

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 a number of appeals made by [REDACTED] and they are grouped and 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 NGET.
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. [REDACTED] submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2018 Capacity Market Auctions. [REDACTED] applied for the T-1 Auction only and the remaining [REDACTED] CMUs applied for both the T-1 and the T-4 Auction.

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 Prequalification Certificate was not submitted for this Application in accordance with Capacity Market Rule 3.12.3, which states each Application must be accompanied by a Prequalification Certificate signed by two directors. The Prequalification Certificate is defined in Capacity Market Rule 1.2 as Exhibit A and must be signed by two directors."

6. ██████████ submitted a request for reconsideration of the Prequalification Decisions on 20 November 2017.
7. NGET issued a Notice of Reconsidered Decision on 1 December 2017 which rejected the dispute on the following grounds:

"Prequalification Certificate - Exhibit A

"- Rule 1.2 states that the "Application" means the application that is to be completed by the Applicant in accordance with the rule 3.3.6(a) and includes a Registration Declaration. Rule 1.2 further states that a "Registration Declaration" means the declaration to be made by an Applicant in a Prequalification Application in accordance with Rule 3.12.

- Rule 3.12.3 states that each Application must be accompanied by a Prequalification Certificate (as defined in Capacity Market Rule 1.2 as Exhibit A) signed by two directors of the Applicant. When submitting this Application, the application was not accompanied with a Prequalification Certificate and therefore did not meet the requirements of the rules."

8. [REDACTED] then submitted an appeal notice to the Authority on 8 December 2017 under Regulation 70 of the Regulations.

[REDACTED] Grounds for appeal

9. [REDACTED] disputes the decision on the following grounds:

Ground 1

10. [REDACTED] claims that the *“CM Rules on Submission of Exhibit A have been complied with”,* as *“The Appellant (i) completed Exhibit A three times; (ii) fully intended to submit a completed Exhibit A before the end of the Prequalification Window; (iii) and uploaded it at least once before 5pm on 29 September 2017.”*
11. [REDACTED] also contests that the *“CM Rules do not appear in terms to require that Exhibit A must be submitted by 5pm on 29 September 2017”,* and therefore the version of *“Exhibit A uploaded on 1 October 2017 (before the Assessment Window began)”* should be accepted.
12. Alternatively, [REDACTED] states *“the previous version of Exhibit A, uploaded on 25 September 2017”* should be treated as satisfying the CM Rules.

Ground 2

13. [REDACTED] also argues that it would be unreasonable to reject their Applications, as *“[REDACTED] of capacity will, for no good reason, not go into the T-1 2018 Auction, [REDACTED] of capacity will not go into the T-4 2021 Auction”* as a result of an administrative error.

[REDACTED]

The Legislative Framework

15. 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 (“the CM

Rules”) were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

16. 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 CM Rules.
17. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
18. 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

19. Rule 1.2 defines the term ‘Application’ and states that :

“Application’ means the application that is to be completed by the Applicant in accordance with Rule 3.3.6(a) and includes a Registration Declaration”

20. Rule 1.2 also defines the term “Registration Declaration” and states that:

“Registration Declaration’ means the declaration to be made by an Applicant in a

Prequalification Application in accordance with Rule 3.12”

21. Rule 3.12.3 states that:

“Each Application must be accompanied by a Prequalification Certificate signed by two directors of the Applicant.”

22. Rule 1.2 then defines the term “Prequalification Certificate” as Exhibit A, and states that :

“Prequalification Certificate’ means: (a) subject to paragraph (b), a directors’ certificate in the form set out in Exhibit A; or

(b) where the certificate is to be provided by a body other than a company, a certificate by two officers of the body in the form set out in Exhibit A with such modifications as may be necessary”

23. 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).

24. Rule 3.3 describes the rules for submitting an Application for Prequalification. Specifically, Rule 3.3.1 states that for 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.

25. 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.”

Our Findings

26. We have assessed each of [REDACTED] grounds for appeal and our findings are set out below:

Ground 1

27. [REDACTED] argues that the version of Exhibit A uploaded on 1 October 2017 should be accepted, or alternatively, the version of Exhibit A uploaded on 25 September 2017 should be accepted.

28. However, Rule 3.12.3 states that each Application “*must be accompanied by a Prequalification Certificate.*” When the Applications were submitted by [REDACTED] they were not accompanied by a Prequalification Certificate.

29. A document previously uploaded but removed before submission will not have been included in the submitted Application. NGET cannot accept an intention “to submit a completed Exhibit A before the end of the Prequalification Window”. The CM Rules clearly set out the process for making an Application, and in this instance the required documents were not included in the submission. Therefore, [REDACTED] failed to meet the requirements of Rule 3.12.3.

30. Therefore, NGET was correct in applying Rule 3.12.3 to prevent the CMUs listed in paragraph 1 from prequalifying.

Ground 2

31. [REDACTED] states that it would be unreasonable to reject over [REDACTED] of capacity for the T-1 Auction and [REDACTED] of capacity for the T-4 Auction as a result of an administrative error.

32. Chapter 3 of the CM Rules sets out the process for applying to prequalify in order to participate in a Capacity Market Auction. In particular, CM Rule 3.2 (Identifying the

Applicant for a CMU) sets out how to identify a correct Applicant. CM Rule 3.2.1 states that there “must be one Applicant only” with respect to any CMU and this must be determined in accordance with CM Rule 3.2. Therefore, CM Rules 3.3.1 and 3.3.2 requires an Applicant may only make “one Application” for a CMU in respect of “a Capacity Auction”.

33. Furthermore, Regulation 22 (Determination of eligibility) of the Regulations require NGET to consider each Application on its own merits and in accordance with the Capacity Market Rules and notify each applicant of its determination.
34. Therefore, NGET’s decision cannot be influenced on the basis of prospective loss of liquidity to the auction as a result of various CMUs’ Applications with a similar error.
35. Furthermore, Regulation 69(5) states that *“the Delivery Body must not take into account any information or evidence which ... (b) the affected person failed to provide in accordance with that requirement”*.
36. Therefore, NGET was correct not to accept the versions of Exhibit A submitted on 1 October 2017 or 25 September 2017 as these were required to be provided when the Application was submitted and cannot be taken into account.

Conclusion

37. NGET reached the correct Reconsidered Decision to not prequalify ██████████ for the T-1 Auction and ██████████ for the T-1 Auction and T-4 Auction on the basis that the Prequalification Certificate required under CM Rule 3.12.3 was not provided with the Application. CM Rule 4.4.2(a) provides that NGET must not prequalify a CMU where “it is aware that the Application has not been completed or submitted in accordance with the Rules”. Furthermore, in accordance with regulation 69(5), when making a Reconsidered Decision, NGET must not take into consideration any information or evidence, which ██████████ was required to and failed to produce before the decision was taken.

Determination

38. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's Reconsidered Decision to reject [REDACTED] for Prequalification be upheld in respect of the CMUs listed in paragraph 1 for the T-1 Auction and T-4 Auction respectively.



Mark Copley

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018