Kilshane Energy
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Confidential Response	N

3rd July 2025

RE: Kilshane Energy Ltd Response to CMC_10_25, CMC_11_25 and CMC_12_25

A. OVERVIEW

1. Kilshane Energy Limited ('**Kilshane**') is a private company limited by shares carrying on the business of electrical energy generation and a company registered as a Party under the Capacity Market Code ('**the CMC**') that has previously applied to participate in various Single Energy Market Capacity Auctions conducted by Eirgrid Plc and SONI Limited ('**the System Operators'**) to date on behalf of the Commission for Regulation of Utilities and the Northern Irish Utility Regulator ('**the Regulatory Authorities'**).

2. Kilshane is a member of the LCC Group of companies, which was initially set up to provide domestic coal to homes in Northern Ireland and now supplies coal, oil, electricity, gas and logistic services to homes across the UK and industry all over the world. LCC is amongst the top three largest liquid fuel distributors on the island of Ireland.

3. Kilshane avails itself of the opportunity to make submissions to the Regulatory Authorities in relation to three of the proposed changes to the CMC submitted on 30 May 2025 – specifically in relation to CMC_10_25, CMC_11_25 and CMC_12_25.

4. In short, Kilshane considers that the proposed changes are in some respects unnecessary, appear to be a reaction to judicial review proceedings taken by a number of participants in the Single Energy Market ('**SEM**') in 2024, including Kilshane, and risk creating further confusion or exacerbating existing ambiguity within the CMC, rather than clarifying in.

5. On these bases, set out in detail below, Kilshane urges the Regulatory Authorities to reject or, at least, revisit or refine in some respects these proposed changes.

A. RELEVANT LEGAL PROVISIONS

The Single Electricity Market

6. The Single Electricity Market is the single wholesale electricity market across the island of Ireland. The SEM is jointly regulated by the Commission for Regulation of Utlities, a statutory body established by the Electricity Regulation Act 1999 ('the 1999 Act'), as amended and the Northern Ireland Authority for Utility Regulation, representatives of whom sit on the SEM Committee ('SEM-C'), the authority for SEM matters.

7. The 1999 Act also makes provision for the regulation of electricity distribution systems and licensing within the State. In particular, under section 14(1)(e), provision is made for the licencing of a transmission system operator, responsible for planning, managing and developing the State's electricity grid. Eirgrid, a public limited company incorporated pursuant to Regulation 34 of the European Communities (Internal Market in Electricity) Regulations 2000, is, by licence, which it holds mandatorily under section 14(2A), the transmission system operator in Ireland.

8. Eirgrid and the System Operator for Northern Ireland Limited ('SONI'), the transmission system operator in Northern Ireland, are the Single Energy Market Operators ('SEM-O'). Eirgrid enjoys this position by licence under section 14(1)(j) of the 1999 Act..

The Capacity Market Code

9. For the purposes of obtaining sufficient capacity to meet the needs of the SEM, periodic capacity auctions are held whereby participating power-generation undertakings such as Kilshane may sell electrical capacity from so-called 'candidate units' – effectively individual generators – to the grid for a given 'capacity year'. As a condition of the licences of both System Operators, they are obliged to administer and maintain in force a code which makes provision for arrangements to secure generation adequacy and capacity to meet the demands of consumers including rules and procedures for the application for,

and allocation of, agreements to remunerate the provision of electricity capacity across the island of Ireland.

10. The CMC is the common policy designated by the Regulatory Authorities to meet the requirements of such a code for their respective licences. The CMC provides for the scheduling of capacity auctions, governs the manner in which participants may qualify for and then bid in a capacity auction, and for the resolution of disputes arising therefrom, amongst other matters.

11. Currently, D.2.1.4 CMC obliges the System Operators to prepare the timetable for a proposed capacity auction, for approval by the Regulatory Authorities under D.2.1.6 CMC. D.2.1.10 CMC entitles the System Operators to amend the timetable, with approval from the Regulatory Authorities, and for the Regulatory Authorities to do so, with written notice to the System Operators.

12. Participants may apply to qualify for capacity auctions in respect of both existing and 'New Capacity' – generally, per the Glossary of the CMC, the planned capacity of a new generator, generator unit or interconnector forming the whole or part of a capacity market unit or proposed capacity market unit or the incremental increase in the capacity of an existing generator, generator unit or interconnector.

13. Per E.7.1.1 CMC, the System Operators, by default, "*shall*" accept an application for qualification. Per E.7.2.1 CMC, they "*may*" reject an application for qualification from, including where, per E.7.2.1(f) CMC, in relation to New Capacity:

    > *they consider the delivery of a part or all of any New Capacity proposed in the Application for Qualification is not feasible (either technically or in the applicable time frame);*

14. Where an application in respect of candidate units has been refused qualification ('a Qualification Dispute'), the CMC makes provision for dispute resolution. B.14.2.4 requires that a participant first seek a review from the System Operators of such a decision. Following which, if unsuccessful, the participant may raise a Notice of Dispute before the Capacity Market Dispute Resolution Board ('**CMDRB**'), established under B.14.5 CMC, conducted on foot of a Dispute Resolution Agreement. The CMDRB is a three-person semi-formal process conducted by an independent panel, comprised of members who are experienced in and familiar with alternative dispute resolution procedures which do not involve litigation and/or understand the electricity

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industry or have the technical competence to acquire such an understanding, per B.14.2.2 CMC. In most respects, per B.14.7.1 CMC, reference of a dispute to the CMDRB is a pre-condition to entitlement to refer a dispute to Court.

15. Per B.14.8.8 CMC, where a participant is dissatisfied with a decision of the CMDRB, within 2 working days of the receiving its decision, it can give Notice of Dissatisfaction to the other disputing parties. The System Operators must then prepare a Final Qualification Decision in respect of an application for qualification, and submit same to the Regulatory Authorities, per E.9.4.3 CMC. Per E.9.4.5-8, the Regulatory Authorities must approve or reject the Final Qualification Decisions by written notice to the System Operators, and this decision is final and binding.

16. Currently, per B.14.4.2 CMC, members of the CMDRB cannot be held individually or personally liable for actions taken in relation to the CMC absent bad faith.

17. B.2.1.2. CMC, which provides that the parties to the CMC will submit to the jurisdiction of the Court of Ireland and the Courts of Northern Ireland for all disputes arising under, out of, or in relation to the CMC and B.14.7.1 CMC, whereby reference of a dispute to the CMDRB is a pre-condition to entitlement to refer a dispute to Court, and B.14.10, which states any dispute in respect of which a notice of dissatisfaction has been issued may only be finally settled by proceedings in a Court having competent jurisdiction currently permit recourse to the courts.

18. As confirmed in both *Re Prime Power Generation*, *Re EP Kilroot Limited* [2024] NIKB 102, [2024] NIKB 105 and [2024] NIKB 106 in Northern Ireland, and *Kilshane Energy Limited v Eirgrid & Ors* [2025] IEHC 174 in Ireland, decisions taken by the System Operators and the Regulatory Authorities are amenable to judicial review and subject to classic administrative grounds of review.

B. SUBMISSIONS OF KILSHANE

CMC_10_25 – Proposed Amendments to E.7 CMC

E.7.1 CMC Discretion should be maintained

19. CMC_10_25 proposes to amend the manner in which the previously default operation of E.7.1.1 CMC functioned to obligate qualification of Candidate Units except pursuant to an identified administrative consideration under E.7.2 CMC. It appears by this amendment, it is intended that where the System Operators have positively determined that Candidate Units ought not qualify by reason of a matter falling under E.7.2, then the default qualification does not arise.

20. While this proposed amend may appear to seek to make clear the previous position, it does subtly effectively negate default qualification.

21. This proposed amendment appears to be an attempt at reversing or addressing the implications of the decision of Scoffield J in *Re Prime Power Generation* at [189]-[191], whereby he determined that the default operation of E.7.1.1 CMC, alongside the discretionary provisions of E.7.2 CMC, provides the System Operators with a discretion that ought to be considered to be exercised. This was based on an earlier decision of Scoffield J in *In Re Duff* [2024] NICA 42.

22. As set out by O'Higgins J in *Kilshane Energy Limited* at [220], notwithstanding submissions to the contrary by the System Operators, the CMC, through E.7.1.1 CMC with E.7.2 CMC, envisages a two-step analysis – whether an administrative consideration arises under E.7.2 CMC, and in any event if the Candidate Units should qualify nevertheless. Irish authority supports this contention – see, *inter alia, Sherwin v. Minister for the Environment* [2004] 4 IR 279 at [26] to [30] and *Mulhare . Cork City Council* [2017] IEHC 288 at [30].

23. In Kilshane's submission, any attempt at changing these position is unhelpful and ought be rejected. First, both the *Re Prime Power Generation* and *Kilshane Energy Limited* judgment provide existing guidance to the existence and extent of this discretion. The *ratio* within these judgments provides clear and singular direction for all participants in the SEM as to how E.7.1 CMC functions and the proposed amendments will plainly negate this guidance.

24. Second, and more practically, in light of the clear guidance as to how the discretion ought function, maintaining a degree of discretion and flexibility as to the qualification of New Capacity notwithstanding where an administrative consideration is considered to arise provides the System Operators with a useful tool to qualify New Capacity that may ultimately aid provision to the SEM despite some early difficulties. It is not improbable that New Capacity that falls afoul of E.7.2 CMC could, if qualified on a discretionary basis, still be in a position to successful bid within the timeframe of a Capacity Auction.

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25. Given the risks and difficulties arising within the SEM, it appears appropriate and prudent to retain this flexibility.

Removal/Replacement of Feasibility creates significant ambiguity

26. Related to the proposed amendment to E.7.1 CMC, it is proposed that the administrative consideration E.7.2.1(f) CMC – technical or temporal feasibility – be removed entirely, and additional amendment to 'achievability' within E.7.5.1. CMC be made.

27. It appears by this amendment that the System Operators would no longer be able to refuse to qualify New Capacity on the basis of feasibility, and obligatory regard shall be had to the achievability of, but not limited to, the date for achieving Substantial Completion of the Generator Unit or Interconnector prior to the start of the Capacity Year.

28. Once again, these proposed amendments appear so arise from the decision in *Re Prime Power Generation* and *Kilshane Energy Limited.* In both proceedings, the interpretation of 'feasibility' was a live issue and both courts considered whether the proper definition had been applied in circumstances where it was not a defined term within the CMC. At [133] of *Re Prime Power Generation*, Scoffield J provided the following definition:

> *How then should this issue be approached as a matter of law? In my view, the word 'feasible' carries a different shade of meaning in each of its uses in section E.7.2.1(f) of the Code. The reference to the delivery of new capacity being technically feasible is much closer to that end of the spectrum where the question is whether it is technically possible. Is there any technical reason why the capacity simply could not be delivered?*
>
> *Provided the delivery of the new capacity is technically possible, the more complex question is whether it is feasible within the applicable time frame. This issue is more predictive in nature and calls for more of an exercise of regulatory judgement. There are more variables to be taken into account and it is not a mere engineering query.* ***In this case, I agree with the position adopted by the SEM-C (and the SOs) that the question is whether in-time delivery is 'reasonably practicable' (which is materially similar in meaning to reasonably possible or reasonably doable). The important point is that this is more than mere possibility. Some assessment of the reasonableness of achieving delivery is required. It is also less than being persuaded that delivery will be achieved on the balance of probabilities. Some***

> ***level of doubt about delivery is permissible but the appropriate level of doubt in all of the circumstances is itself is a question of regulatory judgement.*** [emphasis added]

29. This definition was then adopted in full and applied by O'Higgins J in *Kilshane Energy Limited* at [227]-[229]. As such, by virtue of both proceedings in Ireland and Northern Ireland this is now a judicial interpretation and definition of 'feasibility' within the meaning of E.7.2.1(f) CMC that is known and can be clearly relied upon.

30. In contrast, both the existing provision of E.7.5.1(b) CMC and the proposed amendment, which effectively folds into and amalgamates E.7.5.1(c) with E.7.5.1(b) CMC, in particular the concept and definition of 'achievability', is completely undefined whether within the Glossary of the CMC or by judgment in either jurisdiction.

31. Within the proposed amendments, the Regulatory Authorities state that the overlapping of provisions in E.7.2.1(f) CMC and E.7.5.1 CMC "*could give rise to confusion in various aspects*" and consider that "*the concept of 'achievability' is clearer than that of 'feasibility'*." Respectfully, Kilshane submits that this is incorrect and effectively would create the antithesis of clarity.

32. On the level of principle, Kilshane does not disagree that there may be some overlap between the understanding of feasibility (technical or temporal) and achievability given their similarities. Indeed, Kilshane recognises that discretionary rejection on the grounds of feasibility and obligatory rejection on the grounds of achievability may be inconsistent or difficult to resile with one another in certain circumstances; however, in circumstances where feasibility has actually been defined and achievability has not been, it cannot be the case as a matter of logic that this proposed amendment would add clarity to the CMC. To that end, Kilshane strongly contends that this proposed amendment will have the exact opposite effect, creating ambiguity and inexorably lead to litigation in order to achieve some clear definition.

33. Kilshane also repeats its submissions made above in relation to retaining a degree of discretion to qualify New Capacity given the realities of the SEM. It appears far preferrable to retain the discretionary nature of E.7.2.1(f) CMC rather than the obligatory application of E.7.5.1 CMC, particularly when considered alongside the proposal to replace a known definition with an unknown one. At the very least, if the Regulatory Authorities are intent on

replacing feasibility with achievability, appropriate amendments should be made of E.7.5.1 CMC or E.7.2.1(f) CMC to retain this discretion.

CMC_11_25 – Proposed Amendments to B.2, B.14, E.9, and F.9 CMC

34. Through proposed amendments to B.2, B.14, E.9, and F.9 CMC, the circumstances under which recourse may be had to the Courts of Ireland or Northern Ireland appear to be clarified but in some respects narrowed.

35. First, it is proposed to delete B.14.2.7 CMC in its entirety – that the provisions of the Dispute Resolution Process (defined as the processes set out under B.14) shall not prejudice the entitlement of any party to seek interim or interlocutory relief from an appropriate Court. In this regard, the Regulatory Authorities provide no explanation within the Modification Proposal Form as to why this necessary or any comment on its implications, other than to state that the deletion does not alter the rights of participants to have recourse to the Court, as those rights are now clarified in the proposed revision to B.14.7.1 CMC.

36. In this regard, it is proposed to amend B.14.7.1 CMC to state that no litigation can be commenced absent compliance with B.14, save for the proposed malice or dishonesty exception. B.14 obligates engagement with the various review, CMDRB and Notice of Dissatisfaction processes.

37. Despite the assertions of the Regulatory Authorities, the proposed deletion of B.14.2.7 CMC does appear to restrict the ability of a party of seek interim or interlocutory relief, notwithstanding the proposed amendments to B.14.7.1 CMC. As it stands, by virtue of B.14.2.7 CMC, the CMC permits interim or interlocutory recourse to a relevant court even where the Dispute Resolution Process within B.14 has not been complied with – the provisions set out in this Dispute Resolution Process shall not prejudice or restrict any party's entitlement in this regard.

38. In contrast, by deleting B.14.2.7 CMC, the operation of B.14.7.1 CMC is such that recourse to a relevant court for interim or interlocutory measures can only arise where (1) the provision of B.14 have been complied with, or (2) the malice or dishonesty exception is engaged.

39. Accordingly, while the deletion of B.14.8.9 CMC does to some extent support the Regulatory Authorities contentions in relation to the deflection of B.14.2.7

CMC, Kilshane considers that the operation of and express words used within B.14.7.1 CMC would result in the opposite effect of what is suggested by the Regulatory Authorities.

40. Kilshane does accept that it is far preferrable for all parties to the CMC to, inasmuch as possible, follow and abide by the Dispute Resolution Process set out therein, but does consider there may be circumstances where recourse to seek interim or interlocutory measures may arise albeit such are likely to be very exceptional. As such, Kilshane contends that B.14.2.7 CMC should remain in place as it provides for an important method of ensuring that parties seeking qualification enjoy appropriate protection.

41. Insofar as this is amendment has the effect or intention of ousting or precluding the amenability of any dispute arising to judicial review, Kilshane considers this would be unlikely to be accepted by any court of competent jurisdiction, particularly by virtue of the CMC's status as a policy – see, *inter alia, R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, *State (McCarthy) v O'Donnell* [1945] IR 126 and *Brannigan v Keady* [1959] IR 283.

42. Second, the proposed amendments to include more express reference to dishonesty or malice appear to raise no issues for Kilshane, other than to state that the Regulatory Authorities and System Operators ought to expressly state that the inclusion of this cannot be interpreted to otherwise exclude disputes other than dishonesty or malice.

CMC_12_25 – Proposed Amendments to B.14, B.26, E.9 CMC

43. Through the proposed amendments to B.14 and B.26 CMC, the role of the Regulatory Authorities in determining Final Qualification Decisions is sought to be simplified and the existing multiple step approach reduced so that the Regulatory Authorities only become involved in examining a decision where a party or the System Operators are dissatisfied with the outcome of the CMDRB.

44. Where a disputing party is dissatisfied with a Qualification Decision of the CMDRB, it is proposed that they would raise a Notice of Review with the Regulatory Authorities within 2 working days of receiving the decision, along with any Notice of Review documents in support thereof. The Regulatory Authorities will be empowered to determine the procedure in relation to any review, including the manner and timing for furnishing any reply to an

application for review, any evidence or any submission. On review, the Regulatory Authorities may uphold, vary or replace the decision of the CMDRB.

45. It is proposed that if a disputing party wishes to rely, in any review, on evidence that was not before the CMDRB, it may seek permission from the Regulatory Authorities to introduce and rely on such evidence explaining why such evidence was not before the CMDRB; and why it should be considered by the Regulatory Authorities. The Regulatory Authorities shall not grant such permission unless they are satisfied that introducing such evidence would not cause undue delay or unfairness and is necessary in all the circumstances.

46. In the alternative, through the proposed amendments to E.9 CMC, the current approach would remain the same, and some minor amendments are made to clarify the functioning of the current system.

47. In relation to the proposed changes, Kilshane welcomes the inclusion of a further opportunity to examine qualification before the Regulatory Authorities. Kilshane remains concerned as to the lack of clarity provided by the proposed amendments as to the procedure to be followed in such a few – particularly the very open-ended discretion provided to the Regulatory Authorities in this regard – as well as the standard of review that will be applied.

48. It is unclear from the proposed amendments to what extent the Regulatory Authorities will be at large to uphold, vary or reject a review, and to what extent the Regulatory Authorities will seek to apply the provisions of the code whether merits-based – for example, determining feasibility under E.7.2.1(f) CMC, if at all – or of they will apply another standard, such as the "*plainly wrong*" test brought to bear to date, see *Kilshane Energy Limited* at [294].

49. Finally, Kilshane considers that any power enjoyed by the Regulatory Authorities to permit new evidence should be as permissive as possible and enable parties to demonstrate as best as they can their ability to qualify.

50. Absent clarity to the operation and functioning of these proposed amendments, Kilshane retains considerable pause in supporting their inclusion, notwithstanding its support for revisiting this part of the process. It would be of significant benefit and reassurance to parties to the CMC were the Regulatory Authorities provide further explanation and detail in relation to how it envisages the new processes functioning, and would be crucial to parties having confidence in these provisions.

C. CONCLUSION

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51. On the basis of the foregoing, in summary Kilshane submits the following in relation to the proposed amendments to the CMC:

    i. First, the discretion continued within E.7.1 CMC should be maintained. Maintaining a degree of discretion and flexibility as to the qualification of New Capacity notwithstanding where an administrative consideration is considered to arise provides the System Operators with a useful tool to qualify New Capacity that may ultimately aid provision to the SEM.

    ii. Second, in circumstances where feasibility has actually been defined and achievability has not been, this proposed amendment will not add clarity to the CMC and will in fact have the exact opposite effect, creating ambiguity and inexorably lead to litigation in order to achieve some clear definition.

    iii. Third, and relatedly, if the Regulatory Authorities are intent on replacing feasibility with achievability, appropriate amendments should be made to E.7.5.1 CMC or E.7.2.1(f) CMC to retain the discretion that exists in relation to E.7.2.1.

    iv. Fourth, Kilshane contends that B.14.2.7 CMC should remain in place as it provides for an important method of ensuring that parties seeking qualification enjoy appropriate protection.

    v. Fifth, the Regulatory Authorities and System Operators ought to expressly state that the addition of further wording in relation to dishonesty and malice will not be interpreted to exclude disputes other than dishonesty or malice.

    vi. Sixth, Kilshane welcomes, in principle, the opportunity of a further review post-CMDRB of Qualification Disputes; absent clarity to the operation and functioning of these proposed amendments, Kilshane retains considerable pause in supporting their inclusion.

52. While in some respects the proposed changes to the CMC are welcome, in others it appears as if the effect to the CMC will be the very opposite of what is contended by the Regulatory Authorities, is highly likely to result in confusion and ambiguity, which may itself result in disputes between parties to the CMC.

53. Kilshane remains available to provide further submissions as required.