



Department for  
Business, Energy  
& Industrial Strategy

# CAPACITY MARKET APPEALS PROCESS

Coronavirus-related modifications to appeals process for agreements awarded as a result of auctions held before 1 April 2020

Guidance



**OGL**

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# 1. Introduction

This document provides guidance on modifications to the appeals process to take into account the effects of Coronavirus for Capacity Providers with a Capacity Agreement awarded in a Capacity Auction before 1 April 2020, in relation to a particular Capacity Market Unit (CMU). It provides process guidance on Termination Notices (section 2), appeals to the Secretary of State (section 3) and summarises the relevant modifications to the appeals process introduced by the Electricity Capacity (Amendment etc.) (Coronavirus) Regulations 2020 (“the 2020 Regulations”)<sup>1</sup> to the Electricity Capacity Regulations 2014 (“the Principal Regulations”) and Chapter 18 of the Capacity Market Rules (“the Rules”) which was inserted by the Capacity Market Rules (Amendment) (No. 2) 2020<sup>2</sup> to the Rules.

Informal Keeling Schedules (interpretative aids) showing the modifications made by Schedule 2 to the 2020 Regulations to the Electricity Capacity Regulations 2014 (“the Principal Regulations”) and Chapter 18 to the rest of the Rules can be found at <https://www.gov.uk/government/publications/keeling-schedules-for-the-capacity-market-rules-and-regulations>.

This guidance should be read by all Capacity Providers holding a Capacity Agreement awarded in an auction held before 1 April 2020 who are considering making an appeal to the Secretary of State. Note that there are conditions for the modifications to the appeals process to apply, including that an appeal, if made, must be made before the end of the first or only delivery year of a Capacity Agreement<sup>3</sup>.

The modifications made to the appeals process in respect of the effects of Coronavirus will not apply to Capacity Agreements awarded after 1 April 2020 and such Capacity Providers will need to consider the Principal Regulations and the Rules to determine the applicable requirements. BEIS intends to re-issue appeals guidance ahead of the auctions in early 2021 to assist future Capacity Agreement holders.

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<sup>1</sup> <https://www.legislation.gov.uk/uksi/2020/697/contents/made>

<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/897600/The\\_Capacity\\_Market\\_Amendment\\_No.2\\_Rules\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897600/The_Capacity_Market_Amendment_No.2_Rules_2020.pdf)

<sup>3</sup> See Regulation 33(3A) read into the Regulation 33 of the Principal Regulations by regulation 4(1) and paragraph 2 of Schedule 2 to the 2020 Regulations, and Rule 6.10.1AB(a) read into the Rules by Rule 18.11.1(b).

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## 2. Termination Notices

Rules 6.10.1 and 6.10.1A of the Capacity Market Rules specify the events (“Termination Events”) that will cause a Capacity Agreement to be terminated. Should such an event occur, the Delivery Body will issue a Termination Notice to a Capacity Provider under Rule 6.10.2(a).

The Capacity Provider will receive a Termination Notice from the Delivery Body, specifying the ground for termination and informing them that the Capacity Agreement will terminate in 60 Working Days from the issue date of the Termination Notice (“the termination notice period”). In accordance with Rule 6.10.2(e), the Capacity Agreement will automatically terminate at the end of the termination notice period, unless the termination notice period is extended, or the Termination Notice is withdrawn under Rule 6.10.2(d). The email will include a Termination Notice and an appeal template.

A Capacity Provider may be issued several Termination Notices in respect of the same CMU if more than one Termination Event has arisen. A separate completed appeal template is required in respect of each Termination Notice being appealed by a Capacity Provider in respect of a CMU.

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## 3. Appealing to the Secretary of State

### 3.1. When must I submit my appeal?

As set out in regulation 33(5)(a) of the Principal Regulations as modified by the 2020 Regulations, a Capacity Provider issued with a Termination Notice may, within 30 Working Days<sup>4</sup> after the date on which the notice is given, submit an appeal to the Secretary of State if:

- the Termination Notice was given in respect of an agreement awarded in an auction that took place before 1 April 2020 (which includes agreements awarded in the T-3, T-1 and T-4 auctions held in January, February and March 2020 but which had a 'coming into force' date of 1 May 2020);
- the Delivery Body gave the Termination Notice before 1 May 2021.

For Termination Notices given in respect of Capacity Agreements where the two conditions above are not met, the Capacity Provider may only submit an appeal within 20 Working Days after the date on which the notice is given.

### 3.2. What can I appeal?

An appeal to the Secretary of State may request that his or her discretion under Regulation 33 of the Principal Regulations be exercised to:

- (a) direct a withdrawal of the Termination Notice by the Delivery Body;
- (b) extend the date that the Capacity Provider must meet the requirement specified in the Termination Notice by; or
- (c) in exceptional circumstances arising from the effects of Coronavirus (see further details at 3.2.3 below), direct that the Delivery Body terminate the agreement without a termination fee.

The types of appeal that may be made to the Secretary of State are explained in more detail below.

Please note that an appeal to the Secretary of State relates only to the possible exercise of the Secretary of State's discretion. Should a Capacity Provider wish to appeal the ground specified in a Termination Notice and/or that a Termination Notice was issued in error, the Capacity Provider should, within ten Working Days<sup>5</sup> of receiving the Termination Notice, request the Delivery Body to reconsider its decision in accordance with Regulation 69 of the Principal Regulations.

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<sup>4</sup> As per the modification read into Regulation 33 of the Principal Regulations by regulation 4(1) and paragraph 2(d) of Schedule 2 to the 2020 Regulations and read into Rules 6.10.2(b) and (c) by Rule 18.11.1(b).

<sup>5</sup> As per the modification read into Regulation 69 of the Principal Regulations by regulation 4(1) and paragraph 4 of Schedule 2 to the 2020 Regulations.

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A Capacity Provider may be able to further appeal to the Authority (Ofgem) to dispute the reconsidered decision, in accordance with Regulation 70 of the Principal Regulations, within ten Working Days<sup>6</sup> of the Delivery Body notice of the reconsidered decision.

### 3.2.1. Requesting a withdrawal of a Termination Notice

A Capacity Provider may request a withdrawal of a Termination Notice by providing evidence, in writing, that demonstrates that the circumstances giving rise to the Termination Event specified in the Termination Notice have been resolved.

### 3.2.2. Requesting an extension of the notice period

A Capacity Provider can request an extension of the termination notice period.

When requesting an extension, the Capacity Provider must specify the length of extension they are seeking. The maximum extension length a Capacity Provider can request for any agreement awarded as a result of an auction that took place before 1 April 2020 is twelve months<sup>7</sup>.

The Capacity Provider must specify the reasons for requesting an extension and include a cure plan that explains how and when they will comply with the requirements that gave rise to the Termination Notice being issued within the proposed extended timeframe.

### 3.2.3. Requesting termination of an agreement without a termination fee

Under Regulation 33(2) of the Principal Regulations, as modified by the 2020 Regulations and the Rules<sup>8</sup>, a Capacity Provider can request the Secretary of State to direct the Delivery Body to withdraw the Termination Notice and instead terminate the agreement on a temporary termination ground which does not impose a liability to pay a termination fee. The temporary termination ground, set out in Rule 6.10.1AB<sup>9</sup>, can only be used if the Capacity Provider failed to meet a requirement giving rise to a Termination Event owing to the exceptional circumstances of the Capacity Provider's particular case arising from the effects of Coronavirus.

The Secretary of State may only exercise this discretion if a Capacity Provider:

- provides written evidence satisfying the Secretary of State that their failure to meet the requirement was owing to the exceptional circumstances of their particular case which arose from the effects of the Coronavirus pandemic and the response to it; and
- acknowledges in the appeal that, if the Capacity Agreement is terminated on this ground, the Capacity Provider is not liable to pay a Termination Fee in relation to the termination and must repay any Capacity Payments paid to the Capacity Provider under the Capacity Agreement (see Rule 6.10.1AB(a)(iv) and (c)).

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<sup>6</sup> As per the modification read into Regulation 70 of the Principal Regulations by regulation 4(1) and paragraph 5 of Schedule 2 to the 2020 Regulations.

<sup>7</sup> As per the modification read into Regulation 33 of the Principal Regulations by regulation 4(1) and paragraph 2 of Schedule 2 to the 2020 Regulations and read into Rule 6.10.2(b) by Rule 18.11.1(c).

<sup>8</sup> As per Regulation 33(2)(c) read into Regulation 33 of the Principal Regulations by regulation 4(1) and paragraph 2 of Schedule 2 to the 2020 Regulations, and Rule 6.10.1AB read into the Rules by Rule 18.11.1(b).

<sup>9</sup> Read into the Rules by Rule 18.11.1(b).

The temporary termination ground does not apply in relation to the effects of Coronavirus on a proposed or actual cure plan or other consequential efforts to address a Termination Event specified in a Termination Notice which was issued other than due to the exceptional circumstances of the Capacity Provider's particular case arising from the effects of Coronavirus.

Each appeal will be determined on its individual circumstances. The Secretary of State will need to consider the law relating to State aid in deciding whether to exercise this discretion, given that for most Termination Events a financial penalty would normally be payable.

The modifications made to the appeals process in respect of the effects of Coronavirus apply to appeals made before the end of the first or only delivery year of a Capacity Agreement<sup>10</sup>. Table 1 shows the latest date by which an appeal will need to be sent to BEIS by a particular type of Capacity Agreement holder to be considered by the Secretary of State.

**Table 1: Appeals in respect of a Capacity Agreement awarded as a result of a Capacity Auction held before 1 April 2020**

<b>Agreement</b>	<b>Last date appeal may be submitted to BEIS applying modified Regulations and Rules</b>
<b>T-1 for Delivery Year 2019/20</b>	<b>30 September 2020</b>
T-4 for Delivery Year 2019/20	30 September 2020
T-1 for Delivery Year 2020/21	30 September 2021
T-4 for Delivery Year 2020/21	30 September 2021
T-4 for Delivery Year 2021/22	30 September 2022
T-3 for Delivery Year 2022/23	30 September 2023
T-4 for Delivery Year 2023/24	30 September 2024

<sup>10</sup> See Regulation 33(3A)(b) read into the Regulation 33 of the Principal Regulations by regulation 4(1) and paragraph 2 of Schedule 2 to the 2020 Regulations, and Rule 6.10.1AB(a)(v) read into the Rules by Rule 18.11.1(b) and Rule 6.10.2(cc) read into the Rules by Rule 18.11.1(e).



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## 3.3. Frequently asked questions

### 3.3.1. Can I make different types of appeal (e.g. withdrawal, extension) when submitting an appeal against a single Termination Notice?

No, only one type of appeal can be made for each Termination Notice.

### 3.3.2. How do I submit an appeal?

Appeals should be submitted by email to:

[CMappeals@beis.gov.uk](mailto:CMappeals@beis.gov.uk)

### 3.3.3. What happens if my appeal is unsuccessful?

A Capacity Agreement will automatically terminate on the date specified in the Termination Notice (unless the Termination Notice is withdrawn or extended by the Delivery Body under Rule 6.10.2(d)).

### 3.3.4. Can I submit another appeal if I am not successful the first time?

No, you can only appeal once to the Secretary of State in respect of each Termination Notice.

### 3.3.5. What happens if I don't appeal?

If no appeal is submitted to the Secretary of State, the Capacity Agreement will automatically terminate at the end of the 60 Working Day period from the date on which the Termination Notice is given (unless the Termination Notice is withdrawn or extended by the Delivery Body under Rule 6.10.2(d)). In most circumstances, a termination fee will be incurred (as set out in Rule 6.10.3) and repayment of capacity payments required (Rule 6.10.3A).

Note that the 60 Working Day termination notice period has not been modified by the modifications made to the Rules in respect of the effects of Coronavirus.

Once a Capacity Agreement has automatically terminated, it is not possible to make an appeal seeking the Secretary of State to exercise his or her discretion under Regulation 33 of the Principal Regulations to extend the termination notice period or direct the Delivery Body to withdraw the Termination Notice.

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### 3.3.6. What will the arrangements be for Capacity Agreements won in future auctions?

The modifications made to the Principal Regulations and the Rules in respect of the appeals process due to the effects of Coronavirus apply only to Capacity Agreements awarded as a result of an auction held before 1 April 2020. Unless further modifications are introduced to the Principal Regulations or the Rules, Capacity Agreements awarded in future auctions cannot rely on the modifications made in respect of the effects of the coronavirus.

### 3.3.7. What will the arrangements be for agreements after the first Delivery Year?

The modifications made to the appeals process in respect of the effects of Coronavirus apply to appeals made before the end of the first or only delivery year of a Capacity Agreement. Unless further modifications are introduced to the Principal Regulations or the Rules, the modifications made in respect of the effects of the coronavirus cannot be relied upon after in subsequent delivery years.

### 3.3.8. What are the arrangements for appeals in relation to Fossil Fuel Emissions Declarations?

The Capacity Market (Amendment) (No. 2) Rules 2020 introduced Rules in respect of carbon emissions limits which will apply to Capacity Agreements awarded in all future Capacity Auctions<sup>11</sup>. We do not expect to receive appeals before the auctions scheduled for early 2021 in respect of termination of a Capacity Agreement due to a failure to provide a Fossil Fuel Emissions Declaration so we have not covered the issue in this guidance document. The Government intends to publish a re-issued appeals guidance before the early 2021 auctions in which we intend to cover this issue in more depth.

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<sup>11</sup> New Build CMUs and Unproven DSR CMUs Prequalifying for the auctions held in early 2020 were required to provide a Fossil Fuel Emissions Declaration during Prequalification in 2019. Under Rule 2.1 of the Capacity Market (Amendment) (No. 2) Rules 2020 the new Rules introduced by the Capacity Market (Amendment) (No. 2) Rules 2020 in respect of carbon emissions only apply to Capacity Agreements awarded in future Capacity Auctions.

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