

Dear Sirs

EN010092: Thurrock Flexible Generation Plant

Procedural Deadline 5 Submission on behalf of RWE Generation (UK) Plc

We are acting for RWE Generation (UK) Plc ("RWE") in relation to the application for Development Consent for the above project.

Response to 2nd Written Questions

In response to question 2.5.6, RWE welcome the Applicant's agreement that bespoke protective provisions are required for the benefit of RWE within the DCO. It is noted that currently only the definitions and a couple of headings have been included in the draft DCO rather than a full set of protective provisions. RWE would also note that the heading should be for the protection of RWE Generation (UK) Plc rather than RWE Generation UK Limited.

RWE submitted a form of protective provisions along with its Written Representation. These protective provisions are currently being negotiated between the parties and good progress is being made. Attached to the submission are the latest form of RWE's preferred protective provisions by way of update. Please note that these protective provisions have not yet been agreed with the Applicant and represent RWE's position on the points which remain under discussion.

RWE's position is that protective provisions substantially in the form of those attached are required in order to protect its site and statutory undertaking.

RWE will keep the Examining Authority updated in relation to progress on the protective provisions.

It is also noted that the Applicant has been asked about the provision of drafting to limit the compulsory acquisition powers in relation to Work Nos. 12(c) and (d) (question 2.1.2) and about a mechanism to control the use of the Works (question 2.8.1). RWE's position, as expressed in the CA ISH and at Deadline 4, that a suitable mechanism is essential in the draft DCO to determine which route may be used, and that the Applicant should not have the ability to use both. RWE would welcome the provision of such drafting by the Applicant.

Statement of Common Ground

RWE and the Applicant are progressing a Statement of Common Ground which is currently being negotiated between the parties.

Please do not hesitate to contact us if you require anything further.

Yours faithfully,

Eversheds Sutherland (International) LLP

SCHEDULE 9
PROTECTIVE PROVISIONS
PART []
FOR THE PROTECTION OF RWE GENERATION UK PLC

1 The provisions of this part of this Schedule have effect for the protection of RWE Generation UK Plc unless otherwise agreed in writing between the Undertaker and RWE Generation UK Plc.

2 In this Part of this Schedule:

"the road" means the existing road owned by RWE which runs through the site shown as plots 01/04, 01/11, 01/19, 01/20, 01/21, 01/22, 01/30, 04/01, 04/02, 04/03, 04/05 and 04/06 on sheets 1 and 4 of the Land Plans;

"the proposed road" means an access road for abnormal indivisible loads which runs through the site shown as plots 01/04, 01/11, 01/33, 01/34, 01/35, 01/36, 01/37, 05/01, 05/02, 05/03, 05/04, 05/05, 05/06, 05/07 and 05/08 on sheets 1 and 5 of the Land Plans;

"existing apparatus" means any pipes, cables, drainage systems or associated equipment belonging to RWE within the Order land;

"environmental permit" means the environmental permit held by RWE in relation to the site with reference EP3433LZ;

"functions" includes powers and duties;

"in": in a context referring to the existing apparatus or alternative apparatus being in land, includes a reference to apparatus under, over or on land;

"plan" includes all designs, drawings, specifications and method statements necessary to describe the works to be executed;

"RWE" means RWE Generation UK Plc, company number 03892782 of Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, SNS 6PB or any of its entities or successor entities;

"RWE Undertaking" means any land and existing apparatus belonging to RWE including but not limited to the site, the existing apparatus and the land subject to the environmental permit including any rights, liabilities and duties of RWE;

"specified powers" means the powers conferred by articles 11 (street works); 13 (temporary restriction of use of streets); 14 (access to works); 15 (traffic regulation); 17 (authority to survey and investigate the land); 18 (removal of human remains); 27 (rights under or over streets); 28 (temporary use of land for carrying out the authorised development); 29 (temporary use of land for maintaining the authorised development) of the Order;

"specified works" means any authorised works under the Order which are undertaken within 15m of any existing apparatus and the road and proposed road and within 3m of the site (or 15m of any apparatus within the site) or which may have an adverse impact on the RWE Undertaking and includes invasive investigatory works;

Commented [ES1]: under discussion between the parties

"the site" means the former Tilbury B Power Station site located to the East of Tilbury Town as shown on sheets 1 and 4 of the Land Plans.

3 Acquisition of Land and Exercise of Powers

3.1 [Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order the undertaker must not acquire any land

interest or apparatus under articles 19, 22, 25 or 30 override any easement or other interest of RWE otherwise than by agreement.]

Commented [ES2]: under discussion between the parties

- 3.2 At least 56 days before the undertaker exercises any or all of:
- (a) the specified powers in respect of the site and the affected highways or streets within the site; or
 - (b) the specified powers in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site); or
 - (c) the powers referred to in paragraph 3.4,
- the undertaker must submit to RWE details of the works to be undertaken in reliance on those powers.

- 3.3 Any specified powers:
- (a) in respect of the site and the affected highways or streets within the site must not be exercised except with the agreement of RWE; and
 - (b) in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site) must not be exercised without the undertaker first consulting RWE on the details submitted pursuant to paragraph 3.2 and taking account of any consultation response.

- 3.4 The undertaker must not exercise the powers conferred by article 20 (statutory authority to override easements and other rights) or article 23 (extinguishment of private rights) in relation to any land in the site without the consent of RWE..

- 3.5 Any agreement or approval or consent to be given by RWE under this paragraph:

- (a) Must not be unreasonably withheld or delayed; and
- (b) May be given subject to such reasonable requirements and/or conditions as RWE may have or consider necessary for the protection of the RWE Undertaking.

- 3.6 If RWE refuses any approval or agreement or consent sought under this paragraph then that refusal must be accompanied by a statement of grounds for refusal.

4 Existing apparatus

- 4.1 Despite any provision of this Order and anything shown on the Land Plans, the undertaker must not acquire any existing apparatus other than by agreement.

- 4.2 If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any existing apparatus is placed, that existing apparatus must not be removed without the consent of RWE (which must not be unreasonably withheld) and any right of RWE to use, maintain, or renew that existing apparatus in that land must not be extinguished until a replacement is installed and available for use by RWE.

Commented [ES3]: under discussion between the parties

- 4.3 Any replacement apparatus must fulfil the same functions as the apparatus being replaced and must be no less advantageous in nature to RWE than the apparatus being replaced.

- 4.4 Any replacement apparatus must be in a suitable location to fulfil its function as agreed with RWE.

- 4.5 Not less than 56 days before starting the execution of specified works, the undertaker must submit to RWE a plan, section and description of the works to be executed.

- 4.6 Those works must be executed only in accordance with the plan, section and description submitted under sub-paragraph 4.5 and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph 4.5 by RWE for the alteration or otherwise for the protection of the existing apparatus, or for securing access to it, and RWE is entitled to watch and inspect the execution of those works, and the undertaker must supply RWE with any additional information concerning such works as RWE may reasonably require.
- 4.7 Any requirements made by RWE under sub-paragraph 4.6 must be made within a period of 56 days beginning with the date on which a plan, section and description under sub-paragraph 4.1 are submitted to it.
- 4.8 Where RWE requires any protective works under sub-paragraph 4.6 to be carried out either by itself or by the undertaker (whether of a permanent or temporary nature), the protective works must be carried out to RWE's reasonable satisfaction prior to the carrying out of the specified works.
- 4.9 Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.
- 4.10 The undertaker is not required to comply with sub-paragraph 4.5 in a case of emergency, but in that case it must give to RWE notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph 4.6 in so far as is reasonably practicable in the circumstances.
- 4.11 The undertaker must pay to RWE the proper and reasonable expenses reasonably incurred by RWE in, or in connection with, the inspection, alteration or protection of any existing apparatus.
- 4.12 Subject to sub-paragraph 4.14 if by reason, or in consequence, of the construction, use, existence, operation or failure of any specified works or in consequence of the construction, use, existence, operation, maintenance or failure of any of the authorised development by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by the undertaker) in the course of carrying out such works, any damage is caused to any existing apparatus or property of RWE, or to the road, or to the RWE Undertaking, or to operations, or there is any interruption in any service provided to RWE or by RWE, or in the supply of any goods to RWE or by RWE, or RWE becomes liable to pay any amount to any third party, the undertaker must—
- (a) bear and pay on demand the proper and reasonable cost reasonably and properly incurred by RWE in making good such damage or restoring operations, services or supply; and
 - (b) indemnify RWE for any other expenses, loss (whether direct or indirect and including losses of an economic nature), demands, proceedings, damages, claims penalty or costs incurred by or recovered from RWE, by reason or in consequence of any such damage or interruption or RWE becoming so liable to any third party.
- 4.13 The fact that any act or thing may have been done by RWE on behalf of the undertaker or in accordance with a plan approved by RWE or in accordance with any requirement of RWE or its supervision does not (subject to sub-paragraph 4.12) excuse the undertaker from liability under subparagraph 4.12(a).

Commented [ES4]: under discussion between the parties

4.14 Nothing in sub-paragraph 4.12(a) imposes any liability on the undertaker with respect to any loss, damage, injury or interruption to the extent that it is attributable to the neglect or default of RWE, its officers, servants, contractors or agents.

4.15 RWE must give the undertaker reasonable notice (being not less than 28 days) of any claim or demand, and no settlement or compromise may be made without the consent of the undertaker (not to be unreasonably withheld or delayed) which, if it reasonably withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

5 Road, proposed road and RWE Undertaking

5.1 The undertaker must give RWE no less than 56 days' written notice of the intended commencement of any specified works and must include with this notification a plan and description of the works to be commenced and a programme for these works.

5.2 Subject to 5.3, the undertaker must permit RWE, its successors in title, occupiers, tenants and invitees of the site pedestrian and vehicular access at all times and for all purposes along the road and proposed road in common with the undertaker.

5.3 The undertaker must give RWE not less than 28 days' notice of any exercise of powers under article 11 (Street works), article 13 (Temporary restriction of use of streets), article 14 (access to works) and article 15 (traffic regulation) which would restrict access by RWE, its successors in title, occupiers, tenants and invitees to the road and/or the proposed road. Where access to the road along an existing route is prevented or restricted by the undertaker, the undertaker must ensure that suitable alternative is available for use by RWE, its successors in title, occupiers, tenants and invitees for the whole period of the closure or restriction before exercising any power.

5.4 Save in the case of emergency, the undertaker may not prevent or restrict RWE from using the road (or any alternative access provided under these protective provisions).

5.5 The undertaker must ensure that the road or a suitable alternative is open for emergency access to the site at all times.

5.6 If the undertaker requires to undertake any specified works which will break open the surface of the road or involve any temporary closure of the road then the undertaker must provide 7 days written notice of such works to RWE and acting reasonably must have regard to (and accommodate so far as reasonably practicable) any requests from RWE in respect of this period of works, including measures, where practicable to minimise disruption and facilitate access to the site.

5.7 Where any temporary closure of the road is required, a suitable alternative access to the site must be provided to RWE, its occupiers, tenants and invitees which is no less convenient to access the site than the road for the whole period of the closure. The undertaker must have regard to any requests from RWE (acting reasonably) in relation to the location of the alternative access road.

5.8 The undertaker must keep the road (or alternative access if one is provided) clean and tidy and free of obstructions at all times.

5.9 If at any time RWE require the relocation, variation or alteration of the proposed road, then RWE shall serve written notice on the undertaker informing them of this fact and identifying the proposed relocation, alteration or variation of the proposed road within the Site.

5.10 Subject to

- (a) agreement by the undertaker (not to be unreasonably withheld or delayed) that the proposed relocation, alteration or variation of the proposed road within the site is acceptable; and

- (b) the undertaker seeking and being granted the necessary rights for the proposed relocation, alteration or variation of the proposed road,
- 5.11 then the undertaker must undertake the relocation, alteration or variation of the proposed road within a reasonable time agreed between the parties.
- 5.12 If at any time RWE require the relocation, variation or alteration of the road, then RWE shall serve written notice on the undertaker informing them of this fact and identifying the proposed relocation, alteration or variation of the road within the Site.
- 5.13 Subject to
- (a) agreement by the undertaker (not to be unreasonably withheld or delayed) that the proposed relocation, alteration or variation of the road within the site is acceptable; and
- (b) the undertaker seeking and being granted the necessary rights for the proposed relocation, alteration or variation of the road,
- then RWE shall undertake the relocation, alteration or variation of the road within a reasonable time agreed between the parties.

Commented [ES5]: under discussion between the parties.

6 Flood Defences and Site Security

- 6.1 The undertaker must consult RWE on the detailed design for the flood defences and gate in the flood defence wall (forming part of Work No 11) prior to undertaking these works.
- 6.2 The undertaker must take into account any reasonable comments and suggestions from RWE in relation to the design of the flood defences and gate in the flood defence wall (forming part of Work No. 11).

7 General

- 7.1 Any difference or dispute arising between the undertaker and RWE under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and RWE, be determined by arbitration in accordance with article 44 of this Order.
- 7.2 The undertaker and RWE must each act reasonably in connection with the implementation of this Part of this Schedule.

8 Notices

- 8.1 Any plans or notices submitted to RWE by the undertaker pursuant to this Part must be sent to RWE c/o the Company Secretary at its registered address on Windmill Hill Business Park, Whitehill Way, Swindon, SN5 6PB or such other address as RWE may from time to time appoint instead for that purpose and notify to the undertaker in writing .