

Response to SEM-22-050

Capacity Market Code Modifications Working Group 26 Consultation Paper

EirGrid and SONI Response
21st September 2022



Introduction

EirGrid holds licences as independent electricity Transmission System Operator (TSO) and Market Operator (MO) in the wholesale trading system in Ireland. System Operator Northern Ireland (SONI Ltd) is the licensed TSO and MO in Northern Ireland. The Single Electricity Market Operator (SEMO) is part of the EirGrid Group and operates the Single Electricity Market on the island of Ireland.

EirGrid and SONI have been certified by the European Commission as independent TSOs. EirGrid also owns and operates the East West Interconnector, while SONI acts as Interconnector Administrator for both of the interconnectors that connect the island of Ireland and GB.

EirGrid and SONI, both as TSOs and MOs, are committed to delivering high quality services to all customers, including generators, suppliers and consumers across the high voltage electricity system and via the efficient operation of the wholesale power market. EirGrid and SONI therefore have a keen interest in ensuring that the market design is workable, will facilitate security of supply and compliance with the duties mandated to us and will provide the optimum outcome for customers.

EirGrid and SONI have duties under licence to advise the CRU and UR respectively on matters relating to the current and expected future reliability of the electricity supply. We have also been allocated responsibility for administering the Capacity Market Code through our TSO licences. This response is on behalf of EirGrid and SONI in their roles as TSOs for Ireland and Northern Ireland.

EirGrid and SONI Views on the Consultation Topic

EirGrid and SONI, in our role as System Operators have considered the revised modification text, the points raised during Capacity Market Workshop 26 and the SEM Committee's subsequent consultation paper ([SEM-22-050](#), 22nd August 2022), in relation to the proposed Capacity Market Code modification:

- [CMC 10 22](#) – Introduction of New Remedial Action in the Event of Third-Party Delays

EirGrid and SONI acknowledge that issues outside the control of participants introduce risks to the delivery of capacity and welcome opportunities to work with participants to mitigate these risks and their impact. However EirGrid and SONI support the SEM Committee's *mindful to reject* position in relation to this specific proposed modification, in part due to its broad application. Whilst the proposal intends to reduce the risk associated with delivering capacity, an unintended consequence of the proposal would be to increase the risk of timely delivery.

EirGrid and SONI believe there is merit in further consideration of mechanisms to address risks associated with third party dependencies including the introduction of a new remedial action scheme to extend Long Stop Dates and potentially Maximum Capacity Duration in the specific circumstances of a Judicial Review of the planning process associated with a project. A summary of rationale is appended for your consideration.

APPENDIX: Response Template

SUMMARY INFORMATION

Respondent's Name	SONI & EirGrid
Type of Stakeholder	System Operators
Contact name (for any queries)	-
Contact Email Address	-
Contact Telephone Number	-
Confidential Response	No

CAPACITY MARKET CODE MODIFICATIONS CONSULTATION COMMENTS:

ID	EirGrid and SONI Response
CMC_10_22 Introduction of New Remedial Action in the Event of Third-Party Delays	
Proposed Modification and its Consistency with the Code Objectives	<p>EirGrid and SONI recognise that events outside of the control of a project promoter can impact on delivery timelines and we welcome opportunities to work with participants to mitigate these risks. However, EirGrid and SONI support the SEM Committee's <i>minded to reject</i> position in relation to this proposed modification. Whilst the proposal is intended to reduce risk associated with the delivery of capacity, should it be implemented as proposed, EirGrid and SONI believe, on balance, the remedial action would increase risk associated with the timely delivery of capacity to improve Security of Supply.</p> <p>The proposal contends that the remedial action would be used only in limited circumstances e.g. in relation to T-3 auctions and 'delays associated with the delivery of a Connection Agreement'. The proposed facility could potentially be used as a form of project contingency and influence unrealistic implementation plans for new capacity to the detriment of the delivery of capacity to meet demand in a capacity year and to the detriment of other potential capacity which may be displaced in the qualification / auction process.</p> <p>The existing contractual milestones for capacity - including Minimum Completion before the applicable Long Stop Date (18 months <i>after the start of the first Capacity Year in which the Awarded New Capacity is to be provided</i>) - provide reasonable contingency for events within and outside the control of the project.</p>

<p>Impacts Not Identified in the Modification Proposal Form</p>	<p>The proposed remedial action would apply to awarded capacity which competed and was successful in a previous qualification and auction process. Careful consideration of the impact of a modification applicable to these participants would be required to ensure no undue advantage was conferred.</p> <p>Whilst the implementation of the detail of the proposed remedial action process including timelines, due diligence, third party consultation etc. would be a matter for the Regulatory Authorities, the process itself would present a further risk to timely delivery of capacity. In particular if the process is subject to appeal, dispute or legal challenge.</p> <p>The existence of the proposed remedial action may negatively influence the engagement between statutory bodies and the promoters of the project in that a more formal, legal engagement may be the default in the expectation that delays or perceived delays would be debated, catalogued and presented to the Regulatory Authorities for adjudication.</p> <p>The proposal cites the planning and consents process as one driver for the new remedial action. Planning approval processes by their nature are deliberative and consultative with opportunities for public observation and consultation, appeal and legal challenge. These are risks which apply to any project and which require appropriate planning, management, mitigation and contingency.</p> <p>However, on balance and notwithstanding these concerns, there are circumstances where a specific remedial action - designed to address many of the issues above - may be merited.</p> <p>Should a new remedial action for third party delays be introduced, it should seek to address very specific risks e.g. the time risk associated with legal challenges in the context of obligated delivery milestones. There is merit in facilitating due planning processes in both jurisdictions to allow projects and third parties utilise the statutory and legal processes available to them such that they do not make it impossible for a project promoter to deliver or commit further to deliver contracted capacity. Such a facility would need to be implemented with unambiguous definitions and criteria and apply to precise circumstances. Applications for such a remedial action would also likely require supporting evidence akin to an affidavit that the applicant has no commercial relationship with the party which instigated legal proceedings.</p> <p>For clarity, such a remedial action facility should not apply when the contracted party's actions or omissions cause a delay to the planning process, nor when the party instigates legal proceedings on their own behalf. Nor should the remedial action apply to anything other than legal proceedings with respect to the planning process i.e. Judicial Review.</p>
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<p>Detailed CMC Drafting Proposed to Deliver the Modification</p>	<p>The proposed text introduces a broad number of considerations for deliberation which would be open to interpretation and which would introduce risk to the efficiency, effectiveness and timeliness of the remedial action process itself and the timely delivery of capacity.</p> <p>Third parties are not defined or limited to specific entities with direct relevance to the delivery of a project. Determining with due diligence which party is 'solely responsible' for a delay may be extremely difficult if not impossible, in particular if the third party cannot be compelled to engage in the remedial action process e.g. planning authority, contractor or equipment supplier. What qualifies as 'sufficient detail' with respect to the application is unclear and open to interpretation.</p> <p>There is merit in further consideration of a more targeted approach. If a new remedial action targeting specific risks such as planning processes and challenges is implemented, the existing clause, J.5.2 Extension of Date for Substantial Financial Completion, could be a basis or model for the application procedure. With respect to the extension of milestones including the Long Stop Date for a successful application in such a scenario, they could be extended by a duration equivalent to the Judicial Review proceedings, which may be lengthy, with a clearly defined and documented start and end point addressing both jurisdictions' Judicial Review processes. Similar remediation could apply to the Maximum Capacity Duration however this may reduce the incentive for the contracted party to find a resolution with the third party.</p> <p>EirGrid and SONI are available to participate in further consideration and provide further input to the SEM Committee's deliberations on this matter.</p>
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