

## **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 Shaw-Energi Ltd (“Shaw-Energi”) 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) SHW011 (T-4 Auction)
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. Shaw-Energi submitted an Application for Prequalification for the CMU 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 06 November 2020 (the “Prequalification Decision”). The Delivery Body Rejected the CMU on the following grounds:

*“Capacity Market Rule 4.4.2(i) 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 ZB, specifically a missing or incorrect Directors Printed name.*

---

<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.

*If this Application had met the requirements for Prequalification, the Credit Cover requirement would have been £49540.00 as the CMU has yet to satisfy the following requirement(s):*

*Financial Commitment Milestone: As per the Capacity Market Rule 6.6, the Financial Commitment Milestone has not been achieved."*

5. Shaw-Energi submitted a request for reconsideration of the Prequalification Decision ("Tier 1 Appeal") on 18 November 2020.
6. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which rejected the appeal on the following grounds:

*"The Delivery Body will be upholding its decision. Upon assessing the application the Delivery Body have found that the application is missing Exhibit ZB Part 2(c) (material change declaration), required pursuant to Rule 3.7.4. In accordance with Rule 4.4.2(i) the decision therefore remains upheld.*

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

7. Shaw-Energi then submitted an Appeal Notice to the Authority ("Tier 2 Appeal") on 18 December 2020 under Regulation 70(1) of the Regulations.

## **Shaw-Energi's Grounds for appeal**

8. Shaw-Energi disputes the Reconsidered Decision on the following ground.

### Ground of Appeal

9. Shaw-Energi alleges that, in preparation for its Tier 1 Appeal, the Delivery Body confirmed via email that the sole reason for rejection in the Prequalification Decision was the omission of the Director's printed name on Exhibit ZB. Shaw-Energi further claims that the Delivery Body did not directly respond to its arguments and gave a different reason for rejecting the Application for Prequalification (i.e. the omission of Part 2(c) in Exhibit ZB).

10. Shaw-Energi claims that *"... had the Delivery Body identified this missing text as one of the reasons for rejection of the original re-qualification [sic] application, the applicant would have duly included the requisite wording as part of its Tier 1 Dispute application"*.
11. Shaw-Energi *"... respectfully requests that Ofgem accepts a replacement Exhibit ZB (...) as a substitute for the original Exhibit ZB, and therefore deems the corrected application as being Conditionally Prequalified."*

## **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) (the "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 Rules.
14. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals. 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."*

## Capacity Market Rules

15. Rule 1.2 contains the definitions used throughout the CM Rules, and, in particular, defines a 'Fossil Fuel Emissions Commitment' as *"a declaration in the form set out in Exhibit ZB"*.

16. Rule 3.3.7 provides that:

*"An Application will not be considered or accepted unless it is submitted:*

*(a) during the Prequalification Window; and*

*(b) in accordance with:*

*(i) the Regulations and the Rules;*

*(ii) the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction; and*

*(iii) such other requirements as may be specified by the Delivery Body from time to time."*

17. Rule 3.7.4 requires New Build CMUs to submit a Fossil Fuel Emissions Commitment and states that:

*"Each Applicant for a New Build CMU must provide to the Delivery Body a Fossil Fuel Emissions Commitment signed by two directors (or two officers, in the case of a body other than a company)."*

18. Rule 4.4.2 provides further in respect of Exhibit ZB that:

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

*...*

- (i) the Applicant is required to provide a Fossil Fuel Emissions Commitment under Rule 3.7.4, Rule 3.8.3 or Rule 3.10.4, but has not done so or has provided a Fossil Fuel Emissions Commitment which the Delivery Body*

*considers does not fully address the matters set out in Exhibit ZB...".*

## Our Findings

19. 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. We have set out our assessment and analysis below.

### Ground of Appeal

20. Shaw-Energi alleges that the Delivery Body did not inform them of the full reasoning for the rejection of its Application for Prequalification. Shaw-Energi claims that it sought clarification for this from the Delivery Body and were not informed of the full reasoning for rejection of their Application. Shaw-Energi argues that had they been made aware of the omission of Part 2(c) in Exhibit ZB, they would have duly amended the relevant omission as part of their Tier 1 Appeal.
21. We have reviewed the Delivery Body's Prequalification Decision and Dispute Letter, and we have verified the facts as alleged by Shaw-Energi (and summarised in paragraph 9). Shaw-Energi did indeed seek to clarify the full reasoning for the rejection of their Application, before submitting the Tier 1 Appeal, and specifically to confirm that the sole reason for rejection of the Exhibit ZB was the omission of the Director's Printed Name. The Delivery Body confirmed this via email and failed to mention the Application was missing Part 2(c) of Exhibit ZB.
22. Regulation 22 provides that the Delivery Body must "*determine each application for prequalification*" and "*notify each applicant of its determination*". Given this, and having regard to the nature of the interest concerned and the impact of the decision on that interest, it is the Authority's view that a reasoned decision is required, and this means that the Delivery Body must provide all of the reasons for its Prequalification Decisions.
23. As a consequence, we consider that the Delivery Body has taken a decision which is at odds with the principles of procedural fairness. Specifically, the Authority finds that it was procedurally unfair for the Delivery Body to give reasons at the initial decision stage and

then to reject the Tier 1 Appeal on a different ground which they had not previously drawn Shaw-Energi's attention to. We therefore find that Shaw-Energi should be afforded the opportunity to rectify the omission of Part 2(c) of Exhibit ZB in its Appeal to the Authority.

24. Furthermore, we have considered the requirement for Exhibit ZB to include Part 2(c) and have concluded that this requirement is confusing for applicants, for the reasons set out below.
25. Capacity Market Rule 3.7.4 requires New Build CMUs to submit a Fossil Fuel Emissions Commitment and Rule 1.2 defines it as "*a declaration in the form set out in Exhibit ZB*".
26. The EMR Delivery Body Prequalification Guidance<sup>2</sup> ("Prequalification Guidance") and Prequalification Fossil Fuel Emissions Guidance<sup>3</sup> ("Exhibits Guidance") are explicit about Part 2 of Exhibit ZB requiring all applicants to retain Part 2(c) and selecting either Part 2(a) or Part 2(b) to retain.
27. Rule 3.3.7 allows the Delivery Body to establish application requirements in guidance. However, such guidance must be in accordance with the Rules and Regulations. Part 2 of Exhibit ZB contains three declarations (i.e. Part 2(a), Part 2(b), and Part 2(c)), whereas the definition of "Fossil Fuel Emissions Commitment" under Rule 1.2 means "*a declaration*"; not two or more declarations. By requiring two declarations to be made under Part 2, the Prequalification Guidance and Exhibits Guidance are asking applicants to provide something that is beyond what is strictly required by the Rules.
28. In addition, we find that the requirement to retain Part 2(c) is confusing based on the form of Exhibit ZB itself. We note that:
  - a) The Delivery Body's requirement to retain Part 2(c) does not flow naturally from Part 2(a), which provides that "*the Relevant CMU will not comprise of any Fossil Fuel Component*", and so applicants could have reasonably

---

<sup>2</sup> Available at:

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Prequalification%20guidance%202020%20v.4.0.pdf>

<sup>3</sup> See slide 14. Available at:

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Prequalification%20Fossil%20Fuel%20Emissions%20Exhibits%20Guidance%20v4.0.pdf>

concluded that Part 2(c) was not applicable to their circumstances; and

- b) the presence of square brackets (“[ ]”) around Part 2(a) and Part 2(b), in the absence of further explanation in the form of Exhibit ZB, does not provide sufficient clarity to applicants in terms of the Delivery Body’s requirement in the Prequalification Guidance and Exhibits Guidance to retain Part 2(c).

29. Further, we find that the lack of clarity in the form of Exhibit ZB is compounded by the Prequalification Guidance’s Frequently Asked Questions<sup>4</sup> section, which is also confusing. Firstly, it sets out that applicants must choose between Part 2(a) and Part 2(b), while they must retain Part 2(c). Secondly, it sets out that choosing which section of Part 2 is applicable is solely down to the applicant to decide. This type of instruction is ambiguous and unclear, resulting in confusion for applicants.

## Conclusion

- 30. We find in favour of Shaw-Energi under its Tier 2 Appeal.
- 31. We have concluded that it was procedurally unfair for the Delivery Body to give reasons at the initial decision stage and then to reject the Tier 1 Appeal on a different ground which they had not previously drawn Shaw-Energi’s attention to. As a consequence, the Delivery Body did not provide Shaw-Energi with all of the reasons for its Prequalification Decision. We have found therefore that Shaw-Energi should be afforded the opportunity to rectify the omission of Part 2(c) of Exhibit ZB in its Appeal to the Authority.
- 32. We have also found that the form of Exhibit ZB itself is confusing, which is compounded by a lack of clarity in the Prequalification Guidance’s Frequently Asked Questions section. Moreover, by requiring two declarations to be made under Part 2, the Prequalification Guidance and Exhibits Guidance are asking applicants to provide something that is beyond what is strictly required by the Rules (per the definition of “Fossil Fuel Emissions Commitment” under Rule 1.2). Accordingly, in this respect, the Prequalification Guidance and Exhibits Guidance are not in accordance with the Rules, and therefore the

---

<sup>4</sup> See last question in slide 3. Available at:  
<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/FAQ%20Prequalification%202020.pdf>

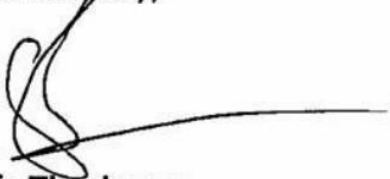
requirements of the Rules prevail.

33. Therefore, we direct the Delivery Body to overturn their Reconsidered Decision to reject the CMU listed in paragraph 1 of this determination for the respective auctions, and to “Conditionally Prequalify” the CMU listed in paragraph 1 on the condition that the Delivery Body is provided with a complete Exhibit ZB for Shaw-Energi’s Application for Prequalification by the deadline required by Rule 5.5.14 (i.e. by the date falling 10 Working Days prior to the commencement of the first Bidding Window), for the relevant 2021 auction, as well as any other conditions associated with their Prequalification status, as required by the Regulations and the Rules.

## **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 Shaw-Energi for Prequalification be overturned in respect of the CMU listed in Paragraph 1 for the T-4 Auction.
35. The Authority directs the Applicant to submit the additional evidence to the Delivery Body, and the Delivery Body to accept and file where appropriate the corresponding Exhibit ZB.

Yours faithfully,



**Chris Thackeray**  
**Head of GB Wholesale Markets**

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

18 February 2021