

Thurrock Power Ltd Comments on RWE's Deadline 4 Submission

Deadline 5



1 INTRODUCTION

- 1.1 This document sets out the Applicant's response to RWE's deadline 4 submission on serious detriment (REP4-032).
- 1.2 The Applicant submits that there can be no detriment to RWE's undertaking as an electricity generator as there is no generation facility on this site which the proposed compulsory powers could impact. Even if there were an impact on the undertaking, the Applicant submits that it would not be of the high level required to constitute serious detriment.

2 MEANING OF SERIOUS DETRIMENT

- 2.1 Sections 127(3) and 127(5) of the Planning Act 2008 provide that the compulsory acquisition of the land and rights of statutory undertakers which is held for the purposes of their undertaking can be only authorised where the Secretary of State is satisfied the right can be purchased without serious detriment to the carrying on of that undertaking.
- 2.2 It is clear from previous considerations of section 127 that serious detriment is a high bar. Just because there is any adverse impact or detriment will not mean that serious detriment exists.
- 2.3 In the Lake Lothing DCO¹ examination, ABP (the port authority) argued that the proposals would cause serious detriment to their port undertaking at Port of Lowestoft. The proposals included the permanent compulsory acquisition of 3,000m² of land side and bed of the lake; 2,500m² of airspace and rights under bridge decks; and 4,500m² of rights over the only access to the port. Temporary Possession of 40,500m² of land and water within the port estate was also sought for construction purposes. The impact of the permanent works included the loss of 165m of berthing. ABP also submitted that the proposals would seriously compromise the operational viability of the port, create a constraint on the retention of existing and the attraction of new business, and cause damage to the strategic significance and the economic contribution of the port. ABP submitted that this therefore amounted to serious detriment.
- 2.4 The panel in their recommendation report found that *"the Proposed Development would cause material harm to the operational port. However, the extent of this harm, when considered in the context of the port operation as a whole, may be characterised as no more than moderate"*². In the decision letter the Secretary of State concluded that the *"effect of the Proposed Development on the operation of the port would not justify refusing development consent"*³. The Secretary of State determined that *"in the context of section 127 of the 2008 Act that the CA and TP powers sought would be detrimental to the carrying out of ABP's statutory undertaking but this detriment would not be serious"*⁴.

The current application and the RWE site

- 2.5 The Applicant is not seeking to displace RWE or any other party from using the site, in situ apparatus is protected by the protective provisions and the Applicant has already agreed that it would consent as is necessary to the reasonable diversion of the access rights sought where that is requested to facilitate RWE's redevelopment of the site. The

¹ Planning Inspectorate reference TR010023

² Examining Authority Recommendation Report on the Lake Lothing Third Crossing Development Consent Order, paragraph 5.8.156

³ Secretary of State Decision Letter on the application for the proposed Lake Lothing Third Crossing Development Consent Order dated 30 April 2020, Paragraph 25

⁴ Ibid, Paragraph 35

Applicant therefore considers that there is no seriously detrimental impact on the undertaking due to the compulsory acquisition sought in the dDCO.

- 2.6 For the prohibition on authorisation of compulsory powers to apply, the serious detriment must be to the 'carrying on' of the undertaking. The Applicant does not accept that the acquisition of land or rights in the current circumstances causes any detriment to the 'carrying on' of the RWE electricity generation undertaking. At this time there is no generation facility operating on the site, there can accordingly be no detriment at all in terms of impact on generation. In Lake Lothing there was a direct reduction in the size of the statutory undertaking through the loss of port berthing and that impact did not constitute serious detriment. In this case there would be no loss of generating capacity at all due to the proposals, they cannot therefore be reasonably argued to be serious detriment.
- 2.7 The Applicant notes that while stating that their land is operational and held for the purposes of their undertaking, RWE is also submitting that the causeway would impede Freeport development. Freeport development is fundamentally incompatible with this land being necessary for energy generation as part of RWE's undertaking. RWE's submissions are contradictory on this point. It is unclear how it can be argued that this land is necessary for RWE's generation undertaking in the absence of an objection to the Freeport aspiration.

3 IMPACT OF ACQUISITION OF PLOT 04/02 ON THE UNDERTAKING

- 3.1 RWE submit that plot 04/02 *"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"*⁵.
- 3.2 The proposed causeway would occupy only a portion not the whole of RWE's foreshore ownership as shown in the plan included in their written representation (REP2-095). RWE will retain considerable direct access to the foreshore on land already within their ownership which could serve exactly the same function (as part of access to cooling water) as plot 04/02. The Applicant will also seek to minimise the size of the affected plot at detailed design reducing the loss of foreshore access land.
- 3.3 RWE has no active energy generation facility on the site. RWE has presented no evidence that it has specific plans for thermal energy generation on this site using water cooling which would require to be routed through this plot. Construction of a new facility would require planning and the Applicant is not aware of any live planning application for this site.
- 3.4 There is no detriment to RWE's undertaking through loss of foreshore as there is no impact on any energy generation facility.

4 IMPACT OF ACQUISITION OF ACCESS RIGHTS ON THE UNDERTAKING

- 4.1 RWE has further submitted that *"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."*⁶.

⁵ REP4-032 at 2.8

⁶ REP4-032 at 2.9

- 4.2 The creation of new rights of access over the RWE site cannot be fundamentally unacceptable to RWE as a statutory undertaker or RWE would not, as it currently is, be progressing voluntary negotiation with the Applicant to create these by agreement.
- 4.3 The Applicant refutes RWE's submission that the imposition of access rights over an existing access on land already subject to third party access rights (over the same route) reaches the level of impact necessary to constitute serious detriment under section 127 of the Planning Act 2008. The land is already subject to such rights, with which the Applicant will co-exist. There is accordingly no new constraint on the land created by the proposal.
- 4.4 The Applicant is not seeking to remove the current access rights of any party. In particular National Grid has the benefit of a protective provision that the Applicant would not extinguish its rights through compulsory powers.
- 4.5 The Applicant has already agreed that it would consent to the reasonable diversion of the access rights sought where that is requested to facilitate RWE's redevelopment of the site. A draft protective provision securing this has been proposed, and the drafting of that remains under discussion between the parties.