

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 (the “appellant”) against reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET” or the “Delivery Body”) in respect of the following Capacity Market Unit (“CMU”):
 - a) FLXR35
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 NGET.

Appeal Background

3. The appellant submitted Applications for Prequalification for the CMU in Paragraph 1 in respect of the 2017 T-1 and T-4 Auctions.
4. NGET issued Prequalification Decisions dated 11 November 2017 (the “Prequalification Decisions”). NGET Rejected the CMUs on the following grounds:

This application has not met the requirements of the Capacity Market Rules due to the following reasons:

In accordance with Capacity Market Rule 3.7.3(b)(ii), the Applicant is required to provide the connection offer (with evidence of acceptance) that they have with the

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.

Distribution Network Operator. Although the connection offer has been submitted in the Application, there is no evidence of acceptance of the connection offer provided nor, where such evidence is not available, is there written confirmation from the Distribution Network Operator that the connection offer is in effect. Therefore we are not able to accept the connection offer as a result.

5. For the T-4 Application, NGET provided a further ground:

As per Capacity Market Rule 8.3.6B(a), the Application has not satisfied the requirements of the Extended Years Criteria as there is no reference as to whether 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 requests for reconsideration of the Prequalification Decisions before the deadline of 20 November 2017.
7. NGET issued a Notice of Reconsidered Decision, with respect to each Application, on 01 December which rejected the disputes on the following grounds:

We have reviewed your dispute and maintain that the original Delivery Body prequalification decision still stands. Details in relation to the specific rejection reasons are as follows:

1. In accordance with Capacity Market Rule 3.7.3(b)(ii) there was no evidence with the original application of a Distribution Connection Agreement or connection offer (with evidence of acceptance), or where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement or connection offer is in effect

8. For the T-4 Application, NGET issued the further ground below:

2. In accordance with Capacity Market Rule 8.6.6B(a), [sic] the application, and subsequent dispute, have not satisfied the requirements of the Extended Years Criteria as there is no reference as to whether 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.

9. 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

10. The appellant disputes the decision on the following grounds.

Ground 1

11. The Appellant contends that it had "*attached to the Application a connection offer reference 5500074926/C . This offer had not been accepted at the date of submission of the Application, therefore it was not possible to provide 'evidence of acceptance' or a Distribution Connection Agreement. This therefore required us to rely on the second part of Rule 3.7.3(b)(ii). The connection offer states a validity of 180 days from 06 April 2017, making it valid until 3 October 2017 – after closure of the Prequalification window. The connection offer was therefore 'in effect'".*
12. The appellant contends that "*that the connection offer supplied, which is in writing, is from the Distribution Network Operator, and was in effect beyond the Prequalification window, constitutes 'written confirmation from the Distribution Network Operator that such Distribution Connection Agreement or connection offer is in effect'. This satisfies Rule 3.7.3(b)(ii)".*

Ground 2

13. The appellant also claims that:

As stated above, Rule 8.3.6B(a) is a descriptive rule, providing (together with the remainder of Rule 8.3.6B) the definition of the term Extended Years Criteria. The specific paragraph (a) cited deals only with whether the Core Generating Plant is new, refurbished, etc, and not with any other aspect of the Extended Years Criteria. This Rule does not of itself place any requirement on an Applicant in submission of

an Application. Nevertheless, the Delivery Body cites this Rule as a reason for rejection.

The Delivery Body does not cite Rule 3.7.2(a)(ii), which might seem more relevant to the Application. [...] Since the Delivery Body addresses only paragraph (a) of Rule 8.3.6B, we conclude that only the matter of whether the Core Generating Plant is new (or refurbished, etc) is in question, and that the other aspects of the Extended Years Criteria are accepted.

[...] The Delivery Body has not given a valid reason for rejection in its use of Rule 8.3.6B(a), as this Rule does not impose requirements on an Application. It is essential that the Delivery Body make clear references to the Rules which it feels that an Application does not satisfy, if the Applicant is to be able to respond appropriately. We believe that the Delivery Body's objection in terms of this Rule should be set aside for this reason alone."

Ground 3

14. *The appellant says "We have dealt with what we believe to be the only realistic interpretation of the Delivery Body's reasoning, in supposing that it is Rule 3.7.2(a)(ii) which the Delivery Body believes is not satisfied." It suggests that in its "request for reconsideration, we pointed out three ways in which we provided 'a description of how those criteria are to be met' in the Application. Among these is the word 'proposed' – the Core Generating Plant will indeed be new. We point out that the requirement to provide this description does not stipulate that the Applicant must make explicit statements in respect of 'newness' or otherwise in its description, merely to describe 'how' the criteria are to be met, which is by installing plant (as more fully stated in our request for reconsideration). Furthermore, in making the declaration referred to in Rule 3.7.2(a)(i), we have thereby confirmed that the Core Generating Plant will be as set out in Rule 8.3.6B(a)."*

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 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 Capacity Market 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 3.7.2 establishes the requirement for Applicants to submit a Construction Plan and paragraph (a) in particular sets out the connection of this to the Extended Years Criteria:

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

(a) a description of the nature of the construction, repowering or refurbishment works to be undertaken; and, where the duration of the Capacity Agreement for

the CMU is to be greater than three Delivery Years:

(i) that, to the best of its knowledge and belief, the CMU will meet the Extended Years Criteria when completed; and

(ii) a description of how those criteria are to be met;

20. Rule 3.7.3 sets out the requirements on Applicants regarding the provision of Connection Agreements with their Applications for Prequalification. In particular, Rule 3.7.3(b) states that :

(b) Subject to Rule 3.7.3(c) below, Applicants for a New Build CMU that is, or will be, directly connected to a Distribution Network must:

(i) confirm that there are one or more Distribution Connection Agreements or accepted connection offers which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMUs to which the Distribution Connection Agreement applies to connect to the Distribution Network in the relevant Delivery Years, and

(ii) provide with the Application a copy of any such Distribution Connection Agreement or connection offer (with evidence of acceptance), or where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement or connection offer is in effect and confirming:

(aa) the registered capacity (or inverter rating, if applicable) of that Generating Unit and where a range of values is specified for the registered capacity (or inverter rating, if applicable), the minimum value in that range; and

(bb) the capacity that such Generating Unit is permitted to export to

the Distribution Network.

21. Rule 8.3.6B (*Definition of Extended Years Criteria*) provides as follows:

"Extended Years Criteria" means the requirements, in respect of a Prospective Generating CMU, that:

(a) for each Generating Unit of the CMU, the Core Generating Plant consists of:

(i) new Apparatus;

(ii) both new and rebuilt Apparatus, where at least one complete generator or turbine is new; or

(iii) rebuilt and/or previously used Apparatus, provided that the Generating Unit:

(aa) has not been used, or been available for 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;

Our Findings

22. We have assessed each of the appellant's grounds for appeal and our assessment of each is set out below.

Ground 1

23. NGET held that the appellant failed to satisfy Rule 3.7.3(b)(ii).

24. The appellant claims that it has satisfied Rule 3.7.3(b)(ii) because it supplied with its applications a written connection offer (for sufficient capacity) from the Distribution Network Operator which was open for acceptance beyond the Prequalification window.

The appellant claims that, pursuant to Rule 3.7.3(b)(ii), this document constitutes written confirmation from the Distribution Network Operator that such Distribution Connection Agreement or connection offer is in effect and meets the capacity requirement in the rule.

25. Rule 3.7.3(b)(ii) says that, where an Applicant has not provided with the Application a copy of any **such** Distribution Connection Agreement or connection offer (with evidence of acceptance), the Applicant must provide written confirmation from the Distribution Network Operator that **such** Distribution Connection Agreement or connection offer is in effect and confirms the things in subparagraphs (aa) and (bb). The term “such” refers back to the **accepted** connection offer, confirmation of which is required under 3.7.3(b)(i).
26. The connection offer from the Distribution Network Operator —provided by appellant with its application—had not been accepted at the time that the application for prequalification was submitted and this was acknowledged by the appellant in its Appeal Notice. The requirements of Rule 3.7.3(b)(ii) are therefore not met.
27. As a result, the Authority holds that NGET was correct to not prequalify FLXR35.

Grounds 2 and 3

28. Grounds 2 and 3 relate to the T-4 Application only because both concern the Extended Years Criteria for Capacity Agreements with a duration greater than three Delivery Years.
29. The appellant claims that NGET’s reason for rejection is not valid because Rule 8.3.6B(a) is descriptive only and does not impose requirements on an Applicant. The appellant says that it is essential that NGET make clear references to the Rules which it feels that an Application does not satisfy, to enable the Applicant to respond appropriately. The appellant says that NGET’s objection in terms of Rule 8.3.6B(a) should be set aside for this reason alone.
30. The appellant believes that the real reason for NGET’s rejection is that NGET believes the

appellant has not satisfied Rule 3.7.2(a)(ii). The appellant argues that it has in fact satisfied Rule 3.7.2(a)(ii) through statements given across three documents in its application.

31. The Extended Years Criteria is defined in Rule 1.2, which states *“Extended Years Criteria has meaning given in Rules 8.3.6B and 8.3.6C”*.
32. Rule 8.3.6B(b) requires that the Applicant provides some form of evidence that: *“each Generating Unit of the CMU can, with routine maintenance, be expected to remain capable of operation for at least fifteen years beginning with the first Delivery Year for which the Capacity Agreement is awarded”*
33. Rule 8.3.6B (b) cannot be read in isolation. It forms part of the definition of the term *“Extended Years Criteria²”* and as such must be read as part of the construction of Rule 3.7.2 (a) which sets out that-

“Each applicant for a New Build CMU must state in the Application:

(a) A description of the nature of the construction, repowering or refurbishment works to be undertaken; and, where the duration of the Capacity Agreement for the CMU is to be greater than three Delivery Years:

(i) that, to the best of its knowledge and belief, the CMU will meet the Extended Years Criteria when completed; and

a description of how those criteria are to be met;”

34. The application form requires a confirmation, by a tick box, that, to the best of an Applicant’s knowledge and belief, the CMU will meet the Extended Years Criteria when

² As per Rule 1.2 **Extended Years Criteria** has the meaning given in Rules 8.3.6B and 8.3.6C

completed. Furthermore, the application form requires a Construction Declaration Plan which includes, among other things, a description of how the Extended Year Criteria will be met as per Rule 3.7.2(a).

35. To satisfy Rule 3.7.2(a), the appellant submitted an explanation as its construction plan, which, among other points, confirmed the plant's lifespan and that it would be operated to manufacturers' O&M guidelines.
36. The appellant also provided the necessary confirmation and statement on the application form. As such, the Authority holds that FLXR35 met the requirements of the Extended Years Criteria.

Conclusion

37. NGET reached the correct reconsidered decision to not prequalify FLXR35 for the T-4 and T-1 Auctions on the basis that evidence of a valid connection agreement or an accepted connection offer required under Rule 3.7.3(b) was not provided. The information that was submitted instead did not satisfy the requirements of this rule.

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 the appellant for Prequalification be upheld in respect of the CMUs listed in paragraph 1 for the T-4 Auction and T-1 Auction.



Emily Sam

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018