

| MODIFICATION PROPOSAL FORM | | | |
|---|---|---|---|
| Proposer <i>(Company)</i> | Date of receipt <i>(assigned by System Operator)</i> | Type of Proposal <i>(delete as appropriate)</i> | Modification Proposal ID <i>(assigned by System Operator)</i> |
| EirGrid / SONI | 23 November 2022 | Urgent | CMC_13_22 |
| Contact Details for Modification Proposal Originator | | | |
| Name | Telephone number | Email address | |
| Martin McCarthy | - | - | |
| Modification Proposal Title | | | |
| Third Party Judicial Review Remedial Action V2 | | | |
| Documents affected <i>(delete as appropriate)</i> | Section(s) Affected | Version number of CMC used in Drafting | |
| Capacity Market Code | J.5 Remedial Actions; J.6 Termination of Awarded New Capacity; Glossary | Version 7.0 | |
| Explanation of Proposed Change <i>(mandatory by originator)</i> | | | |
| <p>This proposed modification develops a new Remedial Action to mitigate the risk of delays associated with Third Party instigated Judicial Reviews of planning permission processes for Awarded New Capacity. The proposal intends to be targeted and specific, supported by an objective application of the remedial action.</p> <p>The proposed remedial action would facilitate a delay by extending the Date of Substantial Financial Completion and Long Stop Date by a period equal to the duration of the Third Party Judicial Review proceedings. The intent is that the clock would effectively stop for affected Awarded New Capacity and restart at the conclusion of the Judicial Review.</p> <p>The proposed approach ensures that the mitigation focuses on a delivery risk which is beyond the control of the Participant and does not impact on the formation of realistic, contingency inclusive implementation plans and on incentives for meeting delivery milestones. The approach intends to minimise the administrative burden involved in implementing the facility.</p> <p>As the duration of a Judicial Review and hence the length of extension is unknown until concluded, the proposed legal drafting also seeks to address termination milestones which may bind during the Third Party Judicial Review period.</p> <p>The proposed approach does not introduce additional reporting requirements as existing Implementation Progress Report requirements and ongoing monitoring of progress are deemed to be adequate.</p> | | | |
| Legal Drafting Change | | | |
| <i>(Clearly show proposed code change using tracked changes, if proposer fails to identify changes, please indicate best estimate of potential changes)</i> | | | |
| <p>To introduce the intended remedial action a new Section J.5.5 is proposed:</p> <p><u>J.5.5 Extension of Long Stop Date by Third Party Judicial Review</u></p> <p><u>J.5.5.1(a)</u></p> | | | |

Subject to the requirements of paragraph J.5.5.2, a Participant may apply to the System Operators to extend the date of Substantial Financial Completion and/or Long Stop Date associated with a Capacity Market Unit by a period equal to the Third Party Judicial Review Period where that Capacity Market Unit is subject to a Third Party Judicial Review.

J.5.5.1(b)

Any extension under this Section J.5.5 shall constitute the Participant's sole and exclusive remedy caused by a Third Party Judicial Review.

J.5.5.2

The System Operators shall extend the date of Substantial Financial Completion and Long Stop Date subject to the requirements of paragraph J.4.2.5 and following the receipt of the following from the Participant:

- (a) Documentary evidence confirming the commencement of the Third Party Judicial Review, and requirement for the extension. Such documentary evidence to be provided by the Participant to the System Operators as soon as is reasonably practical; and-
- (b) A statutory declaration signed on behalf of the Participant by a Participant Director confirming that the Participant and/or anyone related to (either directly or through marriage) or otherwise connected to the Participant and/or any of its agents and/or its employees had no involvement in instigating the Third Party Judicial Review.

To address the issue of termination during the Third Party Judicial Review Period the following change is proposed to J.6 Termination of Awarded New Capacity:

J.6 Termination of Awarded New Capacity

J.6.1.1

For the purposes of this section.....

- (b) **Long Stop Date:** the Long Stop Date in respect of Awarded New Capacity means
 - (i) in the case of a Capacity Award with a capacity duration greater than one year, the last day of the eighteenth full calendar Month after the start of the first Capacity Year in which the Awarded New Capacity is to be provided; or
 - (ii) in the case of a Capacity Award with a capacity duration of one year or less, the last day of the first full calendar Month after the start of the first Capacity Year in which the Awarded New Capacity is to be provided; or
 - (iii) such later date as may be provided for pursuant to paragraph J.5.5.

J.6.1.2

The System Operators shall terminate all the Awarded New Capacity in respect of a new or refurbished Generator Unit or Interconnector in the event that:

- a) Substantial Financial Completion has not been achieved within

i. the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated; or

ii. ~~(or such later date as allowed by the Regulatory Authorities under section J.5.2); or~~

iii. such later date as may be provided for pursuant to paragraph J.5.5;

or

b) Minimum Completion has not been achieved by the applicable Long Stop Date.

New Glossary Terms:

Relevant Planning Authority means the Department for Infrastructure, the Planning Appeals Commission or a district council.

Third Party Judicial Review means, in respect of a Participant:

i) In respect of Ireland, statutory judicial review proceedings commenced, by a party other than the Participant or an Associate of the Participant, pursuant to Section 50(2) of the Planning and Development Acts 2000-2022, as amended, and relating to a decision of a local authority or An Bord Pleanála to grant planning permission required for the development or operation of a new or refurbished Generator Unit or Interconnector in respect of the delivery of Awarded New Capacity; or

ii) In respect of Northern Ireland, judicial review proceedings commenced, by a party other than the Participant or an Associate of the Participant, pursuant to the Rules of the Court of Judicature (Northern Ireland) 1980 Order 53, as amended or re-enacted from time to time, and relating to a decision of the Relevant Planning Authority to grant planning permission required for the development or operation of a new or refurbished Generator Unit or Interconnector in respect of the delivery of Awarded New Capacity.

Third Party Judicial Review Period means, in respect of date of Substantial Financial Completion and Long Stop Date extension under paragraph J.5.5.1, the period from the date on which the relevant Participant has been served a notice of motion in respect of the Third Party Judicial Review to the date on which the Third Party Judicial Review is concluded, either by final and conclusive order of the court, or otherwise.

Modification Proposal Justification

(Clearly state the reason for the Modification)

Infrastructure consenting and planning processes by their nature are deliberative and consultative with opportunities for public observation, participation, appeal and legal challenge. There are associated risks which apply to any project and which require appropriate planning, management, mitigation and contingency.

However, with respect to the legal challenge risk, specifically Third Party Judicial Review proceedings, a specific remedial action is warranted in the context of obligated delivery milestones. The new remedial action, if called on, would allow planning processes in both jurisdictions to reach a conclusion (in favour of either party), in a manner which would better facilitate investments committing to Awarded New Capacity. The existence of the remedial action in and of itself would be a partial mitigation of risk, and potentially a source of comfort, for prospective and committed capacity projects.

For clarity, the intent of the proposed remedial action is that it should not apply when the contracted party's actions or omissions cause a delay to the planning process, nor when the party instigates legal proceedings on their own behalf. Nor should the remedial action apply to anything other than a Judicial Review of matters associated with the relevant planning authorities.

The existing requirement that Minimum Completion is reached before the applicable Long Stop Date provides reasonable contingency for other events both within the control of the project and subject to third party risk.

The proposal has no effect retrospectively per Section B.12.15 of the Code.

Code Objectives Furthered

(State the Code Objectives the Proposal furthers, see Sub-Section A.1.2 of the CMC Code Objectives)

The intent of the proposed modification and the legal drafting which would implement that intent furthers the following Capacity Market Code Objectives:

- (a) to facilitate the efficient discharge by EirGrid and SONI of the obligations imposed by their respective Transmission System Operator Licences in relation to the Capacity Market;*
- (b) to facilitate the efficient, economic and coordinated operation, administration and development of the Capacity Market and the provision of adequate future capacity in a financially secure manner;*
- (c) to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of electricity capacity in the Capacity Market;*
- (e) to provide transparency in the operation of the SEM;*
- (f) to ensure no undue discrimination between persons who are or may seek to become parties to the Capacity Market Code; and*
- (g) through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland.*

Implication of not implementing the Modification Proposal

(State the possible outcomes should the Modification Proposal not be implemented)

Should this proposed modification not be implemented there will remain a risk that capacity that would otherwise have been successfully delivered would be terminated due to the risk a Third Party Judicial Review would introduce or present to the timely delivery of capacity. Further, potential investors in new capacity may be deterred from engaging in the sector due to the risk in the context of capacity delivery milestones.

Impacts

(Indicate the impacts on systems, resources, processes and/or procedures)

The proposal is drafted in a manner which aims to be very specific and to avoid the need for system updates and resource intensive processing by the Regulatory Authorities and/or System Operators. The proposal is intended to provide clear guidance for Market Participants such that inappropriate applications are prevented i.e. applications effectively self-select based on the criteria introduced. The proposal also seeks to provide a simple, objective verification of applications.

Please return this form to the System Operators by email to CapacityModifications@sem-o.com

Notes on completing Modification Proposal Form:

1. If a person submits a Modification Proposal on behalf of another person, that person who proposes the material of the change should be identified on the Modification Proposal Form as the Modification Proposal Originator.
2. Any person raising a Modification Proposal shall ensure that their proposal is clear and substantiated with the appropriate detail including the way in which it furthers the Code Objectives to enable it to be fully considered by the Regulatory Authorities.
3. Each Modification Proposal will include a draft text of the proposed Modification to the Code unless, if raising a Provisional Modification Proposal whereby legal drafting text is not imperative.
4. For the purposes of this Modification Proposal Form, the following terms shall have the following meanings:

| | |
|------------------------|---|
| CMC / Code: | means the Capacity Market Code for the Single Electricity Market |
| Modification Proposal: | means the proposal to modify the Code as set out in the attached form |
| Derivative Work: | means any text or work which incorporates or contains all or part of the Modification Proposal or any adaptation, abridgement, expansion or other modification of the Modification Proposal |

The terms "System Operators" and "Regulatory Authorities" shall have the meanings assigned to those terms in the Code.

In consideration for the right to submit, and have the Modification Proposal assessed in accordance with the terms of Section B.12 of the Code, which I have read and understand, I agree as follows:

1. I hereby grant a worldwide, perpetual, royalty-free, non-exclusive licence:
 - 1.1 to the System Operators and the Regulatory Authorities to publish and/or distribute the Modification Proposal for free and unrestricted access;
 - 1.2 to the Regulatory Authorities to amend, adapt, combine, abridge, expand or otherwise modify the Modification Proposal at their sole discretion for the purpose of developing the Modification Proposal in accordance with the Code;
 - 1.3 to the System Operators and the Regulatory Authorities to incorporate the Modification Proposal into the Code;
 - 1.4 to all Parties to the Code and the Regulatory Authorities to use, reproduce and distribute the Modification Proposal, whether as part of the Code or otherwise, for any purpose arising out of or in connection with the Code.
2. The licences set out in clause 1 shall equally apply to any Derivative Works.
3. I hereby waive in favour of the Parties to the Code and the Regulatory Authorities any and all moral rights I may have arising out of or in connection with the Modification Proposal or any Derivative Works.
4. I hereby warrant that, except where expressly indicated otherwise, I am the owner of the copyright and any other intellectual property and proprietary rights in the Modification Proposal and, where not the owner, I have the requisite permissions to grant the rights set out in this form.
5. I hereby acknowledge that the Modification Proposal may be rejected by the Regulatory Authorities and that there is no guarantee that my Modification Proposal will be incorporated into the Code.