
RWE Generation UK plc

TILBURY 2 Examination – TR030003

Submission of Comments on behalf of Interested Party RWE Generation UK plc

**Submitted at Deadline 6
3 August 2018**

1. **Background**

1.1 This submission comprises the comments of RWE Generation UK PLC ("RWE") submitted at Deadline 6 in accordance with the timetable at Annex C of the Examining Authority's Rule 8 letter dated 26 February 2018. Comments are submitted in respect of the following:

1.1.1 Comments on Applicant's revised draft Development Consent Order (revision 4) (dDCO); and

1.1.2 Comments on information submitted by parties at Deadline 5.

2. **Applicant's draft DCO 'Revision 4'**

Article 3:

Disapplication of legislation

2.1 As confirmed at Deadline 5 RWE is largely content with the operation of Article 3 which now preserves its existing River Works Licence ('RWL') granted under s66 (1) (a) of the Port of London Authority Act 1968 ('the 1968 Act') which RWE holds in respect of the 'B station' intake structures.

2.2 RWE's proposed amendments to Article 3 at Deadline 5 have been addressed by the Applicant within Revision 4 of the dDCO, specifically in respect of Article 3 (7) being limited to the Applicant's statutory function as Harbour Authority and in respect of the definition of the 'B station' intake structures in Article 3 (13).

2.3 However, RWE's satisfaction with Article 3 still remains subject to proposed amendments to the protective provision being incorporated within the final DCO (see paragraphs 2.6.1 – 2.6.6 below).

Schedule 10 Part 10:

Protective Provision for the protection of RWE Generation UK plc

2.4 On 26 June ahead of the DCO hearing RWE submitted to the Examination an updated version of the protective provision. This was re-submitted for clarity at Deadline 5. At Deadline 5 the Applicant provided the 'Revision 4' dDCO which incorporated a further version of the protective provision but which did not address all of RWE's proposed amendments.

2.5 As part of its Deadline 6 submission RWE is providing to the ExA a clean copy of the protective provision it is seeking together with a comparative document showing the differences between this and the document contained in the Applicant's Revision 4 dDCO. These documents are included at Annex A to this submission. For the avoidance of doubt RWE's position has not changed beyond Deadline 5.

2.6 RWE asks the ExA to consider that the amendments being sought by RWE are reflected in the made DCO for the following reasons:

2.6.1 Paragraph 129 (10) of the comparative is self-explanatory and requires the Port to act reasonably in the exercise of powers granted to it as referred to in sub paragraphs (1) – (9).

2.6.2 In paragraph 131 of the comparative, RWE is seeking an indemnity in the same terms offered to other statutory undertakers within Schedule 10 (paragraph 10 of Part 1 of Schedule 10). Whilst there is dispute between RWE and the Applicant as to whether RWE are currently a statutory undertaker, as a matter of practicality it is not disputed that RWE will be a statutory undertaker once they are operating a power station on their retained land. Given that this is acknowledged by the Applicant and indeed was the purpose underlying the rights reserved to RWE in the Jetty Asset Transfer, RWE does not believe that there is

any reasonable basis for not extending the same protection to RWE's existing apparatus if it is used for that purpose. The Applicant has sought to argue that it is not appropriate to protect RWE's future project in the Tilbury 2 DCO but that argument overlooks the reality that the provision is for the protection of existing apparatus being used for a purpose expressly contemplated by an existing arrangement which the Applicant is seeking to interfere with using powers under its DCO.

- 2.6.3 The protection provided to RWE in paragraph 132 is two-fold: it provides reassurance to RWE in that it can exercise rights it already has under the existing RWL and, in the event the Applicant acquires a proprietary interest in the River Thames, that the Applicant will grant such rights to RWE as necessary to ensure it is in the same position with regard to the existing RWL engaging with the provision of Article 3(8) and 3(9). This amend addresses the point raised by the PLA at Deadline 6 with regard to RWE's existing apparatus.
- 2.6.4 The inclusion of paragraph 137 is to provide protection to RWE in respect of any potential future dispute with regard to the ability of RWE to move abnormal loads to the proposed TEC site. Although the Applicant has confirmed that it is not seeking powers to interfere with RWE's rights and interests through the DCO that do not relate to the Order Land, RWE has a right of way to the proposed TEC site via Fort Road "at all times and for all purposes". Whilst those rights are granted subject to "lift and shift" provisions in the related land transfer, the powers contained within Article 12 of the draft DCO and shown on Sheet 2 of the Rights of Way and Access Plan propose a stopping up of RWE's existing private means of access and its replacement with an access which passes under the proposed Fort Road bridge (Work No.10) to a point joining the proposed A1089 St Andrews Road as described in Part 3 of Schedule 4 of the dDCO. The Applicant has agreed to construct Work No. 10 to allow clearance of at least 6m, but this would still act as a constraint on the ability of RWE to move abnormal loads.
- 2.6.5 Paragraph 138 reflects the fact that RWE remains concerned with regard to potential for dust emissions from the Tilbury 2 development impacting upon the future operation of the TEC. The inclusion of this paragraph requires nothing beyond that already required by the Applicant's Operational Management Plan.
- 2.6.6 Paragraph 141 has been inserted to clarify that the Applicant will not interfere with RWE's rights under the Jetty Asset Transfer other than as set out in the protective provision.

Eversheds Sutherland (International) LLP

ANNEX A

CLEAN COPY OF RWE'S PROPOSED PROTECTIVE PROVISION

PART 10

FOR THE PROTECTION OF RWE GENERATION UK PLC

125. 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 Company and RWE Generation UK plc.

126. In this Part of this Schedule—

“alternative apparatus” means any apparatus, plant or equipment installed by RWE within the extended port limits—

- (a) to replace or perform substantially the same function as the existing apparatus; or
- (b) otherwise in connection with the construction of any power station by RWE on land adjacent to the Order limits,

to the extent that the apparatus referred to in either case is proposed to be within the area hatched [in red] on sheet no. 3 of the works plans;

“the existing apparatus” means the former Tilbury B power station cold water intake culverts and cold water intake structures, to the extent that they are for the time being owned by RWE, as shown on sheet 3 of the works plans and as more particularly defined as the "Transferor's Jetty Fixtures" in the jetty asset transfer;

“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;

“the jetty” means the existing jetty superstructure shown shaded blue on sheet 3 of the works plans;

“the jetty asset transfer” means an agreement for the transfer of the jetty from RWE to the Company dated 31 March 2017;

“the land access” means access by RWE to the existing apparatus by passing over the jetty in accordance with the jetty asset transfer, or in such other manner as may be agreed with the Company;

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

“the river access” means access by RWE to the existing apparatus by use of the river Thames within the extended port limits; and

“RWE” means RWE Generation UK Plc, company number 03892782 of Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, SN5 6PB or any of its entities or successor entities and includes any assignee of the jetty asset transfer.

Existing apparatus

127. This Order does not authorise the acquisition of any of the existing apparatus by the Company, except with RWE’s agreement.

128. The authorised development must be carried out, operated and maintained so as not to damage, interfere with, move or destroy the existing apparatus except with RWE’s agreement.

129.—(1) If, for the purpose of constructing any works comprised in the authorised development the Company requires the ability temporarily to interfere with the land access or the river access, it must, except in emergencies, give to RWE 14 days’ advance written notice of that requirement, together with a plan of the works proposed and a date by when the temporary interference will end.

(2) If, for the purpose of maintaining any works comprised in the authorised development the Company requires the ability temporarily to interfere with the land access or the river access, it must, except in emergencies, give to RWE 28 days’ advance written notice of that requirement, together with a plan of the works proposed and a date by when the temporary interference will end.

(3) The Company must end the temporary interference with the land access or the river access on the date given pursuant to sub-paragraph (1) or sub-paragraph (2) unless otherwise agreed in writing between RWE and the Company.

(4) Those works must be executed in accordance with the plan submitted under sub-paragraph (1) or sub-paragraph (2) and in accordance with such reasonable requirements as may be made by RWE for the protection of RWE's access to the existing apparatus.

(5) At all times during execution of those works RWE must be afforded by the Company sufficient emergency access to the existing apparatus.

(6) Any requirements made by RWE under sub-paragraph (4) must be made within a period of 7 days beginning with the date on which a plan under sub-paragraph (4) is submitted to it and within a period of 14 days beginning with the date on which a plan under sub-paragraph (2) is submitted to it.

(7) Nothing in this paragraph precludes the Company from submitting at any time or from time to time, but in no case less than 14 days before commencing the execution of any works, a new plan instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(8) The Company is not required to comply with sub-paragraph (1) or sub-paragraph (2) in emergencies but in those circumstances it must give to RWE notice and a plan of the works concerned as soon as reasonably practicable and the Company must comply with sub-paragraph (4) in so far as is reasonably practicable in the circumstances.

(9) Any proposed temporary interference with the land access or the river access by the Company after 1 June 2021 must have reasonable regard to any need for RWE to exercise the land access or river access to undertake works to the existing apparatus as part of the development of a power station on land adjacent to the Order limits and adopt any reasonable requirements that may be made by RWE to ensure that any temporary interference does not prejudice RWE's development programme for a power station on land adjacent to the Order limits.

(10) The Company shall act reasonably in the exercise of its powers under sub-paragraphs (1) to (9) above.

130.—(1) Subject to sub-paragraph (2) and paragraph (131), if by reason or in consequence of the construction, operation or maintenance of the authorised development any damage is caused to the existing apparatus (other than any part of that apparatus whose repair is not reasonably necessary in view of its intended removal by RWE) the Company must bear and pay the cost reasonably incurred by RWE in making good such damage.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage to the extent that it is attributable to the act, neglect or default of RWE or its officers, servants, contractors or agents

131.—(1) In the event that the existing apparatus is used in connection with the operation of a power station by RWE on land adjacent to the Order Limits then subject to sub-paragraph (2) and (3), if by reason or in consequence of the construction, operation or maintenance of the authorised development any damage is caused to the existing apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal by RWE) or there is any interruption in any service provided by the existing apparatus, the Company must-

(a) bear and pay the cost reasonably incurred by RWE in making good such damage or restoring the service; and

(b) indemnify RWE against all reasonable claims, penalties, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from, or reasonably and properly incurred by RWE.

by reason or in consequence of any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of RWE its officers, servants, contractors or agents.

(3) RWE must give the Company reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the Company which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

132.—(1) If the Company has or acquires at any point in time a proprietary interest in the parts of the river Thames situated within the extended port limits in respect of which RWE holds a licence granted by the PLA under Section 66 of the 1968 Act relating to the existing apparatus the Company will for no consideration grant to RWE such rights in, under or over the land concerned as are necessary to enable RWE to retain, use and maintain the apparatus for as long as the licence subsists and in the absence of the grant of such rights the Company shall be deemed to have agreed for the purposes of Article 3(8) that the provisions of Section 66(1)(b) of the 1968 Act shall continue to apply for the benefit of RWE in relation to that licence.

(2) The Company shall not withhold its consent under Article 3(7) to any new licence proposed to be granted by the PLA under section 66 or 73 of the 1968 Act in so far as it relates to the existing apparatus nor require any modifications to works, or impose terms or conditions on it under Article 3(9) that are additional to the standard terms of such licences issued by the PLA

Alternative apparatus

133.—(1) RWE and the Company must use their reasonable endeavours to co-ordinate with each other on the timing and method of construction and maintenance of the authorised development and the construction, use and maintenance of any alternative apparatus by RWE, in the interests of health and safety and the efficient and economic—

- (a) construction of the authorised development; and
- (b) construction of any alternative apparatus.

134.—(1) In particular, the Company must consult with RWE prior to finalising the detailed design of Work No. 2 and will accommodate any reasonable requirements of RWE in relation to the detailed design or construction of Work No. 2 so as to accommodate any alternative apparatus, provided those requirements—

- (a) are made prior to the Company finalising the detailed design of Work No. 2;
- (b) would not be detrimental to the construction, operation or maintenance of the authorised development; and
- (c) RWE pays to the Company such additional reasonable and proper costs as the Company would incur in accommodating those requirements.

135.—(1) If and to the extent that any alternative apparatus to be placed in the parts of the river Thames situated within the extended port limits and in respect of which the Company has a or acquires at any point in time proprietary interest is licensed by the PLA under section 66 or 73 of the 1968 Act, the Company will for no consideration grant to RWE such rights in the land concerned as are necessary to enable RWE to retain, use and maintain the alternative apparatus for as long as the licence subsists.

Highway access

136. The Company must construct Work Nos. 4 and 10 so that they afford a clearance under Work No.10 of at least 6 metres.

137. At all times following the stopping up of the private means of access noted at Part 3 of Schedule 4 the Company must provide RWE with either an access capable of accommodating abnormal loads measuring up to 7m (height), 9m (width) and 40m (length) through the Port of Tilbury to a point east of Work No 10 on either the existing private means of access or new private means of access that is to be provided or such other means of transporting loads of that size from the Port of Tilbury to RWE's retained land.

Dust Management

138. The Company must, following the date on which a power station on the land adjacent to the Order Limits becomes operational, undertake dust monitoring at the power station site as one of the selected monitoring locations proposed in the operational management plan described in Schedule 11 and must provide the result of such monitoring to RWE within 7 days of them becoming available.

General

139. Any difference or dispute arising between the Company and RWE under this Part of this Schedule must, unless otherwise agreed in writing between the Company and RWE, be determined by arbitration in accordance with article 60 (arbitration) of this Order.

140. The Company and RWE must each act reasonably in connection with the implementation of this Part of this Schedule.

141. Except in so far as provided for in this Part of this Schedule this Order does not authorize any activity which would conflict with the terms of the jetty asset transfer

**COMPARITE SHOWING RWE'S PROTECTIVE PROVISION AGAINST REVISION 4 dDCO
PROTECTIVE PROVISION**

PART 10

FOR THE PROTECTION OF RWE GENERATION UK PLC

125. 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 Company and RWE Generation UK plc.

126. In this Part of this Schedule—

“alternative apparatus” means any apparatus, plant or equipment installed by RWE within the extended port limits—

- (a) to replace or perform substantially the same function as the existing apparatus; or
- (b) otherwise in connection with the construction of any power station by RWE on land adjacent to the Order limits,

to the extent that the apparatus referred to in either case is proposed to be within the area hatched [in red] on sheet no. 3 of the works plans;

“the existing apparatus” means the former Tilbury B power station cold water intake culverts and cold water intake structures, to the extent that they are for the time being owned by RWE, as shown on sheet 3 of the works plans and as more particularly defined as the "Transferor's Jetty Fixtures" in the jetty asset transfer;

“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;

“the jetty” means the existing jetty superstructure shown shaded blue on sheet 3 of the works plans;

“the jetty asset transfer” means an agreement for the transfer of the jetty from RWE to the Company dated 31 March 2017;

“the land access” means access by RWE to the existing apparatus by passing over the jetty in accordance with the jetty asset transfer, or in such other manner as may be agreed with the Company;

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

“the river access” means access by RWE to the existing apparatus by use of the river Thames within the extended port limits; and

“RWE” means RWE Generation UK Plc, company number 03892782 of Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, SN5 6PB or any of its entities or successor entities and includes any assignee of the jetty asset transfer.

Existing apparatus

127. This Order does not authorise the acquisition of any of the existing apparatus by the Company, except with RWE’s agreement.

128. The authorised development must be carried out, operated and maintained so as not to damage, interfere with, move or destroy the existing apparatus except with RWE’s agreement.

129.—(1) If, for the purpose of constructing any works comprised in the authorised development the Company requires the ability temporarily to interfere with the land access or the river access, it must, except in emergencies, give to RWE 14 days’ advance written notice of that requirement, together with a plan of the works proposed and a date by when the temporary interference will end.

(2) If, for the purpose of maintaining any works comprised in the authorised development the Company requires the ability temporarily to interfere with the land access or the river access, it must, except in emergencies, give to RWE 28 days’ advance written notice of that requirement, together with a plan of the works proposed and a date by when the temporary interference will end.

(3) The Company must end the temporary interference with the land access or the river access on the date given pursuant to sub-paragraph (1) or sub-paragraph (2) unless otherwise agreed in writing between RWE and the Company.

(4) Those works must be executed in accordance with the plan submitted under sub-paragraph (1) or sub-paragraph (2) and in accordance with such reasonable requirements as may be made by RWE for the protection of RWE's access to the existing apparatus.

(5) At all times during execution of those works RWE must be afforded by the Company sufficient emergency access to the existing apparatus.

(6) Any requirements made by RWE under sub-paragraph (4) must be made within a period of 7 days beginning with the date on which a plan under sub-paragraph (4) is submitted to it and within a period of 14 days beginning with the date on which a plan under sub-paragraph (2) is submitted to it.

(7) Nothing in this paragraph precludes the Company from submitting at any time or from time to time, but in no case less than 14 days before commencing the execution of any works, a new plan instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(8) The Company is not required to comply with sub-paragraph (1) or sub-paragraph (2) in emergencies but in those circumstances it must give to RWE notice and a plan of the works concerned as soon as reasonably practicable and the Company must comply with sub-paragraph (4) in so far as is reasonably practicable in the circumstances.

(9) Any proposed temporary interference with the land access or the river access by the Company after 1 June 2021 must have reasonable regard to any need for RWE to exercise the land access or river access to undertake works to the existing apparatus as part of the development of a power station on land adjacent to the Order limits and adopt any reasonable requirements that may be made by RWE to ensure that any temporary interference does not prejudice RWE's development programme for a power station on land adjacent to the Order limits ~~provided that those requirements must not materially interfere with the unloading and loading of vessels within the extended port limits.~~

(10) The Company shall act reasonably in the exercise of its powers under sub-paragraphs (1) to (9) above.

130.—(1) Subject to sub-paragraph (2) and paragraph (131), if by reason or in consequence of the construction, operation or maintenance of the authorised development any damage is caused to the existing apparatus (other than any part of that apparatus whose repair is not reasonably necessary in view of its intended removal by RWE) the Company must bear and pay the cost reasonably incurred by RWE in making good such damage.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage to the extent that it is attributable to the act, neglect or default of RWE or its officers, servants, contractors or agents

131.—(1) In the event that the existing apparatus is used in connection with the operation of a power station by RWE on land adjacent to the Order Limits then subject to sub-paragraph (2) and (3), if by reason or in consequence of the construction, operation or maintenance of the authorised development any damage is caused to the existing apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal by RWE) or there is any interruption in any service provided by the existing apparatus, the Company must-

(a) bear and pay the cost reasonably incurred by RWE in making good such damage or restoring the service; and

(b) indemnify RWE against all reasonable claims, penalties, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from, or reasonably and properly incurred by RWE.

by reason or in consequence of any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of RWE its officers, servants, contractors or agents.

(3) RWE must give the Company reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the Company which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

132.—(1) If the Company has or acquires at any point in time a proprietary interest in the parts of the river Thames situated within the extended port limits in respect of which RWE holds a licence granted by the PLA under Section 66 of the 1968 Act relating to the existing apparatus the Company will for no consideration grant to RWE such rights in, under or over the land concerned as are necessary to enable RWE to retain, use and maintain the apparatus for as long as the licence subsists and in the absence of the grant of such rights the Company shall be deemed to have agreed for the purposes of Article 3(8) that the provisions of Section 66(1)(b) of the 1968 Act shall continue to apply for the benefit of RWE in relation to that licence.

(2) The Company shall not withhold its consent under Article 3(7) to any new licence proposed to be granted by the PLA under section 66 or 73 of the 1968 Act in so far as it relates to the existing apparatus nor require any modifications to works, or impose terms or conditions on it under Article 3(9) that are additional to the standard terms of such licences issued by the PLA

Alternative apparatus

~~131~~133.—(1) RWE and the Company must use their reasonable endeavours to co-ordinate with each other on the timing and method of construction and maintenance of the authorised development and the construction, use and maintenance of any alternative apparatus by RWE, in the interests of health and safety and the efficient and economic—

- (a) construction of the authorised development; and
- (b) construction of any alternative apparatus.

~~132~~134.—(1) In particular, the Company must consult with RWE prior to finalising the detailed design of Work No. 2 and will accommodate any reasonable requirements of RWE in relation to the detailed design or construction of Work No. 2 so as to accommodate any alternative apparatus, provided those requirements—

- (a) are made prior to the Company finalising the detailed design of Work No. 2;
- (b) would not be detrimental to the construction, operation or maintenance of the authorised development; and
- (c) RWE pays to the Company such additional reasonable and proper costs as the Company would incur in accommodating those requirements.

~~133~~135.—(1) If and to the extent that any alternative apparatus to be placed in the parts of the river Thames situated within the extended port limits and in respect of which the Company has a or acquires at any point in time proprietary interest is licensed by the PLA under section 66 or 73 of the 1968 Act, the Company will for no consideration grant to RWE such rights in the land concerned as are necessary to enable RWE to retain, use and maintain the alternative apparatus for as long as the licence subsists.

Highway access

~~134~~136. The Company must construct Work Nos. 4 and 10 so that they afford a clearance under Work No.10 of at least 6 metres.

137

. At all times following the stopping up of the private means of access noted at Part 3 of Schedule 4 the Company must provide RWE with either an access capable of accommodating abnormal loads measuring up to 7m (height), 9m (width) and 40m (length) through the Port of Tilbury to a point east of Work No 10

on either the existing private means of access or new private means of access that is to be provided or such other means of transporting loads of that size from the Port of Tilbury to RWE's retained land.

Dust Management

138. The Company must, following the date on which a power station on the land adjacent to the Order Limits becomes operational, undertake dust monitoring at the power station site as one of the selected monitoring locations proposed in the operational management plan described in Schedule 11 and must provide the result of such monitoring to RWE within 7 days of them becoming available.

General

~~135~~**139.** Any difference or dispute arising between the Company and RWE under this Part of this Schedule must, unless otherwise agreed in writing between the Company and RWE, be determined by arbitration in accordance with article 60 (arbitration) of this Order.

~~136. Subject to the provisions of this Part of this Schedule, RWE's rights and interests under the jetty asset transfer continue to subsist and to have effect.~~

140

~~137.~~ The Company and RWE must each act reasonably in connection with the implementation of this Part of this Schedule.

141. Except in so far as provided for in this Part of this Schedule this Order does not authorize any activity which would conflict with the terms of the jetty asset transfer