

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

Introduction

1. This determination relates to appeals made by [REDACTED] against reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):

[REDACTED]
2. [REDACTED] submitted identical appeals for [REDACTED] in relation to the 2018 T-1 and T-4 auctions; this determination relates to both.
3. 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

4. The appellant submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2018 T-1 and T-4 Auctions.
5. For the CMU listed in Paragraph 1, NGET issued a Notification of Prequalification Decision dated 10 November 2017 (the “Prequalification Decision”). NGET rejected the CMU on the following grounds:

This application has not met the requirements of the Capacity Market rules due to the following reason(s):

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.

Capacity Market Rule 3.2.6 states, where legal ownership is/will be vested in more than one person and the Applicant is a Despatch Controller, an Aggregator Declaration (defined in Capacity Market Rule 1.2 as Exhibit F) must be submitted for each Generating Unit comprised in the CMU. Exhibit F submitted with this application has the following errors:



If this application had met the requirements for Prequalification, there would be a credit cover requirement (which has been stated in the T-4 application letter for this CMU) for the following reasons:

Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved;

Deferred Distribution Connection Agreement: As per Capacity Market Rule 3.7.3(c), Distribution Connection Agreement has been deferred;

Deferred Planning Consents: As per Capacity Market Rule 3.7.1(a)(ii), Planning Consents have been deferred.

6. The appellant submitted a request for reconsideration of the Prequalification Decisions on 20 November 2017.
7. NGET issued a Notice of Reconsidered Decision on 01 December which rejected the dispute on the following grounds:

The Delivery Body have reviewed your dispute and the overall Application decision remains Rejected.

Legal Owner Declaration

- Exhibit G (Director validation) - Not Accepted - Rule 3.2.7(b) requires two directors of the person having legal ownership of the relevant Generating Unit. The Exhibit is in the name of the applicant company which is specified as the legal owner.

- The second signatory is not a Director of the Applicant / Legal Owner.

Aggregator Declaration - Exhibit F - Accepted

- *The Delivery Body has reviewed and accepted the evidence provided for your disputes on this item.*

8. NGET accepted the evidence for Exhibit F because the information was available elsewhere in the original prequalification application.
9. The appellant then submitted an appeal notice to the Authority on 07 December 2017 under Regulation 70 of the Regulations.

Grounds for appeal

10. [REDACTED] disputes the decision on the following grounds.

Ground 1

11. The second director of [REDACTED] did not have an opportunity to sign Exhibit G as a result of the clerical error of [REDACTED]. He has confirmed that he would have been ready to sign Exhibit G had he had an opportunity prior to the submission of the Relevant Application.

Ground 2

12. Failing to prequalify the Relevant Application on the basis of such a minor error which is caused solely because the Capacity Market Rules introduced a stricter regime than otherwise required under the Companies Act 2006 for validly executing documents would be totally unfair and unreasonable.

The Legislative Framework

13. The Electricity Capacity Regulations 2014 were made by the Secretary of State under the provisions of section 27 of the Energy Act 2013. The Capacity Market Rules were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

14. The Regulations set out the duties upon NGET when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
15. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
16. In particular, Regulation 69(5) sets out the requirements for NGET reconsidering a prequalification decision:

69(5) Subject to [regulations 29(10A) and 87(7)], in reconsidering a prequalification decision or a decision to issue a termination notice or a notice of intention to terminate, the Delivery Body must not take into account any information or evidence which—

(a) the affected person was required by these Regulations or capacity market rules to provide to the Delivery Body before the decision was taken; and

(b) the affected person failed to provide in accordance with that requirement.

Capacity Market Rules

17. *Rule 3.2.7(b) requires two directors of the person having legal ownership of the relevant Generating Unit.*

18. Rule 3.2.7(b) requires two directors to sign the form of legal ownership declaration:

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

19. We have assessed each of [REDACTED] grounds for appeal, which are set out below.

Ground 1

20. The appellant's first ground was that the relevant director "did not have an opportunity to sign Exhibit G as a result of the clerical error [REDACTED]" but confirms that he would have signed it, had he had the opportunity to do so prior to submission of the application. They do not dispute that 3.2.7(b) requires Exhibit G to have been signed by two directors nor that they failed to do so.
21. It is the applicant's responsibility to ensure that any necessary signatures are provided in accordance with the Rules and Regulations when submitting their Application to Prequalify.

Ground 2

22. The appellant's second ground was that the Capacity Market Rules introduce stricter rules with regards to proof of ownership compared to the Companies Act 2006. However, as set out in paragraph 13 above, arrangements for prequalification to the Capacity Market are set out in the Capacity Market Rules, which are subject to the Electricity Capacity Regulations under the Energy Act 2013, rather than Companies Act 2006.

Conclusion

23. NGET reached the correct reconsidered decision to not prequalify [REDACTED] for the 2018 T-4 and T-1 Auction on the basis that:
- a) The director's signature required under 3.2.7(b) was not provided in the application and accordingly under Rule 4.4.2, the Delivery Body must not prequalify a CMU where it is aware that the Application has not been completed or submitted in accordance with the Capacity Market Rules.

Determination

24. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's reconsidered decision to reject the appellant for Prequalification be upheld in respect of the CMU listed in paragraph 1 for the T-4 Auction and T-1 Auction.

A handwritten signature in black ink, appearing to be 'Emily Sam', with a long horizontal stroke extending to the right.

Emily Sam

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018