

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 an appeal made by Energy Store 4 Ltd (the “appellant”) against the reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (NGET)) in respect of the following Capacity Market Unit (CMU):
 - a) GSHULL
2. 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 the Delivery Body.

Appeal Background

3. The appellant submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2018 T-4 Auction.
4. The Delivery Body issued a Notification of Prequalification Decision dated 10 November 2017 (the “Prequalification Decision”). The Delivery Body conditionally prequalified for GSHULL for the 2018 T-4 Auction on the following grounds:

“Application is Conditionally Prequalified for the following reasons: Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved; therefore this application is Conditionally Prequalified and will need to provide credit cover as above.”

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.

Deferred Distribution Connection Agreement: As per Capacity Market Rule 3.7.3(c), Distribution Connection Agreement has been deferred; therefore this application is Conditionally Prequalified and will need to provide credit cover as above.

Deferred Planning Consents: As per Capacity Market Rule 3.7.1(a)(ii), Planning Consents have been deferred; therefore this application is Conditionally Prequalified. The deadline for submitting your planning consents for the T-4 auction is 22 working days before the auction which is the 5th January 2018.”

5. The appellant submitted a request for reconsideration of the Prequalification Decision on 20 November 2017. The appellant explained under the “Relevant parts of the Item” that it:

“applied for Gas OCGT/Reciprocating Engine for GSHULL because this would be the key energy type for this project however since submission of the pre-qualification application for GSHULL, we were told that we would not be able to get planning permission nor would we be able to secure the necessary Gas Connection. We are requesting to change the primary technology to Storage for the same MW.”

6. The Delivery Body issued a Notice of Reconsidered Decision on 11 December which rejected the dispute on the following grounds:

“We have assessed your Tier 1 Dispute and have concluded that we cannot accept the arguments or supporting documents submitted. You have disputed the Prequalification decision under Regulation 69. Your dispute asks to change the generating technology class, this is not a disputable decision, therefore we cannot consider in relation to this. Therefore the original decision of the Delivery Body is upheld.”

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

The appellant's grounds for appeal

8. The appellant disputes NGET's refusal to make changes to their Application for Prequalification, arguing that the changes are permissible.
9. The appellant requested that NGET change the Generating Technology Class of the CMU GSHULL. The appellant states:

"we believe 'Storage' is now the most appropriate technology class for the hybrid system in order to enter the T-4 auction."

10. The appellant also requested NGET change the Primary Fuel Type of the CMU GSHULL, stating:

"We would therefore like to rectify the CM Register to change the fuel type from Gas to Storage."

11. The appellant argues that neither of the changes would change the configuration of the Generating Units, which it notes to be prevented by virtue of Rule 4.4.4, and that a change in Primary Fuel Type is permissible under Rule 7.5.1(ra).
12. The appellant supports the above argument by noting that changing the Primary Fuel Type does *"not pose a risk to security of supply"* or *"set a precedent for future CMUs to change their Primary Fuel Type"* as the CMU does not yet hold a capacity agreement.

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 the Delivery Body 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.

17. Regulation 70(1)(a)(1) sets out the possible ways in which an affected person may appeal to the Authority.

An affected person who has, in accordance with regulation 69(2), made a request to the Delivery Body to review a delivery body reviewable decision, may appeal to the Authority if—

(a) the affected person disputes the reconsidered decision

(b) the request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2).

Capacity Market Rules

18. Rule 3.4.5(b) sets out that each Application must specify Generating Technology Class:

in the case of a Generating CMU, the Generating Technology Class to which each Generating Unit that comprises such a CMU belongs.

19. Rule 3.4.5A sets out that all Applicants must state their Primary Fuel Type:

In the case of a Generating CMU, each Application must state the Primary Fuel Type which it is intended at the time the Application is made will be used for the CMU at the beginning of the Delivery Year.

20. Rule 4.4.4 sets out that the configuration of Generating Units must not be changed once a CMU has prequalified.

The configuration of Generating Units or DSR CMU Components (as applicable) that comprise a CMU must not be changed once that CMU has prequalified.

21. Rule 7.4.1(a)(ii) specifies that the Delivery Body must, with each Capacity Auction, ensure that both Generation Technology Class and Primary Fuel Type must be included in the Capacity Market Register.

a description of the CMU including (where applicable) each Generating Unit or DSR CMU Component comprising such CMU and in the case of a Generating CMU, the Primary Fuel Type and Generating Technology Class for the CMU;

22. Rule 7.5.1(ra) states that the Delivery Body must update the Register if it is notified of a change in the Primary Fuel Type of a Generating CMU

7.5.1 The Delivery Body must update the Capacity Market Register:

[...]

(ra) to record any change in the Primary Fuel Type for a Generating CMU notified to the Delivery Body;

23. Rule 7.7.1A sets out where an Applicant can request the Delivery Body to rectify the Capacity Market Register

Where any person considers that an entry maintained in respect of it or any Prequalified CMU for which they are the Applicant under this Chapter 7 is factually inaccurate, during the period beginning fifteen working days following the relevant Prequalification Results Day and ending ten working days prior to the first bidding round of the relevant auction only, they may request to the Delivery Body that the entry be amended or deleted.

24. Rule 8.3.4A sets out that

A Capacity Provider must notify the Delivery Body of a change in the Primary Fuel Type for a Generating CMU

Our Findings

25. We note that the appellant did not meet the condition of Regulation 69(2)(b) as it failed to include each of the matters specified in sub-paragraphs (a) to (e) of Regulation 70(3) in its request for reconsideration. In particular, it failed to provide a summary of the grounds for disputing the delivery body reviewable decision or any arguments supporting those grounds. NGET should therefore have rejected the request for reconsideration and this matter should then have come to us on the basis of Regulation 70(1)(b) seeking relief from such rejection.
26. Further, the Appeal Notice submitted to the Authority *“seeks to appeal the refused dispute which was raised to rectify the Capacity Market Register”*. We note this request is inaccurate, as the appellant’s actual request for

reconsideration sought a review of the Delivery Body's Prequalification Decision and not a rectification of the CM Register.

27. Notwithstanding the above, we will consider the Appeal Notice as being compliant with Regulation 70(1)(a) since the appellant, as the affected person, disputes the reconsidered decision by the Delivery Body.

Facts relating to the appellant's site

28. The appellant explains that the relevant CMU GSHULL is a hybrid power plant that combines Solar PV, Energy Storage and Gas Generators. While the appellant's site may contain several technologies we do not agree with the appellant that the CMU GSHULL is a hybrid power plant, as the Application for GSHULL only included a single Generating Unit which was described as 'OCGT and Reciprocating Engines'. This is the Generating Technology Class that was entered into the Capacity Market Register.
29. In their Application for Prequalification, the appellant chose 'OCGT and Reciprocating Engines' as their Generating Technology Class and Gas as their Primary Fuel Type. Subsequently, and as the appellant set out in their Appeal Notice, it failed to obtain planning permission or secure a gas connection, both of which would be necessary in order to build the generating unit. The appellant explained that it instead now wished to change the technology to a battery. We do not accept the appellant's argument that it was "*just seeking a change to the fuel type*" as their request would cover both a change to the Generating Technology Class (from 'OCGT and Reciprocating Engines' to 'Storage') and the Primary Fuel Type (from 'Gas' to 'Storage').

The provision of new information

30. Rule 3.4.5 (b) requires that an Applicant specify Generating Technology Class and Rule 3.4.5A requires that an Applicant must specify their primary fuel type. Regulation 69(5) sets out that in reconsidering a prequalification decision the Delivery Body must not take into account any information or evidence which the affected person was required to provide to the Delivery Body before the prequalification decision was taken and the affected person failed to provide in accordance with that requirement.

31. The Delivery Body made its prequalification decision based on the information provided in the Application and was not able to consider the new information that the appellant provided in its request for reconsideration. The information provided in the Application was accepted as correct and therefore there was: (a) not a factual inaccuracy on the Register, as the Application had specified the Generating Unit would be an OCGT; and (b) no ability for NGET to amend the Application to change the technology class or primary fuel type of the CMU.
32. We do not accept the appellant's argument that the information was already provided in a covering letter as part of the Application for Prequalification, as the covering letter clearly stated that the CMU was "*a 21MW Gas project*".

The factual accuracy of the Capacity Market Register

33. The appellant has requested a rectification of the Capacity Market register. Rule 8.3.4A sets out that "*a Capacity Provider must notify the Delivery Body of a change in the Primary Fuel Type for a Generating CMU*". Rule 7.5.1(ra) then sets out that NGET must update the Capacity Market Register to record any change in the Primary Fuel Type for a Generating CMU that is notified to the Delivery Body.
34. As noted above, we consider that the appellant has requested a change in both the Technology Class and Primary Fuel Type of the CMU. Therefore, it cannot rely on Rules 8.3.4A and 7.5.1(ra) which only allow for a change in the Primary Fuel Type.
35. The appellant, in its request for reconsideration, also referred to Rule 7.7, which in the appellant's circumstances would specifically relate to 7.7.1A. This Rule sets out that where any person considers that an entry maintained in respect of it or any Prequalified CMU for which it is the Applicant is factually inaccurate, it may request to the Delivery Body that the entry be amended or deleted.
36. This request must be submitted during the period beginning fifteen working days following the relevant Prequalification Results Day and ending ten working days prior to the first bidding round of the relevant auction only. As the appellant's request for

reconsideration was submitted on 20 November and the Prequalification Results Day was on the 10 November, the appellant failed to submit a within the relevant time period and therefore did not meet the requirements of Rule 7.7.1A.

37. We also maintain that the appellant did not submit a request to the Delivery Body to amend the relevant entry in the Capacity Market Register. The appellant rather disputed the Prequalification Decision taken by the Delivery Body, which was made on the basis of the information provided as part of the Prequalification Application.
38. Even if the appellant had submitted a request to NGET in the timings specified by Rule 7.7.1A, NGET would have had to conclude that the Register was factually accurate, as it accurately reflected the Application for Prequalification submitted by the Applicant.

Change in the configuration of the CMU

39. Rule 4.4.4 sets out that *“the configuration of Generating Units or DSR CMU Components (as applicable) that comprise a CMU must not be changed once that CMU has Prequalified”*.
40. Prequalification *“means written confirmation by the Delivery Body pursuant to Rule 4.5 or Part 10 of the Regulations that a CMU has prequalified for a Capacity Auction (and “Prequalify” and “Prequalified” must be construed accordingly)”*. The CMU has received a confirmation pursuant to Rule 4.5.1(b)(v) and therefore must be considered to be subject to the condition of Rule 4.4.4.
41. We do not agree with the appellant that a change in the Primary Fuel type and the Generating Technology Class does not change the configuration of Generating Units.
42. The CMU GSHULL contains one Generating Unit. A change of the Generating Technology Class and Primary Fuel Type to Storage would alter the ‘configuration’, in its ordinary meaning, of that Generating Unit. The change would therefore not be permitted by virtue of Rule 4.4.4.

43. In addition, we note that there is no specific provision within Rule 7.5.1 which would allow the Delivery Body to update the Capacity Market Register to change the Generating Technology Class. The inference therefore must be that an Applicant is not allowed to change its Generating Technology Class after Prequalification, only its Primary Fuel Type.

The impact on security of supply

44. The appellant supports its case by arguing that amending the Technology Class and Primary Fuel Type of the CMU does not pose a risk to security of supply. Given the conclusions above – that GSHULL is unable to change its Generating Technology class and Primary Fuel Type – this ground is not relevant to this dispute.

Conclusion

45. The Delivery Body reached the correct reconsidered decision to prevent GSHULL from changing its technology class and primary fuel type for the T-4 Capacity Auction on the basis that:
- a) new information is not permitted to be added to an Application after the deadline as specified by Regulation 69(5);
 - b) the Capacity Market Register accurately reflected the Application for Prequalification submitted by the appellant; and
 - c) A change in the Technology Class and Primary Fuel Type of the CMU would amount to a change in the configuration of the Generating Unit, which is inadmissible under rule 4.4.4.

Determination

46. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's reconsidered decision be upheld in respect of the CMU GSHULL for the 2018 T-4 Auction.

A handwritten signature in black ink, appearing to read 'Mark Copley', with a large, sweeping flourish at the end.

Mark Copley

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018