
RWE Generation UK plc

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TILBURY 2 Examination – TR030003

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

**Submitted at Deadline 7
16 August 2018**

1. **Background**

1.1 This submission comprises the comments of RWE Generation UK PLC ("RWE") submitted at Deadline 7 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 5) (dDCO);
- 1.1.2 Comments on information submitted by parties at Deadline 6; and
- 1.1.3 Comments to address the ExA's question for RWE contained within its Rule 17 letter dated 7 August 2018

2. **Applicant's draft DCO 'Revision 5'**

Article 3:

Disapplication of legislation

- 2.1 As confirmed at Deadline 6 RWE is content with the operation of Article 3 in so far as it now preserves the existing River Works Licence ('RWL') granted under s66 (1) (a) of the Port of London Act 1968 ('the 1968 Act') which RWE holds in respect of the 'B station' intake structures by virtue of the provisions of Articles 3(2) and 3(3).
- 2.2 RWE had previously expressed concerns relating to the ability of the Applicant to veto the grant of any new or variations to RWLs pursuant to Article 3(7), the ability of the Applicant to prevent or ransom the ability to undertake works or enjoy the benefit of any RWL pursuant to Article 3(8), and the ability of the applicant to seek unduly restrictive conditions in providing its consent to the grant or variation of any RWL. The issue is of relevance to RWE since it may wish to use the B station intake structures, and/or locate new apparatus within the extended port limits in order to facilitate the development of its Tilbury Energy Centre project or of any other future electricity statutory undertaking.
- 2.3 RWE can confirm that it is satisfied with the wording of Article 3 subject to the inclusion of paragraphs 133 and 136 of RWE's proposed protective provisions in the Order (see **Appendix 2**) to address the concerns noted at paragraph 2.2 above. Progress has been made in agreeing a form of protective provision with the Applicant but where RWE requires additional protection over and above that offered by the Applicant in revision 5 of the dDCO these changes are shown tracked in the version of the protective provision attached at **Appendix 1** and an explanation for each of the changes is set out in the table below.
- 2.4 RWE emphasise that in the absence of these amendments to the protective provisions the terms of the draft DCO would unreasonably and unnecessarily prejudice the ability for RWE to bring forward the development of its Tilbury Energy Centre project and RWE would seek the deletion of Articles 3(7) to 3(10) of the dDCO to address its concerns.

Article 28

- 2.5 The Applicant has included an amendment in revision 5 of the dDCO changing "Order land" to "Order limits". The change was not explained in the Applicant's Deadline 6 "Explanation of Changes to the Draft Development Consent Order" but the consequence is to extend the Applicant's power to override rights to include rights over land within the Order Limits.
- 2.6 The Examining Authority is referred to RWE's previous objections to such a provision in relation to its rights secured over the Order limits but not relating to the Order land, and the Applicant's previous submissions at Deadline 2 (see the Applicant's "Response to the Written Representations, Local Impact Reports and Interested Parties' Responses to First Written Questions") confirmed that it has no intention of acquiring or interfering with such rights. Accordingly, the Applicant amended both Articles 27 and 28 in its revision 2 of the dDCO to give effect to that intention and RWE has relied upon that position being reflected in the dDCO throughout the examination. To revert to the original drafting of 'Order limits',

without drawing this to RWE's or the ExA's attention, is wholly inappropriate and disingenuous, particularly (as explained in RWE's written representation (REP1 - 087)) as this has potentially significant consequences for RWE and the ability to bring forward the Tilbury Energy Centre project.

- 2.7 RWE therefore insist that the reference to "Order land" is retained in Article 28. Alternatively, an express provision could be included within the protective provisions benefitting RWE preventing the Applicant from using its powers under Article 28 to interfere with RWE's rights. RWE has suggested wording in its version of the protective provision to address this.

Schedule 10 Part 10:

Protective Provision for the protection of RWE Generation UK plc

- 2.8 In response to Question 18 of the ExA's Rule 17 letter dated 7 August 2018 RWE confirms that it is content with the form of protective provision included at Schedule 10 Part 10 of the Applicant's Revision 5 dDCO with the exception of the further amendments set out and explained below and which are shown tracked in the version of the protective provision attached at **Appendix 1**
- 2.9 RWE has also provided to the Examination a clean copy of the protective provision incorporating its amendments at **Appendix 2**. It is essential for the protection of RWE and its statutory undertaking that the amendments are incorporated in the final version of the Order.
- 2.10 Furthermore, to assist the Examining Authority in understanding RWE's comments, a copy of the jetty asset transfer (as defined in the protective provision) is attached at **Appendix 3**. RWE would remind the Examining Authority that the jetty asset transfer was entered into by Applicant and RWE to transfer ownership of the jetty from RWE to the Applicant whilst (inter alia) reserving certain rights for the benefit of RWE relating to the future use of, and access for the purposes of carrying out maintenance, repair and/or upgrading the existing apparatus and undertaking other works. The Applicant has repeatedly stated in its submissions that it does not seek powers to acquire these rights (see for example the Applicant's response at Deadline 2 to RWE's written representation (REP1-087) in which it stated "no compulsory acquisition is proposed for these rights or infrastructure. As such, RWE's existing reserved rights will still subsist and the use of these DCO powers will still be subject to them" (PoTLL/T2/EX/60). This position was confirmed in the Applicant's written submission of its case presented at the Compulsory Acquisition Hearing on 27 June 2018 (PoTLL/T2/EX134) RWE notes that accordingly those rights have not been incorporated into the Book of Reference.
- 2.11 The amendments sought by RWE are as follows:

- 2.11.1 In paragraph 130(9) delete:

"provided that those requirements must not materially interfere with the unloading and loading of vessels within the extended port limits".

Reason:

Clauses 4.5.4 and 4.5.4 of the jetty asset transfer deal with the manner in which RWE should exercise the land rights and state:

Provided that in exercising such rights (and without compromising the Transferor's right to exercise such rights) the Transferor shall:

cause as little inconvenience and disruption to the Transferee's operations including cargo handling operations at the Jetty the Property and Phase 1 and (at the Jetty) the berthing of vessels and as little damage to the Jetty the Property and Phase 1 as reasonably possible and shall make good any damage caused to the reasonable satisfaction of the Transferee;

comply with all applicable laws and health and safety requirements the Jetty Licence and all reasonable site rules notified from time to time by the Transferee to the Transferor.

The proposed inclusion by the Applicant of the wording shown in paragraph 130 (9) which it is proposed by RWE to delete would impose a greater restriction on RWE than the rights contained in the jetty asset transfer. The Applicant agrees that those rights should subsist notwithstanding the provisions of the Order and therefore the wording should be deleted.

2.11.2 The addition of paragraph 132.

Reason:

RWE is seeking an indemnity in the same terms offered to other statutory undertakers within Schedule 10 (see for example, paragraph 10 of Part 1 of Schedule 10) in relation to its existing apparatus in the event that that apparatus is used as part of a power station. The Examining Authority will note that RWE is not seeking such an indemnity in respect of any alternative apparatus.

RWE acknowledges that there is a difference of opinion between RWE and the Applicant as to whether RWE are an existing statutory undertaker. As confirmed at Deadline 1 within the RWE written representation (REP01-87) RWE is a statutory undertaker for the purposes of the Planning Act 2008 by virtue of it having a s6 (1) (a) Electricity Act 1989 electricity generating licence.

It has never been disputed by the Applicant that RWE will be a statutory undertaker once they are operating a power station on retained land. Given this position, and that one of the purposes underlying the rights reserved to RWE in the Jetty Asset Transfer is to grant RWE the necessary rights to use the existing apparatus as part of a cooling system for a power station on its land, 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 intended use was clearly understood and contemplated by the Applicant. 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 and the powers which the Applicant is seeking under the DCO might interfere with.

2.11.3 The inclusion of the following wording at the end of paragraphs 133(2) and 136(1):

and will for no consideration grant such rights to RWE as are necessary to enable RWE to carry out dredging works in accordance with the terms of its licence

Reason:

The current wording proposed by the Applicant engages with the provisions of article 3(8) and ensures that the Applicant's consent is provided so as to confer on RWE the rights referred to in section 66(1)(b) of the 1968 Act in respect of any licence for works granted under s66. This ensures that the Applicant cannot prevent RWE from enjoying the benefits of the licence nor seek a landowner ransom before RWE may do so.

However, there are no such statutory rights associated with the enjoyment of a dredging licence granted under section 73 of the 1968 Act. Consequently, the consent of the landowner is required prior undertaking any licensed dredging. The wording is required to ensure that the Applicant is not able to frustrate works by refusing to grant the necessary rights or demanding a ransom payment in respect of their grant.

The additional wording should not be problematic since the Applicant has already accepted the principle in relation to licences granted under section 66 in its proposed wording.

2.11.4 The addition of paragraph 138:

Reason:

As explained in its previous submissions, RWE has an existing right of way to the proposed TEC site via Fort Road "at all times and for all purposes" reserved through the transfers effecting the sale of part of the former Tilbury Power Station site for the benefit of RWE's retained land. The Applicant has confirmed that it is not seeking any powers under the dDCO to acquire or interfere with that right and has previously proposed amendments to articles 27 and 28 to give effect to that submission (noting our comments on the latest revisions to Article 28 above).

Whilst that right is 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 which RWE has indicated may be necessary for the construction of TEC. At present, regardless of constraints on the wider highway network further afield, such loads could be landed at the Port of Tilbury and moved to RWE's land without constraint.

However, RWE is mindful of the Applicant's Deadline 6 submission ("Responses to Interested Parties' Deadline 5 submissions" (pages 18 & 19)) and has proposed amendments which preserve RWE's right but do not insist on the Work No 10 being altered to accommodate such loads. This would enable the Applicant to identify such other means such as alternative routes through its land, or alternative mean over moving abnormal loads from the port to RWE's land this is an interference with RWE's rights which is not authorised by the dDCO.

2.11.5 The addition of paragraph 139:

Reason:

RWE has highlighted concerns throughout the examination with regard to the potential for dust emissions from the Tilbury 2 development to impact upon the future operation of the TEC. RWE can design its TEC scheme to address this concern provided the Applicant complies with emissions standards secured by the monitoring provisions as set out in section 7 of the Applicant's Operational Management Plan. RWE note the Applicant's response to paragraph 2.14 of its Deadline 5 submission and the changes made to the Operational Management Plan at Deadline 6 in the section titled 'Monitoring Locations' which seek to further demonstrate that dust monitoring and mitigation will be adaptive to the on-going operations of the Port and its surroundings, but reinforce the point that the inclusion of paragraph 139 in the protective provision requires nothing beyond that already required by the Applicant's Operational Management Plan.

In response to the Applicant's Deadline 6 submission, RWE is not asking for monitoring to take place on its site if TEC is not consented or built. Its proposed wording is clear that the monitoring obligation would only apply "following the date on which a power station...becomes operational"

2.11.6 The inclusion of the following wording at the end of paragraph 141:

and except in so far as provided for in this Part of this Schedule this Order does not authorise any activity which would conflict with such rights and interests

The additional wording clarifies that the Applicant will not interfere with RWE's rights under the Jetty Asset Transfer other than as set out in the protective provision. RWE are reassured by the Applicant's insertion of paragraph 141 in its Revision 5 dDCO. However, whilst the rights under the jetty asset transfer may still subsist they could still be interfered with beyond the extent otherwise specified in the protective provision under authority of article 28. The Applicant has accepted that the relationship between itself and RWE should be consistent with the jetty asset transfer and the additional wording seeks to ensure that is the case.

2.11.7 The inclusion of paragraph 143:

Reason:

This additional wording is proposed to address RWE's comments in respect of article 28 above in the event that the Examining Authority is not minded to amend the DCO to reinstate the reference to Order Land. It mirrors the wording in paragraph 33 of the protective provision in favour of the PLA.

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