

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 Peak Gen Power Limited ("Peak Gen Power") against reconsidered decisions made by the Electricity Market Reform Delivery Body (the "Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
 - a) W42020 (T-4 and T-1 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. Peak Gen Power submitted an Application for Prequalification for the CMU listed in Paragraph 1 of this determination in respect of the 2021 T-1 and T-4 Auctions.
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 3.6.3(c) requires all Existing Generating CMUs that are Distribution connected to confirm that one or more Grid Connections Agreements have been entered into which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Distribution Connection Agreement applies to connect to the Distribution Network for the

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.

relevant Delivery Years, and that the Applicant provides a copy of the Grid Connection Agreement for each Generating Unit comprised in the CMU with the Application, or if not possible, a written confirmation from the Network Operator to confirm the registered capacity of the Generating Unit and that the capacity of the Generating Unit is permitted to export to the Distribution Network. The Distribution Connection Agreement provided for at least one Generating Unit in the CMU has not been signed, therefore fails to meet the requirements of the rule."

5. Peak Gen Power submitted a Request for Reconsideration of the Prequalification Decision on 13 November 2020.
6. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which Rejected the dispute on the following grounds:

"The Delivery Body acknowledges that the Applicant has addressed the point within the Dispute as part of the request to review the Prequalification Decision, however the Delivery Body has determined insufficient evidence has been provided within the Dispute in order to comply with Capacity Market Rule 3.6.3 (c). This is due to the unlinked CMU containing the relevant signed documentation of the Quotation Acceptance, required within this years Prequalification Application."

7. Peak Gen Power then submitted an Appeal Notice to the Authority on 18th December 2020 under regulation 70 of the Regulations.

Peak Gen Power's Grounds for appeal

8. Peak Gen Power disputes the decision on the following grounds:

Ground 1

9. Peak Gen Power argues that "Rule 3.6.3.c stated that all Existing Generating CMUs that are Distribution connected confirm that one or more Grid Connections Agreements have been entered into. Nowhere in Rule 3.6.3.c does it say that the Connection Agreement has

to be signed. The Delivery Body have added this to their guidance. However the Rule trumps the Guidance and there [sic] the connection agreement provided is acceptable and in the best interests of customers this CMU should be prequalified."

Ground 2

10. Peak Gen Power argues that there is an existing signed copy of an identical Distribution Connection Agreement ("Connection Agreement")² at the same site in the EMR Delivery Body Portal ("EMR Portal")³, albeit for another CMU with the same owner for a different auction.
11. This was raised to the Delivery Body in the Request for Reconsideration of the Prequalification Decision, however the Delivery Body Rejected this reasoning on the basis that the signed Connection Agreement was not provided within this year's Application for Prequalification, although it was required under the Capacity Market Rules 2014 (as amended) (the "Rules").
12. Notwithstanding this, Peak Gen Power argues that as the Delivery Body was able to view *"a signed copy of the same connection agreement"*, their decision should be reconsidered.

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 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.

² Rule 1.2 defines Distribution Connection Agreement as an agreement entered into between a DNO and the person responsible for that CMU for the connection of that CMU to, and use of, a Distribution Network.

³ Rule 1.2 defines the EMR Delivery Body Portal as the IT infrastructure through which the Regulations and the Rules are administered by the Delivery Body.

15. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
16. In particular, regulation 69(5) sets out the requirements for the Delivery Body when 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 3.6.3(c), requiring the provision of a Connection Agreement, states that the Applicants must:

- (i) confirm that one or more Distribution Connection Agreements have been entered into which permit at least, in aggregate, the Anticipated De-rated Capacity of that CMU and any other CMU to which any such Distribution Connection Agreement applies to connect to the Distribution Network in*

the relevant Delivery Years; and

- (ii) provide a copy of the Distribution Connection Agreement for each Generating Unit comprised in the CMU with the Application or, where this is not possible, written confirmation from the Distribution Network Operator that such Distribution Connection Agreement is in effect and confirming:*

(aa) the registered capacity (or inverter rating, if applicable) of that Generating Unit and where a range of values is specified for the registered capacity (or inverter rating if applicable), the minimum value in that range; and

(bb) the capacity that such Generating Unit is permitted to export to the Distribution Network.

Our Findings

- 19. We have assessed Grounds 1 and 2 of Peak Gen Power's appeal, which are also summarised in Paragraphs 20 and 22, below.

Ground 1

- 20. Peak Gen Power's first Ground for appealing the Delivery Body's Reconsidered Decision within each Application is that Rule 3.6.3(c) does not expressly state that evidence of the acceptance of a connection offer should be in the form of a signed acceptance letter. On this basis, Peak Gen Power argues that the Connection Agreement provided was acceptable.
- 21. The Authority cannot determine if a Connection Agreement is in place without a valid offer for a Connection Agreement and evidence of acceptance of that offer, or otherwise written confirmation from the relevant Distribution Network Operator that the Connection Agreement is in effect. The Authority would consider a signature to be evidence of acceptance of an offer for a Connection Agreement. Therefore, it is the Authority's view that the unsigned documents provided with the initial Application do not adequately

demonstrate sufficient evidence of the acceptance of a connection offer. The requirements of Rule 3.6.3(c) are therefore not met, and the Delivery Body was correct to not Prequalify the CMU listed in Paragraph 1 of this determination.

Ground 2

22. Peak Gen Power argues that the Delivery Body had access to a signed Connection Agreement from a previous Application for the same site. On the EMR Portal there was a signed Connection Agreement for CMU PGPSOT, which was a CMU in the Early Auction 2017-18 Delivery Year. This was Peak Gen Power's basis for a Request for Reconsideration of the Prequalification Decision, and was referenced again in their subsequent appeal to the Authority.
23. In its Reconsidered Decision, the Delivery Body acknowledged that Peak Gen Power had addressed this point as part of their Request for Reconsideration, however they had determined that insufficient evidence had been provided to demonstrate compliance with Rule 3.6.3(c).
24. The CMU PGPSOT agreement, as available in the EMR Portal, showed evidence of a signed Connection Agreement at the same site for a previous Application. The PGPSOT agreement was a predecessor to CMU W4BREL, which was linked to this Application and was awarded a capacity agreement in the T-4 2014 auction for a New Build Generating CMU, valid between 2018-2033. However, a signed copy of this Connection Agreement was not provided with Peak Gen Power's latest Application, as was required by Rule 3.6.3.
25. Under regulation 69(5), it is not possible for the Delivery Body to consider any information or evidence which the applicant was required to provide before the Prequalification Decision was made but failed to provide in accordance with that requirement. A Connection Agreement housed within a separate Application for Prequalification, relating to a previous years' auction, is not sufficient evidence to comply with Rule 3.6.3(c); the signed Connection Agreement should have been included in Peak Gen Power's most recent Application. In this case, Peak Gen Power chose to submit an unsigned Connection Agreement and this would therefore not be considered as an error.
26. It is the Authority's view that Peak Gen Power did not provide the required information in

their Application or in their Appeal Notice to satisfy Rule 3.6.3(c). Therefore, the Delivery Body was correct not to Prequalify the CMU listed in Paragraph 1 of this determination on this basis.

Conclusion

27. The Delivery Body reached the correct Reconsidered Decision to not Prequalify Peak Gen Power for the T-4 Auction and T-1 Auction on the basis that:

- a) A signed Connection Agreement, as required under Rule 3.6.3(c) to show sufficient evidence of an accepted offer, was not provided in the Application.
- b) In addition, in accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take into consideration any information or evidence which Peak Gen Power was required to and failed to produce in their Application before the decision was taken.

28. On that basis, the Delivery Body was correct not to consider the CMU PGPSOT Connection Agreement that had been provided by Peak Gen Power in a previous Application.

Determination

29. 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 Peak Gen Power for Prequalification be upheld in respect of the CMUs listed in Paragraph 1 for the T-4 Auction and T-1 Auction.



Robin Dunne

For and on behalf of the Gas and Electricity Markets Authority

12 February 2021