

Decision by the SEM Committee with respect to Modifications to be made to the SONI SO and MO Licence and to the EirGrid SO Licence

26 February 2009

DECISION

On 26 February 2009, the SEM Committee, having considered and given due regard to the responses received to the Consultation Paper dated 18 December 2008 (relating to the acquisition of SONI by EirGrid) and mindful of its statutory duties, decided that:

- 1) The relevant licences of SONI and Eirgrid shall be modified as set out in Appendix 1 to the Consultation Paper, and the modifications shall take effect from Monday 2nd March 2009.
- 2) In the event that the proposed acquisition of SONI by EirGrid fails to complete for any reason, the SEM Committee shall consider at the earliest opportunity whether the modifications made to the relevant licences by virtue of its decision 1 above continue to be appropriate.

BACKGROUND TO THE DECISION

The SEM Committee on 21st November 2008 determined that the underlying policy and the related exercise of regulatory functions in respect of the EirGrid acquisition of SONI constituted SEM matters, as defined under relevant legislation. The SEM Committee also authorised relevant senior officials within the two regulatory authorities to publish a consultation paper on behalf of the SEM Committee.

The SEM Committee's consultation on the regulatory measures required in connection with the proposed purchase of SONI by EirGrid ('The Proposed Acquisition of SONI Limited by EirGrid plc – A Consultation Paper (Incorporating Statutory Consultation Notices)' closed on 30th January 2009. As noted in the consultation paper, the SEM Committee has formed the view that in the event EirGrid purchases SONI, regulatory measures would be required to ensure that (i) the various licences held by SONI and EirGrid take account of the new ownership structure and (ii) that consumers of electricity in Ireland, but particularly in Northern Ireland, continue to be protected and are not in any way disadvantaged by the change of control of SONI. These proposed changes to the System Operator (SO) and Market Operator (MO) licences of SONI and to the equivalent SO licence of EirGrid were set out in the consultation paper together with the statutory consultation notices. The reasons for the proposed modifications were captured throughout the consultation, but most particularly at Paragraphs 29-38.

Also detailed in the consultation paper but not forming part of the consultation on the regulatory licence changes are additional constitutional and corporate measures designed to further enhance the prominence and protection of SONI and Northern Ireland consumers. Recent updates from EirGrid confirm that these constitutional and corporate measures are proceeding as anticipated. DETI have informed us that the Ministerial letter detailing various assurances from the Irish

Government has now been issued by Minister Ryan of DCENR to Minister Foster of DETI. The SEM Committee has no reason to believe that the corporate and constitutional measures will not be finalised, in full, as anticipated. The SEM Committee is satisfied that it should proceed forthwith to make the regulatory licence modifications.

RESPONSES RECEIVED TO THE CONSULTATION

A total of four responses were received to the consultation. After consideration by the SEM Committee, it was decided that no amendments to the proposed modifications are needed in light of these responses. The SEM Committee received the following responses, which responses were co-ordinated and forwarded by the CER and NIAUR as appropriate. CER received a nil response from Disability Action and also a response from Viridian Power & Energy (VPE) whilst the Utility Regulator received responses from NIE and the Consumer Council for Northern Ireland (CCNI).

VPE indicated its general support for the proposed acquisition on the basis that it would (i) promote the harmonisation of TSO processes, (ii) reduce the risk associated with the contractual joint venture of SEMO and (iii) lower cost. Whilst supportive, VPE also suggested that there was an ongoing need to develop increased transparency on corporate governance arrangements. As indicated in the consultation paper at paragraph 9, the SEM Committee with CER and the Utility Regulator will continue to keep under review the regulatory arrangements and therefore we do not consider any new or bespoke action is required in response to this comment. VPE also suggested that it would welcome clear incentives on the new organisation to ensure efficiency. It is likely though to be the case that it will take some time for SONI/EirGrid efficiencies to take effect. In the interim, it is therefore considered that the proposed licence modifications around protecting consumers give sufficient flexibility to all to adapt to economies of scale and efficiencies since the protection of consumers will have to have regard to the pricing of services.

NIE also indicated its support for the proposed modifications to SONI's licences. It also urged as did VPE that the regulatory process be expedited to enable the proposed acquisition to be completed.

CCNI in its response sought clarification on a number of matters – chiefly connected to the corporate and constitutional measures over which the SEM Committee has no control. It indicated that 'the overriding issue arising from the proposal is to ensure that consumers in Northern Ireland are treated on a fair and equitable basis with their counterparts in the Republic of Ireland'. The SEM Committee believes that the licence modifications considerably help to assuage this overriding concern.

It went on to make a number of comments about the constitutional and corporate measures being proposed and upon which it seeks clarification. The first of these concerned the meaning of 'independent' as in the addition of two independent directors onto the Board of EirGrid and the request for assurance that this measure and also the other constitutional and corporate measures will be carried out. It is proposed to pass this concern to DETI and DCENR as this is being dealt with at ministerial level, as set out in paragraph 18 of the consultation. However, we do not consider this impacts on the proposed licence changes. CCNI also seeks clarification on what steps the regulatory authorities will take if the obligations are not fulfilled within a reasonable timeframe. As far as licence conditions are concerned, the obligations will be monitored closely and as they are with all licensees – any breach of licence condition will be met with the appropriate investigation and

enforcement procedures as required. As to binding commitments to enforce licence conditions, it is considered that the SEM Committee and regulatory authorities must not fetter their discretion (whilst noting the particular Energy Order enforcement regime) and must judge each circumstance on its given merits. As such, it doesn't seem that setting a timeframe for review would be helpful as the SEM Committee and the regulatory authorities will, in practice, be continuously monitoring the regulatory licences of SONI and Eirgrid as it does so with all other licensees.

CCNI suggests that the consultation should address directly the reasons why the original licence condition which prevented vertical integration was deemed necessary in the first place as this would provide reassurance that the change being proposed is in the interests of all consumers. It is considered that paragraphs 13 and 26 of the consultation paper already clearly set out the rationale behind the original licence condition.

CCNI also sought clarification on what 'encouraged through other means' is suggesting. This is in the context of paragraphs 8 and 19 which refers to '...EirGrid [being] monitored through licence or encouraged through other means to ensure that consumers of electricity in Ireland and Northern Ireland are being appropriately protected'. No specific means of encouragement was alluded to through these words; the SEM Committee, as with many regulatory bodies has a wide range of formal tools (enforcement, penalties, licence modifications, price controls) and informal tools (workshops, policy developments, expertise and influence) which assist with the delivery of its own performance and the performance of industry participants. In this context the SEM Committee also notes the particular interplay of Ministerial assurance in this matter, as an added source of control or encouragement that all consumers of electricity in both Northern Ireland and Ireland will be appropriately protected.

TIMING OF MODIFICATIONS

The SEM Committee has decided to give legal effect to the licence modifications from 2nd March 2009. The subsequent corporate transaction is expected to complete during March 2009. If the proposed transaction fails to complete for whatever reason, the SEM Committee has agreed to revisit the suite of licence modifications afresh – so that inappropriate controls are not kept in place.