

**DETERMINATION PURSUANT TO REGULATION 71(3) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING AN APPEAL MADE TO THE AUTHORITY PURSUANT TO REGULATION 70(1)(b)**

**Introduction**

1. This determination relates to appeals made by Keystone Power Ltd (Keystone) against decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Units (CMUs):
  - a) KEYDT1
  - b) KEYDT2
  - c) KPFUP1
  - d) KPFUP2
2. This decision deals with all of the appeals listed above as they are substantively in respect of the same issue and differ only in so far as concerns the identity of the respective CMUs.
3. 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**

4. The appellant submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2017 T-4 Auction.

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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.

5. For each of the CMUs listed in Paragraph 1 NGET issued a Notification of Prequalification Decision dated 10 November 2017 (the “Prequalification Decision”). NGET Rejected all four of the CMUs on the following grounds:

*Capacity Market Rule 3.4.3 states, each Applicant must specify in the Application: the CMU to which the Application relates (including a description of CMU, the full postal address with postcode, correctly formatted and Ordnance Survey grid references. However, the location specified by the postcode does not correspond to the location specified by the OS Grid Reference.)*

6. NGET also rejected the CMUs KPFUP1 and KPFUP2 on the following grounds:

*Capacity Market Rule 3.5.2 states, the following options are applicable for “Method used to calculate the Connection Capacity” for the application type:-*

- All CMU – Historic Output
- Distribution CMU - Unit Reg. Capacity
- Distribution CMU - MEC Pro-rota [sic]

*However, the incorrect option has been selected for this application type.*

7. The appellant submitted a request for reconsideration of the Prequalification Decisions on 21 November 2017.

8. NGET issued a letter to Keystone on 01 December which rejected the dispute on the following grounds:

*the Delivery Body does not consider this correspondence to constitute a compliant request to the Delivery Body to review a delivery body reviewable decision under*

*Regulation 69 of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”) for the following reasons:*

- *Regulation 69(1) states that “An affected person may request the Delivery Body to review a delivery body reviewable decision.”*
- *Regulation 69(2) states that the request must –*
  - (a) Be submitted in writing to the Delivery Body within 5 working days after receiving notice of the decision; and*
  - (b) Include each of the matters specified in sub-paragraphs (a) to (e) of regulation 70(3)*
- *Regulation 70(3) states that an appeal notice must contain –*
  - (a) a concise statement identifying the relevant part of the delivery body reviewable decision in dispute;*
  - (b) a concise statement of the facts on which the affected person relies;*
  - (c) a summary of the grounds for disputing the delivery body reviewable decision;*
  - (d) a succinct presentation of the arguments supporting each of the grounds for dispute; and*
  - (e) a schedule listing the documents submitted with the appeal notice.*
- *The Applicant was given notice by the Delivery Body of the Prequalification Decision via an email notice notifying the Applicant to log in to the EMR Delivery Body Portal to view the decision. This notice was sent to the Applicant on Friday 10th November after 17:00.*
- *The Delivery Body subsequently extended the deadline for submission of requests to review a delivery body reviewable decision under Regulation 69 from the previous deadline of Friday 17 November to Monday 20 November at 17:00 in order to accommodate the time period for request submissions set out in Regulation 69(2).*

- *The Applicant did not submit a request to review a delivery body reviewable decision in writing by 17:00 on Monday 20th November.*
- *The Applicant submitted an email on Tuesday 21 November stating disagreement with the prequalification decision for KPFU1, KPFU2, KEYDT1 and KEYDT2. This e mail to the Delivery Body was not compliant with Regulation 69(2)(a), 69(2)(b) or Rule 1.6 which requires all submissions to be made via the EMR Delivery Body Portal.*

9. The appellant then submitted appeal notices for KEYDT1, KEYDT2, and KPFUP1 to the Authority on 8 December 2017 under Regulation 70(1) of the Regulations. The appeal notice for KPFUP2 was received on the next Working Day on 11 December 2017 as it was submitted after the 5pm deadline on 8 December 2017. Rule 1.4.1 states that where “anything is to be done under the Rules” on a Working Day, it must be done by 5pm and if it is done after 5pm, “it is to be treated as having been done on the next following Working Day.”
10. The appellant sent a letter to the Authority on 22 December 2017 further setting out its case. This letter provided no new information relevant to the appeal notices submitted on 8 December 2017.

### **Keystone’s Grounds for appeal**

11. Keystone disputes the decision on the following grounds.

#### **Ground 1**

12. Keystone claims that “[t]he emails of 10<sup>th</sup> November (an example of which, DOC 2, relates to KPFU1 and KPFU2) do not constitute notices of the Delivery Body’s Pre-Qualification Decisions; they merely informed the Applicant that a notice of the Delivery Body’s decision was available on the EMR Portal.”

### Ground 2

13. Keystone claims that “[t]he deadline to which the Delivery Body refers is irrelevant because it does not relate to the notice given to the Applicant. That notice was only given once the Applicant had successfully accessed the Delivery Body’s decision on the EMR Portal.”

### Ground 3

14. Keystone claims that “[i]t is irrelevant that the Applicant did not submit a request to review a Delivery Body reviewable decision in writing by 17:00 on Monday 20th November for the reasons given in response to ground 2 above.”

### Ground 4

15. Keystone claims that:

*“[a]s the Delivery Body closed down the functionality on the EMR Portal for the notification of review requests after the expiry of the deadline arbitrarily imposed by it on all Applicants as set out in Ground 2 (or the functionality was otherwise unavailable) it was impossible to notify the Delivery Body of the request via the EMR Portal, as that term is commonly understood. Firstly, the Regulations cannot be properly interpreted as allowing the Delivery Body to refuse to accept requests for reviews of its decisions by disabling functions on the EMR Portal (as the Delivery Body appears to understand that term in its statement of Ground 4). Secondly, according to the definition of EMR Delivery Body Portal in the Capacity Market Rules, the EMR Delivery Body Portal includes the Delivery Body’s own email system. In the absence of the necessary functionality on the IT system commonly referred to as the EMR Portal, notification by email satisfies the requirements of Regulations 69(2)(a) that the notice be in writing, and Rule 1.6 that it be sent by the EMR Delivery Body Portal.”*

### 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. Regulation 69 sets out that appellants may request reconsidered decisions by the Delivery Body and 69(2) in particular sets out the process by which they may do so:

*69(2) The request must --*

*(a) be submitted in writing to the Delivery Body within 5 working days after receiving notice of the decision; and*

*(b) include each of the matters specified in sub-paragraphs (a) to (e) of regulation 70(3).*

20. Regulation 69(4) sets out that:

*69(4) The Delivery Body must, within 5 working days after receiving a request which does not comply with paragraph (2), give notice to the affected person that the request is rejected as not complying with that paragraph, and give the reason why.*

21. Regulation 70(1) sets out that:

*70 (1) 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; or*

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

22. Regulation 70(2) sets out that:

*70 (2) An appeal under paragraph (1) must be made by submitting an appeal notice to the Authority within 5 working days after the date on which the affected person received the notice from the Delivery Body under regulation 69(3) or (4).*

23. Regulation 70(5) sets out that:

*70(5) Where a request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2), the affected person may submit evidence to the Authority that the request did comply with that regulation.*

24. Regulation 71(7) sets out that:

*71(7) If the Authority determines that the Delivery Body incorrectly rejected a request for reconsideration of a decision as mentioned in regulation 70(5)—*

*(a) the Authority must remit the request to the Delivery Body and direct the Delivery Body to reconsider the decision in accordance with regulation 69; and*

*(b) the Delivery Body must comply with the direction.*

25. Rule 1.4.1 of the Capacity Market Rules sets out that:

*a) where anything is to be done under the Rules or a Capacity Agreement by or not later than a Working Day or any period is to run to a Working Day, such thing may be done or such period must run up to 1700 hours on such Working Day; and*

*(b) where anything which is to be done on a Working Day is done:*

*(i) after 1700 hours on a Working Day, or*

*(ii) on a day which is not a Working Day,*

*it is to be treated as having been done on the next following Working Day.*

26. Rule 1.6.1 of the Capacity Market Rules sets out that:

*1.6.1 All notices, submissions and other communications by, or to, the Delivery Body pursuant to the Regulations or the Rules must be in writing and:*

*(a) where pursuant to Rule 5.6 or Rule 5.10, submitted via the IT Auction System;  
and*

*(b) for all other purposes, submitted via the EMR Delivery Body Portal.*

27. Rule 1.6.3 of the Capacity Market Rules sets out that:

*1.6.3 Neither the Delivery Body nor the Auctioneer has any obligation to respond to, or otherwise act upon, any notice, submission or other communication received by it other than in accordance with Rule 1.6.1 or Rule 1.6.2 (as applicable) which it will be deemed not to have received for any purposes under the Regulations or the Rules.*

### **Our Findings**

28. The Authority notes that under Regulation 69(4), NGET had an obligation to give notice to



the appellant rejecting the Request for Reconsideration where it does not comply with Regulation 69(2). NGET issued its decision on this matter on 1 December 2017, instead of 28 November 2017. This delay by NGET does not, however, prejudice the appeal made by the appellant to the Authority as the appellant has submitted three of its appeals to the Authority within the five Working Day window beginning when NGET issued the decisions.

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

Grounds 1, 2, and 3

30. Keystone contended that the emails of 10<sup>th</sup> November instructing applicants to log in to the EMR Delivery Body Portal to check their Prequalification Decision do not constitute notices of Prequalification Decisions, that the window for submitting a Request for Reconsideration did not open until the EMR Delivery Body Portal had been accessed, and that as a result it is irrelevant that the submission of Requests for Reconsideration for the relevant CMUs in paragraph 1 was not completed until after NGET's deadline.
31. The appellant has admitted that the emails were received on 10<sup>th</sup> November but Keystone's Authorised User "did not treat logging into the EMR Delivery Body Portal as Authorised User for Keystone Power as a priority". Instead, he "eventually logged on to the EMR Portal as Authorised User for Keystone Power on 20<sup>th</sup> November at approximately 5.30 pm."
32. Rule 1.6.1 requires all notices, submissions, or other communications by NGET to be through the EMR Delivery Body Portal. To alert applicants that such a notice, submission, or other communication has been uploaded by NGET, an alert email is sent. The Delivery Body appropriately supplied the sufficient Notifications of Prequalification on 10<sup>th</sup> November by the same means to Keystone as to all other applicants and Keystone has acknowledged emails stating that "*[t]he Pre-Qualification Application results for the following CMUs can be found by clicking on the following links ... If you wish to dispute any of these results in accordance with the Capacity Market Regulations you may do so by logging on to the EMR system.*"

33. The fact that the Authorised User for the Keystone CMUs did not log in and did not confirm these CMUs' Prequalification status is irrelevant. We therefore find that the window during which the applicant could submit a Request for Reconsideration pursuant to regulation 69 commenced at 5pm on 10<sup>th</sup> November.
34. The window to submit such an appeal would therefore have closed at 5pm on 17<sup>th</sup> November, but due to IT issues NGET extended this window to 5pm on 20<sup>th</sup> November. Despite this extension, the applicant did not submit a Request for Reconsideration pursuant to regulation 69 until 21<sup>st</sup> November. Therefore, Keystone's Request for Reconsideration was not submitted to NGET until the deadline had elapsed and NGET was correct on these grounds not to consider it.

#### Ground 4

35. Keystone claims that the Request for Reconsideration submitted to NGET on 21<sup>st</sup> November was submitted in the correct form and in compliance with Regulation 69(2).
36. NGET suspended access to the EMR Portal on the closure of the window at 5pm on 20<sup>th</sup> November. Keystone therefore submitted its Request for Reconsideration by email to NGET.
37. Although Rules 1.6.1 and 1.6.3 require all notices, submissions, and documents by or to NGET to be through the EMR Delivery Body Portal, the unavailability of the Portal means it was not possible for Keystone to fulfil this requirement. Regulation 69(2)(a) requires the Request for Reconsideration to be submitted in writing to NGET. We therefore find that the Request for Reconsideration was submitted in compliance with regulation 69(2)(a).

#### Conclusion

38. NGET reached the correct reconsidered decision to not review the Requests for

Reconsideration submitted by Keystone for the CMUs KEYDT1, KEYDT2, and KPFUP1 for the T-4 Auction on the basis that the submissions were made by Keystone after the window for submissions had closed.

39. The appeal notice for KPFUP2 was submitted after the 5pm deadline on 8 December 2017 and is therefore rejected by the Authority. However, the grounds for this appeal were the same as for the other three CMUs and the Authority would have come to the same conclusion.

### **Determination**

40. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's decision to not review the Requests for Reconsideration submitted by Keystone was correct.



Mark Copley

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

12 January 2018