

**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 EirGrid Interconnector Designated Activity Company (EIDAC) (“the Appellant”) against a reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):

a) EWIC17

2. 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 made by NGET.

**Appeal Background**

3. The Appellant submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2018 T-4.
4. 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:

*As per Rule 3.5A.1 The Connection Capacity of an Interconnector CMU is equal to the positive value of Connection Entry Capacity stated in the Grid Connection*

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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.

*Agreement. This detail is not included in the application so the assessment has failed.*

5. The Appellant submitted a request for reconsideration of the Prequalification Decisions on 17 November 2017.
6. NGET issued a Notice of Reconsidered Decision on 1 December which rejected the dispute on the following grounds:

*The Delivery Body is not able to verify the Connection Entry Capacity in respect of your CMU pursuant to Rule 3.5A.1 because a Grid Connection Agreement as defined in the Rules has not been provided with the Application.*

*Under Rule 3.6A.2 each Applicant for an Interconnector CMU must provide a copy of the Grid Connection Agreement with the Application. The documentation provided within the Application for this CMU did not contain a Grid Connection Agreement as defined in the Rules.*

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

**EIDAC's Grounds for appeal**

8. EIDAC disputes the decision on the following grounds.

**Ground 1**

9. EIDAC contends that:

*“National Grid had the required information and documentary evidence to approve the prequalification application in that the CEC figure was evidenced in section 2.17 of the construction agreement submitted as part of the connection agreement*

*and provided within the Application; EIDAC declared its connection capacity; National Grid derived the de-rated capacity figure from the CEC figure it had available; National Grid had the connection agreement by virtue of the fact that it is counterparty to the connection agreement; and it had Appendix C as part of the application for the 2020 T-4 Capacity Auction;”*

#### Ground 2

10. EIDAC contends that NGET is wrong to reject EWIC17 pursuant to Rule 3.6A.2 for not submitting a full connection agreement because section 2.3.5 of the Auction Guidelines issued by NGET does not insist on the submission of a full connection agreement.

#### Ground 3

11. EIDAC claims that NGET “National Grid should be prevented, or stopped, from insisting on submission of a full connection agreement when it has not insisted on submission of a full connection agreement in previous capacity market prequalifications”.

#### Ground 4

12. EIDAC claims that “Rule 3.5A.1 of the Capacity Market Rules does not impose any prequalification requirement on the applicant to supply the Connection Capacity and/or the process by which it is determined or the Connection Entry Capacity and therefore the Application should not have been rejected on that ground”.

#### Ground 5

13. EIDAC contends that the Notification of Prequalification Decision and Notice of Reconsidered Decision were procedurally deficient because NGET cited a reason for rejection in the Notice of Reconsidered Decision that had not been included in the Notification of Prequalification Decision.

### Ground 6

14. EIDAC suggests that NGET's procedure for assessing the Request for Reconsideration was procedurally deficient and in violation of principles of administrative law. EIDAC claims that "Where a body exercising the functions of a regulated, public, body makes a decision, it is a requirement that a consideration of reasonable grounds raised is apparent from the bodies' decision and reasons for a decision are provided. This is absent from the decision of National Grid in terms of the dispute outcome notification."

### Ground 7

15. EIDAC suggests that NGET's procedure for assessing Applications for Prequalification was also procedurally deficient and in violation of principles of administrative law. EIDAC claims that "[i]n deciding to reject the Application without seeking clarification from EIDAC in respect of the alleged omission, National Grid has breached its fundamental duty, as a body exercising functions of a public or quasi-public nature, to evaluate applications reasonably and proportionately."

### **The Legislative Framework**

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

19. 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**

20. Rule 3.5A.1 of the Capacity Market Rules establishes how the Connection Capacity of an Interconnector CMU should be set:

*3.5A.1 The Connection Capacity of an Interconnector CMU is equal to the positive value of Connection Entry Capacity stated in the Grid Connection Agreement.*

21. Rule 3.6A.2 requires the submission of a Connection Agreement by Applicants for Interconnector CMUs:

*3.6A.2 Connection Arrangements*

*Each Applicant for an Interconnector CMU must:*

*(a) confirm that one or more Grid Connection Agreements have been entered into and are in force which secure Transmission Entry Capacity for the relevant Delivery Year for that CMU at least equal, in aggregate, to the Anticipated De-rated*

*Capacity of the CMU and any other CMUs to which any such Grid Connection Agreement applies; and*

*(b) provide a copy of the Grid Connection Agreement with the Application*

22. Rule 3.3.6 requires that

*For each CMU which an Applicant wishes to Prequalify, and for each Capacity Auction, the Applicant must:*

*(a) submit a separate application form and the required Additional Information (together, an "Application") to the Delivery Body;*

23. Rule 4.4.2 states that

*the Delivery Body must not Prequalify a CMU where:*

*(a) it is aware that the Application has not been completed or submitted in accordance with the Rules;*

*(aa) it reasonably believes that any information or declaration submitted in or with an Application does not comply with the requirements in Rule 3.12.1;*

*(b) the required Additional Information is missing*

## **Our Findings**

24. We have assessed each of EIDAC's grounds for appeal, which are set out below.

### **Ground 1**

25. EIDAC claims that NGET already held the required information and documentary evidence to satisfy Rule 3.6A.2 and the necessary information to inform the assignment of Connection Capacity under Rule 3.5A.1.
26. Rule 3.6A.2 requires the applicant to provide a copy of the Grid Connection Agreement. Rule 1.2 defines a Grid Connection Agreement for the purposes of an Interconnector CMU as 'a Bilateral Connection Agreement between the System Operator and a person responsible for the CMU'. NGET has issued statutory Guidelines pursuant to Regulation 21 of the Electricity Capacity Regulations 2014. These indicate that NGET require the Grid Connection Agreement to confirm the existence of such an Agreement for the site in question and to verify the specific entry capacity information for the CMU.
27. The Construction Agreement which the Appellant submitted does not constitute a Bilateral Connection Agreement. Nor does it provide sufficient evidence as to the CMU's TEC or CEC to enable NGET to inform the assignment of Connection Capacity under Rule 3.5A.1.
28. EIDAC has argued that NGET as the System Operator is the counterparty to connection agreements and therefore holds copies of them. They also claim that NGET could have used the connection agreement submitted with the Application for Prequalification for the 2016 T-4 Auction as evidence of a valid connection agreement.
29. NGET assesses each Application for Prequalification on the basis of the Additional Information (as specified in section 3.6A for Existing Interconnector CMUs) provided with the Application. Where this Additional Information is not provided, NGET is required by Rule 4.4.2 to reject the Application. The Capacity Market functions that NGET performs, are carried out in a separate part of the NGET business and at arm's length from its system operator role. It would therefore be inappropriate for NGET to seek documentary evidence it may hold in another part of its business for the purpose of assessing an Application.
30. Rule 3.3.6 requires a separate Application, including the required Additional Information, for each CMU and for each Capacity Auction. Applicants are therefore required to submit

their connection agreement for each Application. In addition, Rule 3.5B.1 specifically notes that the Agreement must be the Agreement that is in force at the time the Application is made. The Agreement submitted with the 2016 Application for Prequalification (which EIDAC has provided as supplementary evidence with its appeal to the Authority) is not for the same site as the Application submitted in 2017.

31. It is worth noting here that Regulation 69(5) prohibits NGET, when it is taking a Reconsidered Decision, from considering information which was required to be provided to it before it made its Prequalification decision.
32. Accordingly the Authority holds that NGET was correct to reject the CMU EWIC17 because it did not submit a connection agreement in accordance with Rule 3.6A.2 and the Prequalification decision has to be taken on the basis of documents EIDAC submitted with the Application.

### Ground 2

33. Further to Ground 1 above, EIDAC has claimed that NGET should not have rejected the CMU EWIC17 because the requirements explained in the Auction Guidelines and in Rule 3.6A.2 do not match. Rule 3.6A.2, as shown above, requires the submission of a connection agreement by an Applicant for an Interconnector CMU. The Auction Guidelines provide additional information to applicants as to what is required to meet Rule 3.6A.2. We do not consider this to be contradictory to Rule 3.6A.2 and the Authority therefore does not consider there to be any merit to this Ground.

### Ground 3

34. EIDAC claims that “National Grid should be prevented, or stopped, from insisting on submission of a full connection agreement when it has not insisted on submission of a full connection agreement in previous capacity market prequalifications”. This on the basis that



EIDAC' successfully submitted parts of a Connection Agreement as additional information with its Application for Prequalification in 2016. .

35. We acknowledge that NGET permit submission of parts of a connection agreement. NGET's Auction Guidelines, made pursuant to Regulation 21, make clear that only certain key pages are needed to satisfy the requirement. Section 2.3.5(a) sets out the requirements for what sections of a connection agreement must be submitted by Transmission CMUs (including Interconnector CMUs):

*a) Transmission CMU: Where the Existing CMU is a Transmission CMU and able to give the confirmation required by Rule 3.6.3(a)(i), Applicants need to provide:*

- *The identifying cover page and signature page of the connection agreement to demonstrate that the agreement is in force:*
  - *This can be a signature on the original agreement, on the latest agreement to vary or on the bi-party agreement signed at the time of NETA which moved agreements to the CUSC framework;*
  - *In the latter case the signed bi-party agreement (which may have covered multiple sites) should be accompanied by the (unsigned) Bilateral Connection Agreement (BCA) which was appended to the bi-party agreement and which relates to the CMU in question; and*
- *Appendix C of the relevant agreement to give the technical information required for Prequalification. This should be the latest/current Appendix C to confirm CEC and TEC.*

36. However, the Connection Agreement which EIDAC submitted in 2016 was substantially more complete than the Construction Agreement submitted with the 2017 Application. The 2016 submission contained the key components, namely, the signed cover page and Appendix C to demonstrate CEC and TEC, both of which were missing from the Construction Agreement

37. Therefore, and as discussed under Ground 1 above, the submitted documents do not constitute a Connection Agreement. The Authority holds that NGET acted correctly to reject EIDAC on this basis.

#### Ground 4

38. EIDAC claims that “Rule 3.5A.1 of the Capacity Market Rules does not impose any prequalification requirement on the applicant to supply the Connection Capacity and/or the process by which it is determined or the Connection Entry Capacity and therefore the Application should not have been rejected on that ground”.
39. EIDAC is correct that Rule 3.5A.1 in isolation does not explicitly impose any requirement on the Applicant to submit a Connection Agreement. EIDAC is correct that Rule 3.5A.1 exists only to establish the means by which NGET should assess the Connection Capacity of the CMU.
40. However, Rule 3.5A.1 is related to and must be considered alongside Rule 3.6A.2, which does explicitly require the submission of this document. The Authority therefore holds that although EIDAC is correct on this ground, it still failed to meet the requirements for Prequalification and NGET was correct to reject it.

#### Grounds 5 and 6

41. EIDAC contends that the Notification of Prequalification Decision and Notice of Reconsidered Decision were procedurally deficient because NGET cited a reason for rejection in the Notice of Reconsidered Decision that had not been included in the Notification of Prequalification Decision. Further, that NGET’s procedure for assessing the Request for Reconsideration and Applications for Prequalification are procedurally deficient and in violation of principles of administrative law.

42. The Authority agrees that NGET should have specifically referred to EIDAC's failure to comply with Rule 3.6A.2 within the Prequalification Decision. However, the Authority considers that adequate information was given by NGET for EIDAC to be able to engage with the process for seeking a Reconsidered Decision. The Notice of Prequalification Decision sets out that NGET had been unable to satisfy itself in respect of Rule 3.5A.1 and that Rule specifically refers to the Grid Connection Agreement being the reference point for assessing connection capacity. Further, even if EIDAC had been explicitly made aware by NGET of its failure to submit a Connection Agreement pursuant to Rule 3.6A.2, it would have been unable to address this failing as part of its request for a Reconsidered Decision due to the prohibition on the submission of new information under Regulation 69(5). EIDAC did not therefore suffer any prejudice as a result of NGET's failure to provide full reasoning in the Notification of Prequalification Decision.

#### Grounds 6 and 7

43. EIDAC also claims that "[i]n deciding to reject the Application without seeking clarification from EIDAC in respect of the alleged omission, National Grid has breached its fundamental duty, as a body exercising functions of a public or quasi-public nature, to evaluate applications reasonably and proportionately."
44. NGET's role as the EMR Delivery Body is constrained by the Capacity Market Rules and the Electricity Capacity Regulations. The information that it takes into account is strictly defined in Chapters 3 and 4 of the Rules, which set out the Prequalification requirements for Applicants and the processes NGET must take to consider Applications.
45. The Regulations also establish the Request for Reconsideration as the means by which a prequalification decision can be reviewed. The opportunity to do so is constrained by the prohibition on new information or evidence as set out in Regulation 69(5). Giving EIDAC an alternative means by which to correct errors in the initial Application would place EIDAC at

an advantage and discriminate against other Applicants and not in accordance with the legal framework.

46. With regard to NGET's assessment of the Request for Reconsideration, the Authority believes that NGET has taken a reasonable and to the extent relevant a proportionate approach, consistent with that offered to other applicants.

### **Conclusion**

47. NGET reached the correct Reconsidered Decision to not prequalify EWIC17 for the T-4 Auction on the basis that it was unable to verify CEC and TEC by reference to the Connection Agreement which EIDAC was required to provide under Rule 3.6A.2(b) with the Application. In accordance with regulation 69(5), when making a Reconsidered Decision, the Delivery Body must not consider any information or evidence which the Appellant was required to and failed to provide as part of its original Application for prequalification.

### **Determination**

48. 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 CMUs listed in paragraph 1 for the T-4 Auction.



Mark Copley

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

12 January 2018