

# 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 Kiwi Power Ltd (“Kiwi”) against the reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Units (“CMU”):
  - a) KPEG28
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. Kiwi submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2019 T-1 and T-4 Auctions.
4. For each of 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:

*Capacity Market Rule 3.2.5 requires a Despatch Controller Applicant to upload an Applicant Declaration (Exhibit D) if a CMU is comprised of Generating Units that have the same legal owner. The Applicant Declaration provided has a missing/incorrect Directors signatures from the legal owner therefore cannot be accepted for this Application.*

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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.

5. Kiwi submitted a Request for Reconsideration of the Prequalification Decisions.
6. NGET issued a Notice of Reconsidered Decision (“Reconsidered Decision”) on 16 November 2018 which rejected the dispute on the following grounds:

*The Delivery Body has reviewed the Prequalification Decision in accordance with the request to review that decision. The Reconsidered Decision is that the Prequalification Decision is upheld.*

*Capacity Market Rule 3.2.5 requires a Despatch Controller Applicant to upload an Applicant Declaration (Exhibit D) if a CMU is comprised of Generating Units that have the same legal owner. The Applicant Declaration provided has a missing/incorrect Directors signatures from the legal owner therefore cannot be accepted for this Application. 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. Specifically the Rule requires an Applicant Declaration to be submitted with the relevant Application signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU. If you require more information, please contact the Delivery Body.*

7. Kiwi then submitted an Appeal Notice to the Authority on 23 November December 2018 under Regulation 70 of the Regulations.

**Kiwi’s Grounds for appeal**

8. Following NGET’s Notice of Reconsidered Decision on 16 November 2018 Kiwi disputes the decision on the following grounds.

9. Kiwi argues that the Capacity Market Rules regarding certificates are not clear for organisations which are not companies. The Legal Owners for the CMU listed in Paragraph 1 are NHS Trusts and Kiwi argues that the provisions in the Rules concerning the Exhibits required to be submitted in support of Prequalification do not adequately set out how many signatures are required for NHS Trusts or even who they must be signed by when the Legal Owner is not a company and does not have the same legal structure regarding directors and company ownership.
10. Kiwi also highlights that the Capacity Market Rules make provision for a sole signature where a company has a sole director. For each of the CMU listed in Paragraph 1 Kiwi has submitted evidence that a sole director for Exhibit D was appropriate, has been provided and should be accepted.

#### **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 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**

16. Rule 1.2 Definitions

1.2.1 In these Rules

**Director** means, in relation to the certificates, nomination form and declarations in Exhibit A to I, a director of a company or, in the case of a body other than a

*company, an officer of that body including any authorised signatory.*

17. Rule 1.3A provides:

*1.3A.1 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.*

18. Chapter 3 of the Rules sets out the process for applying to Prequalify in order to participate in a Capacity Market auction. It stipulates how the application must be submitted and the information that is to be provided within and accompanying the Application (as defined in Rule 1.2).

19. Rules 3.2.3 to 3.2.9 provide:

*3.2.3 Subject to Rules 3.2.4 to 3.2.9, the Applicant for a Generating CMU must be the person that is, or in the case of a Prospective Generating CMU will be, the legal owner of each Generating Unit comprised in that CMU.*

*3.2.4 Rule 3.2.5 applies where:*

- (a) an Existing Generating CMU comprises a Generating Unit or a number of Generating Units;*

- (b) *all such Generating Units are within the legal ownership of the same person; and*
- (c) *the Despatch Controller with respect to each Generating Unit comprised in that Existing Generating CMU is a person other than the legal owner.*

3.2.5 *Where this Rule 3.2.5 applies, the Despatch Controller may be the Applicant with respect to an Existing Generating CMU provided that an Applicant Declaration is submitted with the relevant Application signed by:*

- (a) *two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU; and*
- (b) *two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Existing Generating CMU.*

3.2.6 *Rule 3.2.7 applies where:*

- (a) *a Generating CMU comprises a number of Generating Units with a Connection Capacity totalling no more than 50 MW;*
- (b) *legal ownership of such Generating Units is or, in the case of a Prospective CMU, will be vested in more than one person; and*
- (c) *Despatch Control with respect to each Generating Unit comprised in that Generating CMU rests or, in the case of a Prospective CMU, will rest with a single Despatch Controller (who may also be the legal owner of one or more of the Generating Units comprised in such Generating CMU).*

3.2.7 *Where this Rule 3.2.7 applies, the Despatch Controller (or, in the case of a Prospective CMU, the person who will be the Despatch Controller) must be the Applicant with respect to a Generating CMU and the following declarations must be submitted with the relevant Application:*

- (a) *an Aggregator Declaration signed by two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Generating CMU; and*

- (b) *a Legal Owner Declaration in respect of each Generating Unit comprised in that Generating CMU signed by two directors (or officers, in the case of a body other than a company) of the person having legal ownership of the relevant Generating Unit.*

3.2.8 *Rule 3.2.9 applies where:*

- (a) *a Prospective Generating CMU comprises a Generating Unit or a number of Generating Units with a Connection Capacity totalling no more than 50MW;*
- (b) *all such Generating Units are within the legal ownership of the same person; and*
- (c) *the Despatch Controller with respect to each Generating Unit comprised in that Prospective Generating CMU is a person other than the legal owner.*

3.2.9 *Where this Rule 3.2.9 applies, the Despatch Controller must be the Applicant with respect to a Prospective Generating CMU and an Applicant Declaration must be submitted with the relevant Application, signed by:*

- (a) *two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Prospective Generating CMU; and*
- (b) *two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Prospective Generating CMU.*

### **Our Findings**

- 20. We have assessed Kiwi's grounds for appeal.
- 21. Kiwi argues that one signature from the Legal Owner was appropriate under Rule 3.2.5.
- 22. NGET rejected Kiwi's Application for Prequalification for KPEG28 for both the T-1 and T-4 auctions because Exhibit D had only been signed by one officer of the Legal Owner and

therefore did not meet the requirements of Rule 3.2.5. NGET was also not satisfied that the single signatory was an appropriate director or officer of the Legal Owner.

23. Rules 3.2.4 and 3.2.5 relate to an Existing Generating CMU with one or a number of Generating Units with one Legal Owner and a different Despatch Controller. Rule 3.2.5 establishes that the Applicant as defined in Rule 1.2 should be the Despatch Controller. These Rules require such Applicants to submit Exhibit D as the appropriate form of Applicant Declaration as part of the Application for Prequalification.
24. Kiwi is the Despatch Controller and, as a sole director company, is only required to have a single signatory as pursuant to Rule 1.3A for the Exhibit D. The Legal Owner is a body other than a company, so declarations can be made by an officer of the organisation rather than by directors, but because it is not a sole director company, Exhibit D must be signed by two officers.
25. In addition to the sole director of Kiwi as the Despatch Controller, Rule 3.2.5(a) requires the signatures of two officers of the Legal Owner of each of the Generating Units comprised in that Existing Generating CMU are still required. However, only one officer signed for the Generating Unit of KPEG28. It was on this basis that NGET rejected the application.
26. To assuage NGET's concerns about the officer's authority to sign the declaration, Kiwi submitted evidence with its Request for Reconsideration to demonstrate that the officer has been appropriately authorised within the governance structure of the Legal Owner, and that the governance structure of the Legal Owner requires only one signature for the purpose of signing Exhibit D. However, Rule 3.2.5(a) requires two signatures, which 1.3A clarifies to include officers authorised on behalf of the organisation if it is a body other than a company. The internal governance arrangement of the Legal Owner is superseded by the requirements of the Rules.



27. We therefore consider that Kiwi has not complied with the requirements of Rule 3.2.5 due to the provision of an incorrect Applicant Declaration (Exhibit D) from the Legal Owner and that NGET was thus correct in preventing the CMU listed in Paragraph 1 from prequalifying.

**Conclusion**

28. NGET reached the correct Reconsidered Decision to not Prequalify the CMU listed in Paragraph 1 for the T-4 Auction and T-1 Auctions on the basis that:
- a) Rules 3.2.5(a) and 3.2.5(b) require the Applicant Declaration (Exhibit D) to be signed by two directors (or two officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in an Existing Generating CMU and by the Despatch Controller of each Generating Unit in that Existing Generating CMU. The Legal Owner of the generating assets is a body other than a company, so the Applicant Declaration could be signed by officers, but this was only done by one officer. This does not meet the requirements of Rule 3.2.5(a): in the case of a body other than a company, the Applicant Declaration must be signed by two officers. The Despatch Controller Kiwi is a sole director company, so one signature on behalf of the Despatch Controller is sufficient. Accordingly, 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.
  - b) Regulation 69(5) provides that, in reconsidering a Prequalification Decision, NGET must not take into account any information or evidence which the applicant was required to provide in accordance with the requirements of the Rules before the Prequalification Decision was first made.

**Determination**

29. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's Reconsidered Decision to reject Kiwi for Prequalification be upheld in respect of the CMU listed in Paragraph 1 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