

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 Mercia Waste Management Limited (“Mercia”) 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) MWM001 (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. Mercia submitted an Application for Prequalification for the CMU listed in paragraph 1 of this determination in respect of the 2021 T-4 Auction.
4. For this CMU, 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 grounds:

“Capacity Market Rule 3.6.6 requires, an Applicant for an Existing Generating CMU to declare that if, after the Capacity Auction to which the Application relates, there is an Emissions Related Material Change to the CMU, it will, as

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.

soon as reasonably practicable following that Emissions Related Material Change, provide a Fossil Fuel Emissions Declaration to the Delivery Body. The Delivery Body considers that the Applicant has not fully addressed the matters as per rule 3.6.6, since a Declaration relating to Emissions Related Material Changes has not been provided. Please contact the Delivery Body for more information.

Please note, Historic Output selected as method used to calculate Connection Capacity but Historic Output values entered do not reach Connection Capacity applied for. Therefore, Connection Capacity amended to reflect Historic Output. Please contact the Delivery Body for more information."

5. Mercia 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 dispute on the following ground:

"Capacity Market Rule 3.6.6 requires, an Applicant for an Existing Generating CMU to declare that if, after the Capacity Auction to which the Application relates, there is an Emissions Related Material Change to the CMU, it will, as soon as reasonably practicable following that Emissions Related Material Change, provide a Fossil Fuel Emissions Declaration to the Delivery Body. The Delivery Body considers that the Applicant has not fully addressed the matters as per rule 3.6.6, since a Declaration relating to Emissions Related Material Changes has not been provided. Please contact the Delivery Body for more information.

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. Mercia then submitted an Appeal Notice to the Authority ("Tier 2 Appeal") on 23 December 2020 under regulation 70 of the Regulations.

Mercia's Grounds for appeal

8. Mercia disputes the decision on the following ground:

"The delivery body have declared in an email that in 2020, CMU MWM001 Energy from Waste is exempt and not classed as a fossil fuel."

9. Mercia have also stated the following:

"We were informed that we were not classed as a fossil fuel consumer and understood this as declaration for the year 2020 and we were exempt."

10. Mercia refer to an email discussion that they had with the Delivery Body in their appeal. Specifically, on 7 September 2020, an email from Mercia to the Delivery Body asking, *"Under the Emission Limit Declaration on our application could you please clarify if the stance from the government is applicable today as per their distribution of the CAPACITY MARKET CONSULTATION ON FUTURE IMPROVEMENTS 2020?"*
11. Further, on 9 September 2020, and in response to Mercia's 7 September 2020 email, the Delivery Body replied that *"Energy from waste is an exception this year, so it won't be classed as a fossil fuel."*
12. We understand from Mercia's statements that they consider that the Delivery Body's 9 September 2020 response assured them they were exempt from providing any declaration relating to fossil fuel emissions.

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) (the "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) 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."*

17. 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

18. Rule 1.2 defines an "Emissions Related Material Change" as meaning:

- "(a) in respect of a CMU, means adding 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; and*
- (b) in respect of a Fossil Fuel Component, means any change which alters its Fossil Fuel Emissions or Fossil Fuel Yearly Emissions."*

19. Rule 1.2 defines a "Fossil Fuel Emissions Declaration" as meaning:

"a declaration in the form set out in Exhibit ZA, which complies with the requirements in Rule 3.15."

20. Rule 3.6.5 sets out the requirement for an applicant to provide a Fossil Fuel Emissions Declaration.

21. Rule 3.6.6 sets out the requirement for an applicant to provide a declaration that they will provide a Fossil Fuel Emissions Declaration to the Delivery Body following an Emissions Related Material Change to the CMU, and states that:

"An Applicant for an Existing Generating CMU which does not comprise of any Fossil Fuel Component or Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component must declare that if, after the Capacity Auction to which the Application relates, there is an Emissions Related Material Change to the CMU, it will, as soon as reasonably practicable following that Emissions Related Material Change, and in any case by no later than two months following that Emissions Related Material Change, provide a Fossil Fuel Emissions Declaration to the Delivery Body."

22. Rule 4.4.2 sets out where the Delivery Body must not Prequalify a CMU, and states that:

"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...".

Our Findings

23. We have assessed Mercia's grounds for appeal, which are summarised below.
24. In its Tier 1 and Tier 2 Appeals, Mercia argued that *"At the time of submitting our application we made inquiries to our position as regards the Fossil Fuel Emissions declaration."*
25. We understand that Mercia refer here to its 7 September 2020 email to the Delivery Body asking, *"Under the Emission Limit Declaration on our application could you please clarify if the stance from the government is applicable today as per their distribution of the CAPACITY MARKET CONSULTATION ON FUTURE IMPROVEMENTS 2020?"*
26. Mercia state in both its Tier 1 and Tier 2 Appeals that *"We were informed that we were not classed as a fossil fuel consumer and understood this as declaration for the year 2020 and we were exempt."*
27. Mercia refers in its Tier 2 Appeal to an email from the Delivery Body on 9 September 2020 in response to Mercia's 7 September 2020 email. This reply reads that *"Energy from waste is an exception this year, so it won't be classed as a fossil fuel."*
28. Having reviewed this correspondence, we acknowledge that the Delivery Body's 9 September 2020 response may be read to suggest to Mercia that they need not provide a Fossil Fuel Emissions Declaration pursuant to Rule 3.6.5. We do not consider, however, that the response creates an expectation that a declaration under Rule 3.6.6 would not be required.
29. The Delivery Body Prequalification Guidance² ("Prequalification Guidance") reads that *"If you do not currently have Fossil Fuel Components you do not need to upload an Exhibit ZA, but you will still need to declare in your Covering Letter, that in the event of a*

² For the Delivery Body's Prequalification Guidance 2020 v4.0 see [here](#)

material change you will provide the Delivery Body with an Exhibit ZA within 2 months of that change."

30. We consider the Rules to be sufficiently clear on the requirements for a declaration under Rule 3.6.6. Further, we consider the Prequalification Guidance to be unambiguous as to the requirements under Rule 3.6.6.
31. For the avoidance of doubt, we do not consider Mercia's 7 September 2020 email, itself, to constitute a declaration under Rule 3.6.6.
32. Noting that Mercia failed to provide a declaration under Rule 3.6.6 in a covering letter, or by any other means, in the Application for Prequalification, or as part of its Tier 1 Appeal, the Authority finds that the Delivery Body was correct in rejecting the CMU listed in paragraph 1 of this determination from Prequalification on the basis of Rule 3.3.6 and Rule 4.4.2(a).

Conclusion

33. The Delivery Body reached the correct Reconsidered Decision to not Prequalify MWM001 for the 2021 T-4 Auction on the basis that:
 - a) Rule 4.4.2(a) provides that the Delivery Body must not Prequalify a CMU where it is aware that the Application for Prequalification has not been completed or submitted in accordance with the Rules;
 - b) Rule 3.6.6 requires that an applicant for an Existing Generating CMU which does not comprise of any Fossil Fuel Component or Storage Facility which has part or all of its electricity requirements met by an Associated Fossil Fuel Component, provides a declaration that in the event of an Emissions Related Material Change to the CMU, the applicant will provide the Delivery Body with a Fossil Fuel Emissions Declaration by no later than two months following that Emissions Related Material Change; and

- c) Mercia failed to provide a declaration under Rule 3.6.6 in a covering letter, or by any other means, in the Application for Prequalification, or as part of its Tier 1 Appeal.

Determination

34. 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 Mercia for Prequalification be upheld in respect of the CMU listed in paragraph 1 of this determination for the 2021 T-4 Auction.



Robin Dunne

For and on behalf of the Gas and Electricity Markets Authority

19 February 2021