

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 ORSTED ESS MERSEY LIMITED (“Orsted”) against reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):
 - a) ORS001
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. Orsted submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2019 T-1 and T-4 Auctions.
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 reasons: 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

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.

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.

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.

5. Orsted 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. 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 grounds from NGET's reconsidered decision letter.

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

Orsted's Grounds for appeal

8. Orsted disputes NGET's Reconsidered Decision on the following grounds.

Ground 1

9. Orsted argues that the dates of the Prequalification Certificate and the Certificate of Conduct are implicit as the *"two documents state '2018' in the headline and both documents are generated as part of the application process"*. Orsted further highlights that as the Prequalification Window opened in 2018, documents related to the ORSO001 CMU *"could not have been signed earlier than that."*
10. Orsted also suggests that the cover letter, which was dated 13 September 2018, was submitted at Prequalification and *"prepared simultaneously to the relevant documents"* and thus it can be presumed that the signatures were also gained at this time.

Ground 2

11. Orsted specifies that the omission of a date above a director's signature should be deemed a clerical error as outlined in the disputes guidance², whilst also stating that *"is not a legal requirement for a signature to be dated in order to be legally binding"* and that *"it is not clearly stated that the exact date shall be provided on each document"*. Orsted argues that

² For NGET's disputes guidance v3.0 (November 2018) please see [here](#)

proof that the relevant documents were retrieved during the application process and signed on September 12 2018 can be evidenced from email correspondence attached to the Appeal Notice.

The Legislative Framework

12. 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

13. The Regulations set out the duties upon NGET when it determines eligibility. Regulation 22(a) specifies that each Prequalification Application must be determined in accordance with the Rules.
14. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
15. 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.*

16. 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

17. 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

18. 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.*

19. 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).

20. 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

21. We have assessed each of Orsted's grounds for appeal, which are set out below.

Ground 1

22. Orsted argues that the date of the Prequalification Certificate and the Certificate of Conduct are implicit, with the inclusion of "2018" in the document headings. Orsted also highlights that as the Prequalification Window opened in 2018, documents related to the given CMU could not have been signed earlier than this time. In addition to this Orsted draw upon the signed and dated cover letter submitted in September 2018, as verification of the date window of the director signatures.
23. 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 a provision stating that for each exhibit there are two aspects to the dating requirements. The exhibit form requires 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 directors' signatures.
24. The importance of the exhibits should be noted: the Prequalification Certificate and Certificate of Conduct provide necessary information required for the purpose of verifying information within the Prequalification Application. 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.

25. NGET is clear in its Prequalification Guidance³ 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.
26. The Authority finds that the date on which the signatures were made cannot just be inferred from either the inclusion of “2018” in the document title or from the time window in which the signatures were allegedly gained, between the opening of the Prequalification period and the submission date of the cover letter.
27. The Authority concludes that Rule 1.2 and the exhibit template are sufficiently clear that the signature needs to be dated. As a result, the Authority finds NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMU listed in Paragraph 1 from prequalifying.

Ground 2

28. Orsted specifies that the omission of a date above a director signature should be deemed a clerical error, referencing the disputes guidance, whilst arguing that signing of the relevant documents on 12 September 2018 can be evidenced from email correspondence.
29. The exhibit title and signatures both need to be dated to conform with Rule 1.2 and Rule 3.12.3 and 3.12.4. The signature and associated date has significance, as it is what allows NGET to gain necessary certification of the documents in conjunction with information from Companies House, as outlined in Ground 1.
30. In the first email submitted by Orsted there is evidence of requesting the signature of an individual on two attached documents entitled Exhibit A and Exhibit C. It is not clear from

³ For NGET’s Prequalification Guidance v13.0 see [here](#)

the email provided if this aforementioned person is the relevant signing director, or if a second director is required and who that may be. In addition, no copies of these attachments were included in the appeal so there is no way to verify if they were indeed the correct forms of Exhibit A and C.

31. Furthermore, the evidence relied upon to show the signatures were made is a returned scan. This return email is not from the individual whose signature was requested in the first email. There is nothing in the content of the email to indicate it is the signed certificates and does not include a copy of the scanned document entitled “*SPRKLDN01218091212360*” to verify the signatures.
32. The Authority finds that the email correspondence submitted as evidence of the date at which the documents were executed by the relevant directors is insufficient and therefore, NGET was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMU listed in Paragraph 1 from prequalifying. As the exact date of the signatures can not be confirmed it is inappropriate for the omission to date and therefore validate the signatures to be considered a clerical error.

Conclusion

33. NGET reached the correct Reconsidered Decision to not Prequalify the CMU contained in Paragraph 1 for the T-4 and T-1 Auctions 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

34. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET’s Reconsidered Decision to reject Orsted for Prequalification be

upheld in respect of the CMU listed in Paragraph 1 for the T-4 Auction and T-1 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