EirGrid and SONI SEM-25-027 Response Summary

Capacity Market Code Modifications Workshop 43B Consultation

Non-Confidential Summary of SEM-25-027 Response

Contents

1. EirGrid and SONI Response Summary

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1.1. CMC_10_25 Amendments to E.7

- The SOs acknowledge the importance of ensuring a robust, consistent and transparent set of auction entry criteria which can facilitate the SOs in making decisions with respect to auction qualification and as a result raised CMC_08_25 at WS43. The SOs are of the view that CMC_10_25 as drafted, is not consistent with the Code Objectives, namely (a),(b),(c),(e),(g).
- In the combined judgment in the cases of *Re Prime Power Generation's Application* and *Re EP Kilroot's Application* [2024] NIKB 102, the definition of 'feasible' and the judgement expected of the SOs as the 'Prudent Industry Operator' are set out by Scoffield J. in paragraphs [135] and [136] respectively. This definition of 'feasible' (which was also approved by the High Court in Ireland) provides clarity and certainty to both the SOs and market participants in respect of future applications for qualification.
- There is no court-approved definition of 'achievable' such as has been handed down in respect of 'feasible', within the context of the CMC.
- While confusion over the application of E.7.2.1(f) versus E.7.5.1 was a feature of the judicial reviews referenced above, it was ultimately not one of the deciding factors in the quashing of those decisions.
- It is not evident that the wording changes proposed to E.7.1 shifts the presumption of qualification as intended. The revised text still provides for a presumption in favour of qualification, unless the provisions of E.7.2 apply to reject an application.
- The amalgamated E.7.5.1(b) and (c) has also omitted 'relevant' from 'relevant Capacity Year', which may lead to confusion as regards the Capacity Year in question.

1.2. CMC_11_25 Clarification on provisions relating to 'final and binding' and dispute resolution under the CMC

- The SOs are of the view that CMC_11_25 is not consistent with the Code Objectives, namely A.1.2.1(a),(b),(c),(e), and (g).
- The SOs fulfil their roles under the CMC honestly and in good faith, and in no event would the SOs counsel dishonesty or malice in the performance of any Parties' duties under the CMC. The SOs have no objections to any statements or provisions which seek to exclude dishonesty or malice from decision-making processes.
- CMC_11_25 seeks to amend paragraphs B.14.8.10, E.9.4.8, and F.9.4.4 to provide that decisions deemed 'final and binding' under the CMC do not include those made dishonestly or maliciously. This change would introduce uncertainty into previously definitive provisions of the CMC. No definition for either 'dishonesty' or 'malice' has been put forward, and it is unclear how they would

function in practice. Either provisions of the CMC are applied correctly or incorrectly, and the ordinary provisions of administrative decision-making have either been observed or not.

- Similarly, the existing text of B.14.7.1 already requires parties to comply with the dispute resolution process prior to commencing litigation. The new terms proposed of dishonesty and malice introduces uncertainty.
- Reference to the issue of the 'final and binding' nature with respect to Final Qualification Decisions ('FQD') specifically was addressed in the judgment of Scoffield J in *Re Prime Power* [2024] NIKB 102 paragraphs [107 – 119]. Any proposed changes should be analysed against the judgment text, to test its effectiveness. In the context of the judgment, there is no obvious need to introduce new concepts of 'dishonesty or malice' and it is not clear how these terms address or mitigate issues discussed in the judgment.
- CMC_11_25 also seeks to revise the legal basis for initiating litigation and removes interlocutory relief and other procedural safeguards. Parties are currently entitled to seek interlocutory relief prior to or during dispute resolution under the existing CMC. This provision is of relevance to all Parties under the Code
- The removal of the notice of dissatisfaction as a pre-requisite to court proceedings in paragraph B.14.8.9 also removes the principle function of the notice of dissatisfaction under the CMC which, in the SOs' view, is to signal that litigation may be imminent.
- CMC_11_25 represents a significant change to the existing rights of Parties with respect to commencing litigation. It is the SOs' view that further consideration and consultation would be needed to assess the full impacts of the approach should the SEMC be minded to proceed.

1.3. CMC_12_25 RAs' role in relation to FQDs

- The SOs are concerned regarding the consistency of CMC_12_25 with the statutory powers of both the RAs and the SOs in the island of Ireland. As such, it is not evident how CMC_12_25 as drafted is consistent with the Code Objectives. namely A.1.2.1(a),(b),(c),(e), and (g).
- CMC_12_25 seeks to amend Section E.9.4, transferring the authority for FQDs solely to the SOs and removing the RAs from this role. This represents significant and fundamental changes to the governance of the CRM.
- CMC_12_25 may necessitate changes to the statutory powers of the RAs and SOs, and amendments to the Terms of Reference of the SEMC, and possible revisions to the licences of the TSOs. These impacts do not appear to have been considered in CMC_12_25 as drafted. The SOs are of the view that these implications along with the proposal of such a fundamental change to the design of the CRM warrants further consultation.
- A further implication to note is that while some modification to the CMC to allow for rectification or amendment of a decision of the CMDRB (where the CMDRB has made an error) would be helpful, inserting a fresh appeals process into an already constrained auction timetable is likely to impact auction processing and delivery timelines which could risk the procurement of required capacity.
- A possible alternative could be for the SOs to conduct a review of any notice of dissatisfaction submitted by disappointed Participants, and to flag any clear procedural or factual error in a CMDRB decision to the RAs when submitting FQD recommendations. The RAs could then account for any CMDRB error in making its FQD.
- The SOs would be open to discussion on revisions to the dispute resolution process to provide for some mechanism to rectify clear errors in a decision of a DRB but are of the view that the establishment of an 'RA Appeal' stage is not the optimum solution.

1.4. CMC_13_25 Amendments to the Capacity Auction Timetable

- The SOs are of the view that CMC_13_25 is consistent with the Code Objectives. To avoid ambiguity and conflicting provisions, it may be more prudent to consider combining Sections D.2.1.10 and D.2.1.12 into a single provision dealing with delays, postponements or cancellations to the Capacity Auction, to remove any possibility of a conflict.

1.5. CMC_14_25 New Dates in the Capacity Auction Timetable

- The SOs acknowledge the intent behind CMC_14_25 and are happy to engage with the RAs to adopt measures which can provide the RAs with more time to facilitate assessment and scrutiny of LCC volumes data.
- As drafted, CMC_14_25 represents a significant change to existing processes. However, it is not evident that the proposed approach would deliver on its intent. To provide reasonably indicative LCC data at IAIP stage would require nearly a doubling of SO resources as the fundamental processes would need to be duplicated with value definition activities (including DRFs from the RAs) commencing six weeks earlier than present.
- This would also introduce risks with processing activities and dependencies overlapping between T-4/T-1 auctions. Even considering this, the LCC data provided, while indicative, may ultimately be of limited benefit to the RAs for assessment purposes.
- Certain adjustments would not be feasible to provide at earlier stages as in addition to the dependencies noted there are further dependencies on relevant auction qualification results and preceding auction results.
- As such, the SOs propose an alternative incremental approach which will enable earlier data sharing and facilitate better understanding of the adjustments in advance of Table F4.1.1. submission. At each stage, there would be an opportunity for feedback / update of previously supplied adjustments and would allow the RAs additional time to assess and scrutinise the volume data. While the SOs would still not consider the LCC volumes truly 'indicative' until the Table F.4.1.1 submission, this approach may be of more benefit to the RAs in assessing final volumes.
- Should the RAs be minded to proceed with CMC_14_25 as drafted, further detailed assessment would be required to determine a timeline and the additional resources required to implement. As noted, such an approach would entail significant duplication of work and in the SOs view would not deliver on the original proposed intent. The SOs are of the view that CMC_14_25 as drafted could not be implemented in time for the T-4 2029/2030 Capacity Auction.

1.6. CMC_15_25 Performance Securities for Extended Projects in T-4 2026/27

- The SOs have a number of concerns with CMC_15_25 and are of the view that it is not consistent with the Code Objectives, namely A.1.2.1(a),(b),(c),(e), and (g).
- The SOs would re-iterate its position expressed in response to the Consultation on CMC_15_23 *'Amendment to Performance Securities for Extended Projects'*, namely that the purpose of Performance Securities and Termination Charges are to protect consumers from the impacts associated with non-delivery of capacity which was secured at auction.
- When a project is delayed, the risk to delivery increases rather than decreases and therefore relaxing the risk mitigation for the developer appears to be inappropriate and contrary to the outcome of the consultation exercises undertaken when the CMC was established. Overall, relaxing Performance Security requirements reduces commitment to an auction outcome.
- The SOs acknowledge the remarks of the SEMC in Decision SEM-23-069 (approving CMC_15_23) that the SEMC *"…considers it preferential to narrowly focus the modification at this time and apply it only to the T-3 CY2024/2025 Capacity Auction and the T-4 CY2025/2026 Capacity Auction"*.
- The SOs further note the comments expressed by the SEMC in the present Consultation paper SEM-25-027 that *"the SEMC notes that its decision to limit the applicability of CMC_15_23 to the T-3 24/25 and T-4 25/26 auctions was in recognition that projects awarded via these auctions were*

impacted by unforeseen global events, notably the invasion of Ukraine, with subsequent rates of inflation impacting their financial viability".

- In light of the above, it is not clear to the SOs why the CMC_15_23 approach should be extended to the T-4 2026/27 auction as proposed by CMC_15_25 (or to other auctions).
- The SOs would note the increasing complexity regarding the path to delivery for capacity with multiple remedial actions and different stages of delivery. Tracking capacity delivery is becoming more complex with increased risk and uncertainty associated with accounting / modelling for future delivery. CMC_15_25 potentially exacerbates this situation.
- The SOs note that there would be process, and potentially system, impacts resulting from CMC_15_25 and a full Impact Assessment would be required should the SEMC be minded to proceed.