

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 GridBeyond Limited ("GridBeyond") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit (CMU):
 - a) GBD009 (T-1, 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. GridBeyond submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2020 T-1, T-3 and T-4 Auctions.
4. For each of the Auctions listed in Paragraph 3 for CMU GBD009, 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:

Ground 1²

"Capacity Market Rule 3.2.5 requires a Despatch Controller Applicant to upload an Applicant Declaration (Exhibit D) if a CMU is comprised of Generating Units that have the same legal owner. The Applicant Declaration provided has a

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.

² The grounds of appeal are materially the same for all of the CMUs mentioned in Paragraph 1

missing/incorrect Directors signatures from the legal owner therefore cannot be accepted for this Application."

Ground 2

"Please note, the Connection Capacity for the CMU was amended in assessment as the Connection Capacity entered is higher than the Connection Agreement. Connection Agreement values were used to apply the De-rating factor therefore it is 17.000 MW before De-rating."

5. GridBeyond submitted a request for reconsideration of the Prequalification Decision on 31 October 2019.
6. The Delivery Body issued a Notice of Reconsidered Decision on 22 November 2019 which overturned their original decision on Ground 1 stating:

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

7. This led to GBD009's status changing from 'Not Prequalified' to 'Conditionally Prequalified'. However, the Delivery Body rejected the dispute on Ground 2:

"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 supporting document can not be accepted after Prequalification."

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."

8. Following the Delivery Body's reconsidered decision, GridBeyond submitted an Appeal Notice to the Authority on 29 November 2019 under Regulation 70 of the Regulations.

GridBeyond's grounds for appeal

9. GridBeyond disputed the reconsidered decision only on Ground 2 of their Prequalification Decision, given that the Delivery Body had overturned their decision on Ground 1 in their Notice of Reconsidered Decision in GridBeyond's favour.

Ground 1

10. Given that this Ground was not addressed in their Appeal made to the Authority, here we note the arguments provided by GridBeyond in their Request for Reconsideration to the Delivery Body:

"[The named signatory]³ is the Company Secretary of the Legal Owner of the generating unit, and a recognised 'active officer' of the company on Companies House. His name was acceptable to the "Exhibits Tool 2019 v3.1" Excel tool used to create the Exhibit D form when that tool checked for valid names against Companies House. On 05 Sep 2019 GridBeyond spoke to the EMR Delivery Body requesting confirmation that [the named signatory] would be an acceptable signatory of the Exhibit D letter forming part of the GBD009 prequalification submission. Directly following that conversation, [an individual] of the EMR Delivery Body team wrote to us on 05 Sep 2019 to confirm that [the named signatory] would be an acceptable signatory in light of this conversation. We would not have called the EMR Delivery Body team for advice had [the named signatory] been a listed director, and after the nature of the discussion we understood that the written confirmation provided us with permission to submit our Exhibit D with [the named signatory's] signature. We did not write to the EMR Delivery Body team citing [the named signatory's] name, so [the EMR DB's] email confirmation of the validity of [the named signatory] as a signatory followed directly from the details of our phone conversation and, it can be presumed, a subsequent search of Companies House to make an assessment of our questions. The email response from the Delivery Body constituted in our

³ Names redacted

opinion an acknowledgement that [the named signatory] could be regarded as an acceptable signatory."

Ground 2

11. GridBeyond indicated that it had provided both a Private Network Letter and a Distribution Connection Agreement during Prequalification, but that the Delivery Body (as confirmed in an email to GridBeyond on 29 November 2019) that it had elected to take the capacity from the Connection Agreement. GridBeyond considered it was wrong for the Delivery Body to have done this, on the basis of their reading of Rule 3.6.3(d):

"...Two key points to consider about Rule 3.6.3(d) are that:

- the Applicant does not have to provide a copy of the Private Network's Distribution Connection Agreement as part of the prequalification process, only a confirmation that there exists such an agreement;*
- the Private Network's export connection to the relevant Distribution Network does not have to be the same size as the export capability of the CMU onto the Private Network. The requirement is to show the export onto the Private Network, and not through the Private Network and then onto the Distribution Network.*

...

*We cannot see anywhere in the **CM Rules** (particularly **Rule 3.6.3(d)**) or in the **Prequalification Guidance document** or in **any correspondence with the EMR Delivery Body** where the export capacity of the CMU has to be less than or equal to the Private Network's export capability onto the Distribution Network, and so we contest the reduction in connection capacity from 33.058MW to 17.000MW (29.752MW to 15.300MW in de-rated volumes). It is reasonable to conclude that **Rule 3.6.3(d)** implies that the Export Capacity of the CMU does not have to equal the export capacity stated in the Private Network's Connection Agreement to the relevant distribution network."*

12. The Regulations require that the Authority must determine whether the Delivery Body's reconsidered decision was correct on the basis of the information which the Delivery Body had at the time of making its decision and accordingly we need to look beyond the Grounds of appeal to the Authority. We have therefore requested both Grid Beyond and the DB to submit additional representations in respect of Ground 1.

The Legislative Framework

13. 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

14. 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.
15. Regulations 68 to 72 set out the process and powers in relation to Dispute Resolution and Appeals.
16. 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.

17. Regulation 71(3) sets out the Authority's obligations when receiving an appeal notice.

71(3) Upon receiving an Appeal Notice which complies with regulation 70, and any information requested from the Delivery Body, the Authority must—

- i. subject to paragraph (4), review the reconsidered decision;*
- ii. determine whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision.*

18. Regulation 71 (4) also sets out the requirements for the Authority when determining whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision pursuant to Regulation 71(3)(b)

71(4) In a determination under paragraph (3)(b)—

- i. the Authority must uphold the reconsidered decision if the Authority determines that it was correct on the basis described in paragraph (3)(b);*
- ii. if the Authority determines that the Delivery Body incorrectly decided not to Prequalify the applicant for a capacity auction in respect of a CMU, it must direct the Delivery Body to register the CMU on the capacity market register as a Prequalified CMU (in which case regulation 73 applies);*
- iii. in any other case, if the Authority determines that the Delivery Body's decision was incorrect it must substitute the decision that it considers the Delivery Body should have made.*

Capacity Market Rules

19. Rule 3.12.1 sets out the declarations that must be made by persons when submitting an Application:

3.12.1 A person submitting an Application or an Opt-out Notification must ensure and confirm in the Application or the Opt-out Notification that:

(a) in all material respects, the Application or Opt-out Notification and, in the case of an Application, all Additional Information submitted by the Applicant; and

(b) in all respects, each of the specific declarations referred to in Rules 3.4 to 3.11 (where relevant),

is true and correct (or, to the extent that the Additional Information is a copy document, that it is a true and correct copy) and that the Application and Additional Information has been authorised by the board of directors of the Applicant or the person submitting the Opt-out Notification (as applicable).

20. Rule 3.2.5 sets out the persons who must sign relevant Applicant Declarations when the Despatch Controller is the Applicant with respect to an Existing Generating CMU:

- i. two directors (or officers, in the case of a body other than a company) of the person having legal ownership of each Generating Unit comprised in that Existing Generating CMU; and*
- ii. two directors (or officers, in the case of a body other than a company) of the Despatch Controller of each Generating Unit comprised in that Existing Generating CMU.*

21. Rules 3.5.2(b) and 3.5.2(ba) detail what the Connection Capacity of a Generating Unit forming part or all of an Existing Generating CMU which is a Distribution CMU should be:

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:...

- b) for a Generating Unit forming part or all of an Existing Generating CMU which is a Distribution CMU, the registered capacity (or inverter rating, if applicable) stated in the Distribution Connection Agreement for that Generating Unit or in the written confirmation from the Distribution Network Operator provided pursuant to Rule 3.6.3(c)(ii) (as applicable);*

- ba) for a Generating Unit forming part or all of an Existing Generating CMU which is a Distribution CMU, but where the Distribution Connection Agreement or connection offer does not state its registered capacity (or inverter rating, if applicable):*
- (i) the estimated capacity that the Applicant, with respect to the Generating CMU (that includes that Generating Unit), calculates to be the registered capacity or inverter rating, based on information otherwise contained within the Distribution Connection Agreement or a connection offer; or*
 - (ii) the maximum capacity which will be physically capable of being transmitted from the Generating Unit to the Distribution Network, based on information otherwise contained within the Distribution Connection Agreement or a connection offer*

22. Rule 3.6.3 (c) puts obligations on each Applicant for an Existing Generating CMU that is a Distribution CMU:

3.6.3(c) Each Applicant for an Existing Generating CMU that is a Distribution CMU must:

- i) confirm that one or more Distribution Connection 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 in the relevant Delivery Years; and*
- ii) provide a copy of the Distribution Connection Agreement for each Generating Unit comprised in the CMU with the Application or, where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement 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.

23. Rule 3.6.3 (d) sets out obligations for an Existing Generating CMU that is not directly connected to a Distribution Network:

3.6.3(d) For an Existing Generating CMU that is not directly connected to a Distribution Network the Applicant may, instead of complying with Rule 3.6.3(c), provide a letter from the owner of the Private Network to which the CMU is connected confirming:

- i) the full output that CMU is able to Export onto that Private Network; and*
- (ii) that the owner of that Private Network has an agreement with the relevant Distribution Network Operator for the connection of the Private Network to, and use of, a Distribution Network*

24. Rule 3.3.7 provides general requirements on the timing and content of Applications:

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.

25. In addition Rules 4.4.2 (a) and 4.4.2 (aa) set out requirements on the Delivery Body when deciding to Prequalify a CMU.

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;

(aa) it reasonably believes that any information or declaration submitted in or with an Application does not comply with the requirements in Rule 3.12.1;

Our Findings

26. Regulation 71(3)(b) requires us to determine whether the reconsidered decision made by the Delivery Body was correct on the basis of the information which the Delivery Body had when it made the decision. Our review of the Delivery Body's reconsidered decision therefore includes GridBeyond's appeal on Ground 2, as well as the request for reconsideration on Ground 1, which the Delivery Body overturned in its reconsidered decision. We have set out our assessment and analysis of both grounds below.

Ground 1

27. Rule 3.2.5 requires that in the case of a company, two directors of the person having legal ownership of each Generating Unit, and of the Despatch Controller of each Generating Unit, must provide a signature on the Application Declaration (Exhibit D).
28. Our assessment of the original Exhibit D evidence shows that only one company director from the legal owner of the Existing Generating CMU, [REDACTED], signed the Declaration, and that the second signature was from the company secretary.

29. [REDACTED] are a limited company and, in our view, cannot be considered a body other than a company. Therefore, to comply with Rule 3.2.5(a), [REDACTED] should have provided two director's signatures in Exhibit D at Prequalification. A company secretary is not sufficient based on the explicit and unambiguous wording of Rule 3.2.5(a).
30. In its Notice of Reconsidered Decision rejecting GridBeyond on Ground 2, the Delivery Body confirmed to GridBeyond that it had accepted GridBeyond's argument on Ground 1. The Delivery Body confirmed to the Authority on 6 January 2019 that it was satisfied with the signatures provided in Exhibit D, as they were the signatures of company officials of a company that reflected an active status on Companies House search. Therefore, the Delivery Body decided to overturn its original decision to not prequalify on the basis of an incorrect signature on Exhibit D.
31. GridBeyond did not include arguments related to Ground 1 in its appeal notice to Ofgem, on the basis that the Delivery Body had overturned its original decision on this Ground in its Notice of Reconsidered Decision. GridBeyond subsequently provided us with additional information related to this Ground in response to a request from the Authority. This additional information is summarised in Paragraph 32, below.
32. Gridbeyond noted that the Company Secretary was listed as an active officer on the Government's public company listing, Companies House, and also confirmed that the signature entered passed the test's in the Delivery Body's Exhibits Tool. GridBeyond further claimed that their communication with the Delivery Body during Prequalification led them to understand that it was acceptable for the company officer in question to sign the Exhibit D.
33. It is our view that the Delivery Body correctly applied Rule 3.2.5 in its original Prequalification Decision, and to reject the CMUs listed in Paragraph 1 from prequalifying. Further, the Delivery Body was incorrect to subsequently overturn this ground in their Notice of Reconsidered Decision.
34. Rule 4.4.2(a) prevents the Delivery Body from Prequalifying a CMU where it is aware that an Application has not been submitted in accordance with the Rules; alternatively, Rule 4.4.2 (aa) provides that the Delivery Body must not Prequalify a CMU where it

reasonably believes that any information or declaration submitted in, or with, an Application does not comply with the requirements in Rule 3.12.1.

35. Rule 3.3.7 provides that an Application will not be considered or accepted unless it is submitted in accordance with the Regulations and the Rules, the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction, and such other requirements as may be specified by the Delivery Body from time to time.
36. For the avoidance of doubt, notwithstanding any oral discussions that Grid Beyond had with the Delivery Body, on whether they could submit Exhibit Form D with only one director signature along with the signature of the company secretary, the Authority does not consider that this constitutes a reason to permit the CMU to Prequalify, particularly, but not only, since that discussion was followed up by an e-mail of the 5th September 2019 confirming that the named signatory would be able to sign the Application Declaration but only "as long as he remains an active director." The named signatory was not a director, nor have we seen any evidence that he ever was a director. We do not consider that the fact that the named signatory was an active officer meets the requirements of Rule 3.2.5(a).
37. Given the nature of the case, we provided GridBeyond with our minded-to position on Ground 1, providing them with an opportunity to respond with any additional representations. In response to this request, Gridbeyond raised two new arguments, in relation to Ground 1.
38. The first of these was that, in their view, the Delivery Body's CM Prequalification Guidance V13.0 Document⁴ (slides 22 and 99), coupled with their interpretation of Rule 3.2.5, led GridBeyond to consider that a company secretary was an appropriate active officer. We do not consider that the Delivery Body's guidance changes the unequivocal and unambiguous wording of Rule 3.2.5 which requires two company directors. We also

note that the version of the Prequalification Guidance referred to is from 2018, and not the latest version.

39. The second new point was in relation to a previous Determination made by the Authority in relation to Limejump Limited⁵ ("Limejump"), however we do not consider these cases to be comparable. This is because at the time that this decision was made in 2016 Regulation 69(5) (see Paragraph 16) had been suspended from operation. The effect that this had was to allow Limejump to be able to provide additional information in support of their case, had they known the full reasons for rejection ahead of the Notice of Reconsidered Decision. We determined, at the time, that full reasoning had not been granted. GridBeyond's case can be distinguished from the Limejump decision in that they were made aware of the reasons for rejection in the Delivery Body's Prequalification Decision, and that Regulation 69(5) had the effect as to prevent any additional Exhibit D being considered by the Delivery Body when they made their reconsidered decision.

Ground 2

40. In an email to Ofgem dated 20 December 2019, the Delivery Body confirmed that GridBeyond had provided a Private Network Letter with the correct capacity, but noted the letter was uploaded to a section of the Application portal where the Delivery Body would not have looked during the Prequalification Assessment. This letter was also not considered by the Delivery Body during the reconsidered decision because, according to the Delivery Body, GridBeyond did not reference the location of the letter.
41. Pursuant to Rule 3.6.3(d) Applicants that are Existing Generating CMUs not directly connected to Distribution Network may, instead of complying with Rule 3.6.3(c), the requirement to provide a Distribution Connection Agreement, provide a letter from the owner Private Network. Our assessment is that a Private Network Letter, with capacity matching the Application, was provided by GridBeyond at Prequalification stage.
42. We consider, therefore, that the Delivery Body was incorrect not to reconsider this point after Prequalification, as Regulation 69(5) was not applicable on the basis that the

⁵https://www.ofgem.gov.uk/system/files/docs/2016/12/20161205_determination_limejump_t_a.pdf

applicant had provided the information at the time of its application and the Delivery Body had the information at the time it made its decision.

Conclusion

43. The Delivery Body reached the correct Prequalification Decision to reject the CMUs listed in Paragraph 1 for the 2020 T-1, 2022 T-3 and 2023 T-4 Auctions.
44. However, the Delivery Body was incorrect to overturn Ground 1 in their reconsidered decision, as the signatures of two Directors, required on the Application Declaration under CM Rule 3.2.5(a), were not provided in the Application for Prequalification. Under Rule 4.4.2, the Delivery Body must not Prequalify a CMU where it is aware that the Application has not been submitted in accordance with the Rules.
45. The Delivery Body was also incorrect to uphold their Prequalification Decision on Ground 2. GridBeyond had provided sufficient evidence at Prequalification stage to verify the Connection Capacity that was entered under CM Rule 3.6.3(c) and (d), as it had provided a Private Network Letter.

Determination

46. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's reconsidered decision was incorrect on both Grounds in respect of the CMUs listed in Paragraph 1. In particular, we note that the Delivery Body should have upheld their original Prequalification Decision in their Notice of Reconsidered Decision.
47. Therefore, pursuant to our power under Regulation 71(4) to substitute the decision the Delivery Body should have made, we hereby determine that these CMUs have not Prequalified for the 2020 T-1 and T-4 Auctions, the 2023 T-4 Auctions.



Mark Carolan

For and on behalf of the Gas and Electricity Markets Authority

15 January 2020