

RWE GENERATION UK PLC

THURROCK FLEXIBLE GENERATION PLANT DEVELOPMENT CONSENT ORDER APPLICATION

SUMMARY OF HEARING SUBMISSIONS

1. ISSUE SPECIFIC HEARING 1 – TRANSPORTATION – 27 APRIL 2021

Agenda Item 3 – Delivery of Abnormal Indivisible Loads

1.1 RWE's Position in relation to the Causeway and Impact on Future Development

- 1.1.1 Despite the power station having been demolished, this land remains an important asset for RWE: it is operational land which is held by RWE for energy generation purposes in accordance with RWE's electricity generation licence granted pursuant to section 6(1) of the Electricity Act 1989. This is a strategic site which is well located for power generation development, with access to an NGET substation, gas supply and the river.
- 1.1.2 Further, RWE needs to be cognisant of the recently made Freeport allocation and the opportunities which this may allow for future development in co-ordination with its neighbours, POTLL.
- 1.1.3 The proposed causeway would have a detrimental impact on any such proposed future development. It is particularly important for RWE to have unconstrained access to the river as it allows for cooling operations which is essential for power related development. The proposed location of the causeway would prevent this.
- 1.1.4 In summary, RWE view this land as a power generation site, it is considering its options for such development, and it needs to protect its ability to do so.
- 1.1.5 Whilst the change request for the alternative AIL route is not to be examined at this round of hearings, RWE's position, as set out in the Joint Position Statement dated 26 April, is that the causeway and its access, and the powers for the same, should be removed from the dDCO. The proposed draft requirement 18 in the dDCO with a review mechanism after 5 years is not appropriate and would mean at least 5 years' uncertainty for RWE as to whether the causeway will be delivered and/or retained.

1.2 Operational Land

- 1.2.1 The Examining Authority ("EXA") asked what the significance of the land being 'operational land' is.
- 1.2.2 It was clarified that the land being 'operational land' reinforces the position that sections 127 and section 138 of the Planning Act 2008 ("PA 2008") are engaged which bring in extra tests which need to be met as part of the decision making process to ensure the land and apparatus of statutory undertakers is adequately protected.
- 1.2.3 It was further stated that whether the land is 'operational land' is a question of fact and this designation brings with it certain benefits, for example, certain categories of development can be progressed through permitted development rights.
- 1.2.4 Operational land is in short supply and cannot be easily replicated. RWE would therefore not divest itself of this land without good reason.
- 1.2.5 It was agreed that the operation of s.127/138 PA 2008 would be discussed further at the Compulsory Acquisition Hearing.

1.3 **Appropriate Controls in the DCO in relation to the Construction Access**

- 1.3.1 Whilst RWE recognises that the Applicant needs to ensure that the land heave to the east of the National Grid compound does not prevent that limb of the construction access from being used, RWE seeks suitable controls in the Development Consent Order regarding the mechanism by which it will be decided which route can be used, and to ensure that the Applicant would not have the ability to acquire compulsorily the land required for both of the alternative construction access routes.
- 1.3.2 The Applicant is requested to propose suitable drafting in this respect for RWE's consideration.

2. **COMPULSORY ACQUISITION HEARING- 28 APRIL 2021**

Agenda Item 3 – the objections to compulsory acquisition and temporary possession

- 2.1 RWE welcomed the Applicant's acceptance that bespoke protective provisions are required. It was confirmed that good progress is being made in relation to protective provisions and also for the heads of terms for a private treaty agreement for the rights required over its land.
- 2.2 It is expected that an agreed position will be reached.
- 2.3 RWE's desired outcome is that the compulsory powers over its land will be removed from the Order.

Agenda Item 5 – Statutory Undertakers – s127 and 138 PA 2008

- 2.4 The ExA returned to the question of 'operational land' which has been raised at the Transport ISH and queried whether there were any particular plots which RWE considered to be operational and which RWE were especially concerned about the Applicant having compulsory acquisition powers over.
- 2.5 It was confirmed that RWE' objects to compulsory acquisition over any of its land, all of which is held for the purposes of its undertaking and therefore engages section 127 of the Planning Act 2008. Furthermore, the entirety of RWE's site is operational land for the purposes of section 263 of the Town and Country Planning Act 1990 ("TCPA 1990"). It was noted that the wording of section 263 of the TCPA 1990 (see further below) is similar to that in section 127 of the PA 2008, and that both concern interests in land which are held for the purposes of the undertaking.
- 2.6 For the purposes of establishing whether land is held for the purposes of RWE's undertaking, it is not considered to be appropriate to examine particular land parcels at a granular level. The fact that the site is not *currently* being used does not mean that it is not operational land or that it is not held by RWE for the purposes of its undertaking. If however RWE were holding the land for a totally different purpose, such as office or retail uses, then that might take it out of the sphere of section 127, but that is not the case here. The land in question is held for power related reasons which is totally in keeping with RWE's undertaking. RWE retains the land as a strategic power generation site and a freehold interest is held in the land for this purpose.
- 2.7 The Applicant subsequently confirmed that it did not dispute that RWE's land was operational and/or was held for the purposes of its undertaking. Where the parties differ is whether the land and/or rights sought from RWE can be compulsorily acquired and not replaced without serious detriment to the carrying on of RWE's undertaking.
- 2.8 It was explained that RWE's particular area of concern in relation to detriment being caused to its undertaking is the area of the site fronting onto the river (plot 04/02) where the

causeway is proposed to be located, for which the Applicant seeks powers to compulsorily acquire the freehold of this land from RWE. This land is essential to allow for water intake and cooling for power related development. By virtue of its location and the function which it can perform, this land could not be purchased and replaced by other land without serious detriment to RWE's undertaking. This point was illustrated by the plan that forms part of REP2-095 which was shared on the screen. This area of land is particularly suitable for supporting energy generation and therefore RWE are opposed to the proposed causeway and the compulsory acquisition of land and rights for it.

- 2.9 Nor can the new rights over the site which the Applicant proposes to acquire be acquired compulsorily without serious detriment to RWE's undertaking. This includes the new access rights sought over an existing internal access road. The imposition of inflexible rights across its operational land would severely constrain RWE's ability to manage its own land and bring forward development. Further, RWE has obligations to its tenant National Grid.
- 2.10 RWE also notes that the Applicant currently seeks to retain a number of alternatives on the table, each of which are accompanied by proposed compulsory acquisition powers, namely:
- 2.10.1 the current causeway and access route, which is an alternative to the route included in the recent change request; and
- 2.10.2 the two construction access which have been included as a result of the land heave issue.
- 2.11 RWE is concerned to ensure that the Applicant does not have an unfettered ability to use compulsory acquisition powers in respect of all these alternative options.
- 2.12 The ExA asked whether the protective provisions being negotiated includes a provision that land and rights of RWE cannot be acquired without consent.
- 2.13 It was confirmed that the draft protective provisions as proposed by RWE at Deadline 2 do include such provision but that these have not been agreed and it is understood that the Applicant requires a legal agreement to be in place for the land rights before this provision is accepted.
- 2.14 The ExA questioned whether if compulsory acquisition powers were granted but the protective provisions in the DCO required consent to be given by RWE before these powers were exercised, would this help to deal with the concerns?
- 2.15 It was confirmed that this would go some way to alleviating RWE's concerns, given the ability of protective provisions to provide for collaboration and the mitigation of the impacts of a scheme on apparatus and land, but that protective provisions could not deal with the in-principle issue as to whether there is a compelling case in the public interest for the authorisation of compulsory acquisition powers in the first place. RWE has an in-principle objection to the inclusion of such powers over its land.
- 2.16 For such powers to be granted, the Applicant must demonstrate a compelling case in the public interest and must also show that these powers are necessary for the scheme, justified and proportionate.
- 2.17 RWE does not accept that these tests are met in circumstances where:
- 2.17.1 alternatives to compulsory acquisition exist;
- 2.17.2 multiple alternative options and associated compulsory acquisition powers are being promoted; or
- 2.17.3 the tests in section 127 of the PA 2008 are not met.
- 2.18 The existence of protective provisions does not remedy a situation in which the compulsory acquisition powers should not have been granted.

- 2.19 If the Secretary of State is against RWE on these points and decides to grant the compulsory acquisition powers, then RWE would however need to fall back on the protection in the protective provisions.
- 2.20 In summary, RWE does not believe that compulsory acquisition powers are justified over its land.
3. **Post Hearing Informative in relation to s127 Planning Act 2008 and Operational Land**
- 3.1 Given the focus of some discussion in both hearings on the issue of 'operational land' and the application of section 127 Planning Act 2008, this section has been included to assist with the context for the discussions summarised above.
- 3.2 Section 263 Town and Country Planning Act 1990 provides that:
- "(1) Subject to the following provisions of this section and to section 264, in this Act "operational land" means, in relation to statutory undertakers—*
- (a) land which is used for the purpose of carrying on their undertaking; and*
- (b) land in which an interest is held for that purpose.*
- (2) Paragraphs (a) and (b) of subsection (1) do not include land which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings."*
- 3.3 Commentary in P263.04 of the Planning Encyclopaedia explains, in relation to the above tests that:
- "Subsection (1) defines two categories of operational land. Land may be operational land if it is used for the purposes of the undertaking concerned, or if an interest is held in it for that purpose. Thus it includes land which the undertaker now owns for future operational use.*
- Neither category includes land which "is comparable rather with land in general" than with land used for statutory undertakings (subs.(2)). This strangely worded exclusion appears to be intended to rule out premises such as shops, offices, showrooms and dwelling-houses owned by a statutory undertaker, even if used in some way for the undertaking.*
- It is said to be in each case a question of fact: R. v Minister of Fuel and Power Ex p. Warwickshire County Council [1957] 1 W.L.R. 861; 8 P. & C.R. 305. Some information as to the meaning of the term in relation to the land of railway undertakers may be gathered from East Barnet Urban District Council v British Transport Commission [1962] 2 Q.B. 484; 13 P. & C.R. 127. Land held purely for investment is clearly not operational land."*
- 3.4 In *R. v Minister of Fuel and Power Ex p. Warwickshire County Council [1957] 1 W.L.R. 861; 8 P. & C.R. 305* it was held that it was not necessary for a statutory undertaker to begin operations on land before that land could be 'operational land' and whether the land was comparable in with land in general rather than with the land used for the purposes of the statutory undertaking is a question of fact.
- 3.5 Section 127 of the Planning Act 2008 applies if:
- (a) the land has been acquired by statutory undertakers for the purposes of their undertaking,*
- (b) a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*

(c) as a result of the representation the Secretary of State is satisfied that—

(i) the land is used for the purposes of carrying on the statutory undertakers' undertaking, or

(ii) an interest in the land is held for those purposes.

3.6 Where these tests are met, compulsory acquisition over this land can only be authorised if the nature and situation of the land are such that:

(a) it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or

(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

3.7 It can be seen that Section 127 Planning Act 2008 uses similar wording to that in section 263 Town and Country Planning Act 1990 and it is submitted that similar principles above are therefore relevant to identifying whether land is held for the purposes of carrying on a statutory undertaker's undertaking. The legislation requires an interest in the land to be held for the purposes of the undertaking and the test is not contingent on any particular current use of the land.

3.8 RWE has used the land in question for the purposes of power generation since the 1950s and continues to hold an interest in the land for this purpose.

3.9 RWE welcomes the Applicant's confirmation at the Compulsory Acquisition Hearing that it agrees the tests in section 127 are engaged in relation to RWE's land given the site's long history for power generation.