

Kilshane Energy Ltd

CMC_18_23 – Amendment to definition of
third party extension period

CAPACITY WORKSHOP 33 – 21ST SEPTEMBER 2023

CMC_18_23 – Amendment to definition of Third Party Extension Period

Explanation of Proposed Change

SEM-23-001 decision was based on the principle that Participants should not be penalised due to a Third Party Delay through an appeal to a planning decision or subsequent judicial review.

Thus, SEM-23-001 allows Participants under J.5.5 of the CMC to apply for an Extension of the Substantial Financial Completion and Long Stop Date milestones by a **period equal to the Third Party Extension Period**.

Current definition of Third Party Extension Period;

“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. in respect of Ireland, been served with an originating notice or, in respect of Northern Ireland, been served with an application for leave to apply for judicial review, 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. received a copy of the Third Party Planning Appeal to the **date of the determination by An Bord Pleanála** [emphasis added] in respect of the Third Party Planning Appeal.”*

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Explanation of Proposed Change

Planning application timeline for an application made under Section 34 of Planning and Development Act, 2000 (PDA);

1. Submission of planning application to a decision from local council
2. Under Section 37 of PDA, appeal of this decision can be raised within four weeks from decision date

If appealed, then goes to An Bord Plenala (ABP). If not, FINAL planning grant obtained after 4 weeks.

3. Notification of appeal to a decision of the appeal from ABP
4. Under Section 50 of PDA, application for leave for judicial review of ABP decision can be made within 8 weeks from ABP decision date (JR review period)

If judicial review is applied for then goes to High Court. If not, FINAL planning grant obtained after 8 weeks from ABP decision.

5. Notification of judicial review to the decision of High Court.

Third Party Extension Period definition currently covers steps 3 and 5. This modification would incorporate step 4 to ensure the entire period a Participant is delayed due to Third Party Delay is covered.

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Justification for Proposed Change

The Substantial Financial Completion milestone is achieved when, inter alia;

1. Finance documents and all conditions precedents of same are in full force and effect
2. All necessary consents, licenses, authorisations and permits have been obtained

Finance documents as well as several licenses and authorisations cannot be issued until a FINAL planning grant is in place. Also, until a FINAL planning grant is in hand, there is a risk that judicial review proceedings could be raised and so it limits a Participant's ability to make key investment decisions to further the delivery of the project.

Only after the JR review period, will a Participant obtain their FINAL planning grant and issuing of key financial documents, licenses and authorisations and further key investment decisions be made.

Therefore, when a Participant's planning decision is subject to Third Party Appeal to ABP, they are delayed from being able to declare Substantial Financial Completion and progress with key investment decisions for a period equal to when they receive notification of an appeal by ABP until the end of the period when an application for leave to apply for judicial review has ended.

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Justification for Proposed Change

KEL considers that the inclusion of the JR review period is entirely consistent with SEM-23-001. It will ensure the full period a Participant is delayed from being able to meet their SFC and LSD milestones aligns with any extension granted under J.5.5 of the CMC.

SEM-23-001 also accepts that there are several projects currently at risk of delivery and the chilling effects further terminations could have on security of supply concerns, of which there have been several since SEM-23-001. This modification will only help alleviate delivery risk of those projects affected by SEM-23-001.

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Implications of not implementing the proposed modification

Participants delivery schedule is currently being penalised by a period equal to the JR review period as a result of Third Party Delay.

Refusing this modification would put more risk onto project delivery.

Impacts

This modification will enable Participants to apply for an extension to their respective SFC and LSD milestones equal to the period with which they are delayed as a result of Third Party Delay.

There will be no change in process.

KEL considers this modification to have minimal impact.