

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 GB Gas Holdings Limited (GB Gas Holding) against the Reconsidered Decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):
 - a) 3CEES2
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. GB Gas Holding submitted an Application for Prequalification for 3CEES2 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 on the following grounds:
 - a) *“Capacity Market Rule 3.4.2 states that each Applicant must provide with each Application [a] copy of its certificate of incorporation and other related*

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.

evidence as required for the relevant type of person under the Auction Guidelines. The Company name on the Change of Name included with the Certificate of incorporation is not the full Company name.”

- b) *“Capacity Market Rule 3.4.3 states, each Applicant must: (a) specify in the Application: (i) the CMU to which the Application relates, a description of, the full postal address with postcode and the two letter prefix and six-figure Ordnance Survey grid reference numbers of, the Generating Unit(s). The location specified by the postcode provided in your Application does not correspond with the location specified by the OS Grid Reference.”*

6. GB Gas Holding submitted a request for reconsideration of the Prequalification Decisions before the deadline of 20 November 2017. The request for reconsideration was brought only on the grounds of the incomplete certificate of incorporation, as described in the paragraph (a) of NGET’s Notice of Prequalification Decision. No grounds relating to the incorrect OS Grid Reference were raised.
7. NGET issued a Notice of Reconsidered Decision on 1 December which accepted the grounds put forward by GB Gas Holding but continued to reject the CMU on the following grounds:

We have reviewed and accepted your dispute; however, your Prequalification status remains Rejected as the location specified by the postcode provided in your Application does not correspond with the location specified by the OS Grid Reference.

8. GB Gas Holding then submitted appeal notices to the Authority on 7 December 2017 under regulation 70 of the Regulations.

GB Gas Holding’s Grounds for appeal

9. GB Gas Holding disputes the decision on the following grounds.

Ground 1

10. *“Capacity Market Rule 3.4.3 [...] (a)(i) states that each Applicant must specify in the Application the CMU to which the Application relates, including a description of, the full postal address with postcode and the two letter prefix and six-figure Ordnance Survey grid reference numbers of, the Generating Unit.”*

The description, full postal address and *“a two letter and six-figure Ordnance Survey grid reference number was also provided. However, this reference contained an extremely minor typographic error. The reference provided was SK 581 205, when, strictly speaking, it should have been SK 581 025. We believe the decision to reject our CMU’s application on the grounds of an extremely minor typographical error cannot be justified on the merits.”*

Ground 2

11. *“We believe the Authority’s principal objective to serve the interests of consumers and the clear competitive benefits of increased supply side competition for capacity agreements far outweigh a minor typographical error in importance. The Authority should therefore allow our appeal in the interests of consumers, particularly because the grounds for rejection are so trivial.”*

Ground 3

12. *“We also believe the objectives of the Capacity Market Rules” among which “Regulation 78(b): facilitating the efficient operation and administration of the capacity market; are poorly served by the rejection of our application. In our view, the Capacity Market is not operating or being administered efficiently if a CMU can fail on the basis of an extremely minor typographical error in an otherwise sound application.”*

The Legislative Framework

13. The Electricity Act 1989 establishes the general legal framework applicable to the electricity sector. Section 3A specifies the principal objective of the Authority:

3A. (1) The principal objective of the Secretary of State and the Gas and Electricity Markets Authority (in this Act referred to as "the Authority") in carrying out their respective functions under this Part is to protect the interests of consumers in relation to electricity conveyed by distribution systems, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors .

14. Section 3D of the Electricity Act 1989 further specifies that:

*Sections 3A to 3C do not apply in relation to anything done by the Authority—
(a) in the exercise of functions relating to the determination of disputes;*

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:

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.*

19. Finally, Regulation 78 states that:

The Authority must when making capacity market rules, in addition to having regard to its principal objective and general duties, have regard to the following objectives—

- (a) *promoting investment in capacity to ensure security of electricity supply;*
- (b) *facilitating the efficient operation and administration of the capacity market;*
- (c) *ensuring the compatibility of capacity market rules with other subordinate legislation under Part 2 of the Act.*

Capacity Market Rules

20. Rule 3.4.3 states that each Applicant must:

(a) specify in the Application:

- (i) *the CMU to which the Application relates (including a description of, the full postal address with postcode and the two letter prefix and six-figure Ordnance Survey grid reference numbers of, the Generating Unit(s) and for Proven DSR CMUs, their CMU Component(s), or of the Electricity Interconnector).*

21. Rule 4.4.2 states that:

Subject to Rule 3.8.1A(c)(ii), 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.*

Our Findings

22. We have assessed each of GB Gas Holding grounds for appeal, which are set out below.

Ground 1

23. GB Gas Holding states that *“an extremely minor typographical error cannot justify the rejection of a CMU’s application”* which is otherwise *“sound in all material respects”*.
24. We understand that the mistake in the reference to the Ordnance Survey grid reference number (mentioning SK 581 205 instead of SK 581 025) pertains to a typographic error.
25. However, as the correct Ordnance Survey grid reference number could not be found in any other part of the Application, and the Applicant did not provide any explanation or evidence to NGET in its request for reconsideration of the Prequalification Decisions that a clerical error led to the incorrect the Ordnance Survey grid reference, there was no way for NGET to adjust the mistake accordingly.
26. In accordance with the Rule 4.4.2 (a), NGET was thus justified to consider that the location specified by the postcode provided in the Application did not correspond with the location specified by the Ordnance Survey grid reference.
27. We therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.4.3 and correctly decided not to overturn its Prequalification Decision to not prequalify the CMU.

Ground 2

28. GB Gas Holding believes that the *“Authority’s principal objective to serve the interests of consumers”* and that *“the clear competitive benefits of increased supply side competition for capacity agreements far outweigh a minor typographical error in importance.”*

29. In accordance with the Authority's principal objective, it must exercise its functions in a way that protects the interests of existing and future consumers. Section 3D of the Electricity Act 1989, however, explicitly sets out that the principle objective as set out in section 3A of the Electricity Act 1989 shall not apply when the Authority exercises its functions relating to the determination of disputes.
30. As above, we consider that the NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.4.3 and in deciding not to prequalify the CMU.

Ground 3

31. GB Gas Holding believes that the rejection of an Application on the basis of a typographical error would poorly serve Regulation 78(b) as it would not facilitate the efficient operation and administration of the capacity market.
32. The Authority is vested with the objective of Regulation 78(b) – to facilitate the efficient operation and administration of the capacity market – only when making the Capacity Market Rules. This objective however does not apply with regard to the administration of appeals. The appellant is therefore incorrectly relying on Regulation 78(b).
33. As above, we therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.4.3, and in deciding not to prequalify the CMU.

Conclusion

34. NGET reached the correct Reconsidered Decision to not prequalify 3CEES2 for the T-1 and T-4 Auctions on the basis that:
 - (a) the information required under CM 3.4.3 was not provided in the Application for Prequalification; and

(b) NGET consequently correctly did not allow GB Gas Holding to prequalify in accordance with Rule 4.4.2(a).

Determination

For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's Reconsidered Decisions to reject the appellant for Prequalification be upheld in respect of the CMUs listed in paragraph 1 for the T-1 Auction and T-4 Auctions.

A handwritten signature in black ink, appearing to read 'Julian Roberts', written in a cursive style.

Julian Roberts

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018