

## **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 Lakeside Energy From Waste Limited ("Lakeside") against reconsidered decision made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
  - a) LAKE19 (T-3 auction)
2. This decision deals with all of the appeals listed above as they are substantively in respect of the same issue and differ only in so far as concerns the identity of the respective CMU.
3. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the "Regulations"), where the Authority<sup>1</sup> receives an appeal notice that complies with Regulation 70, the Authority must review a reconsidered decision made by the Delivery Body.

### **Appeal Background**

4. Lakeside submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2019 T-3 Auction.
5. 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:

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<sup>1</sup> 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.

*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 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 signed by two directors/a director (if only one director).*

*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 signed by two directors/a director (if only one director).*

6. On 29 October 2019, Lakeside submitted a request for reconsideration of the Prequalification Decisions.
7. The Delivery Body issued a Notice of Reconsidered Decision on 22 November 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.*

*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 signed by two directors/a director (if only one director).*

*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 signed by two directors/a director (if only one director).*

8. On 29 November 2019, Lakeside submitted an appeal notice to the Authority under regulation 70 of the Regulations.

## **Lakeside Energy From Waste Limited's Grounds for appeal**

9. Lakeside disputes the decision on the following grounds.

### Ground 1

*"The signing of the relevant certificates by an officer instead of a second director was an obvious error on the part of Lakeside. It has submitted certificates signed by two directors in all previous applications for prequalification.*

*The error was a minor administrative one that neither signalled an intent to deceive on the part of Lakeside nor related to any of the technical information which is the actual cornerstone on which decisions in relation to prequalification are made. It was a minor administrative detail capable of immediate correction upon request by National Grid ESO.*

*As such, it was unreasonable for National Grid ESO to refuse the application instead of simply drawing the error to Lakeside's attention and asking that it be remedied, giving a very short deadline for it to do so."*

### Ground 2

*"The aim of prequalification, which is for National Grid ESO to assess eligibility (in terms of domicile, type of capacity and previous support) and capacity of individual capacity market units.*

*The ease with which the error could be remedied – properly signed certificates can be readily provided, as can alternative evidence that Lakeside's were content with the statements made in the two certificates at the time of the application, the effect that inability to participate in the auction will reduce*

*Lakeside's revenues, and the UK's obligations in EU law to support energy from renewable sources."*

### Ground 3

*"The failure to inform Lakeside of the error and allow it to be corrected before the initial decision was made, and not to allow it to be corrected on reconsideration was procedurally unfair. That unfairness has caused prejudice to Lakeside in view of its inability to participate in the auction."*

## **The Legislative Framework**

10. 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**

11. 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.
12. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
13. 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.*

## Capacity Market Rules

14. Rule 3.12.3 states that:

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

15. Rule 3.12.4 states that:

*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).*

16. Rule 4.2.2 states that:

*The Delivery Body has no obligation to consider and check an Application prior to the closing of the Prequalification Window.*

## Our Findings

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

### Ground 1

18. Lakeside argues that it is "unreasonable for National Grid ESO to refuse the application" over "a minor administrative detail capable of immediate correction upon request by National Grid ESO".

19. Rules 3.12.3 and 3.12.4 require that two directors of the applicant company must sign the Certificates that have to be provided as part of the Application for Prequalification. If an Application does not meet the requirements of these Rules, the Delivery Body should reject it in line with Rule 4.4.2(b).

20. Further to this, the operation of Regulation 69(5) prohibits the Delivery Body from taking 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. Lakeside did not provide the required information in its original application to satisfy Rules 3.12.3 and 3.12.4 and because this information was required to be provided to the Delivery Body, but was not, Regulation 69(5) prevents the Delivery Body from taking it into account when reconsidering a prequalification decision. Therefore, the Delivery Body were right to not ask Lakeside for a correct version.
21. Lakeside failed to comply with Rules 3.12.3 and 3.12.4 by not providing the necessary signatures in accordance with the Rules and Regulations when submitting their application. Therefore the Delivery Body was correct in applying Rule 3.12.3 and 3.12.4 to prevent the CMUs listed in Paragraph 1 from prequalifying.

### Grounds 2 and 3

22. Lakeside's second ground was that it is disproportionate, as *"the aim of prequalification is to assess eligibility"*.
23. Lakeside also argues that *"the failure to inform Lakeside of the error and allow it to be corrected before the initial decision was made, and not to allow it to be corrected on reconsideration was procedurally unfair"*. However, under Rule 4.2.2, the Delivery Body has no obligation to consider and check an application prior to the closing of the Prequalification window.
24. As outlined above, the operation of Regulation 69(5) prohibits the Delivery Body from taking 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. Therefore, the Delivery Body were right to not ask Lakeside for a correct version.

## **Conclusion**

25. The Delivery Body reached the correct reconsidered decision to not prequalify LAKE19 for the T-3 Auction on the basis that:

- a) two directors of Lakeside have not signed the Certificates as required under Rules 3.12.3 and 3.12.4 respectively;
- b) because the correct Certificates, as required by Rules 3.12.3 and 3.12.4, were not provided with the Application for Prequalification, Regulation 69(5) prohibits the Delivery Body from considering the new Certificates submitted by Lakeside with its Request for Reconsideration; and
- c) under Rule 4.4.2, the Delivery Body must not Prequalify a CMU where it is aware that the Application has not been completed or submitted in accordance with the Capacity Market Rules.

## **Determination**

26. 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 Lakeside for Prequalification will be upheld in respect of the CMUs listed in Paragraph 1 for the T-3 Auction.



Tom Kenyon-Brown

**For and on behalf of the Gas and Electricity Markets Authority**

15 January 2020