

**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 Unit (CMU):
  - a) OENB02
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 listed in Paragraph 1 in respect of the 2019 T-1 and T-4 Auctions.
4. For the CMU listed in Paragraph 1, NGET issued two Notifications of Prequalification Decision dated 29 October 2018 (the “Prequalification Decision”). NGET rejected the CMU for the T-1 Auction on the following grounds:

*Capacity Market Rule 3.4.3 (a) (i) requires the Applicant to provide the full postal address and postcode for all Generating Units / CMU components. The postcode of at least one Generating Unit / CMU component in your Application is missing/invalid, therefore cannot be verified. Please contact the Delivery Body for more information.*

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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.

*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 Agreement / connection offer provided for at least one Generating Unit has not been signed, therefore fails to meet the requirements of the rule. Please contact the Delivery Body for more information.*

*Capacity Market Rule 3.7.2 (a) requires an Applicant to provide a description of the nature of the construction, repowering or refurbishment works to be undertaken. The construction plan description required by this rule is missing/insufficient therefore fails to meet the requirement of this rule. Please contact the Delivery Body for more information.*

*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.*

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

*Capacity Market Rule 3.2.2 states the Applicant for a DSR CMU must be the DSR Provider for that CMU however the Applicant has selected an alternative option for this Application.*

6. Kiwi submitted a Request for Reconsideration for each of the Prequalification Decisions.
7. 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 3.7.3 (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 Agreement / connection offer provided for at least one Generating Unit has not been signed, therefore fails to meet the requirements of the rule. Please contact the Delivery Body for more information.*

*The Applicant has failed to address this failure reason in their dispute, therefore this requirement is still outstanding and the status of the Application remains as Rejected.*

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

### **Kiwi's Grounds for appeal**

9. Kiwi disputes NGET's Reconsidered Decisions on the ground that it considers the documents submitted as part of its Appeal Notice to be sufficient to confirm that it should have Prequalified. Kiwi states in its appeal *"a signed connection offer acceptance is attached. This should satisfy the concerns of the EMR Delivery Body in the prequalification application."*

### **The Legislative Framework**

10. 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**

11. 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.
12. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
13. 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.*

14. 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**

15. 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.*

16. 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*

17. 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**

18. Kiwi failed to provide the evidence of acceptance of the connection offer for the CMU OENB02 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 this required Additional Information required by Rule 3.7.3 is missing.
19. Kiwi argues that submitting this evidence as part of its Appeal to the Authority should satisfy NGET and the requirements of Rule 3.7.3.
20. We consider that 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) and 4.4.2(b), the evidence of acceptance of a connection offer should have been submitted as part of the Application for Prequalification. NGET is therefore, prevented by Regulation 69(5) from considering this evidence as part of the Reconsidered Decision.

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



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 had when making the decision. Kiwi failed to provide NGET with evidence of acceptance of its connection offer as part of its Application for Prequalification and the Authority therefore holds that NGET was correct in rejecting OENB02 from Prequalifying on the basis of Rule 3.7.3 and Rule 4.4.2.
22. Because evidence of acceptance of a connection offer is required at Prequalification, NGET was prevented by Regulation 69(5) from considering new evidence submitted by Kiwi as part of its Request for Reconsideration. The Authority therefore holds that NGET was correct in its Reconsidered Decisions to uphold its Prequalification Decisions. Because the evidence was not submitted to NGET at either the Prequalification or Request for Reconsideration stages, supplying it with the Appeal Notice does not comply with Regulation 70(6) and the Authority has been unable to consider it as part of this appeal.

### **Conclusion**

23. NGET reached the correct Reconsidered Decisions to not Prequalify OENB02 for the T-1 and T-4 Auctions on the basis that:
  - a) Evidence of a valid connection agreement or an accepted connection offer required under Rule 3.7.3(b)(ii) was not provided with the application and accordingly under Rule 4.4.2, NGET must not Prequalify this CMU.
  - b) Regulation 70(6) prevents the Authority from considering information which was required to be submitted as part of the Application for Prequalification and the Request for Reconsideration but was not. The Authority recognises that the information submitted as part of Kiwi's appeal would have been sufficient to Prequalify OENB02 had it been submitted alongside the Application for Prequalification.

**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 Kiwi for Prequalification be upheld in respect of the CMU OENB02 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