

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 C.GEN Killingholme Limited ("C.GEN") against the reconsidered decision made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit (CMU):
 - a) CGEN19
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 the Delivery Body.

Appeal Background

3. C.GEN submitted an Application for Prequalification for the CMU listed in Paragraph 1 in respect of the 2023-24 T-4 Auction and sought a Maximum Obligation Period of 15 years.
4. For the CMU listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 25 October 2019 (the "Prequalification Decision"). The Delivery Body Conditionally Prequalified the CMU on the following grounds:
 - a. Ground 1-Pursuant to CM Rules 6.6 the applicant would still need to provide credit cover "*Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved; therefore, this*

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 is Conditionally Prequalified and will need to provide Credit Cover as above.

Credit Cover is not required during the standstill period as per Regulation 59(1)(C) but should you wish to post Applicant Credit Cover, please contact the CM Settlement Body accordingly. Further information on Credit Cover requirements will be provided by the Delivery Body in accordance with Chapter 17: Rule 4.12 dependent on a "Deferred Capacity Payment Trigger Event" occurring. "

- b. Ground 2- Error with Connection Capacity listed – *"Please note, the Connection Capacity for the CMU was amended in assessment as the Connection Capacity was amended to reflect the Gross-nominal value in the DCO. The Connection Capacity of 470MW was used to apply the De-rating Factor."*

- 5. C.GEN submitted a request for reconsideration of the Prequalification Decisions on 01 November 2019. C.GEN's request for reconsideration challenges only the aspect of the Delivery Body's decision we have described as Ground 2, the amendment of the De-rated Capacity.
- 6. The Delivery Body issued a Notice of Reconsidered Decision on 22 November 2019 which upheld their prequalification decision, the reasoning as below:

"Connection Capacity: the Delivery Body acknowledges that the Applicant has addressed the Connection Capacity as part of the request to review the Prequalification Decision however is not able to accept the Applicant's justification because the Connection Capacity for the CMU was amended in assessment to reflect the Gross-nominal value in the DCO."

- 7. C.GEN then submitted an appeal notice to the Authority on 29 November 2019 under Regulation 70 of the Regulations.
- 8. The Authority asked C.GEN to provide further information on the discrepancy between the Connection Entry Capacity and Development Consent Order on 18 December 2019, and C.GEN elaborated on the justification they originally provided in a cover letter as part of the prequalification application, via a response received 03 January 2020.

9. Given the nature of this dispute and as a point of fair process, we provided both C.GEN and the Delivery Body with our minded-to position, providing both an opportunity to respond with any additional representations. We received responses from both. When making our final decision, we have not taken account any information or evidence that would be prohibited under Regulation 69(5).

C.GEN's Grounds for appeal

10. C.GEN disputes the De-rated Capacity of the New Build Generating CMU CGEN19 at 423MW, as notified in Annex A in the Delivery Body's letter to C.GEN on 25 October 2019. C.GEN's request for reconsideration was based on the argument that *"the Delivery Body had adopted a different approach to De-rating for that used for the 2021 T-4 auction, and the proposed 2022 T-4 auction, for both of which this CMU was allocated a De-rated Capacity of 469.8MW"*. C.GEN made the following arguments in support of their appeal to the Authority:

Ground 1

11. C.GEN claims that:

The Delivery Body's decision "departs from its previous established approach to establishing de-rated capacity for this CMU. There have been no changes to the project in which the CMU is comprised, or any regulatory or legal changes.

The decision is either an error, or the Delivery Body has changed the basis on which it approaches its assessment to de-rating capacity. If there has been such a change, the Delivery Body has not made any announcements to that effect in advance of the auction."

Ground 2

12. C.GEN argues that the advice it received from the Delivery Body gave C.GEN an expectation that C.GEN could justifiably increase the Connection Entry Capacity (CEC) with reference to Rule 3.7.1(b)(iii).

The advice received given was that "if you were to increase the CEC and get this signed before the end of the prequal window, you would need to refer to CM Rule 3.7.1 (b)(iii) which states that if there is a smaller capacity shown in the planning, as opposed to the Connection Agreement, technical documentary evidence justifying the difference [sic]... you would need to be satisfied that you can justify the difference in the evidence you provide, if you were to opt for a higher CEC number to use."

13. C.GEN states that the same covering letter it has provided in each year's prequalification application provides the "technical documentary evidence" justifying the selecting of 522MW as Connection Capacity, and that the Delivery Body had previously accepted this justification.
14. C.GEN claims that: *"Had the CMU been awarded a capacity market contract in 2018, it would have been entitled to capacity market payments based on a de-rated capacity of 469.000 MW. The same approach to de-rating this CMU should be applied in this auction."*

Ground 3

15. C.GEN argues that the Delivery Body did not give any support, reason or explanation for taking a different approach and that absent such a rationale the previous De-rated Capacity should apply. C.GEN *"notes the [Delivery body's] failure to properly address the matters set out in C.GEN's Tier 1 dispute (Annex I), in particular the Delivery Body's inconsistency"*.

The Legislative Framework

16. 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 2014 (as amended) ("Rules") were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

The Regulations

17. The Regulations set out the duties upon the Delivery Body when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.

18. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
19. Regulation 69 (3) set out the duties upon the Delivery Body to provide the outcome of the reconsideration and the reasons for the reconsidered decision to the affected person.

Capacity Market Rules

20. Rule 1.2 (Definitions) states that:

"Connection Capacity

means, with respect to a Generating CMU or a Generating Unit, the capacity of that Generating CMU or Generating Unit as determined pursuant to Rule 3.5;"

"De-rated Capacity

means, for any Generating CMU or DSR CMU and Capacity Auction, an amount (in MW to three decimal places) equal to the product of:

(a) for a Generating CMU, its Connection Capacity; or....

and the De-rating Factor, provided that the De-rated Capacity of a Pre-Refurbishment CMU must not exceed the De-rated Capacity of the related Refurbishing CMU"

"Bidding Capacity

Means, for a Bidding CMU, its De-rated Capacity."

21. Rule 3.5 sets out the Rules to determine the Connection Capacity of a Generating CMU.

3.5.2 Subject to Rules 3.5.3 or 3.5.5, the Connection Capacity of a Generating

Unit must be calculated as follows:

(a) for a Generating Unit forming part or all of a Transmission CMU, the Connection Entry Capacity stated in the Grid Connection Agreement for that Generating Unit;

...

3.5.3 An Applicant for an Existing Generating CMU may, as an alternative to the determination of Connection Capacity set out in Rule 3.5.2, nominate a Connection Capacity for that Generating Unit equal to the Average Output of that Existing Generating CMU.

....

3.5.5 An Applicant for a Generating CMU may, as an alternative to the determination of Connection Capacity set out in Rule 3.5.2 or 3.5.3, nominate a Connection Capacity for a Generating Unit comprised in that Generating CMU in accordance with following formula:

$$CC_i = \frac{UCEC_i}{SCEC} \times STEC$$

22. Rule 3.7.1 (Relevant Planning Consents) requires that New Build Generating CMUs Applicants provide information regarding their Relevant Planning Consents.

3.7.1 (a) Each Applicant for a New Build CMU must declare in the Application:

(i) that it will obtain all Relevant Planning Consents and will have the Legal Right to use the land on which the CMU is, or will be, located by no later than the date falling 22 Working Days prior to the commencement of the first Bidding Window in relation to such Capacity Auction; or...

23. Rule 3.7.1 (b)(iii) sets out that Applicants must justify any difference between the Relevant Planning Consent and the Connection Capacity, where the latter is higher:

Rule 3.7.1 (b)(iii) where the Relevant Planning Consent states the capacity of the New Build CMU is smaller than the Connection Capacity, technical documentary

evidence justifying the difference

24. Rule 4.2.4 states that

"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

25. We have assessed each of C.GEN's grounds for appeal, which are set out below.

Ground 1

26. C.GEN's first ground is its assertion that the Delivery Body departed from its previous established approach for calculating De-rated Capacity for this CMU, while nothing has been changed with respect to the relevant Rules or C.GEN's prequalification submission.
27. We acknowledge that C.GEN has submitted the same information and documents for Prequalification for the 2021, 2022 and 2023 Four Year Ahead Capacity Market Auctions, for the same New Build Generating CMU in 2017, 2018 and 2019 respectively. However, in our view, this does not constitute a legitimate expectation that the prequalification decisions should remain the same in and of itself.
28. It is our view that the approach to establishing De-rated Capacity for a New Build Generating CMU has been clearly defined in the Rules. Rule 1.2.1 and Rule 3.5.2 or Rule 3.5.5 have defined that the De-rated Capacity for a New Build Generating CMU is the product of Connection Capacity and De-rating Factor.
29. We do not consider the previous prequalification applications nor the email from the Delivery Body to C.GEN of 20 September 2017, as giving permission for C.GEN to use an alternative capacity amount, or as setting a legitimate expectation that the Delivery Body

will accept that capacity amount in this or future prequalification applications. We refer to Rule 4.2.4 *".....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."*

Ground 2

30. C.GEN's second ground was that it provided "technical justifications" for selecting 522MW as the Connection Capacity and therefore a De-rated Capacity of 469.8 MW should be applied.
31. The correct way to determine Connection Capacity is under Rule 3.5.2. which sets out the methods by which each application must specify the Connection Capacity of the CMU. In this case, because the CMU is a New Build, Rules 3.5.2(a) and 3.5.5 apply – both of which would result in a Connection Capacity of 540MW (as listed in the Grid Connection Agreement (GCA)).
32. C.GEN was incorrect to indicate the Connection Capacity of 522MW in the prequalification application. However, in this instance, and given the circumstances, it would be proportionate to consider this mistake no differently from a clerical error given that C.GEN had not previously been told that the calculation they had applied in previous applications was incorrect. This is in particular because C.GEN had submitted its GCA in the prequalification application, so the Delivery Body could have read across the correctly specified Connection Capacity of 540MW. This would have resulted in the Delivery Body calculating the De-rated Capacity of the CMU of 486MW as per the definition of De-rated Capacity at Rule 1.2.
33. Rule 3.7.1 (b) (iii) provides that where the Relevant Planning Consent states that the capacity of the New Build CMU is smaller than the Connection Capacity, the Applicant must provide in the Application technical documentary evidence justifying the difference.
34. In this case, we note that the DCO obtained by C.GEN states that the authorised development is a combined cycle plant with a nominal gross electrical output of up to 470 MW (Schedule 1 Part 1, Authorised Development). For the avoidance of doubt, we consider that while the DCO uses the term 'output' rather than 'capacity', Rule 3.7.1 (b)

(iii) encompasses cases in which the DCO states that the 'output' is smaller than the Connection Capacity. Accordingly, technical documentary evidence justifying the difference was required to be provided.

35. We have taken into account the information that C.GEN provided to the Delivery Body. We consider that this constitutes technical documentary evidence as required by the Rules. The information provided to us during the Appeal process further clarified their justification.
36. In this matter, the application of the Rules would produce a Connection Capacity, and therefore a De-rated Capacity, above the limit set out in the Relevant Planning Consent (DCO) of 470MW. As C.GEN are not authorised to produce capacity to such a level of output, awarding a capacity higher than what C.GEN are permitted to produce could, in this instance, lead to an irrational outcome. In these circumstances, i.e. where the DCO is lower than the calculated Connection Capacity we consider that it would be appropriate to limit the Connection Capacity to no more than the level specified in the DCO.
37. As a result of the above, we consider that the CMU CGEN19 should be "Conditionally Prequalified". The Connection Capacity should be set equal to the level of the Relevant Planning Consent at 470MW, and therefore, the De-rated capacity of this CMU should be 423MW.

Ground 3

38. C.GEN's third ground of the dispute is based on "the [Delivery Body's] failure to properly address the matters set out in C.GEN's request for reconsideration (Annex I), in particular the Delivery Body's inconsistency".
39. As stated at the Ground 1 and Ground 2, Ofgem is of the opinion that the correct way to determine the Connection Capacity and De-rated Capacity for this CMU is defined in the Rules. The Delivery Body should have not calculated the Connection Capacity or De-rated Capacity on the basis of any other figure. It is incumbent on an applicant, in this case C.GEN, to be satisfied that they are following the Rules correctly and they are not entitled to rely on the fact that their applications were not rejected in previous years as a reason as to why they should not have been prequalified at their desired De-rated Capacity.

40. In regard to C.GEN's complaints of the Delivery Body's failure to give full reasons for its original decision. Our view is that the Delivery Body has a duty to disclose its reasoning to the Applicant, when making a Reconsidered Decision (as per Reg 69(3)(b)(ii)). In this instance, we note that the Delivery Body did not provide full reasoning to the Applicant.

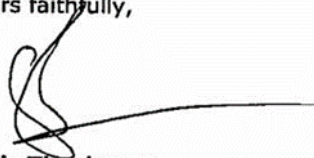
Conclusion

41. The CMU CGEN19 is "Conditionally Prequalified" for the T-4 Auction on the basis that:
- a) Pursuant to Rule 3.7.1(b)(iii), Technical documentary evidence justifying the discrepancy between the Connection Entry Capacity and the Relevant Planning Consent has been provided.
 - b) The De-rated capacity of this CMU should be 423MW, a figure based on the Connection Capacity being limited to that specified in the DCO, i.e. 470MW. This would avoid an irrational outcome and would ensure that C.GEN are not potentially put in conflict with their DCO requirements.

Determination

42. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's reconsidered decision to conditionally prequalify the applicant for Prequalification be upheld in respect of the CMUs listed in paragraph 1 for the T-4 Auction.

Yours faithfully,



Chris Thackeray
Head of GB Wholesale Markets

For and on behalf of the Gas and Electricity Markets Authority

12 March 2020