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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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AND IN THE MATTER OF AN APPLICATION BY EP KILROOT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION (ACTING THROUGH ITS SINGLE ELECTRICITY MARKET COMMITTEE)

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Re EP Kilroot Ltd's Application (No 2)

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David Dunlop KC and Matthew Corkey (instructed by Carson McDowell LLP) for the Applicant
John Larkin KC and Laura King (instructed by O'Reilly Stewart, Solicitors) for the proposed Respondent
Paul McLaughlin KC and Simon Turbitt (instructed by Tughans LLP) for SONI, an Interested Party
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin Ltd) for EirGrid, an Interested Party

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SCOFFIELD J

Introduction

[1] These proceedings are a sequel to a recent application ("the first judicial review") in which the applicant, EP Kilroot Ltd, successfully challenged a decision of the proposed respondent, the Northern Ireland Authority for Utility Regulation acting through its Single Electricity Market Committee, by which it endorsed a decision disqualifying the applicant from participation in an upcoming electricity capacity auction: see *Re PPG's and EPK's Applications* [2024] NIKB 98 ("the previous judgment"). The background to the parties, the capacity auction with which these proceedings are concerned, and the Capacity Market Code which governs the

procedure for the auction, is set out in that judgment; and this judgment should be read in conjunction with it for ease of understanding. The same abbreviations are used in this judgment as in the judgment in the first judicial review.

[2] The final order of the court in the first judicial review was dated 29 November 2024. It quashed the decision of the SEM-C which EPK had challenged and remitted the matter back to the SEM-C for redetermination as soon as practicable. The SEM-C made its further decision on 2 December 2024. The substance of that decision was, again, to disqualify EPK's candidate unit from participation in the capacity auction. It is that decision which the applicant now seeks to challenge.

[3] This case has also been brought on an urgent basis. At the time of the first judicial review, the capacity auction was set to be held from 3 to 5 December. The second of those dates, the end date for submissions, has since changed (by decision of the SEM-C on 2 December). The auction, which commenced on 3 December, is now due to conclude at 10:00am on 12 December, with the "capacity auction run start" commencing later that day by which the offers made by qualified participants are assessed and ranked.

[4] Mr Dunlop KC appeared again with Mr Corkey for the applicant, EPK; Mr Larkin KC appeared again with Ms King for the UR, acting through its SEM Committee; Mr McLaughlin KC appeared again with Mr Turbitt for SONI; and Mr Beattie KC appeared again with Mr McEvoy for EirGrid. I am once more grateful to all counsel for their helpful written and oral submissions and to their instructing solicitors for their work in assembling and presenting the evidence and papers in a compressed timescale.

Factual background

[5] Much of the deeper background to this case is set out in the judgment in the first judicial review and is not repeated here. I summarise briefly below the key developments since the judgment in the first judicial review.

[6] The SEM-C's original decision in relation to EPK's qualification was made on 4 November 2024 and notified to EPK on 7 November. By that decision, the SEM-C upheld the FQD of the SOs of 23 October 2024 (which had been revised from an earlier version submitted on 15 October). The 23 October FQD was in the following terms:

> "Based on the Implementation Plan provided in the Application for Qualification, the System Operators consider that Substantial Completion of the Generator Unit cannot be achieved prior to start of the Capacity Year. In accordance with E.7.5.1(c) of the Capacity Market Code, the Application for Qualification is rejected."

[7] The SEM-C decision which was challenged in the first judicial review was in very similar terms, modified slightly to make clear that the SEM-C had considered the latest version of the implementation plan which had been provided by EPK on 3 October:

> "REJECT_PLAN Based on the latest Implementation Plan provided in the Qualification Process on 3 Oct 2024 the System Operators consider that Substantial Completion of the Generator Unit cannot be achieved prior to start of the Capacity Year. In accordance with E.7.5.1(c) of the Capacity Market Code the Application for Qualification is rejected."

[8] That decision was quashed in the first judicial review, in summary, on the basis that the respondent ought to have provided EPK with an opportunity to deal with new and different concerns which had been raised by the SOs at their meeting with the OSC on 18 October 2024, of which EPK had been unaware. (Further discussion of the precise basis upon which the first judicial review was successful is set out below, at paras [52]-[57].) As noted above, the court's order of 29 November remitted the decision back to the SEM-C for redetermination. The operative provisions of the order for this purpose – which were largely proposed by the respondent itself once the court's intended approach was made clear – were in the following terms:

> "AND IT IS FURTHER ORDERED that:
>
> 1. The decision made by the respondent on 4 November 2024 approving the Final Qualification Decision (FQD) submitted to it by the SEM System Operators on 23 October 2024 in respect of the Applicant's qualification for the Single Electricity Market T-4 2028/2029 Capacity Auction be forthwith removed into the King's Bench Division here for the purpose of being quashed;
>
> 2. That upon the said decision being removed into the King's Bench Division as aforesaid the same be quashed without further Order;
>
> 3. Upon the said quashing, the matter of the approval or rejection of the FQD relating to the applicant be remitted back to the respondent for reconsideration as soon as is practicable;

4. Section E.9.4.7 of the Capacity Market Code is disapplied for the purposes of the said reconsideration."

[9] In advance of the court order being finalised and filed, the court's intention to quash the respondent's decision in relation to EPK's qualification was announced in the course of a summary of the judgment in open court on the afternoon of 27 November. From that point on, there was engagement between the respondent and EPK (and/or their respective lawyers) in order to facilitate the further decision-making process which was then necessary.

[10] In particular, on the evening of 27 November 2024, a detailed letter was sent from the applicant's solicitors to the UR, the SEM-C and SONI ("the 27 November submission"). This correspondence contained a number of appendices and was plainly designed to allay the SOs' and SEM-C's concerns about the achievement of SFC. A major focus of the further representations was EPK's ability to construct GT West on the basis of the 1973 planning permission and without the need for a further planning permission. An opinion from senior counsel who specialises in the planning field was provided to support the contention that the replacement of the existing generator within the power station with the candidate unit CCGT was not development and therefore did not require any fresh planning permission. Further detail about the works involved in this iteration of the project were provided in the reports mentioned in para [215] of the previous judgment, or further iterations of them.

[11] The 27 November submission also emphasised that EPK had provided a construction period (on the latest date anticipated for the achievement of SFC) of 40½ months; with a period of 44½ months being available if the earliest date provided for the SFC was achieved. EPK compared this favourably to the period of 36-38 months which had been considered appropriate (EPK submits) by the SOs at their meeting on 3 October. As to construction, EPK explained that it was going to enter into an Engineer, Procurement and Construction (EPC) contract with EP UK Construction Limited (EPUKC), a sister company of the applicant which has experience in constructing power stations and which has already undertaken work on the GT West project. EPUKC will manage the project. Given that the construction management and funding of the project, via intercompany loan, would be under the control of EPK's ultimate parent company – Energetický a průmyslový holding as (EPH) – the applicant emphasised that there was extremely limited scope for delay. For instance, there is no condition precedent outstanding in relation to entering into the EPC contract; there is Board approval for the project; and EPH has the resources available to fund the project without the need to rely on external funders. A range of additional documentation was provided in support of these representations.

[12] Also on 27 November, Ms Porter of Carson McDowell on behalf of the applicant asked Mr Turner of O'Reilly Stewart on behalf of the SEM-C to confirm

that it would "afford our client a right of reply on any new considerations made that our client has not yet provided explicit views on." In Mr Turner's response, the following position was set out on behalf of the respondent:

> "Whilst you will of course accept that the decision-making process is not one that involves a back and forward discourse, our client will seek clarification from your client on any issue should it so need."

[13] In the event, there was no further substantive correspondence from the respondent, or the SOs or RAs, seeking further information from EPK in advance of the further decision. Such correspondence as was exchanged related to the timing of the decision. Given that the auction had commenced, the applicant was keen to know the outcome of the new decision as soon as possible. There was correspondence in the course of the day on 2 December seeking clarity. The response on behalf of SEM-C was to the effect that a large amount of new material had been placed before it (contrary to the expectation I had mentioned in para [241] of the previous judgment) and that the Committee was dealing with the reconsideration carefully.

[14] The evidence and documents now before the court show that, in the meantime, the SEM-C met on Thursday 28 November 2024. The primary purpose of this meeting was for the Committee to receive a legal briefing in relation to the outcome of the first judicial review. The Committee agreed to discuss matters further at a meeting it scheduled for Monday 2 December.

[15] The redetermination decision was provided by way of correspondence just after 7:00pm on 2 December and the result and reasoning were expressed in the following terms:

> "The SEM Committee has decided, upon re-consideration and in exercise of its powers under clause E.9.4.5 of the Capacity Market Code, to uphold the above mentioned FQD under clause E.7.5.1(c) of the Code.
>
> The SEM Committee does not consider that Substantial Completion of GT West can be achieved prior to the start of Capacity Year 2028/29 (**CY28/29**).
>
> It considers that there is a risk of Substantial Financial Completion (**SFC**) being met at the later end of the range of dates provided in the revised Implementation Plan of 3 October 2024 (the **Revised IP**), but even if SFC is achieved at the earlier point in the range, the Committee does not consider that the project will achieve Substantial Completion by the start of CY28/29.

> This is because the SEM Committee does not consider substantial completion of the construction works associated with the project within the timescale proposed in the Revised IP to be achievable. In particular, the constraint of carrying out construction within the terms of the 1973 planning permission brings about considerable additional complexity and challenge to the timely delivery of the project."

[16] After provision of the Committee's decision, there was correspondence between the parties on 3 December by which the applicant sought disclosure of a number of documents for the purposes of considering a challenge to the new decision. The relevant documents were disclosed over the following days up until the afternoon of 5 December.

The CRMT memo and the SEM-C minutes

[17] The approved minutes of the extraordinary meeting of 2 December were later provided by SEM-C. In the course of the meeting – although in order to facilitate the hearing of other legal proceedings which are ongoing in Dublin – the Committee gave authority to further amend the capacity auction timetable to delay the 'run date' to 12 December (as noted at para [3] above) and extend the time for offer submission on the part of qualified applicants. The main business of the meeting was the reconsideration of the FQD provided on 23 October in respect of EPK's GT West candidate unit. In order to assist with members' consideration of this issue, they had been provided with a further CRMT memo dated 1 December ("the third CRMT memo") which was put together by the OSC and the CRM Team within the RAs. A copy of that document has also been provided to the court and the parties.

The third CRMT memo and the OSC analysis

[18] Amongst other things, the third CRMT memo outlined how the implementation plan for GT West had evolved through the qualification process. It noted the dates for SFC (Substantial Financial Completion), CCW (Commencement of Construction Works) and SC (Substantial Completion) in EPK's first implementation plan, its revised implementation plan as of 19 September, and finally in the latest version of the implementation plan provided on 3 October, drawing attention to the changes in these dates over the various iterations. It further contained the following observations on the Gantt charts which EPK had submitted:

> "In addition to the Implementation Plan dates, EPK also provide Gantt charts. These include one dated 19 September which coincides with the revised Implementation Plan dates of 19 September as set out above. This chart includes a SFC date of 1/3/2026 and on

> inspection it suggests 'Order dates for main EPC equipment' will take place during 2025, which is before the SFC date.
>
> An updated Gantt chart was provided to the SOs on 3rd October, along with the revised Implementation Plan. This includes an SFC date of 3/3/2025 and overall this Gantt chart appears to have several different and much fewer tasks than the one of 19 September."

[19] The OSC recommendation is set out in the third CRMT memo in the following terms (removing discussion of the meaning of the relevant Code provisions which is quoted from the judgment in the first judicial review):

> "Based on a review of all the material in the SEMC papers and noting the observations set out in the Annex to the Memo OSC considered that the delivery of the GT West project is complex and there remains a high degree of uncertainty and risk over the achievability of the dates contained within the overall Implementation Plan (submitted 3rd October), including whether Substantial Completion can be achieved prior to the start of the relevant Capacity Year.
>
> …
>
> OSC would be happy to discuss any aspect of this analysis with members of the SEM Committee in light of their own consideration of the relevant materials.
>
> In the meantime, and subject to that further discussion and to the SEM Committee's own consideration of all relevant matters, OSC considers that the SEM Committee would be entitled to approve the FQD on EPK's Application for Qualification in respect of the GT West Project in light of the analysis which it has carried out and recommends that it do so. This recommendation is simply designed to focus discussion before the SEM Committee; it will, of course, be for the SEM Committee to form its collective view on approval or rejection of this FQD."

[20] The third CRMT memo, as appears in the excerpt above, contained an annex which set out in much more detail the OSC analysis of EPK's position and the materials it had submitted ("the OSC analysis"). This analysis proceeds on the basis that the planning contention advanced by EPK, namely that planning permission is not required for its project beyond that conferred the 1973 permission, is correct.

[21] The OSC analysis nonetheless drew attention to other consents and processes which need to be gone through before SFC can be achieved. In particular, mention was made of the consent from the Department for the Economy (DfE) to 'construct, extend or operate' an electricity generating station under Article 39 of the Electricity (Northern Ireland) Order 1992. In addition, there is reference to a portion of a letter from planning consultants (Gravis) to the local district council explaining that the power station would be "required to vary the existing PPC permit for the replacement generation unit as its emissions cannot simply be ignored." That variation application process is said to be subject to environmental assessment in relation to these emissions.

[22] The main issue in the OSC analysis is that it does not consider construction within the required timeframe to be achievable. It is here that the OSC comments that "the constraint of operating within the 1973 planning permission brings about additional complexity and challenge to the timely delivery of the project" – a phrase which EPK contends has taken it by surprise in terms of its meaning and content. This is further explained in the OSC analysis as follows:

> "The **EP UK Construction Ltd EPC Budgetary Proposal (27/11/24)** sets out a number of complexities with the project, including:
>
> a) **Non-standard equipment** due to the need to avoid any changes to the external building appearance.
>
> b) **Coal station equipment re-use** to avoid any changes to the external building appearance results in the need to reuse (i) the call station exhaust stack and (ii) the sea water cooling system.
>
> c) **Layout challenges**. While noting the proposed layout for the equipment has been developed alongside Fichtner Consulting Engineers, the layout required to fit within the existing building adds to the complexity of the project.
>
> d) **Constructability**. EPUKC has conducted a constructability assessment given the unique location requirement and need to construct adjacent to an operational power station.
>
> In addition to the above EPUKC has also reviewed the removal of the existing plant and equipment required to make room for GT West and this included the potential for asbestos being present.

Constructing a new CCGT within a live working generator hall designed for a different configuration reusing equipment from 70s & 80s is admitted as being complex (Construction of Kilroot Power Station commenced in 1974 with generators 1 and 2 becoming operational in 1981 and 1982). The need to remain within 1973 permission will compound the timeline risks of this non greenfield site. At the detailed design stage it may be the case that these complexities cannot be overcome and/or that it might be more timely to submit for planning permission that later becomes necessary, as a result of constraints arising from the 1973 planning envelope. This puts the achievability of the necessary timescale in significant danger.

Construction within a live and operating turbine hall brings by itself significant timeline risk.

Construction of a HRSG within a live and operating turbine hall with inevitable problems of access and safety will be likely to add to the delay in completing construction.

This document correctly states that construction of GT West entirely within the building will be more complicated than a 'greenfield' construction and while it states that "no significant technical challenges have been identified that would create risk to deliverability" our view is that it will not occur on time.

The document notes the potential for asbestos being present but is not clear if the risk of delay in regard to this is included in the programme or has been quantified in terms of timeline.

It is also notable by its absence in this document that transformers which are very long lead items are not listed under the procurement section. This too may impact timeline risk in terms of delivery.

OSC view is that even if the earliest SFC dates are met, we do not consider that substantial construction can be completed before the end of September 2028."

[23] The analysis goes on to deal with a number of other observations relating to documents provided during or after the hearing of the first judicial review. The OSC notes that the multi-package approach adopted by EPK means that works can be undertaken in advance of SFC if this is necessary to maintain the programme; but also notes that this does not appear to be specifically offered, as far as it can see. It further observes that the Fichtner report is a preliminary review which is directed towards the feasibility of constructing the new plant inside the existing building envelope. Whilst the OSC agreed that this could be done, it did not think it could be done before the end of September 2028. Reference was then made to an earlier letter from the applicant's solicitors to the solicitors for SONI which made the point that EPK may still explore the possibility of securing further planning permission to allow it to proceed out with the constraints of the 1973 permission. (The word 'constraints' is not used; rather, the correspondence refers to "project optimisation" which would involve a modification to the exterior of the building"). OSC took the view, in contrast to that which had been expressed by the applicant's representatives, that this was not merely a risk which lay entirely with EPK.

The minutes of the SEM-C meeting of 2 December

[24] Turning then to the SEM-C minutes, these indicate that the Committee first received a legal briefing on the reconsideration and then, at the invitation of the Chair, adopted a decision tree (which is annexed to the minutes). With one modification which I do not consider relevant for present purposes, the decision tree is essentially the same as that used in respect of the Committee's decision of 4 November (referred to in the previous judgement at para [50]). There was some additional language to reflect the current circumstances; but the Committee maintained its agreed policy approach to the exercise of its review powers.

[25] Potentially significantly, the minutes disclose that no further input had been sought from the SOs as part of the Committee's reconsideration, although the Committee was reminded that it could do so if, in its opinion, it required further information or considered this necessary in order to avoid unfairness. It was also mentioned that certain other market participants had sent communications to the RAs offering information to the Committee for the purposes of its reconsideration. These have not been provided but, I understand, related to the planning issue. However, those parties had been advised that this material would not be put before the SEM-C on the basis that, were that to happen, it would trigger a right of reply from EPK as well as the disclosure of that material to EPK. Members confirmed that they were not minded (pending discussion of the OSC's analysis and recommendation) to obtain any further information at that point.

[26] The Committee's legal advisers referred to the legal advice which had been provided to it, in respect of which privilege has not been waived, by another leading counsel specialising in planning law, in relation to the development of the site under the 1973 planning permission. This advice – the committee's own advice – confirmed the adequacy of the 1973 permission for the purposes of developing GT

West and agreed with the conclusion set out in the advice provided by EPK. The Committee's instructed counsel also advised that no adverse inference could or should be drawn from the seeking by EPK of a CLOPUD in relation to GT West. The Committee accepted that advice and proceeded on that basis.

[27] Each member of the Committee confirmed that they had, and had read, the materials which had been supplied to them. The OSC then gave a presentation in relation to the third CRMT memo and this was then discussed. The key portion of the minutes for present purposes is as follows:

> "Following the presentation by OSC, members took the opportunity to discuss the matter further, drawing on their own examination of EPK's submission as well as the CRM Team Memo. Included in that discussion with the following points:
>
> (a) **SFC**: EPK's submission referenced, for instance, the granting of the DfE consent which would need to be dealt with and as such posed a risk to achieving Substantial Financial Completion (**SFC**) by the earlier point in the range and dates proposed in the Revised IP.
>
> (b) **Complexity of construction project**: Members were struck by the complexity of the proposal to construct a new generating plant on a brownfield, rather than greenfield, site (and, moreover, one in which other generating plant would be operating) and the risks which (from, e.g., engineering and procurement perspectives) this posed to the delivery timeframe for GT West.
>
> (c) **Commercial / timeline risks**: Members noted that, whilst a number of the supporting reports provided by EPK could be viewed as providing a degree of assurance from a technical or engineering standpoint, importantly they did not offer assurance from a commercial or timing perspective (e.g., in terms of orders or contracts), notwithstanding the importance of achieving Substantial Completion by the end of September 2028.
>
> (d) **Track record of delivery**: Members noted that the material supplied by EPK referred to experience of delivering somewhat similar projects elsewhere,

> but they did not consider that this was comparable to the specific range of challenges faced by the project to deliver GT West.
>
> Taking these and other points into account, members agreed that there was a risk of SFC being met at the later end of the range of dates provided in the Revised IP. Even if SFC were to be achieved at the earlier point in the range, they did not consider that GT West would achieve Substantial Completion by the end of September 2028. Substantial completion of the construction works associated with the development of GT West (within the timescale proposed in the Revised IP) was not considered to be achievable. In particular, members took the view that the constraint of carrying out construction within the terms of the 1973 permission would bring about considerable additional complexity and challenge to delivering GT West in the required timescale."

The applicant's evidence in response

[28] In his first affidavit in these proceedings, the applicant's deponent, Mr Crankshaw, relies heavily upon the fact that it is highly experienced and resourced in the provision of generation units and has "delivered countless projects such as this across the UK and Europe." This includes the construction of two new 350MW power generating units within the existing Kilroot Power Station (GT6 and GT7). It therefore says that it has a wealth of institutional knowledge, as well as sound working relationships with various consulting engineers and other specialists, upon which it can draw in making its own assessment of the deliverability of the project. As a result, the applicant disagrees with the respondent's assessment and also contends that, had it been informed of the concerns which featured in the decision letter of 2 December, it could have provided meaningful responses which would (or may) have impacted the decision.

[29] Those responses are foreshadowed and addressed to some degree in the second affidavit provided by Mr Crankshaw in these proceedings. This affidavit comments upon, and responds to, documentation disclosed by the respondent. It does so both in the averments contained in the body of the affidavit and in an annotated version of the OSC analysis document which is exhibited to it. A summary of some of the key points is set out below.

[30] First, Mr Crankshaw makes the point that the project always involved works being undertaken within the existing Kilroot Power Station building. The 2022 planning permission was for the purpose of project optimisation which made provision for only some of the works to be external to the power station building. Second, he makes the point that undertaking such construction within an existing

building has a number of considerable advantages over developing a greenfield site. However, the OSC analysis does not focus on these but, rather, focuses on potential disadvantages (which Mr Crankshaw considers to be misplaced).

[31] For instance, the construction will not be subject to delays due to inclement weather; there are no risks associated with unknown ground conditions; there is no need to construct a new building for the new plant; the building already has significant facilities, such as installed gantry cranes, and extensive lighting which will enable efficient night working; and there is a significant amount of existing infrastructure at the site which will serve to de-risk the construction project. The existence already of the gas turbine air intake and proposed to re-use of the existing chimney stack and seawater cooling system are also considered to be very significant benefits, reducing construction risk and simplifying the project from a ground-up build. Mr Crankshaw's evidence is that any design challenges which arise within the building will be readily resolved and/or will not affect the critical path of construction.

[32] A further issue which he mentions is that the respondent does not appear to have given any consideration to other mitigations for the delivery of the required capacity which EPK could have pursued. Whilst contending that such strategies are unnecessary, Mr Crankshaw avers the thermal tool pull internal options available, one of which would be a phased construction of the CCGT with the first phase would be the construction of the gas turbine element in the form of an Open Cycle Gas Turbine (OCGT). He contends that this would be able to deliver the required capacity for the 2028/29 T-4 auction but would be followed by a second phase where the OCGT was converted to a CCGT by addition of the steam turbine element.

[33] In addition to the general experience of constructing power stations enjoyed by the applicant's company group, EPK relies upon the fact that it recently constructed both GT6 and GT7 (both OCGTs) in the very same turbine hall. This provided it with experience of a similar project and also constructing new plant next to an operational coal station. The applicant reserves fierce criticism for the suggestion on the part of the SEM-C that these projects were not comparable to the specific range of challenges faced by the project to deliver GT West. It says that the construction of these two 350MW generating units within precisely the same building is comparable and was, in fact, more complicated (due to the need to install two chimneys, install a 3km gas pipeline, external air intakes and an external cooling system).

[34] As to the SEM-C minutes, Mr Crankshaw avers that it is clear that the RAs are only concerned with a slight risk of not achieving the earliest dates for SFC contained within the implementation plan. He explains that, in his experience, the relevant DfE consent can be obtained within one month of the application (which would be made after the successful award of a capacity market contract); and the variation of the existing PPC permit is a standard process for power plant operators which only needs to be received before 'hot commissioning.' He vigorously rejects

the suggestion that building on a brownfield site is a disadvantage, pointing out that most modern powerplants are constructed on brownfield sites and relying upon the advantages mentioned above as being reasons to favour such a site. Relatedly, he avers that the existence of other generating plant in the vicinity of a new generation unit is also entirely common.

[35] A particular theme of the applicant's evidence is that the documents submitted with the 27 November submission did not, as the Committee noted, "offer assurance from a commercial timing perspective" because that was not their purpose. They were submitted solely to deal with the issue which EPK was the only remaining issue, namely timely achievement of SFC. For instance, the Fichtner reports related only to technical feasibility and that firm was not asked to comment on timelines.

[36] The constructability assessment which had been commissioned was a normal, standard process and not one which was indicative of any degree of complexity or concern; instead, it was designed to identify and mitigate any issues well before detailed design. EPK had considered the potential for asbestos being present as a sensible precautionary measure but had concluded, based on the existing comprehensive asbestos register, that none is present. As to the existing plant and location, the operating turbines could be switched off if required, although this was assessed as being very unlikely to occur in practice. (The applicant relies upon the fact that GT6 and GT7 are 'peaking units' which only operate during periods of high electricity demand, up to a maximum of 1,500 hours per annum. The SOs accept this but have observed that these units may be required to operate for several days and cannot simply be 'turned off' at will. If they are required, they can run for up to a week which could have implications for construction operations.)

[37] The applicant also says that the concern about the long lead times for transformers was misplaced because, in EPK's experience of the procurement of transformers, current delivery times were 20 months, this would not interfere with the critical path of the project. The concern arising from the Gravis Planning letter was also misplaced because, in later correspondence, Gravis had clarified the earlier statement to make clear that the reference to possible future planning applications could be ignored.

[38] Penultimately, Mr Crankshaw makes a number of comments about relative lack of experience of members of the SEM-C, pointing out that its members are not necessarily engineers or persons with experience of building power stations. It relies upon other persons with the requisite expertise in order to make its decisions.

[39] Finally, Mr Crankshaw avers that the applicant has been asked to provide an extraordinary amount of data in respect of its qualification application and the GT West project. He considers this to be well in excess of what has been demanded of other projects which, he considers, have considerable challenges well in excess of any issue of concern in respect of the GT West project. Two particular instances were

relied upon at hearing: (i) Bord Na Mona (BNM) Cushaling Power, GU_405010, which qualified for the 2025/26 T-4, 2026/27 T-4, 2027/28 T-4 and 2028/29 T-4 auctions; and (ii) Shannon LNG (SLNG) units GU_504590, GU_504860 and GU_504870, two of which were successful in the 2026/27 T-4 auction and one of which qualified for the 2028/29 T-4 auction.

Would these points have made any difference to the decision?

[40] The applicant protests that it was unable to deploy or develop the arguments and information set out in Mr Crankshaw's second affidavit with the respondent in advance of it making the impugned decision. Seeing how the evidence in relation to these matters was developing, I asked the parties to address a number of queries.

[41] In particular, the applicant's skeleton argument was critical of the SEM-C's decision not to seek further information from the SOs. It contended that it was "highly probable that the SOs would have confirmed their view that 36-38 months was sufficient for the construction phase of the Applicant's CCGT" because of what EPK had been told by Mr Downey of Eirgrid at the start of October. However, it seemed unnecessary to speculate on this – or at least to do so on a relatively uninformed basis – when both of the SOs were represented in the proceedings, available to assist the court and subject to a duty of candour (albeit as interested/notice parties). In light of this the SOs were asked what view they would have communicated to the SEM-C on the achievability of SC had they been provided with the 27 November submission and been asked to proceed on the basis (as the SEM-C did) that no further planning permission was presently envisaged as being required.

[42] In addition, given the new evidence and representations contained within Mr Crankshaw's second affidavit, which EPK says it could and would have deployed if further concerns or queries had been raised with it about the construction timescale, both the respondent and SOs were asked whether, in candour, this would have resulted in a different approach. In the respondent's case, that was a query as to whether the OSC recommendation would have been any different had it seen these materials and, separately, whether the SEM-C's decision would have been any different. These queries were posed in the context of the court lacking the technical expertise of the parties; as well as in the context of the distinctive nature of judicial review litigation (described in the Preface to the High Court's Judicial Review Practice Direction, No 3/2018); the time pressure of the proceedings arising from the auction timetable; and the public interest in ensuring both that qualified units are admitted to the capacity auction and unqualified units are not.

[43] The respondent addressed these matters in two short affidavits from Messrs Broomfield and French respectively. Mr Broomfield objects that "much if not all of Mr Crankshaw's second affidavit consists of argument." He takes strong issue with the suggestion that the OSC analysis was designed with a predetermined endpoint

or result, as Mr Crankshaw had suggested. He also averred to the fact that he had considered the materials filed by the applicant over the weekend preceding the hearing and had carefully interrogated them to see whether they caused him to take a different view than that expressed in the OSC analysis. He concluded that they would not have had that effect; and, therefore, said that if this information had been available as part of the 27 November submission it would not have resulted in a different recommendation having been made by the OSC.

[44] For SEM-C's part, Mr French, the Chief Executive of the UR and a member of the Committee, also averred that, having considered Mr Crankshaw's second affidavit and its exhibits, they would not have caused him to take a different view than that expressed in the SEM-C meeting on 2 December. He further averred that he had canvassed the views of other members of the Committee – namely Dr Tanya Harrington, Jon Carlton, Chris Harris, Jim Gannon and Ferghal Mulligan – who had also been provided with Mr French's affidavit evidence. They also did not consider that it would have caused them to take a different view of the decision on the FQD of 23 October which they had considered at the meeting of 2 December. Those members, along with Mr French, are sufficient to form a quorum of the SEM-C. He concluded, therefore, that he could confirm that the information provided would not have made any difference to the respondent's consideration.

[45] The position on the part of the SOs was more nuanced. They considered the materials and met yesterday in order to formulate a response to the court's query, which was provided in a brief written document agreed between SONI and EirGrid. This indicated as follows:

(a) Based on the new information provided by EPK on 27 November, it was the assessment of the SOs that "the new CCGT arrangement deviates significantly from the original application." The change of arrangement would be considered "a bespoke design" and therefore the SOs would require a technical review by their external consultants (Jacobs), who were experts in the field of power station design and project delivery, in order to express a view on the achievability of SC within the timeframe.

(b) In the SOs' view, the change of design "could have potential impacts on the timeline for the delivery." In turn, changes to the delivery timelines "could have a direct impact on the timeline between SFC and SC." The external consultancy with relevant expertise could advise on the impact and such a report "is critical to providing the relevant information to the SOs."

(c) If requested, Jacobs would review the technical design of the project and advise on whether it is technically feasible to build the bespoke arrangement, including "how it is technically feasible within the existing structures, the impact on the thermodynamics, the implications of using existing flues, and the implications of using old parts of the existing power stations in the bespoke design by the required timeline." An initial response would be

expected within a couple of days but if any queries arose the overall process could take up to a week.

(d) The further information contained within Mr Crankshaw's second affidavit did contain some additional information with calculations which it is almost certain Jacobs would require.

[46] In summary, therefore, the SOs were unable to provide a view on whether SC was achievable within the relevant timeframe even with the additional information from EPK which they had now seen, particularly in light of the "bespoke" nature of the proposal which was at significant variance from the original proposal.

[47] In relation to the potential proposal raised in Mr Crankshaw's evidence for phased construction (whereby an OCGT was built first, on a more expeditious basis, and converted to a CCGT at some point in the future), Mr Larkin relied upon the fact that the applicant's own evidence indicates that an OCGT generates only approximately 67% of the overall power of a fully constructed and more efficient CCGT. He submitted, first, that this would not meet the requirement of SC under the Code since section J.2.1.1(c)(iii) made clear that this required the proportion of delivered capacity in respect of the awarded new capacity is not less than 90%; and, second, that it would in any event represent a fundamentally different application or candidate unit from the 500MW CCGT for which the application for qualification had initially been made.

[48] The respondent also placed reliance upon a capacity market termination notice, dated 11 January 2024, which indicated that EPK had failed to meet project deadlines in respect of another of its units. It had acknowledged in an implementation progress report that it did not expect to achieve minimum completion by the relevant long stop date and, in accordance with the CMC, having consulted the RAs the SOs terminated all awarded new capacity for this unit for the capacity year 2025/26. The respondent submitted that this raised a significant breach of the applicant's duty of candour, since Mr Crankshaw had presented this unit in his affidavit evidence as an example of EPK meeting its construction timetable. I do not consider it to have been shown that this was such a breach, since the primary issue appears to have been the call-in of a planning application and not simply difficulties with the construction timeline. However, the associated implementation progress report indicated that mechanical completion had been delayed past the latest date "due to evolving technical and commercial complexities and 'knock-on' from planning delays." It was further explained that the construction project was "more complex than anticipated and will take c.18 months longer than originally planned." This resulted in significant consequences. At the very least, this exchange does go to show that market participants may take an unduly optimistic view of project completion which can later be derailed for a variety of reasons.

Summary of the parties' positions

[49] The applicant relies upon a range of grounds of challenge including procedural unfairness; illegality; and irrationality. The core propositions in the applicant's case may be summarised as follows:

(a) EPK was unaware of the "constraints", "additional complexity" or "challenges" which the respondent thought arose from proceeding under the 1973 planning permission. It had no fair opportunity to deal with these concerns and required this in the form of a 'right of reply' or otherwise. On the contrary, it only anticipated the issue of achieving SFC within the appropriate timescale to be contentious when providing its additional representations.

(b) The approach adopted by the respondent meant that EPK was denied the usual process by which the SOs would have been involved in the decision-making process at an earlier stage. Instead, the respondent has proceeded "bereft of any of the debate between the Applicant and the SOs concerning the actual issues."

(c) The SEM-C failed in its duty of inquiry, particularly in relation to similar projects to the GT West project which EPK had successfully developed and/or input from the SOs on technical and engineering aspects.

(d) There was no proper evidential basis for the respondent's decision. Moreover, the respondent lacked experience or expertise in the technical and engineering issues raised by it as concerns.

(e) The respondent has unfairly discriminated against EPK – in breach of its obligations under Article 9(6) of the 2007 Order – by applying different, and more exacting, standards to its application for qualification than it has to other parties seeking qualification for the auction and/or by permitting or facilitating greater engagement between those parties and the SOs in relation to any concerns which arose.

(f) The respondent has failed to give adequate reasons for its decision, in breach of the principles set out in Article 9(7) of the 2007 Order.

(g) In all of the circumstances, it was irrational for the respondent to conclude that EPK's unit could not achieve SC prior to the start of the relevant capacity year.

[50] The respondent's case may be summarised as follows:

(a) The default position under section E.7.5.1 of the Code is that a candidate unit does not qualify unless the five requirements set out in that provision are

satisfied. If the SOs are not so satisfied, there is no discretion and the application for qualification must be rejected.

(b) Given that the respondent was required to reconsider the FQD of 23 October (set out at para [6] above and which expressly made reference to the candidate unit not being able to achieve SC before the start of the relevant capacity year), it cannot possibly be said that the issue of whether substantial completion of the generator units was achievable was not to the forefront of the applicant's mind. It knew, or ought to have known, that it had to show that SC could be achieved within time.

(c) SC, as defined in section J.2.1.1 of the CMC is an exacting requirement, including the requirement that "all the construction, repowering or refurbished works associated with providing the awarded new capacity are substantially complete (subject only to snag or punch list items or other matters which do not prevent substantial completion or taking over the works taking place under the applicable Major Contracts)."

(d) There was no requirement, in procedural fairness or otherwise, for the SEM-C to invite the Applicant to make further submissions on materials *that it had itself submitted* to the SEM-C. Having provided the materials, EPK could not legitimately complain that it had been carefully considered. (The respondent was also careful to exclude from its consideration material hostile to the EPK application, which was provided by third parties, PPG and Energia, in order to avoid EPK requiring to be given an opportunity to respond to this "in circumstances where risk to security of electricity supply is already heightened by delay arising from amendment to the auction run date.")

(e) It was not for the SEM-C to re-run or assess earlier stages of the process. All it was required to do by the court order in the first judicial review and section E.9.4.5 of the CMC was to reconsider the FQD of 23 October, which it did.

(f) It was not irrational for the Committee to consider that they did not need to seek further information from the applicant or from the SOs. Nor was the outcome of the decision irrational.

(g) Nothing in Article 9(6) of the 2007 Order required EPK to have more than the process from which it benefitted, namely the opportunity to make submissions after its successful judicial review.

(h) The process was transparent in that the applicant had been provided with the SEM-C minutes, the OSC analysis and the other material sought by it. It could be under no illusion as to why it failed to qualify.

(i) The court was invited to look again at the effect of the words "final and binding on the parties" in section E.9.4.8 of the Code as a binding contractual

provision to which the applicant had agreed. Under the Code, recourse to a court would only be in respect of a CMDRB decision and never in respect of qualification decisions of the RAs (absent something such as bad faith or dishonesty). EPK could have challenged the CMDRB decision but did not. Its recourse to the court was limited by the Code to that specific stage of the process, and even then only with limitations.

'Quasi-ouster' revisited

[51] As noted at para [50](i) above, the respondent urged me to consider again its argument raised in the first judicial review that the proceedings should be dismissed as an abuse of process since the applicant had agreed to the SEM-C's decision being "final and binding." Although I was the judge who heard that case, I should not depart from a previous finding of the High Court, where the relevant holding forms part of the ratio of the decision, unless persuaded that it was clearly wrong. I have not been so persuaded. For the reasons set out at paras [107]-[119] of the previous judgment, I consider that the court can and should determine the applicant's challenge.

The basis of the decision in the first judicial review

[52] Before proceeding to deal with the grounds of challenge, the applicant's argument in this case, which relied heavily on the decision in the first judicial review, requires some consideration of the precise basis upon which it succeeded in those proceedings. EPK contends that the respondent has fallen into precisely the same legal errors as previously. It submits that, in the previous application, the court found that the Committee had acted in a procedurally unfair manner for a variety of reasons. It set out six such reasons in its skeleton argument which are contained at paras [213], [218], [219], [220], [221] and [222] of the previous judgment respectively, then observing that "all of these points are pithily captured" in the following statement in that judgment at para [224]:

> "Nonetheless, I do not consider that EPK was given the opportunity it should have been, at the heels of the hunt, to deal with the new issues which had emerged in the thinking of the SOs, the OSC and the SEM-C at a late stage."

[53] The applicant's submissions appear to me to involve a somewhat over-elaborate analysis of the basis for the finding against the respondent in the first application for judicial review. This may well be as a result of my own failure to express myself sufficiently clearly in a judgment produced under time pressure. Several of the passages highlighted by the applicant simply constitute commentary on the evidence in the first case. For my part, the key conclusion was at para [223]:

> "Taking these considerations together, whether viewed as an issue of procedural fairness, an irrational failure to pursue plainly material information which it had requested with no adequate response, or a failure to properly follow its own procedure for the granting of a 'right of reply' where new and material information was discussed at the meeting of 18 October, I consider that the procedure adopted by the SEM-C in relation to EPK's application in the final stages was legally flawed.

[54] As is often the case in judicial review, the procedural flaws identified from the evidence could be categorised in a variety of ways since the grounds for judicial review frequently overlap. However, the key issues in the first application were as follows:

(a) The SEM-C had itself resolved that it would provide (what it termed) a 'right of reply' where new and material information was raised with the OSC by the SOs at their meeting of 18 October (see para [45]). In EPK's case, the OSC considered that new information *had* been raised (see paras [46] and [94] of the previous judgment). I took the view that it was irrational for the OSC to then conclude that this new information was not material and/or that the decision that it did not warrant a right of reply was based on irrelevant considerations (see para [218]). This was essentially a conclusion that the respondent *had failed to comply with its own procedure* by which, exceptionally, it had provided for possible further engagement with applicants for qualification at this stage of its consideration under section E.9.4.5 of the Code. The procedural unfairness arose because the Committee failed to properly give effect to additional procedural rights which it had itself resolved to be necessary in certain circumstances, given the meeting which had occurred between the OSC and the SOs in which the applicants for qualification had no involvement. This is what is referred to as the "failure to properly follow its own procedure for the granting of a 'right of reply' where new and material information was discussed at the meeting of 18 October" in para [223] of the previous judgment. This was the primary basis for finding that an unfair procedure had been followed. It might also have been characterised as breach of a procedural legitimate expectation given the approach the SEM-C decided to adopt at its meeting of 31 October.

(b) However, I also considered that, in the circumstances, it was unlawful for the respondent not to have followed up on its queries as to the SOs' position on EPK's construction timetable (see paras [218] and [220]-[222]). This is what is referred to as the "irrational failure to pursue plainly material information which it had requested with no adequate response" in para [223]. That was not simply because of the assistance which the SOs could have provided on the overall timing of the project but, in particular, because the SEM-C gave up on seeking the SOs' views – for which it had previously pressed – on an

irrational or mistaken basis (namely that the SOs still maintained that a 27 month build period was too short: see para [222] of the previous judgment). SEM-C had itself decided it wanted or needed the SOs' input, on an issue which they had discussed in detail with EPK, but then abandoned this on a mistaken basis.

(c) I had a further concern about procedural fairness which arose from the SOs' interactions with EPK at the time of the submission of its FQD (see para [212] of the previous judgment). This arose because the SOs' thinking in mid-October when the FQD was submitted was entirely different from what had been under discussion between them and EPK. Even though the SOs had committed to providing EPK with an update, they failed to do so (see para [87] of the previous judgment). This meant that the failure to provide the 'right of reply' in accordance with the process established by the SEM-C at its meeting of 4 November was all the more serious, since EPK was labouring under a misapprehension about the SOs' position which had been encouraged or facilitated by the SOs' silence.

[55] The decision in the first judicial review is not authority that, in making a decision under section E.9.4.5 of the CMC (where it chooses to do so), the SEM-C is generally required to provide a right of reply to an applicant of qualification for a capacity auction; nor that it generally has to expose its mind to an applicant or give them an opportunity to deal with every aspect of the Committee's thinking which might be adverse to their application. One must bear in mind, first, that it is the applicant's responsibility to provide the material to satisfy the pre-conditions for qualification under section E.7.5.1 of the Code; and, second, that the SEM-C decision falls at the end, and apex, of previous consideration of the application for qualification. The respondent was correct to take the view that the process does not involve or require a 'back and forward discourse.' Generally, it must simply comply with any procedure it has adopted in order to ensure fairness and act rationally.

[56] However, as the judgment in the first judicial review acknowledged, there will be some circumstances where, exceptionally, fairness *does* require something extra. Frequently that will be where for some reason, perhaps because of factual developments late in the day, the earlier stages of the process have not provided the applicant with any adequate opportunity to address the real issue with their application. In the first case, that occurred because the applicant was unaware that the achievement of SFC was the real issue. As I conclude below, in this case it was because the applicant was unaware that the construction timetable was back in issue in light of the variation to the project required by proceeding under the 1973 permission.

[57] The mere fact that the applicant could have provided additional information which may have been relevant to the Committee's concerns (see paras [214] and [219] of the previous judgment) is obviously not determinative of whether or not fairness requires a further right of response. There will nearly always be something

more which could be said. Similarly, the mere fact that a different course might have been adopted if further time had been available does not of itself mean that any course adopted by the Committee under time pressure is unfair.

Procedural fairness

[58] Turning back to the circumstances of this case, both sides have points of substance to make on the procedural fairness issue. Some of the applicant's assertions that it is at a loss to understand how or why the SEM-C could consider the current proposal to have constraints or complexities (or what they might be) ring hollow when one has regard to the use of such terminology in EPUKC's own document (the EPC Budgetary Proposal), from which these concerns have been drawn. In the section of that document dealing with the scope of the services and execution strategy, there is discussion of the design and construction of the project. This document states that, "The requirement to construct the plant entirely within the extant 1973 planning permission brings about several complexities which EPUKC have been incorporating into the project plan." These complexities are then broken down into four categories, which reflect those set later set out in the OSC analysis (see para [22] above). The EPUKC Budgetary Proposal document goes on to indicate that some of the equipment will be "unusual" and that there is a "unique location requirement" and a "need to construct adjacent to an operational power station." As was evident to all, the current proposal is, as Mr Larkin submitted, EPK's 'Plan B.' It does not benefit from the project optimisation which the 2022 permission facilitated. In that sense it is sub-optimal as well as unusual.

[59] Nonetheless, the central thrust of the applicant's case on procedural fairness has merit. It was not aware that the issue of concern had shifted (yet again) away from achievement of SFC to a totally different issue. In the course of the first judicial review, it became clear that the real issue of concern on the part of the SOs and the respondent was that EPK may not achieve SFC within the range of dates suggested in its most recent implementation plan. That issue has now been resolved in its favour. It is correct that the requirement under section E.9.7.5.1 is to satisfy the decision-maker that all of the preconditions for qualification have been met. It is also correct that the achievement of SC before the commencement of the relevant capacity year – which was in issue arising out of the 23 October FQD – incorporates the requirement to have completed all relevant stages in time. However, this was a case where, by reason particularly of the evidence which emerged in the first judicial review, the applicant was legitimately taken by surprise by the renewed focus on the construction phase of its implementation plan. In the particular circumstances of this case, I do consider that fairness required, exceptionally (as discussed at para [56] above), that the applicant be given an indication that the construction period was back in issue and particularly by reason of the complications arising from the new plan to construct under the 1973 planning permission.

[60] The respondent pointed in submissions to a number of communications where EPK or its representatives had referred to providing materials confirming its

ability "to construct the generator under the 1973 permission"; had referred to section E.7.5.1(b) and (c) of the Code; and/or had invited the respondent to review all of its materials carefully. However, the 27 November submission also clearly expresses EPK's view that "there is no question remaining over construction timetable." Whether it was naïve to have taken this view, it is clear that it was proceeding on the basis that the construction period was no longer in issue. Although it may also be artificial to split the achievement of SC into two clear parts, namely achievement of SFC and construction thereafter, it is clear that, given how this application had evolved and been dealt with by the SOs and RAs, that was a distinction at the forefront of EPK's mind of which the respondent was aware.

[61] In that regard, the applicant has drawn attention to the observation in the judgment in the first judicial review (at para [213]) that, at the time of the SOs' submission of the FQD on 15 October, "on the balance of the evidence… it seems fairly clear that the SOs were not concerned – or were much less concerned – about the build period post SFC…" EPK contends that the constraints and complexity now relied upon is "a new, material issue, that has emerged since the quashing of the decision of 7 November 2024" but which was not notified to them. I accept that submission.

[62] I am bound to say that both the structure of the Code and, in particular, the result codes which are used by the SOs and the SEM-C (along with the apparent limitation on the accompanying explanation which can be uploaded to the CMP) (see paras [177] and [237] of the previous judgment) can be unhelpful in allowing an applicant for qualification to understand the real issue with their application with which the SOs or RAs are grappling. This may be particularly acute where, as here, developments over the course of the application mean that different issues come into or fall out of play. Consideration might usefully be given to means by which a more clear and natural explanation may be given to an applicant for qualification of the reasons for a decision that their unit has not qualified. For my part, in the first judicial review I found the narratives provided by the SOs upon their review decisions pursuant to section E.9.3.3 of the Code were much more helpful than the result codes and limited accompanying text uploaded to the CMP.

[63] In summary in relation to the procedural fairness ground, for the reasons set out above I would hold that, in the particular circumstances of this case, the SEM-C should have alerted EPK to the fact that it was concerned with the construction period, post-SFC, on the basis of the significantly altered nature of the project and potential increased complexity as a result. It is all very well to say that these concerns arose from the applicant's own documentation; but the point is that EPK did not have an opportunity, in advance of the decision, to engage with this issue. Although there is authority to suggest that what fairness requires in any particular circumstance can be affected by the urgency of the procedure, I do not consider that pressure of time in this case was sufficient to relieve the respondent of the obligation to raise this issue with the applicant.

Losing out on the benefits of the full procedure

[64] A separate aspect of the applicant's challenge is that, unlike some other applicants for qualification, it has not had the benefit of a detailed and iterative discussion of the concerns which have led to the rejection of its qualification application from the time of the initial PQD, through the CMDRB procedure, to the final stages of FQD and SEM-C deliberation. I do not consider that this complaint is well-founded. It is true that the particular issues which have featured in the Committee's recent decision were not the subject of debate over many months. However, to hold that that in itself amounted to unfairness would be to ignore the reality of the circumstances in this case.

[65] The Code envisages ongoing engagement between an applicant for qualification and the SOs through the PQD, review and CMDRB processes. In practice, it seems that there is perhaps even more engagement during the course of the dispute resolution process and afterwards than one might have expected. As Mr Crankshaw averred, the practice of the SOs is to engage with relevant concerns, to identify them to the parties and to allow for responses.

[68] However, the Code also makes clear (see paras [38]-[39] of the previous judgment) that updated information ought to be taken into account where circumstances change in the course of the qualification process. All of this is to occur during what is necessarily a time-limited window and developments on the ground are likely to be occurring. It will simply not be possible in every case for a concern raised by the SOs to be the subject of discussion and engagement during the review procedure, at a hearing before the Board and before submission of the FQD. The fact that this full opportunity is not available where new information or developments have to be taken into account during the course of the qualification process does not mean that the process is unfair. It is simply a consequence of the process being required to take into account new information or developments as matters progress.

[69] In the present case, there was a significant development after EPK had lodged its application for qualification, namely the quashing of its recent planning permission, with resultant uncertainty about the potential termination of its connection offer and whether and how it could proceed. The ability (indeed, requirement) upon the SOs to take into account updated information may work in an applicant's favour or to its disadvantage. This is simply part of the process. No unfairness accrued simply by virtue of the fact that the final decision made by SEM-C was not based on a concern which was identified at the very start of the qualification process. Indeed, it was only at a later stage that EPK determined to proceed under the 1973 permission and worked up outline design proposals to show how this might be done. As indicated above, it is in this type of circumstance that the SEM-C may be required to afford some procedural rights to an applicant for qualification which would not otherwise arise. In this case I have held that it was so required. The applicant's reliance on having missed out on the benefits of the full process does not materially add to its procedural fairness challenge.

Failure to consult the SOs

[70] The applicant also complains that there was no further input sought from the SOs as part of the reconsideration process, despite the fact that EPK had a detailed meeting with the SOs (on 3 October) regarding its construction plan at a time when it was proposing to rely on the 1973 planning permission.

[71] The applicant has made the point that the SOs are the primary point of contact where detailed technical information has been exchanged. It is not only the applicant which has drawn attention to the SOs' technical expertise. In his affidavit evidence on behalf of the respondent, Mr Broomfield has stated that the expertise of the SOs in the qualification process is "essential"; and has pointed out that they have significant experience in performing their role, having completed the qualification process for 14 capacity auctions to date.

[72] In his submissions, Mr Dunlop also drew attention to the fact that, in the previous judgment, the respondent's failure to engage further with the SOs was a ground for setting aside the SEM-C's decision. Nonetheless, the Committee had failed to remedy this shortcoming.

[73] The applicant's arguments on this ground are attractive but, ultimately, I have concluded that they should not be upheld. Properly analysed, the question of whether or not the respondent was obliged to seek further input from the SOs is a question of whether it has complied with its *Tameside* duty. In turn, that is a question of whether it was irrational for the respondent not to seek further advice or input from the SOs (see the key principles to be drawn from the *Plantagenet Alliance* case set out at para [128] of the previous judgment).

[74] The most obvious reason why EPK was keen for there to be further SO input is because it has made the case that, in its view, it had "fully addressed and settled the construction timeframe to the SOs' requirements." However, that assertion has proven to be misplaced. As the SOs' recent response to the court indicates, they are not in a position to say that EPK's construction timeframe is satisfactory or achievable. On the contrary, they have emphasised the significant deviation in the applicant's plans from the original application and indicated that they could not themselves express a view on the achievability of SC within the required timeframe (see para [45] above). Further advice would be required in relation to both technical feasibility and impact on timelines. In his brief submissions on behalf of SONI, Mr McLaughlin emphasised that the SOs, in that capacity, had not been provided with a range of materials which were in SONI's possession in November (in relation to the potential termination of EPK's connection offer); and that, more importantly, when the SOs has expressed views on the construction period in October of this year they did not have any of the information now available as to the bespoke arrangement which is proposed.

[75] Although I can see the good sense in the Committee asking the SOs for their input on the issue of the construction timeline, I have not been persuaded that it was irrational for it not to do so. As the discussion immediately above shows, the debate had moved on since the exchanges the SOs had had with EPK in October. This was not now a situation where the SOs had discussed with EPK in detail the very issue which was troubling the Committee or where the SOs would have ready answers. It was also a situation where, as in November, the Committee had decided it wanted or needed the SOs' input and then simply gave up on this enquiry on a mistaken basis. The Committee determined that it should proceed without engaging further with the SOs. As Mr Larkin was inclined to accept in the course of his submissions, the time pressure under which the decision was made is likely to have played a part in this choice. (The decision was made on 2 December with the capacity auction submission commencement scheduled for the next day.) In looking at the question of whether it was rational not to engage further with the SOs, this was a matter which the Committee was entitled to take into account. The subsequent response from the SOs, referred to above, underscores the fact that a speedy response from the SOs was unlikely to be forthcoming.

[76] In all of those circumstances, I do not consider it to have been made out that the respondent's failure to seek further input from the SOs at this stage, whilst perhaps surprising, was irrational.

The expertise of the respondent and rationality

[77] The applicant again challenges the respondent's decision on the basis that it was irrational as to elements of its reasoning and/or in its result. In para [126] of the previous judgment, I made reference to the overarching principle that the court will be exceptionally slow to interfere with the exercise of the expert and informed judgement of a regulator. *R (Friends of the Earth) v Environment Agency* [2019] EWHC 25 (Admin) is an example of a case where the court explained that irrationality was a particularly high hurdle where "challenging the decision of the expert regulator in a complex technical field" at para [44] (and see also *R (Great North Eastern Railway Ltd) v Office of Rail Regulation* [2006] EWHC 1942 (Admin), at para [39]). The same point is made in this immediate context by Humphreys J in *Re SONI Ltd's Application* [2022] NIQB 21 at paras [19]-[20], with reference to *Viridian Power v Commission for Energy Regulation* [2011] IEHC 266 and *R (Jeremy Cox) v Oil and Gas Authority* [2022] EWHC 75 (Admin).

[78] The criticisms of the experience, or supposed lack of experience, of many of the members of the SEM-C was a fairly unedifying aspect of the applicant's case. Where Committee members had experience in the energy sector, the applicant's evidence tended to downplay this or take issue with it in the event that the individual had no specific experience of power station construction. The members of the OSC were also subjected to similar criticism. Mr Broomfield is a Chartered Engineer, who also has a Master's degree in engineering. He has worked for the UR for 17 years. He says that he has gained extensive experience and insight into

market and power station operations. This includes leading the UR work on several industry benchmark technical and economic analyses of power stations; overseeing the delivery of each capacity auction that has taken place to date (including technical and economic assessments relating to the qualification process for each auction); and assessing the delivery of new generating units after they have been successful in an action. However, it was said by the applicant that it was "not clear whether he has any practical experience in power plant construction."

[79] Mr Melvin of the CRU has worked with it for 16 years, becoming a director in 2016. He is the CRU lead on Ireland's Security of Supply Programme. Prior to joining the CRU he worked in a range of roles across the power sector. He is also an engineer and was previously a gas turbine engineer. The respondent's evidence is that he has extensive experience of developing, constructing and operating gas turbine generating units; but, again, it was said on behalf of the applicant that it was "not clear whether he has any practical experience in power plant construction" and that the turbines he had worked with were not CGGTs of the nature or size of the GT West project.

[80] On behalf of the respondent it was submitted that the experience of Mr Broomfield and Mr Melvin is striking. The various members of the SEM-C are appointed by politically accountable Ministers precisely because they are capable, within a complex and specialist field (such as that covered by the CMC) of evaluating evidence and making robust decisions on the basis of that evidence. In his submissions, Mr Dunlop did not seek to suggest that the SEM-C was not an expert body (albeit that appears to be precisely what his client's evidence was designed to suggest).

[81] However, courts afford respect to the judgement exercised by regulatory authorities not simply on the basis of their assessment of the strength of the individual qualifications or experience shown on the CVs of their members. Such bodies will frequently if not always have much more expertise in the subject matter than the court. However, it is also the case that such bodies are publicly accountable in a way in which the court is not; and, more importantly, they are the bodies upon which the legislature has conferred the relevant functions. This very point was made by Clarke J in the *Viridian Power* case (*supra*) quoted by Humphreys J in *Re SONI Ltd's Application*.

[82] For these reasons, I consider it appropriate to afford considerable deference to the expert judgement of the respondent. Although its members may not have the same level of experience as the EPK in the construction of major power stations, they are nonetheless much more expert in this field than the court and, more importantly, constitute the body upon whom the various statutory provisions and licence arrangements confer the relevant decision-making function. As Mr Broomfield's second affidavit stresses, they operate in good faith in the public interest and, unlike the applicant's deponents, do not have a strong commercial interest in the outcome of the qualification application. The experience of the applicant and its company

group cannot mean that the regulatory body is required to proceed unquestioningly on the basis of its own assertions.

[83] EPK relies upon the fact that the respondent was provided with a Gantt chart and implementation plan on 3 October 2024 which expressly provided for a project timeline that was consistent with the prescribed timelines. It also relies upon the fact that, in the first judicial review, the respondent confirmed that the test to be applied in assessing its implementation plan was not the worst-case scenario. It is right that the respondent and SOs in the previous challenge disavowed the suggestion that they must assess only the worst-case scenario envisaged by an applicant for qualification. They have consistently maintained, however, that they are entitled to take that scenario into account in assessing the achievability of the project reaching SC in the required timeframe.

[84] I do not accept the applicant's assertion (contained in the Carson McDowell correspondence of 27 November) that "it is now clear that there is no question about the achievability of a construction period of 39 months." This was based upon a discussion with Mr Downey at the meeting on 3 October 2024. It does not appear to me to have been intended to express a formal and agreed position on behalf of the SOs, much less the SEM-C. In any event, the response from the SOs referred to at para [45] above makes clear that this is not their current position.

[85] It is clear that the materials provided to the respondent on behalf of the applicant on 27 November were considered. The minutes expressly record that each member of the Committee had seen and read these materials; and that it had aided the OSC's assessment.

[86] Perhaps the most important point to bear in mind in relation to the irrationality challenge is that the SEM-C must be satisfied that SC, in all its elements, is reasonably achievable prior to the start of the relevant capacity year. Where not so satisfied, the application for qualification must be rejected. The applicant has not discharged the burden of showing that it was irrational for the Committee, in the exercise of its judgment, not to be so satisfied; or, put another way, that the only rational conclusion for it on the merits was that SC was reasonably achievable.

[87] The OSC raised a number of concerns about the credibility and reliability of the dates set out in the latest implementation plan, having regard to a number of significant changes to key dates across the various implementation plans submitted by EPK during the course of the qualification process. It was in my view entitled to consider these issues and was not obliged to close its eyes to the previous iterations of the implementation plans provided by EPK. That is particularly so when the version submitted during the course of the CMDRB process on 19 September 2024 was said to have been "based on the latest information available from other EPUKI group projects using similar technology." The latest dates for SFC and CCW in that plan were 1 March 2026 and 8 March 2026. The implementation play provided on 3 October 2024 had moved these forward to 3 March 2025 and 16 October 2025

respectively. Mr Broomfield's evidence is that the evolving nature and substantial changes of the implementation plan at a late stage of the qualification process raised questions over the robustness of the overall plan.

[88] As mentioned above, applicants for qualification are both commercially self-interested and may be liable to undue optimism in presently project timelines in order to secure qualification. The RAs must look at these with an objective eye. It is undoubtedly the case that the present option for taking forward the GT West project is not the first or optimal solution. Some further consents or permissions remain outstanding. The content of the EPUKC Budgetary Proposal confirms that there are aspects to the current proposal which are unusual and complex, as the respondent considered. That is confirmed by the SOs' response referring to the bespoke nature of the arrangement and the possible implications for the timeline which arise as a result. I am not in a position to find, as the applicant suggests, that there was no evidential foundation for the respondent's conclusion that it was not satisfied that SC was reasonably achievable within the timeframe.

[89] The applicant's belated reliance on the possibility of amending the project yet further, to construct an OCGT for the commencement of the 2028/29 capacity year and later convert this into a CCGT does not affect this conclusion. This was not previously proposed and I proceed on the basis that it would be a new project which is not the subject of the application for qualification and/or that it could not meet the capacity requirement set out in the definition of SC at section J.2.1.1(c)(iii) of the Code.

The decision tree

[90] In the applicant's skeleton argument, it also complained about the use and effect of the decision tree which the respondent adopted to guide its decision. It may be that there is some force in the suggestion that this led to a convoluted approach to the decision-making which could have been simplified and/or which was not well tailored to the particular circumstances of the reconsideration required in this case. I do not believe the complaint about the decision tree is reflected in a pleaded ground in the applicant's amended Order 53 statement; but, in any event, I am satisfied that the approach adopted by the Committee did not preclude it from considering in substance the relevant matters which it needed to address, nor did it render the Committee unaware of its ability (should it so wish) to seek further information from any quarter.

Equal treatment

[91] The applicant's next ground of challenge is that it has been treated differently from other applicants for qualification, either in this capacity auction process or others.

[92] EPK has consistently emphasised that the CMC does not require planning permission as a pre-condition to qualification. That is correct. However, the planning status of a project can plainly be relevant to its prospects of achieving SC on time. EPK has also referred to a number of other market participants which have been permitted to qualify for the T-4 auction without having planning permission for the relevant project. Again, that may be correct. The potential effect on a project timeline of a lack of planning permission will, however, be dependent on a wide range of factors, including how contentious the planning application is likely to be and the nature of the project at issue. EPK has also emphasised that the CMC does not require a connection offer as a pre-condition to qualification in a capacity auction. That is also correct. In this case, however, the applicant both had a connection offer and was assessed on the basis that it had planning permission for the iteration of the project it is now proposing. The mere fact that one has a connection offer and planning consent is obviously not determinative of the question of whether SC can be completed within the requisite timeframe.

[93] The kernel of EPK's objection on the equal treatment ground is that the respondent has (it contends) imposed higher obligations of proof on EP regarding its planning status and connection offer than it has upon others. I do not find that to be established. As observed in the previous judgment, when the applicant's 2022 planning permission was quashed, this was obviously going to have an effect on the project timeline and be of concern to the SOs and RAs. For a time, the applicant's connection offer looked as though it may be terminated. The facts of the previous application show that PPG in particular was seeking to take EPK's place in the connection queue. In light of this development, it was reasonable for the SOs and RAs to be interested in, and for EPK to wish to address, the planning status of the project and the effect that might have on its connection offer.

[94] As to the recent materials submitted in November, the applicant was provided with an opportunity to furnish whatever additional materials it wished. The applicant chose, for understandable reasons, to provide a great wealth of additional information. The mere fact that it did so does not mean that the respondent imposed a higher burden of proof on it than on others. The overarching point, of course, is that it is always for an applicant for qualification to satisfy the SOs (and, in due course, the SEM-C) that it meets the pre-conditions for qualification.

[95] The applicant also contends that a more relaxed attitude appears to have been taken to a number of identified projects (see para [39] above) in this or other capacity auctions which, it contends, were more complicated or problematic than its GT West project. The court simply does not have adequate information before it in relation to the similarities and/or differences between those projects, and the circumstances under which qualification decisions in relation to them were made or the information provided in that context, and the present project to draw a conclusion that there has been unfair discrimination contrary to the requirements of Article 9(6) of the 2007 Order. In my view, that would require a close and detailed comparison

of the projects, and the matters mentioned above and a difference in treatment which was, or came close to being, irrational.

Reasons

[96] As in the first case, I do not consider the reasons challenge to be made out. The applicant now has the benefit of the approved SEM-C minutes, along with the underlying documentation (the third CRMT memo and the OSC analysis) which sets out the basis for the respondent's decision, whether or not the applicant agrees with this.

Relief

[97] Having found for the applicant on its procedural fairness ground, the next issue is what relief, if any, should follow. The grant and form of relief in judicial review is discretionary.

[98] Notwithstanding the finding that there was unfairness in the procedure, I am presently minded not to grant any relief other than a declaration to that effect. This is for two reasons, whether taken individually or collectively. First, the evidence provided by the respondent suggests that the additional information (which would have been provided by EPK if the identified unfairness had not arisen) would not have altered the outcome. Second, the public interest in minimising further delay to the auction process, as set out in the affidavit of Mr Downey of EirGrid (on behalf of the SOs) is extremely powerful.

[99] Given the recent further delay to the submission end date for the auction which has been extended from 12 to 17 December (of which I was informed today) and the extremely recent news that relief requiring reconsideration by SEM-C has been granted in the Dublin proceedings relating to the same auction, I will hear briefly from the parties on the issue of relief, as soon as this can be arranged. That may be relevant, at least, to the second of the concerns identified above.

Conclusion

[100] This case was again heard on a rolled-up basis. For the detailed reasons given above, I grant the applicant leave to apply for judicial review on its grounds relating to procedural unfairness and failure to further consult the SOs. I refuse leave on the remainder of the applicant's grounds. I find for the applicant on its procedural fairness ground for the reasons set out at paras [58]-[63] above.

[101] I will hear the parties on the issue of relief and, in due course, on the issue of costs.