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15th September 2022

RE: Kilshane Energy Ltd Response to CMC_10_22 - Introduction of New Remedial Action in the event of Third Party Delays

Dear SEM Committee,

Kilshane Energy Limited (KEL) welcomes the opportunity to respond to the proposed Modification CMC_10_22 raised in consultation paper SEM-22-050. KEL would like to make clear from the outset, the importance of this modification to the successful delivery of The Project as outlined below.

The Project

KEL was awarded a ten-year capacity contract for a 293MW Open Cycle Gas Turbine project (The Project) located within the Greater Dublin Locational Capacity Constraint area in the T-3 2024/25 CRM auction (T-3) held in January 2022. The T-3 auction was atypical and supplementary to the T-4 2024/25 CRM auction that failed to deliver the necessary capacity requirement. KEL are working towards delivery of new capacity for October 2024.

Background

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.”

B.4.1.1 of the CMC states;

“In the event of any conflict between any Party’s obligation pursuant to any Legal Requirements and this Code, such conflict shall be resolved according to the following order of priority:

- (a) requirements under Applicable Laws;
- (b) any applicable requirement, direction, determination, decision, instruction or rule of any Competent Authority;
- (c) the applicable Licence;
- (d) the Grid Code applicable to the relevant Unit concerned;
- (e) the Metering Code applicable to the relevant Unit concerned; and
- (f) this Capacity Market Code (subject to paragraphs B.4.1.5, B.4.1.6 and B.4.1.7 below).”

In the absence of a CRU Direction such as CRU/21/030a¹ a participant seeking qualification to a CRM capacity auction would be required to have a final planning grant. The introduction of a CRU Direction instructs Eirgrid to offer a grid connection to all projects that are successfully awarded a contract in a CRM auction. This effectively removes the requirement for that project to have a final planning grant. The planning application process can be considered open ended in terms of forecasting a timeline until a final grant is received. This is due to the right for any individual to appeal and subsequently judicially review a planning application decision and whilst there are statutory timelines imposed to receive certain decisions, these are not in place when considering a judicial review. The Long Stop Date (LSD) as referenced in the Capacity Market Code was drafted in the context of projects qualifying in the absence of a CRU Direction. In this case the planning risk is removed.

Thus, the introduction of a CRU Direction implicitly increases the risk of non-delivery for projects that qualify under this Direction. In our view, it also places the CMC in contradiction of B.4.1.1 Priority as J.6 of the CMC allows for unilateral termination irrespective of any ongoing superior matter such as judicial review.

SEM-22-054A² Performance of the SEM Capacity Remuneration Mechanism was recently published and identified a number of findings on how the CRM design impacts the SEM security of supply requirement. One of the key areas identified with scope for improvement was the lead time in T-4 auctions. It was concluded that;

“the lead time in T-4 auction, in practice is <3.5 years, which is particularly challenging to deliver new build that does not have required consents ahead of the auction.”

¹ https://www.cru.ie/wp-content/uploads/2021/03/CRU21030a-CRU-Direction-to-EirGrid-re-T-3_Final.docx.pdf

² <https://www.semcommittee.com/sites/semc/files/media-files/SEM-22-054A%20Performance%20of%20the%20SEM%20CRM.pdf>

Remedies considered where;

“Extending lead times for projects successful in auctions to get built”

The Project is working on a T-3 timeline.

KEL Response to SEM-22-050

1.1.2

KEL believes that the reference “Third Party” requires further clarification. We are of the opinion that while normal counterparties are indeed third parties, normal counterparty risk should be included as contingency in the business model prepared before bid submission. Therefore, the auction clearing price should reflect the degree of contingency applied by the various participants.

However, where this cannot work is where circumstances arise outside the normal influence of the developer, for example, court action such as judicial review. Particularly where a project faces termination of their contract via the LSD.

2.1.2

KEL notes the EPEDL reference to implementation plans and associated key milestones. The two timebound milestones as identified in section J.6 of the Capacity Market Code (CMC) are Substantial Financial Completion (SFC) and Minimum Completion by the LSD. We would suggest 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. We note, that in section J.5.2 a participant can apply for an extension to the SFC milestone but not to Minimum Completion by the LSD. We believe, that J.5.2. acknowledges that all projects are subject to risk outside the control of the developer and it may be in the interest of all parties to discuss same. We question why the same logic does not apply to J.6.1.2(b). In our opinion the inflexibility of the current drafting presents the single biggest risk to the provision of new capacity under a CRU Direction. A blanket termination clause as currently drafted when viewed in the context of risk exposure outside of the control of the developer discourages participation as the risk is essentially unfinanceable. Our request is not for the RAs to remove their right to project termination where they feel it is appropriate, rather, that the option to achieve successful delivery for all parties is retained.

2.1.16

KEL acknowledges that all project business cases must include contingency. However, the combination of open-ended planning system and unilateral right of termination at the LSD cannot be reasonably accounted for with any form of contingency. We believe this is a factor in both the low auction participation and the failure to procure sufficient MWs in recent CRM auctions.

2.1.17

KEL disagree with this statement. A robust qualification process will identify unrealistic implementation plans. We also agree with the ESB comments in 2.1.21 that the current lead times are in themselves optimistic for T-4 auctions. The Project is working to a T-3 delivery.

2.1.26

KEL believe the Modification as proposed by KEL does not automatically remove “many of the penalties”. Such penalties should be included in the project business model as part of manageable counterparty risk.

2.1.27

KEL believes that the scenario as described is not relevant to the Modification as we propose it. We refer to the auction qualification process which should highlight any participants who have been over optimistic with their implementation plan.

KEL Recommended Amendments to CMC 10 22

KEL are of the view that neither the CMC nor Modification CMC_10_22 as currently drafted address the specific delivery risks that the introduction of a CRU Direction introduce. As outlined above, it is the objective of the CMC to promote the interests of consumers across the island of Ireland in respect to security of supply. The CMC also states that priority will be given to any direction from a Competent Authority or court proceeding ahead of the CMC. The introduction of recent CRU Directions such as CRU/21/030a implicitly increases risk of non-delivery to projects qualifying for a CRM auction under this direction. SEM-22-054A concludes that lead times should be extended for delivery of new build projects that do not require consents ahead of the auction. The CMC as currently drafted is not mindful of a CRU direction and the implications of same. Notwithstanding this, the current CMC is cognisant, through J.5.2, that delays may occur outside what would be perceived as reasonable contingency, but importantly, only allows for delay to achieving the SFC milestone and not Minimum Completion by the LSD.

It is the view of KEL that Modification CMC_10_22 should be amended, in particular when a CRU Direction is in force, to include provision for the open-ended nature of the planning application process, especially with regard to projects that may end up in judicial review. J.5.2 of the CMC should include provision for the extension of Minimum Completion by the LSD and in turn J.6.1.2 should reference the amended J.5.2.

Without this additional provision, KEL strongly believe that the risk to non-delivery of projects that qualified into CRM auctions under the CRU direction is extremely high.
