

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 FCC Environment (Lincolnshire) Limited ("FCC") against reconsidered decision made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
 - a) FCCLI2 (T-3 and T-4 Auction)
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. FCC submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2020 T-3 and T-4 Auctions.
4. For each of the CMUs listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 25 October 2019 (the "Prequalification Decision"). The Delivery Body Rejected the CMUs on the following grounds:

Capacity Market Rule 3.6.3(c) requires all Existing 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

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.

relevant Delivery Years, and that the Applicant provides a copy of the Grid Connection Agreement 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. It has not been possible to verify that the Applicant has use of the Distribution Connection Agreement that has been provided as the Distribution Connection Agreement is in the name of a different company and no explanation of a link between the companies has been made. Please contact the Delivery Body for more information.

Rule 3.6.1 Previous Settlement Period performance (a): Each Applicant for an Existing Generating CMU must identify in the Application three Settlement Periods on separate days.

The applicant has used the same date/s to demonstrate Historic Performance.

5. FCC submitted a request for reconsideration of the Prequalification Decision on 30 October 2019.
6. The Delivery Body issued a Notice of Reconsidered Decision on 22 November 2019 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 original Prequalification Decision is valid and will be upheld.

Rule 3.6.1 Previous Settlement Period performance (a): Each Applicant for an Existing Generating CMU must identify in the Application three Settlement Periods on separate days.

The applicant has used the same date/s to demonstrate Historic Performance.

The Delivery Body acknowledges that the Applicant has addressed the point as part of the request to review the Prequalification Decision, however Regulation

69(5) of the Regulations does not allow the Delivery Body to take into account any information or evidence that was required to be provided to the Delivery Body by the Regulations or Rules before the original decision was made. As a result, this information could not be considered by the Delivery Body in reaching its Reconsidered Decision.

For information, the Delivery Body has accepted the other elements of the Application and has updated our records accordingly.

7. FCC then submitted an appeal notice to the Authority on 28 November 2019 under Regulation 70 of the Regulations.

FCC's Grounds for appeal

8. FCC disputes the decision on the following grounds.
9. FCC accepts that one data set was not compliant in the initial Application for Prequalification, noting this was an error and that the information was submitted in good faith. FCC noted that revised information later provided demonstrated compliance with Rule 3.6.1.
10. FCC disputes that their error was of a magnitude such as to warrant reasonable rejection from the CM auction. They believe the issue constitutes unfair treatment and that non-acceptance of revised information distorts fair competition.

The Legislative Framework

11. The Regulations 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

12. 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 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 the Delivery Body 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. Furthermore, Regulation 70 sets out the requirements for an appellant's appeal to the Authority, in particular Regulation 70(1):

70.— (1) An affected person who has, in accordance with regulation 69(2), made a request to the Delivery Body to review a delivery body reviewable decision, may appeal to the Authority if—

(a) the affected person disputes the reconsidered decision; or

(b) the request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2).

Capacity Market Rules

16. Rule 3.6.1 outlines the criteria for submitting evidence of previous settlement period performance ("historical output") and states that:

(a) Each Applicant for an Existing Generating CMU must identify in the Application three Settlement Periods on separate days in:

the 24 months prior to the end of the Prequalification Window, or in the case where Rule 3.13 applies, prior to the close of the last day for submission of secondary trading, in which such Existing Generating CMU delivered a net output equal to or greater than its Anticipated De-rated Capacity,

and specify the physically generated net outputs, or Metered Volume where applicable, in MWh to three decimal places for each of those Settlement Periods.

17. Rule 4.4.2 dictates the circumstances in which the Delivery Body must not prequalify a CMU. In particular, Rule 4.4.2(a) states:

Subject to Rule 3.8.1A(c)(ii), the Delivery Body must not Prequalify a CMU where:

(a) it is aware that the Application has not been completed or submitted in accordance with the Rules;

Our Findings

18. We have assessed FCC's grounds for appeal, which are set out below.
19. FCC argues that an error was made in the initial Application for Prequalification but the error was corrected and amended; therefore, this should negate the non-compliance of the initial Application for Prequalification.
20. FCC further questions the purpose of Rule 3.6.1(a) and argues that the way it is written and applied is not fair and consistent, and that the rule is not delivering the expected intent of the rule except for proving that the applicant can read or not.

21. However, FCC failed to provide evidence of Previous Settlement Period performance on separate days for CMU FCCLI2 in its Application for Prequalification as required by Rule 3.6.1(a). Rule 4.4.2(a) dictates that the Delivery Body must not prequalify a CMU where the Information required by Rule 3.6.1 is incorrect.
22. Rule 3.6.1(a) clearly states that an Applicant must provide three Settlement Periods on separate days, but FCC failed to provide three separate dates in accordance with the Rules. Therefore, the Delivery Body was correct in applying Rule 3.6.1(a) to prevent the CMU listed in Paragraph 1 from prequalifying.
23. Regulation 69(5) of the Regulations prohibits the Delivery Body, when making its reconsidered decision, from taking into account information or evidence provided by the applicant following the original decision.
24. In accordance with Rules 3.6.1(a) and 4.4.2, the evidence of Previous Settlement Period performance should have been submitted as part of the Application for Prequalification, but FCC failed to do so. Regulation 69(5) prevents the Delivery Body from considering this evidence as part of the reconsidered decision.
25. As set out in Regulation 70, the Authority's role in determining Appeals is to assess the Delivery Body's Prequalification and reconsidered decisions based on the information that the Delivery Body had when making the decision. FCC failed to provide the Delivery Body with evidence in the Application for Prequalification the Previous Settlement Period performance on three separate days. The Authority therefore holds that the Delivery Body was correct in rejecting CMU FCCLI2 from prequalifying on the basis of Rule 3.6.1 and 4.4.2.

Conclusion

26. The Delivery Body reached the correct reconsidered decision to not prequalify CMU FCCLI2 for the T-3 and T-4 Auctions on the basis that:
 - a) the previous Settlement Period Performance data required did not comply with CM Rule 3.6.1 in the application and accordingly under Rule 4.4.2, the Delivery Body must not prequalify this CMU; and

- b) FCC submitted the correct documents required under Rule 3.6.1(a) to the Delivery Body as part of its Request for Reconsideration, however as this information was required at Prequalification it could not be subsequently considered by the Delivery Body. In accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take in consideration any information or evidence which the appellant was required to and failed to produce before the decision was taken.

Determination

27. 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 reject FCC for Prequalification be upheld in respect of the CMU listed in Paragraph 1 for the T-3 and T-4 Auctions.



Tom Kenyon-Brown

For and on behalf of the Gas and Electricity Markets Authority

15 January 2020