

MODIFICATION PROPOSAL FORM			
<b>Proposer</b> <i>(Company)</i>	<b>Date of receipt</b> <i>(assigned by System Operator)</i>	<b>Type of Proposal</b> <i>(delete as appropriate)</i>	<b>Modification Proposal ID</b> <i>(assigned by System Operator)</i>
Kilshane Energy Limited (KEL)	25 <sup>th</sup> October 2022	Urgent	CMC_12_22
Contact Details for Modification Proposal Originator			
<b>Name</b>	<b>Telephone number</b>	<b>Email address</b>	
Brian McMullan		<a href="mailto:brian@kilshaneenergy.ie">brian@kilshaneenergy.ie</a>	
Modification Proposal Title			
Remedial Action in the event of planning application delay to a project that qualifies under a Direction			
<b>Documents affected</b> <i>(delete as appropriate)</i>	<b>Section(s) Affected</b>	<b>Version number of CMC used in Drafting</b>	
	J.5	Current Version	
Explanation of Proposed Change <i>(mandatory by originator)</i>			
<p>The Capacity Market Code (CMC) requires units delivering Awarded New Capacity to establish an implementation plan which outlines key milestone dates for the delivery of New Capacity. These milestones are outlined in Section J.2 of the CMC. A key milestone is the Substantial Completion milestone, which needs to be satisfied for a New Capacity Market Unit to be flagged as 'Actual' in the Capacity and Trade Register. Once the New Capacity Market Unit has been flagged as 'Actual' it receives capacity payments and is liable for RO obligations.</p> <p>Projects that have qualified for a Capacity Auction under a CRU Direction (The Direction) such as CRU/21/030a, encounter additional risks to delivery that projects who qualify in the absence of The Direction. The main project delivery risk implicitly introduced when The Direction applies, is obtaining a final grant to the projects planning application. Obtaining a final grant will dictate the Commercial Operation Date of a project as development cannot start on site until then. Whilst a Participant is responsible for preparing a robust planning application, once they submit their planning application, the date which they obtain their final grant is out of their control, and can be considered open ended. This is due to everyone's right to appeal and possible subsequent judicial review of decisions made by planning authorities or An Bord Pleanala (ABP). This is a judicial review of the ABP process by a third party. This is nothing to do with and cannot be influenced by the Participant.</p> <p>KEL have carried out an extensive review of the planning applications associated with recently Awarded New Capacity, in particular those who were successful in the T-3 auction. There are a number of third parties who are fundamentally against the use of natural gas for generation. They are aware that they do not have to successfully overturn a grant of planning permission to terminate a project, they merely have to delay it long enough to make the delivery of the New Capacity impossible.</p> <p>KEL is proposing a modification which would extend the Long Stop Date (LSD) and the maximum duration of New Capacity in instances where Substantial Completion has</p>			

been delayed as a result of the delay in obtaining final planning grant due to an appeal or subsequent judicial review of a projects planning application.

To ensure security of supply and the delivery of Awarded New Capacity, it is important that the project timelines allow for possible delays to obtaining a final planning grant that are outside of the control of the Participant.

#### Legal Drafting Change

*(Clearly show proposed code change using **tracked** changes, if proposer fails to identify changes, please indicate best estimate of potential changes)*

It is proposed that the modification introduces a new Remedial Action under Section J.5.3 of the Code.

### **J.5.3 Extension Due to Delay in Obtaining Final Grant to Planning Application**

*J.5.3.1 Where the completion of the Substantial Completion Milestone is delayed solely as a result of a delay in obtaining final grant of planning permission due to an appeal or judicial review, a Participant or an Enforcing Party (on behalf of a Participant) may apply to the Regulatory Authorities for an extension to the Maximum Capacity Duration and Long Stop Date associated with the relevant Capacity Market Unit.*

*J.5.3.2 The application under paragraph J.5.3.1 shall include:*

*(a) reasons for the request in sufficient detail to enable the Regulatory Authorities to consider the request, together with sufficiently detailed supporting evidence; and  
(b) an updated estimated date for final completion of the Awarded New Capacity with detailed reasoning.*

*J.5.3.3 Applications made under paragraph J.5.3.1 shall be granted by the Regulatory Authorities in the absence of due cause not to do so.*

*J.5.3.4 Where a request for extension under J.5.3.1 is approved, the relevant Maximum Capacity Duration and Long Stop Date must be extended on a day for day basis in accordance with the approved extension.*

It is envisioned that a change may also be required to Section E.5 of the CMC to take account of the wording around the exemption application, particularly in relation to the ten-year duration.

#### **E.5 EXCEPTION APPLICATIONS**

**E.5.1.1 A Participant may seek the approval of the Regulatory Authorities for:**

**(a) proposed New Capacity to have a Maximum Capacity Duration of more than one and up to 10 Capacity Years with the addition of any extension period approved under Section J.5.3; or**

**[...]**

*E.5.1.8 If a Participant makes an Exception Application, then the Regulatory Authorities shall notify the Participant and the System Operators whether or not they approve the Exception Application and, if they do approve it:*

*(a) if the Exception Application is seeking a Maximum Capacity Duration for New Capacity of longer than one year, the Maximum Capacity Duration approved by the Regulatory Authorities for the New Capacity (which must be 10 Capacity Years **with the addition of any extension period approved under Section J.5.3**); or*

**Modification Proposal Justification**

*(Clearly state the reason for the Modification)*

A.1.2 of the Capacity Market Code (CMC) defines its objectives as;

“(g) through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland.”

If the modification is not allowed the short and long term interests of customers are dictated by parties who are fundamentally against the use of gas regardless of the price, quality, reliability and security of supply of electricity across the island of Ireland.

Our request is not to remove the right to project termination where the appropriate authorities feel it is suitable, rather, that the option to achieve successful delivery for all parties is retained.

In the absence of The Direction, a participant seeking qualification to a Capacity auction would be required to have a final planning grant. The introduction of The Direction removes the requirement for a project to have a final planning grant prior to being awarded a Capacity contract. The Long Stop Date (LSD) as referenced in the CMC was drafted in the context of projects qualifying in the absence of The Direction. In this case the planning risk is removed. Thus, the introduction of The Direction implicitly increases the risk of non-delivery for projects that qualify under The Direction.

The two timebound milestones as identified in section J.6 of the CMC are Substantial Financial Completion (SFC) and Minimum Completion by the LSD. KEL believe that the purpose of the implementation plans and associated dialogue with the RAs and SOs is for the successful delivery of the project by meeting the needs of all stakeholders. In Section J.5.2 of the CMC, a Participant can apply for an extension to the SFC milestone but not to Minimum Completion by the LSD. KEL believe, that J.5.2. acknowledges that all projects are subject to risk outside the control of the Participant and it may be in the interest of all parties to discuss same.

It is the view of KEL that the inflexibility of the current drafting presents the single biggest risk to the provision of New Capacity under The Direction.

**Code Objectives Furthered**

*(State the Code Objectives the Proposal furthers, see Sub-Section A.1.2 of the CMC Code Objectives)*

KEL believes that this modification furthers a number of the Capacity Market Code Objectives:

*(a) to facilitate the efficient discharge by EirGrid and SONI of the obligations imposed by their respective Transmission System Operator Licences in relation to the Capacity Market;*

*(c) to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of electricity capacity in the Capacity Market; and*

*(g) through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland.*

**Implication of not implementing the Modification Proposal**

*(State the possible outcomes should the Modification Proposal not be implemented)*

Failure to implement would mean any third party wishing to prevent the delivery of a project would judicially review the statutory decision-making process and the project would have to terminate their awarded capacity contract as it would be impossible to meet their obligatory delivery milestones.

It would not matter if the judicial review is successful, the delay caused by the process would result in delivery being impossible. An objector would only need to delay the planning application long enough so that a Participant would have to terminate their contract award, resulting in non-delivery of Awarded New Capacity.

Participants who have qualified for a Capacity Auction under The Direction, and in particular those in the T-3 capacity auctions, are exposed to an undue amount of risk that is outside of their control. The Direction was introduced in response to capacity shortfalls and to encourage further competition in the capacity auctions. KEL believe that without this Modification to help mitigate planning risk implicitly introduced by The Direction, further terminations of awarded New Capacity is inevitable.

**Impacts**

*(Indicate the impacts on systems, resources, processes and/or procedures)*

If passed, this modification proposal would mean a poorly founded judicially review is much less likely and as such the delivery of awarded New Capacity is increased substantially on a number of existing projects. It may require the Regulatory Authorities to assess applications made for extensions under the proposed new Remedial Actions. Such applications would likely only be made in relation to T-3 auctions, and only where a milestone has not been achieved because of a third party challenging the statutory decision-making process. This likely represents a minimal impact on Regulatory Authority resources. KEL strongly believe the incentive for third parties to make spurious challenges is substantially reduced if the third party cannot guarantee the termination of the Awarded New Capacity as a result.

**Please return this form to the System Operators by email to [CapacityModifications@sem-o.com](mailto:CapacityModifications@sem-o.com)**

### Notes on completing Modification Proposal Form:

1. If a person submits a Modification Proposal on behalf of another person, that person who proposes the material of the change should be identified on the Modification Proposal Form as the Modification Proposal Originator.
2. Any person raising a Modification Proposal shall ensure that their proposal is clear and substantiated with the appropriate detail including the way in which it furthers the Code Objectives to enable it to be fully considered by the Regulatory Authorities.
3. Each Modification Proposal will include a draft text of the proposed Modification to the Code unless, if raising a Provisional Modification Proposal whereby legal drafting text is not imperative.
4. For the purposes of this Modification Proposal Form, the following terms shall have the following meanings:

CMC / Code:	means the Capacity Market Code for the Single Electricity Market
Modification Proposal:	means the proposal to modify the Code as set out in the attached form
Derivative Work:	means any text or work which incorporates or contains all or part of the Modification Proposal or any adaptation, abridgement, expansion or other modification of the Modification Proposal

The terms "System Operators" and "Regulatory Authorities" shall have the meanings assigned to those terms in the Code.

In consideration for the right to submit, and have the Modification Proposal assessed in accordance with the terms of Section B.12 of the Code, which I have read and understand, I agree as follows:

1. I hereby grant a worldwide, perpetual, royalty-free, non-exclusive licence:
  - 1.1 to the System Operators and the Regulatory Authorities to publish and/or distribute the Modification Proposal for free and unrestricted access;
  - 1.2 to the Regulatory Authorities to amend, adapt, combine, abridge, expand or otherwise modify the Modification Proposal at their sole discretion for the purpose of developing the Modification Proposal in accordance with the Code;
  - 1.3 to the System Operators and the Regulatory Authorities to incorporate the Modification Proposal into the Code;
  - 1.4 to all Parties to the Code and the Regulatory Authorities to use, reproduce and distribute the Modification Proposal, whether as part of the Code or otherwise, for any purpose arising out of or in connection with the Code.
2. The licences set out in clause 1 shall equally apply to any Derivative Works.
3. I hereby waive in favour of the Parties to the Code and the Regulatory Authorities any and all moral rights I may have arising out of or in connection with the Modification Proposal or any Derivative Works.
4. I hereby warrant that, except where expressly indicated otherwise, I am the owner of the copyright and any other intellectual property and proprietary rights in the Modification Proposal and, where not the owner, I have the requisite permissions to grant the rights set out in this form.
5. I hereby acknowledge that the Modification Proposal may be rejected by the Regulatory Authorities and that there is no guarantee that my Modification Proposal will be incorporated into the Code.