Department of Energy & Climate Change

Implementing Contracts for Difference:

Policy and Drafting Update

Contract for Difference

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Introduction

BACKGROUND

Subject to the will of Parliament and the finalisation of provision for Sustainability, Phased Projects and Private Wire Network Generation, the Contract for Difference ('CfD') published alongside this document represents the terms that will be offered by the CfD Counterparty Company Ltd (the 'CfD Counterparty') to Generators following successful allocation for CfD projects in Great Britain.

The CfD is the culmination of several successive cycles of drafting and engagement with industry and the wider public, beginning in May 2012[1] and concluding in January 2014. The CfD now includes additional provisions that seek to ensure it is flexible, investable and remains robust throughout its life. We will continue to work with industry and interested parties on the development of the outstanding areas of the CfD.

In December 2013 the Department of Energy and Climate Change published a version of the CfD that represented the major fulfilment of our policy intent (the 'December Draft').[2] Alongside, we provided an 'update' document ('Update on Terms for Contracts for Difference', the 'December Update') charting the progress that had been made and providing information on any new or evolving positions.[3] Between them, these two documents called for feedback both on the terms themselves and on our new and revised policy positions.

SCOPE OF AND APPROACH TO ENGAGEMENT

We received detailed responses from twenty-two organisations, including generators large and small, suppliers, trade associations, legal advisors and delivery partners. We identified more than three hundred distinct points raised by these respondents, and every issue raised by a stakeholder has been given consideration.

Where we have incorporated points raised, we have set out the reasons for this and the way in which the accompanying CfD will reflect the corresponding drafting amendments. There were other points raised which, following consideration, we have not taken forward. We have endeavoured to give equal time to explaining our reasoning in not taking up those issues as we have in describing the way in which other responses have led to improved drafting.

AREAS OF SIGNIFICANT DEVELOPMENT

Throughout this document we describe a large number of changes that have been made, both on the basis of the views expressed to us and otherwise. Many of these are small changes to drafting that do not significantly impact upon the overall effect of the provision in question, or which simply ensure that an existing policy is more effectively, clearly or reliably delivered.

However, there are four key areas of development that we wish to highlight:

- Our approach to phased Projects has developed from the outline published in the December update. Subsequently, we have developed policy and drafting for two scenarios:

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48373/5358-annex-b-feedin-tariff-with-contracts-for-differe.pdf

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267649/Generic_CfD_-_terms_and_Conditions__518596495_171_.pdf

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267735/EMR_-_Update_on_terms_for_the_Contract_for_Difference_v8.pdf

  - A ‘Single Metering’ approach; and
  - An ‘Apportioned Metering’ approach.

  Our approach to phased projects in general is discussed within Chapter 26, including greater detail on these two approaches and the circumstances in which they might be used. This document was accompanied by drafting for each approach, including in the case of the Single Metering approach three exemplar phase agreements, and in the case of the Apportioned Metering approach a single exemplar phase 1 agreement. In the latter case, the drafting is preliminary but intended to be indicative.

- The CfD now contains the necessary technical provision to allow for the participation of facilities that have existing support for capacity under the Renewables Obligation, and seek additional support for new but separate capacity (or the conversion of fossil-based Generating Units to full biomass) under a CfD (‘Dual Scheme Facilities’). The detail of this approach is found within Chapter 27 of this document.
- Provision for compensation where a Facility is shutdown in particular circumstances, known as Qualifying Shutdown Events, has developed from an empty heading, a definition and a statement of policy within the December Update to a fully-drafted area of provision within the CfD. Discussion of this aspect and our consideration of responses received on it may be found in Chapter 6 of this document.
- The CfD now includes provision for its continued viability where it would otherwise be frustrated; where the Law is changed in such a way as to render it impossible or illegal for it to continue as drafted, (‘Change in Applicable Law’). These changes are summarised within Chapter 25 of this document.

APPROACH

The Department sought to engage with stakeholders on a limited number of key areas from December 2013, and to provide an update on the wider contract, including:

- Milestone Requirements
- Revision of the Installed Capacity Estimate
- Phased Offshore Wind Projects
- Metered Output / Metering
- Market Reference Price (‘MRP’)
- Change in Law
- Qualifying Shutdown Events
- Balancing and Network Charges (‘BSUoS’/’TLM’)
- Curtailment
- Termination Events
- Direct Agreement
- Credit Support / Collateral
- Limited Recourse
- Undertakings and Acknowledgements
- Intellectual Property
- Generation Tax
- Fuel Measurement and Sampling (‘FMS’)
- Renewable Qualifying Multiplier (‘RQM’)
- Combined Heat and Power (‘CHP’)

The “Standard Terms and Conditions” that will be issued by the Secretary of State for Energy and Climate Change pursuant to section 11 of the Energy Act 2013 consist of two elements, a ‘CfD Agreement’ and ‘Standard Terms and Conditions’.

For clarity, terms found within the first document are referred to as ‘Clauses’, while terms found within the second, larger document are referred to as ‘Conditions’. Terms found within the Direct Agreement are also referred to as ‘Clauses’, though the text of that instrument sits within the wider Conditions.

The numbering for Conditions and Clauses is based upon the clean CfD documents released alongside this one. We have not published a comparative version of the CfD documents, but these are available on request.

Terms capitalised within this document represent defined terms that have a meaning within the CfD, and where a wider more detailed understanding of their function is desired reference to the CfD may provide this.

WIDER TIMETABLE

The CfD itself is one of the key documents required for the implementation of CfDs in general, which will be finalised over the coming months through the:

- **CfD Allocation Framework:** Published in draft on 8 April,[4] setting the rules for managing the CfD budget and allocation process. It is expected that the final Allocation Framework will be published in conjunction with the laying of the EMR regulations in June.
- **CfD Budget Allocation:** At the end of April, DECC plan to publish the Government Response to the Consultation on CfD Allocation, confirming our position on a move to competition for established technologies, as well as a further consultation on treatment of individual technologies, including detailed proposals for the application of technology specific minima or maxima, where applicable and an update on the LCF timeline.
- **Indicative CfD Budget:** we plan to publish an initial and indicative budget in mid-July in order to give stakeholders three months visibility of the budget ahead of the first CfD Allocation round.
- **Secondary Legislation and Government Response to the EMR Consultations on Proposals for Implementation and CfD Budget Allocation:** DECC intend to lay the implementing secondary legislation in Parliament and publish the Government Response to the EMR implementation consultation, setting out final decisions reflected in the legislation, on 4 June as well as the response to the above consultation.

As set out in the CfD Implementation Plan,[5] it is anticipated that the application process for CfDs will open and allocation is expected to begin in autumn, with the first contracts awarded in early 2015.

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302767/Draft_Allocation_Framework.pdf

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301464/cfd_implementation_plan.pdf

Part 1: Response to Engagement

1. Milestone Requirements

The Milestone provisions, contained within Condition 4 in the CfD, include an obligation for the Generator to provide the CfD Counterparty with evidence that it has complied with and fulfilled one of the Milestone Requirements by the Milestone Delivery Date. Further detail on these, relating the value of actual spend satisfying the 'Total Project Pre-Commissioning Costs', or submission of documentation listed as the Project Commitments, is then set out in the CfD Agreement, Clauses 5.7, 5.8 and Annex 6.

Eleven organisations submitted responses to the Milestone Requirements in the CfD, expressing concerns around the Milestone Delivery Date timelines and the burden of evidence required, particularly for offshore wind, and then more generally, asking for further clarity on how this evidence would be assessed and verified by the CfD Counterparty.

We have reviewed feedback on the Milestone conditions, and provided further definition and clarity in many areas. However, no major changes to our original policy positions have resulted. Further background and an explanation of our revised or reaffirmed policy positions is provided below.

MILESTONE DELIVERY DATE

1.1. Clause 5.6 defines the 'Initial Milestone Delivery Date', across all technologies, which will be no later than 12 months after the Agreement Date. No later than the Milestone Delivery Date (which is the Initial Milestone Delivery Date as may be extended in certain circumstances) the Generator must provide the CfD Counterparty with evidence that it has complied with and fulfilled one of the Milestone Requirements. This will be in the form of either evidence of actual spending, or submission of documentation listed as the Project Commitments.

1.2. Seven respondents requested further consideration of this condition. All described the 12 month timeline as 'challenging' for offshore wind Generators, requesting either that the period between the Agreement Date and Milestone Delivery Date be increased, or that the burden of evidence at the Milestone Delivery Date is reduced. Issues centred on offshore Projects facing potential difficulty in reaching financial investment decisions within the current timeframe, bringing extra risk to the process.

1.3. Having considered the issues put forward we have retained a 12 month timeline for all technologies, including offshore wind. This maintains a consistent and established policy for all technologies, one which has been visible to industry and Expert groups since summer 2013.

1.4. Further, the robustness of the current Milestone Requirements, which are based upon substantive evidence of commitment to the Project, is required for the CfD Counterparty to accurately ensure the commitment of Projects progressing through the development stages of the contract, and any decrease in the evidentiary burden would increase risk to the CfD budget.

TOTAL PROJECT PRE-COMMISSIONING COSTS (PREVIOUSLY 'TOTAL PROJECT COSTS')

1.5. Taken together, clause 5.7 and condition 4.1(B)(i) expand upon one of the Milestone Requirements, defining the value of the 'Total Project Pre-Commissioning Costs' that will apply on a technology-specific £/MW of Installed Capacity basis. Condition 4.1(B)(i) outlines the

requirements for the Generator to provide Supporting information, such as invoices or payment receipts with respect to the Project, in order to evidence to the CfD Counterparty that it has spent at least 10% of the Total Project Pre-Commissioning Costs on the Project.

1.6. Three respondents offered commentary on this area. A need was identified for further clarity on the definition of the Term formerly known as 'Total Project Costs' and on which costs would be included or excluded in reaching that overall value.

1.7. To address these issues, we have replaced the concept of 'Total Project Costs' with 'Total Project Pre-Commissioning Costs', clarified the two Milestone Requirement options and appended a table to the CfD Agreement which sets out the Total Project pre-Commissioning Costs figure per MW of Installed Capacity applicable to each Facility Generation Technology.

1.8. Clause 5.7 then specifies the relevant cost figure for each technology type, with all figures listed in the appended drafting notes which have been appended to the CfD Agreement. As per Condition 4.1(B)(i), the CfD Counterparty will verify submitted spending information on each Project against this number in relation to the Initial Installed Capacity Estimate as may be amended pursuant to permitted reductions and any Relevant Construction Event (formerly 'Relevant Geological Issue') prior to determining whether the threshold for 10% spend has been met.

TARGET COMMISSIONING WINDOWS AND LONGSTOP DATES

1.9. A table appended as a drafting note to the CfD Agreement sets out the 'Target Commissioning Window' ('TCW') and 'Longstop Date' ('LSD') timelines for each Eligible Generation Technology. TCW and LSD are determined by reference to this table and to the 'Target Commissioning Date' (TCD) nominated by the Generator in their application and reflected within Clause 5. Generators may elect the starting date for their initial TCW in addition to their TCD. These values are then reflected within Clause 5.1 and Clause 5.2.

1.10. Two respondents commented on this area, detailing discomfort at the timelines imposed through use of TCWs and LSDs for specific technologies, in particular whether or not these timelines covered all delays that may impact Projects. Having considered these comments, we consider the TCW and LSD timelines sufficient as set.

1.11. The CfD regime is structured in such a way that it requires certainty as to the capacity and timings of the generation it supports. It is therefore necessary to ensure that Generators accurately gauge the capacity they can provide in a given timeframe. It should be possible to set Project timescales in a way that takes into account and mitigates the risk of delays and other Project risks.

1.12. There is a balance to be struck between giving Generators more time than required to Commission their Required Installed Capacity (resulting in less efficient use of the Levy Control Framework budget) on the one hand, and forcing them to set onerous Project timescales (thereby increasing risk and cost) on the other. However, taking advantage of the TCW and period running up to the LSD, Projects still have up to three years of flexibility , depending upon technology. Therefore, we believe that it is reasonable to expect that Projects should be able to deliver within these flexibilities and existing timeframes.

2. Installed Capacity

Conditions 50.1 and 52.1(D) taken together provide that in the event that a developer fails to Commission at least a given proportion of the Installed Capacity Estimate (this now being referred to as the Required Installed Capacity) the CfD Counterparty has a right to terminate the CfD.

Condition 5 sets out the process for notifying the CfD Counterparty where a Relevant Construction Event ('RCE') has occurred (formerly a 'Relevant Geological Issue') and whether an RCE-Adjusted Installed Capacity Estimate is accepted; based on the definition of RCE in the CfD.

13 organisations submitted responses on this area, the majority of whom sought to address the ways in which capacity thresholds impact the contract, and these are addressed below. The remaining responses concerned either the concept of a 'relevant geological issue', also addressed, or spoke to minor drafting issues that have been acted on accordingly.

TERMINATION THRESHOLD FOR INSTALLED CAPACITY

2.1. Six respondents made comments relating to the Required Installed Capacity. In general, these respondents were concerned that the level set was too high. Two respondents were concerned that if we retained the 95% threshold there would be a risk that some financiers would be reluctant to finance Projects. They believed this could have the potential to increase the cost of capital which Projects might face or even deter investment altogether.

2.2. Speaking in the context of wind generation specifically, two respondents were particularly concerned that for smaller Projects there is a risk that a single turbine may represent more than 5% of the whole Installed Capacity and therefore a failure to deliver a single turbine would lead to the whole Project being terminated. We decided to make provision to ensure smaller projects (up to 30MW) benefit from an appropriate degree of flexibility to alleviate the risk that failure to deliver a single turbine leads to termination of their CfD.

2.3. Taking into account these and other views, we have therefore decided to reduce the Required Installed Capacity to 85% in the case of offshore wind, with the level remaining at 95% for all other technologies.

2.4. This increases the amount of cost-free flexibility available at the LSD but the CfD Counterparty retains the right to terminate the CfD if the Final Installed Capacity delivered is below the Required Installed Capacity. This addresses respondents' concerns about 'unknown unknowns', and the potential for exceedingly low-probability events to lead to termination. Further engagement has led us to believe that this move is of benefit to impacted Generators.

2.5. The remaining two respondents were concerned that ACT Generators would be prejudiced whilst in the process of progressing to full generation. We believe that the concern expressed by the respondents regarding ACT Projects is based upon a false assumption. The measure of Final Installed Capacity is that the size of the plant applied for has been Commissioned, rather than that it achieves 100% output for the entirety of its CfD.

START DATE THRESHOLD

2.6. Six respondents made comments relating to the threshold of Installed Capacity at which a Start Date may be triggered. All respondents desired that it be reduced in order to allow cash flow to begin earlier in the life of the CfD.

2.7. Having considered the response we have decided to introduce a distinct threshold at which a Generator may trigger a ‘Start Date’ under the CfD at 80% of the Installed Capacity Estimate. This will facilitate earlier cash-flows and support the reduction of financing costs. It will also assist Projects intending to Commission on time, but whose failure to erect a small number of turbines ahead of winter, taking offshore wind as a particular example, would otherwise have meant they would have to wait until the following spring before payments could commence.

2.8. However, the fact that the Term of the CfD will start at the earlier of the Start Date or the closure of the TCW maintains a suitable incentive to Commission on time, as later generation will receive support for a shorter period of time.

RELEVANT CONSTRUCTION EVENT (PREVIOUSLY ‘RELEVANT GEOLOGICAL ISSUE’)

2.9. Three respondents raised issues on the scope of the Relevant Geological Issue condition, now known as a Relevant Construction Event (‘RCE’).

2.10. Two were concerned that certain environmental risks (e.g. the existence of protected species) would not constitute a ‘physical constraint’, but rather a physical condition. The definition was suggested to be broadened to 'means any geological, physical or environmental condition affecting the Facility’.

2.11. Another suggestion was to cover unforeseeable environmental and wildlife issues, including nesting birds, marine mammals and unexploded ordnance. As such, the definition has been amended and has been renamed ‘Relevant Construction Event’ to reflect that the Condition captures a range of issues in addition to those of a geological nature.

2.12. The definition of RCE clearly includes the issues raised: “new or unknown fauna or flora, unexploded ordnance, mudstone, archaeological remains, antiquities or hazardous materials”. The amendment to differentiate between a physical condition and a physical constraint was not felt to be necessary.

2.13. One respondent suggested that a geological issue seemed to require that the whole Facility was “uneconomic" and suggested limb (B) of the definition should capture 'part Facility'. We believe that this change was not required in order to serve the purpose that the condition seeks to fulfil.

2.14. One respondent noted that the 10 Business Days for the provision of Supporting information requested by the CfD Counterparty was likely to be insufficient given such information will be likely to come from third parties, and to factor in time for consents to be obtained. The drafting retains the 10 Business Days as a standard but allows the CfD Counterparty to permit a longer period.

3. Metering

The provisions for calculating Metered Output and the technical, informational and metering access obligations that a Generator must continuously comply with under the CfD scheme are set out in Conditions 10 (for baseload Generators), 18 (for intermittent Generators) and 29 respectively. Part B of Schedule 1 stipulates the Further Conditions Precedent which a Generator must deliver to the CfD Counterparty prior to the commencement of Difference payments.

Six organisations provided feedback on the metering provisions. This predominantly consisted of requests for clarification regarding the policy intent of the provisions. We have amended the drafting where this aided in clarification.

DEFINITIONS

Loss Adjusted Metered Output

3.1. This definition describes how 'BM Unit Metered Volume' is adjusted for the Transmission Loss Multiplier ('TLM', in accordance with the Balancing and Settling Code, 'BSC'), or any alternative new or submitted loss multiplier.

3.2. Two respondents made comments on this definition. One raised specific concerns about the transmission loss adjustments to BM Units under the BSC, arguing that the TLM value was dependent on the flows of non-CfD BM Units that may sit within a wider Trading Unit (i.e. a combination of BM Units, used with the approval of the BSC Company, 'BSCCo').

3.3. We accept that where this occurs, certain Generators may be able to access the embedded benefits associated with this arrangement. The CfD scheme would not prevent access to these benefits.

3.4. Another respondent requested clarification as to whether the loss adjustment calculation was performed at a half-hourly level for all BM Units. We confirm that loss adjustment calculations are performed at a half-hourly level for all BM Units but are applied to the BM Unit Metered Volume on a Settlement Unit basis (i.e. an hourly basis for intermittent Generators).

METERED OUTPUT

3.5. Conditions 10 (for baseload Generators) and 18 (for intermittent Generators) outline how the CfD Counterparty will calculate the Metered Output for each Settlement Unit, and the estimation techniques that will apply in the event that settlement data volumes are not provided by the BSCCo. The Condition also sets out how and when estimated data volumes will be reconciled where actual values are subsequently received in relation to a Settlement Unit in respect of which estimated data was previously used.

3.6. One respondent commented that an 'aggregated', rather than 'last known' approach to the estimation of Metered Output for baseload generation would be preferable, because there was a risk that a Generator could be underpaid if such an approach was undertaken. Following consideration, we have opted not to change the method of estimating missing data volumes. We believe that the respondent's concern that such a technique could result in them being underpaid is effectively mitigated through the reconciliation process that occurs once actual metered data volumes become available.

3.7. Another raised concerns that the drafting of Condition 10 assumed that all participants were directly Party to the BSC, when in practice; this may not be the case. We have developed bespoke Metered Output provisions for Generators that are not directly party to the BSC but trade on public electricity systems. These provisions will enable such Generators to access support and continue to participate in the CfD scheme.[6]

METERING UNDERTAKINGS

3.8. Two respondents raised a number of concerns regarding the provisions laid out in the terms. Clarity was sought on whether interest (either Default or Compensatory) would be paid to Generators that failed to meet their Electrical Schematic Obligations, leading to a payment suspension. We confirm that no interest will be paid to Generators where there has been an erroneous suspension of payments when the CfD Counterparty believe that the Electrical Schematic and/or the Metering Access Right have been breached.

3.9. The same respondents also queried whether delays by the BSCCo in approving a Remediation Plan (with respect to the Metering Compliance Obligation) would lead to termination, and whether the CfD Counterparty still retained a termination right in the event that a Generator failed to adhere to the Metering Compliance Obligation and Metering Access Rights.

3.10. We confirm that the CfD Counterparty will retain the right to terminate a Generator's CfD contract in the event that they duly fail to comply with either the Metering Access Right, or the Metering Compliance Obligations. In relation to the Metering Compliance Obligations, the Generator has a period of 15 Business Days from notification of the breach to compile a Metering Remediation Plan. We believe that this period is sufficient to compile a Metering Remediation Plan. The approval of the Metering Remediation Plan simply provides a long-stop date for compliance.

3.11. One respondent questioned the length of the 60-Business Day time period that a Generator is allowed to fix any metering fault (i.e. non-compliance with the Metering Compliance Obligation) and the suitability of CfD Counterparty Representatives for entering a site. We believe that the notification timescales are sufficient to provide adequate time for a Generator to remediate any fault with a Facility's Metering Equipment.

3.12. The use of the Term 'Information technology systems' in the drafting was questioned. The Term was viewed as obscure in its meaning, yet the drafting implied that such systems should be installed to the standards of the BSC. This Term has therefore been replaced with 'Communications Equipment', having the same meaning as it does under the BSC.

3.13. Two respondents were concerned that the contract assumed a one-to-one relationship between a Generator and a BM Unit, and that in practice the association was not always unique; i.e. a Generator might span more than one BM Unit. We have amended the relevant Conditions to clarify that the metering equipment at a Facility may extend beyond a single BM Unit.

METERING-SPECIFIC FURTHER CONDITIONS PRECEDENT

3.14. The Further Conditions Precedent cover a variety of requirements, but a number of these are specific to metering. One respondent was concerned that the language used in part (D), concerning the provision of an electrical schematic diagram, was unsuitable if the Generator was not the owner of the Facility Metering Equipment.

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6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301055/CfD_Metering_Exemptable_Embedded_Generation_Final_-_Published__Recovered_.pdf

3.15. Following consideration, we believe that the current drafting is sufficient. Generators are required to ensure that, if they do not own the relevant metering equipment, they have procured the necessary consents and information from the owner to comply with their obligations.

PRIVATE WIRE NETWORK GENERATION

3.16. Other respondents expressed concern that the current drafting did not acknowledge that Generators on Private Wire Networks would need to establish Metered Output volumes separately to Generators on public networks. We are in the process of drafting tailored terms for Private Wire networks,[7] and we expect to conclude this work by Summer 2014.

3.17. Beyond this specific concern, a number of respondents sought clarity more widely on the contractual terms with regard to Private Wire Network Generation policy. We appreciate that detail of our approach to this area is important to certain Generators, and these concerns will addressed as part of the continuing policy development process.

4. Market Reference Price

The provisions for calculating the Baseload Market Reference Price and Intermittent Market Reference Price are set out in Part 5A Condition 15 and Part 5B Condition 20 respectively. Annexes 4 and 5 set out the processes by which the Market Reference Price can be amended over time to reflect changing market conditions.

Fifteen organisations provided feedback on the Market Reference Price provisions in the December publications. This primarily consisted of minor points of detail, and wherever possible we have made amendments to the drafting to clarify the intent. In some cases, however, the issues raised would have led to more significant changes which are not compatible with the policy adopted, and these have not been accepted, though the basis for this refusal is explained in each case.

DEFINITIONS

‘GB Day Ahead Hourly Price’

4.1. Four respondents suggested that we should define this term, used in setting the Intermittent Market Reference Price, and we have now done so, with reference to the relevant EU legislation. We have also, as requested, clarified what will happen where more than one GB price is published and these diverge: that a volume weighted average price will be used.

4.2. In addition, one respondent indicated that we should consider whether net or gross volumes should be used in such a calculation; we agree that it is important to be consistent in the input and this will be reflected in the processes employed.

CALCULATING THE DIFFERENCE AMOUNT

4.3. One respondent requested clarity on the formulae for Baseload and Intermittent Difference Amounts.

[7] https://www.gov.uk/government/groups/contracts-for-difference-expert-sub-group-on-metering

4.4. The formula caps the amount of energy generated at the smaller of the generation based on the Maximum Contract Capacity or the actual generation. If this is negative, however, then the quantity is capped at zero.

4.5. This takes into account circumstances in which Metered Output is negative e.g. energy is being used to keep control systems operating but the Facility is not generating, when it would be inappropriate for the CfD Counterparty to be obligated to make payments.

ESTABLISHING THE MARKET REFERENCE PRICE

Price Sources

4.6. Annexes 4 and 5 describe the initial price sources intended to be used in calculating both the Intermittent and Baseload Market Reference Prices. These are the N2Ex Day-Ahead Auction Market and the APX Power UK Auction for the Intermittent Market Reference Price, and the LEBA and NASDAQ Baseload Forward Season Indices for the Baseload Market Reference Price.

4.7. Some respondents raised issues around the sources to be used in calculating the Market Reference Price. Firstly, it was proposed that we clarify which APX index we plan to use in setting the Intermittent Market Reference Price. Whilst APX do issue a number of indices, there is only one auction, that for day ahead prices, so we consider the term “APX Power UK Auction” to be sufficiently clear. However, we are engaging with APX to ensure that this is the correct reference, and will pursue a Technical Amendment of the terms if necessary in order to ensure this remains correct.

4.8. Secondly, one respondent noted that the low level of trading on the NASDAQ Baseload Forward Season Index could mean that it would be unlikely to meet the Inclusion Criteria at present. However, whilst giving consideration to the ongoing review criteria, our choice of the initial price sources is driven by the necessity of having robust sources of transactional data from which to set the Baseload Market Reference Price at the start of the CfD regime.

4.9. We still consider that there is merit in including NASDAQ as an Initial Price Source, as volumes may increase over time and feedback from other stakeholders has been broadly positive about the approach that we have taken. Moreover, the price set should not be significantly impacted by any lack of volume on this price source due to the weighting employed within the formula.

4.10. Two respondents also raised concerns about the scope of the Quality Criteria and their application to the price sources. Having reviewed the points raised, we are satisfied that the Quality Criteria cover the key characteristics necessary to ensure sources of data for the reference price are complete, transparent and robust, and that they are broadly in line with other existing and developing market and regulatory guidance on this area. We therefore believe they are appropriate for the on-going review of price sources, and do not propose to make any changes in this area.

4.11. Furthermore, there will be an opportunity through the BMRP Annual Review process for other price sources to be included in future should they satisfy the standards set out within the contract terms, and similarly those that fail to meet the standard at the point of review will be excluded.

4.12. Stakeholders have been keen to ensure that, where an auction platform for season-ahead products is introduced, this could be considered as a price source. We identified that the implied requirement within the Inclusion Criteria for trading to take place every five business days could prevent inclusion of such an auction if it were to run on an infrequent basis. As such, we have

introduced the concept of a "Price Source Live Day" which allows trade numbers and volumes to be considered as spread evenly on the intervening days for these purposes, whilst still requiring prices to be issued at least monthly.

4.13. Separately, concerns have been raised about the potential for the same trade to be counted twice when calculating the BMRP, due to it being reported through more than one price source, and the possible distortion to the price calculation that would follow. We have therefore included the concept of 'Replicated Trades' within the Baseload Market Reference Price provisions, which will ensure that where such trades can be identified, they are not duplicated in the calculation of the price.

Reference Price Data Adjustments

4.14. Two respondents noted that there is no process to adjust the Market Reference Price where there is an error in the underlying trade data. Having engaged with the proposed initial price sources, we have established that such errors are extremely rare, and where they do occur updated data is generally provided within rapid timescales, which would enable the correct data to be used in calculating the Market Reference Price. We therefore do not consider it necessary to include provision for such an unlikely event.

ACHIEVING THE MARKET REFERENCE PRICE

4.15. In order to maximise revenues a Generator will wish to interact with the market in such a way as to achieve as close to the relevant Market Reference Price as possible for their electricity sales.

4.16. Two respondents raised concerns about whether their plant would be able to achieve the Baseload Market Reference Price. They welcomed the work being taken forward to investigate potential route to market issues for smaller baseload Generators; this work remains on-going and an update setting out the conclusions reached will be published in the coming months.

REVIEWING THE MARKET REFERENCE PRICE

Frequency of Reviews

4.17. Three respondents expressed concern about the number of reviews that the Market Reference Price, particularly for Baseload Generators, will be subject to under the provisions of Annexes 4 and 5, and the consequent uncertainty about which price sources would be used.

4.18. Conversely, two other respondents suggested that a review of the Baseload Reference Price should be conducted prior to 2016 or even in advance of first implementation. A balance between stability and enabling the Market Reference Price to adapt to reflect prevailing conditions is therefore essential.

4.19. Upon further reflection we consider that, given the on-going and forthcoming changes in the market, leaving the first Annual Review of the Baseload Reference Price until 2016 is not the right approach. We have therefore updated the contract terms to require the CfD Counterparty to run an Annual Review in October 2015. This avoids potential change right at the start of the regime, with associated uncertainty, but should give confidence that if market conditions change the Baseload Reference Price can adapt to reflect this.

4.20. We accept that some generators have concerns about the frequency of the reviews, but believe that these can be mitigated by the fact that the CfD Counterparty will be operating under a very

clear process which is known about in advance. We also think generators should take comfort that any change will only be for future trading periods and will not be applied retrospectively, with a requirement to give three months' notice of changes to allow time for any new processes to be put in place.

Triggers and Discretion in Initiating Reviews

Market Splitting

4.21. Following requests for clarity from three respondents, we are happy to clarify in drafting that this refers only to the splitting of GB electricity markets, and that the proposal must originate from the relevant Competent Authority. In spite of issues raised on the matter, we believe it is important to consider the impact when market splitting is proposed, rather than waiting until it is effected, as two responses suggested, allowing sufficient time for a change to be proposed, subjected to process and finally implemented. We have, though, added that any proposed change to the Market Reference Price resulting from this trigger will only be implemented once any splitting actually occurs.

Zero Volumes

4.22. Following a suggestion raised by respondents we have provided an exception such that if there is no trading in the period from Christmas to New Year, this will not trigger a review of the Market Reference Price, as volumes are naturally expected to be lower at this time.

4.23. One respondent queried how the five day test would be applied; aside from the aforementioned period, this would be on a rolling basis.

Generator Rights

4.24. One respondent asked for an extension of the period over which concerns raised by Generators are assessed; we are unable to accommodate this as in order to avoid unreasonably frequent reviews it is important that any issues raised are of broad concern across industry, demonstrated through significant numbers raising a concern roughly simultaneously.

4.25. However, we wish to clarify that Generators may resubmit notices if they are not initially successful in initiating a review.

Counterparty Rights

4.26. One response suggested that the scope of circumstances in which the CfD Counterparty can initiate a review should be restricted. We have not acted to limit this, as there needs to be a degree of flexibility to ensure that the CfD Counterparty can respond appropriately to changing market conditions, and it would be difficult or impossible at present to foresee precisely what they may be.

4.27. Generators may take comfort from the fact that, although a review can be initiated by the CfD Counterparty, no changes can be made to the existing Market Reference Price unless it fails to meet the Principles for setting the reference price, and any changes which are to be made must be in compliance with those Principles, limiting the discretion available to the CfD Counterparty substantially.

Market Reference Price Principles

4.28. Drafting has been updated to provide greater clarity on the period over which the Baseload Market Reference Price should be set, in response to confusion from a couple of respondents on this issue. The intent is that the sample period will not be longer than the duration of the contracts used to set the price (so a season initially), and will cover the period immediately prior to delivery.

4.29. We also agree that the term 'market participant' is broad enough to render the addition of 'aggregator' superfluous, and have thus removed it.

4.30. One respondent suggested that there should be a responsibility on the CfD Counterparty to act reasonably in determining whether the Market Reference Price is reflective of the price of electricity. This would actually limit challenge to grounds of whether it was 'reasonable' to have reached this conclusion, and we consider it preferable to retain an objective standard based on the principles set out in the CfD contract.

4.31. Another respondent asked for greater clarity on how the principles relating to market operation and allowing for divergence of prices will be applied; we do not believe it is appropriate to provide specific examples within the CfD itself. It is important to retain these principles as the intent is to ensure that the CfD Market Reference Price does not interfere with other important signals that impact behaviour and pricing within the GB energy market, and to allow the Market Reference Price to reflect local conditions in the case of market splitting.

4.32. One respondent disagreed with prioritisation of Principles; wherever possible all Principles should be met and priority should therefore prove largely irrelevant. However, we do need to provide for a process in the unlikely circumstance that this cannot happen, to ensure that an appropriate Market Reference Price can still be established.

ALTERING THE MARKET REFERENCE PRICE

Fallback Baseload Market Reference Price

4.33. The Fallback Baseload Price will only come into use if there has been a period of five days with no trading. In this scenario, to ensure a Baseload Market Reference Price can still be set, the CfD Counterparty would source quotes from brokers.

4.34. Four respondents noted that the fallback price could be in use for a long time, depending on the length of time that it takes to conduct the Principles Review and determine then implement a new Baseload Reference Price. Three therefore suggested that we should instead revert to the original price sources where these become available.

4.35. Whilst we can see some attractions to this approach, on balance we have decided not to make this change, because it seems highly unlikely that there will be a period of five days with no trading. If this does therefore occur, it suggests a catastrophic event which could well make it inappropriate to revert to the existing price sources.

4.36. If following a review there is a clear optimum solution (which could include reverting to the previous sources) it remains possible to waive the usual three month notice period required prior to making any changes, where all parties agree this should happen. This provides a balance between providing clarity and enabling quick implementation where necessary.

4.37. A separate concern was raised that the calculation of a median within the Fallback Baseload Price process could lead to actual price quotes being disregarded if the majority were zero, so we have updated the drafting to avoid this anomaly.

PPA Interactions

4.38. One respondent noted the importance of engaging with PPA providers and ensuring that they can continue to track the Market Reference Price following a change. We have engaged with PPA providers in developing these provisions and as far as possible have endeavoured to enable them to follow and account for changes made by ensuring that such alterations will tend to make the Market Reference Price more robust and reflective of prevailing electricity prices. We understand that the circumstances in which a review of the Market Reference Price can be held are broadly comparable with those which would currently trigger a change to PPA terms.

Price Sources - Unreasonable Costs

4.39. The December draft already included drafting that allowed the CfD Counterparty, following an Annual Review of the Baseload Market Reference Price, to exclude a price source if it would not make its data available on commercially reasonable terms.

4.40. Following feedback this approach has now been extended to also cover Intermittent Price Sources, and consequently also included in the Principles to ensure that the outcome of any review does not leave the CfD Counterparty still reliant upon unreasonably expensive price sources.

Year-Ahead Reference Price

4.41. One response welcomed the fact that Generators will not be forced to switch to a year-ahead index. However, they suggested that there should be flexibility to use a reference price which reflects market trends and is robust and liquid, not just a year-ahead product. This is what the review process is designed to achieve.

4.42. We have also provided clarity on what is meant by a year-ahead reference price, by adding an additional limb to the definition stating that this would encompass the use of products of a season-ahead duration or longer.

DISPUTE RESOLUTION

4.43. A single respondent commented upon the Market Reference Price-specific Dispute process. They raised a concern about the high threshold of 30% for Disputes to be heard, and objected to the compulsory consolidation of Disputes. It is of paramount importance for the operability of the CfD that the Market Reference Price remains consistent across all baseload and intermittent Generators. As such, any changes must apply across all contracts, which is why we have established a comparatively high bar for any changes to be considered, though attempting to strike a balance with enabling Generators to raise concerns.

4.44. They also stated that the grounds for Dispute on an Annual Review of the Baseload Market Reference Price were too restrictive; but given the highly mechanical functioning of the provision it seems appropriate to limit it to fraud and manifest error and so the drafting has not been changed.

5. Change in Law

The Change in Law provisions are designed to compensate the Generator for regulatory changes that would, had they been foreseeable, have affected the Strike Price quoted for each Project. In such circumstances the provisions provide a system for raising a Change in Law claim, seeking compensation to reflect the additional costs imposed on the Generator, and 'trueing-up' those costs later on to ensure the accuracy of the compensation paid.

The provisions operate symmetrically, also acting to compensate the CfD Counterparty in circumstances where an unforeseen Change in Law means the Generator is realising savings rather than incurring additional costs.

Eleven organisations submitted feedback on the Change in Law provisions. A substantial proportion of those comments were related to the various definitions on which the Change in Law provisions rely.

SCOPE

European Union Law

5.1. The precise scope of the cover provided in terms of changes to European Union Law was questioned by two respondents, with one asking for clarity on the position and another commenting that explicit cover was necessary. It is our intent to provide Change in Law protection for changes to European Union Law, but no alteration has been made to the drafting, as this effect is achieved through the existing definitions.

5.2. The reference made by the definition of 'Change in Law' is to any change in a 'Law', itself a defined term. The definition of 'Law' refers to any 'enforceable EU right within the meaning of section 2 of the European Communities Act 1972'. Section 2(1) of that Act refers to any EU Laws which are directly applicable or which have direct effect in the UK, without any need for further implementing measures by the UK Parliament, such as EU Regulations.

5.3. Other types of EU Law, Directives for example, require transposition by the Member States and so would be captured by the definition of Change in Law at the point at which they are enacted by Parliament, as well as being incorporated by virtue of section 2(2) of the European Communities Act 1972.

Industry Standards

5.4. Further comments on the definitions underpinning the Change in Law provisions were provided on the definition of 'Change in Law' itself, on which four stakeholders had comments. In particular, stakeholders were concerned with limb (iii) of the Change in Law definition, which excludes changes which represent no more 'than a continuous improvement or development of good practice',[8] with which the Reasonable and Prudent Generator would ordinarily comply.

5.5. Most of the comments made on this point advocated the removal of this limb due to its potentially inexact nature. However, as the purpose of the Change in Law provisions is to provide protection only for those regulatory risks that a Generator would not ordinarily assume, it appears appropriate that improving standards in safety and risk management, by way of example, could

[8] CfD Conditions, Definition of 'Change in Law', limb (iii)

be expected by a Reasonable and Prudent Generator, and thus compensation should not be provided.

FORESEEABILITY

Relevant Start Date

5.6. Generators seeking compensation due to a Change in Law must meet the definition of 'Change in Law' but also demonstrate that the relevant Change was not foreseeable. Any changes which fall within the definition of 'Foreseeable Change in Law' will not be compensable. Limbs (A) and (B) of this definition set out an exhaustive list of publication sources.

5.7. Any change published in these sources since the year 2000 will be deemed foreseeable. Four respondents commented that 2000 was an inappropriate starting point, suggesting more recent dates as alternatives. It remains our position, however, that 2000 is an appropriate starting point, in view of some of the key legislation related to energy regulation that dates back to that year, and that 2000 also serves as a suitable proxy for the release of electronic records.

Stated Preferred Proposals

5.8. Further comment on the definition of 'Foreseeable Change in Law' was also submitted on Limb (B)(ii), which refers to proposed changes published in a consultation document by a Competent Authority. Previous changes to this part of the definition have restricted its scope to 'preferred proposals', i.e. where a consultation document is published considering several proposals, only the stated preferred proposal will be deemed foreseeable.

5.9. The respondent in this instance noted that even where such options were implemented, the Generator would be required to include its own preferred proposal in its assessment of changes in Law. This may represent a misreading of the provision. The 'preferred proposal' must be 'stated' by the Competent Authority, i.e. clearly designated as such, in order to be deemed foreseeable. Where no preferred proposal is stated and a range of proposals are considered by the document, the Generator would not be expected to infer or deem that one of them is preferred.

DISCRIMINATORY, SPECIFIC AND OTHER CHANGES IN LAW

Objective Justification

5.10. Once Generators have satisfied the foreseeability requirements, they must also demonstrate that the Change in Law falls within at least one of the qualifying categories of changes, i.e. a 'Discriminatory Change in Law', an 'Other Change in Law', or a 'Specific Change in Law'. On 'Other Change in Law', five respondents advocated the removal or the amendment of the objective qualification test that this limb requires.

5.11. We note, however, that this limb was included due to previous comments from stakeholders expressing concern regarding undue changes which targeted them specifically. We believe that the 'objective justification' test provides a useful guide to how the CfD Counterparty will determine if the relevant Change in Law will have an undue effect on the Generator's costs or not, and that it does not restrict the protections beyond the scope intended.

Comparator Groups

5.12. Both 'Other' and 'Specific' Change in Law involve a comparative aspect, requiring that Generators are compared against a specific group of other Generators. One respondent commenting on the operation of this process noted that where a Law had been enacted that affected all wind Generators, offshore and onshore wind Generators would be precluded from protection as they would not be able to demonstrate that theirs was the only Technology affected.

5.13. We believe that this is a reasonable observation. It is not our intention that either technology would be excluded from protection in such a circumstance. Amending the comparator groups, however, would not have provided the necessary level of certainty in this respect and so we have sought to deal with this concern by allowing both onshore and offshore wind to be deemed the same Generation Technology, solely for the purpose of Change in Law. This is realised under the deeming provision of the Facility Generation Technology definition within the CfD Agreement.

Expansion of the Scope of 'Other Change in Law'

5.14. On 'Other Change in Law' a single respondent recommended that its scope should be extended to all unforeseeable general Changes in Law that have a material or disproportionate effect on the Generator (or the Project). We believe this to be an excessive expansion of the scope of the Change in Law cover. Furthermore, we have stepped back from the use of a materiality threshold after receipt of previous responses indicating that use of such a standard was too nebulous to provide a useful working metric for Change in Law protection, and we are therefore unwilling to revert to its use on this basis.

Changes to the CfD Regime

5.15. Beyond specific observations on the definitions of the various types of Change in Law, respondents also commented on the general scope of the provisions. One noted that, as drafted, the Change in Law provisions would not capture a change to the regime itself, something of concern as such a change may frustrate the contract or prevent the Generator from meetings its contractual obligations.

5.16. We believe that this is a valid concern and have introduced the 'Required CiL Amendment' concept under the newly-introduced 'Change in Applicable Law: Procedure' provisions found within Condition 39, in order to address this issue. This provision enables the Counterparty to put in place amendments that ensure that the terms remain valid and enforceable even where the wider legal environment has rendered the CfD impossible to comply with. Change in Applicable Law is described in greater detail within Chapter 25 of this document.

PROCEDURE

Disputes and Costs

5.17. The general provisions pertaining to Change in Law are contained in the 'Qualifying Change in Law: General Provisions' in Condition 38. Amongst the issues dealt with in this Condition is which Party will bear the costs in respect of a QCiL (Qualifying Change in Law) Dispute. The December draft stipulated that the Generator would have to bear both Parties' costs irrespective of which Party raised the Dispute or in whose favour the Dispute was determined. We took this position

previously as it assuaged concern over the potential for spurious claims following the removal of the materiality threshold.

5.18. We have now amended Condition 38.5 such that the Generator will not need to indemnify the CfD Counterparty against any such costs arising from the CfD Counterparty having disputed that a QCiL had occurred, in cases where a determination is made against the CfD Counterparty.

The Obligation to Mitigate and 'Reasonable and Prudent' Generators

5.19. The general provisions under condition 38 also detail the interaction between the Reasonable and Prudent Standard obligation which underlies the Contract and the Change in Law provisions, as well as explaining the nature of the mitigation obligation that will be placed on Generators in respect of controlling the costs to which they are exposed following a Qualifying Change in Law. Three respondents commented on these two aspects of the provisions.

5.20. One respondent raised a concern that QCiL Compensation inappropriately bases its obligation to mitigate not upon whether that obligation was actually objectively complied with, but on what the CfD Counterparty believes a Generator should have done in complying, and that this approach will open the Generator to potentially unfair limitation of compensation by the CfD Counterparty.

5.21. We believe that this confuses the nature of the test and the way it will be applied. The application of both standards to the Change in Law provisions does not create a new, hybrid test, but instead allows both to be applied in tandem.

5.22. If a Generator can demonstrate compliance with the Mitigation Obligation, and compliance to the standard of commercial behaviour that would be expected from a 'reasonable and prudent' operator, there is no reason their ability to realise a compensation claim for a Qualifying Change in Law would be impinged.

COMPENSATION

Staged Payments

5.23. The mechanistic detail of how compensation payments will be calculated are contained in the "Qualifying Change in Law: Compensation" provisions in Condition 33. In the December update we had indicated that we would also be exploring the idea of making provision for a staged payment option for QCiL Compensation.

5.24. Respondents were receptive to this principle, with three noting that this would make a very positive contribution to the operation of the compensation provisions. As a result, we have created a 'staged' payment option for effecting a QCiL Operations Cessation Event, Construction Event Payment, QCiL Capex Payment or a QCiL Adjusted Revenues Payment.

5.25. Respondents provided several options for staged payments and following consideration we have incorporated an approach that will see payments staged over five years (or the remainder of the Contract term, whichever is the shorter).

5.26. We have not introduced a new formula for the calculation of staged payments as we did not believe we could do so with the degree of accuracy necessary, but have instead required that such compensation shall be equivalent to the amount that the Generator would have received had the compensation been calculated as a lump sum or as daily payments (depending on the circumstances).

Payment Deadlines

5.27. There were two further comments surrounding compensation payments that we have also taken into account. Specifically, two stakeholders noted that the relationship between the 20 Business Day deadline envisaged for QCiL Compensation Payments and the scope to pay compensation on a daily basis was unclear.

5.28. We have sought to clarify the operation of these provisions within the drafting and it should now be clear that the 20 Business Day deadline only attaches to compensation payments being paid by way of a lump sum. Linked to that, we have also sought to clarify when Generators could expect daily or staged payments should commence. To that end the Contract now requires that all daily or staged payments commence no later than 20 Business Days from the later of the QCiL Compensation Date or the date on which the QCiL Compensation is agreed upon.

CfD Counterparty Discretion on Payment Profiles

5.29. Also related to the payment provisions, respondents queried how the CfD Counterparty would make a decision between the different payment options attached to a particular Change in Law, i.e. whether payments should be made as a lump sum or through daily (or staged) payments.

5.30. We do not believe that an exhaustive list of the considerations that the CfD Counterparty must take into account could be reliably compiled without inevitably omitting an unforeseen circumstance or relevant concern. Rather, we believe that maximum flexibility can be provided by the CfD Counterparty deciding upon the appropriate payment profile on a case-by-case basis, after consultation with the Generator.

Tapering

5.31. One respondent put forward views on the tapering provisions, believing that it was inequitable that an on-going Capex event which first occurred before the 12 year cut-off point would be tapered from the 12 year mark on.

5.32. To clarify; the tapering provisions only apply to Qualifying Changes in Law which occur after the above-noted cut-off point. CapEx Events which occur before that point and which are on-going for the rest of the Term will not be tapered. Tapering only applies to Changes in Law which first occur in or after Year 12 of the contract.

True-Up Mechanism

5.33. Stakeholders were generally in favour of the inclusion of a true-up mechanism. A specific set of comments from one respondent, however, noted that (i) there was no specific formula for a Strike Price Adjustment under the true-up mechanism, and (ii) that a Strike Price Adjustment is not necessarily the most appropriate vehicle for true-up payments.

5.34. On (i) it is our view that the inclusion of a formula is not necessary. The Strike Price Adjustment formula can be utilised where appropriate but ultimately the true-up is a reconciliation mechanism that will be based on submitted evidence, and it would be potentially impossible to make provision for the wide spectrum of inputs which may be relevant in algebraic form.

5.35. On point (ii), it is not intended that true-up compensation will necessarily be paid by way of Strike Price Adjustment. The range of payment options associated with the original QCiL Compensation event will be available where a true-up payment is payable.

Procedural Requirements

5.36. Related to the above, one respondent commented that the procedural requirements associated with the QCiL Compensation process are widely spread out, with significant deadlines for the delivery of notices which, combined with the possibility of a claim going to Dispute Resolution, they noted, potentially means that there is significant scope for compensation being materially delayed. The respondent suggested that there should instead be a provisional figure established which should be payable immediately, with provision made for reconciliation of that amount once the final compensation figure is arrived at.

5.37. We note that the deadlines that do exist serve largely as back-stop dates, with both Parties free to make delivery of their respective Notices before the expiry of the time periods specified. Further, it is hoped that the inclusion of the true-up mechanism will provide assurances to both Parties that compensation can be clawed back if over/underpaid, aiding in expediting agreement on the initial compensation figure, and we have not therefore adopted the suggestion made.

Operational Cessation Events

5.38. A further comment recommended that provision should be made for QCiL Operations Cessation Event compensation to be payable before the Start Date if an Operations Cessation Event were to occur during that period. We note, however, that an Operations Cessation Event occurs after operations have begun, meaning that the Generator should have already reached its Start Date.

5.39. If a Generator is prevented from completing works on the Project, such that it never reaches its Start Date, and it qualifies for Change in Law, a QCiL Construction Event will be deemed to have occurred and compensation will be payable in accordance with the QCiL Construction Event formula instead.

Estimated Facility Generation

5.40. The ‘Estimated Facility Generation’ definition supports the calculation of a number of QCiL Compensation formulae. The December update did not include an adjustment for the transmission losses. A new limb (F) now accounts for transmission losses with the inclusion of the metric “one (1) minus the Initial TLM(D) Charge”.

POST-TAX DISCOUNT RATES

5.41. The Change in Law provisions make use of a number of formulae to calculate any applicable QCiL Compensation. This document confirms that a Post-Tax Real Discount Rate will be used as the basis for all compensation formulae. Assumptions appropriate to the use of the post-Tax discount rate are that it applies to pre-Tax cash flows and that the Change in Law compensation has no net Tax effect. A post-Tax discount rate better meets the objective of keeping the Generator whole.

5.42. The following table sets out the post-Tax discount rates that will apply. These have been calculated by converting from the pre-Tax real weighted average cost of capital (WACC) to a pre-Tax nominal rate (using the effective Tax rates), to post Tax nominal before finally to post-Tax

real WACC. We have previously published pre-Tax real hurdle rates under the Renewables Obligation, pre-Tax real hurdle rates under CfDs and effective Tax rate (ETR) assumptions.[9]

Technology	Pre-Tax real hurdle rates under CfDs	Estimated Effective Tax rate	Post-Tax real hurdle rates under CfDs
ACT advanced	10.70%	12.00%	9.10%
ACT CHP	9.50%	12.00%	8.10%
ACT standard	7.90%	12.00%	6.70%
AD >5MW	11.50%	12.00%	9.90%
AD CHP	13.10%	12.00%	11.30%
Biomass CHP	13.60%	20.00%	10.50%
Biomass Conversion	10.90%	21.00%	8.20%
Energy from Waste with CHP	10.80%	12.00%	9.20%
Geothermal	22.00%	20.00%	17.20%
Geothermal with CHP	23.80%	20.00%	18.70%
Hydropower	5.80%	20.00%	4.20%
Landfill	5.70%	12.00%	4.70%
Offshore Wind	9.70%	12.00%	8.30%
Offshore Wind R3	10.10%	12.00%	8.60%
Onshore Wind	7.10%	11.40%	6.10%
Sewage Gas	7.50%	20.00%	5.60%
Large Scale Solar PV	5.30%	12.00%	4.40%
Tidal range	6.40%	20.00%	4.70%
Tidal stream deep (pre-commercial Projects)	8.30%	20.00%	6.20%
Tidal Stream shallow (pre-commercial)	8.30%	20.00%	6.20%
Wave (pre-commercial)	8.30%	12.00%	7.10%

Table 1 Post-Tax Real Discount Rates for QCiL Compensation[10]

[9] See Electricity Generations Costs Report (December 2013) https://www.gov.uk/government/publications/electricity-generation-costs-december-2013

[10] These published figures are estimates to 1 decimal place; underlying calculations use estimates to more than 1 decimal place

6. Qualifying Shutdown Events

The December draft of the CfD did not contain any substantive provisions on Qualifying Shutdown Events (QSE), but did lay out definitions delineating the scope of the concept. Nine organisations submitted comments on QSE. There was general approval of the inclusion of QSE within the CfD terms, with three respondents noting the importance of the provision for the bankability of the CfD, and requesting further detail as soon as possible.

Detailed drafting has since been included, and the relevant terms, in particular Condition 37, now seek to deal with those unforeseen circumstances, falling outside the scope of the general Change in Law provision, that could result in the shutdown of a Project.

SCOPE

6.1. Although lacking the provisions on QSE procedure, the December draft did lay out a detailed definition of a QSE, and it is to this that the majority of comments relate. Seven respondents provided comments, with six offering specific views on the definition of QSE, the majority of which either sought clarity on the drafting or the scope.

Relevance of EU and International Law

6.2. Four respondents expressed concern that shutdowns which were derived from EU or international Law were not encompassed by the definition, as drafted. QSE is designed to deal with the specific circumstances of a targeted shutdown, however, engagement has made it clear to us that the particular concern was that of a politically motivated shut-down which fell outside the scope of the ordinary Change in Law provisions.

6.3. It is unclear what manner of EU or international-Law derived shutdown would fall outside the Change in Law provisions and should be captured by QSE, by contrast. Thus, as it stands, we are confident that the particular concern expressed by stakeholders has already been catered for.

Stated Exclusions

6.4. The definition of QSE is subject to certain stated exclusions, among them any shutdown related to health and safety, security, environment, transport or damage to property. Four stakeholders voiced concerns about the limits of this approach; however, we are satisfied that such exclusions are both reasonable and succeed in achieving a proportionate level of protection against the manner of politically motivated shutdown that was the genus of the QSE terms' inclusion, as compared to say a health and safety issue arising which necessitates shutdown for reasons of public safety.

24 Month Time Limit

6.5. Two respondents contributed views that the 24 month time limit was too long to have to wait before applying for compensation. The drafting, however, stipulates that a QSE may include a situation where consent to restart has been withheld for at least 24 months. Once a QSE has occurred, the protections within the QSE provisions apply.

Duration of Shutdown Event

6.6. Related to the 24 month issue, there was also a comment requesting clarity on whether it was required that the Shutdown must be permanent in order to qualify. For a shutdown to be capable of qualifying as a QSE, it is required either that the Facility is closed permanently or, where there is scope for the Facility to restart, that consent to do so is withheld for at least 24 months.

6.7. That respondent felt that where there was such scope for a restart, a time limit was necessary lest such consent was withheld in perpetuity, in which case the shutdown could not be deemed 'permanent' and compensation would not be available – which is not our intention.

COMPENSATION

6.8. As noted by two respondents, the December draft of the CfD did not clarify how the compensation mechanics for QSE would operate. This has since been included, with such events being treated as equivalent to a 'QCiL Operations Cessation Event' under the Change in Law provisions, in the respect that both should operate under the same compensation formula and compensation mechanics.

7. BSUoS and TLM

Part 10 of the Contract sets out the processes for calculating and making a Strike Price Adjustment in relation to a difference between the cost assumptions made in the Strike Price setting process and the charges realised by the average GB Generator in relation to Balancing Charge Services (BSUoS/RCRC) and Transmission Loss Multiplier ('TLM') charges.

These terms provide cover for Balancing Charges and movements in the losses that arise as a result of the application of the TLM. Other transmission charges, such as TNUoS, are not included within the cover provided by this version of the CfD.

Ten respondents provided comments on this area raising both policy and drafting issues.

TNUoS

7.1. One respondent commented that not allowing for TNUoS charges is an inconsistent approach as changes in these charges could have a significant impact on Generators' costs and Project returns. Although the CfD constrains the ability of Generators to pass on changes to those charges via the wholesale price, as compared to non-CfD holders, we have not amended our position to include TNUoS. This will ensure the economic signals for efficient investment and operation are not weakened or made unnecessarily complicated and will ensure the dynamics of the normal industry process on market governance are retained.

OTHER COSTS

7.2. It was also suggested that similar protection to that under the RO as a result of increases to market prices should be provided, as well as cover for other regulated charges including business rates and, in the case of biomass-conversion, track access charges.

7.3. We have not amended our position to include cover for any other charges as they are not costs that we believe should be passed through in favour of Generators on an automatic basis. Protections exist within the CfD that provide additional protection for Generators such as Change in Law.

PROCESS

7.4. Several stakeholders commented on the process by which Balancing System and TLM charges are passed-through, making similar points that the system would not provide perfect compensation for the costs realised (these are set out in the following paragraphs). The approach in the CfD is to provide a Balancing Charges Strike Price Adjustment based on the difference between an indexed 'Initial Balancing System Charge' and the average charge realised by Generators over a twelve month period.

7.5. Similarly, the difference between assumed TLM (as set out in the CfD Agreement) and the actual average TLM charges (as broadly reflected by the TLM applying to delivering Trading Units, calculated in accordance with BSC) will constitute a TLM(D) Strike Price Adjustment. Neither provides bespoke compensation but they do provide protection for divergence away from initial assumptions.

'LOOK BACK' APPROACH

7.6. Three respondents commented that Balancing System and TLM charges are structured on a 'look back' rather than 'look forward' basis and that there may be dislocation by applying differences in prior years to the subsequent year. One commented that a year of high BSUoS prices caused by a system incident would cause Strike Prices to rise but then, if in the following year BSUoS is low, the Generator's Difference payments would be lower, and that the system should make allowances for year on year adjustments that might affect BSUoS.

7.7. Though we accept that some dislocation may occur between years, we have not made changes to drafting. We believe that the existing approach allows for fair recompense.

AVERAGING

7.8. Three respondents commented that, as the mechanisms are based on average charges across all Generators there is no guarantee that an individual Generator will recover its charges. It was suggested that BSUoS protection should be based on the individual plant's historic BSUoS/ TLM costs rather than an industry average; or that adjustments should be calculated specifically for baseload and intermittent plants.

7.9. Another commented that there is no protection for Generators if the weighted average BSUoS starts to deviate from initial expectations such as under the scenario where the balancing costs of windy periods become higher than non-windy periods.

7.10. In response to each concern, it is understood that the average cost does not necessarily reflect each individual Generator's costs, but no changes have been made in order to provide bespoke compensation: the existing approach allows for fair recompense.

EMBEDDED GENERATORS

7.11. One respondent requested that Embedded Generators be excluded from the annual Strike Price Adjustment process.

7.12. Generation by Embedded Generators is already excluded from the calculation of 'Annual Balancing System Charges' and the calculation of 'Annual TLM(D) Charges'.

TRUE-UP MECHANISM

7.13. Two stakeholders pointed out there would be protection for the final year of the CfD Term and that the final year should have a true-up process.

7.14. A true-up process for these charges will not be included in the contract in order to limit the administrative complexity associated with operating the CfD.

CONSOLIDATION OF REPORTS

7.15. Four respondents raised the potential for confusion following receipt of the TLM and Balancing Charge Reports, and suggested a consolidated report should be provided. This was because both reports were drafted as delivering a new 'Strike Price' rather than a 'Strike Price Adjustment'.

7.16. This amendment has been made, with the final Strike Price applying as calculated by the Strike Price Adjustment process (Conditions 14 and 20). As set out in Chapter 20 of this document,

Generators will be notified within 5 Business Days of the Strike Price that will apply following the adjustment made at 1 April.

7.17. One respondent had suggested that Generators should have the opportunity to comment on the reports and identify any suspected inaccuracies before it is finalised. No change has been made in this regard; the reports are intended to be relatively generic and are to be based upon the forms set out in the relevant annex.

BALANCING SYSTEM CHARGES

7.18. Two respondents suggested that the initial charges should be based on the 'latest' charges and reflect expected future profiles. The Initial Charge data period will be based on the most recent 12 months prior to the Agreement Date. The TLM(D) Charges will be those as set out in the Annex to the CfD Agreement.

7.19. The Initial Balancing System Charge will be calculated by CfD Counterparty body using published data (GB System Operator and BSC Company) on the same basis as the 'Annual Balancing System Charge' (i.e. in broad terms, the net of BSUoS Charges and RCRC Credits divided by total metered generation).

7.20. The most recent 12 months' data available will be used, for example if the CfD Agreement is signed in April, the previous April to March data will be used to calculate the initial charge. To ensure appropriate inflation protection is subsequently provided at each Indexation Anniversary (which uses January CPI) the 'Indexed Initial Balancing System Charge' (IBC) will use a specific 'Base Year CPI' definition, namely: "the value of the CPI for the penultimate month of the period used to calculate the Initial Balancing System Charge" i.e. if the Initial Balancing System Charge used the 12 month period 'April 2013 to March 2014', the 'Base Year CPI' month used for the purposes of calculating the IBC would be February 2014.

7.21. There were a number of definitional points raised. Some minor definitional changes were made (such as updating the definition of BSUoS Charges by inserting "expressed in £/MWh" after "balancing system service use of system charges") whilst others were not (such as 'adding 'for that year' after 'Initial Balancing System Charge' to Condition 45.2(F)). Three respondents stated that the limb (B) definitions of 'BSUoS Charges' and 'TLM(D)' – namely "any new or substituted multiplier or factor", were not precise enough.

7.22. Two respondents commented that, as these charges are moving in the direction of reflecting locational costs that failing to take account of locational incentives or differences was inappropriate, as well as potentially a providing contradiction with limb (B) definitions.

7.23. The requirement to not take account of locational incentives or differences has now been deleted whilst the limb (B) definitions remain unchanged. To provide clarity that RCRC can be payable by Generators, and to ensure the drafting does not result in RCRC Credits payable by Generators being subtracted from the BSUoS Charges, limb (A) of the definition of 'Annual Balancing System Charge' has been amended to provide clarity on the distinction between amounts receivable and owing.

7.24. The same respondent suggested also amending the definition of 'Balancing System Charges' but no change was made as the definitions of RCRC Credits and other terms are considered appropriate.

TRANSMISSION LOSS MULTIPLIER

7.25. Two respondents suggested there was some confusion in the use of the TLM definitions throughout the contract. "TLM(D)" is now used to distinguish between definitions that only apply to the Strike Price Adjustment process, and those that apply to the TLM as allocated to Metered Output as per the BSC processes.

7.26. The TLM(D) Term now also appears within an Annex of the CfD Agreement to make a clear link to the assumed 'losses' for each year of the contract, as taken into account in the Strike Price setting process and published in the National Grid Technical Annex to the Delivery Plan 2013 (page 65)[11].

7.27. A key reason for making the differentiation is that the Strike Price Adjustment process uses a transmission loss multiplier (allocated in accordance with the BSC for BM Units) belonging to delivering Trading Units, whereas in all other areas of the contract, 'Loss Adjusted Metered Output' and 'Difference Amount' - the loss multiplier is "as allocated in accordance with the BSC" and so can be either the 'offtaking' or 'delivering' metric.

7.28. Since publication of the December draft, the TLM equation (Condition 46.2) has been refined. The new formula has improved the accuracy of the calculation and the Term 'IBC' now appears, as changes in 'Balancing Charges' are provided for separately. Any Strike Price Adjustment for TLM(D) applies as a result of expected earnings after balancing charges, but before other costs.

8. Curtailment

Curtailment is provided for within the definitions of the Conditions, and provides for compensation where generation ceases for a period as a result of intervention by the System Operator.

There were 22 comments on the Curtailment provisions submitted by 8 organisations. The majority of these related to the scope and definition of the "Curtailment", "Qualifying Curtailment" and "Qualifying Partial Curtailment", while other varying concerns are addressed individually.

DEFINITIONS

Qualifying Curtailment and Qualifying Partial Curtailment

8.1. Six respondents felt that certain aspects of the drafting around "Qualifying Curtailment" and "Qualifying Partial Curtailment" deviated substantially from what might be expected in achieving our stated policy intention. We have taken these comments into account and have significantly tightened the wording of these definitions such that their scope and application should now be clearer.

Curtailment and Partial Curtailment

8.2. One respondent also expressed concern that the wording of limb (B) in the December draft the definition of Curtailment was not clear on whether ramp up or ramp down is included or excluded from the definition. To be clear, Curtailment is intended to include the minimum period of time

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267614/Annex_D_-_National_Grid_EMR_Report.pdf

that the Facility takes to ramp up or down and this position has been clarified in the reworked definition.

8.3. One respondent sought clarity on the relevance of the inclusion of the 'reasonable and prudent' standard provision in this regard, particularly in the definition of Partial Curtailment and ramp up and ramp down. For clarity: this relates to the 'minimum' period of time that ramp up or ramp down takes in this regard. Where a Generator through its own fault takes an excessive period of time to do so, the period of time that will be factored into the 'Partial Curtailment' period will be determined by reference to a reasonable and prudent Generator's standard in that respect.

PRELIMINARY ANNUAL QCPC REPORTS

Time Limits for Delivery

8.4. In respect of an appropriate time limit for the delivery of the Preliminary Annual QCPC Report, one respondent suggested that a 90 day period would be appropriate. This appears suitable and in line with the other time limits that we have included throughout the Contract for Difference. With that in mind the provision now references a three month limit.

8.5. Where the CfD Counterparty Body disagrees with the position taken by the Generator in the Preliminary Annual QCPC Report, provision was made under Condition 42.7 of the December draft for a meeting to be held for the Parties to seek to agree such matters. The time limit on this requirement was left blank at that point, as noted by one respondent, who suggested 20 Business Days as an appropriate time limit.

8.6. We have since placed a fifteen Business Day time limit on this requirement (i) in line with other time limits throughout the Contract, (ii) in light of the extensive evidence that the Generator will already have accumulated in respect of the Preliminary Annual QCPC Report, and (iii) in light of both Parties' interest in expediting the process.

Request for Further information

8.7. One respondent felt that the relationship between Condition 42.3 and Condition 42.4 of the December draft was unclear and required clarification. Condition 42.3 stipulated that the CfD Counterparty Body shall be under no obligation to act in response to the submission of a Preliminary Annual QCPC Report unless the Generator has provided the CfD Counterparty with the relevant information, where Condition 42.3 created the ability for the CfD Counterparty Body to respond to the submission of a Preliminary Annual QCPC Report with a request for further information.

8.8. The precise relationship between these two provisions, i.e. whether the CfD Counterparty will request further information or simply take no action where the information submitted was insufficient was the focus of the comment in this regard. These provisions have since been revised and amalgamated to make the nature of the CfD Counterparty's obligations clearer.

CURTAILMENT COMPENSATION

Compensatory Interest

8.9. One respondent commented that it was not clear from the drafting if Compensatory Interest would be payable on Curtailment compensation, advocating that this be included through specific

terms. This has since been remedied with specific reference to Curtailment compensation in Condition 22.6 (K) (‘Calculation of Compensatory Interest Amount’) of the revised Contract for Difference.

Payment Dates for Compensation

8.10. One respondent also noted that the payment provisions under Condition 43.5 in the December draft made no references to when payments could be made. This has also since been remedied and a new version of the Condition, with payment timing details, can be found at Condition 47.5

9. Termination

The termination provisions are found within Part 12 of the Conditions and relate to those circumstances in which the CfD Counterparty will be empowered to terminate the CfD. They also set out the process and consequences of any such termination.

Eleven organisations provided specific comments on the termination provisions, although as a cross-cutting set of provisions comments also dealt with issues such as Installed Capacity adjustment, Milestone Delivery Dates, Metered Output and Conditions Precedent, addressed elsewhere in this document where appropriate.

TERMINATION EVENTS

Fraud

9.1. Three respondents advocated that the commission of fraud by any director, officer or other senior manager should not necessarily trigger a termination but rather that there should be scope for the Generator to remedy the misconduct by removing the individual concerned in tandem, potentially, with the imposition of 'stringent fines'.

9.2. We believe that given the fraud provisions relate only to fraud committed in respect of the CfD itself, it is appropriate to retain the termination right in this regard.

Cure Periods

9.3. It was also observed that there were no 'cure' or 'grace' periods for termination itself, i.e. at the point at which a termination Event has occurred. One respondent recommended that Generators should be provided with an opportunity to cure such breaches either through a single common cure period or an extension to the cure periods associated with particular events prior to termination where Generators could demonstrate that they were undertaking 'reasonable efforts' to rectify the issue.

9.4. We believe that sufficient individual cure periods exist prior to termination to allow a reasonable and prudent Generator to ensure it is in compliance with its contractual obligations and that any extension of this would limit our stance on termination Events. Considering that these only attach to the most fundamental breaches of the CfD's terms, we do not believe that such a change is merited.

9.5. In respect of the 'reasonable efforts' proposal submitted we believe that 'reasonable efforts' represents a rather nebulous standard to define in respect of such events. Ultimately, it is imperative that these provisions remain as clear as possible given the very serious consequences associated with breaching them.

TERMINATION RIGHTS

CfD Counterparty Discretion Regarding termination

9.6. We believe that concerns on this point stem from particular and unusual circumstances which may prevent the Generator from meeting its obligations for some reason. In such circumstances it is the case that the CfD Counterparty retains only a right to terminate, not an obligation – a

change that was widely welcomed both by respondents and by Generators more widely since the August publication.

Disputes Relating to Termination Amounts

9.7. Four respondents advocated that, in circumstances where the amount of the termination Payment was at issue within a Dispute, the obligation to make a termination Payment within 30 days under the 'Pay Now, Dispute Later' principle should also be suspended. This would be a significant policy departure, and not one which we believe is merited in the circumstances.

Termination Payments

9.8. The precise amount and form in which the termination Payment must be paid was also the subject of a number of observations. One respondent suggested that the termination payment should either be removed or capped. It was not clear on what basis a cap could be justified. Respondents also suggested we make provision for the staggering of payments which exceeded a certain cap.

9.9. One identified that our concern in this regard stemmed in part from the risk that the Project and the Project Company may be dissolved whilst payments are outstanding and suggested that this risk could be offset by virtue of that fact that, were that same Project shut down while the CfD continued to run, there would also have been no Difference payments due, as generation would have ceased. We believe that such a justification does not represent a true comparison, and does not accurately reflect the allocation risks and budget impacts that are represented by a Project which has been involved in a termination Event.

9.10. One further respondent suggested that the discount rate used to calculate the 'termination Amount' (Annex 1) should be the Project rate, rather than the Green Book rate. Another requested clarification on the exact rate to be used, claiming there is a choice in the HM Treasury publication.

9.11. The Green Book discount rate is more appropriate, as it reflects the social time preference rate and the relevant loss to consumers. The drafting has been amended to be clear that the 'Social Time Preference rate (a real discount rate)' will be used.

9.12. The definition of 'Estimated Facility Generation' in the December draft did not include an adjustment for the transmission losses. A new limb (F) has been added to account for transmission losses through inclusion of the metric "one (1) minus the Initial TLM(D) Charge".

10. Direct Agreement

Conditions 78.6(B) of the CfD set out the circumstances in which, and to whom, a Direct Agreement with the CfD Counterparty will be available. The Direct Agreement made available pursuant to the terms of the CfD is a CfD-specific standard form Direct Agreement. This standard form can be found at Annex 3 of the CfD Standard terms and Conditions.

Five respondents provided feedback on the proposed terms of the standard form Direct Agreement and/or the circumstances in which/type of financiers to whom the Direct Agreement is to be made available. A number of these comments related to minor drafting amendments to clarify the intent. We have updated the Direct Agreement to reflect these.

Other comments related to matters of a more substantive nature both in respect of the types of funders to whom the Direct Agreement would be available or the rights afforded by the provisions of the Direct Agreement itself, and these are considered below.

AVAILABILITY OF THE DIRECT AGREEMENT

10.1. We received a number of comments from respondents requesting that the Direct Agreement be made available to equity financiers under Condition 78.6 as well as debt financiers (to whom the Direct Agreement was already made available).

10.2. We have rejected this widening of the availability of the Direct Agreement. The significant concessions (in particular on the time period before which CfD termination or suspension of CfD payment can be made) provided by the terms of the Direct Agreement are accepted as an integral element of providing the security package necessary to secure debt finance.

10.3. However, the cure periods within the Direct Agreement and the terms of the CfD itself are designed to provide an acceptable and appropriate balance of risk in an equity context, and therefore we do not view the widening of access to the Direct Agreement as necessary or appropriate. For the same reason we have not adopted the suggestion that longer cure periods within the CfD itself should be provided where there is no Direct Agreement in place.

10.4. One respondent noted that the drafting did not allow for a Direct Agreement with a direct or indirect shareholder(s) secured against the relevant Facility and CfD (or a security trustee acting on its/their behalf), in circumstances where:

a. Debt finance from a bank or financial institution (“Lender”) in respect of the Project is injected into the direct or indirect shareholder of the Generator; and

b. Rights under the Direct Agreement must be exercised in accordance with instructions of the relevant Lender.

10.5. We acknowledge this concern, and do not wish to restrict access to a Direct Agreement where there is *bona fide* third party debt finance in respect of a Project or unnecessarily limit the financing structures that may be used. We have therefore inserted drafting at Condition 78.6 (and the definitions used therein) to provide that a Direct Agreement would be available in the circumstances (and subject to the evidence) set out in Condition 78.6.

TERMS OF THE STANDARD FORM DIRECT AGREEMENT

Definitions

CfD Counterparty Enforcement

10.6. One respondent suggested that this definition within Annex 3 should be expanded to include the CfD Counterparty taking any action against the Generator (including, for example, court action to enforce a prior court judgment). We have not adopted this change as we view the existing events incorporated within the definition as providing funders with protection against the key risk of CfD termination/payment suspension. This while not unduly or unnecessarily fettering the ability of the CfD Counterparty to take appropriate action against the Generator in the event it is required to protect the CfD Counterparty's (and therefore ultimately the consumer's) interests.

10.7. A number of respondents were concerned that the implication of the Direct Agreement was that the relevant funders' security trustee could not procure remedial action in respect of a Generator breach of the CfD except during a Step-In Decision Period (or Step-In itself). Clause 3.2 has now been incorporated, which makes it clear that security trustees may, outside of a Step-In Period, remedy breaches by the Generator of its obligations under the CfD regardless of whether, as a result of an Event of Default under the Facilities Agreement, the Generator has been served with a Lender Enforcement Notice, the definition of which has now been removed.

Representatives

10.8. Two respondents noted that the definition of Representatives incorporates court appointed administrators and that it may not be appropriate for the standard step-in requirements or provisions to apply to court appointed administrators. We have rejected this as our existing approach is relatively common among direct agreements in the market and therefore we view the approach as acceptable from a funder perspective while protecting the position of the CfD Counterparty.

No Other Security Interests

10.9. One Respondent suggested that the confirmation provided by the CfD Counterparty under condition 2.2 should be extended to include a confirmation that the CfD Counterparty has not received notice of the interest of any third party in the CfD. We have rejected this amendment as it is viewed as too wide a confirmation for the CfD Counterparty to be able to provide.

10.10. The requirement for the CfD Counterparty to confirm that it has not received notice of any other security interest granted over the Generator's rights, title or interest in and to the CfD remains (other than those security interests of which it is actually aware, as highlighted in square brackets within the drafting of clause 2.2).

Payment

10.11. Condition 2.3 has been amended so that the Security Trustee may direct the CfD Counterparty to make payments under the CfD to an account other than the Generator's Proceeds Account on and after the occurrence of an Event of Default rather than, as previously drafted, on the commencement of and during the Step-In Decision Period.

Notice of Event of Default

10.12. Condition 4.1 has been amended as a consequence of the removal of the definition of 'Lender Enforcement Notice' – as explained as in paragraph 10.7.

10.13. One respondent was concerned that a Lender enforcement of rights under its security documents and other Direct Agreements could give rise to a right for the CfD Counterparty to terminate or suspend payment under the CfD. We have not made any change here as we do not believe that under the existing drafting such enforcement would give rise to such a right for the CfD Counterparty.

10.14. One respondent requested that any Default under a Facility Agreement trigger the commencement of a Step-in Decision Period. This runs contrary to views express by others that suggested this approach would create an undesirable trigger for the commencement of the Step-in Decision Period, and no change has been made on this basis.

Performance by the Security Trustee

10.15. Clause 4.3 has been superseded and replaced by Clause 3.2 which provides the Security Trustee with rights, outside of a Step-In Period, to cure breaches by the Generator of its obligations under the CfD regardless of whether a Step-In Decision Period has commenced; please see paragraph 10.7 for more detail.

Statements of Amounts Due

10.16. Two respondents commented in respect of clause 5.2. We have accepted a request for the imposition of a time limit for the CfD Counterparty to provide the statement of amounts due, which has been incorporated at clause 5.2(a) and stands at 30 days. However, we have rejected the requests for the liabilities of the Generator to be limited to the amounts included in such a statement.

10.17. This is on the basis that this presents too high an administrative burden (that should more properly be dealt with as between the Generator and its funders) upon the CfD Counterparty, and that it would not be appropriate to fetter the ability for the CfD Counterparty to recover liabilities properly due to it pursuant to the terms of the CfD.

Revival of Remedies

10.18. Two respondents suggested that the circumstances in which the CfD Counterparty cannot take enforcement action following the expiry of the Step-in Decision Period (where Step-In has not occurred), or following Step-Out, should be expanded under clause 5.3 to include where the relevant event has been "mitigated".

10.19. This request has been rejected as we believe that the Term "mitigated" is too vague to provide certainty to the CfD Counterparty, with the current wording being more appropriate. However, the wording in the clause has been amended to make it clear that remedy/cure of a breach includes remedy/cure by the Security Trustee or any other person.

Step in Notices

10.20. One respondent noted that the effect of the notice period at clause 6.1 is a reduction of the Step-in Decision Period by 5 Business Days. We have rejected any extension to the Step-in Decision

Period as the overall length is viewed as sufficiently generous notwithstanding the notice requirement on the Security Trustee.

Approval of Appointed Representatives

10.21. Two respondents were concerned that the grounds upon which the CfD Counterparty may object to a Representative under clause 6.2 of the December draft are not sufficiently clear. As a result, this clause has been removed, with "Representative" nevertheless remaining a defined term.

Step-Out

10.22. One respondent was concerned at the extent of the liabilities that may be imposed upon a Representative (and therefore by extension the Finance Parties) where they step-in. We have not amended the wording to take this into account as ultimately it is essential that the CfD Counterparty's recourse position under the CfD is not artificially limited, in order to protect the Electricity Suppliers/consumers who ultimately fund the CfD Counterparty.

Substitution Procedure

10.23. Two respondents were concerned by the requirements required to be met by a Substitute under clause 9.3. These requirements are designed to reflect (and go no further than) the relevant requirements placed on a Generator entering into a new CfD (for example pursuant to the CfD Conditions Precedent) and therefore are viewed as reasonable and consistent.

10.24. This wording at clause 9.3 has been updated to reflect changes made more widely to the criteria that these requirements impose since the December draft, and should therefore provide greater clarity.

Limited Recourse

10.25. Provision for limited recourse to the CfD Counterparty has been added to the drafting of the Direct Agreement at clause 13.1 in order to maintain consistency with the approach now taken within the CfD terms themselves as now drafted.[12]

Step-In Undertaking Pro-Forma

10.26. Three respondents were concerned around the time periods allowed for remedy as set out in paragraph 1 of Annex 1. We have not amended these as these time periods were chosen in the context of the length of the Step-in Decision Period, and the overall time-period package is viewed as sufficiently generous to give funders the timescales they need.

[12] See chapter 13

11. Collateral

Part 13 of the Conditions, and in particular Condition 54, provide for the posting of collateral by the Generator under certain limited circumstances described within that condition, alongside the process to be followed where collateral must be posted and the formula that determines the amount to be posted.

Part 13 goes on to describe various elements surrounding this, including the property that is acceptable as collateral and the circumstances in which the Posted Collateral may be returned. Certain Conditions elsewhere in the contract engage with the collateral requirements, particularly Condition 52.

Seven organisations submitted their views on this area of the contract, raising nine distinct points between them.

LETTERS OF CREDIT

11.1. Two respondents provided comment on Condition 52.1(E)(iii) noting that the issuer of any Letter of Credit disclaiming, repudiating, rejecting or challenging the validity of the relevant Letter of Credit gives the CfD Counterparty a right to immediately terminate the CfD. The respondents noted that in practice they may not know the reason for the issuer's challenge and thus requested a grace period in which to post alternative collateral in this circumstance.

11.2. We accept the validity of this request and therefore have added a 5 Business Day grace period, prior to the right of termination becoming available to the CfD Counterparty, for the posting of replacement Acceptable Collateral, or the withdrawal of the issuer's challenge, in this circumstance.

'AGGREGATE' COLLATERAL

11.3. One respondent requested that the words "in aggregate" were added to the end of Condition 55.7, which allows for the substitution of existing collateral for other collateral of equivalent value.

11.4. In the interest of clarity, we have accepted this proposal and the revised drafting now includes this language.

DYNAMIC COLLATERAL AMOUNTS

11.5. One respondent requested that we not fix the quantum of the collateral referred to in Condition 54.4, and instead give consideration to linking the amount to the Net Payable Amount outstanding at the point in time the relevant collateral is required.

11.6. We have not amended our approach as this would not provide certainty at the outset of the agreement on the potential level of collateral required, and therefore may impact the ability to attract and the cost of equity and debt financing for CfD-incentivised Projects.

RECIPROCAL COLLATERAL

11.7. One respondent requested that collateral requirements be reciprocal, requiring that the CfD Counterparty also post collateral in order to underwrite its own obligations.

11.8. This request was rejected due to the legislative framework supporting the CfD Counterparty, which provides for the existence and nature of the Supplier Obligation – a funding mechanism which may include a provision for Supplier collateral to be posted. Even were it to be achievable

within the available legal powers, such a requirement would also ultimately add unnecessary additional cost the consumer, while adding to what we believe is an already-sufficient level of certainty with regard to payment.

ACCEPTABLE COLLATERAL

11.9. One respondent asked us to broaden the definition of Acceptable Collateral, most notably to include Parent Company Guarantees.

11.10. We have rejected this change due to the need for liquid collateral that can be accessed by the CfD Counterparty in a timely manner, and the control which the Generator has over when collateral will be required.

RETURN OF COLLATERAL

11.11. One respondent requested that the CfD Counterparty should be obliged to return Posted Collateral to the Generator within a specified period following the end of the Collateral Repayment Date. We agreed that this is reasonable, and therefore now (in Condition 55.12) require the CfD Counterparty to return collateral within 5 Business Days of the Collateral Repayment Date.

11.12. One respondent noted that Condition 52.1(E)(ii) gives the CfD Counterparty a right to terminate where a Letter of Credit expires, terminates or ceases to be in full force and effect, and requested a grace period prior to this termination right being triggered. We note that Conditions 55.5 and 55.6 as already drafted prevent the CfD Counterparty from terminating where Posted Collateral is not Acceptable Collateral until 5 Business Days after the issue of a Collateral Correction Notice by the CfD Counterparty.

COLLATERAL FORMULA

11.13. One respondent requested that the Collateral Amount formula under Condition 54.4 should take into account the RQM and CHPQM where applicable to the relevant Generator.

11.14. We accepted this suggestion and have provided for this within the revised drafting, also including an adjustment for transmission losses. Transmission losses are accounted for in through the inclusion of the metric “one (1) minus the Initial TLM(D) Charge”.

12. Undertakings

Under conditions 30, 31 and 32 the Generator makes certain undertakings to the CfD Counterparty, ensuring that there is clarity as to the on-going obligations on the Generator, as distinct from those driven by events arising from time to time throughout the life of the contract.

We received comment from four respondents in respect of these undertakings. A number of remarks related to points of linguistic clarity that we have accounted for within subsequent drafting.

OWNERSHIP UNDERTAKING

12.1. Condition 30.1 includes an undertaking at limb (E) requiring that the Generator continue to retain ownership of the CfD Facility. Respondents raised concerns that this undertaking cut across the way in which they choose to split ownership and operation of their Projects, in particular between the entity owning land and the entity owning the generating assets.

12.2. We understand these concerns, but remain committed to the principle that, in order to reinforce the robustness of the obligations held by the contracting Generator, the Generator contracting entity should be as close to the generating asset as possible.

12.3. We have therefore retained the ownership undertaking at 30.1(E), but have redeveloped the definition of “Facility” (i.e. the defined Term to which the ownership requirement relates) to clarify that the Facility relates to certain assets for the delivery or generation of electricity within a specified geographical area, rather than relating to the land itself.

12.4. One respondent requested that the ownership undertaking at Condition 30.1(E) should not apply in circumstances where senior Lenders enforce their security. We have rejected this change as there is underlying policy intent that stapling, the continued association of a Facility with its CfD, should continue to apply in all circumstances, including where Transfer of the CfD takes place upon enforcement of security.

12.5. One respondent also raised concerns in respect of the level of interest that would be applied to payment incorrectly suspended by the CfD Counterparty pursuant to Condition 30.2. We have not made any change in response to this, as we are of the view that the drafting at Condition 24 (Default Interest) captures this scenario adequately.

13. Limited Recourse

Condition 70.7 provides for the limitation of the liability held by the CfD Counterparty to be no more than the funds it holds through the operation of the Supplier Obligation (or from any other sources, if any are available to it) and allocated to the functioning of the Contract for Difference. Separately, the Secretary of State is required to raise funds via the Supplier Obligation to cover the liabilities arising from the CfD scheme as a whole.

Three organisations offered specific comment on these provisions, offering nine points of concern.

PAY-WHEN-PAID

13.1. Two respondents suggested funds available to the CfD Counterparty pursuant to the Supplier Obligation should, in a pay-when-paid scenario, be pro-rated across all outstanding payments due to Generators.

13.2. We note that, pursuant to sections 18(1) and 18(3) of the Energy Act 2013, the Secretary of State must have regard to the principle that sums should be apportioned in relation to the amounts owed when making Regulations on this area. The current draft regulations that have recently been consulted on include provisions to pro rate payments, when insufficient money is received, across all Generators in proportion to what they are owed.

TERMINATION ON DEFAULT

13.3. One respondent noted that there is no right of termination for the Generator where the CfD Counterparty is in Default. Section 9(1) of the Energy Act stipulates that “regulations must make provision for Electricity Suppliers to pay a CfD Counterparty for the purpose of enabling the CfD Counterparty to make payments under CfDs”.

13.4. However, due to concerns from respondents the duties on the Secretary of State were added to, so that now section 21(3) says “regulations must include such provision as the Secretary of State considers necessary to ensure that a CfD Counterparty can meet its liabilities under any CfD to which it is a Party”.

13.5. We are of the view that this should give the necessary comfort to Generators and investors in respect of CfD Counterparty Default (and the possibility of this).

DEFAULT INTEREST

13.6. Three respondents highlighted that there is no provision for the CfD Counterparty to pay Default Interest where it is late in payment because it does not have the funds available to cover its CfD liabilities. In addition to this, they noted that Generators should be entitled to further recourse in the event of such a scenario.

13.7. The CfD as drafted intentionally protects the CfD Counterparty, and therefore consumers, by providing that its liability is limited to the funds it holds through the operation of the Supplier Obligation (or from other sources, if any, available to it) and allocated to the Contract for Difference.

DRAFTING CLARITY

13.8. One respondent noted what they considered a drafting disconnect between the Energy Act 2013 and the CfD drafting in relation to liabilities as defined in the contract terms. Those liabilities are limited to the funds held by the CfD Counterparty pursuant to the Supplier Obligation (or from other sources, if any, available to it) which are allocated to the functioning of the Contract for Difference.

13.9. We have carefully considered this and believe that the definition in each instance is sufficiently clear and creates no drafting disconnect. The Energy Act provides assurance that regulations must include provision to ensure that the CfD Counterparty can meet all its liabilities under any CfD. The CfD Counterparty remains liable to the extent that it in broad terms it has the funds at hand.

REGULATORY RISK

13.10. Two respondents commented on regulatory risk arising from the ability to amend the Supplier Obligation Regulations. As per above, under the Energy Act 2013 the Secretary of State is required to raise the funds to cover the CfD Counterparty's liabilities. Any amendment to the Regulations would need to be consistent with the duties on the Secretary of State.

14. Intellectual Property Rights

Condition 74 provides that the parties to the CfD retain ownership of any Intellectual Property Rights ('IPR') developed by them or on their behalf. It does however include provision for the non-exclusive, royalty free, licence of any IPR created pursuant to the terms of the CfD. This is only made available to the other Party to the extent that the other Party requires such IPR in order to comply with the CfD terms or with relevant legal obligations.

An indemnity is provided from the relevant Party in the event that IPR licensed pursuant to Condition 73 leads to liabilities arising from infringement of a Third Party's IPR rights.

We received comments from two organisations concerning the IPR provisions.

CLARITY OF INTENT

14.1. The first respondent queried what IPR Transfer we envisaged would be covered by the IPR Transfer provisions.

14.2. The provisions are not designed for a specific scenario and we do not envisage any particular IPR Transfer being required. However the provisions are incorporated to ensure the extent, and terms, of any IPR Transfer under the CfD is clear.

IPR FROM WITHIN THE FACILITY

14.3. The second raised a concern that the drafting of the IPR provisions could include IPR developed in the Facility itself.

14.4. This is not the intention of the clause. We do not believe the existing wording captures such IPR and therefore no change has been made.

15. Transfer

Condition 78 governs the circumstances in which a Generator or the CfD Counterparty may Transfer or assign all or some of their rights under the contract, with specific limitations on the exercise of that ability in both cases.

A single organisation provided views on these provisions, with our response to their comment below.

UNSTAPLING

15.1. That respondent voiced concerns that the bar on "unstapling" the CfD from the Facility owner, Conditions 78.7 and 30.1(E) in particular, create challenges for certain 'Operating Company/Property Company' corporate structures.

15.2. As described within Chapter 12 of this document, we have refined and clarified this definition in a way designed to assuage these concerns and make the position more clear.

16. Force Majeure and Payment Disruption Events

Certain conditions and clauses within the CfD allow for the extension of some of the time limits under the contract where an event occurs which both impinges an ability to fulfil an obligation and is beyond the control of that Party within the definition of Force Majeure described in the contract.

Seven organisations provided comment on these terms of the contract terms.

DEFINITION

16.1. Four respondents raised concerns in relation to the extent to which Force Majeure is defined to include events caused by Representatives (in particular Contractors) or events outside Representatives' control.

16.2. While we do not accept the premise that *Force Majeure* protection should extend to issues caused by Contractor (or other Representative) acts, as this is a risk that it is appropriate for the Generator to manage, we have accepted that issues caused by events beyond the reasonable control of Representatives should trigger Force Majeure protection.

16.3. The drafting of the definition of Force Majeure (and Payment Disruption Event) has therefore been adjusted to reflect this.

NON-FACILITY FORCE MAJEURE

16.4. One respondent voiced concern that the Milestone Delivery Date, Target Commissioning Date, and Longstop Date would not be extended for Force Majeure impacting the transmission works, as opposed to the Facility itself.

16.5. We recognise this concern, and therefore have extended these three definitions to make clear that they would be adjusted where such an issue causes a delay.

17. Billing and Payment

Part 6 sets out the processes for calculating and issuing Billing Statements to Generators and the requirements for making payments. It includes the content that will be included in each Billing Statement, the calculation of interest and the Net Payable Amount, details of the Billing Statement Dispute process, and the timescales and process for settlement.

Six respondents put forward comments on these provisions, between them raising two distinct issues, addressed below.

PAYMENT PERIODS

17.1. The December draft proposed that Generators should have five Business Days following receipt of a Billing Statement to make payment of the Net Payable Amount on that Billing Statement. There was concern from some Generators that it could be challenging, particularly for smaller Generators, to make payments within this time.

17.2. This point was also made by thirteen respondents to the EMR Consultation on Proposals for Implementation,[13] a formal response to which is forthcoming in June. There was not, however, universal support for a longer payment period, with fifteen respondents putting forward views supportive of the current period.

17.3. A five Business Day payment period was thought to be a particular concern when the payment was relatively unusual i.e. where a short Term price fluctuation moved the reference price above the Strike Price. Where payment requirements are relatively infrequent, respondents said there is a greater relative burden to put in place systems to approve and make payments within a relatively short time period.

17.4. In response to this concern we have increased the payment period to ten Business Days. Due to the payment periods required for most bank payments and the impact of non-Business Days on payments to and from the CfD Counterparty, increasing the payment period beyond ten Business Days would have a negative impact on the CfD Counterparty's working capital as it would be required to start payments to other Generators for the settlement day in question before having received payments from Generators. We therefore rejected a payment period longer than 10 Business Days. This change may be found in clause 23.1.

SET-OFF PROVISIONS

17.5. The December draft allowed the CfD Counterparty to set-off matured obligations due by the Generator pursuant to the CfD against any matured obligation owed by the CfD Counterparty to the Generator. Some respondents were concerned that the CfD Counterparty had a right of set-off of obligations while the Generator did not and proposed that either the Generator should be so entitled or that the right of set-off belonging to the CfD Counterparty should be removed.

17.6. In response to this concern, we have introduced a reciprocal right of set-off so that either Party may set off any matured obligations due by the other Party pursuant to the CfD against a matured obligation owed. This is found in Condition 25.

[13] EMR Consultation on Proposals for Implementation

18. Generation Tax

The provisions governing the Generation Tax ('GT') procedure are detailed in Part 9 of the CfD. They establish the procedure by which a Generator can raise a Generation Tax Change in Law claim, the compensation mechanisms which will be applied where such a claim is successful, and the general provisions which govern the process as a whole.

Eleven organisations provided their views on the proposed Generation Tax provisions.

DEFINITIONS

'Generation Tax'

18.1. Respondents were positive about the inclusion of provisions for Generation Tax, which were a new addition to the December draft. However, clarity and expansion of the scope of the Generation Tax cover provided was requested across the board. The definition of 'Generation Tax', one respondent noted, referred to 'electric generating facilities' – the meaning and application of which was not entirely clear. With this in mind we have revised the definition of Generation Tax, referring instead only to 'electricity generators'.

18.2. Further comments on the definition requested clarification that the provisions were not restricted to changes which only affected electricity generation *per se*. We believe that the revised drafting achieves this and is appropriately broad.

'Generation Tax Liability'

18.3. Concern was expressed that the definition of 'Generation Tax Liability' was unclear and potentially too limited in scope. Six respondents provided comments to that effect. In particular clarity was sought on whether the loss of reliefs by the Generator would be considered a component of the Generation Tax Liability incurred. In light of such comments we have clarified the definition of Generation Tax Liability which now provides substantially more detail on the treatment of reliefs and their loss.

18.4. Similarly, six respondents also queried whether the exclusion of 'any general taxes, levies, duties or imposts on gross or net Income, Profits or Gains or any indirect taxes, levies, duties or imposts' under the definition of Generation Tax Change in Law could not be used to exclude, for example, a Tax on profits from electricity generation. For clarity, that is not the intention of the provision; rather it refers to and excludes 'general' measures which are not specific to electricity generators.

'Generation Tax Effective Date'

18.5. The point at which Generation Tax Liabilities would be deemed effective (under the definition of Generation Tax Effective Date) was also queried, with one respondent noting that, as drafted, it could refer to several dates. Upon further examination we were also concerned that the most relevant point in time for the calculation of a Strike Price Adjustment was the point in time at which Generation Tax Liabilities started to be incurred. With this in mind the definition has been amended and the date from which the Generation Tax Liability is incurred by the Generator will be deemed the Generation Tax Effective Date.

RAISING A CLAIM FOR GENERATION TAX

Process Streamlining

18.6. Three respondents made comments regarding the extent of the procedural hurdles that were in place, in the form of a pattern of successive notices and response notices, in order to raise a Generation Tax Change in Law. Four further comments noted that the extensive lapse in time associated with the procedure could materially delay the Strike Price Adjustment from being instituted and could as a result seriously impact Generators' cash flows.

18.7. With this in mind we have substantially streamlined and shortened the front end of the claim procedure. Generators no longer have to wait 12 months to deliver a Generation Tax Notice, for example.

Agreement Regarding a Generation Tax Change in Law

18.8. Once a Generation Tax Notice has been served by the Generator, the drafting now requires that the Parties must, within 15 days, meet and seek to agree whether a Generation Tax Change in Law has occurred. This partly addresses one respondent's comment that each Party should have the opportunity to challenge the other's assertion that such a Generation Tax Change in Law has occurred.

18.9. This response is bolstered by the fact that where the Parties cannot agree on an alleged Generation Tax Change in Law contained in a Generation Tax Notice served by the Generator, they retain recourse to the Dispute Resolution Procedure in this regard.

GENERATION TAX REPORT

Compensation Metric

18.10. Once (i) it is determined (pursuant to the Dispute Resolution Procedure) or the Parties agree that a Generation Tax Change in Law has taken place, or (ii) the CfD Counterparty gives a Generation Tax Notice, an Energy Consultant will be appointed to produce a Generation Tax Report. This Report will, in broad terms, seek to trace the extent to which non-Generators have been able to 'pass through' the impacts of the Generation Tax to the wholesale price. Broadly, the compensation payable will then be based on the lower of that pass-through amount or the Generation Tax Liability.

18.11. One respondent commented that this metric should be replaced by a Generator submission of cost impacts to the CfD Counterparty and that the Strike Price Adjustment should be based on these costs. It is not the intention of the Generation Tax provisions to compensate for all costs incurred by virtue of the Generation Tax Change in Law, however, but rather to acknowledge that CfD holders are prevented from passing through such costs in the way that non-CfD holding Generators may be able to.

18.12. The intention in this instance is to place Generators in an equivalent position to non-CfD Generators. The metric used is based upon this comparison and so has not been altered.

Appointment of an Energy Consultant

18.13. One respondent noted that it is vital that the Energy Consultant operates independently of both Parties and advocated the introduction of a new condition delineating a range of Energy Consultant undertakings to guarantee this. We are satisfied that the revised draft achieves this position, and that a set of undertakings in this regard is unnecessary.

18.14. One respondent raised concerns regarding the timescales applicable to the appointment of the Energy Consultant. The point raised was that unless there was a specific time limit attached to the appointment there was some scope for this to take a significant amount of time, with an associated impact on the overall timescales and eventual payment.

18.15. This observation is reasonable and, alongside the reduced timescales discussed above, it is now required that the appointment of an Energy Consultant is made within 90 days of the later of the dates on which the CfD Counterparty gives a Generation Tax Notice to the Generator (or it is determined (pursuant to the Dispute Resolution Procedure) or the Parties agree that a Generation Tax Change in Law has taken place) and the Generation Tax Effective Date.

Generation Tax Report Generator Input

18.16. The Energy Consultant is empowered to seek the views of any third party expert, or market participant, which it determines necessary or desirable. One respondent queried whether all Generators should be asked to input. Ultimately, we believe that the Energy Consultant is best placed to make that determination and that, if they deem it necessary, they remain sufficiently empowered to do so under the CfD.

GENERATION TAX COMPENSATION AND PAYMENTS

18.17. Most respondents commented that the operation of the compensation provisions should be clarified. These have now been substantially refined since the December draft and their functioning should be significantly clearer.

Timing of Strike Price Adjustments

18.18. One respondent made two comments on the importance of Strike Price Adjustments being made in an appropriately timely manner. The reference to ‘promptly’ within the GT Strike Price Adjustment condition was not felt by this respondent to be sufficient in guaranteeing that this was indeed the case.

18.19. We note that there is scope for the Energy Consultant to specify the date from which adjustments should be made where appropriate and believe that this presents a more suitable mechanism than attempting to develop a catch-all timeframe for all Generation Tax Strike Price Adjustments, particularly considering the wide range of technologies, Generators and Projects which may be impacted.

18.20. One respondent also commented in relation to the payment of adjustments where it has been decided that payment would be realised via lump sum. The respondent requested that provision be made for payment to be realised within 20 Business Days. The rationale for this request, related to allowing the Generator some level of certainty in terms of when payment could be expected.

18.21. We note, however that the existing provision makes reference to payment being made on a date agreed by the Parties. Considering once again the broad range of Taxes and levies that could be

relevant, and the correspondingly wide range of impacts that could stem from them, we believe that this is a more appropriate means of ensuring the desired level of predictability.

Counterparty Discretion Relating to Payment terms

18.22. As with other similar provisions, in particular Change in Law, concern was expressed in respect of the manner in which the CfD Counterparty would exercise its discretion on the form which payments would take. Five respondents made comments to this effect.

18.23. Although we understand the importance attached to this issue, the CfD Counterparty will ultimately exercise its judgment in the areas where it has discretion.

Mitigation

18.24. Two respondents provided views on the obligation to mitigate costs in relation to Generation Tax, seeking clarity on whether it would extend as far as requiring Generators to 'mitigate' their Tax liability, something these same respondents felt would not be an appropriate requirement over time. For clarity, it is not expected that Generators in any way try to minimise their Tax liabilities beyond taking reasonable steps do so.

19. FMS, CHP & Sustainability

Annex 6 sets out the CHP Qualifying Multiplier ('CHPQM') Calculation Methodology. A Generator needs to have a valid Guidance Note 44 Certificate for payment purposes, and by extension therefore to be accredited to the CHP Quality Assurance Standard, in order to receive CfD support.

Annex 7 sets out the procedural requirements for renewable, fuelled Generators and the CfD Counterparty to agree Fuel Measurement and Sampling ('FMS') Procedures, and sets out the methodology to calculate or deem the Renewable Qualifying Multiplier ('RQM'). It also sets out the consequences for failing to comply with FMS Audit Rights, Fuelling Criteria, FMS Procedures, and FMS Reporting obligations.

Annex 8 contains a holding clause, present in anticipation of the Sustainability Criteria ('SC') currently being drafted, and of our policy on reporting, auditing and non-compliance with those criteria.

We received 12 responses on these areas, all 12 relating to Annex 7, 7 on Annex 6, and 4 further responses relating to the SC. Most respondents requested either relatively minor amendments to contractual drafting or clarification of policy intent where they felt the drafting was not clear enough. With a single exception most respondents raised distinct issues that are not easily addressed together.

FMS

19.1. Seven respondents were of the opinion that the sanctions drafted for breaches of FMS Procedures (Annex 7, Part B, paragraph 6.1 (A) (iii)), were too harsh, specifically that a third breach of agreed procedures should not entail a possible total elimination of CfD support, even if, as currently drafted, such support would only be eliminated until the breach is remedied.

19.2. We have modified the drafting for the consequence of a third breach, no longer reducing the RQM to zero and instead to multiplying the RQM by 0.5.

19.3. Three respondents sought clarification on the timeframe during which a Generator would be able to remedy a breach of FMS Procedures (Annex 7, Part B, paragraph 6.2). We have altered the drafting to include the words 'at any time' in order to make it clear that there would be no time limit.

19.4. One respondent sought to 'carve-out' what they considered to be genuinely insignificant breaches of Fuelling Criteria such that a breach considered to be insignificant would not be subject to sanctions. We believe not only that the CfD Counterparty has discretion in such instances, but that a specific 'carve-out' would place a CfD holder at an advantage over a RO operator, where such discretion is not available and any negligible breach has consequences.

19.5. Other individual concerns raised by Respondents that were addressed include explicitly stating that no sanctions for non-compliance with Fuelling Criteria would be imposed where that non-compliance resulted from a requirement to take action to comply with its Generation Licence. Paragraph 5.2 of Part B of Annex 7 has been introduced to address this concern. Separately, paragraph 2.7 of Part A of Annex 7 has been introduced to allow, at the discretion of the CfD Counterparty, the Generator to submit estimated data as part of its FMS reporting obligations..

19.6. Two respondents appear to have misunderstood the drafting in this area, one in respect of the time period to which measurement of the minimum 90% biomass rule applies to biomass conversions, and another in respect of the definition of 'Fuel with Variable Renewable Content'. The former makes the point that it is unclear how/over what period the 90% level is calculated. The CfD Agreement, Annex 4 (Fuelling Criteria), 1.3 states 'Any assessment as to whether the

Fuelling Criteria are met by the Facility shall be determined by reference to the entirety of an RQM Calculation Month'.

19.7. The latter believes the definition of 'Fuel with Variable Renewable Content' is unclear as 'the wording does not provide a definitive answer as to the materiality of the Difference in energy content which will cause a fuel source to fall within this definition'. The definition as drafted makes use of the words 'composed wholly or partially', ensuring that any renewable material present in a fuel at all causes it to enter under this definition, and we believe therefore that the 'materiality' is appropriately clear as 'anything over zero'.

19.8. One respondent felt that further clarification was needed on what constitutes 'FMS Data', something which will be clarified when agreeing 'Full FMS Procedures' and is therefore inappropriate for inclusion within the drafting of the CfD itself.

19.9. A second respondent suggested that, in circumstances where the Market Reference Price is above the Strike Price and the Generator committed one of three specific breaches, thereby risking their RQM being deemed at 1, the CfD Counterparty should be obligated to evidence 'deliberate' non-compliance. We believe that this places an unacceptable burden of proof upon the CfD Counterparty and would be too inclined to lead to unnecessary Disputes.

19.10. One respondent sought clarification on whether a breach of FMS Procedures which is subsequently remedied counts towards the '3 strikes rule'. We believe that the drafting is clear enough, in that we do not exempt breaches that are subsequently remedied from this count.

19.11. One respondent questioned what breach is deemed to have a material impact, and what is deemed to have a non-material, impact on the RQM. We believe that any impact on the calculation of the RQM may be deemed to be material, and believe that this is provided for within the existing drafting without the need for clarification.

19.12. One respondent commented that a Generator should be able to challenge the validity of an 'FMS Exemption Non-Compliance Notice'. We have rejected this proposal on the basis that exempted status is a privileged position which carries with it an RQM deemed at 1, and that a Generator should immediately be subject to 'Full FMS Procedures' where breaches occur. If the Generator were able to challenge the validity of the notice there is too great a risk that lengthy Disputes could ensue and result in the CfD Counterparty overpaying, over a considerable period of time.

CHP

19.13. Four respondents commented that while the December update made mention of a 5 year grace period on having to produce a Guidance Note 44 Certificate for payment purposes at the beginning of the Term of a CfD, there was no mention of this concession anywhere in the CfD drafting.

19.14. As a result, we have considered whether it would be appropriate to allow a Generator to apply the five year period at a time of its choosing during the CfD, rather than establishing a set time period in the CfD. We can confirm that this is the approach that will be implemented through the existing Guidance Note scheme, with additional flexibility granted through the stipulation that the five years of the amnesty need not be applied for in a single block, and may be split non-consecutively.

19.15. Two respondents believed that the CfD should pay CHP plants on the Total Power Output ('TPO') rather than their Qualifying Power Output ('QPO'), and two others felt that 5 years provides insufficient revenue certainty to raise debt finance, we will not change our policy position on the former and are considering our position on the latter, as noted above. As only the issue of

whether we pay out on the basis of the QPO or the TPO needs to be addressed in the CfD itself, we have left the drafting unchanged.

19.16. A single respondent questioned what constitutes an 'acceptable' framework contract for the supply of heat, in context of the Technology Specific Project Commitments for CHP technologies. Were it to be used, the word ‘acceptable’ would introduce a level of subjectivity and uncertainty inappropriate for this element of the CfD. The Condition as written simply seeks evidence of '*a* framework contract for the supply of heat' and does not describe the ways in which such an agreement may be acceptable.

SUSTAINABILITY

19.17. Three respondents sought further information on the treatment of sustainability within the CfD, which was anticipated given the presence of a holding clause within the December draft.

19.18. There were concerns in a minority of responses about whether Change in Law protection would be available for Generators who suffer financial disadvantage as a result of having to comply with sustainability criteria, should those criteria tighten at some point beyond what is laid down in the CfD.

19.19. One respondent commented that requirements in any case should not be tighter than those in existence under the RO.

19.20. Another commented that there should be no termination rights attached to non-compliance with sustainability criteria. These issues are being addressed in the clauses currently being drafted and will be contained within the forthcoming terms, published in the summer.

20. Strike Price Adjustment

20.1. This chapter addresses the overarching processes for making Strike Price Adjustments, namely Conditions 14 and 19 (for Baseload and Intermittent technologies respectively). These Conditions include provisions that determine how and when the Strike Price is adjusted in relation to the annualised Indexation Adjustment and the process for taking into account the Balancing System Charge Strike Price Adjustment or TLM(D) Strike Price Adjustment.

20.2. The detailed scope and processes of other permitted Strike Price Adjustments (a QCiL Strike Price Adjustment; a QCiL True-Up Strike Price Adjustment; a GT Strike Price Adjustment; a Balancing System Charge Strike Price Adjustment; or a TLM(D) Strike Price Adjustment, as defined within the contract) are set out under their respective clauses.

20.3. Submissions were received from three organisations seeking clarification on the process of Strike Price Adjustments, not including Balancing System Charge and TLM(D) adjustments, which are addressed in Chapter 7.

ORDER OF ADJUSTMENTS

20.4. Respondents queried whether certain adjustments needed to be completed in a particular order and asked for clarity on the periods on which each adjustment is based. It was suggested that: there may not be sufficient time to calculate the Indexation Adjustment and apply it before 1 April if using the February CPI; that a regular report should be sent to each Generator detailing the adjustments that have been made since the Agreement Date; and that the definition of CPI

should refer to the ‘all items’ index and the ‘Base Year’ of the index should be included in its definition.

Unfixed Adjustments

20.5. Certain Strike Price Adjustments can take place at any time through the year, as set out under the relevant provisions in the contract, namely: a QCiL Strike Price Adjustment; a QCiL True-Up Strike Price Adjustment; and a GT Strike Price Adjustment. The formulae in each Condition define the inputs that are used to calculate any payments that are due as well as the payment method, which includes whether a Strike Price Adjustment will be made.

Annual Adjustments

20.6. The other permitted Strike Price Adjustments (an Indexation Adjustment; a Balancing System Charge Strike Price Adjustment; and the TLM(D) Strike Price Adjustment) will occur once a year. A new Term has been included that governs when this annualised process takes place, namely the ‘Strike Price Adjustment Calculation Period’. This is defined as ‘the period from the date the CPI for January in the relevant calendar year is published (or, where the Reference CPI is used, the fifth Business Day prior to the end of March in the relevant calendar year) to and including the first day of the Summer Season in that calendar year’.

20.7. Each year the CfD Counterparty will follow the processes as set out in Conditions 45 and 46 in order to calculate the Balancing System Charge Strike Price Adjustment and the TLM(D) Strike Price Adjustment. This will include providing the Generator with the ‘TLM(D) Charges Report’ and ‘Balancing System Charge Report’, during the Strike Price Adjustment period.

20.8. During the Strike Price Adjustment period the CfD Counterparty will inflate all current Strike Price Adjustments to current prices. The Indexation Adjustment formula governs the process: all valid Strike Price Adjustments are first translated into Base Year terms, added to the Initial Strike Price and then inflated from that date to the current year, using the CPI for January in that calendar year (or the latest published CPI figure if CPI for January is not available).

CPI

20.9. Using the January CPI, rather than the February CPI as previously defined, ensures there is sufficient time to calculate the Strike Price by the first day of the Summer Season (1 April) as well as enabling the inflation process to take place if January CPI is not available for any reason.

20.10. The use of January CPI ensures inflation protection for the Generator remains appropriate through the course of the contract. This is achieved through the definition of ‘Base Year CPI’ as ‘the value of the CPI for October in the calendar year immediately preceding the Base Year’. Providing inflation protection from the preceding October ensures that Generators receive appropriate protection.

20.11. If a value for CPI other than January is used to effect a particular Inflation adjustment, the process at a subsequent Indexation Anniversary will ensure the appropriate level of inflation protection is applied over the course of the contract.

20.12. The CfD Counterparty will provide the Generator with a notification of the new Strike Price within 5 Business Days of the ‘Indexation Adjustment’ being completed.

OTHER CHANGES

20.13. Two other amendments relevant to the Strike Price Adjustment process were made:

- the 'Base Year terms' definition now refers directly to Strike Price Adjustments; and
- the definition of CPI now refers to the 'all items index of consumer price inflation'.

21. Dispute Resolution

21.1. Part 14 of the Conditions governs the processes employed where a Party to the CfD raises a Dispute. Among these are provisions for a resolution through a meeting of Senior Representatives, through the use of an appointed Expert, and for arbitration. Condition 60 goes on to allow for the consolidation of Disputes on connected issues originating from multiple Generators.

21.2. Five respondents made comments on this area, four substantive points were made and are addressed below, while three further points relating to minor drafting issues have been resolved accordingly.

DISPUTE CONSOLIDATION

21.3. Three respondents raised concerns in respect of the approach to the consolidation of CfD Disputes, noting that a Generator may be unwillingly made Party to a consolidated Dispute. We have not made any change as a result of these comments, as we are of the view that:

i. The administrative pressures and costs created by the CfD Counterparty engaging separately on a bilateral basis in respect of Disputes on the same issues means such an approach is not appropriate.

ii. In practice the relevant Expert or Arbitrators will be best placed to determine whether it is appropriate for Disputes to be consolidated, rather than a Party to the Dispute.

iii. Condition 60.1 appropriately and clearly defines the commonality of issue required for two or more Disputes to be consolidated, and therefore that the existing drafting is appropriate; and

iv. Where a Dispute resolution process has not been commenced in relation to a specific Generator the consolidation process would not apply, and therefore there should be limited concern in respect of being unwillingly brought into a Dispute through the consolidation process, though we note the distinct approach to Disputes on Market Reference Pricing, discussed in Chapter 4 of this document.

SENIOR REPRESENTATIVES

21.4. One respondent raised a concern that 10 Business Days is too short a time period for Senior Representatives to first meet to attempt to resolve a Dispute. We have retained this requirement (see Condition 57.1) as we are of the view that is a reasonable time period for this first meeting to take place, and we would highlight that a longer time period of 30 Business Days is allowed for resolution of the relevant Dispute by Senior Representatives.

22. Change Control

Annex 2 provides for a 'Change Control Procedure', creating a mechanism through which the CfD may be amended. The conditions distinguish between an amendment that is 'Material' and one that is 'Technical', with Material Amendments being those that adversely affect the Generator in a number of broad ways, and Technical Amendments, which follow a less onerous procedure but which must be either non-material or required to address a manifest error.

Four organisations provided their views on the Change Control Procedures within the contract. In most cases these sought clarity on the scope and operation of the provision, which we address below.

MATERIAL AMENDMENTS

22.1. Two respondents noted that 'Material' Amendments were broadly defined and requested further specificity on its definition. We have not provided an exhaustive list of those matters that would be considered material, however, on the basis that the Change Control Procedure is by its nature designed to deal with unforeseen changes that become necessary and attempting to delineate them in advance could prevent essential changes from being made in the future which are, as yet, unforeseen.

22.2. On the definition of Material Amendments, one respondent noted that changes which arose due to a Change in Law while causing a material change to the regime itself that could realistically frustrate the Contract would seem to fall within the definition of Material Amendments, and thus the Change Control Procedure. They proposed that a legally binding mechanism to ensure that such necessary changes take place is required and that the Change Control Procedure should be amended to achieve this.

22.3. We believe that this is a fair observation but not one which is inside the intended scope of the Change Control Procedure. With this in mind we have introduced the Change in Applicable Law provisions to address this situation, details of which can be found in Chapter 25.

TECHNICAL AMENDMENTS

22.4. Two respondents objected to the manner in which they felt that Technical Amendments could be 'unilaterally imposed' on the Generator. We feel that the process is more consultative than such statements might indicate and note that it is in the interest of both Parties to the CfD that Technical Amendments are realised as efficiently as possible.

22.5. We further believe that the Material Amendment Process ensures that any matters which are integral to the operation of the CfD are dealt with outside of the Technical Amendment Procedure and are not therefore inappropriately 'unilateral', and as such have not amended the process in this respect.

AMENDMENT NOTIFICATIONS

22.6. For both Technical and Material Notifications we have revised the response time limit for Generators upwards from 10 to 20 Business Days. We feel that this is a more appropriate timescale to allow Generators to meaningfully assess the nature of the amendments proposed, and to gather evidence and proffer any alternative suggestions as necessary.

23. Northern Ireland

We received one response from a single organisation on Northern Ireland, reflecting the nature of the CfD drafting as catering for the GB market at present.

23.1. The respondent raised the issue that Projects in Northern Ireland operate under a different grid connection regime from the Projects in Great Britain and thus might be discriminated against under the grid connection Eligibility Criteria.

23.2. They recommended reducing the Eligibility Criteria to a grid connection offer, rather than a grid connection agreement, due to the lower cost requirements. This was viewed as preferable given the shift to constrained allocation and the increased risk of failing to secure allocation in these circumstances.

23.3. The response continued on to suggest that the appropriate milestone at the eligibility stage might be the submission of a valid connection application (including evidence of payment of the relevant application fee) instead of a connection offer or connection agreement. This reflects the different conditions in Northern Ireland where decisions on connection applications take significantly longer than in Great Britain.

23.4. In addition, the respondent highlighted that Northern Ireland Electricity ('NIE') and the Northern Irish System Operator ('SONI') do not accept connection applications until the Project has planning consent. There will therefore be a delay of about six months, and often longer, between a Project receiving planning consent and then being in a position to enter into a grid agreement.

23.5. A further complication specific to Northern Ireland is the existence of a 'clustered' approach to certain developments, requiring the approval for designation as and investment within a cluster, which can introduce a further significant delay in the granting of a connection offer.

23.6. Initial Eligibility Criteria were published in October 2013.[14] These are designed to cover Great Britain, and we are aware that they will require amendment in order to reflect the realities of Northern Irish Projects, but we cannot yet speak to specific changes.

23.7. We are considering this issue and others. Once the GB position is finalised we will explore the inclusion of elements distinct to Northern Ireland into the CfD regime.

[14] Draft Contracts for Difference (Allocation) Regulations 2014,

Part 2: Policy Updates

24. Payment Start

Difference payments under CfDs and Investment Contracts will begin for generation commencing from April 2015.

PRIOR POSITION

24.1. In the EMR: Consultation on Proposals for Implementation (published October 2013), we stated that:

"We are currently discussing the date on which generation will first be eligible for payments under CfDs or investment contracts and when supplier obligation payments should commence. Initial discussions with potential Generators and consideration of the systems changes that will need to be put in place by both suppliers (for payment of the supplier obligation) and the CfD Counterparty and Settlement Agent suggest that payments may commence from April 2015. However, we will continue to discuss the implications of Start Dates for both potential Generators and suppliers and will provide an update later this year."

UPDATED POSITION

24.2. The process for applying for the first CfD contracts will commence later in 2014 when the CfD scheme goes live. Generation under CfDs and Investment Contracts will first become eligible for Difference payments from April 2015.

24.3. April 2015 will allow payments to align with the start of the financial year while also allowing all participants (potential Generators, licensed suppliers and the CfD Counterparty and Settlement Agent) sufficient time to prepare and test their billing and payment systems to allow a smooth introduction for CfD Difference payments.

25. Change in Applicable Law

PRIOR POSITION

25.1. Feedback on the Change in Law provisions had indicated that stakeholders were concerned regarding Changes in Law that could potentially frustrate the CfD, or render the Generator's continued compliance with its obligations illegal or impossible, and whether it was our intention to ensure that the CfD would continue in effect in such circumstances.

25.2. Such changes could well fall outside the scope of the general Change in Law provisions and upon consideration we have now included a specific set of terms, designed to cater for such a situation.

UPDATED POSITION

25.3. The Change in Applicable Law procedure relies on the introduction of a new concept in the form of a 'Required CiL Amendment'. This refers to any amendment or supplement to the CfD that

must be instituted in order to make sure that the 'Required CiL Amendment Objectives' continue to be met. These are (i) that the CfD can continue in force; and (ii) that no provision of it is rendered illegal, invalid, unenforceable or inoperable.

25.4. If the CfD Counterparty determines that a Change in Applicable Law has occurred which would cause one (or both) of the Required CiL Amendment Objectives to be voided, they will institute the Change in Applicable Law procedure. This takes the form of a 'Change in Applicable Law Review'.

25.5. The CfD Counterparty is also obligated to initiate the process where the 'Change in Applicable Law Request Criterion' is met. This criterion requires that at least 30% of Generators, either by number or by volume, have submitted a Request Notice seeking to initiate the process within any one 10 Business Day period.

25.6. The Change in Applicable Law Review will seek to determine both whether the Change in Applicable Law has prevented one of the CiL Required Amendment Objectives from being met and, if so, what manner of CiL Required Amendment is necessary to remedy the situation.

25.7. If the Generator disagrees with the findings of the review it will have 20 Business Days to notify the CfD Counterparty Body that it wishes to Dispute the outcome. Again, this Notice can only be delivered where the 30% threshold is met. Within that Dispute process provision is also made for the appointment of an Expert in certain circumstances.

26. Phased Projects

This chapter sets out the Government's policy towards 'phased' Projects for offshore wind. We have been engaging with a range of stakeholders to develop an appropriate policy that balances the risks to Government and developers. A number of detailed comments have been received which have shaped the policy that follows.

Alongside this document, and in addition to the revised Standard Terms and Conditions that continue to apply, we have published four documents that relate specifically to phased projects. In a phased project, the CfD Agreement is replaced with a CfD Phase Agreement, with one such agreement existing for each phase of the project. We have published exemplar Phase Agreements for Phases 1, 2 and 3 of a project pursuing the 'single metering' approach to phasing and an exemplar Phase 1 Agreement for those pursuing the 'apportioned metering' approach. The distinction between these metering approaches is described within paragraphs 26.11-14 below.

POLICY SUMMARY

Overview

26.1. The phasing policy outlined has been developed to provide support for offshore wind Projects in a manner which mirrors as closely as possible the commercial realities of constructing offshore wind Projects while keeping to our policy objectives. We have considered stakeholder comments that have advocated extension of the policy to other technologies but remain satisfied that the particular difficulties associated with offshore wind Projects during construction mean that optimisation cannot occur without provision for phasing Projects.

26.2. We believe this allows developers to optimise the commercial profile of a Project, as well as providing financial flexibility by allowing capital to be recycled through the sale of discrete phases. The evidence level for other technologies by comparison has not demonstrated the

same need and we will therefore continue to endorse the approach already established under the Renewables Obligation ('RO') of providing phasing support to offshore wind Projects only.

26.3. Phased CfDs have been designed to support phased offshore wind Projects of up to 1,500MW. This may be achieved in two or three phases, as appropriate, all within the same geographical area. At the Agreement Date each phase will be subject to its own separate CfD Agreement. The standard CfD Terms and Conditions will also apply with any necessary phasing-specific amendments achieved through the relevant CfD Agreement. Once a Start Date for Phase 1 has been triggered all Phases will then, for the most part, operate as separate CfD Projects.

26.4. Such Agreements can either be signed by separate legal entities, or all can be signed by the same developer. Following either case, the legal separation of the Phases after the Phase 1 Start Date shall subsist. This structure has been developed to reduce the risk that having a single signatory and CfD Agreement across a phased project would act as a barrier to the financing of larger offshore wind Projects.

26.5. By enabling separate phases to have discrete CfD Terms and Conditions developers will have greater opportunity for refinancing and recycling of capital in respect of individual phases, which will reduce the overall cost of capital and the cost to consumers.

Triggering a Start Date: Capacity and Milestone Requirements

26.6. It remains a standing requirement that Phase 1 must represent at least 25% of the overall Installed Capacity Estimate for all phases. The Milestone Requirements will thus only have to be met once, at the Milestone Delivery Date attached to Phase 1. However, these will be applied to the aggregated Installed Capacity Estimate of the Phased Project, and evidence of actual spend or Project Commitments across all phases can be used to satisfy the Milestone Requirements. If the Milestone Requirements fail to be met, or if Phase 1 has been terminated for any other pre-Start Date Termination Event (other than a Change in Law Construction Event), then the Phased CfD (for all phases) can be terminated.

26.7. Once Phase 1 has met its Further Conditions Precedents, notified a Start Date and reached the 85% Installed Capacity threshold at the Longstop Date, each of the phases will operate independently for termination purposes. Should Phase 2 fail to meet its Further Conditions Precedent, for example, Phase 3 would be unaffected by any termination of Phase 2.

Capacity Adjustment

26.8. As with all offshore-wind Projects the termination threshold at the Longstop Date is set at 85% of the Installed Capacity Estimate.

26.9. Where a Project encounters a Relevant Construction Event preventing it from constructing capacity in a specific phase, it may reallocate that capacity to another phase prior to the first day of the Target Commissioning Window of the Project which has encountered the Relevant Construction Event.

26.10. This is the only provision for adjusting capacity outside of the standard Relevant Construction Event and Permitted Reduction provisions, and is designed to recognise the geographical and technical difficulties presented by offshore wind Projects.

Metering

26.11. To ensure that all CfD-supported phased projects can operate technically under their contracted terms; developers will have the opportunity to select one of two variations of the CfD Agreement. Each variation will apply a different approach to metering to support developer differences in project design, metering system build and ownership structure.

Single Metering Approach

26.12. The first option available requires the installation of a Boundary Point metering system for each of the individual phases within a Phased Project. Each phase must separately and accurately meter the net output generated and supported under its individual CfD Agreement for CfD settlement. Flows of electricity (i.e. interconnection) between phases are prohibited. That is, phases are treated as individual Projects for the purposes of metering.

Apportioned Metering Approach

26.13. The second option draws on the principle of apportionment, as applied under the Renewables Obligation scheme. Under this approach, the Metered Output of the entire Project would be recorded by at least one BSC (installed, registered and approved) Settlement meter. An apportionment methodology would then be used to assign the net generation of the Project as a whole per Settlement Unit, to each individual phase based on the overall functionality of that phase. The Project's control and monitoring and control system (i.e. SCADA system) would be used to determine how many turbines were operating during each Settlement Unit, allowing the CfD Counterparty to calculate the percentage of Metered Output attributable to each phase.

Relationship with the RO

26.14. Offshore wind Projects which are already accredited within the Renewables Obligation (RO), and which are registering wind turbines in phases under RO phasing arrangements, will be able to transfer some or all of their unaccredited wind turbines to a single CfD (subject to the provision for phasing), if successful in their Application.

26.15. Those Projects would have the option to Commission their remaining phases under the RO, the CfD (subject to the allocation of a contract) or both. In the instance where the RO offshore wind Project was successful under CfD Allocation, although the Project would technically become a Dual Scheme Facility (i.e. with phases supported under the RO and CfD), its CfD-supported phases would be subject to the CfD Phasing provisions, discussed in greater detail within Chapter 27 of this document.[15]

Allocation

26.16. Each phase must have a separate Target Commissioning Date, Target Commissioning Window and Longstop Date, although the Generator is free to have an overlap of Target Commissioning Windows across its phases. Phase 1 is to be the phase whose Target Commissioning Date will be the first to occur.

26.17. The maximum time between CfD signature and the Milestone Delivery Date for the Project as a whole will be one year in duration, the length of the Target Commissioning Window will be one

[15] https://www.gov.uk/government/consultations/transition-from-the-renewables-obligation-to-contracts-for-Difference

year in duration; and each phase will be assigned the same Strike Price, as determined by the Target Commissioning Date of the first phase.

26.18. The allocation process will be based on the capacity of the entire Phased Project as if the entire Project were being constructed in order to be commissioned the first Target Commissioning Date (i.e. the total MW of all the phases). For further details please see the draft allocation framework and associated documents.[16]

Change in Law

26.19. The Change in Law approach for Phased Projects will mirror that of the generic CfD, as far as possible. Each Phase will be entitled to individual Change in Law protection.

26.20. For the purposes of establishing the impact of a Change in Law by reference to Comparator Groups, each phase-owner can be treated as a different Generator, although where the Change in Law impact affects the Project as a whole (i.e. all two/three Phases) protection should be available to all phases in the same way.

26.21. If there is a pre-Start Date Change in Law then the basis for any compensation will be the latest information provided to the CfD Counterparty (in line with the information Provisions) on the relative construction stages at that point.

[16] https://www.gov.uk/government/publications/electricity-market-reform-contracts-for-Difference

27. Dual Scheme Facilities

PURPOSE

27.1. Dual Scheme Facilities ('DSFs') are Facilities which form part of larger Generating Stations where some or all of the Generating Units outside the Facility are accredited under the Renewables Obligations scheme ('RO'). All eligible technologies (both baseload and intermittent) can qualify to become a Dual Scheme Facility. This would include Generators seeking a CfD support for additional, distinct and separate capacity installed.

27.2. Provisions offered under RO Transitional policy also allow Biomass Co-firers with support under the RO to convert individual fossil units to full Biomass (as a Biomass Conversion technology) under the CfD scheme. Generators can also apply for a CfD as a full-station Biomass Conversion, although it would not be captured by the CfD Dual Scheme Facility policy.[17]

27.3. Similarly, offshore wind projects that are accredited under the RO and seek to register turbines in one or more phases, will have the option of applying to commission their remaining phases under the RO, the CfD or both. Where the an offshore wind project which was partially covered under the RO scheme is awarded a CfD in relation to a different phase, although the project will become a DSF (i.e. with phases supported under the RO and CfD), its CfD-supported phases will also be subject to the CfD phasing provisions, discussed in greater detail within Chapter 26 of this document.

27.4. Importantly, Generators under this circumstance will not have an option to choose from the metering approaches outlined in 26.11-14. Instead, the approach outlined in 26.12 must be implemented in order to ensure that generation and metered data associated with the different support schemes remain distinct and separate.

27.5. Under the CfD scheme, the Generator must ensure that its Facility Metering Equipment accurately records all Imported Input Electricity used by the Generating Station and separately records BM Unit Metered Volume generated by the Facility from that generated by the rest of the Generating Station.

PRIOR POSITION

27.6. In July 2013, we released a draft CfD DSF policy (covering baseload and intermittent DSFs) which sought to ensure that CfD Difference payments or RO certificates were only awarded in respect of generation from the capacity associated with its scheme. As such, DSFs were expected to treat the capacity supported by each scheme as distinct and separate, and therefore would require individual fuel data arrangements and metering systems to accurately record all electrical inputs and outputs associated with the CfD accredited capacity.

FINAL POSITION

27.7. Following close industry engagement, the policy on DSFs has been revised to provide Generators with greater flexibility to better reflect the practical constraints faced in meeting their obligations.

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[17] https://www.gov.uk/government/consultations/transition-from-the-renewables-obligation-to-contracts-for-Difference

27.8. Two separate DSF policies have been developed to account individually for:

- baseload generation, including Biomass Unit Conversions; and
- intermittent generation

27.9. The revised policies recognises that, as outlined in RO Transitional policy[18], a Generator's electrical inputs used for services shared across all station capacity cannot be accurately measured between the RO and CfD supported capacities without the installation of additional metering equipment. Therefore, both schemes will allow the apportionment of these shared inputs[19] based on Installed Capacity.

27.10. However, the baseload generation policy also undertakes a reconciliation mechanism to reconcile the initial apportionment, by drawing on the results from the fuel measurement and sampling ('FMS') process. In order to enable the reconciliation mechanism to be carried out, a DSF Generator must provide the CfD Counterparty with separate Fuel Measuring and Sampling ('FMS') data for its CfD and non-CfD capacity. This reconciliation mechanism is only undertaken by the CfD Counterparty in respect of any calendar month once the FMS data has been received in relation to such month.

27.11. Due to the absence of fuel data and the significantly smaller volumes of input electricity drawn by intermittent Generators, no reconciliation mechanism is undertaken.

27.12. Further details of these approaches are outlined on the CfD Expert Group on the Metering section of the DECC website.[20]

28. State Aid

28.1. The Government's aim is for low-carbon technologies to compete on price with other forms of generation. In the Delivery Plan published in December 2013 we clearly stated our intention to move to a competitive price discovery process for all low-carbon technologies as soon as practicable.[21] In that document, in line with guidance on State Aid from the European Commission, we set out that we intend to move to immediate competition (constrained allocation under the CfD) for well-established technologies.

28.2. Following the publication of the latest guidelines on environmental protection and energy (which require individual notification of renewable projects larger 250MW unless awarded aid by a competitive bidding process) we will continue to work with the Commission to secure approval for EMR.[22] As a result of these on-going discussions we will consider the need to make changes to the draft CfD prior to the implementation of EMR.

[18] https://www.gov.uk/government/consultations/transition-from-the-renewables-obligation-to-contracts-for-Difference

[19] Referred to as Imported Input Electricity on the CfD scheme.

[20] https://www.gov.uk/government/groups/contracts-for-difference-expert-sub-group-on-metering

[21] https://www.gov.uk/government/publications/electricity-market-reform-delivery-plan

[22] http://ec.europa.eu/competition/sectors/energy/eeag_en.pdf

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