

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 ARL 001 Limited (“ARL”) against the reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Units (“CMUs”):
 - a) AR0011
 - b) AR0012
2. 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

3. ARL submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2019 T-4 Auction.
4. For each of the CMUs listed in Paragraph 1, NGET issued a Notification of Prequalification Decision dated 29 October 2018 (the “Prequalification Decisions”). In the Prequalification Decisions, NGET rejected both CMUs on the following grounds:

Capacity Market Rule 3.4.1 (ca) states that where an Applicant is a member of a Group, the name of the direct Holding Company for the Applicant is required. The

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.

Applicant has not specified there is a Holding Company in the Application however other information provided states that there is one.

Capacity Market Rule 3.7.3 (b) requires all New Build Generating CMUs that are Distribution connected to confirm that one or more Grid Connections Agreements have been entered into which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Distribution Connection Agreement applies to connect to the Distribution Network for the relevant Delivery Years, and that the Applicant provides a copy of the Grid Connection Agreement, or connection offer (with evidence of acceptance) for each Generating Unit comprised in the CMU with the Application, or if not possible, a written confirmation from the Network Operator to confirm the registered capacity of the Generating Unit and that the capacity of the Generating Unit is permitted to export to the Distribution Network. The Distribution connection offer provided for at least one Generating Unit is interactive / conditional, therefore does not meet the requirements of the rule. Please contact the Delivery Body for more information.

5. NGET added the following grounds for the CMU AR0011:

If this application had met the requirements for prequalification the credit cover requirement would have been £29400.00 as the CMU has yet to satisfy the following requirements:

Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved;

Deferred Planning Consents: As per Capacity Market Rule 3.7.1(a)(i), Planning Consents have been deferred

6. NGET added the following grounds for CMU AR0012:

If this application had met the requirements for prequalification the credit cover requirement would have been £23520.00 as the CMU has yet to satisfy the following requirements:

Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved;

Deferred Planning Consents: As per Capacity Market Rule 3.7.1(a)(i), Planning Consents have been deferred.

7. ARL submitted a Request for Reconsideration for the Prequalification Decisions.
8. For each of the CMUs listed in Paragraph 1, NGET issued a Notice of Reconsidered Decision (“Reconsidered Decision”) for each dispute on 16 November 2018 which upheld NGET’s Prequalification Decisions on the following grounds:

Capacity Market Rule 3.7.3 (b) requires all New Build Generating CMUs that are Distribution connected to confirm that one or more Grid Connections Agreements have been entered into which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Distribution Connection Agreement applies to connect to the Distribution Network for the relevant Delivery Years, and that the Applicant provides a copy of the Grid Connection Agreement, or connection offer (with evidence of acceptance) for each Generating Unit comprised in the CMU with the Application, or if not possible, a written confirmation from the Network Operator to confirm the registered capacity of the Generating Unit and that the capacity of the Generating Unit is permitted to export to the Distribution Network. The Distribution connection offer provided for at least one Generating Unit is interactive / conditional, therefore does not meet the requirements of the rule. The Applicant has failed to address this failure reason

in the request to review the Prequalification Decision as the uploaded document date doesn't match with the novation. Therefore, this requirement is still outstanding and the status of the Application under the Reconsidered Decision remains as Rejected.

For information, the Delivery Body has accepted the other elements of the Application and has updated our records accordingly.

9. ARL then submitted an Appeal Notice to the Authority on 19 November 2018 under Regulation 70 of the Regulations.

ARL's Grounds for appeal

10. ARL disputes NGET's Reconsidered Decision on the basis that it considers the documents submitted as part of its Request for Reconsideration to be sufficient to Prequalify it. ARL states in its Appeal Notice that "[a] clerical error meant that proof of acceptance of offer was not uploaded to the portal originally" but that now this has been "accepted and has been novated into our SPV – AR0011 Limited". The documents ARL refers to are: the 'Signed Novation Agreement – Electricity Northwest – Arlington – ARL001 – Gipsy Lane – July 2018.pdf', 'Grid Deposit Payment – Electricity Northwest – Gipsy Lane – August 2017.pdf', and the 'Signed Acceptance Connection Offer - Electricity Northwest - Gipsy Lane - December 2017.pdf', all of which ARL suggests it submitted with its Application for Prequalification.
11. ARL further disputes NGET's Reconsidered Decision on the grounds of the current rules being unfair. In its Appeal Notice, ARL highlight that "As the connection offer can be deferred we don't believe it is fair to reject our application on these grounds as we have provided information".

The Legislative Framework

12. 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

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

16. Rule 3.7.3 sets out the requirements on Applicants regarding the provision of Connection Agreements with their Applications for Prequalification. In particular, Rule 3.7.3(b) states that:

Subject to Rule 3.7.3(c) below, Applicants for a New Build CMU that is, or will be, directly connected to a Distribution Network must:

- (i) confirm that there are one or more Distribution Connection Agreements or accepted connection offers which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMUs to which the Distribution Connection Agreement applies to connect to the Distribution Network in the relevant Delivery Years, and*
- (ii) 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.**

17. Rule 4.4.2 dictates the circumstances in which NGET must not Prequalify a CMU. In particular, Rule 4.4.2(b) states:

Subject to Rule 3.8.1A(c)(ii)², the Delivery Body must not Prequalify a CMU where:

(b) the required Additional Information is missing

18. The 'Additional Information' referred to in Rule 4.4.2(b) is defined in Rule 1.2 to mean the additional information to be submitted with an Application, which in this case, is the information as is required by Rule 3.7.

Our Findings

19. ARL failed to provide evidence of acceptance of the connection offer for the CMUs listed in Paragraph 1 in its Application for Prequalification as required by Rule 3.7.3. Rule 4.4.2 dictates that NGET must not Prequalify a CMU where the Additional Information required by Rule 3.7.3 is missing.
20. ARL argues that submitting the documents listed in Paragraph 8 above as part of its Request for Reconsideration should satisfy the requirements of Rule 3.7.3.
21. Regulation 69(5) prevents NGET, when making its Reconsidered Decision, from taking into account information or evidence provided by the applicant after the closing date for submission of applications where applicants were required to provide that information on or before the closing date of Prequalification. In accordance with Rules 3.7.3(b)(ii), the evidence of acceptance of connection offer should have been submitted as part of the Application for Prequalification. ARL did not submit the evidence listed in Paragraph 8 at Prequalification - it submitted this information as part of its Request for Reconsideration - and therefore, in accordance with Regulation 69(5), NGET is prevented from considering this evidence as part of the Reconsidered Decision.
22. However, ARL submitted a signed novation agreement as part of its Application for Prequalification as listed in Paragraph 8 above. This agreement contains signed

² Rule 3.8.1A relates to the additional information for a Refurbishing CMU.

acknowledgement and confirmation from Electricity North West Limited that ARL has accepted the offer and that it has made the payment for the connection offer. It includes the same project reference number as the interactive connection offer ('5500096418E Gipsy Lane Requote') uploaded with the Application for Prequalification, and the date the connection offer was accepted on (21st March 2018). The date of acceptance falls within the acceptance window provided in the offer.

23. The interactive connection offer provides all of the information required by Rule 3.7.3(b) and the novation agreement contains evidence that the offer has been accepted required by Rule 3.7.3(b)(ii). The Authority holds that the novation and the interactive connection agreement offer together sufficiently demonstrate evidence of acceptance of the connection offer and therefore meet the requirements of Rule 3.7.3(b).
24. The novation agreement provided by ARL with its Application for Prequalification constituted evidence of acceptance of connection offer. The Authority therefore holds that NGET was incorrect in applying Rule 3.7.3(b) and Rule 4.4.2 and rejecting NGET from Prequalifying the CMUs AR0011 and AR0012. The Authority holds that NGET was also therefore, incorrect in its Reconsidered Decision to reject the CMUs for failing to provide evidence of acceptance of their connection offer.

Conclusion

25. NGET did not reach the correct conclusion in its Reconsidered Decisions not to Prequalify AR0011 and AR0012 for the T-4 Auction on the basis that:
 - a) The information contained in the novation agreement confirms that the connection offer has been accepted and provides the information required by Rule 3.7.3(b). These documents were both provided with the Application for Prequalification.

Determination

26. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's Reconsidered Decision to reject ARL for Prequalification be overturned in respect of the CMUs listed in Paragraph 1 for the 2018 T-4 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