

Guidance

Electricity Market Reform dispute resolution guidance

Publication**date:** 22 October 2021**Contact:** GB Wholesale Markets**Team:** Electricity Market Reform**Email:** EMR_DR@ofgem.gov.uk

This guidance describes our process for determining disputes between National Grid Electricity System Operator as the Delivery Body (“Delivery Body”) and participants in the Capacity Market (“CM”) and Contracts for Difference (“CfD”) mechanisms.

Ofgem have a statutory role in determining certain disputes where participants disagree with a decision made by the Delivery Body. This guidance provides an overview of the dispute resolution process and the procedures we will follow in making our decision.

This guidance will be kept under review and updated when necessary. It should be read in conjunction with the latest versions of the Electricity Capacity Regulations 2014 (as amended) (“CM Regulations”)¹, the Capacity Market Rules 2014 (as amended)² and the Contracts for Difference (Allocation) Regulations 2014 (as amended) (“CfD Regulations”)³. If there is any inconsistency between these statutory documents and this guidance, then the statutory documents take precedence.

¹ The Electricity Capacity Regulations 2014 can be found here: <http://www.legislation.gov.uk/ukdsi/2014/978011116852/contents>

² The Capacity Market Rules (as amended) can be found here: <https://www.gov.uk/government/publications/capacity-market-rules>

³ The Contracts for Difference (Allocation) Regulations 2014 can be found here: <https://www.legislation.gov.uk/ukdsi/2014/2011/contents/made> The relevant amending instrument is S.I 2021/758

© Crown copyright 2021

The text of this document may be reproduced (excluding logos) under and in accordance with the terms of the [Open Government Licence](#).

Without prejudice to the generality of the terms of the Open Government Licence the material that is reproduced must be acknowledged as Crown copyright and the document title of this document must be specified in that acknowledgement.

Any enquiries related to the text of this publication should be sent to Ofgem at: 10 South Colonnade, Canary Wharf, London, E14 4PU. Alternatively, please call Ofgem on 0207 901 7000.

This publication is available at www.ofgem.gov.uk. Any enquiries regarding the use and re-use of this information resource should be sent to: psi@nationalarchives.gsi.gov.uk

Contents

Executive Summary	5
1. Introduction	8
Context and related publications	8
The Capacity Market.....	8
Contracts for Difference	8
EMR administrative parties	8
Dispute resolution	9
2. Dispute resolution procedures: Capacity Market	11
Section summary	11
Disputes eligible for dispute resolution	11
Prequalification decision.....	12
Rectification of the Capacity Market Register (“CMR”)	12
Amendments to a Capacity Agreement Notice (“CAN”).....	13
Termination notice	14
Request for review not accepted by the Delivery Body	14
How to request dispute resolution	15
The dispute resolution process	17
Timeline for determining disputes.....	17
3. Dispute resolution procedures: Contracts for Difference	20
Section summary	20
Decisions eligible for dispute resolution	20
How to request dispute resolution	20
The dispute resolution review process.....	22
Timeline for determining dispute resolution	23
4. CM and CfD dispute resolution decision	25
Section summary	25
Decision making process	25
Consequence of a successful application.....	25
Consequence of an unsuccessful application	26
Publication of the decision	26
Confidentiality.....	26
5. Appeal to the court	28

Section summary	28
Reason for a court appeal.....	28
When to make a court appeal	28
The court decision	28
Consequence of a successful appeal.....	29
Appendices.....	30

Executive Summary

The Electricity Market Reform (“EMR”) programme introduced two new mechanisms:

- the Capacity Market (“CM”), to provide incentives for investment in the overall level of reliable capacity (both supply and demand-side response) needed to ensure secure electricity supplies; and
- Contracts for Difference (“CfD”), to support new investment in low-carbon generation.

The Delivery Body is responsible for making a number of decisions related to these mechanisms, such as whether an applicant has prequalified to take part in a capacity auction.

Some of these decisions are reviewable, in that the appellant can ask the Delivery Body to look again at the decision if they think it is wrong. Where the Delivery Body upholds its original decision, the appellant can ask us⁴ to consider the Delivery Body’s decision and make a determination on the dispute.

The circumstances in which we can perform this dispute resolution role are defined in the CM Regulations and the CfD Regulations. These regulations set out:

- the decisions the Delivery Body can be asked to reconsider and which we are able to review;
- our role in resolving disputes;
- the information that must be included in any application for dispute resolution; and
- the right of appeal to the courts.

A request for dispute resolution to the Authority, in respect of the CM, has to be made within:

- **five working days**⁵ of receiving the Delivery Body’s notice of reconsidered decision.

A request for dispute resolution to the Authority, in respect of the CfD scheme, has to be made within:

⁴ References to the “Authority”, “Ofgem”, “we”, “us” and “our” are used interchangeably in this guidance. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work.

⁵ Where a working day ends at 5pm.

- **five working days**⁶ from receiving the Delivery Body's non-qualification review notice.

In both cases a request for dispute resolution to the Authority must be made in the form of an appeal notice, explaining why the appellant considers that the Delivery Body made the wrong decision. It is only possible to ask us to review a decision after the Delivery Body has been asked to review the original decision it made, and where the Delivery Body has upheld that original decision.

Our dispute resolution role is to decide whether the Delivery Body made a correct decision in line with the applicable regulations and rules, based on the information the Delivery Body had when it made its decision. This means that we are unable to take account of information or documents that the Delivery Body did not have when it made its review decision.

We will seek to make a decision on each dispute within a specified timeframe that depends on the type of dispute submitted. More information on the timeframe is provided in later chapters of this guidance. When we have made our decision, we will issue a decision notice, explaining how we reached that decision.

If we decide that the Delivery Body did not make the correct decision, we can:

- For CM prequalification decisions, direct the Delivery Body to register the relevant Capacity Market Unit ("CMU") on the Capacity Market Register as a prequalified or conditionally pre-qualified CMU.
- For all other CM reviewable decisions, substitute the Delivery Body's decision with a new decision made by the Authority.
- For CM disputes regarding whether the Delivery Body was correct to reject a request for review, return the decision to the Delivery Body and direct it to reconsider the decision in accordance with the CM Regulations.
- For CfD qualification decisions, determine that the appellant does qualify.

If we decide that the Delivery Body made the correct decision and the appellant continues to dispute that decision, the appellant can further appeal to the High Court or, in Scotland, the

⁶ Where a working day ends at 5pm.

Court of Session, in accordance with the applicable regulations. In determining whether our decision is correct, the court will consider only matters of law.

Where the Delivery Body's decision is overturned, either at the direction of the court or by us, the regulations set out what the Delivery Body needs to do to correct it. This includes safeguards to protect the appellant's participation in the relevant CM auction and CfD allocation process.

This guidance applies only to the decisions as described in Chapters 2 and 3. It will be kept under review and updated when necessary and should be read in conjunction with the regulations and rules in force at that time.

1. Introduction

Context and related publications

- 1.1. The Government's EMR programme is intended to incentivise investment in secure, low-carbon electricity generation, whilst improving affordability for consumers and ensuring security of supply. This guidance concerns two EMR mechanisms: the CM and CfD.

The Capacity Market

- 1.2. The CM provides incentives for investment in the overall level of reliable capacity or flexibility solutions needed to ensure secure electricity supplies. It is governed by a combination of the CM Regulations and The Capacity Market Rules (as amended) ("CM Rules"). The CM Regulations provide the overarching policy and design of the CM, including the powers that the Secretary of State will retain. The CM Rules provide the detail for implementing much of the operating framework in the CM Regulations, including many of the technical rules and procedures for the CM.
- 1.3. The CM Rules are made by the Secretary of State. We are responsible for the process of changing the CM Rules from the day after publication of the results of the first capacity auction.

Contracts for Difference

- 1.4. The CfD scheme supports new investment in low-carbon generation.
- 1.5. The CfD scheme is governed by a number of statutory documents. The provisions dealing with disputes are in the CfD Regulations, and the CfD Allocation Framework.

EMR administrative parties

- 1.6. Delivery of EMR is supported by a number of administrative parties:
 - **National Grid Electricity System Operator as the EMR Delivery Body ("Delivery Body")**, which administers both the CM and CfD mechanisms.
 - **Low Carbon Contracts Company Ltd**, a private company wholly owned by the Government, which acts as the counterparty to the contracts – entering into them

when directed by government or when it receives notification from the Delivery Body of a person's eligibility for a contract.

- **Electricity Settlements Company Ltd**, the settlement body which makes capacity payments and retains accountability for, and control of, the CM settlement process.
- **EMR Settlement Ltd**, the settlement agent which settles CfDs on behalf of the Low Carbon Contracts Company Ltd and capacity agreements on behalf of the Electricity Settlements Company Ltd.

Dispute resolution

1.7. Where an appellant⁷ disagrees with a decision made by the Delivery Body that can be reviewed under the CM Regulations or CfD Regulations it has the right to ask it to review that decision (referred to as a "Tier 1 dispute"). Where the Delivery Body decides not to change its decision, the appellant can ask us to seek to resolve the dispute⁸ (referred to as a "Tier 2 dispute"). The circumstances in which we can perform our Tier 2 dispute resolution role are defined in the CM Regulations and the CfD Regulations. These regulations set out:

- the decisions the Delivery Body can be asked to reconsider and which we are able to review;
- our role in resolving disputes;
- the information that must be included in any application for dispute resolution; and
- the right of appeal to the courts.

⁷ For the purpose of this guidance, "appellant" means an applicant for, or participant in, the capacity market, as defined in Regulation 68 of the CM Regulations, or an applicant for CfD qualification

⁸ The CM Regulations and CfD Regulations refer to "appeals" and "disputes". We refer to both when we say "dispute" and "dispute resolution" in this guidance

- 1.8. This guidance applies only to the decisions as described in Chapters 2 and 3 of this guidance. It does not apply to any other dispute.
- 1.9. In addition, this guidance does not apply to actions taken by the settlement body⁹ under Parts 6 and 7 of the CM Regulations (i.e. payments and credit cover); the procedures for disputing these decisions are set out in Part 10, Chapter 2 of the CM Regulations and Schedule 5 of the CM Rules.

⁹ As defined in regulation 80 of the 2014 Regulations (as amended)

2. Dispute resolution procedures: Capacity Market

Section summary

A description of the procedures we will adopt in resolving disputes between CM participants and the Delivery Body. It covers decisions made by the Delivery Body that can be reviewed under the CM Regulations.

Disputes eligible for dispute resolution

2.1. The ‘reviewable decisions’ that are eligible for dispute resolution are defined in Regulation 68 of the CM Regulations. These are:

Decision	Applies to
Prequalification decision	The applicant or secondary trading entrant ¹⁰ in relation to whom the decision has been made
Rectification of the Capacity Market Register (“CMR”)	The person who made a request for rectification in accordance with capacity market rules.
Amendments to a Capacity Agreement Notice (“CAN”)	The capacity provider to whom a CAN has been issued, and who has made a request to amend it in accordance with capacity market rules.
Issue of a termination notice or notice of intention to terminate a capacity agreement	The capacity provider to whom the notice has been issued.

¹⁰ Whilst there are some minor differences in the application process for secondary trading entrants, all applications are subject to the same dispute procedure outlined in this guidance.

- 2.2. In the event of any conflict or inconsistency between the relevant Regulations, the Rules or any guidance including this document, the following order of precedence must apply:
- the Regulations prevail over the Rules and any guidance document; and
 - the Rules prevail over any guidance document.

Prequalification decision

- 2.3. Chapter 3 of the CM Rules explains the process for applying to prequalify to participate in a CM auction. It specifies how an application must be submitted and the information that must be provided alongside or in an application. This includes both information to be included in all applications and information that is specific to different categories of applications (for example a new build Capacity Market Unit (“CMU”)).
- 2.4. The Delivery Body must, for each CMU for which an application is received, determine whether it prequalifies for the Capacity Auction. The process the Delivery Body follows in making a prequalification decision is set out in Chapter 4 of the CM Rules. In particular, Rule 4.4.2 sets out the circumstances in which the Delivery Body must not prequalify a CMU. In some circumstances, a decision to prequalify an applicant will be conditional on the applicant providing further evidence regarding, for example, credit cover or planning consent (resulting in a “conditional prequalification decision”).
- 2.5. Where the Delivery Body decides that an applicant has not prequalified, the applicant can ask the Delivery Body to review that decision. If the Delivery Body decides not to change its decision, the applicant can submit a Tier 2 appeal to us.

Rectification of the Capacity Market Register (“CMR”)

- 2.6. Chapter 7 of the CM Rules explains how the Delivery Body will establish and maintain the CMR. The CMR is determinative of the prequalification status and de-rated capacity of a CMU and of the existence and terms of any capacity agreement. The Delivery Body is required to update the CMR following any change to a CMU’s status – for example after an auction or subsequent CMU trading.
- 2.7. Where a capacity provider believes an entry related to its CMU should be amended or removed, it can ask the Delivery Body to rectify the CMR accordingly. If the Delivery Body decides not to make the requested changes, the capacity provider can ask for a

review of that decision. If following this review the Delivery Body still thinks that the changes to the CMR should not be made, the capacity provider can submit a dispute resolution request to us.

- 2.8. The dispute resolution process in relation to rectification of the CMR is designed only to consider whether changes to the CMR are needed to correct factual inaccuracy. It is not a process for challenging any actions or decisions that led to the entry being made, for example if the applicant does not agree with any aspect of the auction result.

Amendments to a Capacity Agreement Notice (“CAN”)

- 2.9. Chapter 6 of the CM Rules sets out the procedures the Delivery Body must follow in issuing a CAN. A CAN is a notification issued to a capacity provider containing detail regarding its capacity agreement. Where an applicant is successful in a CM auction the Delivery Body must issue a CAN within 20 working days of the auction results day. Chapter 6 sets out further provisions that apply to any changes to the CAN, including where a capacity provider believes it contains a mistake (see CM Rules 6.3.3 to 6.3.7 in particular).
- 2.10. Chapter 6 of the CM Rules includes the Delivery Body’s process for determining requests for changes to a CAN. If the Delivery Body decides not to make the requested changes, the capacity provider and the Delivery Body have 20 working days to try to resolve the disagreement. If they fail to do so, the capacity provider can start the formal dispute resolution process – this means asking the Delivery Body to review its decision and then, if appropriate, applying to us for dispute resolution.
- 2.11. As is the case with the CMR, the dispute resolution process is designed only to consider whether changes to a CAN are needed to correct factual inaccuracy.

Termination notice¹¹

- 2.12. The procedures for terminating a capacity agreement are set out in Chapter 6 of the CM Rules. In particular, Rule 6.10.1 lists “termination events” - if any of these occur, the Delivery Body must issue a termination notice.
- 2.13. Where a termination notice has been issued, the capacity provider can ask the Delivery Body to review that decision. Where the Delivery Body does so and decides not to change it, the provider can submit a dispute resolution request to us.
- 2.14. In addition to this dispute resolution procedure, once a termination notice has been issued, a capacity provider can also make representations to the Secretary of State. Under Regulation 33(5) of the CM Regulations, these representations must be made within 20 working days of the date the termination notice was issued, and can request that the termination notice be withdrawn or its notice period extended.
- 2.15. Capacity providers cannot use this representation to the Secretary of State to dispute whether the termination event had or had not occurred. In that respect it is entirely separate to and independent of the dispute resolution process covered in this guidance. We will carry out our review of the Delivery Body’s decision independently from the Secretary of State.

Request for review not accepted by the Delivery Body

- 2.16. In addition to ‘reviewable decisions’, if the Delivery Body decides that a request for review was not submitted in accordance with Regulation 69(2) of the CM Regulations, which includes requirements as to the content of a valid review application, it must notify the appellant that the request has been rejected, giving the reasons why.
- 2.17. If an appellant disagrees with the Delivery Body’s decision not to review, it can refer the decision to us for dispute resolution. In such cases, we will consider only whether the Delivery Body was correct to decide not to review its original decision. If we agree with the appellant, we will direct the Delivery Body to review its original decision. We will not

¹¹ For the purpose of this guidance “termination notice” includes “notice of intention to terminate”. The latter refers to a notice issued under rule 6.82 where a new build CMU has failed to reach its minimum completion requirement.

consider any substantive matter about the original application. However, if the subsequent review by the Delivery Body does not change the original decision the appellant can still submit a dispute resolution request to us.

How to request dispute resolution

2.18. Our dispute resolution process can begin only once the Delivery Body has reconsidered its decision (“Tier 1 review”) and issued a reconsidered decision notice (“Tier 1 decision notice”); or where the Delivery Body has informed the appellant that it has not accepted an application for Tier 1 review.

2.19. A request may then be made by the appellant by submitting an appeal notice to us within five working days after the date on which the appellant received the Delivery Body’s Tier 1 decision notice.

2.20. Regulation 70(3) of the CM Regulations provides that the appeal notice must contain:

- a concise statement identifying the relevant part of the Delivery Body’s decision in dispute;
- a concise statement of the facts on which the appellant relies;
- a summary of the grounds for disputing the Delivery Body’s decision;
- a succinct presentation of the arguments supporting each of the grounds for dispute; and
- a schedule listing the documents submitted with the appeal notice.

2.21. Regulation 70(4) of the CM Regulations provides that the appeal notice must also be accompanied by a copy of:

- the Tier 1 decision notice;
- the request for a Tier 1 review;

- any information or evidence submitted to the Delivery Body to support the request for a Tier 1 review;
- in the case of a prequalification dispute, a copy of the original prequalification decision, and any information or documents provided by the appellant as part of the prequalification application, which are relevant to the dispute;
- in the case of a termination dispute, the termination notice and any information or documents provided by the appellant before the notice was issued, which are relevant to the dispute; and
- any other relevant documentary evidence which the appellant wishes to rely on in support of its appeal which was provided to the Delivery Body before the Tier 1 review was made.

2.22. Where an appellant intends to make an application for dispute resolution in respect of more than one reconsidered decision, the appellant must submit one appeal notice per reconsidered decision, together with the accompanying information listed above.

2.23. Where the Delivery Body decide not to review a decision on the basis that the request did not comply with Regulation 69(2), the appellant can include with the appeal notice evidence that it did comply with that Regulation.

2.24. No other information or documentary evidence should be supplied with the appeal notice.

2.25. To help us manage the dispute process in a timely manner we expect appeal notices to be submitted electronically. A copy of the Capacity Market appeal notice is at **Appendix 1**. The latest version of the form is available from our website¹². If you experience any difficulty accessing or uploading your application, you should contact us immediately at EMR_DR@ofgem.gov.uk so we can discuss alternative arrangements for submission.

2.26. It is important that an appeal notice is completed in full. We may inform appellants during the appeal submission window if we notice that an obvious error or omission has been made, but we are under no obligation to do so. Where an appeal notice is

¹² <https://www.ofgem.gov.uk/publications/applying-electricity-market-reform-emr-tier-2-dispute>

incomplete, we may not be able to make a decision and it may not be possible for the appellant to submit an amended application within the statutory time limits.

- 2.27. The appeal notice should also include correct and up to date contact and business details to enable us to consider the dispute in an efficient and timely manner.

The dispute resolution process

- 2.28. Once we receive the appeal notice we will tell the Delivery Body that an application for dispute resolution has been submitted. We may ask the Delivery Body to provide us with further information relating to the disputed decision, which we consider necessary to determine the dispute. The Delivery Body are required to provide us with that information within five working days of receiving our request.

- 2.29. Our review will be of the decision made by the Delivery Body not to change its original decision or to refuse a request for Tier 1 review. In considering the dispute, we will look at whether the Delivery Body had applied the CM Regulations and CM Rules correctly. We will decide whether it was correct for the Delivery Body to make the decision it did, based on the evidence before it when it made the decision.

- 2.30. To help us make our decision, we may appoint an independent person to consider the application, or any matter relating to it (for example to seek technical or legal advice); we may also use external resources to manage the decision process if necessary. However, we will always remain responsible for our final decision.

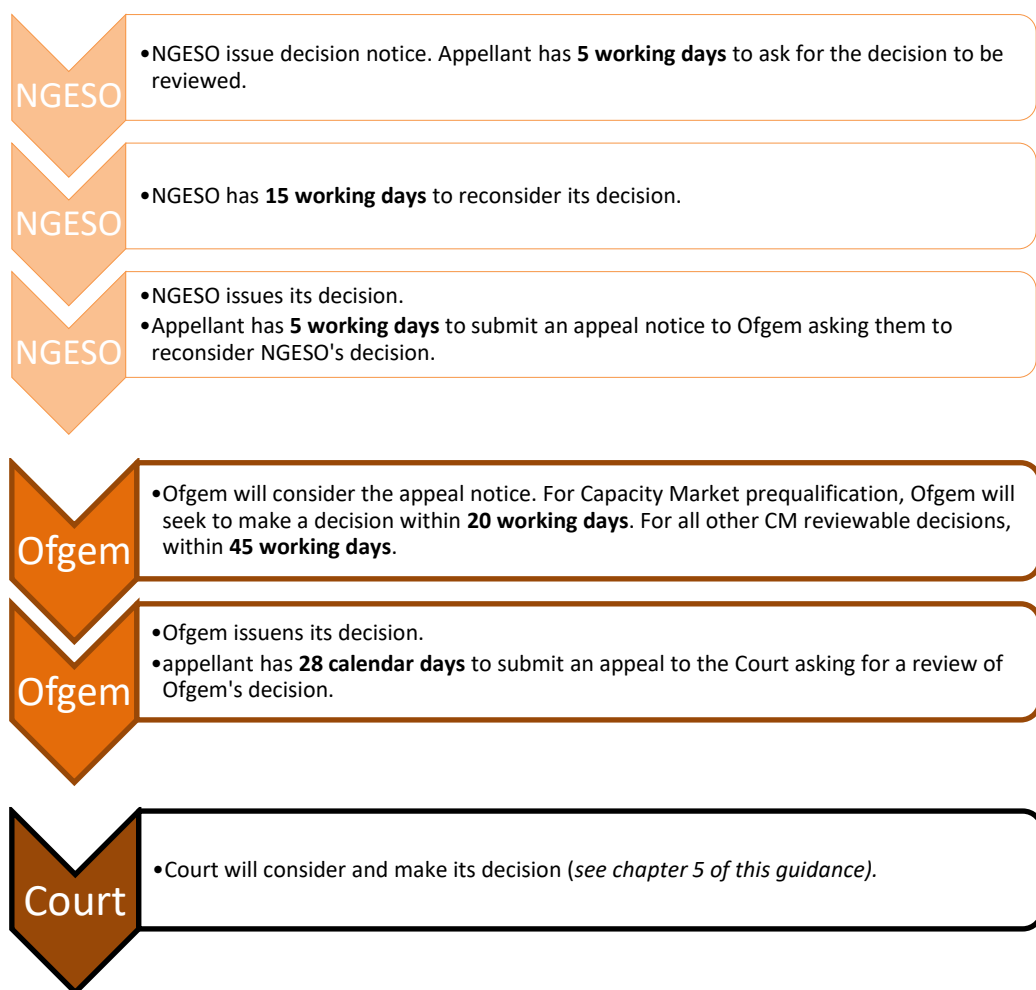
- 2.31. Chapter 4 of this guidance explains how we will make our decision and the consequences of it.

Timeline for determining disputes

- 2.32. In accordance with Regulation 70(2) of the CM Regulations, an appeal notice must be submitted to us within five working days of the date on which the appellant received a Tier 1 decision notice from the Delivery Body. We will not be able to accept applications after this date, nor can we accept a request for the deadline to be extended.

- 2.33. Once we have received an appeal notice, and provided it is within the statutory time limit for doing so, we will send an electronic acknowledgement of receipt within one working day.
- 2.34. For prequalification decisions we will seek to make our decision within whichever is the later of:
- 20 working days of receiving all information required to reach a robust, rational and procedurally fair decision.
 - 20 working days of the deadline for receipt of disputes (assuming all the information is received by then).
 - In all other cases we will seek to make our decision on CM reviewable decisions within 45 working days of receipt of that information.
- 2.35. We may exceed the above targets if we determine that this would be necessary for example: (a) to enable us to reach a robust, rational and procedurally fair decision; or (b) as a result of the volume of concurrent applications for dispute resolution we have received.
- 2.36. We will inform both parties to the dispute whether, and to what extent, we need more time to make a decision.

Figure 1: Capacity Market dispute resolution indicative timelines¹³. Please note that the below figure is a guide and providers should read it in conjunction with the latest versions of the CM Regulations and CM Rules. If there is any inconsistency between these statutory documents and this guidance, then the statutory documents take precedence



¹³ These timelines are explained in more detail at paragraphs 2.32 to 2.35 of this guidance.

3. Dispute resolution procedures: Contracts for Difference

Section summary

The procedures we will adopt in resolving disputes between applicants and the Delivery Body about CfD qualification decisions.

Decisions eligible for dispute resolution

- 3.1. The procedure by which the Delivery Body determines whether an applicant qualifies for a contract is set out in Part 4 of the CfD Regulations. Part 4 also explains the process by which applicants can ask the Delivery Body to review a qualification decision. Part 7 of the CfD Regulations describes how any dispute over qualification is resolved.
- 3.2. The dispute resolution procedure in this chapter only applies to qualification decisions made by the Delivery Body under Part 4 of the CfD Regulations. It does not apply to any dispute that may arise from the allocation process or following the award of a contract

How to request dispute resolution

- 3.3. Our dispute resolution process can begin only when the Delivery Body has undertaken a non-qualification review (“Tier 1 review”) and issued a non-qualification review notice (“Tier 1 decision notice”).
- 3.4. A request may be made by a CfD applicant by submitting an appeal notice to us within 5 working days after the date on which the appellant received the Delivery Body’s Tier 1 decision notice.
- 3.5. Regulation 44(1) of the CfD Regulations provides that the appeal notice must contain:
 - a concise statement identifying the relevant part of the Delivery Body’s decision in dispute and setting out the facts on which the appellant relies;
 - a summary of the grounds for disputing the Delivery Body’s decision;

- a succinct presentation of the arguments supporting each of the grounds for dispute; and
- a schedule listing the documents submitted with the request for a Tier 1 review.

3.6. Regulation 44(2) of the CfD Regulations provides that the appeal notice must be also accompanied by a copy of:

- the non-qualification determination;
- the Tier 1 decision notice;
- any information or evidence submitted to the Delivery Body to support the Tier 1 review by the Delivery Body;
- any other relevant documentary evidence which the appellant wishes to rely on in support of its appeal which was provided to the Delivery Body before the Tier 1 review was made; and
- evidence to show what evidence was before the Delivery Body when the Tier 1 review was made. For example, if the applicant is seeking to demonstrate that the Delivery Body had a document in its possession related to the reviewable decision that was not taken into account by the Delivery Body in making that decision.

3.7. No other information or documentary evidence should be supplied with the appeal notice.

3.8. Where an appellant intends to make an application for dispute resolution in respect of more than one reconsidered decision, the appellant must submit one appeal notice per reconsidered decision, together with the accompanying information listed above.

3.9. A copy of the appeal notice must be sent to the Delivery Body via the EMR Delivery Portal (the "Portal") at the same time it is sent to us.

- 3.10. Appeal notices should be sent to our EMR Dispute Resolution mailbox¹⁴. A copy of the CfD appeal notice is at **Appendix 2**. The latest version of the form is also available from our website¹⁵. If you experience any difficulty accessing or uploading your application, you should immediately contact us via the EMR Dispute Resolution mailbox (EMR_DR@ofgem.gov.uk) so that we can discuss any alternative arrangements for submission.
- 3.11. It is important that an appeal notice is completed in full. We may inform appellants during the appeal submission window if we notice that an obvious error or omission has been made, but we are under no obligation to do so. Where an application is incomplete, we may not be able to make a decision and it may not be possible for the appellant to submit an amended application within the statutory time limits for doing so.
- 3.12. The appeal notice should also include correct and up to date contact and business details to enable us to consider the dispute in an efficient and timely manner.

The dispute resolution review process

- 3.13. Once we have received the appeal notice we will tell the Delivery Body that an application for dispute resolution has been submitted and state that they may reply to that application. A reply must be given by the Delivery Body to both us and the appellant no later than five working days after the date we notify them that an appeal notice has been submitted.
- 3.14. Our review will be of the decision made by the Delivery Body not to change its original decision. In that respect, applicants may only be able to provide clarification on evidence submitted as part of their original Application if they believe the Delivery Body has misunderstood the information provided. In considering the dispute, we will look at whether the Delivery Body had applied the CfD Regulations and CfD Allocation Framework correctly. We will decide whether it was correct for the Delivery Body to make the decision it did, based on the evidence before it when it made the decision.

¹⁴ EMR_DR@ofgem.gov.uk

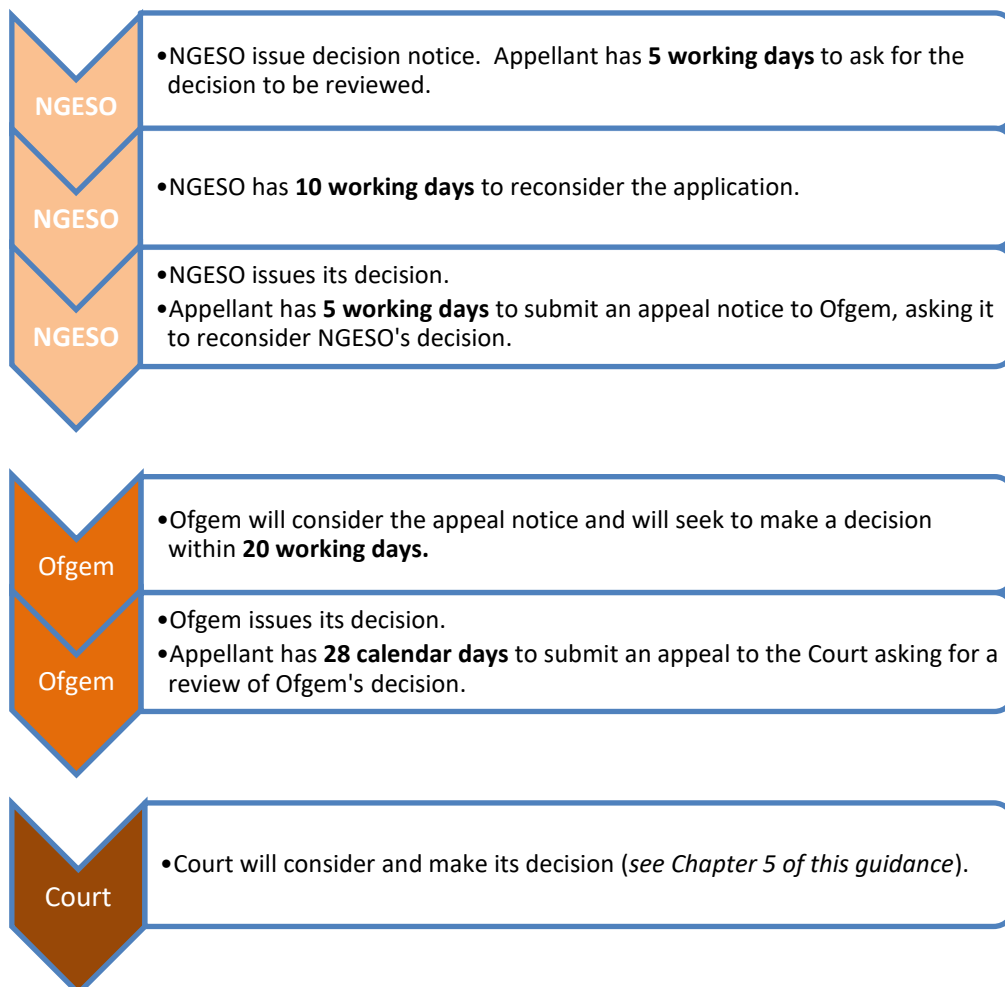
¹⁵ <https://www.ofgem.gov.uk/publications/applying-electricity-market-reform-emr-tier-2-dispute>

- 3.15. To help us make our decision we may appoint an independent person to consider the application, or any matter relating to it (for example to seek technical or legal advice); we may also use external resources to manage the decision process if necessary. However, we will always remain responsible for our final decision.
- 3.16. Chapter 4 of this guidance explains how we will make our decision and the consequences of it.

Timeline for determining dispute resolution

- 3.17. In accordance with Regulation 43(2) of the CfD Regulations, an appeal notice must be submitted to us within five working days of the date on which the appellant received a Tier 1 decision notice from the Delivery Body. We will not be able to accept applications after this date nor can we accept a request for the deadline to be extended.
- 3.18. Once we have received an appeal notice, and provided it is within the statutory time limit for doing so, we will send an electronic acknowledgement of receipt within one working day.
- 3.19. We will seek to make our decision within whichever is the later of:
- 20 working days of receiving a qualification appeal from the applicant and any further relevant information from the Delivery Body.
 - 20 working days of the deadline for receipt of the qualification appeal.
- 3.20. We may exceed the above targets if we determine that this would be necessary for example (a) to enable us to reach a robust, rational and procedurally fair decision; or (b) as a result of the volume of concurrent applications for dispute resolution we have received.
- 3.21. We will inform both parties to the dispute whether, and to what extent, we need more time to make our decision.

Figure 2: Contracts for Difference indicative appeals timeline overview



4. CM and CfD dispute resolution decision

Section summary

An overview of the decision making process, how we will explain our decision, the effect of that decision and how it is communicated.

Decision making process

- 4.1. We will look at the decision made by the Delivery Body when it reviewed its original decision. -That means we will consider whether it was correct in deciding not to change its original decision on review based on the information that was before it.
- 4.2. The information we will take into account is the information identified in paragraphs 2.20 and 2.21 (in the case of Capacity Market appeals) and 3.5 and 3.6 (in the case of CfD appeals) of this guidance.
- 4.3. We will convey our final decision via a decision notice. -The decision notice will be dated, and will set out in detail what decision we have reached, how we reached it, and what information we took into account when making that decision. In particular, we will detail in the decision notice any information we took into account when making our decision that was not given to us by the appellant. A copy will go to the appellant and to the Delivery Body (and in the case of a capacity market decision, the settlement body).

Consequence of a successful application for dispute resolution

- 4.4. If our review of a **Capacity Market prequalifying decision** finds in favour of the appellant, we will direct the Delivery Body to register the relevant CMU on the CMR as a prequalified CMU. Regulation 73 of the CM Regulations explains how this will affect participation in the Capacity Market.
- 4.5. If our review of a **CMR or CAN decision** finds in favour of the appellant, we can replace the Delivery Body's decision with a new decision.

- 4.6. If our review of the issuing of a **termination notice or notice of intention to terminate** finds in favour of the appellant, we can replace the Delivery Body's decision with a new decision.
- 4.7. If our review of a **Contracts for Difference qualification decision** finds in favour of the appellant, we can determine that the appellant does qualify. Regulations 51 and 52 of the CfD Regulations explain how this will affect participation in the CfD allocation process if the relevant allocation round has already commenced.
- 4.8. If our review of a **decision by the Delivery Body to reject an application for a CM Tier 1 review on the ground that it had not been properly made** finds in favour of the appellant, we can direct the Delivery Body to undertake a Tier 1 review.

Consequence of an unsuccessful application for dispute resolution

- 4.9. Once we have issued a decision notice we will not consider the dispute any further. Where we decide not to change the Delivery Body's decision the appellant can ask the court to reconsider our decision¹⁶. Information on the court process is at Chapter 5 of this guidance.

Publication of the decision

- 4.10. We will publish our decision on the EMR section of our website.¹⁷

Confidentiality

- 4.11. Both parties will normally be named in published decisions. If any party to a decision wishes to exclude any matter from publication for example personal or commercially sensitive information, it should make representations to the case officer within 10 working days of the issue of the decision. After this period the decision will be placed on

¹⁶ The applicant may make an appeal to the High Court or, in Scotland, the Court of Session, on a point of law.

¹⁷ <https://www.ofgem.gov.uk/electricity/wholesale-market/market-efficiency-review-and-reform/electricity-market-reform-emr>

the website or otherwise made publicly available in the form in which it was issued to the parties.

5. Appeal to the court

Section summary

The circumstances in which an appellant can ask a court to reconsider a decision made by us, and the steps that must be taken before making such an application

Reason for a court appeal

- 5.1. The appellant may appeal to the court¹⁸ against a decision we have made. The court will consider only whether the decision was correct in law.

When to make a court appeal

- 5.2. An appeal to the court can be made only once we have made our decision and issued a decision notice.
- 5.3. An application to the court must be made within 28 calendar days of the date of our decision notice as outlined in Regulation 72 of the CM Regulations. The timescale for deciding an appeal is a matter for the court.

The court decision

- 5.4. For a **Capacity Market prequalifying decision**, the court may:
- (a) dismiss the appeal,
 - (b) direct the Delivery Body to register the CMU on the CMR as a prequalified CMU, or
 - (c) remit the matter to the Delivery Body with a direction to reconsider it and make a new decision in accordance with the findings of the court.

¹⁸ In this context “the court” means—(a) the High Court; or (b) in Scotland, the Court of Session

- 5.5. The court may not, however, order a capacity auction to be cancelled, postponed or suspended pending the determination of an appeal.
- 5.6. For a **termination notice, CMR or CAN decision** the court may:
- (a) dismiss the application, or
 - (b) remit the matter to the Delivery Body with a direction to reconsider it and make a new decision in accordance with the findings of the court.
- 5.7. For a **Contracts for Difference qualification decision** the court may:
- (a) dismiss the application,
 - (b) decide that the application is a qualifying application,
 - (c) remit the application to us to reconsider the non-qualification decision, or
 - (d) grant such further or other remedy as it thinks fit.

Consequence of a successful appeal

- 5.7. Where the court finds in favour of an appellant and directs the Delivery Body to change its decision, or where the court asks the Delivery Body to reconsider its decision and the Delivery Body subsequently changes it, Regulation 73 of the CM Regulations and Regulations 51 and 52 of the CfD Regulations explain the consequences for the appellant's participation in the CM and CfD mechanisms.

Appendices

Index

Appendix	Name of Appendix	Page No.
1	Capacity Market Dispute Resolution Appeal Notice	31
2	Contracts for Difference Dispute Resolution Appeal Notice	34

Appendix 1 – Capacity Market Draft appeal notice

The final version of the Capacity Market appeal notice and the Contracts for Difference appeal notice are also available on the EMR section of the Ofgem website¹⁹

Capacity Market Appeal Notice

Note: If you are making a dispute for more than one CMU, please complete one application form for each CMU.

Application for review of a decision made by National Grid Electricity System Operator as the Delivery Body (“the Delivery Body”), pursuant to Regulation 70 of The Electricity Capacity Regulations 2014 (as amended).

The following three fields should be the same as your entry in the CM Register.

Unique CMU Identifier	
CM Unit Name	
Name of applicant	

The following should be taken from the ‘Notice of a Reconsidered Decision’ by the Delivery Body:

Dispute Reference Number	
--------------------------	--

Please complete these fields carefully:

Contact name(s)	
Contact Telephone(s)	
Contact E-Mail(s)	
(Important: we will correspond via email so this must be entered correctly)	

Please complete the following fields. Failure to do so may result in your dispute being rejected.

¹⁹ <https://www.ofgem.gov.uk/publications/applying-electricity-market-reform-emr-tier-2-dispute>

a. Please provide a concise statement identifying the relevant part of the Delivery Body's decision in dispute.

b. Please provide a concise statement of the facts on which you rely.

c. Please provide a summary of the grounds for disputing the Delivery Body's decision.

d. Please provide a succinct presentation of the arguments supporting each of the grounds for dispute.

Supporting evidence:

e. Please provide a schedule listing the documents submitted with this appeal notice

This appeal notice must be accompanied by all the relevant documents listed in Regulation 70(4) of the Electricity Capacity Regulations 2014.

- A copy of the notice given by the Delivery Body under Regulation 69(3) or (4);
- the request to the Delivery Body for a reconsidered decision;
- any information or evidence submitted to the Delivery Body to support the request for a reconsidered decision;
- in the case of a **prequalification dispute** , a copy of the original Prequalification Decision, and any information or documents provided by the appellant as part of the prequalification application, where are relevant to the dispute;
- in the case of a **termination dispute**, the termination notice and any information or documents which are relevant to the dispute;
- any other relevant documentary evidence which the appellant wishes to rely on in support of its appeal which was provided to the Delivery Body before the reconsidered decision was made; and
- evidence to show what evidence was before the Delivery Body when the reconsidered decision was made.

Failure to comply with these requirements may result in your dispute being rejected.

Appendix 2 – Contracts for Difference Draft appeal notice

Contracts for Difference Appeal Notice

Note: If you are making a dispute for more than one CMU, please complete one application form for each CMU.

Application for an appeal against a non-qualification determination made by National Grid Electricity System Operator as the Delivery Body (“the Delivery Body”), pursuant to Regulation 43(1) of The Contracts for Difference (Allocation) Regulations (as amended) 2014.

Please note all fields in this application form are mandatory.

The following fields should be the same as details entered on your non-qualification review application:

Application ID:	
Name of CfD Unit:	
Company/Applicant:	
Contact name of applicant:	
E-Mail address of applicant: (Important: we will correspond via email so this must be entered correctly)	
Telephone contact number:	
Date of Non-Qualification Determination:	

Please complete the following fields. Failure to do so may result in your dispute being rejected.

a. Please provide a concise statement identifying the relevant part of the Delivery Body’s decision in dispute.

b. Please provide a concise statement of the facts on which you rely.

c. Please provide a concise statement of the facts on which you rely.

d. Please provide a concise statement of the facts on which you rely.

e. Please provide a schedule listing the documents submitted with this appeal notice.

This appeal notice must be accompanied by all relevant documents set out in Regulation 44(2) of The Contracts for Difference (Allocation) Regulations 2014.

The following documents must be submitted with this appeal:

- The original non-qualification determination;
- The non-qualification review notice;
- Any information or evidence submitted to the Delivery Body to support the non-qualification review by the Delivery Body;
- Any other relevant documentary evidence which the appellant wishes to rely on in support of its appeal which was provided to the Delivery Body before the Reconsidered Decision was made;
- Evidence to show what evidence was before the Delivery Body when the Reconsidered Decision was made.

Failure to comply with these requirements may result in your dispute being rejected.