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

Introduction

1. This determination relates to appeals made by Carrington Power Limited ("CPL") against reconsidered decisions made by the EMR delivery body (National Grid Electricity Transmission plc ("NGET")) in respect of two Capacity Market Units (CMUs):

    (1) CARR01
    (2) CARR02

2. This decision deals with both 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.

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.

Appeal Background

4. CPL submitted applications for two CMUs in respect of the 2016 T-4 Capacity Auction. It should be noted that at the time of its application for Prequalification, the relevant CMUs had not been commissioned by CPL and as such the applications were made on the basis of a New Build Generating CMU[2].

5. In the Notification of Prequalification Decisions dated 23 September 2016 (the "NGET Prequalification Decisions"), NGET rejected both CARR01 and CARR02 applications on the following two grounds:

    "This Application has been rejected because –
    (1) the Project Spend has been used in previous year's application, and

[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] As defined by the CM Rules read alongside regulation 4(1)(b) of the Electricity Capacity Regulations 2014

(2) The OS Grid Reference has not been provided in the XX 111 111 format required as per Rule 3.4.3 (a) (i).”

6. CPL submitted its request for reconsideration of the initial Prequalification Decision (“Dispute Notice”) on 30 September 2016. The Dispute Notice raised three grounds which were summarised as follows:[3]

    1. *In rejecting the application on the basis that the Applicant has used the TPS in the previous year's application, National Grid has misinterpreted and misapplied Rule 3.7.2(c) (the "Rule") of the Capacity Market Rules (the "Rules"), as amended with effect from 21 July 2016. On its true construction, Rule 3.7.2(c) operates to preclude only a New Build CMU which has previously obtained a multi-year Capacity Agreement from seeking to prequalify for a further multi-year Capacity Agreement in reliance on the same TPS.*

    2. *Further or alternatively, in submitting its application, the Applicant relied on express assurances made specifically to the Applicant from National Grid that National Grid would interpret and apply the Rule as set out in paragraph 1 above. These assurances are evidenced by an email from [NGET Rep], dated 22 August 2016, and were subsequently expressly confirmed in the course of a telephone discussion with the Applicant on 24 August and in a further email dated 23 August 2016 but sent on 24 August 2016. These assurances gave rise to a legitimate expectation on the Applicant’s part that the change to the Rule would not bar its prequalification for a multi-year Capacity Agreement. The Applicant relied in good faith on the assurances in making its application. By rejecting the Application on the basis that the Project Spend had been used in the previous year's application, National Grid has, unfairly and unlawfully, frustrated the Applicant's substantive legitimate expectation that National Grid itself engendered.*

    3. *In the alternative to the Applicant's primary arguments set out in Grounds 1 and 2 above, and without prejudice to the Applicant's right to pursue (if necessary, by way of Tier 2 appeal and appeal under Regulation 72) Grounds 1 and 2 above, the Applicant submits that National Grid should, in determining whether the Applicant has prequalified, treat the TPS in the current Application as zero, rather than rejecting the Application outright. This would entitle the*

[3] Extract from the Appellant’s Dispute Notice: Summary of grounds for disputing National Grid’s Prequalification Decision.

Applicant to prequalify for a one-year Capacity Contract, entirely without prejudice to its contention that it is entitled to prequalify for a multi-year contract under Grounds 1 and/or 2 above.

7. NGET issued a Notice of Reconsidered Decision on 13 October 2016. NGET determined that CPL should Prequalify[4] but that the Maximum Obligation Period of the Capacity Agreement that CPL may bid for should be one year ("the Reconsidered Decision"). In effect, NGET allowed the request for reconsideration on the third ground that had been raised in the Dispute Notice, but not on the other grounds. In the Notice, NGET explained its decision as follows:

"We have reviewed and accepted your dispute.
1) We have attached the supporting planning documentation to your application.
2) We have amended the grid reference of the CMU Component on your behalf.
3) We have set the Total Project Spend to zero."

8. CPL was not satisfied with the Reconsidered Decision to Prequalify CPL with a Maximum Obligation Period of one year. In particular, CPL considered that NGET had failed to provide reasons for rejecting the first and second grounds that had been raised in the Dispute Notice. It appears to have engaged in correspondence with NGET between 14 October 2016 and 20 October 2016 seeking reasons for the rejection of the first and second grounds.

9. CPL thereafter submitted an appeal to the Authority on 21 October 2016 under regulation 70 of the Regulations.

CPL's Grounds for Appeal

10. CPL appeals against the Reconsidered Decision in so far as NGET rejected the first and second grounds set out in the Dispute Notice.

11. CPL's grounds of appeal are contained in Section d of the Appeal Notice. In summary, Ground 1 argues that NGET has misinterpreted Rule 3.7.2(c) of the CM Rules. CPL contends that on its true construction, Rule 3.7.2(c) operates to preclude only a New Build CMU which has previously obtained a multi-year Capacity Agreement from seeking to Prequalify for a further multi-year Capacity Agreement in reliance on the same Capital Expenditure.

[4] Defined terms are denoted by Capitalization, and if not defined in the determination are defined in the Rules and Regulations.

12. Ground 2 of the appeal alleges that NGET has abused its public law powers by unlawfully frustrating a substantive legitimate expectation it had engendered in CPL that Rule 3.72(c) would be interpreted as set out above. The substantive legitimate expectation is said to arise from certain assurances NGET gave to CPL between 22 August 2016 and 24 August 2016.

13. CPL has also provided certain information on the third ground which was set out in the Dispute Notice, and which appears to have been accepted by NGET. However, CPL has not sought to appeal against the Reconsidered Decision in so far as it upheld the third ground.

First Ground of Appeal

14. CPL contends that Rule 3.7.2(c) does not, on its proper construction, operate to prevent CPL from prequalifying for a multi-year Capacity Agreement of up to 15 years' duration. CPL argues that Rule 3.7.2(c) operates to preclude only a New Build CMU which has previously obtained a multi-year Capacity Agreement from seeking to Prequalify for a further multi-year Capacity Agreement in reliance on the same Capital Expenditure. CPL does not dispute that it previously declared the Capital Expenditure on which it now relies in the application it made for the 2015 Capacity Auction. CPL notes, however, that in the 2015 Capacity Auction it did not obtain a multi-year Capacity Agreement and was only granted a one year Capacity Agreement. This was because although it had Prequalified to bid for such for a multi-year Capacity Agreement, it exercised its right under Rule 5.6.4 to amend its Duration Bid from 15 years to one year, by submitting a Duration Bid Amendment. On that basis, CPL contends that Rule 3.7.2(c) did not prevent it from pre-qualifying for a multi-year Capacity Agreement of up to 15 years' duration, and that NGET was wrong to determine otherwise.

15. CPL considers that NGET has wrongly applied a *"literal and mechanistic"* reading of Rule 3.7.2(c) which CPL argues is *"wholly uncommercial and unfair and fails to give effect to the purpose of the amended rule"* (paragraph 5 of the Appeal Notice).

16. CPL raises two main arguments of construction. The first is that for the purposes of Rule 3.7.2(c), Capital Expenditure is not "considered" or indeed in any way taken into account in the grant of a one year Capacity Agreement (paragraph 6 of the Appeal Notice). CPL relies on the fact that there is no minimum amount of Capital Expenditure which a bidder must commit to spending in order to be eligible to bid for a capacity obligation for a period of one year, and there is no requirement pursuant to Rule 8.3.6 to verify the Capital Expenditure in respect of a one year Capacity Agreement (paragraph 4 of the Appeal Notice). CPL argues that the Capital Expenditure it had previously declared was not

"considered" by NGET when it granted CPL a one year Capacity Agreement after the 2015 Capacity Auction (paragraph 7 of the Appeal Notice).

17. The second argument is to rely on "the legislative history of the amendment to" Rule 3.7.2(c) (paragraph 9 of the Appeal Notice). CPL argues that previous statements made by the Authority support its proposed construction of Rule 3.7.2(c). It relies in particular on: (a) statements made by the Authority in a statutory consultation issued on 29 April 2016 seeking views on a potential amendment to Rule 3.7.2(c) (paragraphs 9 and 10 of the Appeal Notice); (b) statements made in the Authority's decision document dated 5 July 2016 (paragraphs 13 and 14 of the Appeal Notice); and (c) statements made in the Authority's updated Capacity Market FAQs document issued on 24 August 2016 (paragraphs 16 and 17 of the Appeal Notice).

18. CPL acknowledges that BEIS[5] issued a further FAQ document on 9 September 2016 which provides guidance on the meaning of Rule 3.7.2(c), which is inconsistent with CPL's proposed construction. However, CPL argues that the guidance is clearly wrong (paragraphs 19 to 21 of the Appeal Notice).

Second Ground of Appeal

19. CPL argues that it had the benefit of a substantive legitimate expectation that its Application would be assessed on the basis that the fact that it had stated Capital Expenditure in a previous application for Prequalification and had accepted a one year Capacity Agreement would not preclude its application for Prequalification for a Capacity Agreement of up to 15 years' duration (paragraph 28 of the Appeal Notice).

20. The substantive legitimate expectation is said to arise from certain assurances provided by NGET to CPL between 22 and 24 August 2016. CPL refers, in particular, to: (a) an email dated 22 August 2016 from [NGET Rep] to [CPL Rep] on behalf of CPL; (b) a further email from [NGET Rep] dated 23 August 2014; (c) telephone discussions on 23 August 2016 between [CPL Rep] and [NGET Rep]; and (d) telephone discussions on 24 August 2016 between [CPL Rep] and [CPL Rep], on the one hand, and [NGET Rep], on the other (paragraph 26 of the Appeal Notice).

21. CPL contends it relied on the assurances it was given. The reliance is identified in the following terms: *"the Appellant submitted its application on the basis that the assurances*

[5] Department for Business, Energy & Industrial Strategy

were reliable and would be adhered to by National Grid in its assessment of the Appellant's application" (paragraph 27 of the Appeal Notice).

22. CPL argues that NGET has abused its public law powers by frustrating CPL's substantive legitimate expectation without offering any counterweighting reasons (paragraph 28 of the Appeal Notice). CPL submits that, in light of the substantive legitimate expectation, NGET was incorrect to refuse to grant CPL's application to Prequalify for a Capacity Agreement of up to 15 years' duration (paragraph 29 of the Appeal Notice).

The Statutory Framework

23. 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.

24. 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.

25. The Regulations set out the duties 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.

26. Regulations 68 to 72 set out the process and the powers in relation to Dispute Resolution and Appeals.

27. Further, regulation 77 grants the Authority the power to make, amend or revoke Capacity Market Rules. The regulation limits the Authority's power from making any provision in the rules that is inconsistent with the Regulations, and the Authority is required to obtain the approval of the Secretary of State where it is seeking to confer additional functions upon itself or the Secretary of State.[6]

[6] Reg 77(3)(a) and (b).

The Capacity Market Rules

28. Under the Capacity Market Rules, in order to participate in a Capacity Auction to obtain a Capacity Agreement, an applicant must Prequalify to bid. The Capacity Market Rules establish certain conditions for Prequalification.

29. Rule 3.7.2(c) provides that *"Each Applicant for a New Build CMU must state in the Application: … the total amount of Capital Expenditure (excluding contingency) incurred, or expected in the reasonable opinion of the Applicant to be incurred (either by the Applicant or another person) with respect to the CMU (or, in the case of an Interconnector CMU, the CMU together with the Non-GB Part) between the date which is 77 months prior to the commencement of the first Delivery Year to which the Application relates and the commencement of the first Delivery Year to which the Application relates, such Capital Expenditure not having previously been considered in respect of any application for prequalification by a CMU which subsequently gained a Capacity Agreement* ("the Total Project Spend")." (Emphasis added)

30. Further, Rule 3.7.2(d) requires each Applicant to state, for a Generating CMU, whether the Qualifying £/kW Capital Expenditure is (i) equal to or greater than the Fifteen Year Minimum £/kW Threshold; (ii) equal to or greater than the Three Year Minimum £/kW Threshold and less than the Fifteen Year Minimum £/kW Threshold; or (iii) less than the Three Year Minimum £/kW Threshold. Qualifying £/kW Capital Expenditure means *"the Capital Expenditure (excluding contingency) incurred or expected to be incurred (either by the Applicant or another person), between the date which is 77 months prior to the commencement of the first Delivery Year to which the Application relates, and the commencement of the first Delivery Year to which the Application relates, divided by the De-rated Capacity of the Generating CMU that is expected in the reasonable opinion of the Applicant to result from such Capital Expenditure"*. The terms Fifteen Year Minimum £/kW Threshold and Three Year Minimum £/kW Threshold are defined in Regulation 11 of the Regulations. They refer, in essence, to the minimum amount of capital expenditure per kilowatt of de-rated capacity which a bidder must commit to spending on a generating CMU to be eligible to bid for capacity obligations for periods of respectively (i) more than three and up to 15 delivery years; and (ii) for a period of two or three delivery years. There is no such minimum threshold for a CMU to be eligible to bid for a capacity obligation period of only one year.

31. Once a CMU has Prequalified to bid in the Capacity Auction, it may make a Duration Bid in the Capacity Auction. Rule 5.6.1 provides that *"A Duration Bid in relation to a Bidding CMU*

in a Capacity Auction specifies the duration of Capacity Agreement in whole Delivery Years that the Bidder requires at any particular price". Furthermore, Rule 5.6.4 provides for a right to amend a Duration Bid by submitting a notice to the Auctioneer. The effect of this is that a CMU that has Prequalified to bid for a Capacity Agreement with a Maximum Obligation Period of 15 years may nevertheless after the submission of a Bid Duration Amendment receive a Capacity Agreement of lesser duration.

32. Rule 8.3.6 imposes certain requirements which apply after the award of a Capacity Agreement. Rule 8.3.6(a) provides: *"Where a Prospective Generating CMU has been awarded a Capacity Agreement with a duration exceeding one Delivery Year … the relevant Capacity Provider must provide the Delivery Body, no later than three months after the start of the first Delivery Year, with a certificate from an Independent Technical Expert confirming that it is satisfied, on the basis of the evidence reviewed, that the Total Project Spend incurred divided by the De-Rated Capacity of the CMU is: (i) less than the Three Year Minimum £/kW Threshold; or (ii) equal to or greater than Three Year Minimum £/kW Threshold and less than the Fifteen Year Minimum £/kW Threshold; or (iii) equal to or greater than the Fifteen Year Minimum £/kW Threshold."*

33. Similarly, Rule 8.3.6(aa) provides that in the same circumstances *"the relevant Capacity Provider must provide the Delivery Body, no later than three months after the start of the first Delivery Year, with a certificate from an Independent Technical Expert confirming that it is satisfied, on the basis of the evidence reviewed, that the Total Project Spend incurred has not previously been considered in respect of any application for prequalification by a Prospective CMU which subsequently gained a Capacity Agreement"*.

34. The consequences of the provision or non-provision of such certificates are specified in Rules 8.3.6(b) and (c).

Our Findings

First Ground

35. The first ground raises a question as to the construction of Rule 3.7.2(c). For the reasons given below we do not accept the construction of Rule 3.7.2(c) that CPL proposes.

36. As a result of changes effected in the summer of this year, a qualification was introduced into Rule 3.7.2(c) in respect of the Capital Expenditure that is to be stated by the Applicant and considered by NGET when it makes its Prequalification Decision. Rule 3.7.2(c) reads in relevant part as follows (the amendment is underlined): *"Each Applicant for a New Build*

CMU must state in the Application…the total amount of Capital Expenditure…, such Capital Expenditure not having previously been considered in respect of any application for prequalification by a CMU which subsequently gained a Capacity Agreement ("the Total Project Spend")".

37. Rule 3.7.2(c) requires that all New Build CMUs must declare Capital Expenditure in their application and that the Capital Expenditure so declared must not have previously been considered (1) in respect of an application for Prequalification (2) which subsequently gained a Capacity Agreement.

38. The meaning of Rule 3.7.2(c) is clear and unambiguous. The effect of the Rule is that it precludes application for Prequalification from including statements of Capital Expenditure that have previously been considered in respect of any prior application for pre-qualification, which application resulted in an Applicant obtaining a Capacity Agreement in the Capacity Auction, and irrespective of the duration of the Capacity Agreement that the relevant Applicant obtained. The use of the words "a Capacity Agreement" in the proviso contained in Rule 3.7.2(c) confirms that the proviso applies to any type of Capacity Agreement, be that a single year agreement or a multi-year agreement.

39. The Capital Expenditure that CPL set out in its application for Prequalification formed part of its application for Prequalification in 2015 and was, as such, considered at that time. CPL was subsequently awarded a one year agreement in the 2015 auction. Consequently, CPL was precluded from stating this same Capital Expenditure for the application for Prequalification which forms the subject of this appeal. On that basis it is not entitled to Prequalify for a multi-year agreement.

40. We have considered the arguments CPL has raised in support of a contrary construction but do not find them persuasive. The first argument is that for the purposes of Rule 3.7.2(c), Capital Expenditure is not "considered" or indeed in any way taken into account in the grant of a one year Capacity Agreement. However, Rule 3.7.2(c) only refers to the Capital Expenditure having been *"considered in respect of any application for prequalification by a CMU…"*. Accordingly, the relevant question is whether the Capital Expenditure was considered as part of the application for Prequalification, and not whether the Capital Expenditure was in any way considered in the grant of the specific Capacity Agreement that the Applicant subsequently obtained. An Applicant may obtain Prequalification so as to be able to bid for a Capacity Agreement of up to 15 years' duration, but it may subsequently decide, for its own reasons, only to enter into a Capacity Agreement of a shorter duration. The Capital Expenditure stated in its application for Prequalification will still have been considered in the grant of that application for Prequalification.

41. CPL's second argument relies on what it refers to as the legislative history of the amendment to Rule 3.7.2(c). CPL has not explained the legal rationale for having regard to these matters. In our view, given that the language of Rule 3.7.2(c) is clear and ambiguous, there is no reason to have regard to the alleged legislative history of the amendment to the Rule in order to construe it. CPL's second argument must fail on that basis.

42. In any event we make the following further points on the aspects of the alleged legislative history on which CPL relies. As to the Authority's consultation document dated 29 April 2016, CPL has failed to quote all of the relevant passages in the explanatory note to Of7. In particular, the Authority went on to say in respect of its proposal to amend Rule 3.7.2(c) that *"It was not the original policy intent that CMUs should be able to claim a given item of Capital Expenditure for more than one capacity agreement. Such a possibility, although unlikely, remains feasible without the amendments in this proposal."* Accordingly, the statements made in the 29 April 2016 consultation document did not unambiguously support the construction of Rule 3.7.2(c) which CPL now proposes.

43. The Authority's decision dated 5 July 2016 did indeed state that *"The existing Rules potentially enable a CMU which has gained a multi-year capacity agreement to cite the same expenditure in a subsequent application in order to qualify for a second multi-year agreement."* However, this statement does not provide a sufficient basis to construe Rule 3.7.2(c) otherwise than in accordance with its plain language. CPL has not explained why it should do so.

44. Finally, as to the Authority's Capacity Market FAQs issued on 24 August 2016, we make the following points. First, the relevant FAQs post-date the entry into force of the amendment to Rule 3.7.2(c). Accordingly, they could not form part of the suggested legislative history of Rule 3.7.2(c) and they are not relevant to the construction of Rule 3.7.2(c). Second, even if that were not the position, the FAQs made clear that *"These FAQs are for information only and do not supersede or replace the requirements contained in The Capacity Market Rules 2014"*. Accordingly, we do not consider CPL is entitled to rely on the content of the FAQs in support of its proposed construction of Rule 3.7.2(c).

45. In view of the reasons set out above we reject the first ground of appeal.

Second Ground

46. We do not consider that NGET was obliged to grant CPL Prequalification to bid for a Capacity Agreement of 15 years' duration based on any substantive legitimate expectation.

47. First, Regulation 22(a) sets out the duty on NGET to *"determine each application for prequalification in accordance with the capacity market rules".* Consequently, NGET is obliged to determine every application for Prequalification in accordance with the Capacity Market Rules as properly construed. To do otherwise would amount to an ultra vires act on the part of NGET and a breach of a statutory duty. As we have concluded above, on its true construction, Rule 3.7.2(c) operated to prevent CPL from prequalifying for a multi-year Capacity Agreement of up to 15 years' duration. CPL has failed to explain why any assurances that NGET may have provided to CPL would have obliged NGET to act in breach of statutory duty. We do not consider that CPL could benefit from a substantive legitimate expectation that NGET would act in breach of its statutory duty to determine each application for Prequalification in accordance with the Capacity Market Rules.

48. Second, CPL has failed properly to explain why it would have been unlawful and an abuse of power for NGET to have resiled from any clear or unambiguous representation it may have made to CPL concerning its proposed approach to Rule 3.7.2(c). In particular, it appears that CPL only relied on the assurances it says were given between 22 and 24 August 2016 to the extent that it submitted its current application on the basis that the assurances were reliable. CPL has failed to explain what it would have done if the assurances had not been given. We assume that CPL would either (a) have declined to make an application; or (b) applied in any event without the benefit of the assurances. In either case, the outcome for CPL would not have been materially better than that achieved in the Reconsidered Decision. We note that whether or not the assurances were given could not affect the fact that CPL had in 2015 already declared the Capital Expenditure on which it chose to rely in support of its current application, and had entered into a one year Capacity Agreement. In the circumstances, we cannot see that there has been any sufficient detrimental reliance by CPL on the assurances it says were given to it to justify NGET in construing and applying Rule 3.7.2(c) otherwise than in accordance with its true meaning.

49. Whilst we consider the points made above are sufficient to dispose of the second ground of appeal, we are also doubtful that CPL was provided with any sufficiently clear and unambiguous representation such as to found a substantive legitimate expectation. The information that CPL has provided on the alleged assurances it received between 22 and 24 August 2016 is not precise or complete. However, on the basis of the material provided, it appears that the position NGET was adopting at the relevant time was (1) qualified; and (2) at least significantly inconsistent or unclear.

50. On 22 August 2016 [NGET Rep] appears to have sent an email to [CPL Rep] stating in material part as follows: *"We spoke briefly last week about OF7 and the DB interpretation. I*

just want to check you [sic] concerns. After looking through with the team and with ofgem [sic]. We agree with their interpretation that the rule change is designed to prevent providers with multi-year agreements from using the same capital expenditure for a further multi-year agreement".

51. On 23 August 2016, it appears there was a telephone call between [CPL Rep] and [NGET Rep].

52. [CPL Rep] followed up with an email to [NGET Rep] timed at 19.46. [CPL Rep] wished to state *"my understanding as to how the Delivery Body will treat out Prequalification application for Carrington Power Ltd from a procedural perspective"*. The relevant part of her understanding was confirmed as follows: *"Carrington's Capital expenditure is therefore eligible for submission for Prequalification for a multi-year agreement as part of this years [sic] Prequalification process given that such Capital expenditure was not previously applied toward the receipt of a multi-year capacity agreement"*. She asked: *"Can you confirm that this is in line with the Delivery Body's position in relation to the Prequalification procedures for the 2016 t-4 Capacity Auction?"*

53. [NGET Rep] appears to have responded by an email which is dated 23 August 2016 and timed at 20.04. CPL's position on when this email was sent is not entirely clear. CPL contends at paragraph 26 of the Appeal Notice both that (a) the email dated 23 August 2016 *"was sent on 24 August"* and (b) that the email was *"revised and resent"* on 24 August 2016. The email dated 23 August 2016 suggests that [NGET Rep] was not purporting to offer an interpretation of the Capacity Market Rules on which CPL should rely. The first paragraph states: *"In line with your email below. This should not be considered as legal interpretation of the rules and is provided as guidance on the Prequalification process"*. Furthermore, the substantive observations offered in the second paragraph do not appear to be consistent with CPL's proposed construction of Rule 3.7.2(c), because they do not suggest that the qualification in that rule is limited to cases where an applicant has previously obtained a multi-year Capacity Agreement. [NGET Rep] states (emphasis added): *"Where a CMU is entering for a multi-year agreement. With in [sic] the rules we are required to check whether the CMU has previously identified capital expenditure in relation to application for a capacity agreement. If previous applications had identified the same capital expenditure as a result of seeking an agreement we would not accept this application as a breach of the rules. If there is no capital expenditure identified in previous applications then there would be no breach of the rules"*.

54. CPL states that on 24 August 2016 there was a further call between [CPL Rep] and [CPL Rep] on behalf of CPL and [NGET Rep] on behalf of NGET. CPL states that during that call [NGET

Rep] *"confirmed the approach that would be taken, which he had previously outlined in a call on the afternoon of 23 August, namely that if a CMU had not previously gained a multi-year Capacity Agreement then there would be no previously considered Capex test to be performed in the context of the Rule, meaning that the revised Rule would not apply to a CMU (such as the Appellant) which previously only gained a single year agreement, as the Capital Expenditure had not been utilised for this"*. CPL does not explain whether [NGET Rep] expressly abandoned the position stated in his email dated 23 August 2016 that he was not purporting to offer a legal interpretation of the Capacity Market Rules on which CPL should rely.

55. CPL also states that on 24 August 2016, [NGET Rep] revised and resent his email of 23 August *"to reflect this further confirmation of the approach National Grid would take"* (paragraph 26 of the Appeal Notice). We note that the revised version of the email of 23 August 2016 continued to maintain that [NGET Rep] was not purporting to offer an interpretation of the Capacity Market Rules on which CPL should rely. In particular, the first paragraph of the email remained unaltered and stated: *"In line with your email below. This should not be considered as legal interpretation of the rules and is provided as guidance on the Prequalification process"*. The only revision that appears to have been made was to the second paragraph of the email, which in the revised version read: *"Where a CMU is entering for a multi-year agreement. With in [sic] the rules we are required to check whether the CMU has previously identified capital expenditure in relation to application for a capacity agreement [sic]. If previous applications had identified the same capital expenditure as a result of receiving a multi-year agreement we would not accept this application as a breach of the rules."* The meaning of the final sentence does not appear clear or unambiguous. Furthermore, we note that the email contains no positive assurance concerning circumstances in which capital expenditure that had been considered in respect of previous applications could properly be restated in a new application.

56. We have sought further information from NGET in relation to the alleged assurances that were provided. NGET has responded in the following terms: *"In response to Carrington's assertion that assurances were provided by the Delivery Body in accordance with this matter. [NGET Rep's] email of 23 August expressly stated: 'This should not be considered as legal interpretation of the rules and is provided as guidance on the Prequalification process'. This email was provided prior to the BEIS clarification note dated 9 September 2016 and referred to above. It is not for the Delivery Body to advise applicants other than on process points and the Delivery Body gave no assurances to the applicant in this respect"*. Accordingly, NGET appears to maintain that no unqualified assurance was given.

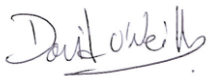
57. For all of the reasons given above, we reject CPL's second ground of appeal.

Conclusion

58. NGET reached the correct decision in not prequalifying CPL to bid for multi-year Capacity Agreements because the application for Prequalification cited Capital Expenditure which had been previously considered as part of a previous application for Prequalification.

Determination

59. For the reasons set out in this determination the Authority hereby determines pursuant to regulation 71(3) that the NGET Reconsidered Decision to Prequalify the Appellant for a Maximum Obligation Period of one year be upheld in respect of the CARR01 CMU and CARR02 CMU in relation to the 2016 T-4 Capacity Auction.



David O'Neill

Head of Security of Supply
For and on behalf of the Gas and Electricity Markets Authority

25 November 2016