

**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 Inovyn ChlorVinyls Limited (“Inovyn”) 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) VID100
2. 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**

3. Inovyn submitted an Application for Prequalification for the CMU VID100 in respect of the 2019 T-1 and T-4 Auctions.
4. For the CMU INV100, NGET issued two Notifications of Prequalification Decision dated 29 October 2018 (the “Prequalification Decision”). NGET rejected the CMU for the T-1 Auction and T-4 Auction on similar grounds. The following grounds were given for both the T-1 Auction and T-4 Auctions:

*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*

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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.

*1.2 as Exhibit A for the following reason: the company name does not match the registered company details on Companies House.*

*Capacity Market Rule 3.6.1 (a) must identify in their Application three Settlement Periods on separate days in the past 24 months prior to the end of the Prequalification Window in which the net output has been equal to or greater than the Anticipated De-rated Capacity for the CMU. This Application has failed as the Applicant has provided at least one Settlement Period that falls outside of the 24-month window. Please contact the Delivery Body for more information.*

*Capacity Market Rule 3.6.1 (c) requires the Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU, using the Balancing Services Metering Configuration or Bespoke Metering Configuration Solution, must provide evidence of the historic output, as per sections 3.6.1 (c) (i), (ii) or (iii). This Application has failed as no evidence has been provided for this CMU.*

5. NGET rejected the CMU for the T-1 Auction for the grounds listed in Paragraph 4 with the addition of:

*If this application had met the requirements for Prequalification, there would be credit cover requirement (which has been stated in the T-4 application letter for this CMU) for the following reasons:*

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

6. NGET rejected the CMU for the T-4 Auction for the grounds listed in Paragraph 4 with the addition of:

*Subject to Capacity Market Rules 3.2.4 to 3.2.9, Capacity Market Rule 3.2.3 states the Applicant for a Generating CMU must be or will be (if Prospective), the legal*

*owner of each Generating Unit comprised within the CMU. The Applicant has selected an Applicant Status of “Legal Owner”, but has submitted Exhibits that indicate they are not the Legal Owner of the Generating Units, therefore does not comply with this rule.*

7. Inovyn submitted a Request for Reconsideration for each of the Prequalification Decisions.
8. For the CMU listed in Paragraph 1, NGET issued Notices 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 3.6.1 (c) requires the Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU, using the Balancing Services Metering Configuration or Bespoke Metering Configuration Solution, must provide evidence of the historic output, as per sections 3.6.1 (c) (i), (ii) or (iii). This Application has failed as no evidence has been provided for this CMU. 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.*

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

### **Inovyn's Grounds for appeal**

10. Inovyn disputes NGET's Reconsidered Decisions on the grounds of the current rules being unfair. In its Appeal Notice, Inovyn highlight that the *"inability to accept additional information as part of the appeal process is overly zealous and has had the effect of withholding available capacity from future auctions clearly leading to a loss of competition."*

### **The Legislative Framework**

11. 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**

12. 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.
13. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
14. 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.*

15. Regulation 70 sets out the requirements for an appellant's appeal to the Authority, with Paragraphs 4, 5, and 6 setting out in detail the documents an appellant can and must submit with the Appeal Notice:

*70(4) The appeal notice must be accompanied by—*

- (a) *a copy of—*
  - (i) *the notice given by the Delivery Body under regulation 69(3) or (4);*
  - (ii) *the request made to the Delivery Body for reconsideration; and*
  - (iii) *any information or evidence submitted to the Delivery Body in support of that request;*
- (b) *in the case of an appeal relating to a prequalification decision, a copy of—*
  - (i) *the prequalification decision; and*

- (ii) *any information or documents provided by the affected person to the Delivery Body as part of the application for prequalification which are relevant to the matter in dispute;*
- (c) *in the case of an appeal relating to a termination notice or a notice of intention to terminate, a copy of—*
  - (i) *the notice; and*
  - (ii) *any information or documents provided by the affected person to the Delivery Body before the notice was issued, which are relevant to the matter in dispute; and*
- (d) *any other documentary evidence which the affected person wishes to rely on in support of the appeal and which—*
  - (i) *was provided to the Delivery Body before the reconsidered decision was made; or*
  - (ii) *is needed to show what evidence was before the Delivery Body when the reconsidered decision was made.*

*70(5) Where a request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2), the affected person may submit evidence to the Authority that the request did comply with that regulation.*

*70(6) Except as provided in paragraphs (4) and (5), no other documentary evidence may be included in or submitted with the appeal notice.*

### **Capacity Market Rules**

16. Rule 3.6.1 outlines the criteria for submitting proof of Previous Settlement Period performance (“historical output”):

(a) *Each Applicant for an Existing Generating CMU must identify in the Application three Settlement Periods on separate days in:*

*the 24 months prior to the end of the Prequalification Window, or in the case where Rule 3.13 applies, prior to the close of the last day for submission of secondary trading, in which such Existing Generating CMU delivered a net output equal to or greater than its Anticipated De-rated Capacity, and specify the physically generated net outputs, or Metered Volume where applicable, in MWh to three decimal places for each of those Settlement Periods.*

(b) *Each Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU using the Supplier Settlement Metering Configuration Solution must provide:*

(i) *a letter from the supplier or former supplier to such CMU confirming:*

(aa) *the CMU or Generating Unit’s physically generated net output, or Metered Volume where applicable, in MWh to three decimal places; and*

(bb) *whether line loss adjustments have been applied; or*

(ii) *where the Applicant cannot meet the requirements of 3.6.1(b)(i), evidence the CMU or Generating Unit delivered a Metered Volume (in MWh to three decimal places) in discharge of an obligation to deliver a balancing service confirming the CMU or Generating Unit’s*

*physically generated net output, in the three Settlement Periods referred to in Rule 3.6.1(a) for each Generating Unit that comprises that CMU.*

- (c) *Each Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU using the Balancing Services Metering Configuration Solution or Bespoke Metering Configuration Solution must provide either in relation to the CMU or to each Generating Unit comprising the Generating CMU:*
- (i) *a letter from the supplier or former supplier to such CMU confirming the CMU or Generating Unit's physically generated net output in MWh to three decimal places; or*
  - (ii) *evidence the CMU or Generating Unit delivered a Metered Volume (in MWh to three decimal places) in discharge of an obligation to deliver a balancing service confirming the CMU or Generating Unit's physically generated net output in MWh to three decimal places;*
  - (iii) *and if line loss adjustments have been applied, either:*
    - (aa) *a letter from the Distribution Network Operator confirming the Line Loss Factor values in the three Settlement Periods referred to in Rule 3.6.1(a); or*
    - (bb) *where applicable, a letter from the owner of the Unlicensed Network confirming the electrical loss factor values in the three Settlement Periods referred to in Rule 3.6.1(a) and the methodology used to calculate such values.*



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)<sup>2</sup>, 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 for a New Build CMU, is the information as required by Rule 3.7.

### **Our Findings**

19. Inovyn failed to provide the evidence of Previous Settlement Period performance for CMU VID100 in its Application for Prequalification as required by Rule 3.6.1. Rule 4.4.2 dictates that NGET must not Prequalify a CMU where the Additional Information required by Rule 3.6.1 is missing. Inovyn has argued that it is unfair that additional information cannot be accepted.
20. We consider that Regulation 69(5) prohibits 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 3.6.1 and 4.4.2(b), the evidence of Previous Settlement Period performance should have been submitted as part of the Application for Prequalification but was not. NGET is therefore, prevented by Regulation 69(5) from considering this evidence as part of the Reconsidered Decision.
21. As set out in Regulation 70, the Authority’s role in determining Appeals is to assess NGET’s Prequalification and Reconsidered Decisions on the basis of the information that NGET

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<sup>2</sup> Rule 3.8.1A relates to the additional information for a Refurbishing CMU.

received as part of the Applications for Prequalification and Requests for Reconsideration. Inovyn failed to provide NGET with the relevant Previous Settlement Period performance data as part of its Application for Prequalification and the Authority therefore holds that NGET was correct in rejecting INV100 from prequalifying on the basis of Rule 3.6.1 and Rule 4.4.2.

22. Because the relevant Previous Settlement Period performance data is required at Prequalification, NGET was prevented by Regulation 69(5) from considering new evidence submitted by Inovyn as part of its Request for Reconsideration. The Authority therefore holds that NGET was correct in its Reconsidered Decisions to uphold its Prequalification Decisions.

### **Conclusion**

23. NGET reached the correct Reconsidered Decisions to not Prequalify VID100 for the T-4 and T-1 Auctions on the basis that:
  - a) The previous Settlement Period Performance data required under Rule 3.6.1 was not provided in the application and accordingly under Rule 4.4.2, NGET must not Prequalify this CMU.
  - b) Inovyn submitted the correct documents to NGET as part of its Request for Reconsideration but, because this evidence was required at Prequalification, NGET could not accept them. In accordance with Regulation 69(5), when making a Reconsidered Decision, NGET must not take in consideration any information or evidence which Inovyn was required to and failed to produce before the Prequalification Decision.

**Determination**

24. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's Reconsidered Decisions to reject Inovyn for Prequalification be upheld in respect of the CMU VID100 for the T-4 and T-1 Auctions.

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