

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 O09 Limited (“ARL O09”) 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) AR0091
 - b) AR0092
 - c) AR0093
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.

Appeal Background

4. ARL O09 submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2019 T-4 Auction.

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.

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:

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 directors who have signed the certificate cannot be verified against Companies House.

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: one/two directors who have signed the certificate cannot be verified against Companies House.

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

6. ARL O09 submitted a Request for Reconsideration of the Prequalification Decisions.
7. NGET issued a Notice of Reconsidered Decision (“Reconsidered Decision”) on 16 November 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 directors who have signed the certificate cannot be verified against Companies House. 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: one/two directors who have signed the certificate cannot be verified against Companies House. 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.

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

8. ARL O09 then submitted an Appeal Notice to the Authority on 19 December 2018 under regulation 70 of the Regulations.

ARL O09's Grounds for appeal

9. ARL O09 disputes the decision on the following grounds.
10. ARL O09 argued that *“there were two signatures on the Prequalification Certificate, one did fully match with companies house”* and it *“was a clerical error that Matthew Clare was listed, as Matthew Clare is a director of the parent company Arlington Energy – A NEW CERTIFICATE WAS PROVIDED”*.
11. ARL O09 further argued that *“[t]here were two signatures on the Certificate of Conduct certificate, one did match full with companies house”* and *“this was a clerical error that*

Matthew Clare was listed, as Matthew Clare is a director of the parent company Arlington Energy – A NEW CERTIFICATE WAS PROVIDED”.

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 1.3A specifies the requirements that apply to sole director companies and states that:

Where a company has a sole director, any requirement in these Rules which requires:

- (a) that company to act by two directors signing a document is to be read as a requirement to act by the sole director only signing the document;*
- (b) information to be provided in respect of the directors of that company is to be read as a requirement applicable to the sole director only; and*
- (c) authorisation by the board of directors is to be read as a requirement for authorisation by the sole director only.*

17. Rule 3.12.3 states that:

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

18. Rule 3.12.4 states 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).

Our Findings

19. We have assessed each of ARL O09 grounds for appeal, which are set out below.
20. ARL O09 argued that one of the directors who signed the certificates is a director of the parent company Arlington Energy Ltd and was listed in error as a director of ARL O09. ARL O09 claimed that this was a clerical error that resulted in the information on those

certificates not matching Companies House records.

21. Rules 3.12.3 and 3.12.4 state that the Prequalification Certificate and the Certificate of Conduct must be signed by two directors of the applicant company.
22. NGET was unable to verify one of the directors who signed these certificates against Companies House records. For this reason, NGET correctly did not allow the CMUs listed in Paragraph 1 to Prequalify as they have not met the requirements under Rule 3.12.3 and Rule 3.12.4.
23. ARL O09 also argued that there were two directors' signatures on the Prequalification Certificate and the Certificate of Conduct, of which one matched with the data on Companies House. ARL O09 submitted an updated version of those certificates with its Request for Reconsideration to correct its clerical error. This updated certificate, however, only contained the signature of one director that could be matched against the details held by the Companies House.
24. Rules 3.12.3 and 3.12.4 specifically require that two directors of the applicant company must sign the Prequalification Certificate and the Certificate of Conduct that have to be provided as part of the Application for Prequalification and Regulation 69(5) does not allow any further information or evidence to be taken into account when NGET reconsiders a prequalification decision. ARL O09 did not provide the required information in its original application to satisfy Rules 3.12.3 and 3.12.4. Because this information was required to be submitted but was not, Regulation 69(5) prevented NGET from considering it as part of its Reconsidered Decision.
25. In addition, had the applicant submitted the information they provided with their Request for Reconsideration as part of the original Applications for Prequalification, the requirements of Rules 3.12.3 and 3.12.4 would still have not been met and the applications would have been rejected. The submitted certificates had to be signed by two directors of the applicant company as ARL O09 is not a sole director company.

26. The Applicant has failed to provide certificates executed in accordance with the requirements of rules 3.12.3 and 3.12.4. Accordingly, the CMU's listed in Paragraph 1 should be prevented from Prequalifying as specified in Rule 4.4.2(a). Therefore, NGET would have been unsuccessful in verifying compliance against Companies House.

Conclusion

27. NGET reached the correct Reconsidered Decision to not Prequalify AR0091, AR0092, and AR0093 for the T-4 Auction on the basis that:

- a) two directors of the applicant company have not signed the Prequalification Certificate and the Certificate of Conduct as required under Rule 3.12.3 and Rule 3.12.4 respectively; and
- b) even if the applicant had provided the updated versions of the certificates submitted with its Requests for Reconsideration as part of its Applications for Prequalification, the certificates would still fail to meet the requirements in the Rules 3.12.3 and 3.12.4.

Determination

28. 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 O09 for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the T-4 Auction.



Johannes Pelkonen

For and on behalf of the Gas and Electricity Markets Authority

07 February 2019