

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 an appeal made by Esso Petroleum Company, Limited ("Esso Petroleum") against a reconsidered decision made by the Electricity Market Reform Delivery Body (the "Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
 - a) EMD-20 (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. Esso Petroleum submitted an Application for Prequalification for the CMU in paragraph 1 in respect of the 2024-25 T-4 Auction and sought a Maximum Obligation Period of 1 year.
4. For the CMU listed in paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 6 November 2020 (the "Prequalification Decision"). The Delivery Body Rejected the CMU on the following Ground:

"Capacity Market Rules 3.6.1(b) requires the Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU, using the Supplier Settlement Metering

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.

Configuration Solution, must provide either a letter from the supplier or former supplier to each CMU confirming the physically generated net output or Metered Volume where applicable, in MWh to three decimal places, and confirmation if line losses have been applied, for the three Settlement Periods required as per Capacity Market Rule 3.6.1(a). If this is not possible, the Applicant can provide evidence the CMU or Generating Unit delivered Metered Volume (in MWh to three decimal places) in discharge of an obligation to delivering a balancing service confirming the CMU or Generating Unit's physically generated net output. This Application has failed as no evidence has been provided for this CMU."

5. Esso Petroleum submitted a request for reconsideration of the Prequalification Decision ("Tier 1 Appeal") on 20 November 2020.
6. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which rejected the Tier 1 Appeal on the following Ground:

"Capacity Market Rule 3.6.1(b) clearly required the Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU, using the Supplier Settlement Metering Configuration Solution or Bespoke Metering Configuration Solution must provide either a letter from the supplier or former supplier to each CMU confirming the physically generated net output or Metered Volume where applicable, in MWh to three decimal places, and confirmation if line losses have been applied, for the three Settlement Periods required as per Capacity Market Rules 3.6.1(a). If this is not possible, the Applicant can provide evidence the CMU or Generating Unit delivered Metered Volume (in MWh to three decimal places) in discharge of an obligation to delivering balancing service confirming the CMU or Generating Unit's physically generated net output.

The Applicant has failed to address this failure reason in the request to review the Prequalification Decision, therefore this requirement is still outstanding, and the status of the Application under the Reconsidered Decision remains as Rejected."

7. Esso Petroleum then submitted an appeal notice to the Authority ("Tier 2 Appeal") on 18 December 2020 under regulation 70 of the Regulations.

Esso Petroleum's Grounds for appeal

8. Esso Petroleum disputes the decision of the Delivery Body in relation to its Tier 1 Appeal on the following Grounds:

Ground 1

9. Esso Petroleum argues that it did provide all of the relevant information. In its Appeal Notice to the Authority Esso Petroleum states that "*the information requested and provided as part of the original application, and the subsequent Tier 1 dispute, contained all relevant information that enables it to be accepted by the Delivery Body*". In addition, Esso Petroleum state that in its Request for Reconsideration, it submitted a "*document from the supplier (EPCo)... to confirm the historical metered output*" (the "Supplier Letter") and that "*this was not submitted with the original application, as the same data was captured in the historical output application page*." Esso Petroleum were the named company on the Supplier Letter.

Ground 2

10. Esso Petroleum argues that the metered output data provided in its letter to the Delivery Body and submitted as part of the Request for Reconsideration is identical to the data presented in its Prequalification Application submitted in 2019, which was an Application in respect of CMU EMD-19 to participate in the 2013 four-year-ahead auction. Esso Petroleum claims that the submitted physically generated net output data provided in 2019 has remained the same this year, and this was previously accepted by the Delivery Body.

Ground 3

11. Esso Petroleum state that during a telephone communication with the Delivery Body, which took place after the Prequalification Decision was received, the "*Delivery Body confirmed the document [Supplier Letter] could be submitted as part of the Tier 1 dispute under the clerical error terms, given there is no change in the data submitted, nor was it new data to the application*". Esso Petroleum state that the letter provided as part of its Request for Reconsideration "*confirms the values already submitted within the [original] application*". Esso Petroleum also refer to Section 8 of the Delivery Body's Capacity Market Disputes Guidance and claim that "*the additional letter is immaterial to confirming the historical net generated output*".

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 Capacity Market 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 3.6.1(b) specifies the Previous Settlement Period performance requirement for Existing Non-CMRS Distribution CMUs using the Supplier Settlement Metering Configuration Solution and states that:

"Each Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU using the Supplier Settlement Metering Configuration Solution must provide:

(i) A letter from the supplier or former supplier to such CMU confirming:

(aa) the CMU or Generating Unit's physically generated net output, or Metered Volume where applicable, in MWh to three decimal places; and

(bb) whether line loss adjustments have been applied; or

- (ii) *where the Applicant cannot meet the requirements of 3.6.1(b)(i), evidence the CMU or Generating Unit delivered a Metered Volume (in MWh to three decimal places) in discharge of an obligation to deliver a balancing service confirming the CMU or Generating Unit's physically generated net output,*

in three Settlement Periods referred to in Rule 3.6.1(a) for each Generating Unit that comprises that CMU."

- 17. Rule 3.6.1(c) specifies the Previous Settlement Period performance requirement for Existing Non-CMRS Distribution CMUs using the Balancing Services Metering Configuration Solution or Bespoke Metering Configuration Solution and states that:

"Each Applicant for an Existing Generating CMU that is a Non-CMRS Distribution CMU using the Balancing Services Metering Configuration Solution or Bespoke Metering Configuration Solution must provide either in relation to the CMU or to each Generating Unit comprising the Generating CMU:

- (i) *a letter from the supplier or former supplier to such CMU confirming the CMU or Generating Unit's physically generated net output in MWh to three decimal places;*
or
- (ii) *evidence the CMU or Generating Unit delivered a Metered Volume (in MWh to three decimal places) in discharge of an obligation to deliver a balancing service confirming the CMU or Generating Unit's physically generated net output in MWh to three decimal places;*
- (iii) *and if line loss adjustments have been applied, either:*

(aa) a letter from the Distribution Network Operator confirming the Line Loss Factor values in the three Settlement Periods referred to in Rule 3.6.1(a); or

(bb) where applicable, a letter from the owner of the Unlicensed Network confirming the electrical loss factor values in the three Settlement Periods referred to in Rule 3.6.1(a) and the methodology used to calculate such values.”

Our Findings

Application of Rules by the Delivery Body

18. Esso Petroleum identified, in the metering configuration section of the Application for Prequalification, that metering option (b) (Bespoke Metering Configuration Solution) was applicable for CMU EMD-20. Rule 3.6.1(c) makes provisions for an Existing Generating CMU that is a Non-CMRS Distribution CMU using a Bespoke Metering Configuration Solution. Therefore, the Delivery Body incorrectly applied Rule 3.6.1(b) to Reject this CMU from prequalification. The Authority therefore refers to Rule 3.6.1(c) as the relevant Rule in this Determination. We note that the relevant requirements under Rules 3.6.1(b) and 3.6.1(c) are materially equivalent, but such that Esso Petroleum’s grounds should be addressed against Rule 3.6.1(c). In this case, and for the reasons set out in this paragraph, we consider that Rule 3.6.1(c) is the correct Rule against which Esso Petroleum’s application and subsequent appeals should be assessed, and we address Esso Petroleum’s grounds of appeal with reference to that Rule.
19. Given that the Delivery Body’s assessment at Tier 1 was on the application of the incorrect Rules the Authority invited Esso Petroleum to make further representations to the Authority on 2 March 2021, in advance of issuing this Determination. As a point of fair process, we provided Esso Petroleum (and the Delivery Body) with our ‘minded to’ position, and gave Esso Petroleum an opportunity to respond with additional representations. We received a response from Esso Petroleum on 5 March 2021 and have taken this response into consideration in reaching our final decision. For the avoidance of doubt, we note that we have not taken into account any information or evidence that would be prohibited from consideration under regulation 69(5).

Esso Petroleum’s Grounds for Appeal

20. We have assessed Esso Petroleum’s grounds under its Tier 2 Appeal, which are again summarised below:

Ground 1

21. Esso Petroleum's first ground is that it provided sufficient evidence to comply with the requirements of the Rules in the Application for Prequalification. According to Esso Petroleum, the Supplier Letter that was submitted in its Request for Reconsideration was not new information, as the metering data in the Supplier Letter matched the metering data captured in the Application for Prequalification.
22. Rule 3.6.1(c) requires an Applicant to which the Rule is applicable to provide either (i) a letter from a supplier confirming the CMU's physically generated output or (ii) evidence that the CMU has delivered a Metered Volume in discharge of an obligation to deliver a balance service confirming the CMU or Generating Unit's physically generated net output in MWh to three decimal places. We note that regulation 69(5) prevents the Delivery Body from taking information or evidence into account that should have been provided within the Application for Prequalification.
23. At Prequalification Esso Petroleum provided details of Historic Metered Output in its Application for Prequalification. However, this information was not provided within a letter from a supplier or former supplier, and so did not fulfil the requirements of Rule 3.6.1(c)(i). In addition to this, the information provided at Prequalification did not evidence that the CMU has delivered a Metered Volume in discharge of an obligation to deliver a balancing service, and therefore does not fulfil the requirements of Rule 3.6.1(c)(ii). The Authority finds that in its Application for Prequalification, Esso Petroleum failed to provide the evidence required to satisfy either Rule 3.6.1(c)(i) or 3.6.1(c)(ii).
24. We note that following Esso Petroleum's Tier 1 Appeal, the Delivery Body upheld the Rejected status of CMU EMD-20 on the basis that Esso Petroleum did not provide sufficient evidence to meet the requirements of 3.6.1(b). This was the reason given in the Notice of Reconsidered Decision as to why the Delivery Body correctly rejected Esso Petroleum's Application for Prequalification. However, in its Reconsidered Decision the Delivery Body should have rejected the Supplier Letter that was submitted as part of Esso Petroleum's Tier 1 Appeal on the basis that regulation 69(5) prevents the Delivery Body from taking into consideration information or evidence which was required to be provided at Prequalification and was not provided at that stage. The Authority made further enquiries to the Delivery Body (by virtue of the powers set out in regulation 71(1)(b))² and the

² Regulation 71(1)(b) provides that the Authority may request the Delivery Body to provide it with any information relating to the disputed decision which the Authority considers necessary to enable it to determine the appeal.

Delivery Body subsequently confirmed that the further information submitted by Esso Petroleum in its Tier 1 Appeal was rejected on the application of regulation 69(5). The Delivery Body did not, however, mention this in its reason for rejection.

25. In its response to the Tier 1 Appeal made by Esso Petroleum, the Delivery Body rejected the Supplier Letter on the basis that it did not comply with the requirements of Rule 3.6.1(b). Therefore, in our view, and as per paragraphs 18 and 24 above, although the Delivery Body's Reconsidered Decision reached the correct conclusion, it was arrived at via an incorrect application of the Regulations in that the Delivery Body failed to mention the application of regulation 69(5). This is contrary to the requirements of regulation 69(3)(ii), which requires the Delivery Body to provide full reasoning for the rejection of a Capacity Market Appeal. We do not consider this omission to have any material impact on the outcome of the Tier 1 Appeal, or on the Authority's decision in this Determination.
26. In addition, the Authority does not accept Esso Petroleum's argument that the Supplier Letter did not provide new information but verified the metering information that was provided at Prequalification. Rules 3.6.1(c)(i) and 3.6.1(c)(ii) require an Applicant to provide either a letter from the supplier or former supplier, or evidence that the CMU or generating unit delivers a metered volume in discharge of an obligation to deliver a balancing service. The information provided by Esso Petroleum at Prequalification did not comply with either of these Rules. As set out above, regulation 69(5) prevents the Delivery Body from considering this evidence as it was provided in its Tier 1 Appeal.

Ground 2

27. Esso Petroleum's second ground is that the metering data submitted in respect of the CMU in paragraph 1 has not changed since the previous years' submission, and that the Delivery Body has already confirmed that this data is correct in 2019, and that submission was approved.
28. The Authority must consider each appeal according to its own merits. The fact that Esso Petroleum has previously been prequalified for the Capacity Market Auction does not create a legitimate expectation that the Delivery Body should have prequalified its current application in respect of the CMU listed in paragraph 1. We therefore do not consider ground 2 to be a relevant consideration in this Tier 2 Appeal.

Ground 3

29. Esso Petroleum, in its third ground, state that the Delivery Body confirmed that further information could be submitted in its Request for Reconsideration and considered under "*clerical error*" terms.
30. Esso Petroleum refer to Section 8 of the Delivery Body's Capacity Market Disputes Guidance³ (the "guidance"), which provides a summary of the Delivery Body's understanding of how regulation 69(5) may be interpreted, under certain conditions, to allow an error or omission to be accepted within its Reconsidered Decision . The guidance refers to clarification of the policy intent behind regulation 69(5) by the UK Government Department for Business, Energy and Industrial Strategy ("BEIS").
31. The Delivery Body states in its guidance that errors may be corrected provided that the error is "*inadvertent, obvious, isolated or trivial*". The guidance also states the following: "*The above approach does not extend to the treatment of missing or incorrect information within connection agreements, planning consents or supplier letters*".
32. In applying BEIS' policy intent clarification, the relevant Rules and regulation 69(5), the Delivery Body has determined that the information provided by Esso Petroleum does not meet the requirements of the Rules as it was not provided at Prequalification, nor does it fall within the categories outlined above to constitute a clerical error.
33. The Authority's view is that whilst the Delivery Body incorrectly identified Rule 3.6.1(b), the decision reached was correct as the requirements of Rule 3.6.1(b) are mirrored in Rule 3.6.1(c) for an Existing Generating CMU that is a Non-CMRS Distribution CMU using Bespoke Metering Configuration Solution.
34. Had the Delivery Body applied Rule 3.6.1(c) and regulation 69(5) it would have arrived at the same conclusion, and therefore the Authority find that the Delivery Body was correct to Reject the Application for Prequalification, as the information submitted in the Request for Reconsideration could not be considered.

Conclusion

35. The Delivery Body reached the correct reconsidered decision to not Prequalify EMD-20 for the T-4 Auction on the basis that:

³ [Disputes guidance \(emrdeliverybody.com\)](https://www.emrdeliverybody.com/disputes-guidance), Version 6.0, November 2020, Page 13

- a) The Prequalification Application did not include the information required by Rules 3.6.1 (c)(i) or 3.6.1(c)(ii):
 - i. A valid supplier letter was not provided by Esso Petroleum with the Application for Prequalification in order to comply with the requirements in Rule 3.6.1(c)(i);
 - ii. Esso Petroleum failed to demonstrate that it is delivering a Metered Volume in discharge of an obligation to deliver a balancing service, in accordance with Rule 3.6.1(c)(ii).
- b) In accordance with regulation 69(5), when making a Reconsidered Decision, the Delivery Body must not take into consideration any information or evidence which Esso Petroleum was required to and failed to produce before the decision was taken.

36. Whilst the Delivery Body reached the correct reconsidered decision, as per paragraph 18, it was incorrect in its application of the Rules during the Prequalification stage, and in making the Reconsidered Decision. Further, the Delivery Body acted contrary to the requirements of regulation 69(3)(ii), by failing to provide full reasoning for their decision to uphold the rejection within the Notice of Reconsidered Decision.

Determination

37. 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 Esso Petroleum for Prequalification be upheld in respect of the CMU listed in paragraph 1 for the T-4 Auction.



Robin Dunne

For and on behalf of the Gas and Electricity Markets Authority

12 March 2021