

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 [REDACTED] 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) [REDACTED]
 - b) [REDACTED]
 - c) [REDACTED]
 - d) [REDACTED]
 - e) [REDACTED]
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.

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. █████ submitted an Application for Prequalification for each of the CMUs in Paragraph 1 in respect of the 2019 T-1 and T-4 Auctions.
5. For each of the CMUs listed in Paragraph 1, NGET issued a Notification of Prequalification Decision dated 29 October 2018 (the "Prequalification Decision"). NGET rejected the CMUs on the following grounds:

This application has not met the requirements of the Capacity Market Rules due to the following reason(s): Capacity Market Rule 3.2.5 requires a Despatch Controller Applicant to upload an Applicant Declaration (Exhibit D) if a CMU is comprised of Generating Units that have the same legal owner. The Applicant Declaration provided has a missing/incorrect date therefore cannot be accepted for this Application.

6. █████ submitted a Request for Reconsideration of the Prequalification Decisions.
7. NGET issued a Notice of Reconsidered Decision ("Reconsidered Decision") on 16 November 2018 which rejected the dispute on the following grounds:

Capacity Market Rule 3.2.5 requires a Despatch Controller Applicant to upload an Applicant Declaration (Exhibit D) if a CMU is comprised of Generating Units that have the same legal owner. The Applicant Declaration provided has a missing/incorrect date therefore cannot be accepted for this Application. The Applicant has failed to sufficiently address this failure reason in the request to review the Prequalification Decision, therefore this requirement is still outstanding and the status of the Application under the Reconsidered Decision remains as Rejected.

8. █████ then submitted an Appeal Notice to the Authority on 23 November 2018 under Regulation 70 of the Regulations.

██████'s Grounds for appeal

9. ██████ disputes the decision on the following grounds.

Ground 1

10. ██████ contends that *“there is no express requirement in CM Rule 3.2.5 (or elsewhere in the CM Rules) that the Applicant Declaration be signed and dated: the CM Rules merely provide that the Applicant Declaration is signed by the relevant individuals.”* ██████ therefore believes that as the Applicant Declaration was signed by two directors of ██████ ██████ (“██████”) and two directors of ██████, it has sufficiently complied with Rule 3.2.5. ██████ also states that the Applicant Declaration has also *“been executed in accordance with Section 44 of the Companies Act 2006 (Execution of Documents), such that it has been validly executed under the law of England and Wales.”*
11. ██████ also highlights that although the Applicant Declaration contains a space for date entry, it is not clear what format the date is intended to be entered and *“if this were a requirement, one could expect the form to provide as follows: ‘DATED: [DD/MM/YY]’”*.

Ground 2

12. ██████ argues that in the Prequalification Decision, NGET *“considers that the Applicant Declaration has a ‘missing/incorrect date’ but does not specify whether the date is ‘missing’ or ‘incorrect’.”* ██████ details that *“neither of these deficiencies apply in respect of the current Application: The Applicant Declaration was dated (‘2018’), and that date is correct.”*
13. ██████ outlines that NGET’s disputes guidance² indicates that clerical errors may be corrected if the information can be verified from other parts of the application. ██████ notes their *“cover letter accompanying the Application is dated 13 September 2018”* and contend that it is *“reasonable to assume that the Applicant Declaration was signed on or around this date,*

² For the Capacity Market disputes guidance v3.0 (November 2018) see [here](#)

such that the 'missing' information may be verified from information provided in the Application."

14. [REDACTED] also references the disputes guidance and highlights that verification can be acquired from the relevant board minutes that were submitted as part of the Tier 1 appeals process. [REDACTED] provided minutes of the [REDACTED] and [REDACTED] board meetings, which *"evidence that the Applicant Declaration was signed by two [REDACTED] Directors between 5 and 13 September 2018, and by two [REDACTED] Directors on 13 September 2018."* [REDACTED] contends that these documents provide *"ample evidence of the discrete and recent period in which the Applicant Declaration was signed by the [REDACTED] and [REDACTED] Directors, allowing the deemed incorrect information to be corrected."*

The Legislative Framework

15. 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 ("Rules") were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

The Regulations

16. 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 Rules.
17. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
18. 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.

19. Regulation 86 and Schedule 2 set out the provisions that apply to a document, which includes an application, notice, invoice or credit note:

86. Schedule 2 (documents) has effect.

1. The provisions of this Schedule—

(a) apply to a document, which includes an application, notice, invoice or credit note; and

(b) are subject to any specific provisions in these Regulations or capacity market rules about—

(i) a particular kind of document; or

(ii) the provision of documents by or to a particular person or class of persons.

2. A document must be in writing and dated.

Capacity Market Rules

20. Rule 1.2 sets out the relevant definitions and states that:

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

21. Rule 3.2.5 details the requirement for submission of an Applicant Declaration and states:

3.2.5 *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 3.3.7 outlines the requirements for submitting an Application for Prequalification and states that:

3.3.7 *An Application will not be considered or accepted unless it is submitted:*

- (a) *during the Prequalification Window; and*
- (b) *in accordance with:*
 - (i) *the Regulations and the Rules;*
 - (ii) *the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction; and*
 - (iii) *such other requirements as may be specified by the Delivery Body from time to time.*

23. Rule 4.2.4 outline the provisions for NGET to assess the completeness of an Application and states that:

4.2.4 *Any evidence which does not meet the requirements of the Regulations, the Rules or the Auction Guidelines or such other requirements as specified by the Delivery Body*

under Rule 3.3.7(b)(iii) may be rejected by the Delivery Body. However, failure by the Delivery Body to reject evidence does not constitute, and must not be taken as constituting, a representation that such evidence satisfies the aforementioned requirements.

Our Findings

24. We have assessed each of [REDACTED] grounds of appeal, which are set out below.

Ground 1

25. [REDACTED] argues that it has complied with the Rules: Rule 3.2.5 has been satisfied as the submitted Applicant Declaration has been signed by two [REDACTED] Directors and two [REDACTED] Directors. [REDACTED] also contends that the documents have been validly executed under Section 44 of the Companies Act 2006.
26. Rule 1.2 stipulates that the certificate required under Rule 3.2.5 is to be in the form set out in Exhibit D of the Rules, which provide a template of the form of the document. The exhibit includes the provision that indicates that there are two aspects to the dating requirements for each exhibit. The exhibit form requires that the heading contain '[Application year]' to date the contents of the exhibit and a separate requirement for the signatures themselves to be dated, with 'DATED: [●]' present above the director's signatures.
27. The importance of the exhibit should be noted: the Applicant Declaration provides vital information required for the purpose of verifying information within the Application for Prequalification. The requirement to date the director signatures is in place to verify, in conjunction with Companies House records, that the relevant director held the position of required authority at the point of application and time of signing. Dating the signature provides validation and certification of the content by the person who signed with authority to do so, under Rule 3.2.5, on the date provided and for the relevant time period.

28. NGET is clear in its Prequalification Guidance³ as to the requirements of the exhibits needed for Prequalification. Section B: Company Details requires both the content and signature to be dated. Furthermore, NGET points out in “Section E: Common errors” that *“All Exhibits must have a Prequalification year (i.e. 2018 for this year) and the signatures must also be accompanied with a date.”* The guidance document therefore reinforces Rule 1.2 that each exhibit requires two dates.
29. In relation to the reliance of [REDACTED] on Section 44 of the Companies Act 2006, the Authority finds that this legislation does not supersede the requirements for CMUs to meet the Rules and Guidance which requires that the signatures be dated.
30. Furthermore, the Authority concludes that Rule 1.2 and the exhibit template are sufficiently clear that the signature needs to be dated.
31. The Authority finds NGET was correct in applying Rule 3.2.5 to prevent the CMUs listed in Paragraph 1 from prequalifying.

Ground 2

32. [REDACTED] second ground is that NGET was not clear in its Prequalification Decision and Reconsidered Decision because, to explain why the [REDACTED] CMUs had been rejected, it used the phrase ‘missing/incorrect date’. Missing and incorrect have two different meanings and that by not specifying which of the two applied, NGET highlights that neither issues are present.
33. The Authority believes a rational approach should be applied and a review of Exhibit D submitted evidences that the date above the signatures is missing and that therefore this makes the exhibit incomplete. Therefore, both missing and incomplete are sufficient.

³ For NGET’s Prequalification Guidance v13.0 see [here](#)

34. █████ contends that NGET's disputes guidance indicates that clerical errors may be corrected if the information can be verified from other parts of the application. █████ notes that the cover letter accompanying the Application is dated 13 September and argues that it is reasonable to assume that the Applicant Declaration was signed on or around this date.
35. With reference to the importance of dating the relevant signatures outlined in Ground 1, the significance of the signatures and of the date in which the signatures were made cannot simply be inferred from the date at which the cover letter was submitted. The exhibit title and signatures both need to be dated to conform with Rule 1.2. As the exact date of the signatures cannot be confirmed it is inappropriate for the omission to date, and therefore validate the signatures, to be considered a clerical error.
36. Similarly, to the point above, █████ also argues that the dates of the directors' signatures can be evidenced in the form of minutes of board meetings, supplied with the Request for Reconsideration. █████ claims that these board minutes show that the Applicant Declaration was signed by two █████ Directors between 5 and 13 September 2018 and by two █████ Directors on 13 September 2018.
37. The aforementioned board minutes were included with the Request for Reconsideration. The minutes show that the signatures were duly signed by the two █████ Directors on 13 September 2018. However, the █████ board minutes do not evidence the exact date of the other two required █████ signatures; these minutes indicate that the documents for the Application for Prequalification were approved at the board meeting and the chairman instructed for them to be signed, but does not confirm that they were signed at that board meeting to evidence the date of the signatures. The Authority believes that it is not sufficient to infer that the █████ directors signed the relevant declaration between the board approval on 5 September to the date at which the covering letter of the Application for Prequalification on 13 September 2018 was submitted.
38. The Authority believes that NGET has taken a reasonable and to the extent relevant a

proportionate approach and finds NGET was correct in applying Rule 3.2.5 to prevent the CMUs listed in Paragraph 1 from Prequalifying.

Conclusion

39. NGET reached the correct reconsidered decision to not Prequalify the CMUs contained in Paragraph 1 for the T-4 and T-1 Auctions on the basis that the dates of the relevant directors' signatures required under Rule 1.2, which outlines the required form of the Applicant Declaration (Exhibit D) required under Rule 3.2.5, were not provided in the Application. Under Rule 4.2.4 NGET must not Prequalify a CMU where it is aware that the Application has not been completed or submitted in accordance with the Rules.

Determination

40. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's reconsidered decision to reject [REDACTED] for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the T-4 and T-1 Auctions.



Johannes Pelkonen

For and on behalf of the Gas and Electricity Markets Authority

07 February 2019