

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 East London Energy Limited ("East London Energy") against Reconsidered Decisions made by the Electricity Market Reform Delivery Body (the "Delivery Body") in respect of the following Capacity Market Units ("CMUs"):
 - a) CES106 (T-4 Auction)
 - b) CES107 (T-4 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.
3. 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

4. East London Energy submitted an Application for Prequalification for the CMUs listed in paragraph 1 of this determination in respect of the 2021 T-4 Auction.

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.

5. For these CMUs, the Delivery Body issued a Notification of Prequalification Decision dated 6 November 2020 (the "Prequalification Decision"). The Delivery Body rejected the CMUs on the following grounds:

"Capacity Market Rule 4.4.2(j) requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Declaration in its Application. The Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZA, specifically a missing or incorrect Directors Printed name. Please contact the Delivery Body for more information.

Capacity Market Rule 4.4.2(j) requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Declaration in its Application. The Delivery Body considers that the Applicant has not fully addressed the matters set out in Exhibit ZA, specifically, the missing or incomplete Part 6 of the Exhibit ZA document. Please contact the Delivery Body for more information."

6. East London Energy submitted a Request for Reconsideration of the Prequalification Decision ("Tier 1 Appeal") on 19 November 2020.
7. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which rejected the appeal on the following ground:

"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) as updated by BEIS, after considering the Application as a whole the Delivery Body considers the error or omission of part 6 of the Exhibit ZA document, prevents the ability of the Delivery Body to enforce the relevant requirement to which it relates. As a result, the original Prequalification Decision has been upheld.

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

8. East London Energy then submitted an Appeal Notice to the Authority ("Tier 2 Appeal") on 22 December 2020 under regulation 70 of the Regulations.

East London Energy's Ground for appeal

9. East London Energy disputes the decision on the following ground:

"The calculation and supporting files are omitted from the submission by clerical error. The calculation follows the methodology from Schedule 8 and uses Stand Emission Factors and Net Calorific Values from Schedule 9 of The Capacity Market (Amendment) (No 2) Rules 2020. Electrical Generation is measured by electricity meters maintained and calibrated in accordance to a Maintenance Management System, Piranha. CHP data is taken from the as built manufacturer data sheet from the O&M manual for CES 106. CHP data sheet, and calculation sheet are provided to support this dispute."

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) (the "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 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) provides for what the Delivery Body may not take into account in reconsidering a Prequalification Decision:

"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."*

14. Regulation 71(3) sets out the Authority's obligations when receiving an Appeal Notice:

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

- (a) *subject to paragraph (4), review the Reconsidered Decision;*
- (b) *determine whether the Reconsidered Decision was correct on the basis of the information which the Delivery Body had when it made the decision."*

Capacity Market Rules

15. Rule 3.6.5 sets out the requirement for an applicant to provide a Fossil Fuel Emissions Declaration, and states that:

- (a) *Subject to Rule 3.6.5(b) and Rule 3.6.5(d), an Applicant for an Existing Generating CMU must provide to the Delivery Body a Fossil Fuel Emissions Declaration if the CMU comprises of at least one Fossil Fuel Component or at least one Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component 65 (each a "relevant Fossil Fuel Component").*
- (b) *The Applicant is not required to provide a Fossil Fuel Emissions Declaration under this Rule 3.6.5 if the Applicant confirms in the Application that:*
 - (i) *after the coming into force of the Capacity Market (Amendment) (No. 2) Rules 2020, a Fossil Fuel Emissions Declaration has been provided to the Delivery Body in respect of the CMU (a "previous*

Fossil Fuel Emissions Declaration”), and it is not a Fossil Fuel Emissions Declaration specified in Rule 3.6.5(c);

(ii) the previous Fossil Fuel Emissions Declaration remains accurate because:

(aa) there has been no Emissions Related Material Change to the CMU or a relevant Fossil Fuel Component since the previous Fossil Fuel Emissions Declaration was provided; and

(bb) the previous Fossil Fuel Emissions Declaration did not specify the Fossil Fuel Yearly Emissions of any relevant Fossil Fuel Component.

(c) A Fossil Fuel Emissions Declaration specified in this Rule 3.6.5(c) is:

(i) a Transitional Fossil Fuel Emissions Declaration; or

(ii) where the Application is in respect of the Delivery Year commencing on 1 October 2024 or any subsequent Delivery Year, a Pre-2024 T-1 Fossil Fuel Emissions Declaration.

(d) The Applicant is not required to provide a Fossil Fuel Emissions Declaration under this Rule 3.6.5 if the Applicant confirms in the Application that:

(i) the Application is in respect of a Pre-2024 T-1 Auction; and

(ii) each relevant Fossil Fuel Component comprised in the CMU has a Commercial Production Start Date which is before 4 July 2019.”

16. Rule 4.4.2(j) sets out where the Delivery Body must not Prequalify a CMU in respect to providing a Fossil Fuel Emissions Declaration, and states that:

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

...

- (j) the Applicant is required to provide a Fossil Fuel Emissions Declaration under Rule 3.6.5 or Rule 3.9.5, but has not done so or has provided a Fossil Fuel Emissions Declaration which the Delivery Body considers does not fully address the matters set out in Exhibit ZA..."*

17. Exhibit ZA, Part 6, requires Relevant Persons to provide specific data and other information in their Prequalification Application to evidence or verify the Fossil Fuel Emissions declared in Part 4 of Exhibit ZA:

"[The Relevant Person hereby confirms that:

- (a) in respect of the Fossil Fuel Emissions specified in the fourth column of the table in Part 4, attached to this Declaration is the following information for each relevant Fossil Fuel Component:*

- (i) the data used to calculate the Design Efficiency of the Fossil Fuel Component;*
- (ii) a description (including title and year) of the ISO (International Organisation for Standardisation) or EN (European Standards) standard/s applied by the Relevant Person;*
- (ii) the data used to determine the appropriate Emission Factor; and*
- (iv) details of any assumptions made in calculations of Fossil Fuel Emissions [and, where applicable, Fossil Fuel Yearly Emissions].*

and

- [(b) in respect of the Fossil Fuel Yearly Emissions specified in the fifth column of the table in Part 4, attached to this Declaration is the data used to calculate Electricity Production for each relevant Fossil Fuel*

Component.]]”

Our Findings

18. We have assessed East London Energy’s ground for appeal, which is summarised below.
19. As set out in paragraph 17 of this determination, Part 6 of Exhibit ZA requires that specific data and other information are provided in the Application for Prequalification to evidence or verify the Fossil Fuel Emissions declared under Part 4 of Exhibit ZA.
20. East London Energy argue that the required data and other information for Part 6 of Exhibit ZA were omitted through “clerical error” in its Application for Prequalification. East London Energy subsequently attached the omitted data and other information to its Tier 1 Appeal to the Delivery Body, as well as its Tier 2 Appeal to the Authority. However, it is accepted that East London Energy failed to provide the required data and other information required for the purpose of Part 6 of Exhibit ZA in its Application for Prequalification.
21. Rule 4.4.2(j) provides that the Delivery Body must not Prequalify a CMU where the Fossil Fuel Emissions Declaration submitted does not fully address the matters set out in Exhibit ZA. Thus, in accordance with Rule 3.6.5 and Rule 4.4.2(j), the data and other information declared as being provided under Part 6 of Exhibit ZA should have been submitted in the Application for Prequalification.
22. Regulation 69(5) of the Regulations prohibits the Delivery Body, when making its Reconsidered Decision, from taking into consideration any information or evidence that was required to be provided by the applicant to the Delivery Body before the Prequalification Decision was made.
23. Regulation 71(3)(b) requires the Authority 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.
24. The Authority therefore finds that the Delivery Body was correct in rejecting the CMU’s listed in paragraph 1 of this determination from Prequalification on the basis of Rule

4.4.2(j). Furthermore, the Authority finds that the Delivery Body was correct not to accept the data and other information provided for the purpose of Part 6 of Exhibit ZA in East London Energy's Tier 1 Appeal.

Conclusion

25. The Delivery Body reached the correct Reconsidered Decision to not Prequalify CES106 and CES107 for the 2021 T-4 Auction on the basis that:

- a) Rule 3.6.5 requires that an applicant for an Existing Generating CMU must provide to the Delivery Body a Fossil Fuel Emissions Declaration if the CMU comprises of at least one Fossil Fuel Component or at least one Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component;
- b) Part 6 of Exhibit ZA requires that specific data and other information are provided in the Application for Prequalification to evidence or verify the Fossil Fuel Emissions declared under Part 4 of Exhibit ZA;
- c) Rule 4.4.2(j) provides that the Delivery Body must not Prequalify a CMU where the Fossil Fuel Emissions Declaration provided does not fully address the matters set out in Exhibit ZA; and
- d) East London Energy only submitted the data and other information for the purpose of Part 6 of Exhibit ZA to the Delivery Body as part of its Tier 1 Appeal. In accordance with regulation 69(5), when making a Reconsidered Decision, the Delivery Body must not take into consideration any information or evidence which East London Energy was required to provide before the Prequalification Decision.

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 East London Energy for Prequalification be upheld in respect of the CMUs listed in paragraph 1 of this determination for the 2021 T-4 Auction.



Mark Carolan

For and on behalf of the Gas and Electricity Markets Authority

19 February 2021