

DECISION NOTICE

Notice of Decision pursuant to section 25 of the Electricity Act 1989 ("EA") following an investigation into whether Adret Ltd ("Adret") and Berangere Ltd ("Berangere") complied with relevant requirements (defined in section 25(8) EA), namely the requirements of Rule 5.13.1(b) of the Capacity Market Rules ("Rules") which prohibits submitting information to the Delivery Body which is false or misleading.

1. Summary

- 1.1 This document sets out the decision of the Gas and Electricity Markets Authority ("the Authority") under section 25 EA as to whether it is satisfied that both Adret and Berangere contravened relevant requirements (defined in section 25(8) EA), namely the requirements of Rule 5.13.1(b) of the Rules.
- 1.2 Following an investigation, the Authority is satisfied that Adret and Berangere breached relevant requirements, namely Rule 5.13.1(b) of the Rules, owing to both Adret and Berangere submitting to National Grid ("the Delivery Body") false and misleading information in connection with the First Full Capacity Auction of 16 December 2014 ("the Auction"). The Authority takes the provision of inaccurate information very seriously as it relies on information from industry participants in order to discharge its duties.
- 1.3 Adret and Berangere were required to submit to the Delivery Body, by 21 November 2014, declarations under Rule 4.7.1 that it had obtained all Relevant Planning Consents¹ for those Capacity Market Units ("CMUs") that it had entered into the Auction.
- 1.4 Adret prequalified 3 CMUs in the Auction, securing two 15-year Capacity Agreements. The Authority subsequently found that, in relation to the CMU G17JAM, which did not secure a Capacity Agreement, Adret had not obtained all Relevant Planning Consents and therefore made a false and misleading declaration.
- 1.5 Berangere prequalified 3 CMUs in the Auction, securing 15-year Capacity Agreements in respect of each of these units. The Authority subsequently found that in relation to the CMU G15MAT, Berangere had not obtained all Relevant Planning Consents and therefore made a false and misleading declaration.
- 1.6 At the time of the Capacity Auction, Adret was known as GFE 2017 Limited. Adret's name was changed shortly before Ofgem opened its investigation. Berangere was known as GFE 2015 at the time of the Auction and changed its name at the same time as Adret. Both Adret and Berangere became subsidiaries of GF Energy Ltd in February 2015, along with Arpasson Ltd (previously known as GFE 2016 Ltd), which are therefore now part of the same Group of companies as defined in the Rules. Consequently, in making this decision the Authority has had regard to their

¹ Relevant Planning Consent is defined in Rule 1.2.

activities as a Group. The Authority further notes that each member of the Group secured Capacity Agreements in the Auction.

- 1.7 As a result of the breaches committed by Adret and Berangere, the Authority has decided to direct the Delivery Body to terminate the capacity agreement for G15MAT. Additionally, G15MAT will be disqualified from participating in Capacity Auctions for the next two Delivery Years.
- 1.8 The directors of Adret and Berangere have stated that the declarations were made in good faith as they felt that it was certain that the companies would obtain planning consent for G15MAT and G17JAM. Adret and Berangere now accept that they did not have all Relevant Planning Consent in place in respect of either of the units and therefore contravened 5.13.1 (b).

2 Background

- 2.1 Electricity Market Reform ("EMR") is a government policy implemented under the Energy Act 2013 and designed to incentivise investment in secure, low-carbon electricity, improve the security of Great Britain's electricity supply, and improve affordability for consumers. The Capacity Market is part of the EMR and will ensure security of electricity supply by providing a payment to generators for reliable sources of capacity, alongside electricity revenues, to ensure that energy is delivered when needed.
- 2.2 The Capacity Market involves prequalification and auction processes whereby generators wishing to participate in the Capacity Market can apply for prequalification status for CMUs and, if successful, bid for Capacity Agreements. The first Auction commenced on 16 December 2014 and a quantity of 49,260MW was secured. Generators who obtain Capacity Agreements take on a Capacity 'Obligation' in return for Capacity Payments² and must be available to deliver energy when instructed or face penalties.
- 2.3 National Grid is the Delivery Body for EMR and administers the auction process on behalf of DECC. Ofgem, acting on behalf of the Authority, is responsible for enforcing compliance with the Rules.

² See Regulation 2 of the Electricity Capacity Regulations 2014 ("Regulations") for definitions of the terms Capacity Obligation and Capacity Payment.

- 2.4 Adret submitted prequalification applications in relation to 3 CMUs, all of which prequalified to participate in the Auction. Berangere also submitted prequalification applications in relation to 3 CMUs, all of which prequalified to participate in the Auction. In order to prequalify, both Adret and Berangere were required to submit to the Delivery Body, by 21 November 2014, declarations under Rule 4.7.1 that they had obtained all Relevant Planning Consents for those units. Adret and Berangere submitted declarations for those CMUs, including G17JAM and G15MAT, by 21 November 2014.
- 2.5 Following Ofgem's investigation into UK Capacity Reserve Ltd³, we reviewed planning permissions for New Build CMUs entered into the Capacity Auction. This review identified that in the case of both G15MAT and G17JAM, in respect of which declarations had been submitted, Adret and Berangere may not have obtained planning permission at the time they made their respective Rule 4.7.1 declarations. In order to make declarations which were not false or misleading, the relevant permissions had to be in place by 21 November 2014.

3 Company Information on Adret and Berangere

- 3.1 Adret was incorporated in August 2014 as GFE 2017 Ltd and prequalified 3 CMUs for the Auction. On 23 February 2015, Adret's entire share ownership was transferred to GF Energy Ltd. GFE 2017 changed its name to Adret Limited on 10 April 2015. On 30 April 2015, Ofgem notified the company that the Enforcement team were reviewing its involvement in the Auction and prequalification process.
- 3.2 Berangere was incorporated in August 2014 as GFE 2015 Ltd and prequalified 3 CMUs for the Auction. On 23 February 2015, Berangere's entire share ownership was transferred to GF Energy Ltd. GFE 2015 changed its name to Berangere Ltd on 18 April 2015. On 30 April 2015, Ofgem notified the company that the Enforcement team were reviewing its involvement in the Auction and prequalification process.

4 Ofgem's investigation

- 4.1 Ofgem opened investigations into Adret and Berangere on 21 May 2015. The investigation into Adret considered whether Adret provided false or misleading information to the Delivery Body in regard to whether it had obtained Relevant Planning Consent for G17JAM. The same issue was investigated in respect of G15MAT.
- 4.2 In order to establish the facts Ofgem considered information provided by Adret and Berangere in response to two formal information requests.
- 4.3 Ofgem served Summary Statement of Initial Findings to both companies on 10 September 2015. Adret and Berangere made written and oral representations in response.

³ On 18 March 2015 [the Authority concluded](#) that UK Capacity Reserve had breached rule 5.13.1(b) of the Rules by providing false and misleading statements to prequalify for the Auction.

5 The Auction and Adret's actions

- 5.1 Adret is a participant in the Capacity Market and participated in the Auction on 16 December 2014, submitting prequalification applications in relation to 3 CMUs to enter the Auction.
- 5.2 In relation to G17JAM and in relation to the Auction, Adret fell within the definition of a Bidder. It was therefore required to prequalify G17JAM before participating in the Auction (Rule 5.3.1).
- 5.3 In applying to prequalify G17JAM, Adret was first required to declare that it would obtain all Relevant Planning Consents by no later than the date falling 17 Working Days prior to the commencement of the first Bidding Window in relation to the Auction (Rule 3.7.1 (a)). The Bidding Window for the Auction opened on 16 December 2014. Adret's Rule 3.7.1(a) declaration was therefore that it would obtain planning permissions for the 3 CMUs by 21 November 2014.
- 5.4 In relation to G17JAM, Adret was then required to submit to the Delivery Body, by no later than 21 November 2014, a declaration that it had obtained all Relevant Planning Consents for the CMU and a director's certificate confirming that Adret could correctly make such declaration (Rule 4.7.1). Adret submitted its declaration and director's certificate by 21 November 2014.
- 5.5 In the case of G17JAM planning permission had not (at that time), in fact, been obtained.
- 5.6 In its response to Ofgem's information request dated 15 June 2015 Adret stated that it had been informed that formal planning consent was to be issued when the company entered into a 'Section 106 Agreement' requiring the company to install and maintain an earth barrier around the site. Adret considered that the issuance of Relevant Planning Consent was within its control. On this basis Adret felt able to make the declaration under Rule 4.7.1.
- 5.7 The Authority's view, based on the evidence presented is that the advice given by the planning officer stated that Adret needed to enter into a s106 Agreement before the local planning authority would make its final decision. Due to there being a necessary action in the process that remained outstanding, and the possibility of the planning authority taking a different view to its officer, we cannot conclude that planning permission would automatically flow from Adret entering into the agreement.
- 5.8 Rule 4.7.1 requires a declaration that all Relevant Planning Consents have been obtained, not that they will be obtained at some point in the future. Therefore in making its Rule 4.7.1 declaration in relation to G17JAM, Adret submitted to the Delivery Body information in connection with the Auction which was false and misleading, in breach of Rule 5.13.1.
- 5.9 In the Auction, Adret did not secure a Capacity Agreement for G17JAM. It secured 15 year Capacity Agreements for its two other CMUs, G17HER and G17WAT. Whilst Adret has not secured the financial benefit of a Capacity Agreement for this CMU, it benefited by being able to compete in the Auction for this unit when it would otherwise not have been able to do so.

- 5.10 In its written representations in response to Ofgem's Summary Statement of Initial Findings dated 10 September 2015, Adret reiterated that its declaration was made in good faith, due to being "absolutely certain" of obtaining planning permission. Adret further stated that this certainty reduced any risk that the capacity may not be deliverable.
- 5.11 Adret now accepts that the Authority requires the Relevant Planning Consents to be dated prior to the declaration under Rule 4.7.1 being given. Adret has not subsequently received the Relevant Planning Consent as it has not entered into a s106 agreement and pursued the planning application, due to its not securing a capacity obligation.

6 The Auction and Berangere's actions

- 6.1 Berangere is a participant in the Capacity Market and participated in the first Auction on 16 December 2014, submitting prequalification applications in relation to 3 CMUs to enter the Auction.
- 6.2 In relation to G15MAT and in relation to the Auction, Berangere fell within the definition of a Bidder. It was therefore required to prequalify G15MAT before participating in the Auction (Rule 5.3.1).
- 6.3 In applying to prequalify G15MAT, Berangere was first required to declare that it would obtain all Relevant Planning Consents by no later than the date falling 17 Working Days prior to the commencement of the first Bidding Window in relation to the Auction (Rule 3.7.1 (a)). The Bidding Window for the Auction opened on 16 December 2014. Berangere's Rule 3.7.1(a) declaration was therefore that it would obtain planning permissions for the 3 CMUs by 21 November 2014.
- 6.4 In relation to G15MAT, Berangere was then required to submit to the Delivery Body, by no later than 21 November 2014, a declaration that it had obtained all Relevant Planning Consents for the CMU and a director's certificate confirming that Berangere could correctly make such declaration (Rule 4.7.1). Berangere submitted its declaration and director's certificate by 21 November 2014.
- 6.5 In the case of G15MAT planning permission had not (at that time), in fact, been obtained.
- 6.6 In its response to Ofgem's information request dated 15 June 2015 Berangere stated that the formal Planning Consent Notice for G15MAT is dated 4 February 2015, i.e. after the deadline for the declaration pursuant to Rule 4.7.1. Berangere outlined that it had received an email from the planning officer on 10 November 2014 stating that the application would be recommended for approval, subject to the production of an environmental report on the site. Berangere has stated that it felt certain that planning permission would be granted and on this basis felt able to make the declaration under Rule 4.7.1.
- 6.7 Rule 4.7.1 requires a declaration that all Relevant Planning Consents have been obtained, not that they will be obtained at some point in the future. Therefore in making its Rule 4.7.1 declaration in relation to G15MAT, Berangere submitted to the Delivery Body information in connection with the Auction which was false and misleading, in breach of Rule 5.13.1.

- 6.8 In the Auction, Berangere secured a 15 year Capacity Agreement for G15MAT to deliver 19.658 MW of capacity. The first delivery year for this agreement commences in October 2018.
- 6.9 In its written representations in response to Ofgem's Summary Statement of Initial Findings dated 10 September 2015, Berangere reiterated that its declaration had been made in good faith, due to being "absolutely certain" of obtaining planning permission.
- 6.10 Berangere now accepts that the Rules require the Relevant Planning Consents to have been obtained – i.e. the consent to have actually been received, by the time of the declaration under Rule 4.7.1 being given. Berangere received the Relevant Planning Consent on 4 February 2015.

7 The Authority's decision

- 7.1 False or misleading statements, made for the purposes of prequalifying for the Capacity Market, are damaging to the Wholesale Electricity Market and Capacity Market function. Prequalification for the Auction (and the proper and fair functioning of the Auction and EMR more generally) relies on participants taking care to provide accurate information. The credibility of the EMR generally will be undermined if companies participate in auctions for which they have prequalified by providing misleading information.
- 7.2 More generally, the Authority relies heavily on the submission of accurate information in order to regulate effectively, for example in its role of administering environmental schemes, monitoring the energy market and setting price controls for network companies. If the Authority could not rely on accurate information being provided in relation to its functions, it would need to undertake more intensive validation work. This would impose greater costs on Ofgem and regulated entities which would ultimately be passed through to consumers. To this end, the Authority has adopted the provision of accurate information as one of its strategic priorities for the year 2015-16. This follows the Enforcement Priority in 2014-15 of adopting a low tolerance approach to all inaccurate, misreported and late data. The Authority therefore considers it important to take action against the provision of inaccurate information.
- 7.3 In relation to Adret, after considering all relevant information, the Authority is satisfied that Adret contravened relevant requirements (under section 25(8)), namely the requirements of Rule 5.13.1(b), by submitting to the Delivery Body information in connection with the Auction which was false and misleading. This is a Prohibited Activity as defined in the Rules.
- 7.4 The information submitted was in the form of a declaration dated 19 November 2014 stating that "having made due and careful enquiry, to the best of their knowledge, information and belief" it had obtained all Relevant Planning Consents for G17JAM with a director's certificate confirming that Adret could correctly make such a declaration (Rule 4.7.1). In the case of G17JAM planning permission had not in fact been obtained by the date of the declaration. This breach has been admitted by Adret. The Authority considers that this was a deliberate breach on the part of Adret, with the intention of securing the right to participate in the Auction when it otherwise would not have been able to do so.

- 7.5 In relation to Berangere, the Authority is also satisfied that it contravened relevant requirements (under section 25(8)), namely the requirement of Rule 5.13.1(b), by submitting to the Delivery Body information in connection with the Auction which was false and misleading. As stated above, this is a Prohibited Activity.
- 7.6 The information submitted was in the form of a declaration dated 19 November 2014 stating that "having made due and careful enquiry, to the best of their knowledge, information and belief" it had obtained all Relevant Planning Consents for G15MAT with a director's certificate confirming that Berangere could correctly make such a declaration (Rule 4.7.1). In the case of G15MAT planning permission had not in fact been obtained by the date of the declaration. This breach has been admitted by Berangere. The Authority considers that this was a deliberate breach on the part of Berangere, and that by doing so Berangere was able to secure a Capacity Agreement for G15MAT – and the opportunity to gain Capacity Payments – when it otherwise would not have been able to do so.
- 7.7 Regulation 67 of the Electricity Capacity Regulations 2014 in turn states that the requirements of the Regulations and Rules are enforceable by the Authority as if they were relevant requirements on a regulated person for the purposes of section 25 EA.
- 7.8 Pursuant to Rule 6.10.2(a)(ii), the Authority may issue a direction to the Delivery Body to terminate the Capacity Agreement for an actual or suspected engagement in one or more of the Prohibited Activities by any member of the applicant's Group.
- 7.9 The Authority has considered all of the circumstances of the investigation and the Prohibited Activities undertaken by Adret and Berangere, which belong to the same Group of companies. In light of its findings the Authority has decided to issue a direction to terminate the Capacity Agreement that was secured in relation to G15MAT.
- 7.10 Terminating the agreement of G15MAT would make the unit a Defaulting CMU. As a result, G15MAT will be prevented from bidding in Capacity Auctions for the next two years in accordance with Rule 5.3.1 (b).
- 7.11 The Authority notes the potential negative effects outlined at para 7.1. The Authority also notes that by terminating the Capacity Agreement for G15MAT Berangere is deprived of receiving regular Capacity Payments for the 15 year duration of the Capacity Agreement. The Authority further notes that owing to the automatic effect of Rule 5.4 (disqualification from future bid submissions) following a breach of Rule 5.13.1 (b), Berangere will not be able to submit any or part of the CMU in any other Capacity Auction relating to the same Delivery Year or either of the two subsequent Delivery Years.
- 7.12 The Authority also notes that Adret and Berangere fully co-operated with Ofgem's investigations and provided the Authority with an early admission of breach in each case.
- 7.13 In accordance with section 25(5A) of the EA, the Authority has been provided

with assurances from the director of Adret and Berangere that in future, the companies will interpret Rule 4.7.1 in accordance with paragraphs 5.11 and 6.10 above. The Authority is therefore not making a Final Order in respect of the breaches found.

Gas and Electricity Markets Authority

14 December 2015