SEM Capacity Market Code Mods Workshop 43 (Part B) Consultation paper SEM-25-027 17th June 2025

SSE Response

July 2025

Who we are

At SSE we are driven by our purpose: to provide the energy needed today while building a better world of energy for tomorrow. SSE develops, owns, and operates low-carbon infrastructure to support the transition to net-zero. This includes onshore and offshore wind, hydropower, flexible thermal generation, electricity transmission and distribution networks, alongside providing energy products and services to customers. With current interests across the island of Ireland and Great Britain, in addition to carefully selected international markets, including East Asia, Europe and North America, SSE is both growing its footprint and its range of expertise in our bid to lead the transition to net-zero.

Since entering the Irish energy market in 2008, we have invested significantly, with a total economic contribution of just under €2bn in the last 3 years, supporting over 3,270 jobs in 2023/24. SSE Renewables owns 700MW of onshore wind capacity across the island and operates a total of over 1,000MW, with SSE Thermal owning and operating 672MW of flexible generation capacity to support security of supply.[1] SSER is currently developing additional onshore wind capacity in Ireland, as well as offshore wind projects like Arklow Bank Wind Park 2, and an emerging solar and battery pipeline. SSE Renewables has operated a voluntary Community Fund in Ireland since 2008, and SSE Renewables has awarded almost €1 million over the last year to over 268 community groups that neighbour our wind farms here. To date we have invested over €12.3million to community groups across the country.

At SSE, we have a clear focus on electricity infrastructure as the key to unlocking decarbonisation. Our growth helps power and is powered by society's drive to develop a clean, secure and affordable energy system. Recognising the international importance of decarbonising the power sector, SSE aims to achieve net zero across scope 1 and 2 emissions by 2040 at the latest including through investment in low-carbon dispatchable power generation options such as Carbon Capture and Storage, Hydrogen and electricity storage.

[1] SSE's Economic Contribution to the UK, Scotland and the Republic of Ireland, FY24 results (PwC report), May 2024. https://www.sse.com/media/zz3huuie/eia-group-report-fy24.pdf

SSE Response

SSE welcomes the opportunity to respond to SEM Capacity Market Code Mods Workshop 43 (Part B) Consultation Paper SEM-25-027. This is a non-confidential response.

CMC_10_25 Amendments to E.7

This Mod relates to requirements for Qualification. The RAs propose to remove any presumption of qualification and clarify that no unit should be considered qualified unless the qualification tests are satisfied. It also proposed the concept of ‘achievability’ over ‘feasibility’. The mod proposed to remove the discretionary Section E.7.2.1(f) from the CMC to achieve this.

SSE notes that this Section was used by the System Operators to reject Applications for Qualifications on the ground that the projects were considered ‘not feasible’. Another related Section frequently invoked by the SOs is the mandatory Section E.7.5.1 which requires the project’s Implementation Plan dates to be ‘achievable’.

In the Workshop discussion, the meanings of the words ‘feasible’ and achievable’ were discussed. There were questions on the meaning of the 2 words and the rationale for this mod. The RAs indicated their view that the concept of ‘achievability’ is clearer than ‘feasibility’.

The T-4 2028/29 litigation considered the meaning of ‘achievable’ and ‘feasible’ which was the subject of legal advice. This advice suggested that both terms were more or less interchangeable and meant ‘reasonably practicable, reasonably doable or deliverable.’

Noting that the terms are considered interchangeable we are concerned that the change in approach when considered against a backdrop of both a *de facto* condensed capacity auction timeframe for delivery and the uncertainty that third party factors can impact on delivery will set the bar unnecessarily high for market participants at the initial stages of the capacity auction.

Rather we are of the view that the “achievability” of projects is already considered fully through the various milestones that are included in the Capacity Code. For example, Substantial Financial Completion (SFC) is one milestone that must be achieved, which in turn we consider a marker of whether a project is “achievable”. We believe that given there is already discretion afforded to reject on the grounds of feasibility, which is sufficiently expansive, to amend this assessment approach, in particular at a time when the RAs have condensed the delivery timeframes from 4 years to 3 years 4 months is inequitable to market participants.

CMC_11_25 Clarification on Provisions relating to 'Final and Binding' and Dispute Resolution under the CMC

This Mod seeks to make the RAs' decisions final and binding. Although the RAs propose that this is a clarificatory Mod which does not seek to change the substance of the CMC, it was confirmed on the Workshop that a decision made by the RAs can only be challenged if it was made dishonestly or with malice as is the purported intent of the modification.

The corollary of this is that all other decisions are final and binding and cannot be challenged. It is our considered view that this goes beyond the accepted standard of administrative law whereby a decision may be challenged on the ground of process and instead attempts *ultra vires* to determine the circumstances on which an appellant may raise a legal challenge to an administrative decision of the SEM Committee.

This bar cannot be set unilaterally by the SEM Committee given that it must, like all public agencies, adhere to the requirements of administrative law whereby decisions can be challenged on a number of grounds, including for example, procedural irregularity.

The RAs proposal is a concerning attempt to exclude the jurisdiction of the courts, and possibly unconstitutional under Article 34 of the Constitution as it aims to limit the ability of market participants to challenge a decision where a process error has occurred. It is our view that a decision on inadmissibility of a decision is one for the Courts to decide based on locus standi of an appellant which is determined by the Court system not by a state agency or administrative body acting unilaterally.

It is our considered position that exercise of powers in relation to SEM must be undertaken in a particular manner. For example, we do not view that the powers afforded to CRU to protect the interests of consumers of electricity, including by promoting competition (Section 9D of the ERA) is furthered by limitations being placed on market participants, when the entire basis of the capacity auction in itself is predicated on being a competitive auction process.

We also note that the underlying decisions being made on capacity remuneration are a form of State Aid. As such, the CRM is regulated by Regulation (EU) 2019/943 which affords the mechanism a State Aid law lens. Member States are obligated to ensure effective review of decisions to ensure adherence with EU Law, including through using the preliminary reference procedure (Article 267 TFEU).

It is our considered view that given the linkages between the implementation and the design of the CRM and State Aid, the RAs cannot unilaterally remove court access from participants as by virtue of being a State Aid policy, decisions of the CRM must be challengeable through the Court system, including where applicable the EU legal institutions.

The endeavour of the RAs to restrict court access is concerning given it attempts to have a chilling effect on market participants both in terms of their exercise of constitutional rights of court access as well as being incompatible with EU law on the basis of the State Aid element to the CRM design.

CMC_12_25 RAs' role in relation to FQDs

This mod includes the proposed addition to B.14.10.1

'For the avoidance of doubt recourse to the Courts is not possible after a review by the Regulatory Authorities in a Qualification Dispute (save in the case of dishonesty or malice).'

SSE does not support this part of the proposal, as explained in the response to the previous CMC_11_25 mod. We are of the view that this is not legally compatible on the basis of the grounds set out above.

The Consultation refers to two options proposed by the RAs, concerning the RAs role in relation to approving/ rejecting Final Qualification Decisions submitted by the SOs.

It is not clear in the Mod itself which changes are part of which Option. Given the significant number of changes proposed in the legal wording, this needs to be clarified so that Market Participants are clear about which changes are relevant to each Option.

1. The first option proposes to alter the RAs' role to be confined to resolving challenges/ qualification disputes after qualification decisions i.e. through the Capacity Market Dispute Resolution Board (CMDRB). They would rely on information from the earlier stages.
2. The second option appears to involve several detailed proposed changes to Section E.9.4 'to clarify the operation of this provision', and the addition of a new section relating to Reviews of CMDRB decisions in relation to Qualification disputes. This section allows for a Disputing party who is dissatisfied with the CMDRB's decision to request the RAs to review that decision.

In principle, SSE supports the proposal for the RAs to approve or reject Final Qualification Decisions submitted by the SOs.

However:

a) This should not preclude the ability for an FQD to be challenged through the Courts, as covered in the response to the previous CMC_11_25 mod. This is proposed in the following legal wording change in B.14.10.1, which SSE does not support:

'In B.14.10.1, add the following:

B.14.10 Court Proceedings B.14.10.1 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. *For the avoidance of doubt recourse to the Courts is not possible after a review by the Regulatory Authorities in a Qualification Dispute (save in the case of dishonesty or malice).'*

b) Given the significant number of legal wording changes to existing Sections and the addition of a detailed new Section, SSE suggests that this needs to be reviewed to ensure that all changes are appropriate to the RAs role in relation to Final Qualification Decisions.

CMC_13_25 Amendments to the Capacity Auction Timetable

This Mod proposes to allow amendments to the Capacity Auction Timetable at short notice.

Although this mod aims to clarify how two Code provisions operate, the RAs are proposing to amend the Capacity Market Code to clarify that the powers of the SOs and RAs provided under D.2.1.10 are not limited, thus allowing amendments to the Capacity Auction Timetable at short notice. It appears to give the RAs and the SOs latitude to make any changes to the Timetable without any limits or conditions or reference to reasonableness.

Market participants require certainty to make plans to comply with conditions and to meet the timelines in an already condensed timetable. Without limits or conditions, RAs could make changes at short notice which may leave Participants without sufficient time to prepare for an Auction. Participants spend time and money planning for a Capacity Auction which may then be cancelled at short notice.

SSE does not support this mod. We contend that this mod is not acceptable as proposed and we ask that limits and reasonable conditions should be included to ensure that Participants can react in a timely manner to any Timetable amendments which may arise, according to predetermined conditions, limits and a reasonable lens.

CMC_14_25 New dates in the Capacity Auction Timetable

This mod seeks to include new dates in the Timetable in relation to the submission by the SOs of Locational Capacity Constraint LCC volumes to the RAs.

SSE supports this mod. We would also welcome the provision of indicative LCC volumes information as early as possible in the process. We appreciate that final LCC information may vary from this e.g. due to terminated contracts, and that this final information will be submitted along with qualification decisions to the RAs. This information should also be made available to market participants as soon as it is available.