

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 Leaffield Energy Limited (the “appellant”) against reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Units (CMUs):
 - a) Leaffield Energy Storage (LEAF18) 2018 T-1
 - b) Leaffield Energy Limited (6LEA18) 2018 T-1
 - c) Leaffield Energy Limited (14LE18) 2018 T-1
 - d) Leaffield Energy Storage (LEAF21) 2021 T-4
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 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 CMUs LEAF18, 6LEA18 and 14LE18 in Paragraph 1 in respect of the 2018 T-1 Auction, and CMU LEAF21 in Paragraph 1 in respect of the 2018 T-4 Auction.

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.

5. NGET issued Notification of Prequalification Decisions dated 10 November 2017 (the “Prequalification Decision”). NGET Rejected these CMUs for the T-1 and T-4 auctions on the following grounds:

“The Certificate of Conduct was not submitted for this Application in accordance with Capacity Market Rule 3.12.4, which states Each Application must be accompanied by a Certificate of Conduct signed by two directors of the Applicant. The Certificate of Conduct is defined in 1.2 as Exhibit C and must be signed by two directors. The Certificate of Conduct with the application has been submitted with deleted content; the second page of the Prequalification Certificate has been submitted instead of page 2 of the Certificate of Conduct.”

6. The appellant submitted requests for reconsideration (a “Tier 1 dispute”) of the Prequalification Decisions to NGET before the deadline of 20 November 2017.
7. NGET issued Notices of Reconsidered Decision on 1 December 2017 which rejected each dispute on the following grounds:

“We have reviewed your dispute and maintain that the original Delivery Body prequalification decision still stands, in accordance with Capacity Market Rule 3.12.4 which states Each Application must be accompanied by a Certificate of Conduct signed by two directors of the Applicant. The Certificate of Conduct is defined in 1.2 as Exhibit C and must be signed by two directors. The Certificate of Conduct with the application has been submitted with deleted content; the second page of the Prequalification Certificate has been submitted instead of page 2 of the Certificate of Conduct.”

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

Leaffield Energy Limited's Grounds for appeal

9. Leaffield Energy Limited disputes the Reconsidered Decisions on the following six grounds:

Ground 1

10. The appellant's first ground is that the incorrectly scanned Exhibit C was a clear error and the error had been corrected during Tier 1. According to the appellant, NGET had the necessary information at Tier 1 to conclude that Exhibit C had been signed correctly.

Ground 2

11. The appellant's second ground is that NGET was in possession of all necessary material to conclude that a Tier 1 appeal should have been successful.
12. To support its statement that, at the time of the Tier 1 appeal, NGET had the information necessary to verify that Exhibit C had been approved by two directors, the appellant explains that the relevant words had been supplied to NGET (partly in the uploaded form and partly in the dispute material) and that they had been signed off by the Directors. This is because the same Directors had provided a letter to NGET that they had in fact signed the letter (the clarification letter provided during Tier 1).

Ground 3

13. The appellant's third ground is that, following NGET's advice, it did not supply the correct Exhibit C during Tier 1 to correct the identified mistake in the Prequalification Decision. The appellant claims that, if NGET's advice had been to supply the correct Exhibit C, it would have done so to support its Tier 1 appeal and would have been able to correct the clerical mistake.

Ground 4

14. The appellant's fourth ground is that the advice NGET gave ahead of Tier 1 was confusing as to what should and should not be provided in the request for reconsideration and that,

consequently, it did not submit the information which would have allowed it to demonstrate that the certificate had been signed appropriately.

15. According to the appellant, in a surgery appointment on 13 November 2017 NGET verbally agreed that the error in Exhibit C was a clerical mistake, and that the appellant would be able to resolve this with a clarification letter.
16. Further to this surgery appointment, the appellant stresses that NGET clarified through an email sent on 15 November 2017 its position on mistakes in different Prequalification Certificates.
17. The subsequent advice from NGET, dated 16 November 2017, was that it would not accept new Exhibits as part of a Tier 1 dispute.
18. The appellant explains that, as a result of this advice, it did not submit further information that would have demonstrated that the certificate was signed appropriately. The appellant states that it would have otherwise provided minutes from a board meeting that took place in September 2017, thus demonstrating that the Exhibit C had been correctly signed.

Ground 5

19. The appellant's fifth ground asks the Authority to make the same decision for this appeal as a previous determination, where the Authority would have accepted a clerical error as a ground to overturn a Tier 1 decision.
20. The appellant states that the grounds for their appeal are similar to the grounds raised in the that appeal case, namely that:
 - a) there had been an administrative error; and
 - b) the appellant was aware of the obligations since it had prequalified units in the previous years.

Ground 6

21. In its sixth ground, the appellant suggests that not prequalifying a demonstrated provider as a result of simple clerical error is not a proportionate application of the Capacity Market Rules, especially as the objective of those rules is to incentivise the delivery of new capacity.

The Legislative Framework

22. 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.
23. 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.
24. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
25. 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

26. Rule 1.2 defines the Certificate of Conduct as follows:

“Certificate of Conduct means a certificate of conduct in the form set out in Exhibit C.”

27. Rule 3.12.4 outlines that each Prequalification Application must be accompanied by an Exhibit C:

“Each Application and each Opt-out Notification must be accompanied by a Certificate of Conduct signed by two directors of the Applicant or the person submitting the Opt-out Notification (as applicable).”

28. Rule 4.4.2 outlines the circumstances in which NGET must not prequalify a CMU:

“4.4.2 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

29. We have assessed each of Leaffield Energy Limited’s grounds for appeal, which are set out below.

Grounds 1 and 2

30. The appellant’s first and second grounds are assessed together as they relate to the same arguments, namely that (i) the incorrectly scanned Exhibit C pertains to a clerical mistake; and (ii) that NGET had the necessary information at Tier 1 to conclude that Exhibit C had been signed correctly.

On whether there is a clerical mistake

31. With its Reconsidered Decision, NGET upheld its Prequalification decision as the Certificate of Conduct was submitted with deleted content and the second page of the Prequalification Certificate had been submitted instead of the second page of the Certificate of Conduct.

32. Rule 3.12.4 requires the Applicant to submit a Certificate of Conduct (Exhibit C). The purpose of the completed Exhibit C document is to confirm that the applicant has complied with the conduct requirements set by the Capacity Market Rules.
33. The Exhibit C requires the Applicant to fill in the name of the company, the registered number and two director signatures. The rest of the document is standard with no possibility to amend the terms of the Exhibit.
34. The appellant provided a document, in place of Exhibit C, that consisted of two different certificates combined together. This document cannot be considered to be Exhibit C. The clerical mistake therefore does not pertain to a data input error but to a missing document.

On whether NGET could conclude that the Exhibit C had been correctly signed

35. The appellant argued that it did provide the relevant information of the Exhibit C, in part with the Prequalification Application and in part with the Tier 1 dispute material (clarification letter submitted by company Directors).
36. The Exhibit C is a prequalification prerequisite outlined in the CM Rules. The information contained within the Application for Prequalification does not reach the objective of the Exhibit C, ie to prove that two Directors of the appellant confirm that the appellant has complied with the conduct requirements set by the Capacity Market Rules.
37. The information contained in the Tier 1 dispute material, ie the clarification letter dated 20 November 2017 and signed by two of the appellant's Directors, states that the two Directors had correctly completed and signed all the relevant application documents prior to uploading the to the application website.
38. Whereas the clarification letter demonstrates the good will of the appellant's Directors, it does not establish with certainty that the Exhibit C had been duly filled in and signed by the two Directors ahead of the submission of the application. We therefore consider that the

appellant has not submitted the relevant Certificate of Conduct, that the certificate should be considered missing and that the information contained in the remainder of the application or in the Tier 1 dispute material could not allow NGET to conclude that Exhibit C had been signed correctly.

39. We therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.12.4 and in deciding not to prequalify the CMU.

Grounds 3 and 4

40. The appellant states that NGET's advice on the information to be submitted by applicants at Tier 1 was confusing and that, as a result, the appellant did not submit additional information that would otherwise have further demonstrated that Exhibit C was signed appropriately.
41. The appellant states that the clerical mistake with the Exhibit C could have been rectified if it had provided a corrected Exhibit C during Tier 1 but that NGET advised them not to submit the corrected documents.
42. Based on the evidence we have seen, we do not agree that NGET's advice on this matter was confusing. In particular, NGET sent an email on 16 November 2017 stating that NGET would not accept new Exhibits as part of a Tier 1 dispute and that:

“if the reason for rejection in your Application relates to missing or erroneous signatures on an Exhibit, it is unlikely that you will be able to resolve this issue because it is a material part of your prequalification submission”.

43. We finally note that, in accordance with Regulation 69(5), when reconsidering a prequalification decision, NGET must not take into account any information which the appellant was required to provide in its application and that it failed to provide.

Consequently, even if the appellant had submitted an Exhibit C to the NGET in the Tier 1 Dispute material, NGET would not have been able to take it into account.

44. As above, we therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.12.4 and in deciding not to prequalify the CMU.

Ground 5

45. The Appellant refers to a 2016 Tier 2 determination in which, they argue, the Authority accepted a clerical error as a ground to overturn a Tier 1 decision. To support its claim, the Appellant argues that in both situations i) there had been an administrative error; and (ii) that the Appellant was aware of the obligations since it had prequalified units in the previous years.
46. The Authority must consider each Appeal according to its own merits and we therefore do not consider this ground to have merit. However, for completeness, we note that are significant differences between the two Appeals, not least that in 2016, Regulation 69(5) had been suspended. This meant that at that time, NGET was able to accept and take into account, at Tier 1, additional information or evidence which the appellant was required to provide in its original application but had failed to do so, when making their Reconsidered Decision.
47. As above, we therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.12.4 and in deciding not to prequalify the CMU.

Ground 6

48. In its sixth ground, the appellant suggests that not prequalifying a demonstrated provider as a result of simple clerical error is not a proportionate application of the Capacity Market

Rules, especially as the objective of those rules would be to incentivise the delivery of new capacity.

49. As highlighted in Regulation 27, the purpose of the capacity market regulations is to provide capacity to meet demands of consumers for the supply of electricity in Great Britain. There is therefore no absolute objective to deliver new capacity but a relative objective to deliver new capacity when the latter is necessary to meet demand of consumers.
50. We furthermore consider that the rejection of an application for which an essential exhibit is missing is proportionate, even though the absence of such exhibit is the result of a clerical error on the appellant's behalf.
51. As above, we therefore consider that NGET was correct in considering that the Application had not been completed in accordance with the Rule 3.12.4 and in deciding not to prequalify the CMU.

Conclusion

52. NGET reached the correct reconsidered decision to not prequalify the CMUs listed in paragraph 1 for the T-4 Auction and T-1 Auction, as applicable, on the basis that:
 - a) The Certificate of Conduct required under Capacity Market Rule 3.12.4 was not provided with the application. In accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take in consideration any information or evidence which the appellant was required to and failed to produce before the decision was taken; and
 - b) NGET, consequently, was correct to not allow the appellant to prequalify in accordance with Rule 4.4.2(a).

Determination

53. 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.

A handwritten signature in black ink, appearing to read 'Julian Roberts', with a stylized flourish at the end.

Julian Roberts

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018