



**Single Electricity Market
(SEM)**

**Capacity Market Code Working Group WG28
Urgent Modifications Decision Paper**

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| 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 |

SEM-23-001

09 January 2023

EXECUTIVE SUMMARY

The purpose of this decision paper is to set out the decision(s) relating to the proposed urgent modifications to the Capacity Market Code (CMC). These were discussed at Working Group 28, held on 17 November 2022.

The decision(s) within this paper follows on from the associated consultation ([SEM-22-092](#)) which closed on 15 December 2022.

This paper considers the proposed urgent modifications presented at WG28 which are:

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

A total of 9 responses were received to the Capacity Market Code Working Group 28 Urgent Modification Consultation Paper, one of which was marked as private and confidential. One further response was received after the closing date.

Summary of Key Decisions

Following consideration of the proposals and the responses received to the consultation, the SEM Committee have decided:

Modification	Decision	Implementation Date
CMC_12_22: Remedial Action in the Event of Planning Application Delay to a Project that Qualifies under a Direction	Make the combined modification V2 Appendix B	20/01/2023
CMC_13_22: Third Party Judicial Review Remedial Action	Make the combined modification V2 Appendix B	20/01/2023
CMC_14_22: Mitigation of Impact of Third-Party Delays on Participants and Extension of Support Term	Under further consideration	N/A
CMC_15_22: Introduction of New Remedial Action to Enable Extensions due to Planning and Permitting Delays	Make the combined modification V2 Appendix B	20/01/2023

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1. OVERVIEW

1.1. BACKGROUND

1.1.1 The SEM CRM detailed design and auction process has been developed through a series of consultation and decision papers which are all 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 Capacity Market Code (CMC) and updates to the Trading and Settlement Code (TSC). An updated version of the CMC (v7.0) was published on 12 August 2022 and the most recent version of the TSC (v27.0) was published on 7 Dec 2022.

Process for modification of the CMC

- 1.1.2. Section B.12 of the CMC outlines the process used to modify the code. It sets out the processes for proposing, consideration, consultation and implementation or rejection of Modifications to the CMC.
- 1.1.3. 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).
- 1.1.4. 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.
- 1.1.5. 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.
- 1.1.6. 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.
- 1.1.7. 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.
- 1.1.8. If a proposed modification is deemed urgent by the RAs, CMC Section B.12.9.5 will become active and the RAs will determine the procedure and timetable to be followed in the assessment of the Modification Proposal. The CMC states that the procedure and timetable may vary from the normal processes set out in the code, allowing for the modification to be fast-tracked.

Urgent Modifications

1.1.9. This paper is concerned with urgent modification proposals.

1.1.10. In this regard B.12.9.5 provides:

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

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

subject to sub-paragraph (a), the System Operators shall convene a Workshop.”

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

Process and Timeline for this Modification

1.1.12. 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.

1.1.13. As the Regulatory Authorities considered that the matter raised in the Modification Proposal was required before the next Capacity 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.

1.1.14. On the 3 November 2022, three further Modification Proposals on the subject of ‘Third Party Delays’ were submitted. These were from EirGrid/SONI (CMC_13_22), Bord na Móna (CMC_14_22) and EPEDL (CMC_15_22).

1.1.15. 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 and could not otherwise be dealt with in time for the next such auction. They therefore determined that these proposals were also urgent.

1.1.16. On the 21 November 2022 the RAs determined the procedure to apply to the Modification Proposals. An overview of the timetable is as follows:

- i. The System Operators convened a Working Group where both urgent and standard 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 per 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.

1.1.17. The purpose of this decision paper is to set out the decisions relating to the Urgent Modification Proposals discussed during Working Group 28 to either:

- a) Make a modification.
- b) Not make a modification; or
- c) Undertake further consideration in relation to the matters raised in the modification proposal.

1.1.18. This decision paper sets out a summary of the consultation responses and sets out the SEM Committee's decision.

1.2. RESPONSES TO CONSULTATION

1.2.1. This paper includes a summary of the responses made to the Capacity Market Code Modifications consultation paper ([SEM-22-092](#)) which was published on 1 December 2022.

1.2.2. A total of 9 responses were received by close of the consultation period, one of which was marked as private and confidential. The non-confidential respondents are outlined below, and copies of each response can be obtained from the SEM Committee website. One further response was received after the closing date.

- Kilshane Energy Ltd (KEL)
- EirGrid / SONI
- SSE
- Mutual Energy
- ESB GT
- Bord na Móna (BnM)
- BGE
- EPUKI

2. MODIFICATION PROPOSALS

2.1. CMC_12_22 – REMEDIAL ACTION IN THE EVENT OF PLANNING APPLICATION DELAY TO A PROJECT THAT QUALIFIES UNDER A DIRECTION – SUMMARY OF PROPOSAL AS PRESENTED BY KILSHANE ENERGY LIMITED

- 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 Pleanála.
- 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 is 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 – SUMMARY OF PROPOSAL AS PRESENTED BY EIRGRID/SONI

- 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 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 – SUMMARY OF PROPOSAL AS PRESENTED BY BORD NA MÓNA

- 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 - SUMMARY OF PROPOSAL AS PRESENTED BY EPEDL

- 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 to 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 because of either contract value erosion making projects economically unfeasible, or projects exceeding their Long Stop Date.

3. BRIEF SUMMARY OF RESPONSES

3.1. RESPONSES

- 3.1.1. Following a review of the responses received to the Consultation Paper, most respondents supported, at least in principle, some form of remedial action to mitigate the risk of third party delays. However, several expressed reservations about aspects of the draft legal text with one not supporting the proposal at all.
- 3.1.2. SSE stated that as many of the recommendations in the recent review of the CRM market¹ were related to allowing more time and permissive processes to take account of the challenges in planning and short turnaround for delivery in the current CRM design, the proposed modification made sense.
- 3.1.3. KEL also supported the modification (with the exception of the “sunset” clause set out in section 2.5.22 of the Consultation Paper) while BGE were supportive stating that it was more

¹ <https://www.semcommittee.com/publications/sem-22-054-call-comments-ey-review-performance-sem-capacity-remuneration-mechanism>

encompassing than CMC_13_22 and had tighter drafting compared to CMC-12-22 and CMC-15_22. They also believed that the greater scope to include delays caused to environmental licences/permits caused by Judicial Review of the grant was a significant improvement on CMC_13_22.

- 3.1.4. EPUKI supported the modification in principle, subject to a number of recommendations outlined in their response. They highlighted that the timeline associated with the delivery of new projects is very challenging and that this is further exacerbated as a result of Third-Party challenges to planning and permits. They believed that any steps taken by the SEMC to mitigate against these would have a positive effect on the functioning of the CRM.
- 3.1.5. EirGrid/SONI's response provided a commentary on the proposals and noted that any mechanism intended to address delivery risks needed to be specific and targeted to secure the delivery of capacity rather than to facilitate delays. They felt that CMC_13_22 ensured that mitigation focused on a delivery risk which was beyond the control of the Participant and did not impact on the formation of realistic, contingency inclusive implementation plans and on incentives for meeting delivery milestones.
- 3.1.6. Viewing the proposal as a knee-jerk reaction to ongoing issues around the shortening of the duration between the Capacity Auction and the Delivery, ESB GT did not support the proposed modification. They argued it was a project specific 'band-aid solution' and that the integrity and discipline of the Capacity Market Code is protected by encouraging projects to proceed within the boundaries of the existing process which allows parties to request Substantial Financial Completion (SFC) extensions.
- 3.1.7. ESB GT supported the view that it is better to require projects to have planning and environmental consents in place to be shovel ready and, therefore, there may be a need for a longer timeframe (T-5/6) auctions. In their view, this would increase confidence in delivery.
- 3.1.8. A number of responses specifically mentioned section 2.5.22 of the Consultation Paper and the provision of an end to the extension after a finite period of 12 months.
- 3.1.9. KEL disagreed with the intent expressed and argued that this was in conflict with 2.5.19 and 2.5.23. While disputing the statement that allowing an extension period to cover the full extent of the Judicial Review process constituted a 'blank cheque', they recognised that extensions granted under the proposed 'minded to' position should be subject to review on a periodic basis.
- 3.1.10. EirGrid/SONI expressed similar concerns to the proposed 12 month limit on extending Substantial Financial Completion, believing that the threat posed by Third-Party Judicial Reviews is not practically addressed if a cap is introduced. They suggested that the instigation alone of Judicial Review proceedings may be enough to prevent any further investment in Awarded New Capacity if the duration of the remedial action is not solely lined to the judicial Review duration. Placing an arbitrary time limit on the remedial action undermines it to the extent that it becomes redundant.
- 3.1.11. While BGE noted that the proposed use of 'may' rather than 'shall' provided sufficient discretion to cater for cases that may need more than the 12 months and that the RAs had discretion on the

matter, they thought a simple 12-month extension to the Substantial Financial Completion date was too rigid.

- 3.1.12. Alternatively, ESB GT argued that as the period of Judicial Review is not known, an extension to the Capacity Quantity End Date cannot be defined. Therefore, the proposed modification introduces uncertainty regarding the provision of adequate future capacity and, they suggested, stymies the auction process by allowing projects to defer contract termination indefinitely with no guarantee that capacity will actually be delivered.
- 3.1.13. In their responses, ESB GT also outlined a number of impacts they believed weren't identified in the modification proposal form. As well as having the unintended consequence of allowing participants to continue to prepare projects for milestones leading up to substantial completion during the extension period and thus receiving a longer contract with commensurate financial benefit, they also argued that the modification softened qualification and would encourage participants to submit projects with optimistic timelines. This may also offer them the possibility to displace capacity from other participants who have built in sufficient contingency and have taken a more realistic view of project delivery.
- 3.1.14. Should the proposed modification be applied to the previous T-3 and T-4 auctions, ESB GT stated that it would offer specific projects an extension beyond the dates set out in the Final Auction Information Pack (FAIP) and therefore constitute unfairness to others. All projects that were successful in the capacity auctions qualified under a specific set of assumptions/parameters and are expected to deliver on that basis. Changing these parameters midway through the project impacts the business case and offers an unfair advantage to riskier projects (i.e., without planning).
- 3.1.15. SSE were of the opinion that it is clear in the explanatory text that the intention is for the change to apply from T-4 2026/27. They were of the view that if applied to previous auctions, for instance T-3 and T4, this could undermine the confidence of market participants, both new and existing at a time when new capacity is needed to plug the capacity shortfall projected by the TSOs.
- 3.1.16. Not all respondents shared this opinion. BGE were of an opposing view arguing that the changes should apply to the two auctions held earlier in the year as a substantial amount of capacity is to be delivered pursuant to these.
- 3.1.17. They argued that this would not be unfair to participants as the T-3 auction had insufficient bids vs the Auction Required Quantity and cleared at the price cap with all bidders clearing. BGE did not think that prior knowledge of the modification would have completely altered the business case for a participant to bid into the auction. Therefore, the T-3 auction outcome would have been the same had this modification existed or not. Should the RAs decide not to apply the modification to the T-3 CY24/25 and the T-4 CY25/26 then BGE requested that the RAs clearly outline their rationale for such an approach.
- 3.1.18. EPUKI responded to concerns voiced at Working Group 28 where the issue of retrospectivity was raised. They were satisfied that the modification was not retrospective and that as it seeks to amend dates for milestones which are yet to be delivered, this would not satisfy the definition of retrospectivity as established in the Code.

- 3.1.19. BnM recommended that the proposed modification should also include provision for eligible Third-Party Grid or Gas Connection delays as these too were beyond the control of the participant and a legitimate expectation of the project developer. They stated that there are no penalties imposed on statutory undertakers, System Operators and GNI for late delivery of their obligations. Instead, it is the participant who is penalised.
- 3.1.20. Referring to the original modification proposal form relating to CMC_14_22, BnM noted that this did not present a mechanism to SEMC which they believed would work as they did not believe it was reasonable to expect the connection provider to be willing to provide a letter confirming the degree of delay for which they are responsible. Instead, they proposed to address this through an alternative mechanism which would involve the services of an independent certified engineer.
- 3.1.21. BGE also disagreed with the sentiment of the Consultation Paper statement not believing it is reasonable to expect the connection provider to provide a letter confirming the degree of delay for which they are responsible as there is a clear distinction where responsibilities lie in terms of delivering Gas and electricity Grid connection. They did not necessarily believe that a letter from GNI and EirGrid confirming their responsibility for a delay is required. Rather, a letter from either/both grid operator(s) outlining whether a delay in connection is expected and what the reasons for those delays are regardless of whether GNI/EirGrid is wholly responsible or not should be provided.
- 3.1.22. Should this not be amenable, then a certificate provided by an independent, certified engineer who is agreeable to both parties, detailing their determination for the delays may be another option.
- 3.1.23. BGE strongly supported CMC_14_22 arguing that as the RAs new modification proposal agrees on the principle that a project owner should not be exposed to a risk that is entirely and demonstrably outside of their control, this rationale and principle holds true whether the delay is a result of delays in electricity grid or gas connection. BGE urged the RAs to apply this same principle in determining their decision on the two Modifications under discussion.
- 3.1.24. Believing the onus is on the RAs to take proactive action to alleviate pressure on participants that are in receipt of a grid connection offer under CRU direction CRU202258 but are currently experiencing delay in securing a physical connection, ESB GT considered that a modification is required to introduce a default extension for Grid connections which are outside of the control of the project.
- 3.1.25. ESB GT believed that new projects in receipt of an EirGrid grid connection offer could only reflect potential delays via two options. One was through the implementation plan (in which case the start date will be post the start of the capacity year and the project will consequently fail and not be allowed to qualify, while the second was to reflect the delay in the bid price (in which case the APC will need to be increased to reflect a less than 10 year contract value).
- 3.1.26. In terms of gas and grid connection delays, SSE thought it regrettable that the revised and consolidated modification did not consider externally driven risks to developers of delays to grid and gas connections. Given policy positions on seeking to target risk in a fairer way, SSE thought it would make sense that there is a fair treatment of delays to grid connections and gas

connections where developers have capacity project milestones. They were not convinced that this potentially being an issue between participant and provider was sufficient reason for there not being any attempt at mitigation of this issue.

- 3.1.27. EirGrid/SONI did not share these views as they welcomed the exclusion of connections (gas and electrical) from the RAs' alternative proposal. They argued that introducing a remedial action with respect to connections would introduce a significant degree of subjectivity and uncertainty in the implementation of the remedial action and that such a remedial action would present a further risk to timely delivery of capacity.
- 3.1.28. The responses received also covered a broad range of other issues.
- 3.1.29. In their response, Mutual Energy said that given the combined proposed modification with a minded to position does not include reference to gas connections, they did not propose specific drafting.
- 3.1.30. Responding to CMC_14_22, Mutual Energy stated that while sympathetic to the fact that there are circumstances whereby projects may be delayed that are outside of the control of developers, they felt that the proposal increased the risk of overly speculative or optimistic applications into capacity market auctions. They also pointed out that they have limited engagement with SONI relating to individual projects and no engagement in relation to qualifying projects to participate in capacity auctions. Therefore, the assumption was made that formal engagement processes prior to a project being permitted into the capacity auction was presumably limited in extent to RoI, whereas the modification sought to change all-island rules.
- 3.1.31. While EPUKI supported the proposal in principle, they believed that the extension of the Capacity Quantity End Date and Time also needed to take account of the Judicial Review challenge period, the period of time the participant has to apply for the extension and the time the RAs require to determine their Decision.
- 3.1.32. EPUKI also raised concerns that in the event that an extension of Capacity Quantity End Date is granted, the RAs could terminate the Awarded Capacity for the first Capacity Year, thus resulting in a reduction of capacity payments. They believed that the participant should receive the full duration of capacity payments commencing on Substantial Completion.

4. SEM COMMITTEE DECISION

4.1. DECISION

- 4.1.1. The SEM Committee welcomes the broad support for the proposed Modification but notes a number of objections or concerns raised with some of its aspects.

Application to Electrical and Gas Connection Delays

- 4.1.2 The SEM Committee notes support for the application of extension to third party delays relating to gas and electrical connections which was the basis of the proposed modification CMC_14_22 and which was not incorporated into the combined modification which formed the primary basis of the consultation.
- 4.1.3 While the identification of the physical assets relating to a connection may be clear, the SEM Committee note that this does not deal with the issues which led to this class of third-party delay being excluded from the combined modification.
- 4.1.4 Potential complexities arising as a result of such third-party delays may be many. By way of illustration, the SEM Committee would point to the following:
- (a) there are a series of inputs that need to be made by the Participant to the third party's process to deliver the connection. The failure of the Participant to fully provide these inputs in a timely manner will cause delays that would not be considered third party delays; and
 - (b) there are a number of putative delivery dates for the third-party connection that will be given during the connection process, and which could be used for establishing a baseline against which delays could be measured. It is probable that the proposed delivery date only becomes "firm" once the third party can enter into the contract (either internally or externally) for the construction of the connection assets. It is not clear which dates should be used and different third parties may use different nomenclature and different definitions for any dates provided.
- 4.1.5 The SEM Committee welcome the comments on the gas connection process provided by Mutual Energy and the timing issues that arise. Mutual Energy stated that a modification decision should seek to introduce incentives to reduce speculative behaviour such as requiring the developer to have engaged with the relevant gas TSO to ensure a suitable gas connection is feasible prior to engaging with the auction process. The SEM Committee also welcome the highlighting of current challenges relating to gas network connection development planning and the potential impacts from awarded Capacity Market contracts.
- 4.1.6 Given the potential extent of the complexities arising as a result of third party delays associated with electrical and gas connections, the significant issues that are yet to be resolved and the tight timetable for the decision on this Modification, the SEM Committee is not including connection delays in the Modification at this time. However, in line with sub-section B.12.11, the SEM Committee will request the RAs to undertake further consideration of potential modifications in this area.

Application to the 2024/2025 T-3 and 2025/26 T-4 Auctions

- 4.1.7 Several respondents objected to the Modification applying to capacity that was awarded under the 2024/25 T-3 and 2025/26 T-4 Auctions.

- 4.1.8 Of those stating such an application might be unfair, the SEM Committee note that with regard to equity of treatment, all Participants taking part in previous auctions did so, on the basis of the same information that was available at the time of those auctions.
- 4.1.9 Some of the objections related to the prohibition on retrospective effect set out in the CMC, sub-section B.12.15.
- 4.1.10 The SEM Committee wish to stress that approval of the proposed modification to apply to capacity already awarded would not require the modification to take effect before the date of the decision and so would not be affected by B.12.15.
- 4.1.11 The SEM Committee are satisfied that the prohibition on retrospectivity would not be engaged by a decision on this modification as it does not seek to unwind any right or remedy which would have accrued under an existing capacity contract before the date the modification took effect.
- 4.1.12 The SEM Committee note that there are a number of Code Objectives set out in sub-section A.1.2 and that it will not always be possible to achieve all objectives and that it is the role of the SEM Committee to make a balanced decision.
- 4.1.13 The RAs are aware of a number of projects that are currently at risk. Given the impact on both current projects and the potential chilling effect of further terminations of awarded new capacity on future investment decisions, the SEM Committee believe that the objective to promote security of supply must take priority when considering this proposed modification.

The “Sunset” clause

- 4.1.14 A number of respondents raised issues with the “sunset” clause set out in paragraph J.5.5.4, which allowed the SOs (in consultation with the RAs) the possibility, but not the obligation to terminate awarded capacity once the third-party delay exceeded 12 months.
- 4.1.15 While the SEM Committee remain committed to the principle that no extension should be granted without some limitation, the legal drafting of the modification has been amended to extend the period to 18 months and to require the approval of the RAs for any termination.
- 4.1.16 The consequences of the six-monthly review as set out in paragraph J.5.5.3 was not clear in the consulted drafting and added nothing beyond the existing six-monthly Implementation plan progress reporting. In consequence, this paragraph has been removed in the amended legal drafting.

Period for which Capacity Payments are Made

- 4.1.17 The SEM Committee agree with the responses that indicate that under some circumstances following granting of an extension under J.5.6, capacity payments could be made for a longer period than was awarded at the original auction. The legal drafting of J.5.6 has been amended to ensure that this cannot occur.

Capacity Auction Timetable

- 4.1.18 A number of respondents noted that many of the issues arising from third party delay were caused, or exacerbated, by too short a period between the auction and the start of the first Capacity Year.
- 4.1.19 The SEM Committee recognise the validity of these concerns. The Capacity Auction Timetable for the 2027/28 T-4 Auction, published on 23 December 2022, provides a full four years between the date of the auction and first delivery of awarded capacity.

Other

- 4.1.20 The SOs response noted that the drafting of the combined modification was based on their original modification and did not pick up the enhancements in their v2 draft. The SEM Committee agree that the v2 drafting contains a number of enhancements and these have been incorporated in the amended legal drafting.
- 4.1.21 The SOs also noted that the drafting of J.5.5/6 was not compatible with the existing extension to Substantial Financial Completion set out in sub-section J.5.2. While recognising that it would be unusual for a Participant to use both types of extension, the legal drafting has been amended to allow for this situation.
- 4.1.22 A number of responses suggested further time periods that should be added to the period of extension in either J.5.5 or J.5.6. The SEM Committee do not believe that these additional extensions either clearly represented third party delays or met the code objective for equity of treatment of Participants, either between awarded new capacity or between capacity providers and consumers. In consequence, these proposed amendments to the legal drafting have not been incorporated.
- 4.1.23 EPED noted that the consulted drafting did not cover the RAs' termination rights for the first year of an RO under paragraph J.6.1.6. The legal drafting has been amended to recognise extensions granted under J.5.5.2.
- 4.1.24 One respondent suggested an additional measure would be to publish any extensions granted under this process. While the SEM Committee felt this suggestion has merit, the RAs will consider how practicable its implementation may be.
- 4.1.25 Existing extensions granted under J.5.2. are inadequate in terms of dealing with the issues affecting the delivery of current projects. Even with the Capacity Auction Timetable for the forthcoming T-4 2027-2028 auction, these issues may still occur and have a very real possibility of impacting projects.
- 4.1.26 This particularly relates to delays in delivery of capacity which may lead directly to termination due to a failure to achieve the Long Stop Date or indirectly to termination by the participant as a result of damage to project economics caused by the shortening of the RO term. This modification deliberately and precisely specifies the narrow conditions under which extensions can be granted to mitigate potential adverse consequences.

- 4.1.27 The SEM Committee believe the proposed modification as amended offers a practical solution within the existing systems and processes without adding a significant burden to market participants, the SOs and RAs. Such a burden would arise from the alternative, for example, of the running of additional auctions to those already in train and scheduled and could compromise efforts to ensure a full four years between auction and delivery for future T-4 auctions.
- 4.1.28 Given the above, the SEM Committee is approving the proposed Modification with the amended legal drafting set out in Appendix B. Application of an extension caused by third party delays relating to a connection(s), is not approved as part of this Decision. However, the SEM Committee request that the RAs give further consideration to such a modification, if issues, including in identifying both responsibility for delays and the period of the delay, can be satisfactorily resolved.
- 4.1.29 The SEM Committee note that this Decision has an impact on the capacity payments awarded to new capacity at auction. Some of the options set out in the proposed modification CMC_16_22 (which is still out for consultation) would also have an impact on these payments. The Committee will take this into account when coming to its decision on that proposed modification.

5. NEXT STEPS

- 5.1.1. The SEM Committee require that the SOs incorporate the approved Modification contained within this paper into the CMC via an appropriate version control process and the Modifications are to become effective by no later than:

Modification	Decision	Implementation Date
CMC_12_22: Remedial Action in the Event of Planning Application Delay to a Project that Qualifies under a Direction	Make the combined modification V2 Appendix B	20/01/2023
CMC_13_22: Third Party Judicial Review Remedial Action	Make the combined modification V2 Appendix B	20/01/2023
CMC_14_22: Mitigation of Impact of Third-Party Delays on Participants and Extension of Support Term	Under further consideration	N/A
CMC_15_22: Introduction of New Remedial Action to Enable Extensions due to Planning and Permitting Delays	Make the combined modification V2 Appendix B	20/01/2023

- 5.1.2. All SEM Committee decisions are published on the SEM Committee website: www.semcommittee.com