

DRAFT STATUTORY INSTRUMENTS

**2014 No.**

**The Electricity Capacity Regulations 2014**

**PART 10**

Dispute resolution and appeals

**CHAPTER 1**

Delivery Body decisions

**Delivery body reviewable decisions**

**68.**—(1) In this Chapter, a “delivery body reviewable decision” means a decision by the Delivery Body under capacity market rules of a kind specified in the first column of the following table.

- (2) A dispute or appeal in relation to a delivery body reviewable decision may only be brought—
- (a) by a person specified in the corresponding entry in the second column of the table (an “affected person”); and
  - (b) in accordance with this Chapter.

**Table**

<i>Decision</i>	<i>Person who may bring dispute or appeal</i>
A prequalification decision.	The applicant or secondary trading entrant in relation to whom the decision has been made.
A refusal of a request for rectification of the capacity market register on the basis of factual inaccuracy.	The person who made a request for rectification in accordance with capacity market rules.
A refusal of a request to amend a capacity agreement notice on the basis of factual inaccuracy.	The capacity provider to whom a capacity agreement notice has been issued, and who has made a request to amend it in accordance with capacity market rules.
The issue of a termination notice, or a notice of intention to terminate a capacity agreement.	The capacity provider to whom the notice has been issued.

- (3) In the table in paragraph (2), “secondary trading entrant” has the meaning given in the Rules.

**Requesting reconsideration by the Delivery Body**

**69.**—(1) An affected person may request the Delivery Body to review a delivery body reviewable decision.

- (2) The request must—

- (a) be submitted in writing to the Delivery Body within 5 working days after receiving notice of the decision; and
  - (b) include each of the matters specified in sub-paragraphs (a) to (e) of regulation 70(3).
- (3) The Delivery Body must, within 5 working days after receiving a request which complies with paragraph (2)—
- (a) reconsider the matter; and
  - (b) give notice to the affected person of—
    - (i) the outcome of the reconsideration (the “reconsidered decision”); and
    - (ii) the reasons for the reconsidered decision.
- (4) The Delivery Body must, within 5 working days after receiving a request which does not comply with paragraph (2), give notice to the affected person that the request is rejected as not complying with that paragraph, and give the reason why.
- (5) Subject to regulation 87(7), in reconsidering a prequalification decision or a decision to issue a termination notice or a notice of intention to terminate, the Delivery Body must not take into account any information or evidence which—
- (a) the affected person was required by these Regulations or capacity market rules to provide to the Delivery Body before the decision was taken; and
  - (b) the affected person failed to provide in accordance with that requirement.
- (6) Subject to regulations 70 to 72, the reconsidered decision is final.

### **Appeals to the Authority**

- 70.**—(1) An affected person who has, in accordance with regulation 69(2), made a request to the Delivery Body to review a delivery body reviewable decision, may appeal to the Authority if—
- (a) the affected person disputes the reconsidered decision; or
  - (b) the request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2).
- (2) An appeal under paragraph (1) must be made by submitting an appeal notice to the Authority within 5 working days after the date on which the affected person received the notice from the Delivery Body under regulation 69(3) or (4).
- (3) An appeal notice must contain—
- (a) a concise statement identifying the relevant part of the delivery body reviewable decision in dispute;
  - (b) a concise statement of the facts on which the affected person relies;
  - (c) a summary of the grounds for disputing the delivery body reviewable decision;
  - (d) a succinct presentation of the arguments supporting each of the grounds for dispute; and
  - (e) a schedule listing the documents submitted with the appeal notice.
- (4) The appeal notice must be accompanied by—
- (a) a copy of—
    - (i) the notice given by the Delivery Body under regulation 69(3) or (4);
    - (ii) the request made to the Delivery Body for reconsideration; and
    - (iii) any information or evidence submitted to the Delivery Body in support of that request;
  - (b) in the case of an appeal relating to a prequalification decision, a copy of—

- (i) the prequalification decision; and
- (ii) any information or documents provided by the affected person to the Delivery Body as part of the application for prequalification which are relevant to the matter in dispute;
- (c) in the case of an appeal relating to a termination notice or a notice of intention to terminate, a copy of—
  - (i) the notice; and
  - (ii) any information or documents provided by the affected person to the Delivery Body before the notice was issued, which are relevant to the matter in dispute; and
- (d) any other documentary evidence which the affected person wishes to rely on in support of the appeal and which—
  - (i) was provided to the Delivery Body before the reconsidered decision was made; or
  - (ii) is needed to show what evidence was before the Delivery Body when the reconsidered decision was made.

(5) Where a request for reconsideration was rejected by the Delivery Body on the ground that it did not comply with regulation 69(2), the affected person may submit evidence to the Authority that the request did comply with that regulation.

(6) Except as provided in paragraphs (4) and (5), no other documentary evidence may be included in or submitted with the appeal notice.

### **Determination of appeal by the Authority**

71.—(1) The Authority—

- (a) must notify the Delivery Body when it receives an appeal notice under regulation 70; and
- (b) may request the Delivery Body to provide it with any information relating to the disputed decision which the Authority considers necessary to enable it to determine the appeal.

(2) The Delivery Body must provide to the Authority such of the information requested under paragraph (1)(b) as it holds within 5 working days of receiving the Authority's request.

(3) Upon receiving an appeal notice which complies with regulation 70, and any information requested from the Delivery Body, the Authority must—

- (a) subject to paragraph (4), review the reconsidered decision;
- (b) determine whether the reconsidered decision was correct on the basis of the information which the Delivery Body had when it made the decision.

(4) In a determination under paragraph (3)(b)—

- (a) the Authority must uphold the reconsidered decision if the Authority determines that it was correct on the basis described in paragraph (3)(b);
- (b) if the Authority determines that the Delivery Body incorrectly decided not to prequalify the applicant for a capacity auction in respect of a CMU, it must direct the Delivery Body to register the CMU on the capacity market register as a prequalified CMU (in which case regulation 73 applies);
- (c) in any other case, if the Authority determines that the Delivery Body's decision was incorrect it must substitute the decision that it considers the Delivery Body should have made.

(5) The Authority must give notice of its determination to the affected person, the Delivery Body and the Settlement Body.

(6) The Authority may, to assist it in determining an appeal, appoint a person independent of the Delivery Body and the affected person to consider the appeal or any matter relating to it and provide a report to the Authority; but the Authority remains responsible for determining the appeal.

(7) If the Authority determines that the Delivery Body incorrectly rejected a request for reconsideration of a decision as mentioned in regulation 70(5)—

- (a) the Authority must remit the request to the Delivery Body and direct the Delivery Body to reconsider the decision in accordance with regulation 69; and
- (b) the Delivery Body must comply with the direction.

### **Appeals to the court**

**72.**—(1) An affected person may appeal to the court against a determination under regulation 71.

(2) In paragraph (1), “the court” means—

- (a) the High Court; or
- (b) in Scotland, the Court of Session.

(3) An appeal under paragraph (1)—

- (a) may only be made on a point of law; and
- (b) must be brought within 28 days after the date of the determination.

(4) On an appeal relating to a prequalification decision in respect of a CMU the court may—

- (a) dismiss the appeal;
- (b) direct the Delivery Body to register the CMU on the capacity market register as a prequalified CMU (in which case regulation 73 applies); 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.

(5) On an appeal relating to any other decision, the court may—

- (a) dismiss the appeal; 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.

(6) The court may not—

- (a) order a capacity auction to be cancelled, postponed or suspended pending the determination of an appeal; or
- (b) make an order which affects the validity or terms of a capacity agreement that has accrued to any person other than the appellant.

### **Consequences of successful review or appeal**

**73.**—(1) Paragraph (2) applies if the Delivery Body—

- (a) makes a reconsidered decision under regulation 69;
- (b) receives notice of a decision of the Authority or the court under this Chapter; or
- (c) makes a redetermination pursuant to a direction by the Authority or the court under this Chapter.

(2) The Delivery Body must as soon as reasonably practicable—

- (a) make any amendment to the capacity market register required by, or in consequence of, the decision or redetermination; and
- (b) give notice to the affected person of any amendment made to the capacity market register.

(3) Paragraphs (4) to (7) apply if, pursuant to paragraph (2)(a), the Delivery Body registers a CMU on the capacity market register as a prequalified CMU.

(4) If the registration is made not less than 11 working days before the start of the relevant capacity auction, the Delivery Body must permit the applicant to bid in the capacity auction in respect of the CMU.

(5) If—

(a) the registration is made after, or less than 11 working days before, the start of the relevant capacity auction; and

(b) the capacity auction is held and is not annulled,

the Delivery Body must offer to the applicant a capacity agreement in respect of the CMU on terms in accordance with paragraph (6).

(6) A capacity agreement offered under paragraph (5) must be—

(a) at the capacity cleared price which would have applied to the CMU if a successful bid had been made in the relevant capacity auction in respect of the CMU;

(b) for the de-rated capacity of the CMU (which, if not previously determined, must be determined by the Delivery Body in accordance with capacity market rules); and

(c) for the number of delivery years which it appears to the Delivery Body that the applicant is entitled to a capacity agreement under capacity market rules.

(7) An applicant which receives an offer of a capacity agreement under paragraph (5)—

(a) must within 5 working days give notice to the Delivery Body of whether it accepts the offer; and

(b) is not entitled to any other remedy if it does not accept the offer within that time.