

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 SmartestEnergy Ltd (“SmartestEnergy”) 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) SE1820 (T-1)
 - b) SE1820 (T-4)
 - c) SE1821 (T-1)
 - d) SE1821 (T-4)
 - e) SE1822 (T-1)
 - f) SE1822 (T-4)
2. This determination decision deals with a number of appeals made by SmartestEnergy and they are grouped and listed above into a single decision as they are substantively in respect of the same issue. They differ only in so far as concerns the identity of the respective CMUs. The findings of this determination will apply in respect of each reconsidered decision made by the Delivery Body.
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.

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.

Appeal Background

4. The appellant submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the one year ahead Capacity Auction for 2018/2019 (T-1) and the four year ahead Capacity Auction for 2021/2022 (T-4) and sought capacity agreements of various duration. This determination deals exclusively with those prequalification decisions relating to the particular CMUs set out in paragraph 1 and specifically in respect of the particular auction identified in paragraph 1 *in parenthesis*.
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:

"Capacity Market rule 3.2.5 states, the Despatch Controller may be the Applicant with respect to an Existing Generating CMU provided that an Applicant Declaration is submitted with the relevant Application signed by:

(a) two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU; and

(b) two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Existing Generating CMU.

The Applicant Declaration is defined in Capacity Market rule 1.2 as Exhibit D. One of the Directors signatures on your Applicant Declaration cannot be verified with Companies house due to illegibility. Capacity Market rule 3.2.7 states, the Despatch Controller (or, in the case of a Prospective CMU, the person who will be the Despatch Controller) must be the Applicant with respect to a Generating CMU and the following declarations must be submitted with the relevant Application:

(a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Generating CMU; and

(b) a Legal Owner Declaration in respect of each Generating Unit comprised in that Generating CMU signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of the relevant Generating Unit.

Aggregator Declaration is defined in Capacity Market rule 1.2 as Exhibit F. The Aggregator Declaration has not been provided with this Application. If this application had met the requirements for Prequalification, there would be credit cover requirement (which has been stated in the T-4 application letter for this CMU) for the following reasons: Financial Commitment Milestone: As per Capacity Market rule 6.6, the Financial Commitment Milestone has not been achieved; Deferred Distribution Connection Agreement: As per Capacity Market rule 3.7.3(c), Distribution Connection Agreement has been deferred; Deferred Planning Consents: As per Capacity Market rule 3.7.1(a)(ii), Planning Consents have been deferred.”

6. The appellant submitted a request for reconsideration of the Prequalification Decisions on 20 November 2017.
7. NGET issued a Notice of Reconsidered Decision on 01 December which rejected the dispute on the following grounds:

“Item 1: We have accepted this part of the dispute raised and acknowledge the power of attorney supplied in support of the signature provided on the certificate.

Item 2: The Aggregator Declaration has not been provided with this Application as per Capacity Market Rules 3.2.7 and 3.2.9. Aggregator Declaration is defined in

Capacity Market Rule 1.2 as Exhibit F. An Applicant Declaration has been uploaded as a Despatch Controller as per Capacity Market Rule 3.2.5 which is not relevant to a new build CMU application. We therefore are unable to overturn the Prequalification Decision as requested within your dispute.”

8. The appellant then submitted an appeal notice to the Authority on 08 December 2017 under regulation 70 of the Regulations.

SmartestEnergy’s Grounds for appeal

9. SmartestEnergy disputes the decision on the following grounds.

Ground 1

10. The Appellant states that SmartestEnergy applied as an ‘Applicant’ and not as an ‘Aggregator’, therefore the Aggregator Declaration form and Rules 3.2.6 and 3.2.7 are not relevant to their application;

“This accords with our understanding of what aggregation is i.e. that there are more than one generating unit and/or those units are in the legal ownership of more than one person.

We are applying for pre-qualification for a Generating CMU (New Build) comprising of a single generating unit under single legal ownership and we therefore considered that this fell within the Applicant Declaration option.

There is no Aggregation of multiple assets and/ multiple ownership within this application and therefore we submit that this falls within the definition of Applicant.

The Capacity Market Rule 3.2.7 does not apply as this is reliant on the terms of Capacity Market Rule 3.2.6 being valid.”

Ground 2

11. Furthermore, SmartestEnergy supports that the terminology presented and relied upon in the Prequalification Guidance and the Capacity Market Rules are conflicting.
12. Fundamentally the declarations contained in Exhibit D and Exhibit F are the same and have the same effect.

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. Chapter 3 of the Capacity Market Rules sets out the process for applying to prequalify in order to participate in a Capacity Market auction. It stipulates how the application must be submitted and the information that is to be provided within and accompanying the Application (as defined in Rule 1.2).

18. Rule 3.2.1 states that there must be one Applicant in accordance with the Rule 3.2;

“There must be one Applicant only with respect to any CMU as determined in accordance with this Rule 3.2.”

19. Rule 3.2.3 states that the Applicant for a Generating CMU must be:

“the person that is, or in the case of a Prospective Generating CMU will be, the legal owner of each Generating Unit comprised in that CMU.”

20. CM Rules 3.2.4 to 3.2.9 set out a number of exceptions to the default rule set out in CM Rule 3.2.3. Each rule sets out the criteria and then the consequential declaration that is required to be submitted to the Delivery Body. These are situations in which a person other than the legal owner of the Generating Units (namely the Despatch Controller) may, or must be, the Applicant.

21. Rule 3.2.5 applies where:

(a) an Existing Generating CMU comprises a Generating Unit or a number of Generating Units;

(b) all such Generating Units are within the legal ownership of the same person;
and

(c) the Despatch Controller with respect to each Generating Unit comprised in that

Existing Generating CMU is a person other than the legal owner.

Where this Rule 3.2.5 applies, the Despatch Controller may be the Applicant with respect to an Existing Generating CMU provided that an Applicant Declaration is submitted with the relevant Application signed by:

(a) two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU; and

(b) two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Existing Generating CMU.

22. Rule 3.2.6 states the cases where Rule 3.2.7 applies;

(a) a Generating CMU comprises a number of Generating Units with a Connection Capacity totalling no more than 50 MW;

(b) legal ownership of such Generating Units is or, in the case of a Prospective CMU, will be vested in more than one person; and

(c) Despatch Control with respect to each Generating Unit comprised in that Generating CMU rests or, in the case of a Prospective CMU, will rest with a single Despatch Controller (who may also be the legal owner of one or more of the Generating Units comprised in such Generating CMU).

Where Rule 3.2.7 applies, the Despatch Controller (or, in the case of a Prospective CMU, the person who will be the Despatch Controller) must be the Applicant with respect to a Generating CMU and the following declarations must be submitted with the relevant Application;

(a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit

comprised in that Generating CMU; and

(b) a Legal Owner Declaration in respect of each Generating Unit comprised in that Generating CMU signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of the relevant Generating Unit.

23. Rule 3.2.9 applies where:

(a) a Prospective Generating CMU comprises a Generating Unit or a number of Generating Units with a Connection Capacity totalling no more than 50MW;

*(b) all such Generating Units are within the legal ownership of the same person;
and*

(c) the Despatch Controller with respect to each Generating Unit comprised in that Prospective Generating CMU is a person other than the legal owner.

Where this Rule 3.2.9 applies, the Despatch Controller must be the Applicant with respect to a Prospective Generating CMU and the following declarations must be submitted with the relevant Application:

(a) an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Prospective Generating CMU; and

(b) a Legal Owner Declaration in respect of each Generating Unit comprised in that Prospective Generating CMU signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of the relevant Generating Unit.

24. Relevant definitions regarding the terms “Despatch Control” and “Despatched Controller” are stated in Rule 1.2;

“Despatch Control means, for a Generating CMU, control exercised by a person over whether or not the Generating Unit(s) comprised in that Generating CMU generate(s) in a Settlement Period, provided that a person does not cease to have Despatch Control by:

(a) contracting with another person for the service of operating the Generating Unit(s);

(b) contracting with another person to supply electricity in a Settlement Period;

(c) in the case of a CMRS CMU, agreeing that another person may be the BM Responsible Party under the BSC; or

(d) entering into a Balancing Services Contract with the System Operator”

“Despatch Controller means, for a Generating CMU, the person exercising Despatch Control with respect to each Generating Unit comprised in that Generating CMU.”

25. Relevant definitions regarding the Forms are also stated in the Rule 1.2;

“Aggregator Declaration means a declaration in the form set out in Exhibit F”

“Applicant Declaration means an applicant declaration in the form set out in Exhibit D”

“Legal Owner Declaration means a declaration in the form set out in Exhibit G”

Our Findings

26. 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

27. The appellant’s first ground was that the rejection of the application on the basis that Exhibit F was not provided is unreasonable as SmartestEnergy applied as an ‘Applicant’ and

not as an 'Aggregator', therefore the Aggregator Declaration form and Rules 3.2.6 and 3.2.7 are not relevant to its application.

28. Rule 3.2.3 states that the Applicant for a Generating CMU must be the "person that is, or in the case of a Prospective Generating CMU will be, the legal owner of each Generating Unit comprised in that CMU", setting the general 'default' rule. Rules 3.2.4 to 3.2.9 set out the three exceptions to the default rule with each rule setting also out the criteria and the consequential declaration that is required to be submitted to the Delivery Body.
29. Rules 3.2.4 to 3.2.5 relate to an "Existing" Generating CMU with one or a number of Generating Units with one owner, and a different Despatch Controller, with the Despatch Controller being logically different to the legal owner. According to 3.2.5 the Despatch Controller is the Applicant as defined in Rule 1.2. Therefore, there is one form for a Despatch Controller and a legal owner, and this is Exhibit Form D.
30. Rules 3.2.6 to 3.2.7 deal with a Generating CMU comprising a number of Generating Units with a total capacity of no more than 50 MW. These can be a Prospective or Existing Generating CMU with more than one owner and one Despatch Controller. Rules 3.2.6 and 3.2.7 apply to both "Existing" and "Prospective" Generating CMUs. Since there are multiple owners, two Exhibit Forms, F (Form Of Aggregator Declaration) and G (Form Of Legal Owner Declaration), are required.
31. Rules 3.2.8 and 3.2.9 have introduced a new exception to the default rule in Rule 3.2.3, which effectively replicates the exception in Rules 3.2.4 and 3.2.5 but for Prospective Generating CMUs rather than Existing Generating CMUs, and, with the difference that (as in Rules 3.2.6 and 3.2.7), Exhibit F and Exhibit G, rather than Exhibit D, are required.
32. By comparing Rules 3.2.8 to 3.2.9 (**Prospective** Generating CMU and one or a number of Generating Units and one owner and different Despatch Controller) to Rules 3.2.4 to 3.2.5 (**Existing** Generating CMU and one or a number of Generating Units and one owner and different Despatch Controller), the substantive difference is the term "Existing" and

“Prospective”. The other difference is the reference to a “Connection Capacity totalling no more than 50 MW”. However, the reference to capacity is not relevant to the discussions of this specific case.

33. Therefore, the main difference is that for Existing Generating CMUs, Rules 3.2.4 and 3.2.5 require only the one form (Exhibit Form D) to be submitted. For Rules 3.2.8 and 3.2.9, there are the Aggregation Declaration and separate Legal Owner Declaration.
34. Rule 3.2.9 is explicit about what declarations must be submitted however the rule does not specifically reference Exhibit Forms F and G , rather it sets out that in the case of a Prospective Generating CMU, there must also be a Legal Owner Declaration Form (Exhibit G), in addition to an Aggregator Declaration (Exhibit Form F). Form D (the form that the Applicant submitted) identifies itself as “Applicant Declaration”. Nevertheless, this form includes both declarations required by Rule 3.2.9, i.e. a declaration from the Legal Owner and one from the Aggregator. In this case, the Applicant and the Aggregator are one and the same and substantively Form D contains no real difference from the declarations that are given in Forms F and G.
35. Both forms require the signed declaration from the director(s) and Despatch Controller. In addition, Exhibit D also requires a signed declaration from the legal owner. The principle difference in function between the two exhibits is the requirement in Exhibit F to specify the different various legal owners of generating units within a CMU. This distinction does not apply to these particular cases.

Ground 2

36. The appellant’s second ground was that the rejection of the application on the basis that Exhibit F was not provided was unreasonable as there is no substantive difference between the declarations and confirmations contained in Exhibits F and D.

37. We agree with the Applicant that it would have been reasonable for the Delivery Body to accept the declarations provided in Exhibit D, and therefore conditionally prequalify the CMUs listed in paragraph 1.
38. In both declarations (Exhibit F and D), the applicant confirms the description and legal ownership of the Generating Units, and that the applicant will apply, bid and act as the Capacity Provider pursuant to the Capacity Auction. Exhibit D, which was submitted by the Applicant, provides the declarations set out in Exhibit F but also includes the additional declarations of the legal owner.
39. The key declarations required for these CMUs were all exhibited, and NGET erred in preventing the CMUs listed in paragraph 1 from prequalifying. We also note that regarding the issue of the signature in Exhibit D, NGET accepted this part of the dispute raised and acknowledged the power of attorney supplied in support of the signature provided on the certificate.

Conclusion

40. NGET's reconsidered decision to reject the applications listed in paragraph 1 was incorrect. The appellant has sufficiently demonstrated that the information, which NGET considered to be missing in the original prequalification application, is provided elsewhere in their application.

Determination

41. For the reasons set out in this determination, the Authority hereby determines pursuant to Regulation 71(3) that NGET's reconsidered decision to not prequalify the appellant for the CMUs listed in Paragraph 1 was incorrect. We direct the Delivery Body to amend the capacity market register to list these CMUs as conditionally prequalified for the respective auctions, subject to the conditions set out in the Delivery Body's original determination.



Mark Copley

For and on behalf of the Gas and Electricity Markets Authority

12 January 2018