

Dear Sirs

**EN010092: Thurrock Flexible Generation Plant**

**Procedural Deadline 8 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.

**1. Comments on the Applicant's Response to the Rule 17 Request to show the effect of the removal of the causeway from the draft DCO**

1.1 RWE has reviewed the documents submitted by the Applicant illustrating the amendments which would be included in a change request to remove the causeway. RWE confirms that if such a change request were to be made to remove the causeway and associated access, then it would deal with RWE's objection in relation to the same. RWE has no additional comments in respect of the amendments made.

1.2 However, RWE would maintain its objection in relation to the inclusion of compulsory acquisition powers over the RWE land that would still be retained in the DCO, unless and until such time as a private treaty agreement is concluded between the parties so as to provide for the rights by agreement rather than compulsion.

**2. Comments on the Applicant's Deadline 7 Position Statement and draft DCO**

2.1 RWE confirms that the consolidated protective provisions set out in the Applicant's summary of position and the note on status of protective provisions in version 8 of the DCO reflects the agreed position between the parties.

2.2 With the exception of paragraph 3, where the parties' differing preferred wording is shown, all other points on the protective provisions are now agreed.

2.3 As has been set out in previous submissions RWE maintains that its preferred wording for paragraph 3 must be included to ensure the adequate protection of its undertaking.

2.4 RWE confirms that the Applicant's amendments to the dDCO address the previous concerns raised by RWE, save in relation to Requirement 18. In this respect, we note that the Applicant has updated 18(1) to reduce the time period to one year. However, 18(5)(a) and 5(c) still refer to a five year review period, which RWE consider should be changed to one year.

2.5 Further, we note that RWE has been added as a consultee to 18(3) but has been left out of 18(3)(b). RWE consider that they need to be added to 18(3)(b) to be advised of the outcome of applications under the subparagraph.

**3. Comments on Legal Paper on the interface with PoTLL and RWE**

3.1 We note that this paper has been authored by DLA Piper. We are unsure of their role in the Examination and as to what weight should be given to this document. As far as we are aware, they are not acting for the Applicant in relation to the DCO. Notwithstanding, RWE comments as follows.

3.2 DLA's Paper purports to consider whether a protective provision requiring approval can provide protected persons with an ability to prevent or frustrate the statutory scheme. RWE does not consider it necessary to examine those points any further in detail because it has agreed to provide comfort to the Applicant on this point by including a paragraph in its protective provisions to confirm that consent will not be unreasonably withheld, and to

confirm that such consent is intended to control the means and practicalities of the works to protect RWE's apparatus and undertaking. This wording has been accepted by the Applicant.

- 3.3 As identified in paragraph 2.5 of the DLA Paper, it is commonplace to apply a test of reasonableness to the giving of consent in protective provisions for statutory undertakers. This is the position adopted in RWE's Protective Provisions, and indeed this is a position which has been included (and accepted by the Applicant) in respect of other statutory undertakers in this DCO.
- 3.4 Insofar as the Protective Provisions are concerned, RWE and the Applicant remain in dispute as to whether a prescriptive consent mechanism to be included, as is advocated by the Applicant. RWE's position is that it is unnecessary and wholly inappropriate to do so. Furthermore, RWE's position in this respect is supported by the DLA's Paper, which acknowledges in paragraph 2.4 that it would be difficult and unprecedented to prescribe the reasonable grounds for withholding consent under a DCO as what is reasonable will depend on the exact circumstances at the time and the detailed design for the project. This is consistent with RWE's position as to why it would not be appropriate, as proposed by the Applicant in its version of paragraph 3 of the protective provisions, to insert a detailed prescriptive set of circumstances in which it would be reasonable for a statutory undertaker to withhold consent to an approval.
- 3.5 Section 3 of the DLA Paper seeks to examine whether PoTLL should be able to secure protective provisions over RWE's land should it acquire this land in due course. This is generally a matter for PoTLL. However, the Paper alleges that RWE are seeking protective provisions to protect future development by PoTLL if the land acquisition goes ahead.
- 3.6 This premise is incorrect. RWE's Protective Provisions, which are substantially agreed, are in respect of its land and undertaking, not any 'future acquired land' as alleged in the legal note. This can clearly be seen by the way in which they are drafted covering 'existing apparatus' and 'RWE's Undertaking'.
- 3.7 As RWE have set out throughout the Examination, the land remains operational land which should benefit from protection, and if RWE retains land then energy infrastructure may well be brought forward in due course.

Yours faithfully

**Eversheds Sutherland (International) LLP**