

Thurrock Flexible Generation Plant

Applicant's submission for Deadline 8



1 INTRODUCTION

- 1.1 This note sets out the Applicant's comments on the deadline 7 submissions and provides an update to the Examining Authority on progress since deadline 7. The Applicant notes that Deadline 8 is for information requested by the ExA under Rule 17 and that no such request has been made. Nevertheless, the Applicant considers that these submissions will assist the Examination and is submitting them on that basis.

2 COMMON LAND

- 2.1 The Applicant has submitted its response to the representations made in the common land application (section 16) process (REP7-045, REP7-046) along with this response. The Applicant advises that there is no further procedure set for that process at this timing pending the setting of a date for the site visit.

3 NETWORK RAIL

- 3.1 The Applicant and Network Rail have completed the legal agreement between them as anticipated in the deadline 7 joint position statement submission (REP7-041). The Applicant understands that Network Rail has now formally withdrawn its objection to the Application.

4 NATIONAL GRID

- 4.1 The Agreement with National Grid has been finalised, has been signed by the Applicant and is with National Grid for execution. National Grid's lawyers have advised the Applicant that this agreement should be completed on Monday 16 August 2021.

5 RWE GENERATION UK PLC

Access agreement and compulsory acquisition powers

- 5.1 Heads of terms for access with RWE have not yet been agreed although good progress has been made. It was initially agreed that work on these heads would be undertaken following conclusion of the heads of terms with the Port as the Port would have to agree to the RWE heads and it would be known at that stage what was acceptable to them. As agreement has not been reached with the Port, these are now being progressed separately.
- 5.2 As terms have not been agreed, the Applicant maintains its request for powers of compulsory acquisition. These are necessary to ensure that the project is deliverable.

Protective provisions

- 5.3 The Applicant concurs with RWE's deadline 7 submission that the only issue between them on drafting of the protective provision is on the Acquisition of Land and Exercise of Powers section (3). The Applicant maintains its position as set out in REP7-028 that its drafting should be preferred.

6 PORT OF TILBURY LONDON LIMITED

Access agreement and compulsory acquisition powers

- 6.1 The Applicant notes the Port's deadline 7 submission that it hoped that heads could be concluded shortly (REP7-049 at paragraph 20). The Applicant advises that agreement has not been reached on the heads of terms and these have not been executed.
- 6.2 An email from the Applicant's lawyers to PoTLL's lawyers sent earlier today is enclosed with this submission to assist the ExA in understanding the history and current status of the negotiations. In short, the (non-binding) Heads of Terms with PoTLL and separate (non-binding) Heads of Terms with RWE are still under negotiation and are not agreed. Those Heads of

Terms were always a stepping stone to the detailed legal documents, which have not yet been tabled.

- 6.3 There has been no discussion between the Applicant and PoTTL as regards a role for the (non-binding) Heads of Terms in the DCO even if they have been agreed. The first the Applicant was aware of this suggestion was in PoTTL's deadline 7 submission. The Applicant is extremely surprised that PoTTL made this proposal out of the blue given the extensive engagement between the parties in recent months.
- 6.4 Such an approach would be completely inappropriate given the Heads were not negotiated with that role in mind, are non-binding and have never been submitted to or summarised in the Examination or considered by the ExA. In any event, this proposal is now irrelevant because the Heads of Terms are not agreed.
- 6.5 The Applicant will continue to negotiate the Heads of Terms with PoTTL and RWE after the close of the Examination. Assuming they are agreed it will then negotiate the separate detailed agreements with PoTTL and RWE, which have not yet been tabled. We understand that a full draft of the PoTTL legal document has been prepared (although the Applicant has not seen that). The RWE legal document will be informed by the approach in the PoTTL legal document.
- 6.6 The Applicant wishes to stress that the handling agreement's detailed terms are not agreed, and will form part of the main agreement. Any requirement to enter such an agreement under the DCO, as per PoTTL's D7 submission, would be an obligation to agree. As set out in the advice note submitted on behalf of the Applicant at D7 (REP7-042), such an obligation is unenforceable and should not be imposed.
- 6.7 The Applicant also submits that the failure to agree Heads of Terms for an access agreement demonstrates one of the flaws in the Port's submission that the Applicant can rely on the open ports duty to secure the handling agreement needed to use the alternative access. There is an inherent risk of significant delay in these scenarios, in addition to the other legal issues highlighted in the advice note submitted at D7. The Applicant needs sufficient certainty of its entire AIL delivery solution to have a deliverable project. The causeway solution provides that and was developed precisely because of the legal and other risks attached to trying to seek a complete solution through an operational port under a DCO, without a full agreement with the port operator.
- 6.8 The Applicant will write directly to the Secretary of State no later than early November to provide an update as to the position as regards the Port and RWE, in anticipation of the ExA's report being submitted.

dDCO drafting

- 6.9 The Applicant notes that the Port intends at D8 to "make suggestions for changes to the DCO to remove the causeway which the Port considers the Applicant should have made". The Applicant has not seen any such drafting and will not therefore have an opportunity to comment on it.

Protective provisions

- 6.10 The definitions of 'Port', 'specified work' and 'Work No.15 land', and paragraphs 3, 10(1)(b) and 12(1)(a) and (c) remain not agreed.
- 6.11 In response to paragraph 22 of the Port's D7 submission, the Applicant's position remains that the 'port' to be protected by the protective provisions should be the current port and not any future, unassessed, unconsented expansion. The Applicant refers the ExA to the legal submissions on this point in REP7-042 at section 3.
- 6.12 The Applicant confirms that it continues to object to paragraph 3(1) as drafted by the Port regardless of the reduction in the powers sought to be included. The Applicant notes the powers included by the Port were unreasonably wide and entirely outwith the norm for such drafting. The 'reduction' therefore is not a concession, but an acceptance of the reality that what had

been included initially was entirely inappropriate. The Applicant maintains its position that the Port's drafting creates a veto over the delivery of the project, resulting in a ransom situation on the access and that the Applicant's drafting should be preferred.

- 6.13 The Applicant has sought to work with the Port on consequential loss, however the Applicant has taken advice from its insurers on the wording of the indemnity sought by the Port in 12(1)(c) and has been advised that given its breadth and vagueness, they cannot advise whether it can be covered or at what cost. The Applicant therefore considers that is currently unfundable for the same reasons.
- 6.14 The Applicant further strongly objects to the inclusion of access 'into, out of' the Port in the indemnity sought by the Port. It is manifestly unreasonable for the Port to seek to hold the undertaker liable for undefined losses where an accident or breakdown occurs on the public highway or publically navigable river, which may have an effect on access to the Port. The Applicant has accepted it is reasonable that the port can take direct action to remedy any break down or accident within the Port at the Applicant's cost where that is necessary precisely to prevent the impacts of continuing obstructions causing problems for the Port. The Applicant submits that this suitably protects the Port's interest and the indemnity sought by the Port is unreasonable and unjustified.

Appendix one: Copy of Applicant's response to PoTLL following D7

Sent: 13 August 2021 13:50

To: Robbie Owen <Robbie.Owen@pinsentmasons.com>

Cc: Matthew Fox <Matthew.Fox@pinsentmasons.com>; Julian Boswall <Julian.Boswall@burges-salmon.com>; Paula McGeady <Paula.McGeady@burges-salmon.com>

Subject: Thurrock Power Limited

Dear Robbie

You suggested in an email on 1st August regarding the way forward that we take stock on the 12th to discuss where we had reached on the negotiations at that time.

As you will be aware, the ExA has not issued a Rule 17 letter requesting information for Deadline 8, despite a specific invitation from PoTLL at the hearing on 26 July to do so. It is not clear why the ExA has not done so.

Whilst we are assuming he will accept submissions today; we await confirmation from the ExA on their status and whether they will be formally accepted.

As you know, TPL has always been negotiating with PoTLL on the basis that TPL will only request removal of the causeway in the event that the legal documents with PoTLL and RWE have been signed, with (non-binding) Heads of Terms as a stepping stone towards this in the usual way.

We have still not seen the draft legal documents, despite having requested them and suggested moving the negotiations onto the legal documents if that would allow quicker progress overall. It is always the case that there are significant discussions on detailed legal documents in a matter like this. Whilst parts of the Heads of Terms are detailed, parts are not. The Heads of Terms do not, for example, set out the detail of the handling agreement, which is a crucial point and is essential to avoid an agreement to agree.

We think it is useful for the ExA to understand the considerable effort that has been involved in relation to the Heads of Terms' negotiation and we provide a summary of the exchange of documents at the end of this email. This goes up to 5 August. There have been further exchanges and client calls since that time, including a further draft from Walker Morris on behalf of PoTLL last night.

Separately, as you are aware, we have not agreed the RWE Heads of Terms, because they depend in important respects on agreement of the PoTLL Heads of Terms first. We have been in separate negotiations with Eversheds acting for RWE and there has been liaison between PoTLL and RWE. We have not seen a detailed RWE agreement either, as this will reflect whatever approach Walker Morris has taken in the PoTLL agreement.

We were extremely surprised to see in PoTLL's Deadline 7 submission a proposal that if the PoTLL Heads of Terms were agreed by Deadline 8 (which strictly does not exist as there has been no Rule 17 letter, as already noted) that PoTLL would then put forward a mechanism in the DCO to give a legal role to non-binding Heads of Terms between PoTLL and TPL which have not been submitted or summarised in any form to the Examination and without any time remaining in the Examination for TPL to respond to this proposal.

This proposal has never been discussed with TPL, let alone agreed. The first TPL was aware of it was from reading PoTLL's D7 submission.

Despite the effort on all sides and progress made, we have not been able to reach agreement on either (non-binding) Heads of Terms at this point and discussions on the detailed legal documents have not begun.

It remains TPL's intention to continue to negotiate after the Examination closes with PoTTL and RWE and the draft Heads of Terms envisage this approach. TPL intends to update the Secretary of State on the position directly no later than early November i.e. just before the ExA submits his report to the Secretary of State.

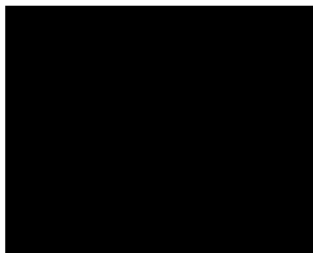
We are including this email in our submission today to assist the ExA.

Kind regards

Julian

Date	Description	Action	Time with PoTTL or its lawyers	Time with TPL or its lawyers
Friday 4 December 2020	Draft Access Agreement	Birketts issuing v1 agreement to BS (Birketts role has been overtaken by Walker Morris (WM), advising on real estate issues, alongside Pinsent Masons (PM) advising on DCO and wider issues.	-	-
Friday 11 December 2020	Draft Access Agreement	Burges Salmon (BS) issuing v2 agreement to Birketts		5 working days
Tuesday 30 March 2021	HoTs – Option for Easement	TPL issuing v1 HOTs to PoTTL	78 working days	
Thursday 8 April 2021	Email PoTTL to TPL. PoTTL RWE TPL Framework Agreement HoTs Updated (08.04.21)	PoTTL issuing v2 HOTs to TPL	6 working days	
Tuesday 13 April 2021	All parties call	Discussing HOTs	-	-
Wednesday 14 April 2021	PoTTL RWE TPL Framework Agreement HoTs Updated (13.04.21)	BS issued v3 HOTs to PM		1 working day
Wednesday 5 May 2021	PoTTL TPL Framework Agreement HoTs Updated - PM and WM comments - 05 May..	PM issued v4 HOTs to BS	15 working days	
Friday 7 May 2021	PoTTL TPL Framework Agreement HoTs Updated - PM and WM comments - 05 May..	BS issued v5 HOTs to PM		2 working days
Friday 21 May 2021	PoTTL TPL Framework Agreement HoTs Outstanding Points v2(123722047.1)	PM issued v6 HOTs to BS	10 working days	
Wednesday 2 June 2021	Correspondence	BS providing comments on v6 HOTs		8 working days
Thursday 3 June 2021	PoTTL TPL Framework Agreement HoTs 03.06.21 (124001748.1)	PM issued v7 HOTs to BS	1 working day	

Friday 4 June 2021	Correspondence	BS providing comments by email		1 working day
Wednesday 9 June 2021	Correspondence	PM providing comments by email	3 working days	
Monday 14 June 2021	Correspondence	BS providing comments by email		3 working days
Wednesday 16 June 2021	PoTLL TPL Framework Agreement HoTs 03.06.21 (124001748.1)	BS issuing v8 HOTs to PM and WM		5 working days
Wednesday 23 June 2021	Correspondence	Lawyers call discussing v8 HOTs	-	-
Thursday 24 June 2021	Correspondence	BS providing comments by email		1 working day
Monday 5 July 2021	Correspondence	Lawyers call discussing v8 HOTs	7 working days	
Monday 12 July 2021	Heads of Terms (with draft plans) 12.7.21 4160-0257-7200	PM issuing v9 HOTs to BS	5 working days	
Tuesday 13 July 2021	Heads of Terms (with draft plans) 12.7.21 4160-0257-7200	BS issuing v10 HOTs to WM		1 working day
Thursday 15 July 2021	WORK_41764464_1_Heads of Terms (with draft plans) 15.7.21 WM and PM amends clean; submitted 4160-0257-7200 (002) 4123-4986-5264 v.1(125055535.1) 4139-3976-~	WM issuing v11 HOTs to BS	2 working days	
Thursday 22 July 2021	Correspondence	Lawyers call discussing v11 HOTs		
Friday 23 July 2021	WORK_41764464_1_Heads of Terms (with draft plans) 22.7.2021 4158-0342-2768 v.1 PM(125277686.1) RECEIVED BY BS 23.07.21	WM issuing v12 HOTs to BS	1 working day	
Tuesday 27 July 2021	Heads of Terms (with draft plans) 22.7.2021 4158-0342-2768 v.1 PM(125277686.1) RECEIVED BY BS 23.07.21	BS issuing v13 HOTs to WM		4 working days
Thursday 29 July 2021	Heads of terms. WM and PM amendments 29.7.2021 4133-6090-1680 [1]	WM issuing v14 HOTs to BS	2 working days	
Friday 30 July 2021	Correspondence	Lawyers call discussing v14 HOTs		-
Thursday 5 August 2021	Heads of terms. WM and PM amendments Clean Submitted 5.8..2021 4133-6090-1680 1 (003) 4126-5869-0864 [1]	WM issuing v14 HOTs to BS	4 working days	



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