

**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 Peak Gen Power 12 Limited (“Peak Gen”) against the Reconsidered Decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) to not amend the Capacity Market Register in respect of the following Capacity Market Unit (CMU):
  - (1) PGP12L
2. NGET’s decision to refuse to rectify the Capacity Market Register in accordance with Peak Gen’s request is a reviewable decision in accordance with row 2 of the table set out in Regulation 68 (2).
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. Peak Gen submitted an Application for Prequalification for PGP12L in respect of the 2015 T-4 Auction in the 2015 Prequalification Window, which was between 20 July and 14 August 2015. In their Application for Prequalification, Peak Gen described the Generating Technology Class for PGP12L as *OCGT and Reciprocating Engines*.
5. NGET Prequalified PGP12L for the 2015 T-4 Auction and notified Peak Gen on 25 September 2015 that they had been Prequalified, after originally being Conditionally

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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.

Prequalified.

6. Peak Gen won a Capacity Agreement for PGP12L in the 2015 T-4 Auction, which concluded on 10 December 2015. The first delivery year for the auction is 2019/20. The Capacity Agreement awarded for PGP12L is a 15 year agreement for a New Build Generating CMU, with a De-rated Capacity of 18.908MW.<sup>2</sup>
7. On 15 February 2017, Peak Gen wrote to NGET to ask to change the Generating Technology Class of PGP12L from OCGT and Reciprocating Engines to Storage, as they would now like to build the project as a Storage development. They also asked to change the Primary Fuel Type, if required, to electricity.
8. NGET replied to this letter on 3 March 2017, stating that Peak Gen *"would not be able to change the generating class of PGP12L"* due to Rule 4.4.4, as PGP12L has already Prequalified for the 2015 T-4 Auction.
9. Peak Gen introduced the arguments (further developed in their Appeal Notice and which are set out in their final detail in paragraphs 13-15 below) for why they should be allowed to change the Generating Technology Class and Primary Fuel Type of PGP12L in their response dated 13 April 2017. For convenience, the thrust of their original arguments can be summarised as follows:
  - a) Rule 4.4.4 is in relation to Prequalification requirements and as such should not be applicable to sites which have been Prequalified and awarded contracts. Whilst this Rule prevents the configuration of the Generating Units being changed, it does not prevent the Generating Units themselves being changed as long as the configuration of the Generating Units remain the same.

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<sup>2</sup> For any Generating CMU and Capacity Auction, the Capacity Market Rules defines De-rated Capacity as an amount (in MW to three decimal places) equal to the product of its Connection Capacity and the De-rating Factor, provided that the De-rated Capacity of a Pre-Refurbishment CMU must not exceed the De-rated Capacity of the related Refurbishing CMU. The De-rating Factor is different for each Generating Technology Class and auction.

- b) Rule 7.7.1 allows Peak Gen to notify the Delivery Body of a change to the Generating Technology Class of the CMU from OCGT and Reciprocating Engines to Storage. It also indicates that the relevant changes to the Derating Factor of the project and the new Capacity Obligation can take place.
  - c) Rule 7.5.1(ra) allows the Primary Fuel Type of the Generating CMU to be changed to electricity.
10. NGET submitted the '*Delivery Body Decision for Capacity Market Register rectification request for CMU PGP12L*' on 25 April 2017, setting out the grounds for rejecting the request:
- "Rule 4.4.4 as stated refers to "the configuration of the Generation Units or DSR CMU". The technology class is part of the configuration of a Generation Unit and as such cannot be amended once that CMU has prequalified, as per rule 4.4.4.*
- Rule 7.7.1 is for use when the Capacity Market Register entry is factually inaccurate. Having reviewed your application for the CMU PGP12L the CMU has a single 20.000 MW component with a technology class of OCGT and Reciprocating Engines. This matches the detail on the Capacity Market Register.*
- Rule 7.5.1 (ra) instructs the Delivery Body to update the Capacity Market Register to change the Fuel Type for a Generating Unit, at this time the only different Fuel Types the Delivery Body records for OCGT and Reciprocating Engines are; Gas, Diesel or Other. The Delivery Body does not record electricity as Fuel Type."*
11. Peak Gen's response dated 27 April 2017 sets out in detail the reasons for disputing NGET's arguments, which are the same as those made in their Appeal Notice.
12. NGET responded on the 8 May 2017, '*Delivery Body review of decision to not accept Capacity Market Register rectification request for CMU PGP12L*', setting out the same decision and grounds for rejection as those stated in their original decision of 25 April 2017, refusing the request to amend the Capacity market Register as requested.

**Peak Gen's Grounds for Appeal**

13. Peak Gen has submitted three grounds of appeal, which are given below.

14. **Ground 1:**

*“The assertion was made in the notice from the Delivery Body on 25th April 2017 that “the technology class is part of the configuration of a Generation Unit and as such cannot be amended once that CMU has prequalified”. This is reiterated in the Notice under Regulation 69, which states that under Rule 4.4.4 “The technology class is part of the configuration of a Generation Unit and as such cannot be amended once that CMU has prequalified, as per rule 4.4.4”. The Notice under Regulation 69 from the Delivery Body does not, however, provide any indication as to where their belief that the Generating Technology Class should be included in the definition of a Generating CMU and they have failed to address the points made in the formal request for change (dated 27/04/2017).*

*However, the definition of Generating Unit provided in the Regulations and Rules does not provide any indication that the Generating Technology Class is part of the configuration of the Generating Unit. The definition provided of the generating unit states that “any equipment” used to produce electricity (including equipment using “electricity from storage”) can constitute the ‘generating unit’. The use of “any equipment” indicates that there is no limitation to the Generation Technology Class which can be used as part of the Generating Unit and, as a result, this should not be considered when defining a Generation Unit.*

*This indicates that there is flexibility in regards to the technology used in a Generation Unit, and the arrangement of a Generating unit does not need to consider the Generating Technology Class (as defined in the Rules) or any other technology arrangements. As a result, the assertion in the Notice under Regulation 69 is incorrect and the Generating Technology Class and technology type should not be included in the configuration of a Generating Unit.*

*This therefore means that the restrictions under Rule 4.4.4 are not relevant<sup>3</sup>, and that*

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<sup>3</sup> This is a different approach from Peak Gen’s original argument that Rule 4.4.4 was only relevant in so much as it related to Prequalification requirements and not applicable to sites that have already Prequalified and awarded contracts.

*it is possible to be change the Generating Technology Class of a CMU after the CMU has prequalified. The new Generating Technology class can therefore be changed from 'OCGT and reciprocating engines (non-autogeneration)' to 'Storage', both of which are listed as possible Generating Technology Classes in Schedule 3 of the Rules."*

15. **Ground 2:**

*"This in turn means that the register would need updating in line with Rule 7.7.1 as the information of the register would no longer be accurate. The Notice under Regulation 69 states that Rule 7.7.1 is for use when the Capacity Market Register entry is factually inaccurate and as the changes we request are made should be allowed because Rule 4.4.4 is not applicable (as discussed above), the details on the register would become factually inaccurate. There is no indication in Rule 7.7.1 that the change cannot take place once the site is pre-accredited."*

16. **Ground 3:**

*"Once the register has been updated, this also allows the Capacity Market Register to be updated according to Rule 7.5.1 (ra). The Notice under Regulation 69 states that the only Fuel Types which can be recorded for a CMU with a Generating Technology of 'OCGT and Reciprocating Engines' are Gas, Diesel or Other. However, as the Generating Technology Class will have been changed from 'OCGT and Reciprocating Engines', this limitation no longer applies.*

*The Notice under Regulation 69 states that the Delivery Body does not record electricity as Fuel Type. However, the Regulations do provide a definition of a 'Storage Facility' which should be used once the Generating Technology class is changed to 'Storage'.*

*The under Regulation 69 also indicates that the only Fuel Types associated with the 'OCGT and reciprocating engines (non-autogeneration)' Generating Technology are "Gas, Diesel and Other". However, there does not appear to be any definitive list of Fuel Types under the Rules and Regulations, and there is no definition of 'Gas', 'Diesel'*

*or 'Other'. This therefore means that there are no limitations on what Fuel Type the delivery body can allow."*

### **The Statutory Framework**

17. 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 (the Rules) were made by the Secretary of State pursuant to powers set out in s34 of the Energy Act 2013.
18. Regulations 68 to 72 set out the process and the powers in relation to Dispute Resolution and Appeals and what type of decisions are capable of being reviewed.
19. Regulation 68 defines the Reconsidered Decisions which can be appealed to the Authority. Capacity Market Register Appeals can be made following a request to NGET for rectification of the Capacity Market Register based on factual inaccuracy.

### **Capacity Market Rules**

20. Rule 4.4.4 provides that:

*"The configuration of Generating Units or DSR CMU Components (as applicable) that comprise a CMU must not be changed once that CMU has Prequalified."*

21. Rule 7.7.1 provides that:

*"Where any person considers that an entry maintained in respect of it or any Capacity Committed CMU for which they are the Capacity Provider under this Chapter 7 is factually inaccurate (writer's emphasis), they may request to the Delivery Body that the entry be amended or deleted."*

22. Rule 7.5.1(ra) provides that:

*"The Delivery Body must update the Capacity Market Register: to record any change in*

*the Primary Fuel Type for a Generating CMU notified to the Delivery Body;”*

## **Our Findings**

### **Ground 1**

23. Peak Gen has argued that NGET has relied on Rule 4.4.4 in support of their view that Peak Gen cannot make changes to the Generating Technology Class of PGP12L. Further, Peak Gen allege that NGET has not substantiated their assertion that technology class is part of the configuration of a Generation Unit, and consequently, Peak Gen has taken this omission to mean that no such reason exists in the Rules.
24. Peak Gen has provided their own view of how Rule 4.4.4 should be read so as to support their argument that the definition of Generating Unit does not specify that *“Generating Technology Class is part of the configuration of the Generating Unit”*.
25. The keyword in Rule 4.4.4, however, is ‘configuration’, which is not a defined term in these Rules and must, therefore be interpreted in accordance with its ordinary natural meaning. The ordinary meaning rule of interpretation requires that this rule be interpreted by giving the words in Rule 4.4.4 their ordinary meaning.
26. The Oxford English Dictionary defines ‘configuration’ as: *“An arrangement of parts or elements in a particular form, figure, or combination”*.
27. Generating Technology Class is defined in the Rules as: *“means a class of Generating Unit, defined by the technology used to generate electricity, for which the Secretary of State requires the Delivery Body to publish a De-Rating Factor, identified in the list attached as Schedule 3”*.
28. Schedule 3 of the Rules states that the plant types included in Generating Technology Class OCGT and Reciprocating Engines are *“gas turbines running in open cycle fired mode”* and *“reciprocating engines not used for autogeneration”*. The plant types included in the Storage Generating Technology Class are *“conversion of imported*

*electricity into a form of energy which can be stored, the storing the energy which has been so converted and the re-conversion of the stored energy into electrical energy” and “includes hydro Generating Units which form part of a Storage Facility (pumped storage hydro stations)”.*

29. As Generating Technology Class is defined as a ‘class’ of Generating Unit, it follows that Generating Technology Class is the element that comprises a Generating Unit and therefore an aspect of the configuration of a Generating Unit.
30. Furthermore, if one were to follow Peak Gen’s argument through, the consequences of not including Generating Technology Class as part of the configuration of a Generating Unit would be that applicants would be allowed to change the Generating Technology Class of their CMUs after Prequalification. This could also include changes, as in this case, some time after the auction was held. This could have wide-ranging and negative impacts on auction outcomes including changes to the capacity acquired and costs to consumers. This would undermine the purpose of the capacity market which is specifically set out in the explanatory note to the Electricity Capacity regulations 2014 as:

*“ These Regulations make provision for the purpose of enabling consumers’ demands for electricity in Great Britain to be met. They do so through capacity agreements, instruments which confer rights and impose obligations on those awarded an agreement. These rights and obligations consist principally of the right to receive capacity payments from the Settlement Body for generating (or reducing demand for) electricity at times of system stress, and the liability to make a penalty payment where the capacity agreement is breached.”*

31. The arguments outlined above support NGET’s reliance on Rule 4.4.4, which is that technology class is part of the configuration of a Generation Unit and as such, the Generating Technology Class of a CMU cannot be changed once it has Prequalified. Therefore Peak Gen cannot change the Generating Technology Class of PGP12L, which has already Prequalified and won a Capacity Agreement under the 2015 T-4 Auction.



**Ground 2**

32. Peak Gen has argued that Rule 7.7.1 allows them to correct the factual inaccuracy created by their ability to change the Generating Technology Class of PGP12L. However for the reasons outlined above in relation to the applicability of Rule 4.4.4, Peak Gen is unable to change the Generating Technology Class, and therefore there is no factual inaccuracy to correct.
33. Any error which would warrant a rectification under Rule 7.7.1 would have to be one of fact and such an error has not been made by NGET. The Register is an accurate reflection of the information contained in the Application for Prequalification for PGP12L at the time that the application was made.
34. There is no factual inaccuracy which needs to be corrected in the Register and therefore Rule 7.7.1 is not applicable.

**Ground 3**

35. As a change to the Generating Technology Class is not possible for PGP12L for the reasons outlined above, and as Peak Gen does not provide any other reason for making a change to Primary Fuel Type, Rule 7.5.1(ra) is not applicable.

**Conclusion**

36. The Authority finds that NGET's Reconsidered Decision of 8 May 2017 was correct as Peak Gen cannot change the Generating Technology Class of PGP12L according to the Rules, and therefore the Register is factually accurate.

**Determination**

37. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3)(b) that NGET's 8 May 2017 Reconsidered Decision to reject Peak Gen's request for rectification of the Register be upheld.

Mark Copley



For and on behalf of the Gas and Electricity Markets Authority

**11 July 2017**