

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 Beryl Street Generation Limited (“Beryl Street Generation”) against the reconsidered decision made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (“CMU”):
 - a) SPWR71
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. Beryl Street Generation submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2019 T-4 Auction.
4. For the CMU listed in Paragraph 1, NGET issued a Notification of Prequalification Decision dated 29 October 2018 (the “Prequalification Decision”). NGET rejected the CMU 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 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.

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 company name provided cannot be verified as the direct Holding Company.

If this application had met the requirements for prequalification the credit cover requirement would have been £190280.00 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 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)(i), Planning Consents have been deferred.

5. Beryl Street Generation submitted a Request for Reconsideration of the Prequalification Decision.
6. 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 directors who have signed the certificate cannot be verified against Companies House. The Delivery Body acknowledges that the Applicant has addressed the point as part of the request to review the Prequalification Decision, however Regulation 69(5) of the Regulations does not allow the Delivery Body to take into account any information or evidence that was required to be provided to the Delivery Body by the Regulations or Rules before the original decision was made. As a result, this information could not be considered by the Delivery Body in reaching its Reconsidered Decision. 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 Delivery Body acknowledges that the Applicant has addressed the point as part of the request to review the Prequalification Decision, however Regulation 69(5) of the Regulations does not allow the Delivery Body to take into account any information or evidence that was required to be provided to the Delivery Body by the Regulations or Rules before the original decision was made. As a result, this information could not be considered by the Delivery Body in reaching its Reconsidered Decision. If you require more information, please contact the Delivery Body.

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

7. Beryl Street Generation then submitted an Appeal Notice to the Authority on 22 November 2018 under Regulation 70 of the Regulations.

Beryl Street Generation's Grounds for appeal

8. Beryl Street Generation disputes the decision on the following grounds.
9. The Application for Prequalification was rejected because one of the two directors that was named on and signed the Prequalification Certificate and Certificate of Conduct (the "Certificates") could not be verified against Companies House records. Beryl Street Generation argues that clerical errors resulted in an incorrect director being named on and signing the Certificates.
10. Beryl Street Generation acknowledges that NGET accepted in its Reconsidered Decision that the clerical error made on the Certificates was addressed as part of the appeal, but that NGET was prevented by Regulation 69(5) from taking into account any information or evidence that was required to be provided to NGET by the Regulations or Rules before the original decision was made.
11. Beryl Street Generation presents two arguments explaining why amending the certificates with a new director does not constitute submission of new information with respect to Regulation 69(5):
 - a) *"The Director's name and signature is not new information for the Delivery Body. It was aware of the Director's names prior to the original decision being made. Prior to Prequalification, during the Company Registration stage, the Delivery Body are required to check registered Directors against Companies House. At this point they would have been aware of the correct Director's names";*
 - b) *"Correction of a Director's name is cited as an error that it is acceptable to correct in the Delivery Body's own guidelines 'CM disputes guidance v3.0 2018'*

it is therefore perverse that they could then deem it inadmissible as new information”;

12. Beryl Street Generation presents four arguments explaining why the certificates submitted with the Request for Reconsideration do not constitute new information with respect to Regulation 69(5):
- a) *“The Prequalification Certificate and Certificate of Conduct were submitted with the Prequalification application, they were not omitted, so the corrected versions do not represent new evidence”;*
 - b) *“A correction was made to both Certificates for Tier 1 as they had an incorrect Director’s name and signature at Prequalification”;*
 - c) *“‘Additional’ information was not submitted, only a correction to the originally supplied Certificates”;* and
 - d) *“There is precedent for Correction of certificates. It is inconsistent of the Delivery Body to not accept this Tier 1 appeal”.*²

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

² Beryl Street Generation refers to the precedent in the Energy Pool determination dated January 2018

The Regulations

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 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. 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 Beryl Street Generation's grounds for appeal, which are set out below.
20. Beryl Street Generation argues that clerical errors were made when signing the Certificates such that an incorrect Director was named on and then signed them. Beryl Street Generation also contends that the Certificates were submitted with the Application for Prequalification and it has therefore not provided additional or new evidence in its Request for Reconsideration, but only corrected what had been submitted.
21. Rules 3.12.3 and 3.12.4 specifically require that two directors of the applicant company must sign the Certificates that have to be provided as part of the Application for Prequalification. If an Application does not meet the requirements of these Rules, NGET should reject it in line with Rule 4.4.2(b). Beryl Street Generation tried to submit further evidence on reconsideration, but the operation of Regulation 69(5) prohibits NGET from taking into account any information or evidence that was required to be provided to NGET by the Regulations or Rules before the original decision was made.
22. It is Beryl Street Generation's responsibility to ensure that any necessary signatures are provided in accordance with the Rules and Regulations when submitting their Application.
23. Beryl Street Generation also argues that NGET's decision, in Energy Pool in January 2018, provides an example of "*the Delivery Body's approach to certificates and holding companies.*" However, we consider this case is distinguishable from Energy Pool.

24. In Energy Pool, the Application for Prequalification was rejected because the Certificates had to be signed by two directors of the applicant company according to the Rules. In that decision, the Certificates had a signature of only one director, while two directors were listed on Companies House. However, Energy Pool's argument was subsequently accepted because the second director of Energy Pool had resigned by the time that the Certificates were signed with the effect of making it a sole director company. The confusion arose as a result of a delay in amending the information on Companies House to reflect that it had become a sole director company.
25. For this reason, NGET reached the decision at Reconsideration of Decision stage that the Certificates, which had been submitted as part of the Application for Prequalification, met the requirements of the Capacity Market Rules.
26. By contrast, Beryl Street Generation has made a clerical error in submitting the Certificates signed by a director who is, by Beryl Street Generation's own admission, not a director of the company. To rectify this, Beryl Street Generation submitted new Certificates as part of its Request for Reconsideration. Therefore, the Authority holds that NGET was prevented by Regulation 69(5) from considering the amended Certificates because they should have been submitted as part of the Application for Prequalification.

Conclusion

27. NGET reached the correct Reconsidered Decision to not Prequalify SPWR71 for the T-4 Auction on the basis that
 - a) two directors of Beryl Street Generation have not signed the Certificates as required under Rules 3.12.3 and 3.12.4 respectively;
 - b) because the correct Certificates, as required by Rules 3.12.3 and 3.12.4, were not provided with the Application for Prequalification, Regulation 69(5)

prohibits NGET from considering the new Certificates submitted by Beryl Street Generation with its Request for Reconsideration; and

- c) under Rule 4.4.2, NGET must not Prequalify a CMU where it is aware that the Application has not been completed or submitted in accordance with the Capacity Market Rules.

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 Beryl Street Generation for Prequalification be upheld in respect of the CMU 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