that NGET did not have the power to review the Reconsidered Decision.

Do the Certificates have to be up to date?

18. EEL state in their Appeal Notice that the requirement to update the dates on already qualified certificates is unclear or ambiguous in the current interpretation of the Rules. In addition, EEL states that nothing in the 2015 Certificates has changed against the 2016 Certificates. On that basis they argue that the 2015 Certificates were already correctly lodged and should stand.
19. We agree with EEL that there is no express requirement in the Rules that the Certificates must be up to date. However, we are of the view that the content required in the Certificates is such that the Certificates must be up to date in order for them to be meaningful. For example, the Prequalification Certificate must certify that there is no reason that EEL could be found to be insolvent. Similarly, the Certificate of Conduct requires certification that EEL has complied with various legislative provisions. In order for this certified information both of the Certificates would need to be certified at the time of the application.

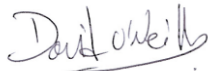
20. Accordingly, we are of the view that the Certificates should be up to date and the 2015 Certificates were not valid for the purposes of EEL's prequalification application.

Conclusion

21. NGET reached the correct decision not to Prequalify IPSW-B for both auctions for which EEL applied because the Certificates provided were incorrect. NGET also reached the correct Reconsidered Decision not to Prequalify IPSW-B for both auctions for which EEL applied because the Certificates NGET had at the point it made its Reconsidered Decision were still incorrect.

Determination

22. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Reconsidered Decision to Reject the Appellant for prequalification be upheld in respect of IPSW-B for the Supplementary Auction and T-4 Auction.



David O'Neill

Head of Wholesale Markets Policy

For and on behalf of the Gas and Electricity Markets Authority

2 December 2016