

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 STOR 114 Ltd, STOR 128 Ltd and STOR 129 Ltd, subsidiaries of 'STOR Power Ltd' (the "appellants") against reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc ("NGET" or the "Delivery Body")) in respect of the following Capacity Market Units (CMUs):
 - a) SPOW14
 - b) SPOW28
 - c) SPOW29
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 appellants submitted an application for Prequalification for the CMUs 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. 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 the CMUs on the following grounds:

The Secondary Trading details were not provided with this Application in accordance with Capacity Market Rule 3.4.1 (c) (ii), which states each Applicant must provide an email address and telephone number that can be used by a person wishing to discuss secondary trading in relation to the CMU which is the subject of the Application.

In accordance with Capacity Market Rule 3.7.3(b)(ii), you are required to provide the connection offer (with evidence of acceptance) you have with the Distribution Network Operator. Although the connection offer has been submitted in your application, there is no evidence of acceptance of such connection offer provided in your application nor, where such evidence is not available, is there written confirmation from the Distribution Network Operator that such connection offer is in effect.

The appellant submitted a request for reconsideration of the Prequalification Decision before 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:

“The Delivery Body has reviewed your dispute and have maintained our decision in accordance with Capacity Market Rule 3.7.3(b)(ii) whereby you are required to provide the connection offer (with evidence of acceptance) you have with the Distribution Network Operator.

We acknowledge that you have provided proof of payment for the connection acceptance however there is no reference number or specific site address linking this invoice to the connection offer provided in your original application.

For clarity the Delivery Body requires that there is a signed acceptance letter for your connection agreement in accordance with Capacity Market Rule 3.7.3(b)(ii). As there was no evidence of signed acceptance of the connection offer provided in your original application nor written confirmation from the Distribution Network Operator that such connection offer is in effect, the Delivery Body maintains that the correct decision was made during the assessment of your application.

We acknowledge and accept submission of your secondary trading details as required by CM rule 3.4.1(c)(ii). In order to preserve data integrity, we request that you update these details in the Companies section of the Portal, no later than 1st Feb 2018. Please note that you will not be able to participate in secondary trading if these details are not updated in the correct section of the CM Portal. Further guidelines on this can be found in our guidance document.”

8. The appellants then submitted an Appeal Notice to the Authority on 8 December 2017 under Regulation 70 of the Regulations.

The appellants’ Grounds for appeal

9. We have considered all the issues raised in the Appeal Notice, however, the substantive grounds of challenge and to which we respond in this document are as follows:

Ground 1

10. The appellants argue that Rule 3.7.3(b)(ii) states that the applicant must have provided the ‘connection offer (with evidence of acceptance)’ and does not expressly state that such evidence should be in the form of a signed acceptance letter. Therefore, in accordance with

Rule 3.7.3(b)(ii), the appellants allege that they provided 'evidence of acceptance' of the grid connection with the application which the Delivery Body failed to consider. The appellant argues that it provided proof of acceptance as follows:

- a) in the form of a letter of agreement which was signed after acceptance of the grid connection offer. In each case, the letter states that the parent company (STOR Power Ltd) will novate the Grid Connection Agreement to STOR 114 Ltd, STOR 128 Ltd and STOR 129 Ltd. The appellants argue that the connection offer must have been accepted otherwise the signed Novation Undertaking would be invalid;
- b) by 'unticking' the box in the application electing to defer submission of the Distribution Entry Capacity supporting evidence (had the connection offer not yet been accepted, STOR 114 Ltd, STOR 128 Ltd and STOR 129 Ltd could simply have deferred submission of the evidence);
- c) through uploading the grid connection offer and Novation Undertaking, which would otherwise not have been required to be provided; and through Exhibit A to each application in which the directors of STOR 114 Ltd, STOR 128 Ltd and STOR 129 Ltd certified at (e) that they could correctly make the declarations in Rules 3.4 to 3.11, including Rule 3.7.3(b)(i) in relation to an accepted grid connection offer being in place.

11. In addition to the above, the appellants argue that in reconsidering its prequalification decision, the Delivery Body is also entitled to consider information or evidence which was not required to be provided to the Delivery Body before the decision was taken. STOR 114 Ltd, STOR 128 Ltd and STOR 129 Ltd included with their request for reconsideration by the Delivery Body, a copy of a stamped and paid invoice from Electricity North West Limited to the companies as evidence of acceptance of the grid connection offer:

"If the Delivery Body is correct that Rule 3.7.3(b)(ii) requires a copy of the grid connection offer acceptance to be provided, that that invoice is not something

which was required to be provided to the Delivery Body before the decision and so was something that the Delivery Body was entitled to take into account in the reconsideration. The Delivery Body has stated that there was no reference number linking the 'stamped as paid' invoice to the connection offer. That is correct, but the linkage between the connection offer and the invoice is clearly established by the following, which are stated in both documents:

- 1. the description "Aldon STOR"; and*
- 2. the price of stated on each invoice which is not a standard fee and is relevant to the specific asset."*

Ground 2

12. The appellants argue that the Delivery Body's decisions on Prequalification are public law decisions and it would be unreasonable and disproportionate to reject the application based on a minor administrative error.

The Legislative Framework

13. 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.
14. 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.
15. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
16. 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

17. Rule 3.7.3(b)(ii) requiring the provision of a Connection Agreement states that Applicants must:

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.

Our Findings

18. We have assessed the appellants' grounds for appeal, which are set out below.

Ground 1

19. The appellants' first ground for appealing the decision within each application was that Rule 3.7.3(b)(ii) does not expressly state that evidence of the acceptance of a connection offer should be in the form of a signed acceptance letter. On this basis, the appellants allege that evidence of acceptance could be found elsewhere in the application. It is the Authority's view that none of the points listed in the appellants' first ground adequately demonstrate evidence of the acceptance of a connection offer, as required under Rule 3.7.3 (b) (ii), for the following reasons:

- a) The letters provided showing that the parent company agrees to novate the Grid Connection Agreement does not confirm that the connection offer has been accepted, despite the contractual obligation that it imposes on the Connection Agreement holder.
- b) Electing not to defer the submission of evidence is not evidence that a connection offer has been accepted.
- c) Uploading the Novation Undertaking between the parent and subsidiary company is not proof that the connection offer has been accepted.
- d) A certification from the directors of the appellants that the company could correctly make the declarations in Rules 3.4 to 3.11 is not evidence that a particular connection offer has been accepted.
- e) The invoices provided did not have a reference number pertaining to the specific Connection Agreement or even the site address of the connection. These documents therefore do not sufficiently evidence the acceptance of a Connection Agreement.

20. Whilst the Authority recognises that it is possible to verify missing information from an application with information provided elsewhere in the same application, the Authority cannot determine that a Connection Agreement is in place if it is not clear from the

documentation itself. Rule 3.7.3(b)(ii) is clear that evidence of an accepted connection offer is needed, or written confirmation to that effect from the Distribution Network Operator.

21. The Authority therefore holds that none of the supporting documentation submitted by the appellants constitutes a Connection Agreement, a valid offer for a Connection Agreement with evidence of acceptance, or written confirmation from the relevant DNO that a Connection Agreement is in force or that a connection offer has been accepted. The requirements of Rule 3.7.3(b)(ii) are therefore not met and NGET was correct to not prequalify SPOW14, SPOW28 and SPOW29.

Ground 2

22. The appellant also claims that Delivery Body's decisions on Prequalification are public law decisions and it would be unreasonable and disproportionate to reject the application based on a minor administrative error. However, NGET's role as the EMR Delivery Body is constrained by the Capacity Market Rules and the Electricity Capacity Regulations. The information that it takes into account is strictly defined in Chapters 3 and 4 of the Rules, which set out the Prequalification requirements for Applicants and the processes NGET must take to consider applications.
23. The Regulations also establish the Request for Reconsideration as the means by which a prequalification decision can be reviewed. The opportunity to do so is constrained by the prohibition on new information or evidence as set out in Regulation 69(5). Giving the appellant an alternative means by which to correct errors in the initial application would place the appellant at an advantage and discriminate against other Applicants.
24. With regard to NGET's assessment of the Request for Reconsideration, the Authority believes that NGET has taken a reasonable and to the extent relevant a proportionate approach consistent with that offered to other applicants.

25. As stated above, the Authority believes NGET was correct not to prequalify SPOW14, SPOW28 and SPOW29. This is because no evidence of a Connection Agreement, a valid offer for a Connection Agreement with evidence of acceptance, or written confirmation from the relevant Distribution Network Operator that a Connection Agreement is in force or that a connection offer has been accepted were provided with the applications. Therefore NGET was correct to prevent the CMUs listed in paragraph 1 from prequalifying, for failing to comply with Rule 3.7.3(b)(ii).

Conclusion

26. NGET reached the correct reconsidered decision to not prequalify SPOW14, SPOW28 and SPOW29 for the T-4 Auction on the basis that evidence of the acceptance of the connection offer required under Capacity Market Rule 3.7.3(b)(ii) 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.

Determination

27. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body'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.



Emily Sam

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018