

## **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 Quinbrook Infrastructure Partners, ("Quinbrook") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Units ("CMU"):
  - a) PEN016.
2. 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.

### **Appeal Background**

3. First Renewable Alpha Limited secured a Capacity Market Agreement in the 2016 T-4 Capacity Market Auction for a Maximum Obligation Period of 15 years.
4. GCP Generation Ltd, a subsidiary of Quinbrook, were issued a Termination Notice on 26 May 2020 as per Rule 6.10.1(e), for failing to provide a Distribution Connection Agreement.
5. GCP Generation Ltd submitted an appeal notice to the Department for Business, Energy and Industrial Strategy ("BEIS") on 23 June 2020 under Regulation 33 of the Regulations.
6. Quinbrook raised a request on 21 August 2020 under Rule 7.7.1 of the Capacity Market Rules 2014 (as amended) (the "Rules") to change an alleged factual inaccuracy on the Capacity Market Register ("CMR").

---

<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.

7. BEIS granted an extension to GCP Generation Ltd on 26 August 2020 of 80 working days from the date on which Quinbrook made the request for reconsideration under Regulation 69, until 14 December 2020.
8. The Delivery Body notified Quinbrook on 27 August 2020 of their decision to refuse the request on the following grounds:

*"We have looked into this and we are unable to accept the Factual Inaccuracy as the information on the register is correct as per the Transfer between First Renewable Beta Limited and Sandwell Power Limited and then between Sandwell Power Limited and GCP Generation Limited. From the Delivery Body's perspective in order for a transfer of a Capacity Agreement, in accordance with Rule 9.2.4, to proceed we have to adhere to Rule 9.3.1 which states that -*

*'the Registered Holder and the Transferee must each submit to the Delivery Body in writing requests which are:*

- (i) in the form prescribed by the Delivery Body; and*
- (ii) identical in all material respects'.*

*The aforementioned written request was received from the Registered Holder (Beta and then Sandwell) and the Transferee (Sandwell and then GCP), causing the transfer of the Capacity Agreement to take place. The Delivery Body checks the form of the written request (ambiguities, incorrectness etc) but it does not check the status of ownership of the CMU's Generating Units, as that is not a prerequisite under the Rules for a Transfer of a Capacity Agreement (via rule 9.2.4) to take place.*

*The Delivery Body's view therefore is that it adhered to its obligations under the Rules, the Transfer was valid and the information on the Registers is correct."*

9. On 3 September 2020, Quinbrook subsequently requested that the Delivery Body reconsider its decision to refuse the request for rectification of the Capacity Market Register under Rule 7.7.4, and in accordance with Regulation 69.

10. In accordance with Regulation 69, the Delivery Body issued a Notice of Reconsidered Decision on 1 October 2020 which rejected the dispute on the following grounds:

*"Rules 9.3.1 – 9.3.4 outline the full extent of the Delivery Body's obligations. The Delivery Body is obliged to check the request form submitted pursuant to Rule 9.3.1(a) in accordance with Rule 9.3.1(b) and (c). The Delivery Body is not required to check or ask for evidence regarding the status of ownership of the CMU's Generating Units. If the requirements of Rule 9.3.1 are met, the Delivery Body will amend the Capacity Market Register in accordance with Rule 9.3.2 and 7.5.1(p). As outlined below, the requirements of Rule 9.3.1(a) were met in both of the transfers concerned. The Delivery Body therefore effected the change to the Capacity Market Register. The transfer accordingly has effect in accordance with Rule 9.3.4.*

*Rule 9.2.4 outlines the circumstances in which a transfer may take place. However, the Delivery Body is not obliged to verify that these circumstances are met and nor is it able to verify that such circumstances are met on the basis of the information provided pursuant to Rule 9.3.1(a). The commercial transfer of the assets is carried out between the Registered Holder and Transferee, without any Delivery Body involvement.*

*It is worth noting that Rule 9.2.4(b) outlines a circumstance in which a transfer may take place. It is incumbent on the Applicant to consider whether this circumstance may apply, and then effect the required transfer while also meeting the requirements of Rule 9.3.1(a). By requesting the transfer via the Portal the two parties confirm that the requirements of 9.2.4 (b) are met. There is no obligation on the Delivery Body to verify the circumstances of Rule 9.2.4(b) or to otherwise confirm who the legal owner of an asset is.*

*The Rule 9.3.1(a) written request was received by the Delivery Body from the Registered Holder (First Renewable Beta Limited then Sandwell Power Limited) and the Transferee (first Sandwell Power Limited and then GCP Generation Limited) and therefore the transfer of the Capacity Agreement took place.*

*The timeline of the transfer is as follows -*

*21/06/2017 – CMU transferred successfully between First Renewable Alpha and First Renewable Beta Limited – All necessary documentation provided for Delivery Body to accept transfer, note that this transfer is not disputed*

*02/05/2018 – CMU transferred successfully between First Renewable Beta and Sandwell, all relevant information submitted to Delivery Body to accept transfer and the Capacity Market Register was updated on the 02/05/2018. Notifications from the Delivery Body Portal would have been sent to the Transferee and the Transferrer as part of this acceptance process. The Notice in accordance with Rule 9.3.1 was received by the Delivery body on the 20/04/2018.*

*20/07/2018 – Sandwell Power uploaded a Connection Offer and Acceptance letter which was rejected by the Delivery Body. Reason for rejection – The site mentioned in the Offer and Acceptance letter did not match the address in the original application, Sandwell Power is the applicant of the Connection Offer and Acceptance letter.*

*24/04/2019 – CMU transfer submitted to the Delivery Body requesting a transfer between Sandwell and Beaufort Power LTD (another company with the same registered address and directors as Quinbrook, Sandwell and GCP) – Transfer rejected by the Delivery Body for the transferee failing to provide relevant documentation as required under Rule 9.2.8*

*28/01/2020– CMU transferred successfully between Sandwell Power and GCP Generation – All necessary documentation provided for the Delivery Body to accept the transfer and the Capacity Market Register was updated on the 28/01/2020 following credit cover. Notifications from the Delivery Body Portal would have been sent to the Transferee and the Transferrer as part of this acceptance process. The Notice in accordance with Rule 9.3.1 was received by the Delivery body on the 27/11/2019.*

*31/03/2020 – Failed to submit a valid Distribution Connection Agreement Milestone Missed*

*29/05/2020- Termination Notice Sent*

*21/08/2020- Factual Inaccuracy raised under Rule 7.7*

*27/08/2020- Factual Inaccuracy rejected by the Delivery Body*

*27/08/2020- BEIS extended the Termination Appeal until the 14 December 2020 until this reviewable decision disputes - the subject of this letter - has concluded.*

*...*

*The Delivery Body has assessed every step of the requested transfers in accordance with its obligations under the Rules. This assessment resulted in successful transfers pursuant to the Rules. The Delivery Body therefore confirms its previous decision in response to GCP's factually inaccuracy request of 21 August 2020 under Rule 7.7.1."*

11. Quinbrook then submitted an appeal notice to the Authority on 7 October 2020 under Regulation 70.

## **Quinbrook's Grounds for appeal**

12. Quinbrook disputes the decision on the following grounds.

### Ground 1

*"Under the CM rules, the transfer was processed by the Delivery Body in the normal way. Rule 9.2.6(b) requires that such a person acquiring assets has to have received "all the contractual and other rights and assets then owned by the Capacity Provider and necessary to achieve the Successful Completion Milestone."*

*Although this transfer proceeded, the facts are that Quinbrook does not have possession of the company, the land, the generating sets or the connection agreement. We assume the connection agreement is in the name of First Renewable Beta Ltd.*

*The final paragraph of 9.2.4 says*

*'... in each case such transfer of the Capacity Agreement to be in accordance with the Regulations and the Rules (including the requirements relating to the updating of the Capacity Market Register).'*

*Since the assets necessary to reach the SCM were not transferred to Quinbrook (since they do not own the company that owns PEN016), then clearly the transfer is not in accordance with the Rules, as 9.2.6(b) has not been complied with. We note that the Delivery Body does not address this point in its Refusal to Reconsider.*

*The Delivery Body has put PEN016 into termination due to the lack of a correct connection agreement. However, it is a connection agreement that Quinbrook does not have, and is not able to access, since it does not own the company that, we assume, does have the connection agreement, being First Renewable Beta Ltd.*

*The ownership and transfer history is as follows. The second and third of these companies are not, and have never been, owned by Quinbrook. We note in passing that the Delivery Body continues to send the notices to the former owners of GCP Generation Ltd, Caledon Capital Partners LLP, rather than to Quinbrook.*

*We note that the CMU PEN016 was subsequently transferred to GCP Ltd, another Quinbrook company. That also seems to have been an erroneous transfer. It was only when the termination notice was issued, and the hunt for a connection agreement began, that Quinbrook realised that they did not own the company that owns PEN016 and would not therefore be able to source the connection agreement.*

*In its Refusal to Reconsider, the Delivery Body says that the transfer was properly carried out, and that its role does not extend to checking whether the parties are in fact transferring the relevant assets. However, the Rules specify that "all relevant assets" have to be transferred. When it is clear that this is not the case, then it is equally clear that the Rules (inadvertently) have not been complied with. As such, the transfer is invalid – under the Rules – and the Delivery Body must therefore correct the Register and the CAN. We note that the Delivery Body does*

*not address the point that if the "relevant assets" have not been transferred, then it is not possible to conclude that "in each case such transfer of the Capacity Agreement to be in accordance with the Regulations and Rules..."*

#### Ground 2

*"We note that the Regulations allow administrative errors in the Capacity Market Register to be addressed. Although the circumstances of this transfer are unclear, it seems likely that there was an administrative error on the part of someone. It is clear, in the evidence submitted to the Delivery Body, that neither party was aware of the transfer of PEN016. Why would the companies be discussing a sales agreement if the CMU had in fact been transferred 2 months earlier?"*

#### Ground 3

*"As explained above, in another case, the Delivery Body (due to its own administrative error) was able to amend the Register accordingly. We request the same approach is taken with respect to PEN016.*

*While we believe that the Delivery Body has the authority to amend the Register and the CAN, there is a matter of wider importance. The Rules should not create situations that are clearly illogical. The fact that the Portal says that GCP Generation Ltd owns PEN016 when it legally does not is a nonsense. The interpretation of the Rules by the Delivery Body should not be able to put an obligation on a party to deliver capacity when it does not own the company, the land, the connection agreement or the generating equipment."*

13. Quinbrook further elaborate and state the facts on which they rely in relation to their above ground of appeal include:

*"Quinbrook bought a company called First Renewable Delta Ltd in 2018. At the time, they were negotiating to buy First Renewable Beta Ltd, the owners of PEN016. That negotiation did not conclude. At some point in 2018, the CMUs owned by Delta were successfully transferred to a Quinbrook company. However,*

*PEN016 seems to have been included in that transfer, being transferred to Sandwell Power Ltd, a company owned by Quinbrook.*

*We do not know why PEN016 was offered up, or why the trade was accepted, given that Quinbrook had not purchased First Renewable Beta Ltd. It is clear that neither party was aware of this transfer, as we explained in the application to reconsider made to the Delivery Body. It is therefore clear that this was an administrative error.*

*The fact remains that PEN016 is shown on the CM Register as owned by GCP Generation Ltd, a Quinbrook company, whereas in reality, PEN016 remains owned by First Renewable Beta Ltd. ...”.*

## **The Legislative Framework**

14. 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**

15. Regulations 68 to 72 of the Regulations set out the process and powers in relation to dispute resolution and appeals.

## **Capacity Market Rules<sup>2</sup>**

16. Rules 7.7.1 to 7.7.4 relate to Applications for rectification of the Capacity Market Register and Appeals, and state:

*"7.7.1 Where any person considers that an entry maintained in respect of it or any Capacity Committed CMU for which they are the Capacity Provider under this*

---

<sup>2</sup> References from the 2016 version of the Rules have been used in this determination, as this was the iteration that was in force when the relevant Capacity Agreement was gained. An informal consolidation can be found here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/538235/Informal\\_consolidation\\_of\\_Capacity\\_Market\\_Rules\\_July\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538235/Informal_consolidation_of_Capacity_Market_Rules_July_2016.pdf)



*Chapter 7 is factually inaccurate, they may request to the Delivery Body that the entry be amended or deleted.*

*7.7.2 If the Delivery Body accepts a request received under Rule 7.7.1, the Delivery Body must within five Working Days of receiving the request:*

- (a) rectify the relevant entry in the Capacity Market Register as set out in the request; and*
- (b) notify the person who made the request for rectification of the Capacity Market Register that it has been rectified.*

*7.7.3 If the Delivery Body refuses a request for rectification received under Rule 7.7.1, the Delivery Body must within five Working Days notify the person who made the request that the Delivery Body has refused the request and may provide reasons for that decision.*

*7.7.4 A person who receives a notice under Rule 7.7.3 may dispute the decision and request that the Delivery Body reconsider its decisions to refuse the request for rectification of the Capacity Market Register in accordance with Regulation 69”.*

17. Rule 9.2.4(b) ('Restrictions on transfer and eligibility to trade') sets out the requirements for the transfer of a Capacity Agreement and states that:

*"(b) with respect to a Capacity Committed CMU which is a Generating CMU where the Capacity Provider is the legal owner of each Generating Unit comprised in such CMU, transferring all Capacity Agreements relating to that CMU outright to:*

- (i) a person acquiring all such Generating Units (or, if it is a Prospective Generating CMU, all the contractual and other rights and assets then owned by the Capacity Provider and necessary to achieve the Substantial Completion Milestone with respect to such CMU); or*

- (ii) *a person that is the Despatch Controller with respect to all such Generating Units, provided in each case that such person is an Acceptable Transferee...".*

18. Rule 9.3.1 outlines the requirements for the registration of transfers and states that:

*"Where a Capacity Agreement or Transferred Part is to be transferred in whole or in part from the Registered Holder to another person (the "Transferee") in accordance with Rule 9.2.4:*

- (a) *the Registered Holder and the Transferee must each submit to the Delivery Body in writing requests which are:*

- (i) *in the form prescribed by the Delivery Body; and*

- (ii) *identical in all material respects;*

*at least five Working Days before the first calendar day to which a Capacity Obligation subject to the transfer relates;*

- (b) *the Delivery Body must inform both the Registered Holder and the Transferee that the requests have been received and, in the event that the requests are not in the prescribed form and/or identical in all material respects, must draw this to their attention and give them the opportunity to correct the requests;*
- (c) *the Delivery Body may refuse to accept an incorrect, ambiguous or incomplete request."*

## **Our Findings**

19. We have assessed Quinbrook's grounds for appeal, which are set out above.

20. The timeline provided by the Delivery Body (set out in Paragraph 10 above) outlines the transfers that have occurred since the Capacity Agreement relating to PEN016 was awarded in the 2016 T-4 Capacity Market Auction. The material transfer, for which this appeal has been submitted relates to the transfer of the Capacity Agreement from First Renewable Beta Limited to Sandwell Power Ltd (the "Transfer"). This Capacity Agreement was then transferred from Sandwell Power Ltd to GCP Generation Ltd, which Quinbrook also allege was erroneous.
21. In summary, Quinbrook argue that they are not the legal owner of the CMU (PEN016) and thus the Transfer between First Renewable Beta Limited (the "Transferor") and Sandwell Power Ltd (the "Transferee") was not valid. As a result, Quinbrook contend that the CMR and Capacity Agreement Notice for PEN016 are incorrect and should be amended to reflect this.

### **Ground 1**

22. We clarified with Quinbrook that they erroneously referenced Rule 9.2.6(b) in their appeal notice, where they intended to reference Rule 9.2.4(b). Noting this, Quinbrook say that the Transferee did not receive rights of ownership for the CMU (PEN016), and so argue that the Transfer of the Capacity Agreement to the Transferee should not have been effected by the Delivery Body; it not being made in accordance with the Rules and Regulations.
23. The term "Capacity Obligation" is defined under Regulation 2 to mean an:
- "Obligation awarded pursuant to a capacity auction, applying for one or more delivery years, to provide a determined amount of capacity when required to do so in accordance with capacity market rules".*
24. Pursuant to Rule 6.2.1 of the Rules (and Regulation 30(1) of the Regulations), the term "Capacity Agreement" (emphasis added) refers to *"the rights and obligations accruing to a Capacity Provider under or by virtue of the Regulations and the Rules in relation to a particular Capacity Committed CMU and one or more Delivery Years".* Capacity Obligations, therefore, are obligations contained in a Capacity Agreement to provide a certain amount of capacity. Importantly, these definitions highlight that an agreement to provide a certain

amount of capacity is distinct from the CMU itself, which is a physical asset (or a collection thereof).

25. Read in conjunction with these definitions, Rule 9.2.4(b) provides that a Capacity Provider, as a transferor, can only transfer a Capacity Agreement to another person, a transferee, when that transferor *"is the legal owner of each Generating Unit comprised in such CMU"*. This plainly makes sense and indicates the underlying purpose of the rule, i.e. the eligibility requirements for the legal holder of a Capacity Agreement to trade it.
26. Quinbrook say in its appeal that *"the Rules specify that 'all relevant assets' have to be transferred"*. We have been unable to identify where the phrase "all relevant assets" appears in the Rules, and Quinbrook has not provided a specific reference. Nevertheless, Quinbrook say that *"since the assets necessary to reach the SCM were not transferred to Quinbrook (since they do not own the company that owns PEN016), then clearly the transfer is not in accordance with the Rules, as [9.2.4(b)] has not been complied with"*.
27. Quinbrook appears to have interpreted Rule 9.2.4(b) to mean that a transfer of a Capacity Agreement is only validly made once the transferee has received all *"contractual and other rights and assets then owned by the Capacity Provider and necessary to achieve the Substantial Completion Milestone with respect to the CMU"*. But this is not what Rule 9.2.4(b) says. This Rule is concerned with the eligibility of transferors to trade Capacity Agreements.
28. Given this, and on the evidence provided, we are satisfied that the Delivery Body received all of the prescribed information from both parties as part of the Transfer request to effect it. Rule 9.3.1 does not place a requirement on the Delivery Body to make enquiries about the transfer of rights or ownership in the CMU; only to give effect to a transfer request of a Capacity Agreement validly made in accordance with the Rules and Regulations.

## **Ground 2**

29. Quinbrook allege that neither the Transferor nor the Transferee were aware of the Transfer of the CMU PEN016. They further allege that the transfer which was registered on the CMR on 28 January 2020 *"...seems to have been an erroneous transfer"*.

30. As part of their request for reconsideration, Quinbrook provided email correspondence (supporting evidence: Doc 3 - Email traffic re PEN016) which contained discussions of a sale agreement. They submit that this demonstrates that neither party was aware of the transfer of PEN016.
31. It follows from our findings to Ground 1 that any ground related to the ownership of the CMU PEN016 falls outside of the scope of our decision. The dispute resolution process in this instance is designed only to consider whether changes to the CMR are needed to correct a factual inaccuracy. The scope of our review is to determine if the decision made by the Delivery Body not to change the CMR was correct based on the evidence before it when it made the decision.
32. Having acknowledged this, we have investigated the Transfer to confirm whom from each of the Transferor and Transferee logged into the EMR Delivery Body Portal ("Portal") to initiate and accept the Transfer before it was submitted to Delivery Body for review and approval. Based on the evidence provided to us by the Delivery Body, we are satisfied that for the Transfer (for which the CMR was amended on 2 May 2018), relevant Portal users for the respective parties requested and reviewed the Transfer before it was submitted to the Delivery Body. The email correspondence provided (referred to in Paragraph 30 above) is not sufficient to demonstrate that the Transfer has been made in error, or not in accordance with the Rules and Regulations. We also reached the same conclusion when assessing the subsequent transfer of the Capacity Agreement from the Transferee to GCP Generation Ltd.
33. Accordingly, we do not consider that sufficient evidence was provided to us by Quinbrook to support the allegation that the information the Delivery Body received as part of the Transfer process was factually inaccurate and could not be relied upon, which is the basis for rectification of the CMR under Rule 7.7.1.
34. While we have found that the evidence supports the conclusion that the Transferor and Transferee had actual knowledge of the Transfer, we note for completeness that there is a legal presumption that a party has constructive notice when it can discover certain facts by due diligence or inquiry into the public records. Each CMR holds a public record of all applications made to the Delivery Body ahead of the relevant Capacity Auction as well as

details of those who were successful in obtaining a Capacity Agreement and any enduring obligations.

### **Ground 3**

35. Quinbrook argue that *"in another case, the Delivery Body (due to its own administrative error) was able to amend the Register accordingly. We request the same approach is taken with respect to PEN016"*.
36. Quinbrook's argument on this point proceeds from an assumption that the Delivery Body made an error. As we have said above, in relation to Grounds 1 and 2, on the evidence provided we cannot find that the Delivery Body has made any error, administrative or otherwise, in respect of the Transfer, and so it follows that it is not incumbent on the Delivery Body to amend the CMR. The Delivery Body can only perform its functions in accordance with what the Rules and Regulations provide, and Quinbrook has not demonstrated that the Delivery Body has failed to perform those functions correctly.

### **Conclusion**

37. The Delivery Body reached the correct reconsidered decision not to amend the CMR for PEN016 on the basis that:
- a) **Ground 1:** Rule 9.2.4(b) of the Rules was correctly applied by the Delivery Body, and Rule 9.3.1 does not place a requirement on the Delivery Body to perform additional checks or make enquiries about the transfer of ownership in the CMU relating to a Capacity Agreement.
  - b) **Ground 2:** The evidence provided to us demonstrates that the Transferor, Transferee and GCP Generation Ltd were aware of the Transfer and subsequent transfer, respectively, prior to the termination notice received by GCP Generation Ltd, dated 26 May 2020.
  - c) **Ground 3:** The Delivery Body is not required to amend the CMR, due to an administrative error being made, because it has not been demonstrated on

the evidence that the execution of the Transfer or subsequent transfer were the result of an administrative error on its part.

38. It follows that the Delivery Body were correct in their decision to update the CMR and the respective Capacity Agreement Notice once the Transfer had been completed.
39. 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 Quinbrook's request to amend the CMR be upheld in respect of the Capacity Agreement for PEN016.



Mark Carolan

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

11 December 2020