

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 an appeal made by Mercia Waste Management Limited (“Mercia”) 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) MWM001
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. Mercia 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:

This application has not met the requirements of the Capacity Market Rules due to the following reason(s): The Prequalification Certificate is required as per Capacity Market Rule 3.12.3. The Prequalification Certificate that you have submitted in your

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.

Application does not conform with the Prequalification Certificate as defined in Capacity Market Rule 1.2 as Exhibit A for the following reason: the certificate has not been dated or has an incorrect date. 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: the certificate has not been dated or has an incorrect date.

5. Mercia 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 certificate has not been dated or has an incorrect date. 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: the certificate has not been dated or has an incorrect date. 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.

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

Mercia's Grounds for appeal

8. Mercia disputes NGET's Reconsidered Decision on the following ground.
9. Mercia contends that *"it was impossible to comply with the restrictions of the Exhibits template"* and as the respective relevant directors are based in different locations, it makes *"it impossible for the Directors to sign the same document on the same date"*. Mercia argues that as the documents were sent from one director to the other and as *"there is no provision on the template to enter a second date,"* it therefore *"wasn't correct to put one date on the form because it was signed on two different dates."*
10. Mercia stipulates that *"both documents submitted can be checked for the date stamp in File, Properties which shows they are current for the auction applied for."*

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 sets out the relevant definitions and states that:

Certificate of Conduct means *a certificate of conduct in the form set out in Exhibit C*

Prequalification Certificate means:

(a) *subject to Paragraph (b), a directors' certificate in the form set out in Exhibit A; or*

(b) *where the certificate is to be provided by a body other than a company, a certificate by two officers of the body in the form set out in Exhibit A with such modifications as may be necessary*

17. Rule 3.3.7 outlines the requirements for submitting an Application for Prequalification and states that:

3.3.7 An Application will not be considered or accepted unless it is submitted:

(a) *during the Prequalification Window; and*

(b) *in accordance with:*

(i) *the Regulations and the Rules;*

(ii) *the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction; and*

(iii) *such other requirements as may be specified by the Delivery Body from time to time.*

18. Rule 3.12 outlines the declarations to be made when submitting an Application and states that:

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

3.12.4 *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).*

19. Rule 4.2.4 outline the provisions for NGET to assess the completeness of an Application and states that:

4.2.4 *Any evidence which does not meet the requirements of the Regulations, the Rules or the Auction Guidelines or such other requirements as specified by the Delivery Body under Rule 3.3.7(b)(iii) may be rejected by the Delivery Body. However, failure by the Delivery Body to reject evidence does not constitute, and must not be taken as constituting, a representation that such evidence satisfies the aforementioned requirements.*

Our Findings

20. Mercia contends that the exhibit form templates are flawed because they allow for two signatures but only for one date. Mercia's directors signed on different dates, and as a result they considered it incorrect to include only one date. In addition, Mercia highlights that the date could be checked via the electronic time stamp located within the exhibit document properties.

21. Rule 1.2 stipulates that the documents required under Rules 3.12.3 and 3.12.4 are to be in

the form set out in Exhibit A and C of the Rules respectively, which provide a template of the form of the documents. The exhibits include the provision that indicates that there are two aspects to the dating requirements for each exhibit. The exhibit forms require that the heading contain “[Application year]” to date the contents of the exhibit and a separate requirement for the signatures themselves to be dated, with “DATED: [●]” present above the director signatures.

22. The importance of the exhibit should be noted: the Prequalification Certificate and Certificate of Conduct provide necessary information required for the purpose of verifying information within the Application for Prequalification. The requirement to date the directors’ signatures is in place to verify, in conjunction with Companies House records, that the relevant director held the position of required authority at the point of application and time of signing. Dating the signature provides validation and certification of the content by the person who signed with authority to do so, under Rule 3.12.3 and 3.13.4, on the date provided, and for the relevant time period.
23. NGET is clear in its Prequalification Guidance² as to the requirements of the exhibits needed for Prequalification. Section B: Company Details requires both the content and signature to be dated. Furthermore, NGET points out in “Section E: Common errors” that *“All Exhibits must have a Prequalification year (i.e. 2018 for this year) and the signatures must also be accompanied with a date.”* The Guidance document therefore reinforces Rule 1.2 that each exhibit requires two dates.
24. The Electronic Identification Authentication and Trust Services Regulation (EU Regulation 910/2014)³ requires the UK to establish a legal framework for qualified electronic time stamps and electronic signatures among other things. The Authority finds that the evidence provided does not constitute a qualified time stamp under the EU Regulation. Electronic Communications Act 2000⁴ permits the use of electronic time stamps in the UK and provides

² For NGET’s Prequalification guidance v13.0 see [here](#)

³ For the EU Regulation 910/2014 see [here](#)

⁴ For section 7B of Electronic Communications Act 2000 see [here](#)

for time stamps to be certified. Section 7B states that a time stamp and the certification by a person of that time stamp *"shall each be admissible in evidence in relation to any question as whether the communication or data existed at the time the electronic time stamp was incorporated into or logically associated with such communication or data."*

25. The Authority finds that the evidence of a time stamp provided by Mercia only authenticates the date on which the PDF documents of Exhibit A and C were created. As the signatures were done by hand, the time stamp does not explicitly validate the date on which the documents were executed by the relevant directors.
26. In addition, we consider insufficient the argument that the form only includes the line "DATED: [●]" above the space of only the director's signatures on the left. This does not preclude an applicant from entering an additional date if both directors are unable to sign on the same date.
27. The Authority therefore finds that NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMU listed in Paragraph 1 from Prequalifying.

Conclusion

28. NGET reached the correct Reconsidered Decision to not Prequalify the CMU contained in Paragraph 1 for the T-4 Auction on the basis that the dates of the relevant directors' signatures required under Rule 1.2, which outlines the required form of both the Prequalification Certificate and the Certificate of Conduct (Exhibits A and C) required under Rules 3.12.3 and 3.12.4 respectively, were not provided in the application. Under Rule 4.2.4 NGET must not Prequalify a CMU where it is aware that the Application has not been completed or submitted in accordance with the Rules.

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 Mercia for Prequalification be upheld in respect of the CMU listed in Paragraph 1 for the T-4 Auction.

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