



## **Single Electricity Market (SEM)**

### **Capacity Market Code Urgent Working Group Modification Consultation Paper**

- CMC\_12\_22: Remedial Action in the Event of Planning Application Delay to a Project that Qualifies under a Direction**
- CMC\_13\_22: Third Party Judicial Review Remedial Action**
- CMC\_14\_22: Mitigation of Impact of Third-Party Delays on Participants and Extension of Support Term**
- CMC\_15\_22: Introduction of New Remedial Action to Enable Extensions due to Planning and Permitting Delays**

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# 1. OVERVIEW

## 1.1 ABSTRACT

1.1.1 The purpose of this consultation paper is to invite industry participants to provide feedback and comments with regard to the proposed modifications to the Capacity Market Code (CMC) discussed at the Urgent Working Group held on 17 November 2022.

1.1.2 During this Working Group, five modifications were presented with four having been designated as Urgent by the Regulatory Authorities. This consultation paper relates to the Urgent Modifications:

**CMC\_12\_22: Remedial Action in the Event of Planning Application Delay to a Project that Qualifies under a Direction<sup>1</sup>**

**CMC\_13\_22: Third Party Judicial Review Remedial Action<sup>2</sup>**

**CMC\_14\_22: Mitigation of Impact of Third-Party Delays on Participants and Extension of Support Term<sup>3</sup>**

**CMC\_15\_22: Introduction of New Remedial Action to Enable Extensions due to Planning and Permitting Delays<sup>4</sup>**

A separate consultation will be undertaken on the standard proposed modification CMC\_16\_22.

## 1.2 BACKGROUND

1.2.1 The SEM CRM detailed design and auction process has been developed through a series of consultation and decision papers with these being available on the SEM Committee's (SEMC) website. These decisions were translated into legal drafting of the market rules via an extensive consultative process leading to the publication of the Trading and Settlement Code (TSC) and

<sup>1</sup> [https://www.sem-o.com/documents/market-modifications/CMC\\_12\\_22/CMC\\_12\\_22RemedialActionintheeventofplanningapplicationdelaytoaprojectthatqualifiesunderaDirection.pdf](https://www.sem-o.com/documents/market-modifications/CMC_12_22/CMC_12_22RemedialActionintheeventofplanningapplicationdelaytoaprojectthatqualifiesunderaDirection.pdf)

<sup>2</sup> [https://www.sem-o.com/documents/market-modifications/CMC\\_13\\_22/CMC\\_13\\_22-Modification-Proposal-JudicialReviewRemedialActionV2.pdf](https://www.sem-o.com/documents/market-modifications/CMC_13_22/CMC_13_22-Modification-Proposal-JudicialReviewRemedialActionV2.pdf)

<sup>3</sup> [https://www.sem-o.com/documents/market-modifications/CMC\\_14\\_22/CMC\\_14\\_22Modificationre-MitigationofimpactofThird-PartyDelaysonParticipantsandextensionofSupportterm.pdf](https://www.sem-o.com/documents/market-modifications/CMC_14_22/CMC_14_22Modificationre-MitigationofimpactofThird-PartyDelaysonParticipantsandextensionofSupportterm.pdf)

<sup>4</sup> [https://www.sem-o.com/documents/market-modifications/CMC\\_15\\_22/UpdatedCMC\\_15\\_22-NewRemedialActiontoEnableExtensionsduetoPlanningandPermittingDelays.pdf](https://www.sem-o.com/documents/market-modifications/CMC_15_22/UpdatedCMC_15_22-NewRemedialActiontoEnableExtensionsduetoPlanningandPermittingDelays.pdf)

the Capacity Market Code (CMC). An updated version of the CMC (v7.0) was published on 12 August 2022 and the most recent version of the TSC (v26.0) was published on 17 May 2022.

### **Process for modification of the CMC**

- 1.2.2 Section B.12 of the CMC outlines the process used to modify the CMC. In particular, it sets out processes for proposing modifications as well as the consideration, consultation and implementation or rejection of modifications.
- 1.2.3 The purpose of the Modifications process is to allow for modifications to the CMC to be proposed, considered and, if appropriate, implemented with a view to better facilitating code objectives as set out in Section A.1.2 of the CMC. (B.12.1.2).
- 1.2.4 Modifications to the CMC can be proposed and submitted by any person (B.12.4.1), at any time. Unless the modification is urgent, modifications are subsequently discussed at a Working Group held on a bi-monthly basis. Each Working Group represents an opportunity for a modification proposer to present their proposal(s) and for this to be discussed by the workshop attendees.
- 1.2.5 For discussion at a Working Group, Modification proposals must be submitted to the System Operators at least 10 working days before a Working Group meeting is due to take place.
- If a proposal is received less than 10 working days before a Working Group and is not marked as urgent it is deferred for discussion to the next Working Group.
- 1.2.6 Following each Working Group and as per section B.12.5.6 of the CMC, the RAs are required to publish a timetable for the consideration, consultation and decision relating to the Modification(s) proposed during a Working Group.
- 1.2.7 If a proposal is received and deemed to be contrary to the Capacity Market Code Objectives or does not further any of those objectives, the Regulatory Authorities (RAs) will reject the proposal on the grounds of being spurious, as set out in section B.12.6 of the CMC.

### **Urgent Modifications**

- 1.2.8 This paper is concerned with four urgent modification proposals.
- 1.2.9 A proposer may choose to mark a Modification proposal as “Urgent” (B.12.9.1). In this case, the RAs, as per section B.12.9.3 of the CMC, will assess whether or not the proposal should be treated as urgent. If the RAs deem a proposal to be urgent they have the power to fast-track the proposal.
- 1.2.10 In this regard B.12.9.5 provides:

*“If the Regulatory Authorities determine that a Modification Proposal is Urgent, then:*

- a) the Regulatory Authorities shall determine the procedure and timetable to be followed in assessing the Modification Proposal which may vary the normal processes provided for in this Code so as to fast-track the Modification Proposal; and*
- b) subject to sub-paragraph (a), the System Operators shall convene a Workshop.”*

1.2.11 The RAs may request the SOs to convene a Working Group to discuss the proposed Modification.

**Process for this Modification**

1.2.12 On the 25 October 2022 Kilshane Energy Limited (KEL) submitted a modification proposal (CMC\_12\_22) under the terms of B.12.4. The Modification Proposal was marked as Urgent.

1.2.13 As the Regulatory Authorities considered that the matter raised in the Modification Proposal was required before the next Capacity Auction or Secondary Trade Auction and could not otherwise be dealt with in time for the next such auction, the Regulatory Authorities determined that the Modification Proposal was Urgent.

1.2.14 On the 3 November 2022, four further Modification Proposals were submitted. These were from EirGrid/SONI (CMC\_13\_22), Bord na Móna (CMC\_14\_22), EPEDL (CMC\_15\_22) and the TSOs (CMC\_16\_22).

1.2.15 CMC\_13\_22, CMC\_14\_22 and CMC\_15\_22 were considered Urgent while CMC\_16\_22 was considered Standard.

1.2.16 After deliberation, the Regulatory Authorities considered that the matters raised in Modification Proposals CMC\_13\_22, CMC\_14\_22 and CMC\_15\_22 were also required before the next Capacity Auction or Secondary Trade Auction and could not otherwise be dealt with in time for the next such auction. They therefore determined that these proposals were also urgent.

1.2.17 On the 21 November 2022 the RAs determined the procedure to apply to the Modification Proposals. This is shown in detail in Appendix A. An overview of the timetable is as follows:

- i. The System Operators convened an urgent Working Group where the urgent and non-urgent Modification Proposals were considered on 17 November 2022.
- ii. The System Operators, as set out in B.12.7.1 (j) of the CMC, are to prepare a report of the discussions which took place at the workshop, provide the report to the RAs and publish it on the Modifications website promptly after the workshop.
- iii. The RAs will then consult on the Proposed Modification, with a response time of 10 Working Days (as per B.12.9.5 in the CMC), from the date of publication of the Consultation.
- iv. As contemplated by B.12.11 the RAs will make their decision as soon as reasonably practicable following conclusion of the consultation and will publish a report in respect of their decision.

## 1.3 PURPOSE OF THIS CONSULTATION PAPER

- 1.3.1 The purpose of this paper is to consult on the proposed urgent modifications. More detail about the modifications is set out in the appended modification proposals (Appendix B).
- 1.3.2 The Regulatory Authorities hereby give notice to all Parties and the Market Operator of a consultation on the proposed Modifications.
- 1.3.3 Interested Parties and the Market Operator are invited to make written submissions concerning the proposed Modifications by no later than 17:00 on Thursday, 15 December 2022. **Please note that late submissions will not be accepted.**
- 1.3.4 Upon closure of the consultation process, the Regulatory Authorities intend to assess all valid submissions received and form a decision to either implement or reject a modification or undertake further consideration with regard to matters raised through the consultation process regarding the proposed modification.

## 2. MODIFICATION PROPOSAL

### 2.1 CMC\_12\_22 – REMEDIAL ACTION IN THE EVENT OF PLANNING APPLICATION DELAY TO A PROJECT THAT QUALIFIES UNDER A DIRECTION

**Proposer: Kilshane Energy Limited (KEL)**

#### **Proposal Overview**

- 2.1.1 This proposal introduces a modification which would extend the Long Stop Date (LSD) and the maximum duration of New Capacity in instances where Substantial Completion has been delayed as a result of a delay in obtaining a final planning grant due to an appeal or subsequent judicial review of a project's planning application.
- 2.1.2 The proposal sets out the requirements under the Capacity Market Code (CMC) which require units delivering New Capacity to establish an implementation plan outlining key milestone dates for its delivery. One such milestone is Substantial Completion which needs to be satisfied for a New Capacity Market Unit to be flagged as 'Actual' in the Capacity and Trade Register.
- 2.1.3 For those projects that have qualified for a Capacity Auction under a CRU Direction such as CRU/21/030a, the main project delivery risk is obtaining a final grant to the project's planning application.
- 2.1.4 While a participant is responsible for preparing a robust planning application, once this has been submitted, 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 judicial review of decisions made by planning authorities An Bord Pleanala.

- 2.1.5 The proposed modification would help mitigate against circumstances where third parties against the development of New Capacity attempt to delay it via these processes long enough for its delivery to be impossible. The proposed modification would introduce a new Remedial Action under Section J.5.3 of the CMC.
- 2.1.6 Failure to implement the proposal would mean any third party wishing to prevent the delivery of a project could judicially review the statutory decision-making process, possibly resulting in the project having to terminate their awarded contract as it would be impossible to meet their obligatory delivery milestones.
- 2.1.7 Regardless of whether the Judicial Review was successful, the delay caused by the process would in itself result in delivery being made impossible.
- 2.1.8 Further detail on the Modification Proposal are set out in the appended Modification Proposal Appendix B, which includes the draft changes to the CMC.

## 2.2 CMC\_13\_22 – THIRD PARTY JUDICIAL REVIEW REMEDIAL ACTION

### Proposer: EirGrid / SONI

### Proposal Overview

- 2.2.1 This proposal develops a new remedial action to mitigate the risk of delays associated with Third Party instigated Judicial Reviews of planning processes for Awarded New Capacity.
- 2.2.2 The remedial action would facilitate a delay by extending the Date of Substantial Completion and Long Stop Date by a period equal to the duration of the Third Party Judicial Review proceedings.
- 2.2.3 While there are associated risks with any project requiring planning, management, mitigation and contingency, the proposal introduces a specific remedial action with respect to the risk of legal challenge, warranted in the context of obligated delivery milestones.
- 2.2.4 The intent of the proposed remedial action is that it 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. It is not intended that the remedial action should apply to anything other than a Judicial Review of matters associated with the relevant planning authorities.
- 2.2.5 Failure to implement the Modification Proposal risks that capacity that would otherwise have been successfully delivered would be terminated due to the risk a Third Party Judicial Review would introduce, or present, to the timely delivery of capacity.

- 2.2.6 Additionally, potential investors in new capacity may be deterred from engaging in the sector due to the risk in the context of capacity delivery milestones.
- 2.2.7 The proposal aims to be very specific in order to avoid the need for system updates and resource intensive processing by the Regulatory Authorities and/or System Operators and states that it has no effect retrospectively per Section B.12.16 of the CMC.

## 2.3 CMC\_14\_22 – MITIGATION OF IMPACT OF THIRD-PARTY DELAYS ON PARTICIPANTS AND EXTENSION OF SUPPORT TERM

### Proposer: Bord na Móna

#### Proposal Overview

- 2.3.1 This Modification proposes the implementation of mitigation measures in circumstances where New Capacity projects experience delays in Grid or Gas Connections which are outside of the control of the project.
- 2.3.2 Within the Capacity Market, as participants receive revenue from the date they achieve Substantial Completion, if this is not achieved by the start of the relevant Capacity Year, they will not be remunerated for the period of any delay. This is not appropriate in instances where participants have no ability to manage delivery.
- 2.3.3 Implementation plans submitted by New Capacity generators are assessed by the TSO and, where gas connection is required, engagement occurs with GNI before a project can qualify to participate in the auction. Plans considered undeliverable result in projects not qualifying while those which are considered deliverable qualify for the auction.
- 2.3.4 Linking the extension of project milestones to the delivery of new elements required to deliver it, i.e., grid and gas (within the scope of the proposal), and planning, should better balance the risk between investors and third parties.
- 2.3.5 The proposal considers it inappropriate for market participants to be exposed to risks because of the activities of System Operators and GNI in relation to Grid and Gas Connections as these activities cannot be managed by participants. As these entities are regulated by the RAs who are also responsible for the CMC and CRM, this modification would apply to their activities.
- 2.3.6 There are no penalties imposed on these statutory undertakers for late delivery of their obligations and instead, if they fail to deliver, it is the participant who is penalised. Market participants have no way of managing such risks and should not be penalised for late delivery of these items.
- 2.3.7 The Modification Proposal requires the RAs to assess applications made for extensions under the third party mitigation action re: Third Party Delays and extension of support term from investors awarded New Capacity contracts for the T-4 2026/27 auction and subsequent auctions.

- 2.3.8 Failure to implement the modification would mean that participants in the T-4 2026/27 capacity auction, and subsequent auctions, would be exposed to an undue amount of risk which is outside of their control. This jeopardises the delivery of New Capacity which is detrimental to the objectives of the CMC.

## 2.4 CMC\_15\_22 – INTRODUCTION OF NEW REMEDIAL ACTION TO ENABLE EXTENSIONS DUE TO PLANNING AND PERMITTING DELAYS

### Proposer: EPEDL

### Proposal Overview

- 2.4.1 This proposal introduces a new remedial action which would be activated in the event that a New Capacity project is delayed as a result of challenges to related necessary planning and permitting decisions.
- 2.4.2 Through the introduction of such a remedial action, the Long Stop Date and the Capacity Quantity End Date of projects would be extended to account for challenges to the necessary planning and permitting decisions related to the New Capacity.
- 2.4.3 It is intended that in the event of a challenge to a planning or permitting decision, participants would apply to the SEMC for an extension under the proposed new Remedial Action. This extension would be granted provided that the extension request was not frivolous or factually inaccurate.
- 2.4.4 Extensions granted under this modification would be calculated based on the delay faced as a result of this planning and permitting challenge. Any extension granted under the modification would reflect, on a day-for-day basis, the period between (i) the date when the challenge window for the planning or permitting decision closes, and (ii) the date when any court or statutory body upholds the planning or permitting decision which enables the project proceed. This would include challenge routes available within the relevant planning process and also judicial reviews.
- 2.4.5 While the modification, if passed, would result in capacity projects connecting later and maintaining their original contract value, the proposal argues that given the current challenges around security of supply, this is better than terminated capacity.
- 2.4.6 Failure to implement the modification proposal would mean that participants delivering New Capacity would be exposed to an undue amount of risk which would be outside of their control. This would be in the form of potential delays which erode the value of contracts undermining investment cases in the process.
- 2.4.7 This may result in termination of New Capacity as a result of either contract value erosion making projects economically unfeasible, or projects exceeding their Long Stop Date.

## 2.5 WORKING GROUP FEEDBACK ON CMC\_12\_22, CMC\_13\_22, CMC\_14\_22 AND CMC\_15\_22

- 2.5.1 Capacity Market Modifications Workshop 28 took place on Thursday 17 November 2022 where the modifications were presented and discussed.
- 2.5.2 Bord na Móna asked whether it might be feasible for the RAs and SOs to write a single Modification to pull together relevant parts of the current proposals.
- 2.5.3 The RAs confirmed that they were happy to meet with participants to discuss this, if needed.
- 2.5.4 Energia questioned why the four Modifications had all been deemed urgent as they weren't convinced that they were urgent, as there was still the ability for milestones such as Substantial Financial Completion for the T-3 and the T-4 auctions to be extended.
- 2.5.5 The RAs stated that given the challenges around security of supply and the recent EY Review of the Capacity Remuneration Mechanism, there was an urgency to try to address the potential termination of projects.
- 2.5.6 Energia commented that there was a risk that capacity not being delivered in the first year could displace capacity that could be delivered. They also raised concerns over the potential retrospectivity of the Modifications if applied to the T-3 and T-4 auctions as, for example, the Long Stop Date is published in the FAIP and participants enter the auction based on that. They don't enter on the basis of an extension. Furthermore, Energia believed the Modifications could result in the deferral of contract termination indefinitely with no guarantee that capacity could be delivered.
- 2.5.7 Bord na Móna disagreed with this position arguing that there was no attempt to leave projects open indefinitely. Instead, if a contract was terminated, it was likely to be replaced by another project one year out which could face the same challenges. They disagreed with Energia's view and did not think the Modifications were retrospective as their Modification was focused on the forthcoming T-4 2026/2027. However, it made sense for the previous T-3 and T-4 to be included.
- 2.5.8 ESBGT supported Energia's view on the status of the Modifications and not see why they should be deemed urgent.
- 2.5.9 EPEDL did not believe the Modifications were retrospective and maintained that this argument had been dealt with before. They believed the Modifications were forward-looking.
- 2.5.10 Kilshane Energy also supported this stance, arguing that decisions on a unit would have to be made long before the Substantial Financial Completion milestone.
- 2.5.11 The RAs remarked how, when an extension was to be sought before the length of the delay is actually known, the Maximum Capacity Duration would be of no avail as it was only used at the time of the Auction. Instead, it would be necessary to modify the Capacity End Date and Time

in the Capacity and Trade Register. They suggested that this would require some of the text to be re-drafted in several of the proposed Modifications.

- 2.5.12 SSE supported the Modifications as long as they had proper controls and believed there could be a workable solution. The suggested adding a possible sunset clause and/or an annual review of the delays be undertaken by the RAs.
- 2.5.13 FERA concurred with Energia's position that the Modifications weren't urgent and agreed that through the publishing of the FAIP, auction participants were aware of the timelines. In their view, the Modifications were opening doors other developers didn't think existed at the time.
- 2.5.14 FERA also had concerns over the open-endedness of the Modifications and didn't think they should be extended into other capacity years. One suggestion they proposed was the possible need for a T-6 auction if the current T-4 timelines were insufficient.
- 2.5.15 The TSOs stated that they planned to send some revised drafting of their Modification in order to tighten some of the definitions. They confirmed that the intent would not be changing.

### **Minded to Position**

- 2.5.16 As discussed at the Working Group, and pursuant to paragraph B.12.5.5 of the CMC, the RAs have combined the modifications into a single proposal to take forward. The original modifications, as amended following the Working Group, are attached as Appendices to this consultation document.
- 2.5.17 The proposed Modification is split into two new sections:
  - J.5.5 covers the extension to Substantial Financial Completion and the Long Stop Date, which manages termination risk. The text is based on the SOs proposal (CMC\_13\_22).
  - J.5.6 covers the issue of erosion of the Reliability Option. This is new drafting as none of the proposed Modifications adequately covered this area.
- 2.5.18 The SOs drafting was used as the basis for J.5.5 as it most tightly defines the conditions under which an extension can be granted.
- 2.5.19 The SOs drafting has been extended to additionally cover delays caused by planning appeal in Ireland (no right of third party appeal exists in Northern Ireland) and to cover third party delays to environmental licences/permits caused by Judicial Review of the grant. In each case, the drafting attempts to maintain the tight focus of the existing drafting from the SOs.
- 2.5.20 The RAs proposal does not include reference to delays caused by gas and electric connections, as proposed by Bord na Móna in CMC\_14\_22. In this situation, there is significant scope for disagreement between the Participant and the connection provider as to the cause of the delay. We do not believe it is reasonable to expect the connection provider would be willing to provide a letter confirming the degree of delay for which they are responsible.

- 2.5.21 The RAs proposed modification also seeks to incorporate some of the comments received at the Working Group into the text.
- 2.5.22 J.5.5 now seeks to address the issue of a “blank cheque” being issued to a delayed CMU by requiring regular review of the extension, based on the existing Implementation Progress Report process. The drafting also seeks to provide an end to the extension after a finite period, 12 months is proposed, or if the Judicial Review or appeal is successful. However, the SOs right to terminate is not absolute which means that any decision must be made in consultation with the RAs (analogous to the existing termination rights in J.6.1.3).
- 2.5.23 J.5.6 is all new drafting and extends the end date and time of an RO which has previously had an extension under J.5.5. It sets out some detail on the application process, based on the existing exception application process in E.5.1.
- 2.5.24 The RAs recognise that depending on the timing of the auction and the technology of the new capacity being delivered, the extension of the Capacity Quantity End Date and Time (the end of the RO) may be less than the period of extension granted under J.5.5. To enable the RAs to sensibly judge the extension to grant, the drafting requires an independent engineer’s report (analogous to that used in J.4.3.2(c)) to support their decision making. This report should be provided by the application.
- 2.5.25 The existing drafting by the SOs relating to termination under J.6.1.1 and J.6.1.2 has been retained, with minor drafting tweaks as this was the only modification to address this issue during the period of extension.
- 2.5.26 The RAs note that there may be interaction between this modification and the proposed Secondary Trading Delays Modification (CMC\_16\_22). Both modifications would seek to use the Capacity Payments awarded at the time of the original auction, albeit in different ways. It is not intended to delay implementation of this modification to await a decision on CMC\_16\_22 but there may be a need to make a consequent further modification to J.5.6 to avoid both Modifications applying to the same new capacity.
- 2.5.27 The SEM Committee are minded-to approve this modification, subject to responses to this consultation paper.
- 2.5.28 *Proposed Legal Drafting*

#### **J.5.5 Extension of Long Stop Date by Third Party Planning Appeal or Judicial Review**

J.5.5.1 Subject to the requirements of paragraph J.5.5.2, a Participant may apply to the System Operators to extend the date of Substantial Financial Completion and Long Stop Date associated with a Capacity Market Unit by a period equal to the Third Party Extension Period where that Capacity Market Unit is subject to a Third Party Judicial Review or Third Party Planning Appeal.

J.5.5.2 The date of Substantial Financial Completion and Long Stop Date shall be extended under paragraph J.5.5.1 subject to the requirements of paragraph J.4.2.6 and the Participant submitting the following proofs to the System Operators: (a) Documentary

evidence confirming the commencement of the Third Party Judicial Review or Third Party Planning Appeal, and (b) Statutory declaration signed on behalf of the Participant by a Participant Director confirming that the Participant, its agents and/or its employees had no involvement in instigating the Third Party Judicial Review or Third Party Planning Appeal.

J.5.5.3 Where the System Operators have granted an extension under paragraph J.5.5.1, they shall review this decision no less often than on receipt of each Implementation Progress Report required in respect of the affected New Capacity under paragraph J.4.2.1

J.5.5.4 The System Operators may, subject to J.5.5.5, terminate the New Capacity for which an extension was granted under J.5.5.1 if:

- (a) Substantial Financial Completion has not been achieved after more than [twelve] months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated;
- (b) an Implementation Progress Report indicates that Substantial Financial Completion will not be achieved after more than [twelve] months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated; or
- (c) the Third Party Judicial Review or Third Party Planning Appeal has been decided in favour of the third party appellant.

J.5.5.5 The System Operators shall consult with the Regulatory Authorities prior to taking any action under paragraph J.5.5.4.

#### **J.5.6 Extension of Capacity Quantity End Date and Time**

J.5.6.1 Where the System Operators have granted an extension under paragraph J.5.5.1, a Participant may seek the approval of Regulatory Authorities for an extension to the Capacity Quantity End Date and Time associated with a Capacity Market Unit by a period no greater than the Third Party Extension Period.

J.5.6.2 A Participant seeking approval of the Regulatory Authorities under paragraph J.5.6.1 shall submit an application (called a "Third Party Exception Application") to the Regulatory Authorities within [20] Working Days of the determination of the Third Party Extension Period.

J.5.6.3 A Third Party Exception Application shall:

- (a) contain the information required by the Regulatory Authorities;

- (b) contain a certificate addressed to the Regulatory Authorities from an independent Certified Engineer, with experience and expertise in the construction and operation of the relevant type of equipment or technology, approved by the Regulatory Authorities (such approval not to be unreasonably delayed or withheld) certifying that, having made all due and careful enquiry and to the best of their knowledge, the extension being claimed under this section J.5.6 can be directly attributed to the Third Party Judicial Review or Third Party Planning Appeal that led to an extension being granted under J.5.5.1:
- (c) be in the form prescribed by the Regulatory Authorities; and
- (d) be made in the manner prescribed by the Regulatory Authorities.

J.5.6.4 For the purposes of paragraph J.5.6.3(b), a person is regarded as independent if:

- (a) the person is not an Affiliate of the relevant Participant;
- (b) the person is not a current employee of the relevant Participant or an Affiliate of the relevant Participant;
- (c) the person has not been an employee of the relevant Participant or an Affiliate of the relevant Participant with the previous two years; and
- (d) the person is not engaged on terms, nor party to any other arrangements, which could allow the Participant or any Affiliate of the Participant to exercise undue influence on any report, assessment, certificate or commentary prepared by that person or otherwise compromise the objectivity of such report, assessment, certificate or commentary.

J.5.6.5 A certificate under this section J.5.6 shall be in the form published from time to time by the Regulatory Authorities.

J.5.6.6 In a certificate given under paragraph J.5.6.3(b), the Certified Engineer giving the certificate shall confirm that they are independent within the meaning of paragraph J.5.6.4 and shall certify each of the matters referred to in paragraph J.5.6.4.

J.5.6.7 The Regulatory Authorities may request that a Participant provide additional information or evidence in relation to a Third Party Extension Application.

J.5.6.8 If a Participant makes a Third Party Exception Application, then the Regulatory Authorities shall notify the Participant and the System Operators whether or not they approve the Third Party Exception Application and, if they do approve it the updated value of the Capacity Quantity End Date and Time that will apply.

J.5.6.9 The System Operators shall update the Capacity Quantity End Date and Time in Capacity and Trade Register as set out in Appendix F to reflect any changes approved by the Regulatory Authorities.

J.6.1.1 For the purposes of this section:

- (a) Minimum Completion: Awarded New Capacity achieves Minimum Completion when:
  - (i) all the construction, repowering or refurbishment works associated with providing the Awarded New Capacity are substantially complete (subject only to snag or punch list items or any other matters which do not prevent substantial completion or taking over taking place under the applicable Major Contracts);
  - (ii) each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity has undergone commissioning testing;
  - (iii) a Final Compliance Certificate, Operational Certificate or Final Operational Notification has been issued under the applicable Grid Code in respect of each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity;
  - (iv) the Proportion of Delivered Capacity in respect of the Awarded New Capacity is not less than 50%; and
  - (v) each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity has met all Trading and Settlement Code and Grid Code requirements for participating in the Balancing Market; and
  - (vi) each new or refurbished Generator Unit providing New Capacity complies with the CO<sub>2</sub> Limits; and
- (b) Long Stop Date: the Long Stop Date in respect of Awarded New Capacity means
  - (i) in the case of a Capacity Award with a capacity duration greater than one year, the last day of the eighteenth full calendar Month after the start of the first Capacity Year in which the Awarded New Capacity is to be provided; or
  - (ii) in the case of a Capacity Award with a capacity duration of one year or less, the last day of the first full calendar Month after the start of the first Capacity Year in which the Awarded New Capacity is to be provided; or
  - (iii) such later date as specified under paragraph J.5.5.1.

J.6.1.2 The System Operators shall terminate all the Awarded New Capacity in respect of a new or refurbished Generator Unit or Interconnector in the event that:

- (a)
  - (i) Substantial Financial Completion has not been achieved within the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated;
  - (ii) such later date as allowed by the Regulatory Authorities under section J.5.2; or
  - (iii) such later date as specified under paragraph J.5.5.1; or
- (b) Minimum Completion has not been achieved by the applicable Long Stop Date.

**Relevant Planning Authority** means the Department for Infrastructure, the Planning Appeals Commission or a district council.

**Third Party Judicial Review** means:

- i) In respect of Ireland, statutory judicial review proceedings commenced, by a party other than the Participant either
  - a. pursuant to Section 50(2) of the Planning and Development Acts 2000-2022, as amended, and relating to a decision of An Bord Pleanála to grant planning permission affecting a new or refurbished Generator Unit or Interconnector in respect of the delivery of Awarded New Capacity, or
  - b. In response to a licence issued under Part V of the Environmental Protection Agency Act 1992 which is required under paragraph J.2.1.1(a)(v) to achieve the Substantial Financial Completion milestone in respect of the delivery of Awarded New Capacity; or
- ii) In respect of Northern Ireland, judicial review proceedings commenced, by a party other than the Participant, pursuant to the Rules of the Court of Judicature (Northern Ireland) 1980 Order 53, as amended or re-enacted from time to time, and relating to a decision either
  - a. of the Relevant Planning Authority to grant planning permission affecting a new or refurbished Generator Unit or Interconnector in respect of the delivery of Awarded New Capacity, or
  - b. of the Department of Agriculture, Environment and Rural Affairs to grant a permit pursuant to the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 which is required under paragraph J.2.1.1(a)(v) to achieve the Substantial Financial Completion milestone in respect of the delivery of Awarded New Capacity.

**Third Party Planning Appeal** means an appeal pursuant to Chapter III of the Planning and Development Acts 2000-2022, as amended, and relating to a decision of An Bord Pleanála to

grant planning permission affecting a new or refurbished Generator Unit or Interconnector in respect of the delivery of Awarded New Capacity

**Third Party Extension Period** means, in respect of date of Substantial Financial Completion and Long Stop Date extension under paragraph J.5.5.1, the period from the date on which the relevant Participant has either

- i. been served a notice of motion in respect of the Third Party Judicial Review to the date on which the Third Party Judicial Review is concluded, either by order, direction or decision of the court (not appealed by the third party to the Third Party Judicial Review), or otherwise; or
- ii. been notified of the determination An Bord Pleanála in respect of the Third Party Planning Appeal.

### 3. CONSULTATION QUESTIONS

3.1.1 The SEM Committee welcomes views and responses on the proposed modifications raised within this consultation paper.

3.1.2 Respondents are invited to provide comments and feedback for each of the proposed Modifications in respect of:

- the proposed modification and its consistency with the Code Objectives;
- any impacts not identified in the Modification Proposal Form, e.g. to the Agreed Procedures, the Trading and Settlement Code, IT systems etc.; and
- the detailed CMC drafting proposed to deliver the Modification.

3.1.3 A template has been provided in Appendix C for the provision of responses.

### 4. NEXT STEPS

4.1.1 The SEM Committee intends to publish a decision by the 06 January 2023 on the implementation of the Modifications outlined within this consultation paper.

4.1.2 Responses to the consultation paper **must** be sent to the CRM Submissions inbox ([CRMsubmissions@uregni.gov.uk](mailto:CRMsubmissions@uregni.gov.uk)), Ian McClelland ([Ian.McClelland@uregni.gov.uk](mailto:Ian.McClelland@uregni.gov.uk)) and Donna Maye ([Donna.Maye@uregni.gov.uk](mailto:Donna.Maye@uregni.gov.uk)) **by no later than 17:00 on Thursday, 15 December 2022. Please note that late submissions will not be accepted.**

4.1.3 Please note that we intend to publish all responses unless marked confidential. While respondents may wish to identify some aspects of their responses as confidential, we request that non-confidential versions are also provided, or that the confidential information is provided in a separate annex. Please note that both Regulatory Authorities are subject to Freedom of Information legislation.