

**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 Alkane Energy UK Limited (“Alkane”) 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) AUK001
- b) AUK003
- c) AUK004
- d) AUK005
- e) AUK006
- f) AUK06a
- g) AUK007
- h) AUK027
- i) AUK028
- j) AUK030
- k) AUK040

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 Authority<sup>1</sup> receives an Appeal Notice that complies with Regulation 70, the Authority must review a Reconsidered Decision made by NGET.

### **Appeal Background**

4. Alkane submitted an Application for Prequalification for 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):*

*The Prequalification Certificate is required as per Capacity Market Rule 3.12.3. The Prequalification Certificate that you have submitted in your Application does not conform with the Prequalification Certificate as defined in Capacity Market Rule 1.2 as Exhibit A for the following reason: the certificate has not been dated or has an incorrect date. The Certificate of Conduct is required as per Capacity Market Rule 3.12.4. The Certificate of Conduct that you have submitted in your Application does not conform with the Certificate of Conduct as defined in Capacity Market Rule 1.2 as Exhibit C for the following reason: the certificate has not been dated or has an incorrect date.*

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<sup>1</sup> 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.

6. Alkane 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:

*The Prequalification Certificate is required as per Capacity Market Rule 3.12.3. The Prequalification Certificate that you have submitted in your Application does not conform with the Prequalification Certificate as defined in Capacity Market Rule 1.2 as Exhibit A for the following reason: the certificate has not been dated or has an incorrect date. 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. If you require more information, please contact the Delivery Body.*

*The Certificate of Conduct is required as per Capacity Market Rule 3.12.4. The Certificate of Conduct that you have submitted in your Application does not conform with the Certificate of Conduct as defined in Capacity Market Rule 1.2 as Exhibit C for the following reason: the certificate has not been dated or has an incorrect date. 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. If you require more information, please contact the Delivery Body.*

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

**Alkane’s Grounds for appeal**

9. Alkane disputes the decision on the following grounds.

### Ground 1

10. Alkane states that it has complied with Rules 3.12.3 or 3.12.4, as these Rules require that *“an Application be accompanied by the requisite certificates ‘signed by two directors of the Applicant’, which both certificates were”*; with each of the respective Rules *“being silent on any requirement for dating of the certificates”*.
11. Alkane argues that *“the proforma certificates in each of Exhibit A and Exhibit C of the Capacity Market Rules include statements given ‘as at the date of this certificate’ without reference to ‘the date written below’ or equivalent wording.”* Whilst each certificate includes a space for insertion of a date, Alkane contends that the *“date of this certificate”* as referred to in the relevant certificates *“is a question of fact which may be evidenced other than by the manuscript or typographical insertion of a date, including electronically”*

### Ground 2

12. Alkane contends that the *“[c]ertificates were dated as a matter of fact and law”* and the dating of the PDF certificates can be evidenced by an electronic time stamp. Alkane argues that the aforementioned time stamp *“can be certified by any person if that person (whether before or after the making of the communication) has made a statement confirming that the time stamp is a valid means of establishing whether the communication or data existed at a particular point in time.”* Alkane states that *“the Applicant director signatories believe that such a statement has already been made through their authorisation of the Applicant making the prequalification application including pdfs with associated time stamps, as evidenced by that submission, and further clarification through the Tier 1 appeal.”*
13. Alkane has included with the Appeal Notice *“confirmations from the Applicant director signatories confirming the prior evidence of the time stamps and the validity of such time stamps embedded in the certificates as a means of establishing that the certificates came into effect upon such points in time.”*

14. Alkane argues that *“such statements of confirmation were not required to be provided with the Application by either the Regulations or the CM Rules for the purpose of Regulation 69(5).”*
15. Alkane states that Companies House records can be utilised to verify that the relevant *“Applicant director signatories were appointed to the board of the Applicant in April 2018”*. Alkane asserts that this information, combined with the *“the exact date of the certificates embedded electronically in those documents as above, such dates of appointment set the earliest dates from which those certificates may have taken effect and clearly demonstrate that they have been given in respect of the 2018 prequalification process.”*

### Ground 3

16. Notwithstanding its position that *“the certificates as submitted were dated as a matter of fact and law”*, Alkane views the omission of a signature date *“to be considered a clerical error”* and notes that *“the DB's disputes guidance expressly envisages that clerical errors can be corrected where correct information can be found elsewhere in the application. Alkane contends that “the date of the certificates has been identified elsewhere in the Application within the properties of those documents”, as outlined in Ground 2.*

### Ground 4

17. Furthermore, Alkane contends that Ofgem has *“previously adopted a purposive interpretation of what the Rules are intending to achieve even where that might be contrary to the plain English meaning of the words in the Rules.”* Alkane believes *“there are no requirements of the Rules which on their plain meaning have not been satisfied.”*

### The Legislative Framework

18. 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**

19. 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.
20. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
21. 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.*

22. 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**

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

***Certificate of Conduct*** *means a certificate of conduct in the form set out in Exhibit C*

***Prequalification Certificate*** *means:*

(a) *subject to paragraph (b), a directors' certificate in the form set out in Exhibit A; or*

(b) *where the certificate is to be provided by a body other than a company, a certificate by two officers of the body in the form set out in Exhibit A with such modifications as may be necessary*

24. 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.*

25. Rule 3.12 outlines the declarations to be made when submitting an Application and states that:

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

*3.12.4 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).*

26. 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**

27. We have assessed each of Alkane's grounds for appeal, which are set out below.

#### **Ground 1**



28. Alkane states that it has complied with Rules 3.12.3 and 3.12.4, as these rules are silent as to a requirement for dating or evidencing dating.
29. Rule 1.2 stipulates that the documents required under Rules 3.12.3 and 3.12.4 are to be in the form set out in Exhibit A and C of the Rules, which provide a template of the form of the documents. The exhibits include 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.
30. The importance of the exhibits should be noted. The Prequalification Certificate and Certificate of Conduct provide 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 3.12.3 and 3.13.4, on the date provided and for the relevant time period.
31. NGET is clear in its Prequalification Guidance<sup>2</sup> 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.

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<sup>2</sup> For NGET’s Prequalification Guidance v13.0 see [here](#)

32. Therefore, the Authority concludes that Rule 1.2 and the exhibit template are sufficiently clear that the signatures need to be dated.
33. The Authority finds NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMUs listed in Paragraph 1 from prequalifying.

## Ground 2

34. Alkane contends that both certificates were dated as a matter of fact and law because both Exhibit A and C were dated electronically by means of an electronic time stamp.
35. Electronic Identification Authentication and Trust Services Regulation (EU Regulation 910/2014)<sup>3</sup> requires the UK to establish a legal framework for qualified electronic time stamps and electronic signatures among other things. The Authority finds that the evidence provided does not constitute a qualified time stamp under the EU Regulation.
36. Electronic Communications Act 2000<sup>4</sup> permits the use of electronic time stamps in the UK and provides for the time stamp to be certified. Section 7B states that a time stamp and the certification by a person of that time stamp *"shall each be admissible in evidence in relation to any question as whether the communication or data existed at the time the electronic time stamp was incorporated into or logically associated with such communication or data."*
37. The Authority finds that the evidence of a time stamp provided by Alkane only authenticates the date on which the PDF documents of Exhibit A and C were created. As the signatures were done by hand, the time stamp does not explicitly validate the date on which the documents were executed by the relevant directors.
38. Statements certifying the time stamp were provided by the relevant company directors

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<sup>3</sup> For the EU Regulation 910/2014 see [here](#)

<sup>4</sup> For section 7B of Electronic Communications Act 2000 see [here](#)

dated 23 November 2018.

39. Importantly, it should be noted that these aforementioned statements were provided after the Reconsidered Decision to reject the CMUs from prequalifying which was made on 16 November 2018. Under Regulation 70(4)(d) in appeals to the Authority, applicants are permitted to include any other documentary evidence the Applicant wishes to rely on in support, provided it was given to NGET before the Reconsidered Decision or is needed to show what evidence was before NGET when the Reconsidered Decision was made. Regulation 71(3)(b) states that the Authority must “*determine whether the reconsidered decision was correct on the basis of the information the Delivery Body had when it made the decision.*”
40. In addition to the time stamp not explicitly verifying the date of the signature, and without prejudice to the validity of the electronic time stamp certification statements dated 23 November 2018, we are unable to consider these statements for determining on this appeal as they were not submitted to NGET ahead of its Prequalification Decision of 29 October 2018 or its Reconsidered Decision on 16 November 2018.
41. The Authority therefore finds that NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMUs listed in Paragraph 1 from prequalifying

### Ground 3

42. Alkane contends that if a manuscript or typographical date needs to be above the signatures, the omission should be regarded as a clerical error which can be corrected where the information can be found elsewhere in the application, in this instance within the properties of those documents.
43. The exhibit title and signatures both need to be dated to conform with Rule 1.2 and Rule 3.12.3 and 3.12.4. The signature and associated date has significance, as it is what allows NGET to gain necessary certification of the documents in conjunction with information from

Companies House, as outlined in Ground 1. 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.

44. Therefore, NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMU listed in Paragraph 1 from Prequalifying.

#### Ground 4

45. In respect of the purposive approach that Alkane contends that the Authority has taken in previous determinations, we find that, as outlined in our findings for Grounds 1 to 3, the requirement to date the director signatures provides necessary validation and has been made sufficiently clear in the Rule and Guidelines.
46. 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 3.12.3 and 3.12.4 to prevent the CMUs listed in Paragraph 1 from Prequalifying.

#### Conclusion

47. 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 director signatures required under Rule 1.2, which outlines the required form of both the Prequalification Certificate and the Certificate of Conduct (Exhibits A and C) required under Rules 3.12.3 and 3.12.4 respectively, 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

48. For the reasons set out in this determination the Authority hereby determines pursuant to

Regulation 71(3) that NGET's Reconsidered Decision to reject Alkane 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 be 'JP', written in a cursive style.

Johannes Pelkonen

**For and on behalf of the Gas and Electricity Markets Authority**

07 February 2019