

APPENDIX C – RESPONSE

SUMMARY INFORMATION

Respondent's Name	<i>Lumcloon Energy Limited</i>
Type of Stakeholder	<i>Generator / Developer</i>
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Confidential Response	[Y] / [N] = Not Confidential

CAPACITY MARKET CODE MODIFICATIONS WORKSHOP 43B CONSULTATION COMMENTS:

APPENDIX C – RESPONSE

ID	Proposed Modification and its Consistency with the Code Objectives	Impacts Not Identified in the Modification Proposal Form	Detailed CMC Drafting Proposed to Deliver the Modification
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APPENDIX C – RESPONSE

CMC_10_25: Amendments to E.7	We agree that enhancing clarity within the CMC is a laudable goal that aligns with the stated objectives including facilitating the "efficient, economic and coordinated operation, administration and development of the Capacity Market" and the "participation of undertakings". However, in considering the replacement of the term "feasible," it is crucial to acknowledge the legal context established by the High Court in recent judicial reviews concerning Prime Power and Kilroot [NIKB 2024/99871/01 and 2024/100765/01] and Kilshane and Coolpowra [HC 2024/1407 JR and 2024/1429 JR]. In these proceedings, the Court provided significant guidance on the interpretation of "feasible" within the context of the CMC. The Court observed that assessing feasibility requires the System Operators to determine if on-time project delivery is "reasonably practicable." Therefore, while the proposal to use the term "achievable" is aimed at increasing clarity, it is important to	The modification proposal form states that there are "No impacts on systems, resources, processes and/or procedures". We believe there is a potential impact that has not been identified. By removing the term "feasible"—a term which has now been subject to judicial interpretation—and relying solely on "achievable," the CMC may be trading a defined concept for a legally undefined one. The term, "achievable," does not have the benefit of the "reasonably practicable" standard established by the Court in the Kilshane and Coolpowra cases. This could inadvertently create fresh uncertainty, potentially leading to new disputes as market participants and the System Operators work to establish the precise meaning and standard of "achievable"	We do not object to the rationale for the proposed modification, however, in executing this change, we recommend that the rigour and standard associated with the term "feasible," as established by the High Court, is explicitly carried into the assessment of "achievability." The Court's finding that feasibility implies a project must be "reasonably practicable" provides a valuable benchmark. We suggest that any final drafting makes it clear that the assessment of whether an Implementation Plan's dates are "achievable" must be conducted to at least the same standard as the "reasonably practicable" test for feasibility defined by the courts. This would ensure that in striving for clarity, the established and understood standards for project assessment are not inadvertently diluted. It would preserve the legal precedent while still achieving the proposal's goal of streamlining the CMC text. At a minimum, a clear
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APPENDIX C – RESPONSE

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	remember that the existing term "feasible" already benefits from a degree of legal certainty provided by the courts.	undermining the proposal's primary goal of increasing clarity.	definition of achievable must be established. We would strongly recommend that the proposed modification CMC_04_25 is incorporated into this modification by amending section E.7.5.1(c) to read: 'Substantial Completion of the Generator Unit or Interconnector can be achieved withing the Applicable Time Frame" and that the new proposed definition of "Applicable Time Frame" and "Complex Project" is adopted.

APPENDIX C – RESPONSE

CMC_11_25: Clarification on provisions relating to ‘final and binding’ and dispute resolution under the CMC	We appreciate the goal of creating a more certain and efficient market; however, we have some reservations about how these specific changes align with the Code’s wider objectives of fairness and competition. Alignment with Fairness and Access to Justice: A key consideration for us is the principle of the administration of justice, as set out in Article 34 of the Constitution, which vests this function in the Courts. Our concern is that by making administrative decisions "final and binding" and severely limiting the role of the Courts, the new framework effectively acts as an 'ouster clause' that encroaches upon the Courts' constitutional function. The principle of access to independent adjudication is a cornerstone of a fair market. Our concern is that by removing the established path to seek interim relief from a court and setting the standard for a challenge as high as "dishonesty	There are a few potential impacts of these changes that we feel might not have been fully explored in the proposal. Interaction with Administrative Law Principles: The proposal aims to limit challenges to instances of "dishonesty or malice." From an administrative law perspective, the High Court's jurisdiction for judicial review is well-established and covers a much broader range of issues, including illegality, irrationality, and procedural impropriety. We are concerned that the current drafting shields decisions even from this standard of review, creating legal uncertainty about the ultimate enforceability of the clause itself. Further, the market would expect the RAs and SOs to adhere to at least legal, rational and fair decisions and would not expect the SOs to fear challenge on that basis.	Regarding the Deletion of B.14.2.7: This change removes the existing safety valve. We do not support removing a Participant’s access to the courts and encroaching on the clear separation of powers between administrative and judicial functions. Regarding the Wording in E.9.4.8 and F.9.4.4: We do not recommend that this wording is adopted. The "dishonesty or malice" standard is a very high bar. As noted, our concern is that it may not cover situations of significant error or unfairness, leaving genuine grievances without a clear path to resolution and potentially conflicting with established grounds for judicial review.
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APPENDIX C – RESPONSE

or malice", the Code may be limiting the options for a participant who has a legitimate grievance based on a significant error. We believe the proposed balance weighs administrative certainty too heavily against procedural fairness.

The Impact on Established Safeguards:

The ability to seek interim relief from a court is a long-standing safety valve in commercial arrangements. Removing it is a significant step. While streamlining is the goal, this change could leave a participant without a remedy to prevent irreversible harm from a flawed process, forcing them to deal with the consequences after the fact.

Potential for Risk Transference:

By making decisions final and binding, the commercial risk associated with a material error in the process seems to shift almost entirely to the participant. We feel it is important to consider if this is the intended outcome, as it could affect how participants

APPENDIX C – RESPONSE

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		price risk and engage with the market. The Practicality of the "Dishonesty or Malice" Standard: This is a very high legal bar to meet. Our concern is that it may not cover situations of significant human or system error, misinterpretation, or even negligence. This could leave genuine and material grievances without a clear path to resolution.	

APPENDIX C – RESPONSE

CMC_12_25: RAs' role in relation to FQDs	OPTION 1 We support the objective of having expert-led reviews. However, our thoughts here are focused on ensuring the structure of the process reinforces the Code's objectives of transparency and non-discriminatory governance and that it aligns with fundamental principles of administrative justice. Alignment with Fair Procedures: A cornerstone of Irish administrative law is the principle that no one should be a judge in their own cause. Our primary concern here is that by positioning the RA as the final arbiter of disputes in a process it actively oversees and approves and where there is no recourse to the Courts, the Code may be inadvertently creating a structural bias. This could place the RA in a very challenging position and could render the review process vulnerable to legal challenge on the grounds of a lack of objective impartiality and unconstitutionality.	OPTION 1 The proposed concentration of functions within the RA could lead to some challenging downstream effects. The Creation of a Structural Conflict: Beyond just a perception, the proposed role could create a structural conflict for the RA. This inherent tension could impact both the decision-making process and its reception by the market. Placing the RA in a position where it must judge the correctness of a process it is ultimately responsible for could be challenging for all involved. Ensuring the review process is demonstrably independent is vital for its legitimacy. Access to Justice:	OPTION 1 Regarding the New Section [XX]: This section outlines a very swift administrative review. It might be worth exploring whether the timelines could be adjusted to allow for a more substantive exchange, ensuring participants feel they have had a full and fair opportunity to present their case. This would build in more procedural safeguards that explicitly acknowledge and address the principles of natural justice. A number of procedural weaknesses, similar to the issues raised above, were pointed out in the Kilshane and Coolpowra judgment [HC 2024/1407 JR and 2024/1429 JR]. We believe it is important to resolve these weaknesses and work out suitable drafting to ensure a fair and effective CMDRB process. Regarding the other Amendments:
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APPENDIX C – RESPONSE

Alignment with Transparency, Good Governance and Non-Discrimination:

Clear separation of roles is key to building trust in any regulatory system. By positioning the RA as the final arbiter of disputes arising from processes it has already overseen and approved (E.9.4 and Section [XX]), the Code could inadvertently create the perception of a conflict of interest. This might pose a challenge to the RA and could undermine the market's confidence in the impartiality of the review process and undermine the transparency that is so crucial to the Code's objectives.

OPTION 2

We agree that, broadly speaking, the proposed modification is consistent with the objectives of the Code. However, we have some concerns that the process could inadvertently cause some procedural weaknesses that may result in a non-

Similarly to the CMC_11_25 proposed modification response, we would have concerns that the modification would effectively 'oust' the judiciaries' constitutional role enshrined in the Irish constitution which could bring the entire process into question.

The Practicality of the Review Process Timelines:

The proposal outlines a very rapid process, particularly the two-working-day deadline for submitting a Notice of Review (Section [XX.2]). While speed is valuable, we have reservations about whether this is sufficient time for a participant to prepare a comprehensive, evidence-based submission for a complex issue. There's a risk that this could favour the party defending the decision. From a fair procedures' perspective, it is worth re-considering if this

We do not support the removal of a Participant's access to the courts. The division of powers between administrative and judicial functions within the Irish State is a key constitutional principle and essential to the impartiality and fairness of the Code and the functioning of the market.

OPTION 2

If CMC_11_25 is approved, then we cannot support the amendments proposed.

If CMC_11_25 is not approved, then we can support the proposed modification, but we recommend that the drafting is amended to take account of the impacts highlighted in this response.

For example, we believe a decision to reject a Generating Unit from participating in the Capacity Market should never occur

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	discriminatory process. We have highlighted these unintended impacts in the next column.	provides a real and substantive opportunity for a participant to be heard which is another key principle of administrative justice. OPTION 2 Risk of incorrect decisions being finalised: We are concerned that the combination of potential ‘regulatory defence’ to the SO’s technical expertise and the ‘deemed approved’ clause creates a risk that a flawed rejection by the SO can become ‘final and binding’ due to RA inaction or a cursory review. This approach appears to prioritise administrative timelines over correct and fair outcomes.	through administrative inaction. In must be an explicit, conscious decision. Amend E.9.4.7: If the RAs do not notify the SOs that they reject a Final Qualification Decision on or before the date that is two Working Days before the Final Qualification Results Date specified in the applicable Capacity Auction Timetable, then they will be deemed to have approved the decision submitted by the System Operators, provided that a Final Qualification Decision which constitutes a rejection of an Application for Qualification shall not be deemed to have been approved and shall require explicit written approval from the Regulatory Authorities to become effective.

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CMC_14_25 Amendments to the CAT	No comment	No comment	No comment
CMC_14_25 New dates in the CAT	No comment	No comment	No comment

NB please add extra rows as needed.