Response by Energia to CER Information
Paper CER/17/111
&
Statutory Notices

*Proposed Modifications to Generation and Supply Licences, necessitated to implement the Integrated Single Electricity Market (I-SEM)*

03 July 2017
1. Introduction
Energia acknowledges and appreciates our statutory right to submit objections and representations on the licence changes notified in the relevant statutory notices (published 02 June) and contained in the CER information paper (CER/17/111) published on the same day. Disappointingly, some of the CER’s proposed amendments seek to effectively remove the role this important statutory process can play in future licence amendments for reasons that are spurious, self-serving and unlawful.

While many of the arguments herein have been included in previous consultation responses and correspondence with the SEM Committee and CER, they are restated in this submission as formal objections and representations on the proposed licence amendments. This response should be read in conjunction with previous Energia submissions, specifically:

- Energia response to SEM/16/059 – Offers in the Balancing Market
- Energia response to SEM/17/026 – Proposed BMPCoP
- Energia response to SEM/16/073 – CRM Parameters
- Energia response to SEM/17/004 – Capacity Market Code

Energia’s responses to SEM/16/059 and SEM/17/026 highlighted that notwithstanding the extensive legal arguments that oppose the SEM Committee’s approach, the licence change proposed, specifically the rejection of a minimal change approach to Condition 15, is simply not required and it does not satisfy the stated objective(s) of the SEM Committee. It is therefore the case that when assesses against the proposed erosion of governance and accountability of relevant regulatory decisions, the proposed changes are wholly disproportionate and should not, but also cannot lawfully, be made.

Response is on behalf of all licenced companies under the control of Energia, as part of the Viridian Group:

- Huntstown Power Company Limited (Huntstown 1)
- Viridian Power Limited (Huntstown 2)
- Holyford Windfarm Limited (Hollyford)
- Windgeneration Ireland Limited (Meenadreen)
- Viridian Energy Limited (Energia)

2. Background: Previous Consultations & Pre-Consultation Engagement
At the outset of this submission of objections and representations on the licence changes proposed by CER, it is important to note the following:

1. This is the first opportunity for market participants to respond to the text of the proposed licence changes.

2. The inclusion of draft licence conditions in previous SEM Committee consultations cannot be said to have any formal bearing on the current process as they were not presented as final proposed licence changes but as
conditions liable to change based on the outcome of the respective consultations.

3. At the time of Energia’s pre-consultation engagement with the CER, the CER were not in a position to present proposed licence changes as they were still awaiting contingent decisions from the SEM Committee on the Capacity Market Code (CMC) and the Balancing Market Principles Code of Practice (BMPCoP). The pre-engagement was on the upcoming process as opposed to the specific licence changes contained herein.

Taking these points together with the importance of the proposed licence changes and the time allowed to licensees to submit representations or objections (31 days or 20 working days), Energia can see no justification for the CER’s decision not to extend the timeframe within which submissions can be made meaningfully beyond the statutory minimum of 28 days (as set out in Section 20(2)(c) of the 1999 Act. Energia made this point to CER during our pre-consultation engagement on process and suggested the timeframe be considerably longer than the statutory minimum.

Given the statutory requirement for notices to be given in respect of an intention to amend the licences, as well as the broader statutory requirements, it is incumbent on the CER to justify each proposed change by reference to applicable statutory requirements and to ensure its lawfulness. We do not believe that the CER has discharged this obligation. In particular, it is entirely insufficient for the CER to only refer to decisions of the SEM Committee, which the amendments would implement, as the appropriate justification for such changes; appropriate justification must be provided in the context of this specific statutory process.

3. Proposed Changes to Generation Licences

The statutory notice published by the CER states that the proposed changes are to facilitate the new wholesale market arrangements in the Single Electricity Market. While it is accepted that some changes are needed to facilitate I-SEM, the two new licence conditions proposed not, as regards the specific obligations they impose, necessary to facilitate I-SEM, they are in conflict with clear legal principles and ultra vires the CER’s statutory powers.

In respect of Condition 15a, Energia’s response to SEM/17/026 (proposed BMPCoP) unambiguously asserts that the proposed arrangements are unrelated to the facilitation of the new market arrangements. Instead they should correctly be seen as a furtive attempt by the SEM Committee to unlawfully undermine the governance and accountability of future regulatory decisions on these matters. This is most clearly seen in the SEM Committee’s rationale for the proposed changes in SEM/17/020;

*Under a minimal change approach (i.e. retain existing cost reflective bidding licence condition), the SEM Committee believes that there would remain the risk that doubts could arise in relation to elements of the principles that remain in the relevant licence condition, and that those doubts could only be definitively resolved through court proceedings or licence modification, both of which processes are expensive and time-consuming. The SEM Committee is of*
the view that such a scenario is not in the interest of industry or consumers, and therefore proposed transferring relevant content from the generation licence into the BMPCOP document. Such an approach also improves transparency and thus is in line with the better regulation principles.¹

In this paragraph, the SEM Committee are, in effect, stating that by reserving additional, almost unfettered discretion to decide all such matters in the future, and by removing the statutory protections of the licence change process and removing or greatly restricting the scope for legal challenges in relevant future matters, that such an outcome is in the interests of industry, customers and better regulation principles. This statement is absurd but it is telling in terms of the SEM Committee’s approach for the following reasons:

1. Doubts over relevant licence conditions can be clarified by the SEM Committee under the current arrangements; e.g. Direction with respect to the treatment of the Carbon Revenue Levy.

2. The removal of all principles in the licence condition is an important objective of the SEM Committee’s, the effect of which is to make the SEM Committee less accountable for its decisions and confer upon itself a new almost unfettered discretion to decide relevant future matters, both within and outside (e.g. Carbon Revenue Levy) their statutory duties and responsibilities.

3. The fact that licence modifications and court proceedings can be expensive and time consuming is an irrelevant consideration for the SEM Committee, pursuant to their statutory duties and obligations, in deciding such matters; yet it appears to play a significant role.

4. Even if acting within their statutory duties and obligations, the SEM Committee cannot expressly or implicitly seek to undermine and/or frustrate the statutory and/or rights of licensees. Furthermore, the SEM Committee cannot seek to undermine and/or frustrate licensees recourse to these rights through appropriate statutory and/or legal action.

5. The proposed removal of this statutory and legal accountability framework is clearly not in the interest of customers or industry and does not conform to the principles of better regulation.

It is necessary that the CER consider these aspects of the previous SEM Committee decision(s) in full when deciding, inter alia, on how and why to exercise their specific statutory powers in relation to amending generation and supply licences.

3.1 New Condition: Condition 15a Balancing Market Principles Code of Practice

The stated reason for this proposed licence modification is "to implement the SEM Committee decision (produced as part of the market power workstream) to establish a generic licence condition to require generation licence holders to comply with the Balancing Market Principles Code of Practice (Decision Paper “Complex Bid Offer Controls in the I-SEM Balancing Market” (SEM-17-020)". It cannot be said that a

¹ SEM/17/020 at para 4.3.5
generic licence condition, *per se*, where it is to replace an existing licence condition, can, in and of itself, facilitate the new market arrangements. There is nothing, *prima facie*, that would facilitate the new market arrangements in a generic licence condition that could not also be achieved through a minor amendment to the existing licence. As such the CER has not explained how the new market arrangements require and justify the proposed licence condition as drafted.

Furthermore, the replacement of an existing licence condition on cost reflective bidding with a generic requirement to follow the BMPCoP gives rise to a number of substantial legal and economic arguments that have been comprehensively set out in previous Energia responses – listed in section 1 of this response – to the SEM Committee. These arguments form the basis of Energia’s formal objection to this proposed new licence condition, primarily on the basis that the proposed condition is unlawful. The following arguments support this conclusion:

a. With respect to the most substantial element of the proposed licence condition – i.e. cost-reflective bidding in the balancing market – the proposed condition is an empty vessel, devoid of any principles and/or policies in respect of this high-level objective. This is a material change from the current licence condition and is unlawful on the basis of its failure to provide legal certainty to generators under the licence.

b. The proposed change is *ultra vires* CER’s statutory powers and duties, specifically;

i. The proposed generic condition is not a condition which the CER may lawfully attach to a licence further to Section 14 of the Electricity Regulation Act 1999 (“the 1999 Act”), which provides that, “*where the Commission grants a licence, that licence shall be subject to such terms and conditions as may be specified in the licence*”. The substance of the requirement to comply with the BMPCoP would not be specified in the licence.

ii. To the extent that the proposed BMPCoP excludes costs which form part of the Short Run Marginal Cost (SRMC) of generation, the inclusion of a generic licence requirement, which is not guided by any principles, to comply with the BMPCoP is entirely inconsistent and contrary to the statutory objectives and duties of the CER. The relevant statutory duties include, in particular, the duty under section 9(1) of the 1999 Act to decide upon and impose *effective and proportionate* measures to promote *effective competition* and to have regard to the need to provide for flexibility to facilitate trading close to real time in order to better integrate renewable electricity and *provide accurate price signals to the market*. They also include under section 9BC the duty to protect the interests of consumers of electricity *wherever appropriate* by promoting effective competition in wholesale electricity markets, having regard to the need, among others: (i) to secure that all reasonable demands by final customers of electricity for electricity are satisfied; and (ii) to secure that licence holders are
capable of financing the undertaking of the activities which they are licensed to undertake and in a manner that is best calculated to promote efficiency and economy on the part of authorised persons.

iii. It is not possible to reconcile the proposed licence condition with the requirement, under section 9BD of the 1999 Act, that in discharging their functions, each of the Minister/CER/SEM Committee is “transparent, accountable, proportionate, consistent and targeted only at cases where action is needed”. The proposed licence change, specifically the removal of the principles of the bidding controls from the licence, is not consistent with the principles of accountability and proportionality.

On the latter point of being “targeted only at cases where action is needed”, the SEM Committee assertions that this change is required for I-SEM implementation does not withstand rudimentary scrutiny and is fully exposed as a Trojan Horse for fundamental changes to governance and accountability of regulatory decision making in Energia’s response to SEM/17/026. Energia’s response highlights the similarities in conditions between existing and proposed licence conditions and undermines the SEM Committee’s argument that such changes assist clarity, transparency and flexibility.

c. The fundamental changes proposed to the governance and accountability of decision making manifests most clearly in the attempt, through this licence condition, to frustrate and/or remove licence holders’ recourse to the statutory appeals mechanism pursuant to Part IV of the 1999 Act in respect of future changes to the high-level principles of cost recovery enshrined in the current licence condition, and/or any other future change to the principle(s) surrounding generators offers in the I-SEM Balancing Market. The appeals mechanism is a statutory mechanism to balance the duties and obligations of licence holders against those of CER, in respect of changes to a statutory licence that is of fundamental importance to both generator and the CER.

d. In his High Court judgment in Viridian and Endesa v Commission for Energy Regulation and (by order of the Court) the Attorney General, Clarke J found that “Provided that the retention of flexibility is itself lawful having regard to the overall statutory regime, there is no reason why a licence, in its terms, may not retain some flexibility to the licence grantor”. It is apparent from this judgment that the discretion of the CER in retaining flexibility when setting out licence conditions is constrained by the requirement that the licence is the legal instrument which the CER has at its disposal for imposing conditions as regards the generation of electricity and that it is the licence which sets out the rights and obligations of generators. It is therefore a necessary conclusion that the discretion the CER have sought to retain for themselves in the context of the proposed generic licence condition and BMPCoP is excessive as it materially interferes with the rights and obligations of
generators, and is thereby unlawful in the context of the relevant statutory regime.

e. The proposed approach of a generic licence condition requiring generators to comply with the proposed, highly-prescriptive, BMPCoP, the draft of which is lacking clarity and clearly incomplete and inaccurate, without any discretion on the part of the generator to reflect their true SRMC, is inconsistent with a generator’s right to property as protected under the Article 40.3 and Article 43 of the Irish Constitution and Article 1 of Protocol 1 of the European Convention on Human Rights.

f. Where, by reason of the proposed licence condition and BMPCoP, a generator was forced to bid at a level below their SRMC, such an obligation would be contrary to competition law, specifically Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Section 5 of the Competition Act 2002 to 2014; the provisions of which prohibit predatory pricing. This particular concern arises in light of the ongoing dominance of ESB and the pre-existing concerns over the exercise of market power and consequently the potential for unlawful discrimination in the approach being proposed, as it proposes to treat licensees that are materially different in the same way. A licence condition such as the proposed condition that undermines competition or requires licensees to engage in prohibited activity, is not a lawful licence condition and cannot be made.

It is recognised that the SEM Committee have attempted to address some of these arguments in the decision paper SEM/17/020 but the arguments put forward are combinations of inconsistent and insufficient, often failing to engage in the substantive argument put forward, and thus has strengthened our view on the unlawfulness of the proposed change. On the other arguments that have not been addressed by the SEM Committee to date (e.g. (e) and (f) above), their view on these is unknown.

On the unlawful exercise of powers by the RAs, the SEM Committee have argued that “any decision to amend the future BMPCOP document would still be subject to a public consultation process whereby the SEM Committee has to abide by its statutory objectives in its decision making. Additionally, the SEM Committee is bound by substantive legal constraints. Specifically, any future decision to amend the BMPCOP document could still be challenged by market participants in the High Court in either jurisdiction in a judicial review”. This retort misses the substantive point that licensees would no longer have the ability to access the statutory appeal process as the proposed licence condition is an empty vessel, thus frustrating licensees recourse to this important statutory counterweight to the CER’s significant powers; the ground for Judicial Review (correctness) and the precedent of the Viridian case would be rendered irrelevant; and, the acknowledgement that the CER, as a ‘creature of statute’, always has to have regard to its statutory duties does not preclude the possibility of the CER making errors and mistakes and is of little comfort.

2 SEM/17/020 at para 4.3.6
given the format and content of the proposed BMPCoP, which Energia says, is entirely inconsistent with the statutory duties and objectives of the CER.

The SEM Committee have addressed the issue of their failure to provide legal certainty in the proposed approach by rejecting such an accusation on the basis that:

“any assessment of legal certainty in the present situation would have to encompass not only the terms of the relevant licence condition but also the terms of the proposed BMPCOP document. This is because the rights and obligations of those subject to the licence condition can only properly be understood by reference to the BMPCOP document.”3

However, this view is inconsistent with the approach being adopted whereby the rights and obligations of licensees are not being fully afforded to them, as there is no statutory basis upon which an affected licensee could commence a statutory appeal against future changes to the BMPCoP. Also, given the proposed licence condition contains no substantive rights or obligations, the SEM Committee are effectively stating that the BMPCoP is required to give legal certainty to the licence condition and the licence holder. The corollary of this argument is an admission on the part of the SEM Committee that the licence condition, as the condition in the primary document, does not, in and of itself, specify the rights and obligations which licence holders are subject to, contrary to statutory requirements. This means that licence holders have no certainty as to the scope of their rights and obligations. This is contrary to the principle of legal certainty and is consequently unlawful.

Addressing the preceding case law and the claim that there is insufficient detail within the licence condition, pursuant to Section 14 of the 1999 Act, the SEM Committee fail to engage with substantive point from Clarke J’s judgment, namely that the CER cannot retain for itself excessive discretion in licence conditions. There may not be a clear demarcation line in all cases but in the present case, the discretion retained by the CER could not be wider and deprives the licence condition of any meaning. It is as such clearly excessive.

On the claim that the RAs have failed to have regard to their statutory duties, the SEM Committee claim that in this particular context, the claims are without merit. This assertion is supported by a reference to “extensive consultation and engagement”4, and a number of specific consultations and decisions, as well as “five key principles [that provide] a basis for assessing various market power mitigation policies for the I-SEM”5. The SEM Committee further claim that, “the specific proposals for ex ante bidding controls put forward…can readily be shown to have been arrived at via a process designed to address the relevant statutory obligations”6. This response is bizarre on at least three different fronts:

1. It does not engage with the arguments put forward by Energia and others on the SEM Committee’s failure to have regard to their statutory duties – restated herein.

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3 Ibid at para 4.3.12
4 Ibid at para 4.3.17
5 Ibid at para 4.3.19
6 Ibid at para 4.3.20
2. It conflates having a process designed to address relevant statutory obligations (and objectives) with ensuring that they are being met. Merely having a process designed to ensure that regard is had to relevant statutory duties and objectives is insufficient. In particular pointing to the existence of such a process does not, and cannot, exonerate the CER for making a decision which is inconsistent with its statutory duties and objectives, as presented in this submission and as recorded as a basis for objecting to the proposed modification.

3. The 5 key principles – Effective, Targeted, Flexible, Practical, Transparent – espoused in this explanation appear to have been immediately retired by the SEM Committee following the I-SEM Market Power Mitigation decision (SEM/16/024), despite a number of market power consultations having been published in the interim, including the consultation paper on Offers in the I-SEM Balancing Market (SEM/16/059) wherein this modification was first presented as a possible option but was not assessed against these five key principles. Assessed against these key principles, Energia’s response to that consultation highlighted that the proposed amendments perform inexorably worse than the current arrangements. The continued absence of these key principles from the process is both astounding and disappointing.

Energia strongly objects to this proposed new licence condition (Condition 15a) for the reasons outlined herein and in previous consultation responses. The extent of the amendments proposed to Condition 15 goes far beyond what is required for the purpose of facilitating I-SEM and the modifications which need to be made to reflect market arrangements under I-SEM. They seek to leave entirely at the discretion of the CER the rights and obligations pertaining to a generator’s participation in the Balancing Market. As such the licence condition is unlawful, its effect is contrary to the SEM Committee’s express intention, it erodes governance and accountability, and it gives rise to an unprecedented level of regulatory risk that further underscores the unlawfulness of the proposal.

In light of the issues identified herein, as well as in previous submissions, the CER should withdraw this proposed new licence condition and publish an alternative licence condition by way of statutory notice. Alternatively, Section 19 of the 1999 Act expressly provides licence holders with the right to request that the CER modify one or more licence conditions and all of Energia’s rights are reserved in this respect.

3.2 New Condition: Condition 20 Capacity Market Code

Energia objects to this new proposed licence condition on grounds which are almost identical to the grounds set out in respect of Condition 15a. The proposed inclusion of a generic licence condition requiring compliance with the Capacity Market Code, where appropriate, and offering no further principles renders this proposed new condition similarly unlawful for, inter alia, the following reasons:

   a. Vagueness or failure to provide legal certainty;

   b. It is ultra vires the CER’s statutory powers and duties;
c. The approach seeks to circumvent the statutory governance and accountability framework and unjustifiably undermines generators’ rights;

d. The approach also has the effect of superseding the relevant case law, and neutering the effect of the leading judgment (Viridian) which overturned previous SEM Committee decisions/directions;

e. Is inconsistent with a generator’s right to property as protected under the Article 40.3 and Article 43 of the Irish Constitution and Article 1 of Protocol 1 of the European Convention on Human Rights;

f. May place generators in direct conflict with competition law, specifically Article 102 of the TFEU and Section 5 of the Competition Act 2002 to 2014.

To the extent that there are restrictions being imposed on generators in connection with their generating activities, then they should be set in the terms and conditions of their licences. In particular the terms and conditions which the CER may attach to the Licence is the only means available to the CER under the 1999 Act to constrain generators’ behaviour. As a matter of public administrative law, the terms and conditions should not be so vague as to be deprived of any meaning, for instance by giving the CER unfettered discretion as to the scope of the obligations to which a generator is subject. This means that the nature of the restrictions/terms and conditions and the reason for them should be readily apparent from the Licence Condition.

Consequently, a Condition that requires compliance with the Capacity Market Code, *simpliciter*, does not meet these criteria. While it may be sufficient to deal with a number of rules governing participation in the auction, it does not establish the legal basis which allows the CER to limit the generation activities of a licensee. Such restrictions must be set out in the Licence Condition. At the very least, the requirement to participate in the auction is an obligation which is properly a condition in the licence to generate electricity, as are the constraints that may be imposed on the price which may be paid for the capacity which a generator is obliged to offer.

For the foregoing reasons, Energia strongly objects to the CER’s proposed new licence condition (Condition 20). The proposed condition is entirely insufficient to regulate generators as regards their participation in the capacity market(s) and does not provide any legal basis for the regulatory determinations which are foreseen in the CMC. Similarly to the proposed Condition 15a, the discretion it indirectly purports to afford the CER in constraining bidding in the market is excessive and as such unlawful.

In light of the issues identified herein, the CER should withdraw this proposed new licence condition and publish an alternative licence condition by way of statutory notice. Alternatively, Section 19 of the 1999 Act expressly provides licence holders with the right to request that the CER modify one or more licence conditions and all of Energia’s rights are reserved in this respect. An appropriate licence condition should incorporate rules governing CRM participation, this may include rules concerned with the maximum price which may be offered and/or paid for capacity, but it must also protect the rights of generators to ensure that licensees cannot be
forced to participate in the CRM at a level which is below the level of their total costs, including the provision for a reasonable rate of return.

3.3 Existing Condition: Conditions to Apply from SEM Go Live Condition 1 Interpretation and Construction
No objection or representation at this time.

3.4 Existing Condition: Conditions to Apply from SEM Go Live Condition 14 Trading and Settlement Codes
No objection or representation at this time.

3.5 Existing Condition: Condition 15 Cost Reflective Bidding in the Single Electricity Market
Energia objects to this proposed amendment to an existing licence condition (Condition 15) on the basis that it is unnecessary, given the objection to Condition 15a contained in Section 2.1 of this submission.

4. Proposed Changes to Supply Licences
The statutory notice published by the CER states that the proposed changes to supply licences are to facilitate the new wholesale market arrangements in the Single Electricity Market. While it is accepted that some changes are needed to facilitate I-SEM, the two new licence conditions proposed are in conflict with clear legal principles and ultra vires the CER’s statutory powers, and in the case of Condition 19a, it is unrelated to the facilitation of the new market arrangements. Energia’s objections to these proposed changes represent a rejection, in general terms, of unlawful measures and poor regulatory practice but also more specifically as a DSU.

4.1 New Condition: Condition 19a Balancing Market Principles Code of Practice
Energia objects to the proposed new licence condition for, inter alia, the following reasons:

a. Vagueness or failure to provide legal certainty;

b. It is ultra vires the CER’s statutory powers and duties;

c. The approach seeks to circumvent the statutory governance and accountability framework and unjustifiably undermines market participants’ rights;

d. The approach also has the effect of superseding the relevant case law, and neutering the effect of the leading judgment (Viridian) which overturned previous SEM Committee decisions/directions;

e. It is potentially inconsistent with market participants’ rights to property as protected under the Article 40.3 and Article 43 of the Irish Constitution and Article 1 of Protocol 1 of the European Convention on Human Rights;
f. May place market participants in direct conflict with competition law, specifically Article 102 of the TFEU and Section 5 of the Competition Act 2002 to 2014.

Overall, the proposed introduction of this new licence condition would be contrary to the overall development of the market and the interests of DSUs. Energia strongly objects to this proposed new condition.

4.2 New Condition: Condition 23 Capacity Market Code

Similar to the preceding section, Energia objects to this new proposed licence condition on the same grounds, specifically:

a. Vagueness or failure to provide legal certainty;

b. It is ultra vires the CER’s statutory powers and duties;

c. The approach seeks to circumvent the statutory governance and accountability framework and unjustifiably undermines market participants’ rights;

d. The approach also has the effect of superseding the relevant case law, and neutering the effect of the leading judgment (Viridian) which overturned previous SEM Committee decisions/directions;

e. It is potentially inconsistent with market participants’ rights to property as protected under the Article 40.3 and Article 43 of the Irish Constitution and Article 1 of Protocol 1 of the European Convention on Human Rights;

f. May place market participants in direct conflict with competition law, specifically Article 102 of the TFEU and Section 5 of the Competition Act 2002 to 2014.

Overall, the proposed introduction of this new licence condition would be contrary to the overall development of the market and the interests of DSUs. Energia strongly objects to this proposed new condition.

4.3 Existing Condition: Section B Conditions to Apply from SEM Go Live Condition 1 (Interpretation and Construction)

No objection or representation at this time.

4.4 Existing Condition: Section B Conditions to Apply from SEM Go Live Condition 13 (Intermediaries)

No objection or representation at this time.

4.5 Existing Condition: Condition 19 Cost Reflective Bidding in the Single Electricity Market

Energia objects to this proposed amendment to an existing licence condition (Condition 19) on the basis that it is unnecessary, given the objection to Condition 19a contained in Section 4.1 of this submission.
5. Proposed Changes to Generation Licences of units <10MW

Acknowledging the different nature of generation licences issued by Order, pursuant to SI No 384 of 2008 to generators less than 10MW, and the need for a new SI to modify the Terms and Conditions these generators must comply with, Energia objects to the proposed new Terms and Conditions for the reasons that have been set out in in Sections 3.1 and 3.2 of this submission.

6. Summary & Conclusions

Energia objects to the new licence conditions the CER propose to insert into the relevant generation (Conditions 15a & 20) and supply licences (Conditions 19a & 23) and consequently also objects, on the basis that it is not required, to the proposed change to Conditions 15 and 19 of the generation and supply licences, respectively. Energia does not offer any representations or objections to the other proposed changes, at this time.

The basis for Energia’s objections to the proposed new licence conditions are multifaceted but are predominantly focused on the unlawfulness of the proposed changes and, in the case of Condition 15a (generation) / 19a (supply) an attempt by the SEM Committee to erode the governance and accountability of regulatory decisions through changes that are unrelated to the introduction of I-SEM.

Given the statutory requirement for notices to be given in respect of an intention to amend the licences, as well as the broader statutory requirements, it is incumbent on the CER to justify each proposed change by reference to applicable statutory requirements and to ensure its lawfulness. We do not believe that the CER has discharged this obligation. In particular, it is entirely insufficient for the CER to only refer to decisions of the SEM Committee, which the proposed modifications would implement, as the appropriate justification for such changes; appropriate justification must be provided in the context of, and consistent with, this specific statutory process.

In light of the issues and objections contained in this submission, Energia considers the CER to have no option but to withdraw the proposed licence modifications contained in the statutory notice (dated 02 June 2017) and for the CER to publish alternative licence conditions by way of statutory notice that address the material issues with the current proposals and process.

In terms of the contents of an alternative licence for Condition 15 (generation licence), the current Condition 15 offers an good starting point, as a licence condition proven to work in SEM and lauded by the SEM Committee, minimal change to this condition could readily facilitate the regulation of the I-SEM balancing market that has been deemed necessary by the SEM Committee. An alternative licence condition, should one be preferred to the minimal change approach, must, at the very least, retain a definition of generators’ SRMC as the true SRMC applicable to a unit based on the unit’s total costs; not an artificial and inflexible construct of “eligible costs”. The maintenance of this core principle in the licence is necessary to ensure appropriate governance and accountability of regulatory decisions in respect of generator’s offers in the I-SEM balancing market.
An alternative to the newly proposed Condition 20 (generation licence) should incorporate rules governing CRM participation, this may include rules concerned with the maximum price which may be offered and/or paid for capacity, but it must also protect the rights of generators to ensure that licensees cannot be forced to participate in the CRM at a level which is below the level of their total costs, including the provision for a reasonable rate of return.

Failing the publication of appropriate alternative licence conditions, Energia requests that the CER hold a public hearing, as provided for under Sections 20 and 21 of the 1999 Act, on the CER's proposals to modify the requirements of the licence, as per the notice dated 02 June 2017. Furthermore, Energia reserves all of its rights, pursuant to Section 19 of the 1999 Act, to request that the CER modify one or more licence conditions.