

## **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 Wincham Lane Power Limited (“Wincham Lane”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (“Delivery Body”) in respect of the following Capacity Market Units (“CMUs”):
  - a) WINC09 (T-4 Auction)
  - b) WINC10 (T-3 Auction)
  - c) WINC11 (T-1 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 CMUs, and the Auctions for which they are in respect of.
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.

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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.

## Appeal Background

4. Wincham Lane submitted an Application for Prequalification for the CMUs in Paragraph 1 in respect of the 2020 T-1, T-3 and T-4 Auctions and sought a Maximum Obligation Period of 15 years.
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 Conditionally Prequalified the CMUs on the following grounds:

*"Application is Conditionally Prequalified for the following reason(s):*

*Financial Commitment Milestone: As per Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved; therefore, this Application is Conditionally Prequalified and will need to provide Credit Cover as above.*

*Deferred Exhibit ZA: As per Capacity Market 4.5.1(b)(va), Exhibit ZA has been deferred; therefore, this Application is Conditionally Prequalified. The deadline for submitting Exhibit ZA is 15 Working Days after Prequalification Results Day which is 15th November 2019 (in accordance with Rule 3.4.10(b)(ii).*

*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.*

*Please note, the method of calculation has changed from Estimate in Good faith to Unit Reg. Capacity for at least one of the components during assessment. Please contact the Delivery Body for more information."*

6. On 14 November 2019, Wincham Lane submitted a document which they incorrectly believed was a copy of their completed Exhibit ZA. The document they submitted did not meet the requirements of the deferred Exhibit ZA, as per the template in the Rules<sup>2</sup>.
7. On 18 November, the Delivery Body issued *"...a Rejection Notice, via email, for failure to upload Exhibit ZA on or before the deadline of 15<sup>th</sup> November 2019."* Wincham Lane subsequently uploaded the correct Exhibit ZA (on 18 November 2019), but was informed by the Delivery Body that the re-submitted file would not be accepted, and that an appeal would be necessary.
8. Wincham Lane submitted a request for reconsideration of the Prequalification Decisions on 27 November 2019.
9. The Delivery Body issued a Notice of Reconsidered Decision on 13 December which rejected the dispute on the following grounds:

*"...following the failure to provide an Exhibit ZA by the prescribed deadline."*

10. Wincham Lane then submitted an appeal notice to the Authority on 17 December 2019 under Regulation 70 of the Regulations.

## **Wincham Lane's Grounds for appeal**

11. Wincham Lane disputes the decision on the following grounds.

### Ground 1<sup>3</sup>

*"EMR issued a rejection notice in relation to WINC09, for failure to upload Exhibit ZA within the applicable timeline. As set out above, Wincham Lane Power prepared and executed Exhibit ZA in relation to WINC09 ahead of the deadline of 15th November 2019. Unfortunately, the incorrect exhibit was uploaded to the portal. This was immediately rectified on discovery and the*

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<sup>2</sup> Informal Consolidated Version of the Capacity Market Rules, 27 July 2019. Page 285.

[https://www.ofgem.gov.uk/system/files/docs/2019/09/informal\\_consolidated\\_capacity\\_market\\_rules\\_26\\_july\\_2019.pdf](https://www.ofgem.gov.uk/system/files/docs/2019/09/informal_consolidated_capacity_market_rules_26_july_2019.pdf)

<sup>3</sup> The grounds of appeal are materially the same for all of the CMUs mentioned in Paragraph 1

*correct Exhibit ZA was uploaded to the portal. This was a clerical error that was immediately rectified. To prevent WINC09, from prequalifying owing to this clerical error is in our view disproportionate and unreasonable.”*

## Ground 2

*“As a matter of record, Wincham Lane Power submitted an appeal in relation to this dispute in the Tier 1 Dispute Resolution regime (“**Tier 1 Dispute**”) and was informed that the appeal was rejected. We note that EMR did not provide any substantive feedback or any reasoning for its rejection of the Tier 1 Dispute. As stated above, this was a clerical error which was immediately rectified. We do not consider EMR’s response to Tier 1 Dispute either proportionate or reasonable given the lack of reasoning provided by the Delivery Body. We note Section 76(5) of the Electricity Capacity Regulations 2014, which requires the EMR to “...as soon as reasonably practicable after determining a dispute give a notice to the disputing party of its decision and the reason for that decision” (emphasis added).”*

## **The Legislative Framework**

12. 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**

13. 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.
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 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**

16. Rule 3.4.10 (b) sets out the requirement for an Applicant to provide a Fossil Fuel Emissions Declaration by 15 Working Days after the Prequalification Results Day, and states that :

*A relevant Applicant must provide to the Delivery Body a Fossil Fuel Emissions Declaration (that the Delivery Body considers fully addresses the matters set out in Exhibit ZA):*

- (i) in its Application; or*  
*(ii) in any case by the date which is 15 Working Days after the Prequalification Results Day.*

17. Rule 4.4.2(i) outlines that the Delivery Body must not Prequalify a CMU where the Applicant has not provided a Fossil Fuels Emissions Declaration and states:

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

- ..(i) Rule 3.4.10 applies to the Applicant for the CMU, and the Applicant has not provided a Fossil Fuel Emissions Declaration in accordance with Rule 3.4.10(b).*

18. Rule 4.5.1 (b) (va) clarifies that a the Prequalification status, as notified by the Delivery Body in the Prequalification Results Letter, is conditional on complying with Rule 3.4.10 (b) and states that:

*On the Prequalification Results Day, the Delivery Body will notify each Applicant other than a Secondary Trading Entrant, the Secretary of State, the CM Settlement Body and the Authority of the following information: ...*

*(b) where the Prequalification Decision is that the CMU has Prequalified: ...*

*(va) if the CMU is a New Build CMU which comprises or will comprise of one or more Fossil Fuel Components or is an Unproven DSR CMU and either the Applicant in respect of the CMU has not provided a Fossil Fuel Emissions Declaration in accordance with Rule 3.4.10(b)(i) or the Delivery Body has provided a notice to the Applicant under Rule 3.4.10(c), that the Prequalification of the CMU is conditional upon the Applicant complying with Rule 3.4.10(b);*

## **Our Findings**

19. We have assessed each of Wincham Lane grounds for appeal, which are set out below.

### Ground 1

20. Wincham Lane recognise that they did not provide the required Exhibit ZA by the deadline set out in Rule 3.4.10 (b). They believe that it would be disproportionate to reject the applications on the basis of what they consider to be a clerical error.

21. As per Paragraph 5, the Notification of Prequalification Decision issued to Wincham Lane on 25 October 2019 stated that the CMUs listed in Paragraph 1 had been Conditionally Prequalified withstanding the requirement to provide Exhibit ZA by 15th November 2019, in accordance with Rule 3.4.10(b) (ii). The Delivery Body thus issued the correct notice to Wincham Lane in accordance with Rule 4.5.1 as detailed above.

22. In our view, Wincham Lane failed to comply with Rule 3.4.10(b) by submitting the incorrect Exhibit on 14 November 2019. On Wincham Lane's point that this was a clerical error, we note that the requirement to submit an Exhibit ZA by the 15 November was clear in the Rules. To this end we consider that the only Exhibit that could be submitted at this point would be Exhibit ZA and the onus to do so rested with Wincham

Lane. We note that Wincham Lane submitted the correct Exhibit ZA on Monday 18 November 2019, however, this was after the deadline of 15 Working Days after Prequalification Results Day.

23. It is the Applicant's responsibility to ensure that an Application for Prequalification is made in accordance with the Rules and that when information is submitted it should be done in accordance with the Rules, or any relevant guidance provided by the Delivery Body.
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 was correct in not considering the Exhibit ZA submitted after the deadline laid out in Rule 3.4.10 (b).

#### Ground 2

25. Wincham Lane's position is that they do not consider the Delivery Body's response *"...either proportionate or reasonable given the lack of reasoning provided by the Delivery Body"*.
26. In our view, Paragraph 9, above, demonstrates that the Delivery Body did in fact provide a reason behind their decision to not prequalify the Applicant in the Notice of Reconsidered Decision.

### **Conclusion**

27. The Delivery Body reached the correct reconsidered decision to not prequalify WINC09, WINC10 and WINC11 for the T-1, T-3 and T-4 Auctions on the basis that the Exhibit ZA required under Rule 3.4.10 (b) was not provided by the deferred deadline. In accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take in consideration any information or evidence which Wincham Lane was required to and failed to produce before the original Prequalification Decision was taken and was therefore precluded from considering the late submittal of Exhibit ZA on the 18 November 2019.

## **Determination**

28. 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 Wincham Lane for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the T-1, T-3 and T-4 Auctions.



Mark Carolan

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

15 January 2020