

NORTHERN IRELAND ELECTRICITY plc

Single Electricity Market Legislation

**Response to DETI's Consultation
of 10 November 2006**

5 January 2007



Response to Consultation on Single Electricity Market Legislation

EXECUTIVE SUMMARY	1
NIE RESPONSE TO CONSULTATION	5
I INTRODUCTION.....	5
II DEFINITION OF SEM (ARTICLE 2)	5
Scope of SEM definition	5
III POWER TO MODIFY LICENCE CONDITIONS (ARTICLE 3)	6
Power to modify licence conditions – Scope.....	7
Power to modify licence conditions - Further details on scope	7
IV PROHIBITION ON MARKET OPERATION ACTIVITY	9
V SEM COMMITTEE (ARTICLE 5-7).....	9
Scope of activity.....	9
Powers of entry	10
VI PRINCIPAL OBJECTIVES (ARTICLES 8 AND 9).....	13
Heading correction.....	13
Provision structure.....	13
Other issues.....	13
VII RELEVANT CHANGE IN LAW (ARTICLE 10)	14
VIII MATTERS NOT COVERED	14
IX SCHEDULE 1 – THE SEM COMMITTEE	16
X SCHEDULE 2 – POWERS OF ENTRY	17
XI SCHEDULE 3 - AMENDMENTS	17
XII REGULATORY IMPACT ASSESSMENT (RIA).....	17

Executive Summary

A. INTRODUCTION

This summary sets out the issues addressed by NIE in its response to the consultation on the Single Electricity Market Legislation paper, both in terms of direct impacts and wider impacts on the industry and arrangements in which NIE has an interest. The key points are summarised below.

B. KEY POINTS ON ORDER IN COUNCIL

1. **Power to modify licences:**

- (i) **Definition of SEM and power to modify licences** – The definition of SEM is wider than the equivalent GB definition which was limited to the creation of the new market. The effect of the wider SEM definition would be to extend the scope of mandatory licence modifications to include changes “to promote the operation” of the SEM. The powers should be limited to those needed to “establish” the SEM. This would allow any fine-tuning necessary for the proper setting up of the market to be done without exposing participants to the potential uncertainty in relation to subsequent mandatory changes promoting the operation of the SEM.
- (ii) **Time period for modification of licences** – Article 3(7) allows 24 months during which powers to mandate licence changes can be exercised. This is longer than the period which had been specified in GB for BETTA (18 months) and it is not clear why such a long period is deemed necessary.
- (iii) **Price Controls** – It would not be appropriate for matters such as price controls to be subject to the mandatory power to modify licences. We suggest an approach to clarify this in the response.
- (iv) **Specific examples of power to modify licences** – Article 3(3) gives further elaboration on the scope of the power to modify licences. We note that such elaboration was not included in GB legislation. We are concerned at the wide powers to implement changes in certain circumstances (for example in relation

to which company holds a licence) and also that the list overall operates to limit the scope of the power that may be needed in other areas.

2. **SEM Committee**

- (i) **Powers of Entry:** The powers of entry available to the SEM Committee are without precedent in the regulatory arrangements in the UK. There have been no indicators that such a power has been seen as necessary, and in addition such powers have a significant potential for harming the regulatory balance between the regulator and regulated entities. Whereas regulation traditionally relies on established models of interaction and information provision, the proposed powers would allow the SEM Committee to circumvent such models with few safeguards. The powers given to the SEM Committee should be no wider than currently available to NIAER and should only be applicable in situations when currently exercisable by NIAER. We elaborate further in our response on (a) why the competition powers are not appropriate in a regulatory context; (b) why the existing powers in the South should not be extended to the combined regulatory regime; and (c) why the powers which are both new and currently widely drafted in scope are not appropriate for the SEM.
- (ii) **Interface with NIAER overall:** The constitutional position of the SEM Committee is unusual in having relatively unfettered powers while technically being subsidiary to NIAER. It is unclear what would be the situation if NIAER disagrees with the SEM Committee. In particular, the dividing line between SEM Matters and Non-SEM Matters is fine, and we have identified as examples some overlaps and likely difficulties for NIAER in our detailed response.
- (iii) **Role of Independent Member** – We acknowledge the crucial role of the independent member of the SEM Committee who will be required to give a measured and informed view to ensure balance. We are also concerned that the quorum rules in Schedule 1 could mean that meetings could go ahead, and decisions be taken, with one part of the island not represented.
- (iv) **Excluded functions** – If a matter affects SEM but is an excluded function, this would be dealt with by NIAER. However, the exercise of an excluded function could be materially affected by the exercise of a relevant function which could lead to the SEM Committee effectively making decisions in relation to excluded

functions. This should be addressed by the ability for NIAER to be involved in any decisions where a decision on a SEM Matter could impact on an excluded function or a non-SEM Matter.

(v) **Working Arrangements** – The working arrangements for SEM (which will describe how NIAER will work with CER) are an important part of the overall picture. Please confirm that these will be available for review and comment.

3. **Principal Objectives of DETI, NIAER and SEM Committee - Potential conflict** – There is a potential conflict between the ‘SEM’ objectives and the ‘ordinary’ objectives of DETI and NIAER, in particular given the overlap and interdependencies between the SEM matters and non-SEM matters. We provide examples of these in this response.
4. **Appeals Mechanism** – We would consider it extraordinary if in the context of the new market there were to be no explicit appeals mechanism from SEM Committee decisions in respect of SEM matters. Lack of an appeal mechanism would be out of line with NI electricity regulatory arrangements and GB regulatory arrangements generally and could lead to such matters being increasingly referred to the courts. We do not believe that an appeal mechanism would be inconsistent with the SEM Committee’s and TSC’s dual-jurisdiction role, particularly as the appeal body could also be required to take into account the wider objectives of the SEM Committee and could operate in a multi-jurisdictional manner. We set out proposed options in relation to that in the detail of our response. We are mindful also of the recent consultation in the South which states that it is “essential that regulators’ decisions are open to scrutiny and challenge by affected parties”. Among the options for appeals from regulatory decisions the consultation considers ad hoc/standing appeal panels and specialist courts.
5. **Definition of Market Operator:** A person acting as SEM operator will require a licence. As currently drafted, the definition would capture persons other than the Market Operator, and requires amendment.
6. **Property Scheme** – The ability to deal with certain matters through a property scheme, as was provided for in the legislation for BETTA in GB would be useful in the Order in Council.

7. **“Best regulatory practice”**: The requirement to have regard to best regulatory practice should be enshrined in the legislative framework both to reflect UK practice and the recommendations of the Better Regulation Task Force and also to give industry greater certainty as to how the new regulatory arrangements for the SEM are likely to operate.

NIE RESPONSE TO CONSULTATION

I Introduction

1. DETI published a consultation on the Single Electricity Market Legislation paper on 10 November 2006. This document sets out the NIE's response both in terms of direct impacts and wider impacts on the industry and arrangements in which NIE has an interest. We have sought to include examples of where we foresee a problem, in order to put our concerns and comments into context.
2. The points in this Section follow the order of the proposed Order in Council.

II Definition of SEM (Article 2)

Scope of SEM definition

3. **Definition:** The definition of "the SEM" states that "the SEM" means the Single Electricity Market, that is to say the new arrangements in Northern Ireland and Ireland which are (a) designed to promote the establishment and operation of a single competitive wholesale electricity market in Northern Ireland and Ireland and (b) which are described in broad terms in the Memorandum of Understanding. In legislation introducing similar new arrangements elsewhere in the UK, for example the BETTA arrangements, the focus is on the creation of the new market. The wider reference to the "operation" of the market raises a number of issues.
4. **Reference to "operation of the market"** - There is no reference in the GB equivalent provision to the operation of the market, only to its "creation". It is not clear what is meant by "promoting the operation" and it is not clear why this has been included in the legislation. If the reason for its inclusion is to allow any issues following initial establishment of the SEM to be dealt with, the wording is unnecessary as the time period within which the power can be used allows any issues relating to establishing the arrangements to be dealt with subsequently. The additional reference therefore introduces uncertainty. The reference to "promoting the operation" of the market is also excessive as it allows the power to interfere with matters outside of the establishment of the arrangements as described in the Memorandum of Understanding

between the two governments (“MOU”), and such matters should be a matter for the ongoing governance arrangements in the market and industry documents.

We note that Article 2(3) refers to the MOU relating to establishment and operation of the SEM. While the MOU needs to deal with ongoing matters due to its wider description of the overall SEM arrangements, the power to modify licences in the Order in Council should be limited to that needed only to *establish* the arrangements. To allow the power to be used to deal with subsequent operational matters implies that there is no faith in those ongoing governance arrangements. From the perspective of a licence holder the concern is that, having established a market, participants will have made decisions and established strategies on the basis of that. If wide power is given to interfere in its “operation” in a way which is difficult to quantify but which could go much wider than putting in place a market and fine tuning it, this could affect everyone’s commercial position. This would be “moving the goal posts”. This is outwith the normal regulatory approach and checks and balances and causes us great concern.

5. **MOU** – This not a document on which comments have been invited. Where issues arise from that document which affect the draft legislation, we are raising them in the text.

III Power to modify licence conditions (Article 3)

6. General Points

- (i) **Exercise of powers:** The powers are linked to the MOU signed by DETI and therefore would be more appropriately exercised at governmental level in accordance with the MOU. We also note that Ofgem did not have the power to mandate licence changes in the GB equivalent provision, and it is not clear why it is considered necessary to depart from the GB precedent in this respect by extending the power to NIAER.
- (ii) **Transmission systems:** The term “transmission systems” is used in the plural in Article 3(2)(a). In NI there is only one transmission system as such. Is this intended to refer to Moyle which holds a transmission licence? As far as we are aware no changes are intended to the “operation” of the Moyle line?

- (iii) **Time period for exercise of powers:** The power to modify licence conditions under subsection (1) is long at twenty four months. For BETTA it was eighteen months, and although set at two years for NETA, we do not believe that it is a suitable precedent particularly as that was limited to “establishment” matters. Why is it thought necessary to have the power active for such a long time? Eighteen months is a long period of time for the arrangements to bed down and any issues regarding establishment of the arrangements to be dealt with. There is particular concern given the scope of the power relating to the “operation” of the market, as outlined above. The additional period of time is both unnecessary and will add further uncertainty as to the interface between the mandatory modification power and the governance arrangements under the TSC and related documents.

Power to modify licence conditions – Scope

7. **Drafting** – as a matter of drafting, why does Article 3(i)(a) not refer to “the SEM” as defined rather than to what is contained in that definition. Again, the power in relation to facilitating the operation is wider than what usually would be seen and the points raised above in relation to the definition apply.
8. **Changes:** It is unclear why it is necessary to say that licence conditions can be changed to give “full effect to” the arrangements (3(1)(b)) when the Article already seeks to give power to implement or facilitate the operation of the new arrangements. Please clarify the intention with regard to the use of the term “full effect”, as it could throw doubt on the meaning of the ‘main’ power.
9. **Other Systems:** Again, the reference to “other systems for the conveyance of electricity”, to cover the distribution system, is expressed in the plural. Please clarify why.

Power to modify licence conditions - Further details on scope

10. **Further detail goes beyond that in GB:** The detail in Article 3(3) is greater than would be expected based upon the equivalent legislative provisions relating to BETTA and NETA in GB. While much of this detail would have been implied in any event (as it was in GB), it would be useful to know why it is thought necessary to depart from the GB precedent in this respect. In particular, the introductory wording does not state that this is a non-exhaustive list and so could be read as limiting the scope of the foregoing

power. We appreciate that it may be useful to give some information so that licence holders understand the agreements and arrangements that could change. However, this may be a matter more appropriately dealt with in the Explanatory Memorandum than in the legislation itself, as it could impact on the ability to exercise the overall powers.

11. **Conditions relating to non-authorised matters:** In Article 3(3)(a) the licence conditions do not need to relate to the activity authorised by the licence. This gives very wide powers to impose licence modifications in respect of an activity in which the licensed party is not involved or has no interest. It is not clear why this power is required and we would request confirmation of how it is intended to be exercised and the checks and balances that will apply. If this is intended to apply only to particular activities, e.g. to Transmission System Operator and Market Operator activities, this should be made clear to avoid regulatory uncertainty for other licence holders.
12. **Procuring a licence:** In Article 3(3)(b) the provision enables DETI/NIAER to include in the licence an obligation on certain licensees to apply (or procure the application) for a specified licence. Statutory prohibitions on undertaking the activity and practicality make such obligations clearly unnecessary in certain cases, for example in the case of applying for a licence for transmission system operation. Please confirm that the power is not intended to be utilised in cases where statutory prohibitions and practicality make this unnecessary.
13. **NIE Price Controls:** Article 3(9) provides that “Nothing in this Article prejudices the generality of any other power to modify a licence; and nothing in paragraph (2) or (3) prejudices the generality of paragraph (1).” Paragraph (1) therefore allows any licence change to be made which is considered necessary or expedient for SEM. In relation to certain areas, such as price controls, it would not be appropriate for these to be subject to the mandatory power to modify the licences. The provision should be expanded to allow DETI the explicit ability to provide that certain matters in particular licences will not be dealt with under the new SEM powers, but only pursuant to the current powers. DETI would then publish a decision on the matters that are explicitly outwith the power, to ensure that the industry has certainty on these matters.

IV Prohibition on market operation activity

14. **Drafting points:** Article 4 deals with the licensing of the SEM Operator. This prohibition is drafted in such a way that it may capture people other than the Market Operator, for example the person responsible for calculating charges under a contract for differences. We propose that the drafting should be amended to read:

“(6) For the purposes of this Part a person acts as SEM operator if his responsibilities include responsibility, under the trading arrangements providing for the operation of the SEM, for calculating charges and other payments due under those arrangements.”.

V SEM Committee (Article 5-7)

Scope of activity

15. **NIAER/SEM Committee relationship:** The constitutional position of the SEM Committee is unusual in having relatively unfettered powers while technically being subsidiary to NIAER. It would be more appropriate to have a formulation which reflects more accurately the hierarchy of the structure and decisions on whether something is a SEM matter. In particular:

- (i) **Disagreements on SEM Matters:** It is unclear what would be the situation if NIAER disagrees with the SEM Committee on whether something is a SEM Matter or not. The implication in the drafting is that this would be a decision for the SEM Committee. However, there are likely to be a number of instances where it is not clear that something is necessarily a SEM Matter. For example, a licence modification in relation to fuel security may affect the SEM but also may legitimately affect something which is important for the Department e.g. in relation to ensuring appropriate fuel stocks. It would be important in such circumstances for the Department to have the ability to veto the SEM Committee decision to ensure that such matters are considered against the appropriate duties to take account of important domestic interests. As drafted, the SEM Committee could take this issue and there are few if any checks and balances.
- (ii) **Concurrent exercise of power by NIAER and SEM Committee:** It appears that something could be both a SEM and a non-SEM Matter, and it is unclear how that might be dealt with. For example, it may be possible that the exercise

of a function could materially affect the SEM but also involve separately the exercise of an excluded function, or a function where the impact on the SEM is below the threshold of materiality. Would NIAER and the SEM Committee conduct the exercise of these functions separately? There is also the likelihood that in these circumstances, the results would be different due to the different principal and subsidiary objectives of NIAER and the SEM Committee.

- (iii) **Reopening previous decisions of NIAER:** Market participants would need certainty that the SEM Committee would not reopen previous decisions of NIAER in relation to industry arrangements solely on the basis that it considers these to be not fully aligned with its primary and subsidiary duties. The duties would apply to exercises of powers by the SEM Committee, e.g. in relation to consequential impacts arising from the implementation or operation of the SEM. However, to mitigate regulatory uncertainty, the SEM Committee should indicate in advance how it expects its duties to impact on existing arrangements.
- (iv) **Change decisions in relation to industry documents:** Also, more generally, a number of documents (for example, distribution connection arrangements) would also operate to a large extent without an impact on the SEM. However, where the SEM Committee is making a decision on a series of changes to an industry document some of which, when viewed in isolation, would not have a material impact on the SEM, would NIAER be involved in consideration of those aspects? Alternatively, where a series of changes are being made will they be unbundled into SEM and non-SEM changes with different processes and decisions making in relation to each?

- 16. **Working Arrangements:** This seeks to put in place the process in terms of ensuring how the Authority will work in the context of the SEM Committee. They are also to deal with how the Authority will work with CER. These are important arrangements upon which we would wish to have an opportunity to review and comment as part of a subsequent consultation. We would have thought also that the Department would want formal overview of these.

Powers of entry

- 17. **Lack of background:** The powers of entry set out in Article 7 and Schedule 2 of the Order in Council are an analogue of the powers in the Competition Act 1998.

18. **Uncertainty for market participants:** These powers would lead to considerable uncertainty as to the applicable regulatory regime in any given set of circumstances:
- (i) **Depends on decision of SEM Committee:** The powers as drafted are applicable when a matter has a material impact on the SEM, which is equivalent to the concept of SEM Matter raised earlier, and Article 7 provides that this would be a decision of the SEM Committee. Accordingly, it would be for the SEM Committee to decide if a particular matter should fall within its jurisdiction and therefore should be subject to these wider entry powers exercisable by it. This gives rise to similar concerns over ambiguity and uncertainty as highlighted above.
 - (ii) **Different powers of NIAER:** Further ambiguity arises from the fact that NIAER generally cannot exercise such powers but the SEM Committee can. The SEM Committee's decision is broadly an unfettered one, and therefore whether such powers would become exercisable or not becomes a matter of considerable concern for licensees.
19. **Powers are too wide for a regulatory regime:** A key issue is that the criteria for invoking the powers of entry are quite wide, wider than currently available to NIAER. To the extent that the provisions seek to reflect a need for consistency between North and South, we note that it is not common practice in GB or NI to set out the regulator's powers in this way as separate provisions to the competition legislation. For example, Article 46 of the Electricity Order 1992 applies the powers of entry in the competition legislation to NIAER by cross-reference. Including them in this stand alone way makes them independent of the competition context.
20. There are instances of different overall approaches North and South, with the broad approach on issues being similar, but with the detail being very different. The ability to refer non-agreed licence modifications to the Competition Commission in the North is a good example, as in the South there is a specifically convened Appeals Panel or judicial review of the decision. That difference has been retained in the proposals. It should not be the goal of this exercise to introduce wholesale consistency changes where not needed, where the equivalent approach in each jurisdiction produces a similar result. Indeed the MOU explicitly states that "it is not the intention ... to require harmonisation of all regulatory functions".

The existing entry powers deliver the UK approach to the exercise of such powers. They do not need to change.

21. **Powers of entry not appropriate in an industry regulatory context:** The background to the existing competition powers is that they were made available to the OFT under the Competition Act 1998 and, therefore, in giving NIAER concurrent powers it was seen as important to ensure that it had the ability to exercise equivalent powers to the OFT in this regard. Such powers are not appropriate for regulatory breaches generally (for which the current powers of enforcement set out in Part VI of the Energy Order already make full provision) and would be inappropriate for NIAER, and also for the SEM Committee, except in the specific context of competition law compliance. The day to day monitoring of compliance with regulatory obligations presents circumstances which are very different to the much more defined and limited requirements and triggers for competition law enforcement.

22. **Low threshold for triggering power:** The powers of entry are invoked where the SEM Committee determines (with no test of objectivity) that a licence holder “may” be contravening or “may” have contravened any condition of its licence. This is a low threshold given the nature of the regulatory and licensing regime and therefore a significant risk for participants. We oppose the concept of such powers for the regulatory regime and reiterate that these powers should be no wider than are currently available to NIAER and should only be applicable in situations where currently exercisable by NIAER. Nevertheless, on commenting on the triggers, we note that these would need to provide a much higher threshold for powers which are as extensive and intrusive as those suggested, such as:
 - (i) That the SEM Committee reasonably considers, based on the evidence, that a licence holder is or has committed a significant breach of a material condition of its licence;

 - (ii) That the SEM Committee reasonably considers, based on the evidence, that a request to the licensee for essential information in relation to the breach would lead to information being destroyed or concealed or not divulged by the licensee and therefore that the powers of entry need to be invoked; and

- (iii) The SEM Committee be required to obtain a court order in relation to every exercise of this power, to indicate that it is available but also to emphasise it as a last resort.

VI Principal objectives (Articles 8 and 9)

Heading correction

- 23. Article 8 sets out the principal objective and duties of the Department and SEM Committee in relation to SEM. Although in the heading it refers to the Department and the SEM Committee, in practice the Article also includes the Authority, and the heading should be changed accordingly.

Provision structure

- 24. The structure sets out objectives in relation, broadly, to SEM matters, but there is a need also to ensure that the way in which these objectives are to be taken into account is consistent with the existing objectives of the Department and the Authority and the way the structure has been designed does not necessarily guarantee that. In particular, there is a need to ensure that functions are exercised in such a way that market participants have confidence in decisions made by the Department, Authority or SEM Committee. For example, where the Authority makes a decision on a non-SEM Matter, the SEM Committee should seek to preserve that decision and not affect it in seeking to exercise the functions in relation to SEM Matters.

Other issues

- 25. In the list the term “unfair discrimination” is used as opposed to the more usual formulation within UK legislation of “undue discrimination”. To follow NI and GB practice, context should be given as to what is meant by “unfair” or “undue” discrimination so that its likely impact can be understood.
- 26. Again, there is the potential overlap between the Department’s ‘ordinary’ functions and those it considers affect SEM. The proposed new Article 13 (1A) of the Energy Order 2003 means that as soon as the Department determines it is a SEM issue, the ordinary objectives cannot apply. The ability of the Department to decide without any objective test is very wide, and there appears no ability to acknowledge that there could be issues which have a domestic effect as well as one on the SEM.

27. In relation to Article 9, why is Article 58 of the Electricity Order (which related to security periods) included, but not Article 37 of the Electricity Order (which relates to fuel stocks)?

VII Relevant Change in Law (Article 10)

28. We note this provision in the context of the proposals and would support this.

VIII Matters not covered

29. **Property Scheme:** The ability to deal with certain matters through a property scheme, as was provided for in the legislation for BETTA in GB in Schedule 18 of the Energy Act 2004, would be useful in the Order in Council. Such a scheme could be made by DETI, on application by the TO and TSO, specifying the property, rights or liabilities to be subject to the scheme within 3 months of the provision coming into force, where the TO and TSO agree that a scheme is necessary or expedient for implementation purposes. The terms of the scheme would be as the TO and TSO agree or, if they fail to agree, as DETI determines. This would deal with consent issues that may be impractical or allow the transfer of contracts, assets or liabilities between the entities in the Viridian Group where this might otherwise require consents or trigger defaults and allow for the transfer of property, rights or liabilities which would not otherwise be capable of being transferred. As with the BETTA provisions, such a scheme may not need to be utilised but would provide a useful backstop in case it proves necessary.

30. **Appeals:**

- (i) It is our strong view that an appeals mechanism for “code” changes is necessary to support investor confidence so that finance may be provided for investment at a reasonable cost of capital. Indeed, we would consider it extraordinary in the context of the market if an appeal process is not enshrined in the legislation. If investors carry a perception that earnings from their assets could be at risk as a result of rapid and unilateral regulatory action, they will either not provide finance or only do so at a high rate of return that raises prices to customers. We consider such certainty is important to investors and would give significant comfort to new entrants, given the commercial nature of the TSC, which includes rules governing the methods of setting prices and so determining companies’ revenues. The argument for a specific appeal

mechanism is even more compelling given that the TSC, which spans two jurisdictions, provides for the RAs to exercise a number of powers, including the right to modify the TSC itself.

- (ii) The need for an effective appeals process is widely acknowledged as an important component of good regulation, and is endorsed by the UK Better Regulation Commission and by the Department of the Taoiseach. Failure to provide an appeal mechanism, in addition to adding to regulatory risk, would lead to such matters being referred to the normal judicial process, a less efficient and less effective approach. Judicial review offers only a very limited right of appeal. Indeed, there is also no guarantee that a market participant would be granted judicial leave to review a RA decision in the first instance. We note the Department of Taoiseach's Consultation Paper on Regulatory Appeals published in July 2006 which states "[Regulatory] bodies often take far-reaching decisions which can have material impacts on society, consumers, market players and on the markets themselves. It is essential that regulators deliver quickly and effectively if the public policy objectives set for them in Irish/EU law are to be met. It is also essential that regulators' decisions are open to scrutiny and challenge by affected parties who consider that they have not been properly treated in accordance with the law. The arrangements for appeals need to be based on sound legal principles and operate efficiently." Appeal mechanisms that are considered for consultation in the paper include ad hoc/standing appeal panels and specialist courts. The appropriate mechanism for appeals from decisions of the SEM Committee needs to be considered to ensure both that the mechanism is consistent with such principles and that it is appropriate for the market arrangements being introduced.
- (iii) This need for a specific appeal mechanism is recognised in the rest of the UK where participants in the GB market have the right of appeal to the Competition Commission against changes to the energy codes which apply there.
- (iv) The issue is a very important element of the introduction of SEM. Our view is therefore that a specific, bespoke appeals process is the only way forward, based upon the process which operates in GB which was introduced under the Energy Act 2004 (ss 173 – 176). We suggest that, as a matter of priority, provision for this should be included as part of the proposed Order in Council.

We note (by the proposed amendment to Article 15(7) of the Electricity Order) that the appeal to the Competition Commission would be available in relation to licence modification references, and see no conceptual difference between that and the ability to raise code changes before the Competition Commission.

- (v) In terms of practicalities, in order for a similar approach to be followed in the Republic of Ireland, a process could be included as part of the “Appeals” process under the 1999 Electricity Regulations, and a process introduced to require both the Competition Commission in Northern Ireland and the Appeals Board established in the Republic of Ireland to convene if an appeal is raised. Both bodies could be required to have regard to the other’s views, with the code change not taking effect if both bodies do not agree on their decisions. This need to achieve parity of approach North and South would equally of course apply to a JR in one or the other jurisdiction, and it would be better to include a specific provision ensuring the right approach is taken, rather than remaining silent.

- 31. **Best Regulatory Practice:** We note that GB practice (e.g. Article 178 of the Energy Act 2004) provides a duty to have regard to best regulatory practice by making this into an explicit requirement on the Secretary of State and the regulator in carrying out their respective functions. In particular, that regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. Given the scope of the SEM Committee’s activities, and how the SEM Committee will seek to operate is not, at this stage, known, it is important to enshrine best regulatory practice into the legislative framework. This would provide market participants with a degree of comfort as to the way in which certain powers, which on their face are widely applicable, may in fact be applied.

IX Schedule 1 – The SEM Committee

- 32. The quorum provisions in paragraph 7, although seeking to avoid an intentional lack of quorum, also enables meetings to go ahead without one part of the Island being represented. Given the powers of the SEM Committee, this effect of the quorum provisions needs to be rectified.

X Schedule 2 – Powers of Entry

33. Please see above on the appropriateness, scope and triggers for the powers of entry. The points in this section are on areas of detail and are not intended to affect the comments stated earlier.
34. Under paragraph 1(2)(a) of Schedule 2 in relation to the power to enter without a warrant, the investigating officer must give 48 hours notice of the intended entry. This should be 2 working days, as under the Competition Act.
35. Paragraph 1(3)(a) leaves it to the investigating officer to decide whether there is reasonable suspicion that the premises are occupied by the licence holder – a decision of this importance should be made by the SEM Committee. The OFT makes the decision in the equivalent provision in the Competition Act.
36. Paragraph 1(6)(a)(ii) allows the investigating officer to take with him “any other persons” authorised by the Authority when entering a premises. Any other persons in this case would not have to be officers of the Authority, with all of the corresponding safeguards. This is inappropriate and unacceptable, particularly given the information that may be made available, and we note that the Competition Act 1998 contains no equivalent provision.
37. In paragraph 2(2) in relation to the power to enter premises with a warrant, the warrant can authorise a named officer of the Authority and “any other persons” authorised by the Authority. This should be limited to any other officers of the Authority – again this mirrors the wording in the Competition Act 1998.

XI Schedule 3 - Amendments

38. Paragraph 3(3), which includes a new Article 11(6B) of the Electricity Order, provides that conditions included in a licence may relate to activities whether or not they are carried out in Northern Ireland. This is extremely wide. It should be limited to matters directly related to and necessary for SEM.

XII Regulatory Impact Assessment (RIA)

39. The RIA estimates the SEM's net NPV benefit at £99.96m. While NIE acknowledges that "Estimating the costs and benefits of a very complex and unique project such as

the SEM a year before it is due to go live and while it is still under development is of necessity uncertain", NIE considers that the impact of the SEM ought more properly to have been evaluated against the benefits that could be obtained from the counterfactual scenario in which the existing bilateral markets are retained and the arrangements developed to improve trading and co-ordination between the separate systems but without instituting the SEM.

40. The two main factors that contribute to the net NPV benefit are cited as (i) variable cost savings (fuel, CO₂ and import cost savings) and (ii) installed reserve savings. While one would anticipate there should be benefits from the optimised generation scheduling, there is little evidence that the availability of ESB power stations will improve. Even if it did, the impact on generation costs is unlikely to be significant with the main benefit of any improvement being to defer investment in new capacity. The benefit attributed to installed reserve is realisable in other ways and is not unique to the establishment of the SEM.
41. Notwithstanding our views of the analysis contained within the RIA, NIE believes that, subject to market dominance being satisfactorily addressed, real benefits will be delivered from the SEM, notably (as the RIA points out), from increased competition in an enlarged market, although the magnitude of the benefit is difficult to quantify.