

Capacity Market appeals procedures

Introduction

1. This paper provides an update to the previous paper CMEG27.02 (July 2013) on appeals procedures for the Capacity Market.

Background

2. Under the consultation version of the CM rules and regulations three appeal routes were prescribed. Additional appeal routes are accessible by capacity providers under existing frameworks not directly specified in the rules/regulations. The appeal routes accessible to capacity providers (and associated categories, depending on their status at the time of appealing) are:

- Route One – Delivery Body – The Authority (Ofgem) – High Court¹
- Route Two - Enforcement via The Authority (Ofgem) – High Court²
- Route Three – Capacity Market Settlement Body – High Court³
- Route Four - Elexon – Trading Disputes panel - BSC Panel⁴
- Route Five – DECC (SofS) – High Court⁵

Judicial reviews of policy decisions or rule amendments are not included within the scope of this paper.

The five routes are detailed below; further details are shown in the annex at the end of this document,

Route One - Delivery Body –The Authority (Ofgem) – High Court

3. This route currently covers ‘Delivery Body Reviewable Decisions’ as specified in CM rule 12.2 – effectively appeals relating to pre-qualification decisions, updates of CM register, issue of Capacity Agreement notices, termination notices, spot test decisions and Delivery Body notifications.

¹ CM Rule 12 and article 40-42 of Electricity Capacity Regulations refer

² Article 39 of Electricity Capacity Regulations and associated sections of Electricity Act 1989

³ Chapter 10 of Electricity Capacity (Payment) Regulations

⁴ Trading disputes committee (http://www.elexon.co.uk/wp-content/uploads/2013/11/trading_disputes_process_v3.0_cgi.pdf)

⁵ Regulation 30 of Electricity Capacity Regulations refers

4. Concerns have been expressed about whether some of the aforementioned appeals against 'reviewable decisions' would be more appropriate for the existing enforcement action route (route two), primarily because they are relatively minor administrative challenges as to whether the Delivery Body had discharged their obligation as per the rules/regulations. Whilst this would provide recourse for parties to challenge whether there had been a breach of obligation, it would not afford the impacted parties the right to have the decision re-heard.
5. It is therefore proposed to remove all the reviewable decisions from the scope of this route, with the exception of pre-qualification decisions (CM Rule 12.2.1) and termination decisions (CM Rule 12.2.5) – which are considered to affect the capacity provider's rights to such an extent that some form of legal challenge would need to be available to mitigate the risk of the Delivery Body being exposed to judicial review, should no alternative statutory appeal route be provided for.

Question - Does the Expert Group agree that only pre-qualification and termination notice appeals should utilise the route one appeals process?

6. It is proposed that where a termination notice is overturned on appeal under rule 12.2.5, the Capacity Provider would be reimbursed for any capacity payments it missed out on in the interim. In addition a successful appellant would be considered to have delivered as per their load following obligation should there be a system stress event in the appeal period, and would not be exposed to penalty liabilities for the period.
7. Under rule 6.10.2, a square bracketed provision states that a termination notice may be issued to a capacity provider on the direction of the SofS or the Authority for failure to comply with the ethical requirements. As currently drafted any appeal against such a notice would be addressed through route one, and thereby presenting a conflict of interest for the Authority given their role in both triggering the notice and resolving any appeal against the notice. The scope of appeals against termination decisions instigated by the Authority's direction would need to be revisited subject to the resolution of the square bracket issue in 6.10.2.
8. As detailed in the CM rules and regs, National Grid will determine whether capacity providers are eligible to participate in Capacity Market auctions. If an applicant disagrees with National Grid's assessment, they will have the right to

request that National Grid review their original decision (Tier one), and may escalate their appeal to Ofgem if they are dissatisfied with National Grid's reconsidered decision. Ofgem, as an independent body, will consider whether National Grid followed the process set out in legislation and may uphold or overturn National Grid's determination (Tier two)

9. Ofgem has expressed concerns about whether the working proposal of 15 business days is long enough to review National Grid's reconsidered decision. The original timescales were proposed to reflect the mechanistic nature of National Grid's pre-qualification assessment and the desire to have a liquid Capacity Auction which, for this to happen, requires disputes to be resolved prior to the auction.
10. Since Ofgem colleagues first raised concerns about their pre-qualification appeals role in May, work has been ongoing to agree a number of mitigation measures:
 - Ofgem's exposure to being liable for damages if their appeals decision is judicially reviewed has been reduced under the terms of the draft Memorandum of Understanding. DECC's Accounting Officer has been advised to offer to pay reasonable costs incurred by Ofgem if such a situation arises.
 - The auction may still run on time even if all appeals are not concluded – subject to any intervention by the Secretary of State to suspend or cancel the auction.
 - There is no penalty for Ofgem if they do not complete all the appeals in the allocated window.
11. Further work is ongoing to address Ofgem's outstanding concerns, with a five day extension to the pre-qualification review window, to 20 working days, now being proposed. Whilst termination notifications follow the same appeal process, they are not subject to the same time constraints as pre-qualification appeals, and there is scope for providing for a longer window for Ofgem's review of termination notifications. This will be finalised in Spring 2014.

Question- Does the Expert Group agree that Ofgem should have longer than 20 business days to review appeals against termination decisions?

12. The last stage of the route one appeal is either the High Court or the Tribunal system. Discussions have been held with Ministry of Justice to determine the arrangements for Tier three and will inform the final decision.
13. Under the current drafting of the CM regs (article 42) applicants successful in appealing at this stage would be offered a Capacity Agreement for the amount of capacity under dispute valued at the clearing price. The auction result would not be re-run nor its results affected. It is also intended that the option of delaying capacity payments and obligations (by the duration of the dispute resolution process) would be offered to the successful appellant.
14. It is also possible that a court may award further damages to a successful appellant arising from the delay to construction / refurbishment plans. It is unlikely that any existing plant would be eligible for further damages.

Route two - The Authority (Ofgem) – High Court

15. Whilst the first component of this route is not strictly an appeal mechanism, this route will enable investigation of whether any party upon whom a duty had been placed had discharged their duties as specified – for example the System Operator's classification of system stress events.
16. Under regulation 39 of the Electricity Capacity regulations, which refers to s25 of the 1989 Electricity Act, any obligation placed on any party (except for the Settlement Agent, Settlement Body, The Authority and the SofS) in the CM regs or rules can be enforced by the Authority. The sanctions available to Ofgem for non-compliance are set out in the Electricity Act 1989. These sanctions allow Ofgem to impose enforcement orders which require corrective behaviour to be implemented to ensure compliance and / or impose financial penalties for licence breaches.
17. The existing provisions of the Electricity Act stipulate a statutory appeals route, to the High Court, which would be accessible to parties wishing to challenge Ofgem's enforcement decisions in relation to capacity market breaches.

Route three – Capacity Market Settlement Body – High Court

18. This route will cover appeals against the Settlement Agency's payment/penalty calculations and assessment of pre-qualification credit support.

19. Under chapter 10 of the draft Electricity Capacity Payment regulations the Settlement agent (Elexon) receives a disputes notice, the settlement agent then recommends to the settlement body that the dispute be looked at. The CM settlement body must then instruct the settlement agent to investigate the dispute and make a decision in respect of the dispute and comply with regulation. The settlement agent must investigate the dispute and provide to the settlement body a report ("a disputes report") of its investigation, including a recommendation as to the resolution of the dispute. The settlement body then makes a final decision. The next stage is the High Court if the decision is appealed against.
20. This process applies to calculation disputes with the proposed outcome likely to be if the appeal is upheld then the calculation will be recalculated and if the appeal is not upheld then the original calculation remains.

Route four - Elexon – BSC Trading Disputes Committee - BSC Panel

21. This route will cover appeals against data provided to under the Balancing and Settlement Code (BSC). This is an existing dispute mechanism, which will be accessible by capacity providers wishing to challenge the provenance of data used in the calculation of penalty/over-delivery payments at times of system stress. This is distinct to appealing the actual calculation, which is subject to route three.
22. Elexon considers the validity of the trading dispute and escalates to the Committee which considers the validity. The appellant may escalate to the BSC panel where it disagrees with the Committee's decision.

Route five - DECC (SofS) – High Court

23. This appeals role is not specified in the legislation but under the current drafting of the regulations⁶ the SoS has a 60 day reflection period to make a decision on whether to intervene with a termination notice or not.
24. We are currently considering the detailed process for the decision of whether the SoS intervenes or not, and how parties wishing to appeal the decision could present their representation.

Question – Does the Expert Group have views on how this process could work?
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⁶ Regulation 30

Next Steps

- All proposed CM appeals/disputes routes will be finalised in Spring 2014 in the final version of the CM rules and secondary legislation.
- Ofgem will discuss their role in CM appeals at their GEMA board meeting in January 2014.
- Finalise format of Tier three appeals for route one with Ministry of Justice officials.

Annex - Capacity Market appeals routes table

Route 1 – Delivery Body – The Authority (Ofgem) – High Court			
Type of Dispute	Role of Stakeholders	Legislation/ rules	Timelines
Pre-qualification disputes including eligibility for the auction.	<p>National Grid (as Delivery Body) informs applicants of their pre – qualification status and also deals with the appeal against their initial decision (Tier 1)</p> <p>The Authority is notified of the appeal in Tier 1 and also deals with the appeal against the National Grid decision (Tier 2)</p> <p>High Court hears the appeal from the appellant against the decision of Tier 2.</p>	<p>First stage chapter 12 of the CM Rules applies.</p> <p>Second stage – After chapter 12 of the CM rules then Part 9 of the draft Electricity Capacity Regulations 2014 apply</p>	<p>Tier 1- appellant has 5 working days to appeal against Delivery Body's decision. The Delivery Body then has 5 days to reconsider their decision.</p> <p>Tier 2 Ofgem then has 20 days to look at the Delivery Body's decision.</p> <p>Tier 3 High Court. An appeal must be brought within 28 days after the date of determination.</p>
<p>Termination decision (this appeals route will be running in parallel with the SoS 's 60 days to look at the decision).</p> <p>Reviewable Decisions. A capacity provider who is dissatisfied with a decision of the Delivery Body to issue a notice of</p>	<p>Delivery Body looks at the appeal under chapter 12.3 of the CM rules within 5 business days of receiving the decision in writing. Delivery Body must reconsider the decision within 5 business days and notify the affected person of the reconsidered decision.</p> <p>An affected person who is unhappy with the reconsidered decision can appeal to Ofgem</p> <p>Ofgem under articles 40 and 41 will then make a decision on the appeal</p>	<p>First stage- chapter 12 of the CM Rules applies</p> <p>Second Stage – After chapter 12 of the CM rules then Parts 8 and 9 of the draft Electricity Capacity Regulations 2014. apply</p>	<p>Tier 1 - Appellant has 5 days to appeal against Delivery Body decision. The Delivery Body then has 5 days to reconsider the decision.</p> <p>Tier 2 - Ofgem then has 20 days to look at the Delivery Body's decision. This may be longer compared to pre-qualification as the time pressures are less days to look at the Delivery Body's decision.</p> <p>Tier 3 - High Court. An appeal must be brought within 28 days after the date of determination.</p>

termination to the Capacity provider in accordance with Rule 6.10.2	If the affected person is unhappy with the Ofgem decision under article 42 they can then go to the courts		
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Route 2- The Authority (Ofgem) – High Court			
Type of Dispute	Role of Stakeholders	Legislation	Timeline
Enforcement – All obligations under the Rules and regulations including Appeal against CM rule book (TBC) Reviewable Decisions including draft CM rules sections 12.2.2, 12.2.3, 12.2.4, 12.2.6 and 12.2.7 (TBC)	No role for Delivery Body The Authority (Ofgem) – Under regulation 39 of the draft Electricity Capacity regulations 2014 which refers to s25 of the 1989 Electricity Act, any obligation placed on any party (except for the SA, SB, GEMA & SoS) in the regs or rules can be enforced by Ofgem.	Draft Electricity Capacity Act 2014 1989 Electricity Act Clause 30 of the Energy Bill	Section 27e the Electricity Act 1989 Appeals – 42 days to make an appeal to the High Court against a decision
NG's classification of system stress events [shown separately from enforcement though part of it due to difference in the consequences of the outcome]	System Operator defines whether there was a system stress event or not. The Authority (Ofgem) then looks at the decision under regulation 39 of the draft Electricity Capacity regulations 2014 which refers to s25 of the 1989 Electricity Act, any obligation placed on any party	Draft Electricity Capacity Act 2014 Parts 8 and 9	Section 27e the Electricity Act 1989 Appeals – 42 days to make an appeal to the High Court against a decision

	(except for the SA, SB, GEMA & SoS) in the regs or rules can be enforced by Ofgem		
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Route 3 – Capacity Market Settlement Body – High Court			
Type of Dispute	Role of Stakeholders	Legislation	Timelines
Calculation issues (A dispute in the context of settlement (ie the language in clause 52 of the regs: “dispute” means a dispute in respect of the capacity market calculations....’))	No roles for The Authority (Ofgem) and National Grid Settlement agent (Elexon)- when the settlement agent receives a disputes notice, the settlement agent must as soon as practicable recommend to the settlement body that the dispute be looked at CM settlement body must— instruct the settlement agent to investigate the dispute and make a decision in respect of the dispute and comply with regulation The settlement agent must investigate the dispute and provide to the settlement body a report (“a disputes report”) of its investigation, including a recommendation as to the resolution of the dispute. Settlement body then makes a final decision. The next stage is the High Court if the decision is appealed	Chapter 10 of the draft Electricity Capacity Payment regulations	Dispute notice must be given within 3 months of the making of the calculation or determination giving rise to the dispute. Investigation by a settlement agent on behalf of the settlement body – 40 working days. This can be extended to 80 working days after the settlement agent received the disputes notice if that is agreed by the disputing party. Settlement Body must make a decision no later than 20 working days after receiving a disputes or interim report.

	against.		
Pre-qualification credit support appeals (TBC)	Settlement agent reviews the decision and gives an extra 5 days for capacity provider to provide further information. Then escalated to Settlement Body for final decision. The next stage is the High Court if the decision is appealed against	Chapter 10 of the draft Electricity Capacity Payment regulations	

Route 4 - Elexon – Trading Disputes panel- BSC Panel

Type of Dispute	Role of Stakeholders	Legislation	Timelines/rules
Data provided to BSCCo	No roles for The Authority (Ofgem) and National Grid Elexon looks at the trading dispute. The Trading Disputes Panel then looks at the dispute, if it is not then resolved it goes to the BSC Panel	BSC code - section W Draft Capacity Electricity Payment Regulations 2014 (Part 4)	Has to be raised within 20 business days of the disputes day deadline.

Route 5 – DECC (SoS) – High Court

Type of Dispute	Role of Stakeholders	Legislation	Timelines
Appeal against termination decision. Likely to be in parallel with route 1 (TBD)	No role for The Authority (Ofgem) The Delivery body receives a direction from the SoS to terminate the capacity agreement Needs to be a process for the decision of whether the SoS intervenes or not. The SoS has 60	6.10 .4 of the CM Rules 6.10.1.lists 7 types of termination events.	The SoS has 60 days to make a decision on whether to intervene or not

	days to make a decision on whether to intervene or not.		
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