

**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):



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 the Delivery Body.
3. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”), where the Authority<sup>1</sup> 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

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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.

to the particular CMUs set out in paragraph 1 and specifically in respect of the particular Auction identified in paragraph 1 *in parenthesis*.

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.*

*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.*

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 1 December 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.*

*Aggregator Declaration - Exhibit F*

*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 8 December 2017 under regulation 70 of the Regulations.

**Grounds for appeal**

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

### Ground A1

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

### Ground A2

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. ██████ 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.”*

#### Ground B1

15. [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.”*
16. [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.
17. Alternatively, [REDACTED] states *“the previous version of Exhibit A, uploaded on 25 September 2017”* should be treated as satisfying the CM Rules.

#### Ground B2

18. [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] [REDACTED] will not go into the T-4 2021 Auction”* as a result of an administrative error.

[REDACTED]

#### The Legislative Framework

19. 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.
20. 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.
21. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
22. 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**

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 3.2.1 states that there must be one Applicant in accordance with the Rule 3.2;

*“There must be one Applicant only with respect to any CMU as determined in accordance with this Rule 3.2.”*

25. 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.”*

26. 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.

27. 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.*

28. 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.*

29. 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.*

30. 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.”*

31. 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.*

32. 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.”*

33. 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”*

34. 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”*

35. Rule 3.12.3 states that :

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

36. 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”*

**Our Findings**

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

**Ground A1**

38. 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.

39. Both the Applicant and the Delivery Body agree 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. However, we agree with the Applicant that it would have been reasonable for the Delivery Body to accept the declarations provided in Exhibit D, and therefore conditionally prequalify the CMUs listed in paragraph 1.

40. CMR 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*”, setting the general ‘default’ rule. CMR 3.2.4 to 3.2.9 set out the three exceptions to the default rule with each rule setting also out the criteria and the consequential declaration that is required to be submitted to the Delivery Body.

41. Rules 3.2.4 to 3.2.5 relate to an “*Existing*” Generating CMU with one or a number of Generating Units and one owner and different Despatch Controller, with the Despatch Controller being logically different to the legal owner. According to 3.2.5 the Despatch Controller is the Applicant as defined in Rule 1.2. Therefore, there is one form for a Despatch Controller and a legal owner and this is Exhibit Form D.
42. Rules 3.2.6 to 3.2.7 are looking at a Generating CMU comprising a number of Generating Units with a total capacity of no more than 50 MW. In Regulation 4(1)(c), it is stated that a generating CMU may be “*a combination of two or more existing generating units*” and, in the same Regulation 4(1)(d), the framework in respect of “*Prospective*” generating units is set out. These can be a Prospective or Existing Generating CMU with more than one owner and one Despatch Controller. The Rules 3.2.6 and 3.2.7 apply to both “*Existing*” and “*Prospective*” Generating CMUs. Since there are multiple owners, two Exhibit Forms, F and G, are required.
43. Rules 3.2.8 and 3.2.9 have introduced a new exception to the default rule in Rule 3.2.3, which effectively replicates the exception in Rules 3.2.4 and 3.2.5 but for Prospective Generating CMUs rather than Existing Generating CMUs, and, with the difference that (as in Rules 3.2.6 and 3.2.7), Exhibit F and Exhibit G, rather than Exhibit D, are required.
44. By comparing Rules 3.2.8 to 3.2.9 (**Prospective** Generating CMU and one or a number of Generating Units and one owner and different Despatch Controller) to Rules 3.2.4 to 3.2.5 (**Existing** Generating CMU and one or a number of Generating Units and one owner and different Despatch Controller), the substantive difference is the term “*Existing*” and “*Prospective*”. The other difference is the reference to a “*Connection Capacity totalling no*

*more than 50 MW*". However, the reference to capacity is not relevant to the discussions of this specific case.

45. Therefore, the main difference is that for Existing Generating CMUs Rules 3.2.4 and 3.2.5, require only the one form (Exhibit Form D) to be submitted. For Rules 3.2.8 and 3.2.9, there are the Aggregator Declaration and separate Legal Owner declaration.
46. Rule 3.2.9 is explicit about what declarations must be submitted however the rule does not specifically reference Exhibit Forms F and G , rather it sets out that in the case of a Prospective Generating CMU, there must also be a Legal Owner Declaration Form (Exhibit G), in addition to an Aggregator Declaration (Exhibit Form F). Form D (the form that the Applicant submitted) identifies itself as "Applicant Declaration". Nevertheless, this form includes both declarations required by Rule 3.2.9, i.e. a declaration from the Legal Owner and one from the Aggregator. In this case, the Applicant and the Aggregator are one and the same and substantively Form D contains no real difference from the declarations that are given in Forms F and G.
47. In both declarations (Exhibit F and D), the Despatch Controller confirms 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.
48. Both forms require the signed declaration from the director(s) and Despatch Controller. In addition, Exhibit D also requires a signed declaration from the legal owner. The principle difference in function between the two exhibits is the requirement in Exhibit F to specify the different various legal owners of generating units within a CMU. This distinction is not relevant to these particular cases.
49. The key declarations required for these CMUs were all exhibited, and NGET erred in preventing the CMUs listed in paragraph 1 from prequalifying. The Exhibit Form D that

██████████ submitted is arguably more helpful in that it increased the efficiency of the process rather than decreased it.

#### Ground A2

50. As the arguments raised under Ground 2 also refer to the application of Rules 3.2.7 to 3.2.9 and we have concluded, as set out above, that the requirements of these Rules have been met by the Applicant there is little merit in revisiting the reasons as to the suitability of the Exhibit form actually submitted.
51. In this case we consider that the Delivery Body in failing to prequalify the Appellant erred in its decision to not accept the declarations that were submitted in Exhibit D and accordingly it is not necessary to consider the second ground of appeal.

#### Ground B1

52. ██████████ 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.
53. However, Rule 3.12.3 states that each Application “*must be accompanied by a Prequalification Certificate.*”. When the applications were submitted by ██████████ they were not accompanied by a Prequalification Certificate.
54. A document previously uploaded but removed before submission will not have been included in the submitted Application. The Delivery Body 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, the Appellant failed to meet the requirements of Rule 3.12.3.

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

#### Ground B2

56. ██████ states that it would be unreasonable to reject ██████ of capacity for the T-1 Auction and ██████ of capacity for the T-4 Auction as a result of an administrative error.

57. 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 CMR 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*”.

58. Furthermore, Regulation 22 (Determination of eligibility) of the Regulations requires the Delivery Body to consider each application in accordance with the Capacity Market Rules and notify each applicant of its determination.

59. Therefore, the Delivery Body’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.

60. 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*”.

61. 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

62. NGET reached the correct reconsidered decision to not prequalify the CMUs listed in paragraph 1 for the T-1 and T-4 Auction, on the basis that the Prequalification Certificate required under CM Rule 3.12.3 was not provided with the application.
63. CM Rule 4.4.2(a) provides that 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 Rules”. Furthermore, in accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take into consideration any information or evidence which the Appellant was required to and failed to produce before the decision was taken.

#### **Determination**

64. 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 respectively.



Mark Copley

**For and on behalf of the Gas and Electricity Markets Authority**

12 January 2018