Energia Response to SEM Committee Consultation Paper SEM-23-014

Consultation and Call for Further Evidence on Indexation of Capacity Payments

10th March 2023

I. Introduction

1. This submission sets out Energia's response to the Consultation and Call for Further Evidence on Indexation of Capacity Payments (SEM-23-014) dated 10 February 2023 (the "**Call for Further Evidence**"), which relates to Modification Proposal ID 'Mod_07_22 v3' dated 6 October 2022 ("**Mod_07_22**"). Mod_07_22 proposed to amend Section F.17 of the Trading and Settlement Code ("**TSC**") Part B in relation to the calculation of capacity payments.

2. This is the second consultation and call for evidence issued by the SEM Committee in relation to Mod_07_22, following the initial call made on 5 October 2022 (the "**Initial Call for Evidence**"). The SEM Committee noted that the information received in response to the Initial Call for Evidence did not provide "*comprehensive evidence of the impact of inflation on actual expected project returns or demonstrate that those returns have been reduced to the extent that project viability have been threatened.*"[1]

3. Although Mod_07_22 was approved by the majority (but not all) of the Modifications Committee, the Call for Further Evidence recognises that "*it became apparent during the systems impact assessment carried out by SEMO subsequent to the Committee's vote that the proposal could not be implemented in systems as currently drafted.*"[2] The SEM Committee now recognises that "*there are flaws in the legal drafting of Mod_07_22 which mean that it cannot be implemented as currently drafted*"[3] and further states that it is:

   > "*not convinced that the proposal, which would continue to apply indexation based on outturn inflation over the course of a ten year contract, would be the appropriate way to mitigate the effect of high and unexpected rates of inflation following, in particular, the invasion of Ukraine.*"[4]

4. In light of these deficiencies, the SEM Committee proposed an alternative potential indexation mechanism for the 2024/25 T-3 and 2025/26 T-4 capacity auctions (the "**Revised Indexation Mechanism**"), the outline of which is set out in Section 3 of the Call for Further Evidence. Under the SEM Committee's approach, the Revised Indexation Mechanism would change the design of the indexation provisions set out in Mod_07_22 as regards eligibility, the basis for applying indexation and risk sharing. Within this submission, Energia refers to this updated form of Mod_07_22 as proposed by the SEM Committee in the Call for Further Evidence as the "**Revised Modification Proposal**".

5. Mod_07_22, as originally articulated, was plainly an inappropriate basis on which to address the issue of indexation for the 2024/25 T-3 and the 2025/26 T-4 auctions. As Energia highlighted in its response to the Initial Call for Evidence, Mod_07_22 suffered from a number of serious deficiencies, in

[1] Call for Further Evidence, page 4. Emphasis in original.

[2] *Ibid*, page 3.

[3] *Ibid*, page 7.

[4] *Ibid*, page 3.

particular regarding the discriminatory effect of the proposal to alter the historic parameters of concluded auctions via a modification with retroactive effect.

6. In this submission, Energia reiterates its core concerns in relation to the proposed approach to the issue of indexation. While the Revised Modification Proposal is framed as a response to unexpected global developments since the conclusion of the capacity auctions (i.e. the conflict in Ukraine), Energia submits that there is no factual or legal basis to justify a change to key auction parameters after the conclusion of capacity auctions. As Energia has previously noted, market participants made commercial decisions in good faith as to whether they would participate in those auctions, and if so to what degree, based on the rules as they stood at the time of the auctions.

7. The Revised Indexation Mechanism does not in any way address these fundamental concerns. The SEM Committee recognises that it is "*consulting on the form of indexation for contracts already awarded in the 2024/25 T-3 and 2025/26 T-4 auctions.*"[5] Even if applied to Mod_07_22 as proposed by the SEM Committee, the Revised Indexation Mechanism would remain retrospective in nature and its effect. While purportedly narrower in scope than the modification originally proposed by Tynagh Energy, the Revised Modification Proposal would nonetheless give rise to the same concern – namely that the historic parameters of capacity auctions are being changed after the auction has been completed in a manner that gives rise to clear benefits to certain market participants (i.e. those that were awarded capacity) over others (i.e. those who did not win, or chose not to bid, in the relevant auctions).

8. Energia wishes to reemphasise its position that, while the introduction of an inflation modifier to the capacity payment price in future capacity auctions is to be welcomed, there are severe difficulties with retrospectively introducing an inflation modifier for auctions already concluded. As Energia has previously noted, there are other ways in which to address inflation in an appropriate matter consistent with the principles governing the design of competitive auction processes that do not require modifications to the TSC or the Capacity Market Code ("**CMC**") that are retrospective in their effect. In light of the Call for Further Evidence, and in particular the potential indexation mechanism proposed by the SEM Committee, Energia has elaborated on those alternative approaches in this submission.

[5] Call for Further Evidence, page 7. Emphasis added.

II. The Revised Modification Proposal is retrospective in effect and not compliant with the requirements of a competitive bidding process

The Revised Modification Proposal is not compliant with applicable regulatory obligations

9. Energia's fundamental concern with the Revised Modification Proposal is that it changes a material component of the parameters for the T-3 and T-4 auctions (i.e. indexation to account for inflation) after the conclusion of the relevant auctions.

10. There is no justifiable legal or regulatory basis for such a change. In its response to the Initial Call for Evidence, Energia provided a detailed overview of the grounds on which Mod_07_22 raised serious concerns, having regard to applicable design principles for capacity auctions set out in energy regulation (in particular Article 22(1) of Regulation (EU) 2019/943[6]), State aid guidelines (in particular the European Commission's Guidelines on State aid for Climate, Environmental Protection and Energy ("**CEEAG**")) and the requirements under EU law for competitive bidding processes.[7] In addition, both the TSC and the CMC specifically prohibit modifications with retrospective effect, while the CMC provides that the capacity payment price shall not be subject to adjustment or indexation, except to the extent provided for under the TSC.

11. As Energia has previously highlighted, Article 22(1) of Regulation (EU) 2019/943 requires that capacity mechanisms: (i) select capacity providers by means of a transparent, non-discriminatory and competitive process; (ii) not create undue market distortions; (iii) set out technical conditions in advance of the selection process; and (iv) ensure that remuneration is determined through the competitive process.

12. Similarly, the CEEAG mandates the following requirements for the allocation of aid: (i) that the bidding process must be open, clear, transparent and non-discriminatory, based on objective criteria defined *ex ante* in accordance with the objective of the measure and minimising the risk of strategic bidding; (ii) the criteria must be published sufficiently far in advance of the deadline for submitting applications to enable effective competition; (iii) the budget or volume related to the bidding process is a binding constraint; and (iv) *ex post* adjustments to the bidding process must be avoided as they undermine the efficiency of the outcome.[8]

13. The Revised Modification Proposal is clearly not compatible with the design requirements under either Regulation (EU) 2019/943 or the CEEAG, or the terms of the TSC and CMC that prohibit modifications with retrospective effect.

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[6] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity (recast) (OJ L158/54).

[7] See Energia's response to the Initial Call for Evidence, paragraphs 12-33.

[8] CEEAG, paragraph 49.

Contrary to the (unsupported) views set out by the SEM Committee in the Call for Further Evidence,[9] the Revised Modification Proposal does in fact have retrospective effect. The SEM Committee accepts that its proposals would apply to auctions that have already taken place.[10] Self-evidently, the nature of the modification is to change the remuneration for capacity contracts that have already been awarded, entirely at odds with the manner in which inflation was addressed at the time the auctions were conducted.

14. Instead of providing clear, open and transparent criteria ahead of the submission of bids, the effect of the Revised Modification Proposal would be to fundamentally alter, after the fact, one of the key parameters of the T-3 and T-4 auctions as they related to inflation. This change is not transparent as it is being made, as the SEM Committee recognises, after the bidding process has concluded and the contracts for capacity have been awarded. Such a retrospective change manifestly confers an unfair advantage on those that were awarded capacity, as they benefit from the change in approach to indexation after the auction process has concluded, which could not have been taken into account by bidders (including in particular those who were unsuccessful or chose not to bid) at the time of the auction.

15. In this regard, Energia has previously noted that one of the key determining factors in its decision not to offer new qualified capacity in the T-4 auction was the absence of a mechanism to adjust tendered pricing in a way which reflected prevailing market (price) conditions.[11] This gave rise to an unacceptable level of both uncertainty and commercial risk. As was the case with Mod_07_22 as originally proposed, the Revised Modification Proposal intends to introduce a mechanism to allow for price changes above the 2% cap proposed in the capacity auction contracts. [Had such a mechanism been included in the capacity auction contracts, this would clearly have had a significant influence on Energia's assessment as to whether to offer new qualified capacity in the T-4 auction.]

16. The Regulatory Authorities are public bodies who are subject to public procurement law and are generally bound to observe good industry practices of purchasing and procurement. There is an overriding principle to which the

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[9] Call for Further Evidence, pages 21-22. The SEM Committee asserts that "*the modification would not be required to take effect before the date of the modification decision and so would not be affected by the provisions in the TSC or CMC that relate to retrospectivity.*" The SEM Committee also asserts that "*the prohibition on retrospectivity would not be engaged by a decision on this potential modification as it would not seek to unwind any right or remedy which would have accrued under an existing capacity contract before the date the modification took effect.*" In Energia's view, this position is unsustainable. It ignores entirely the regulatory requirements for a competitive bidding process and the obvious retrospective effect of the Revised Modification Proposal in shielding awarded participants from the effect of inflation in a manner that was not contemplated at the time of the auction, where such a change may have had a direct and material impact on the outcome of the auction.

[10] The SEM Committee accepts that the Revised Modification Proposal would alter the parameters of auctions that have already taken place, but asserts that such an approach is justified where there is an "*extraordinary risk*" to security of supply. See Call for Further Evidence, page 17.

[11] Energia informed the Regulatory Authorities of its decision on 12 April 2022. See Energia's response to the Initial Call for Evidence, paragraph 16.

Regulatory Authorities are subject which provides that, in relation to awarded contracts, changes to the terms of contracts which are materially different in character from the originally tendered contract, and demonstrate the intention of the parties to alter the essential terms, are not permitted. Energia considers the adjustments proposed in the Revised Indexation Mechanism and the Revised Modification Proposal offend this fundamental principle of procurement and are manifestly wrong. The Revised Modification Proposal specifically aims to adjust the fundamental basis upon which bids in the capacity auction would have been based. In doing so, it effects a change to an essential part of the contract and clearly demonstrates an intention to alter those essential terms.

The inflationary position was clear at the time the T-3 and T-4 auctions were conducted and bids were submitted

17. The parameters of the T-3 and T-4 auctions were set out in detail in Decisions SEM-21-058 and SEM-21-059 (both of which decided against applying indexation to the Net CONE[12]) and updated in the Information Notice on indexation of the Auction Price Cap for the T-3 and T-4 auctions (the "**December Information Notice**"). The issue of inflation was ultimately addressed at the time in the December Information Notice, where the Regulatory Authorities applied an indexation of 2% to the Auction Price Caps to take account of the inflationary environment. Market participants chose to participate – or not – in the T-3 and T-4 auctions on the basis of those parameters. Contracts were awarded on 4 March 2022 in respect of the T-3 auction and on 3 May 2022 in respect of the T-4 auction.

18. It is simply not credible that inflationary pressures were not apparent to bidders participating in auctions that took place from January to March 2022, given CPI in the UK and Ireland was running at or in excess of 5% at the time. All available indicators during the period when bids were submitted and contracts were awarded for the T-3 and T-4 auctions showed that inflation, already substantially in excess of 2%, was likely to remain at elevated levels.[13] Indeed, as the SEM Committee recognises in the Call for Further Evidence "*a prudent investor will have expected a degree of risk around a central case expectation of inflation and factored a risk premium into its bids.*"[14]

19. However, the SEM Committee asserts that winners in the T-3 and T-4 auctions are "*likely to have been faced with a fairly immediate price shock resulting from the Ukraine invasion in February 2022*" and that "*they may have been required to commit to capex contracts at a time when, contrary to prior expectations,*

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[12] See SEM-21-058, paragraph 5 and SEM-21-059, paragraph 4(e).

[13] See, for example, Bank of England Monetary Policy Report November 2021, Section 2.4 and Chart 2.25, which showed that CPI inflation picked up during Q3 2021and was expected to rise further in the near term. In its Monetary Policy Report for February 2022, the Bank of England highlighted higher than expected CPI inflation levels of 5.4% in December 2021, expected to rise to 7.25% by April 2022 (see Section 2.4 and Chart 2.19).

[14] Call for Further Evidence, page 8.

inflation was not falling but accelerating."[15] As noted above, even prior to the onset of the war in Ukraine in February 2022, the likelihood of ongoing elevated inflation levels had already been clearly signposted by various regulatory and governmental authorities as early as November 2021. Indeed, in its February 2022 Monetary Policy Report (published prior to the outbreak of the war), the Bank of England was estimating CPI inflation in the UK to reach 7.25% by April 2022.[16]

20. The SEM Committee has not pointed to any evidence to support the assertion that awarded participants in the T-3 and T-4 auctions priced their bids "*based on relatively low expectations of inflation*"[17] or were subject to an unforeseen inflationary shock brought on unexpectedly by the Ukrainian conflict. While the war may have exacerbated the situation by its impact on global supply chains, inflation levels were already elevated prior to the conflict. In light of the data available to bidders at the time of the T-3 and T-4 capacity auctions, this position was, or at the very least ought to have been, readily apparent to any prudent bidder participating in those auctions.

21. Moreover, as the SEM Committee recognises, no evidence has been provided to date to justify the Revised Modification Proposal by clearly demonstrating the impact of inflation on the financial viability of projects awarded on foot of the T-3 and T-4 auctions. No such evidence was provided by Tynagh Energy at the time that Mod_07_22 was proposed and no such evidence was provided in response to the Initial Call for Evidence (a fact which prompted the Call for Further Evidence).

22. More generally, neither the SEM Committee nor the Regulatory Authorities have conducted a detailed assessment on the underlying commercial rationale for Mod_07_22 or the Revised Modification Proposal.[18] Although the Revised Indexation Mechanism purports to adopt a more targeted approach to the issue of inflation with respect to these projects, the analysis underpinning the proposal is not supported by any cogent evidence relating to specific projects or the impact on awarded contracts, much less on its impact on competition in the relevant markets that the Revised Modification Proposal may have.

23. In any event, as Energia has previously submitted, even if information was available to support the commercial rationale for Mod_07_22 as originally

[15] Call for Further Evidence, page 12. Despite its prominence in the Call for Further Evidence, Energia notes that the Initial Call for Evidence published by the SEM Committee on 5 October 2022 made no reference whatsoever to the Ukraine war.

[16] Following the conflict, the CPI inflation rate was projected to be in excess of 9% during Q2 and Q3 2022. See Bank of England Monetary Policy Report (May 2022), page 59. See also Deutsche Bundesbank Discussion Paper No 03/2023, "Inflation Expectations in the Wake of the War in Ukraine".

[17] Call for Further Evidence, page 12.

[18] As Energia has previously noted, the approach taken in relation to Mod_07-22 and the Revised Modification Proposal may be contrasted with the rigorous evidence-based evaluation of the various capital and recurrent fixed costs, cost of capital and projected energy and system services for investors in relation to BNE-NET-CONE for auction price caps. See Energia's response to the Initial Call for Evidence, paragraph 24.

articulated or the Revised Modification Proposal (including the Revised Indexation Mechanism proposed by the SEM Committee), it would not be capable of overcoming the fundamental deficiency inherent in the SEM Committee's proposed approach, i.e. that it changes the material bidding parameters of the T-3 and T-4 auctions after they have already been concluded. As outlined above, and in Energia's previous response to the Initial Call for Evidence, this deficiency is incompatible with the rules governing the design of competitive bidding processes, the requirements of Regulation (EU) 2019/943 and the specific requirements of the State aid rules applicable to the energy sector.

III. Appropriate alternative options are available to address indexation and security of supply risks

24. Energia supports appropriate measures to deal with the issue of inflation, in particular to address the capacity payment price in future capacity auctions. Energia also agrees in general terms with the SEM Committee's view that *if* there are projects for which inflation threatens financial viability, appropriate mitigation measures should be introduced to address any security of supply issues that arise.[19] However, it is essential that any such measures, if required: (i) are supported by clear evidence to justify the intervention; and (ii) do not alter the historic parameters of concluded auctions in a manner that distorts competition and is incompatible with applicable rules for the design and implementation of capacity auctions.

25. Mod_07_22 does not satisfy these criteria, either in its original guise or an updated under the Revised Modification Proposal incorporating the Revised Indexation Mechanism. In particular, while the SEM Committee asserts that such a mechanism would be targeted in its application and limited in its scope, Energia notes that it would apply to all new multi-year contracts awarded in the 2024/25 T-3 and 2025/26 T-4 auctions. Moreover, no detail has been provided as to the circumstances of financial jeopardy in which the mechanism would be activated, or the nature and extent of information that would be required to justify such measures.[20] Indeed, the difficulties experienced by the SEM Committee in obtaining any information in response to the Initial Call for Evidence showing a definitive link between allegedly unexpected inflation rates and the financial viability of projects illustrates the importance of there being, at minimum, clear evidential requirements for the Revised Indexation Mechanism to be applied.

26. It is also notable in this regard that the Call for Further Evidence is being conducted 14 months after the T-3 auction took place for delivery of new capacity by 1 October 2024 and nearly 12 months after the T-4 auction for

[19] Call for Further Evidence, page 4.

[20] Any such information/evidence would, in Energia's view, need to be based on objective criteria (e.g. by reference to how a prudent investor in the circumstances would act) and, consistent with the approach of the Regulatory Authorities in other areas where inflation has been considered, be subject to rigorous stress-testing.

delivery of new capacity by 1 October 2025. To the extent that projects are genuinely in financial jeopardy (subject to inflationary indexation being applied), it is highly unlikely that they will have progressed to any material degree at this stage and are therefore likely to be late delivering in any event.

27. As outlined in its response to the Initial Call for Evidence, Energia considers that there is significant merit in taking account of the macroeconomic circumstances (including as regards inflation) in the design of future capacity auctions. Such an approach would allow for market participants to take adequate account at the bidding stage of the impact of construction-related and other inflation on the delivery of energy projects and to price and risk-weight their bids appropriately. Given the likely prevalence of elevated rates of inflation affecting market participants in the UK and Ireland in the near to medium term, Energia believes that it is important to recognise the potential impact of these economic conditions (including construction-related and other inflationary pressures) on project financing and delivery going forward.[21]

28. As regards contracts that have already been awarded, the SEM Committee appears to accept in the Call for Further Evidence that the Revised Indexation Mechanism would constitute an "intervention" by the Regulatory Authorities,[22] albeit one purportedly justified on the basis of extraordinary economic circumstances to safeguard security of supply. Energia notes that there are viable alternative options available to the Regulatory Authorities to intervene in order to address security of supply concerns. These existing levers are capable of addressing systemic risks to supply without retrospectively changing key parameters of completed auctions and avoiding the serious distortions to competition inherent in the Revised Modification Proposal.

29. In particular, Section 9 of the Electricity Regulation Act (as amended) requires the CRU to have regard to ensuring security of supply, while Regulation 28 of the European Communities (Internal Market in Electricity) Regulations 2005[23] outline provisions for the CRU and the TSO to address security of supply issues, including: (i) an obligation on the CRU to monitor measures to deal with a shortfall of capacity by one or more suppliers;[24] (ii) a requirement for the TSO to advise the CRU in circumstances where security of supply is threatened or is likely to be threatened;[25] and (iii) provision to allow the CRU to take such measures as it considers necessary to protect security of supply.[26]

[21] The SEM Committee appears to recognise the need for a different approach in the longer term to indexation in future capacity auctions – see in particular Section 4 of the Call for Further Evidence, pages 22-23.

[22] See, for example, Call for Further Evidence, pages 17 and 21.

[23] SI No. 60/2005.

[24] *Ibid*, Regulation 28(2)(f).

[25] *Ibid*, Regulation 28(4).

[26] *Ibid*, Regulation 28(5). Where a security of supply issue has been identified, the CRU may secure new or additional generation capacity with the consent of the Minister.

30. Against this legal and regulatory backdrop, the CRU has previously set out in some detail its objectives, principles and intended regulatory approach to interventions aimed at maintaining local security of supply in response to significant demand growth or a generator exiting the market.[27] The CRU elaborated on the specific measures it may look to take under such a regulatory intervention in relation to security of supply in the Dublin region, none of which involved retrospective changes to concluded auction parameters, notwithstanding significant shifts in demand since the time of the auctions.[28]

31. While not directly analogous to the present case, the approach articulated by the CRU demonstrates the availability and viability of specific regulatory measures to allow the Regulatory Authorities to intervene in order to protect security of supply. Unlike the Revised Modification Proposal, these regulatory options provide a clear legal basis for intervention if required, as well as a coherent framework to provide clarity for all market participants as to the circumstances in which any intervention may be made and the associated conditions required to mitigate the risk of moral hazard and market distortions, including the exclusion of such units from participating in the ex-ante energy markets.

IV. Conclusion

32. There has been a significant passage of time since the T-3 and T-4 auctions were concluded, and since Mod_07_22 was first proposed. It has been through several iterations and now two consultation and calls for evidence. No clear evidence has been provided to date to justify the approach proposed. The Regulatory Authorities have identified severe flaws in the modification as originally proposed, including in the version approved by a majority of the Modifications Committee. While the Revised Indexation Mechanism proposed by the SEM Committee in the Call for Further Evidence purports to narrow (to some extent[29]) the scope of Mod_07_22, but does not address the fundamental legal and economic deficiencies inherent in its basic design and intent.

33. Throughout this process, Energia has raised serious concerns regarding Mod_07_22 and the approach to addressing the issue of indexation in the manner proposed. The issues discussed in this submission, Energia's previous response to the Initial Call for Evidence and its previously correspondence with

[27] See CRU Information Paper CRU/17/346 (18 December 2017). In relation to its approach to intervention, the Information Paper notes that "*the CRU expects generators to have reasonable foresight of their business and to exercise prudence to ensure they are in a position to honour their commitments under the Grid Code*". In addition, the CRU "*considers that in most circumstances the most effective means of achieving its objectives … is to allow the market and the Grid Code mechanisms to work as intended and to avoid taking any intervention in the market that would prevent, or delay, the closure of a generator. The CRU will intervene where it considers that failure to do so would risk security of supply on all or part of the system.*" See Information Paper CRU/17/346, page 10.

[28] CRU Information Paper CRU/18/228 "Dublin Security of Supply: Measures to Mitigate the Risk of Disorderly Exit", pages 13-18.

[29] As noted above, the Revised Modification Proposal would still seem to apply to all new multi-year capacity awarded in the T-3 and T-4 auctions for 2024/25 and 2025/26 respectively.

the Regulatory Authorities, are of serious concern to Energia and profound importance to the operation of the Capacity Market generally. It is important that these concerns be addressed fully and comprehensively, which the Revised Modification Proposal does not do.

34. As it has consistently maintained, Energia generally supports the introduction of an inflation modifier, properly implemented, to the capacity payment price in future capacity auctions.

35. However, Energia's fundamental concern remains that there are serious and ultimately insurmountable difficulties with retrospectively introducing an inflation modifier in the manner proposed for auctions that have already concluded. Energia has previously expressed the view, and maintains it, that if capacity cannot be delivered at the prices bid and subject to the risk allocation published in prior auctions, those capacity contracts should be terminated and new auctions should be carried out with appropriate lead times, risk allocation, price caps and inflation indexation being taken into account in an open, transparent and non-discriminatory manner. Energia also considers that, given the length of time between the conclusion of the T-3 and T-4 auctions in early 2022 and now, if projects are genuinely in financial jeopardy (subject to inflationary indexation being applied), it is highly unlikely that they will have progressed to any material degree and are likely to be late delivering in any event.

36. Energia has set out in this response that, even if the Regulatory Authorities considers intervention is necessary to address a real and substantial risk to security of supply, effective alternative options are available under the current regulatory framework to deal with such risks. Critically, any intervention must come with mandatory conditions required to mitigate the risk of moral hazard and market distortions, including the exclusion of the specific units from participating in the ex-ante markets. While no cogent evidence has been provided to suggest security of supply risks arise in fact, the Revised Modification Proposal is not, in any event, an appropriate tool to address concerns regarding the delivery of contracted-for capacity or security of supply.

37. Given the need for clarity as soon as possible, Energia reiterates the view expressed to the Regulatory Authorities in July and October 2022 that the Revised Modification Proposal should not be approved or implemented insofar as it relates to projects that have already secured a capacity contract in previous capacity auctions. Energia is treating the proposed distortion of the awarded capacity contracts resulting from any implementation of the Revised Modification Proposal with the utmost seriousness. It considers the Revised Modification Proposal to be fundamentally flawed, incompatible with applicable law and manifestly wrong.

38. In the event the Regulatory Authorities were to approve the Revised Modification Proposal (or any other measure with equivalent effect), Energia reserves all of its rights to take further action in this regard and to protect the competitive nature of the relevant markets.