

## **Response to applicant query on the basis for firm access allocation within Gate 3**

### **Background**

As per the CER Gate 3 December 2008 Direction, inclusion in Gate 3 was based on a completed application receipt date which meant that an application was not recorded as received (for the purposes of inclusion in Gate 3) until all information that was required to deem an application complete had been received. Appendix 1 of the Gate 3 direction included a list of all applicants to be included in the Gate and referenced the date at which the application was first received by the relevant System Operator

Subsequent to the decision as to which projects were included in the Gate, these projects were then included in the ITC program. The dates used for inclusion were as per Appendix 1 in the CER direction.

An applicant has now questioned the basis on which firm access is to be awarded and considers that firm access should be awarded on the same basis as inclusion in the Gate.

Having considered the query and re-read the Gate 3 direction, the System Operator's now consider that there may be some perceived ambiguity between the clause referencing inclusion in Gate 3 (clause 5.13) and the clause referencing allocation of firm access (clause 5.18).

### **Options to be considered**

At this stage, there appear to be 2 main options to be considered

#### **Option 1 – Allocation of firm capacity on the basis of date order as published in Appendix 1 to the Direction:**

Under this option

- firm access would be allocated based on the date received by the relevant System Operator.
- the criterion for allocation of firm access is distinct and separate to the criterion used for inclusion in the Gate.

### **Advantages of this approach**

1. Work on the Gate 3 program would continue unchanged
2. This option is a fair means of allocating capacity as all applicants can be considered to have submitted applications in good faith with no intent of gaining advantage by submitting an incomplete application.<sup>1</sup>
3. This approach is easily verified and audited

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<sup>1</sup> Prior to November 2008 deemed complete date was always the date used where a date order criteria determined order of processing. This was the case even prior to Group Processing

4. There will be no change to the order in the published list in Appendix 1 of the direction
5. This is consistent with the approach taken for conventional applications.

### **Disadvantages**

1. Some parties (such as the applicant who has queried this issue) will be disadvantaged as against their position in the queue should firm access be awarded on a date order basis which is more closely aligned to the deemed complete date.

### **Option 2 - Allocation of firm capacity Based on Full Application Checks**

Implement the Gate 3 Direction (as perceived by the applicant who has queried this issue) such that allocation of firm access is consistent with the criterion used for inclusion in the Gate. Under this option the date order in the queue for firm access to the transmission system will change for a number of applicants from the order perceived based on dates currently published (both in the CER direction and the EirGrid website.)

### **Advantages of Option 2**

1. Criterion used for scarce capacity allocation would be consistent with the criterion for inclusion in the Gate
2. This option is fairest to those applicants whose first submission was a complete and correct application

### **Disadvantages**

1. The lists currently published would need to be substantially revised
2. Parties who have moved down the list (as published in Appendix 1 of the CER direction CER\08\260) may perceive that they are being unfairly disadvantaged based on queue movement
3. Applications included in Gate 3 were received over a three and a half year period. Over this time both processes used in assessing application forms submitted, and the application forms themselves have evolved such that it is difficult to define a consistent rule for what is necessary information
4. The System Operator's had different processes for dealing with applications as they were received, and therefore consistency of treatment between the System Operator's is also an issue<sup>2</sup>
5. This option will lead to a delay to the Gate 3 Programme which will operate to the detriment of all parties, irrespective of how their position in the queue changes

### **System Operator's preferred option**

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<sup>2</sup> Please note that given that the rule for inclusion in Gate 3 by necessity had only to be applied over a short time period and that the rule was applied exactly to overcome inconsistencies between the System Operators, these concerns do not arise with regard to inclusion in Gate 3

Having considered both options above, the System Operator's preferred option is Option 1. The System Operator's consider that it is the most fair and verifiable date order for allocating firm capacity and is in line with progress to date.

## **Legal View**

### **ESB Networks**

1. Any legal challenge to a revised list or the existing list would have to show a quantifiable loss in order to be successful. Given that FAQ's have not yet been published it is difficult to see how an applicant could prove such a loss
2. Given that there may be some ambiguity between the clause referencing inclusion in Gate 3 (clause 5.13) and the clause referencing allocation of firm access (clause 5.18), a clarification is required from CER

### **EirGrid**

1. It is difficult to ascertain what reliance may have been placed on the list published with the direction or who may make a challenge if the list is changed.
2. Whilst there is ambiguity in the wording of the direction, particularly in clause 5.13, the list in the appendix is directly reference in clause 5.15 and is clear. To change it may be viewed as a retrospective change to the direction that does not facilitate regulatory certainty.
3. The literal interpretation of "received date of the application" within 5.18 (as applied under option 1) is fair and reasonable.