

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 Vigor Renewables Limited (Vigor) against reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (NGET) in respect of the following Capacity Market Units (CMUs):
 - a) SIDD01
 - b) SIDD02
2. This decision deals with the appeals in respect of both of the CMUs 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 the CMUs in Paragraph 1 in respect of the Capacity Auction for 2021/2022 (T-4).
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:

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.

“This application has not met the requirements of the Capacity Market rules to the following reason(s):

Capacity Market Rule 3.12.3 states, each Application must be accompanied by a Prequalification Certificate. The Prequalification Certificate is defined in CM Rule 1.2 as Exhibit A and must be signed by two directors. The Prequalification Certificate was not submitted for this Application.

Capacity Market Rule 3.12.4 states, each Application must be accompanied by a Certificate of Conduct. The Certificate of Conduct is defined in 1.2 as Exhibit C and must be signed by two directors. The Certificate of Conduct was not submitted for this Application.”

6. NGET issued a Notice of Reconsidered Decision, with respect to each CMU, on 1 December 2017 both of which rejected the disputes on the following grounds:

“We have reviewed your dispute and your application remains rejected. Our records show that your certificate of conduct and prequalification were uploaded into the CM Portal on 20 November 2017 which is past the prequalification application window”

7. The Appellant then submitted an appeal notice to the Authority on 8 December 2017 under Regulation 70 of the Regulations.

Vigor’s Grounds for appeal

8. Vigor disputes the decision on the following grounds.

Ground 1

9. The Appellant have appealed that a “clerical error” led to the exclusion of exhibits A and C - the Prequalification Certificate and the Certificate of Conduct.

10. The Appellant has accepted that the relevant Exhibits were not uploaded. However, they appeal on the basis that the documents were “*signed and dated*” appropriately and provided evidence that they “*had decided to pre-qualify the site*”. The Appellant questioned the decision to reject their request for reconsideration of the Delivery Body’s prequalification decision (Tier 1) on the basis that they had uploaded the appropriate document. The Appellant argues in their Appeal Notice that had they not uploaded the document, and instead made a director’s statement, they are of the belief that they might then have successfully passed through the tier one appeal.
11. The Appellant have advised in the Appeal Notice that they “*can cite a number of companies where the same director has successfully pre-qualified sites*”. This is to indicate that the error was a result of “*a clerical error*”.

Ground 2

12. The Appellant has appealed on the grounds that in a previous appeal to the Authority under Regulation 70 (Tier 2 appeal) which was determined by the Authority in 2016, the Authority had accepted a clerical error as grounds for setting aside a Tier 1 decision. The Appellant advised that the root of their own appeal lies in a clerical error and that they regard the situation to be similar.

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 3.12.3 provides:

Each Application must be accompanied by a Prequalification Certificate signed by two directors of the Applicant.

18. Rule 3.12.4 provides that:

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).

19. Rule 4.4.2(a) 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;*

- (aa) it reasonably believes that any information or declaration submitted in or with an Application does not comply with the requirements in Rule 3.12.1;*
(b) the required Additional Information is missing;

Our Findings

20. We have assessed each of Vigor's grounds for appeal and our assessment of each is set out below.

Ground 1

21. The Appellant claims that the Prequalification Certificate ("Exhibit A") and the Certificate of Conduct ("Exhibit C") for the CMUs listed in paragraph 1 (the "Exhibits") were not uploaded owing to a clerical error. In support of this, the Appellant states that the director who signed the Exhibits has already successfully pre-qualified a number of other companies.
22. The Appellant claims that NGET's Reconsidered Decision rejected the applications because they uploaded the Exhibits for the purposes of NGET's reconsideration. The Appellant says that this was a perverse reason for NGET to reject the applications. They say that if it had not uploaded the Exhibits, and had it made a director's statement instead, NGET's Reconsidered Decision might have been able to accept the applications.
23. Rule 3.12.3 and 3.12.4 provides that each application must be accompanied by the Exhibits. This was not the case for the applications for the CMUs in paragraph 1 above. 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. Therefore, pursuant to Rule 4.4.2(a), NGET was correct to not Prequalify the CMUs.

Ground 2

24. 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 that

(ii) the Appellant was aware of the obligations since it had prequalified units in the previous years.

25. The Authority must consider each Appeal according to its own merits and we therefore do not consider this ground to have any merit. However, for completeness, we note that there 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.

26. **Conclusion** NGET reached the correct reconsidered decisions to not prequalify SIDD01 and SIDD02 for the T-4 Auction on the basis that:

(a) The Appellant did not provide the Prequalification Certificate to NGET as specified in Rule 3.12.3.

(b) The Appellant did not provide the Certificate of Conduct to NGET as specified in 3.12.

Determination

27. 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.



Emily Sam

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018