

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 Units (CMUs):

[REDACTED]
2. This determination decision deals with all of the appeals listed above into a single decision as they are substantively in respect of the same issue. They differ only in so far as concerns the identity of the respective CMUs. The findings of this determination will apply in respect of each reconsidered decision made by the Delivery Body.
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.

Appeal Background

4. The appellant submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the one year ahead Capacity Auction for 2018/2019 (T-1) and the four year ahead Capacity Auction for 2021/2022 (T-4) and sought capacity agreements of various duration. This determination deals exclusively with those prequalification decisions relating to the particular CMUs set out in paragraph 1.

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.

5. For each of the CMUs listed in Paragraph 1, NGET issued a Notification of Prequalification Decision dated 10 November 2017 (the “Prequalification Decision”). NGET rejected the CMUs on the following grounds:

The Aggregator Declaration has not been provided with this Application as per Capacity Market Rules 3.2.7 and 3.2.9. Aggregator Declaration is defined in Capacity Market Rule 1.2 as Exhibit F. An Applicant Declaration has been uploaded as a Despatch Controller as per Capacity Market Rule 3.2.5 which is not relevant to a new build CMU application. 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:

Aggregator Declaration - Exhibit F - Not Accepted As per Capacity Market Rules 3.2.7 and 3.2.9, if the Applicant is a Despatch Controller and the Application is for a Prospective Generating CMU, the Applicant is required to provide; - An Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that

Prospective CMU. The Aggregator Declaration is defined in Capacity Market Rule 1.2 as Exhibit F; The Aggregator Declaration was not provided with this Application and therefore did not meet the requirements of the rules.”

8. The appellant then submitted an appeal notice to the Authority on 08 December 2017 under regulation 70 of the Regulations.

██████████ **Grounds for appeal**

9. ██████████ disputes the decision on the following grounds.

Ground 1

10. ██████████ argues that the declarations made in an Exhibit D are materially the same as those made in an Exhibit F. It states that:

“Since the difference between Exhibits D and F is one of form, not substance, it would be inappropriate, unreasonable and wholly disproportionate for the Delivery Body and/or the Authority in such a case not to accept the Exhibit Ds in the place of Exhibit Fs and not to prequalify the CMUs that are the subject of all those applications rejected only on the Exhibit F ground.”

11. ██████████ avers that since the difference between the two Exhibits is one of form and not substance, the decision to not prequalify is “*wholly disproportionate*”.

Ground 2

12. ██████████ argues that it was influenced in submitting a particular form (Exhibit D instead of Exhibit F) by the Delivery Body’s guidance and explicitly as a result of direct communication between ██████████ and the Delivery Body.

13. Specifically, ██████████ states that the email communication with the Delivery Body prior to the submission of the applications gave the Appellant advice that was clear, unambiguous

and unqualified. The Appellant relied on that confirmation and completed Exhibits D and G (rather than F and G) in respect of all the Prospective Generating CMUs:

“The Appellant's decision to submit Exhibit Ds instead of Exhibit Fs was materially influenced (i) by the Delivery Body's Prequalification Guidance, and (ii) - decisively – by the Delivery Body's email explicitly confirming that the Appellant should submit Exhibits D and G in respect of the New Build Generating CMUs under the same legal ownership for which it was about to submit applications.”

14. [REDACTED] also refers to the Dispute Guidance of 10 November 2017 (p. 6):

“The Delivery Body has a policy (stated in its Disputes Guidance of 10 November 2017, at p. 6, and applied in numerous cases) that "missing... information may...be corrected if it can be verified from other information provided in the Application". This demonstrates that there is a power to prequalify applications which are, when submitted, less than 100% perfect. As already noted, the "missing" Exhibit F "information" is contained in the submitted Exhibit Ds.”

15. The Exhibit D submitted by the Applicant did not contain the signature of the Despatch Controller. The Appellant avers that this should not prevent the Appellant from relying on the above arguments:

“It would have been better if the Appellant had signed the Exhibit D which it submitted, believing this, rather than Exhibit F, to be the required Exhibit. However the non-signature of this Exhibit D should not prevent the Appellant from relying on the above arguments in support of the Relevant Application being pre-qualified, notwithstanding the submission of Exhibit D in place of Exhibit F.”

16. In addition, the Appellant states that the failure to sign the document was a clerical error resulting in missing information, and that such an information can readily be found on Exhibit G and the online application form.

The Legislative Framework

17. 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.
18. The Regulations set out the duties upon NGET when it determines eligibility for Prequalification. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
19. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
20. 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

21. Chapter 3 of the Capacity Market Rules sets out the process for applying to prequalify in order to participate in a Capacity Market auction. It stipulates how the application must be submitted and the information that is to be provided within and accompanying the Application (as defined in Rule 1.2).
22. Rule 3.3 describes the rules for submitting an Application for Prequalification. Specifically,

Rule 3.3.1 states that an application to prequalify a CMU for a Capacity Auction must only be made:

(a) by the Applicant for that CMU (subject to Rule 3.3.5); and

(b) through the EMR Delivery Body Portal in the form and in the manner prescribed in the Auction Guidelines.

23. In addition, Rule 3.3.2 states that;

“Subject to Rule 4.2.3, an Applicant may only make one Application for a CMU for a Capacity Auction.”

24. Rule 3.2.3 states that the Applicant for a Generating CMU must be:

“the person that is, or in the case of a Prospective Generating CMU will be, the legal owner of each Generating Unit comprised in that CMU.”

25. CM Rules 3.2.4 to 3.2.9 set out a number of exceptions to the default rule set out in CM Rule 3.2.3. Each rule sets out the criteria and then the consequential declaration that is required to be submitted to the Delivery Body. These are situations in which a person other than the legal owner of the Generating Units (namely the Despatch Controller) may, or must be, the Applicant.

26. Rule 3.2.5 applies where:

(a) an Existing Generating CMU comprises a Generating Unit or a number of Generating Units;

(b) all such Generating Units are within the legal ownership of the same person;

and

(c) the Despatch Controller with respect to each Generating Unit comprised in that Existing Generating CMU is a person other than the legal owner.

Where this Rule 3.2.5 applies, the Despatch Controller may be the Applicant with respect to an Existing Generating CMU provided that an Applicant Declaration is submitted with the relevant Application signed by:

(a) two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU; and

(b) two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Existing Generating CMU.

27. Rule 3.2.7 applies where:

(a) a Generating CMU comprises a number of Generating Units with a Connection Capacity totalling no more than 50 MW;

(b) legal ownership of such Generating Units is or, in the case of a Prospective CMU, will be vested in more than one person; and

(c) Despatch Control with respect to each Generating Unit comprised in that Generating CMU rests or, in the case of a Prospective CMU, will rest with a single Despatch Controller (who may also be the legal owner of one or more of the Generating Units comprised in such Generating CMU).

Where the Rule 3.2.7 applies, the Despatch Controller (or, in the case of a Prospective CMU, the person who will be the Despatch Controller) must be the Applicant with respect to a Generating CMU and the following declarations must be submitted with the relevant Application;

(a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Generating CMU; and

(b) 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.

28. Rule 3.2.9 applies where:

(a) a Prospective Generating CMU comprises a Generating Unit or a number of Generating Units with a Connection Capacity totalling no more than 50MW;

(b) all such Generating Units are within the legal ownership of the same person; and

(c) the Despatch Controller with respect to each Generating Unit comprised in that Prospective Generating CMU is a person other than the legal owner.

Where this Rule 3.2.9 applies, the Despatch Controller must be the Applicant with respect to a Prospective Generating CMU and the following declarations must be submitted with the relevant Application:

(a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Prospective Generating CMU; and

(b) a Legal Owner Declaration in respect of each Generating Unit comprised in that Prospective 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.

29. Relevant definitions regarding the terms “Despatch Control” and “Despatch Controller” are stated in the Rule 1.2;

“Despatch Control means, for a Generating CMU, control exercised by a person over whether or not the Generating Unit(s) comprised in that Generating CMU generate(s) in a Settlement Period, provided that a person does not cease to have Despatch Control by:

(a) contracting with another person for the service of operating the Generating Unit(s);

(b) contracting with another person to supply electricity in a Settlement Period;

(c) in the case of a CMRS CMU, agreeing that another person may be the BM Responsible Party under the BSC; or

(d) entering into a Balancing Services Contract with the System Operator”

“Despatch Controller means, for a Generating CMU, the person exercising Despatch Control with respect to each Generating Unit comprised in that Generating CMU.”

30. Relevant definitions regarding the Forms are also stated in the Rule 1.2;

“Aggregator Declaration means a declaration in the form set out in Exhibit F”

“Applicant Declaration means an applicant declaration in the form set out in Exhibit D”

“Legal Owner Declaration means a declaration in the form set out in Exhibit G”

Our Findings

31. We have considered all the issues raised in the Appeal Notice, however, the substantive grounds of challenge and to which we respond in this document are as follows:

Ground 1

32. The appellant's first ground was that the rejection of the application on the basis that Exhibit F was not provided was unreasonable as there is no substantive difference between the declarations and confirmations contained in Exhibits F and D. In some circumstances, it may be possible for an Applicant to exhibit the declarations required under Rules 3.2.7 and 3.2.9 through submitting Exhibit D instead of Exhibit F.
33. The Applicant accepts that, under Rules 3.2.7 and 3.2.9, Exhibit F should be submitted. It was on this basis that the Delivery Body rejected the Application. The appellant avers that the information contained in Exhibits D and F can be found elsewhere in its Application. However, these Exhibits contain specific declarations required under the CM Rules, and as such, a signature elsewhere in an application is insufficient evidence that these declarations and confirmations required under the CM Rules have been made.
34. In both declarations (Exhibit F and D), the Despatch Controller is required to confirm the description and legal ownership of the Generating Units, and that the Despatch Controller will apply, bid and act as the Capacity Provider pursuant to the Capacity Auction. Exhibit D, which was submitted by the Applicant, provides the declarations set out in Exhibit F but also includes the additional declarations of the legal owner.
35. The missing signature of the Despatch Controller is therefore key to the declarations required under Rules 3.2.7 and 3.2.9. We conclude that the Delivery Body was correct to reject the Application on these grounds.

Ground 2

36. The arguments raised under Ground 2 also refer to the application of Rules 3.2.7 to 3.2.9,

and, specifically to the Applicant's claim that Exhibit D should have been accepted in the absence of Exhibit F.

37. However, as set out above, the Applicant failed to submit the required signatures on either Exhibit D or Exhibit F as part of its Application. The declarations contained in these exhibits are required under Rules 3.2.7 and 3.2.9. Therefore, since the requirements of these Rules have not been met by the appellant, there is little merit in revisiting the reasons as to the suitability of the Exhibit form actually submitted.

Conclusion

38. NGET reached the correct reconsidered decision not to prequalify [REDACTED] for the T-1 Auction and T-4 Auction respectively. The Aggregator Declaration required under Rules 3.2.7 and 3.2.9 was not provided in the application. 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 CM Rules.

Determination

39. 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 is upheld in respect of the CMUs listed in paragraph 1 for the T-1 Auction and T-4 Auction.



Mark Copley

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018