

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 Flexitricity Limited (“Flexitricity”) against reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”) in respect of the following Capacity Market Unit (CMU):
 - a) FLXR39
2. This decision deals with all of the appeals for the CMU listed above as they are substantively in respect of the same issue and differ only in so far as concerns the T-1 or T-4 auctions.
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. The appellant submitted an Application for Prequalification for FLXR39 in respect of the 2018 T-1 and T-4 Auctions.
5. NGET then issued a Notification of Prequalification Decision dated 10 November 2017 (the “Prequalification Decision”). NGET rejected the CMU applying for 2018 T-1 auction on the following three grounds:

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.

- a) *“As per Capacity Market Rule 3.7.1(a)(ii), the Applicant must provide documentary evidence of the Relevant Planning Consents that it has obtained however the Delivery Body has been unable to verify the link between Flexitricity Limited (the Applicant), or Thanet Growers Three Limited (the Legal Owner), with RPS Newark, to whom the planning documentation is addressed to. We are therefore unable to accept the submitted documentation as a result.”*
- b) *“The Aggregator Declaration, required as per Capacity Market Rules 3.2.7 and 3.2.9 and defined in Capacity Market Rule 1.2 as Exhibit F, does not state the Legal Owner name in table of the Generating Units as requested, therefore does not meet the requirements.”*
- c) *“If this application had met the requirements for Prequalification the credit cover requirement would have been £30600.00 as the CMU has yet to satisfy the following requirement: Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved.”*

NGET rejected the CMU applying for 2018 T-4 auction on the same three grounds above mentioned, plus on additional one:

- d) *“As per Capacity Market Rule 8.3.6Bn(a), the Application has not satisfied the requirements of the Extended Years Criteria as there is no reference to the following requirements: The Generating Unit will consist of either: (i) New Apparatus; (ii) both new and rebuilt Apparatus, where at least one complete generator or turbine is new; (iii) rebuilt and/or previously used Apparatus provided that the Generating Unit; (aa) has not been used, or been available to use, for the generation and Export of electricity in Great Britain at any time in the three years preceding the Application; and (bb) forms part of a CMU which is installed on a site that has not previously been used for that CMU and benefits from a new Grid or Distribution Connection Agreement.”*

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

“As per Capacity Market Rule 3.7.1(a)(ii) the Applicant will obtain all Relevant Planning Consents and will have the Legal Right to use the land on which the CMU is, or will be, located. The [Delivery Body] have been unable to confirm that the Applicant has the Legal Right to use the land.”

All the other grounds for dispute were accepted.

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

Flexitricity’s Grounds for appeal

9. Flexitricity disputes the decision on the following grounds.

Ground 1

“Rule 3.7.1(a)(ii) requires that the Applicant” must declare it has the Legal Right to use the land on which the CMU is, or will be, located, “which it has in fact made. The Application was and is compliant with this rule.” [...] “There is no requirement to provide evidence of ‘Legal Right to use the land’; there is merely a requirement to make a declaration.”

Ground 2

“The Delivery Body raised a new objection in terms of Rule 3.7.1(a)(ii), which was not cited in the original Prequalification Decision notification” [...] “thus denying the Applicant the

ability to address it in its request for a reconsidered decision.”

The Legislative Framework

10. 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.
11. 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.
12. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.

Capacity Market Rules

13. Rule 3.7 lists the additional information required for a New Build CMU. More specifically, Rule 3.7.1(a) states that :

“Each Applicant for a New Build CMU must declare in the Application:

- (i) that it will obtain all Relevant Planning Consents and will have the Legal Right to use the land on which the CMU is, or will be, located by no later than the date falling 22 Working Days prior to the commencement of the first Bidding Window in relation to such Capacity Auction; or*
- (ii) otherwise that it has obtained all Relevant Planning Consents required for the construction and commissioning of the Prospective Generating Plant or Prospective Interconnector CMU (but excluding any ancillary infrastructure associated with, but not comprised in, the Prospective Generating Plant or Prospective Interconnector CMU) and has the Legal Right to use the land on which the CMU is, or will be, located.*

and in the case of 3.7.1 (a)(ii) must provide documentary evidence of Relevant Planning Consents”

14. Rule 3.12.1 declares:

A person submitting an Application or an Opt-out Notification must ensure and confirm in the Application or the Opt-out Notification that:

- a) in all material respects, the Application or Opt-out Notification and, in the case of an Application, all Additional Information submitted by the Applicant; and*
- b) in all respects, each of the specific declarations referred to in Rules 3.4 to 3.11 (where relevant),*

is true and correct.

15. Rule 4.4.2 (aa) states that:

Subject to Rule 3.8.1A(c)(ii), the Delivery Body must not Prequalify a CMU where:

(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

Our Findings

16. We have assessed each of the appellant’s grounds for appeal, which are set out below.

Ground 1

17. The appellant stated that Rule 3.7.1(a)(ii) only requires the applicant to declare it *“has the Legal Right to use the land on which the CMU is, or will be, located”*, and not to provide evidence to support such declaration. The only documentary evidence which is required by the rules 3.7.1 (a) and (b) is with regard to the Relevant Planning Consents.

18. We have concluded that the appellant is correct since they did declare they had the right to use the land and that they did submit the required documentary evidence of Relevant Planning Consents.
19. While the Delivery Body can decide not to Prequalify a CMU where it believes the information submitted is not true and correct, as specified in Rule 4.4.2(aa), the Delivery Body has not provided sufficient evidence to suggest the declaration made by the Applicant was not correct, and it did not refer to this Rule in its Notice of Reconsidered Decision.
20. Therefore NGET was incorrect in applying Rule 3.7.1.(a)(ii) to prevent the CMU listed in paragraph 1 from prequalifying.

Ground 2

21. The appellant stated that by raising a new objection in terms of Rule 3.7.1.(a)(ii) in the Dispute Letter, the Delivery Body denied the applicant the ability to address it in its request for a reconsidered decision.
22. We agree that the Delivery Body could have raised this concern in its Notification of Prequalification Decision as it would have allowed the applicant to clarify the matter in its request for reconsideration. By raising this new concern in its Notice of Reconsidered Decision, the Delivery Body did not allow the applicant to address this concern directly with the Delivery Body but only through an appeal to the Authority.

Conclusion

23. NGET did not reach the correct reconsidered decision to reject CMU FLXR39 for the T-1 Auction and T-4 Auction on the basis that
 - a) the information provided by the appellant demonstrates that it met the relevant requirements in the Rules.

Determination

24. 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 overturned in respect of the CMU listed in paragraph 1 for the T-1 Auction and T-4 Auction. We direct the Delivery Body to register the CMU FLXR39 on the capacity market register as a prequalified CMU 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