

**THE OXFORDSHIRE COUNTY COUNCIL (DIDCOT GARDEN TOWN HIGHWAYS  
INFRASTRUCTURE – A4130 IMPROVEMENT (MILTON GATE TO COLLETT  
ROUNDAABOUT), A4197 DIDCOT TO CULHAM LINK ROAD, AND A415 CLIFTON  
HAMPDEN BYPASS) COMPULSORY PURCHASE ORDER 2022 (“CPO”)**

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**CLOSING SUBMISSIONS ON BEHALF  
OF RWE GENERATION UK PLC**

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**Introduction**

1. These Closing Submissions are made on behalf of RWE Generation UK plc (“RWE”) in support of its position that the abovementioned CPO and SRO (“the Orders”):
  - (1) should not be confirmed by the Secretary of State; or
  - (2) should only be confirmed if the plots in which RWE has an interest<sup>1</sup> are excluded from the relevant orders.
2. For the reasons set out below (in addition to those previously set out in RWE’s Statement of Case dated 4 October 2023 and in the Statement of Evidence of Matthew Trigg dated 30 January 2024) RWE maintains that there is no compelling case in the public interest justifying the confirmation of the CPO in relation to its interests because, in summary:
  - (1) In the absence of a voluntary agreement making adequate protective provisions in respect of RWE’s operational interests, RWE’s undertaking

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<sup>1</sup> Plots 4/3a-c (freehold), 5/2a-1 (freehold), 5/3a-b (leasehold), 6/1a-1 (freehold) and 13/6a-c (freehold).

(namely the operation of Didcot ‘B’ which is a 1440 MW combined gas cycle power plant which supplies the National Grid with electricity for over 1 million homes) would be substantially adversely affected in that:

- (a) there is nothing ensuring the provision of 24/7 access to Didcot ‘B’ during the construction of the HIF1 road scheme;
  - (b) there is nothing ensuring that any temporary access arrangements would be qualitatively suitable (i.e. sufficient surface treatment and width) to accommodate HGVs and other heavy haul vehicular traffic accessing the Didcot ‘A’ and ‘B’ sites, including (in particular) by abnormal load vehicles, during the construction of the HIF1 road scheme;
  - (c) there is nothing making adequate provision for an appropriate approach to (i) constructing a new drainage lagoon and bringing it on stream before (ii) removing the existing drainage lagoon whose operation is mandated by the Environmental Permit for Didcot ‘A’;
  - (d) there is nothing making provision for the adequate moving/replacement/interference with power transmission (*inter alia*) services/utilities/apparatus in connection with the delivery of the HIF1 road scheme; and
  - (e) there is nothing ensuring the timely and operationally satisfactory delivery of a replacement security gatehouse.
- (2) Oxfordshire County Council (“OCC”) (a) has not taken reasonable steps to acquire all of RWE’s interests in the order land by agreement and (b) has not pursued meaningful attempts at negotiation. As such their overall conduct has been contrary to the CPO Guidance. This too weighs against confirmation of the CPO.

- (3) There are agreed Heads of Terms (“HOTs”) in place which provide a pathway to the voluntary acquisition of RWE’s interests in a manner which is satisfactory to both OCC and RWE. There is accordingly no need for the CPO which is a “*last resort*”.
  - (4) Furthermore, the matters summarised at para. 2(1)(a)-(d) above apply with considerable force to RWE’s proposals to deliver a data campus on some 27ha of the site of the former Didcot ‘A’ power station for which planning permission has been sought from the relevant local planning authority (Ref. P22/V1857/O) and is expected to be issued this year.
  - (5) For the same reasons (i.e. those summarised at para. 2(1)(a)-(d) above) in the context of s.14(6) of the Highways Act 1980 the SRO should not be confirmed unless RWE’s interests are excluded from it.
3. For the avoidance of doubt RWE is supportive of the HIF1 Scheme in principle. Its objection is to the confirmation of the Orders. Because RWE is willing to dispose of its interests voluntarily to OCC, in return for adequate protective provisions, the removal of RWE’s interests from the Orders would not prejudice the delivery of the HIF1 Scheme.

**Preliminary matter: s.16 ALA 1981**

4. RWE acknowledges that it did not make a representation to the “*appropriate minister*” (namely the Secretary of State for Energy Security and Net Zero (“SSENZ”)) within the meaning of s.16 ALA 1981 within the relevant time period. Accordingly the Secretary of State for Transport (“SST”) is legally entitled to confirm the CPO without a s.16 certificate issued by the Secretary of State for Energy Security and Net Zero.
5. That is not the end of the matter, however, because the absence of a formal s.16 representation does not deprive RWE’s operational land (encompassing the Didcot ‘A’ land as well as the Didcot ‘B’ land) of its character as statutorily “*special land*”. In compulsory purchase practice, undertakers’ operational land has always been regarded

as having a “*special*” character. This character is intrinsic; it does not only arise as a result of the making of a s.16 representation.

6. In that context, the extent to which the CPO would adversely affect/cause detriment to RWE’s undertaking is an “*obviously material consideration*” that is accordingly implicitly statutorily relevant to the SST’s decision as to whether to confirm, and/or whether to modify, the CPO. See R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52.
7. In other words, just because there is no formal s.16 representation does *not* mean that the adverse operational effects that the CPO would cause are irrelevant or immaterial. Rather, they remain obviously material, and it is for the SST to address, weigh and consider them in the context of deciding whether there is a compelling case in the public interest justifying the CPO.
8. RWE disagrees strongly with OCC’s suggestion (see para. 16 of OCC’s Opening Statement dated 24 April 2024) that the extent to which the Orders would operationally prejudice RWE’s undertaking would be a mere “*private loss*”. On the contrary, as set out above, the Didcot ‘B’ power station is a nationally significant piece of electricity generation and transmission infrastructure. Any adverse operational effects to it are accordingly matters of critical public importance - and should be weighed accordingly.

### **RWE’s case**

#### **Preliminary**

9. All of the matters outlined below need to be seen in the light of the concession by Mr. Blanchard, under cross-examination, that in the absence of a private agreement providing sufficient protection to RWE’s operational assets, RWE’s undertaking would be seriously detrimentally affected by the CPO. Given that this is now a matter that is agreed by OCC and RWE, RWE submits that there is no conceivable case in support of the confirmation of the CPO so far as it relates to RWE’s interests.

10. Note that in cross-examination Mr. Moon also retracted the following underlined statement at para. 4.282 of his Proof of Evidence: “...*even under a CPO scenario...[OCC] has explained how it would address the concerns which have been raised by [RWE]. [OCC] therefore considers that there would not be serious detriment to RWE’s ability to carry out its statutory undertaking.*” This assertion (which Mr. Moon fairly acknowledged he was neither qualified nor instructed to make) does not form part of OCC’s case, therefore.

Access during the HIF1 construction (para. 2(1)(a),(b), 2(4) and (2(5) above)

11. At present the only way for heavy haul/HGV vehicles to access the Didcot ‘A’ and ‘B’ sites is via the 2<sup>nd</sup> exit (if approaching on the northbound A4130) of the Milton Road/A4130 roundabout. Non-HGV vehicles can access the sites using Milton Road, i.e. the 1<sup>st</sup> exit on the aforementioned roundabout, but there is a weight restricted bridge over a cutting that prevents heavy haul/HGVs and abnormal load vehicles from using this road.
12. It is operationally necessary for Didcot ‘B’ (as well as the National Grid substation on the RWE land) to be capable of being accessed safely and efficiently by HGVs 24/7. This is not disputed by OCC (and nor could it be). HGVs and, where necessary, abnormally loaded vehicles carry large pieces of plant and machinery (“P&M”) that are necessary in the context of the careful maintenance of the generation/transmission infrastructure at the site, and also in the event of unplanned outage events. Mr. Trigg explained that if HGV/abnormal load access was impeded (whether in the context of planned maintenance or an unplanned outage) and P&M could not be brought on-site, Didcot ‘B’ could go offline which would prevent electricity from being supplied to over 1 million homes (not to mention other consumers such as train lines and hospitals).
13. It is for this reason that RWE requires:
- (1) 24/7 access for HGVs/heavy haul/abnormal loads throughout the construction of the HIF1 scheme; and

- (2) those temporary (i.e. construction-related) access arrangements to be qualitatively and quantitatively suitable in terms of their surface treatment and widths (particularly in order to accommodate HGV and other vehicles transporting P&M swept paths) and to be able to simultaneously accommodate other vehicles and pedestrians/cyclists who may need to access the land in conjunction with HGVs.
14. There is no mechanism for the CPO (or SRO) to secure these measures.
15. OCC has offered to incorporate planning conditions on any planning consent for the HIF1 Scheme to secure the above matters. RWE will work with OCC to devise appropriate conditions. At present no such conditions have been drafted or agreed by RWE. In any event any such conditions would not replace the need for a voluntary agreement given that such conditions could not be enforced by RWE and could be varied without RWE's consent.
16. Accordingly, a voluntary agreement is needed to give effect to RWE's operational access requirements. There is at present no other mechanism that can do so. As set out above, Mr. Blanchard's own evidence reflects this position. In the absence of such an agreement the public interest in favour of maintaining the status quo (i.e. maintaining suitable access to the RWE land) militates strongly in favour of modifying the Orders to exclude the RWE land.
17. For the avoidance of doubt, RWE does not accept that an unsecured undertaking on the part of OCC to enter into a construction contract for the HIF Scheme works which is subject to a condition requiring the contractor to provide suitable temporary access to RWE is sufficient to allay its concerns. In particular, *inter alia*:
  - (1) RWE would not be a party to any such contract and, because of the doctrine of privity of contract, would be unable to enforce any breaches of condition as against OCC or the contractor;
  - (2) the form of the condition is not known and accordingly RWE cannot be satisfied that it would be sufficient (for example: the contractor may decide

to 'comply' with the condition by providing a shared access way that may from time to time become clogged by construction-related traffic or may decide to provide a gravel surface which would not be acceptable to RWE because of its susceptibility to adverse weather events);

- (3) the contractor and the contractor's track record is not known such that RWE's concerns remain; and
- (4) it is well known (and such is the nature of things) that even with the best intentions, construction activities often depart from contractual standards (whether inadvertently, for example a construction vehicle breaking down on the designated RWE access road, or because standards are not enforced/maintained on-site).

- 18. For similar reasons, an access provision similar to that outlined above is required by RWE in order to deliver the anticipated data campus planning consent when that consent is issued. This can only be secured by private agreement. If it is not so secured the CPO would adversely affect the delivery of that scheme. This too weighs against the confirmation of the CPO so far as RWE's land is concerned.

#### Drainage lagoons

- 19. RWE's undertaking is subject to an Environmental Permit (Ref. EPR/YB3999DB) for the former Didcot 'A' site which contains surface water drainage requirements and conditions. In particular, those conditions require residual standing water at the former Didcot 'A' site to be pumped to drainage lagoons on RWE's land. One such drainage lagoon will need to be removed as part of the delivery of HIF1. It will accordingly need to be replaced by another lagoon which must be brought online before the existing lagoon can be removed.
- 20. The scheme design makes provision for a replacement lagoon, but at present the sequencing of the construction for the scheme is not secured within the planning permission for RWE to be sure that it will be able to comply with the terms of its Environmental Permit in that context. Detail and clarity are needed, as is RWE's close

involvement in the process of decommissioning the existing drainage asset and making the replacement asset operational. This can only be done by way of a private agreement. As above, a commitment to have the contractor deal with this matter in a way that does not involve the close and active engagement of RWE is not acceptable and weighs against the confirmation of the CPO.

#### Utilities/services

21. For reasons which are self-evident (and not contested by OCC) there is a need to ensure that no adverse impacts arise as a result of interference with, or disruption to, the services and utilities in the RWE order land. Mr. Blanchard acknowledged that this would be a “*challenging task*” which, RWE submits, is putting it mildly. At the moment there can be no certainty that no adverse impacts will arise.
22. OCC’s non-binding commitment to ensure the selected contractor deals satisfactorily with this matter is not good enough for RWE. These utilities are in themselves critical pieces of infrastructure that are essential to the proper functioning of the electricity generating and transmission undertakings at Didcot ‘A’ and ‘B’. They are too important to be left to a contractor who has no binding covenant to deal with the apparatus in consultation and co-ordination with RWE. Until that outcome is secured by a voluntary agreement, the public interest weighs against making the CPO.

#### Security gatehouse

23. Mr. Moon’s Rebuttal Proof of Evidence acknowledges (paras 5.5 and 5.7) that the gatehouse matter is “*not fully resolved*” because “*the exact detail of how and when the new gatehouse will be delivered has not been agreed.*” This is problematic because, self-evidently, the security gatehouse performs an important security function and is needed for both the temporary (i.e. during construction) and permanent (i.e. post-construction) periods.
24. There is little doubt that at some point a new gatehouse will be constructed, but since RWE does not know when or whether the functional configuration/specification will be adequate, or how it will relate to the temporary access road, it cannot say that its



need to secure its operational land will not be adversely affected by the Orders. This weighs against confirming the Orders so far as they relate to the RWE land.

25. It is no answer to this point to say that there is an agreement in place between OCC and Clowes to deliver the replacement gatehouse. This agreement has not been produced in OCC's evidence and its terms are not known to RWE. Moreover, RWE is not a party to that agreement and cannot enforce its terms whether against OCC or Clowes.

### Negotiations

26. RWE is pleased that there are agreed (albeit not yet signed) HOTs, but considers that if OCC had complied with the CPO Guidance at an earlier stage in the process (which, for the avoidance of doubt, it should have) it is very likely that there would be a binding land acquisition/asset protection agreement in place at this point.
27. It is clear from Mr. Moon's schedule of engagement with RWE (pp43-45 of Mr. Moon's Appendices) that in 2020 and 2021, OCC's only interaction with RWE concerned access arrangements for geotechnical surveys.
28. In 2022 the record only shows three engagements with RWE, none of which amounted to land acquisition negotiations. This is significant because the CPO was made on 21 December 2022 and was submitted to the SST for confirmation on 26 January 2023. In other words, by the time the CPO was made and submitted, OCC had entirely failed to:
- (1) take any steps (let alone reasonable steps) to acquire the interests required from RWE by agreement; or
  - (2) initiate or "*genuinely attempt*" any "*meaningful attempts at negotiation*".
29. This was contrary to p.6 (section 2) and p.15 (section 17) of the CPO Guidance.
30. RWE acknowledges that the final HIF1 scheme was designed to accommodate RWE's requirements and does not object to the final arrangements of the scheme (as opposed to the uncertain/inadequate arrangements for the scheme's construction period). RWE

also acknowledges that it was aware that OCC would need to acquire interests from RWE in order to deliver HIF1. However, these are not the tests imposed by the CPO Guidance.

31. The test is not: “*was the affected person aware that the AA would need to acquire land/rights from them?*” or “*did the AA engage with the affected person to obtain access rights and in terms of scheme design?*” The test is clearly framed in terms of land acquisition negotiations, of which there were none until well after the CPO was in fact made and submitted for confirmation. RWE submits that this conduct fell well short of Government’s expectations of AAs. This is a serious failure and weighs against the CPO being confirmed.
32. In 2023 itself, there is no record of OCC in fact having sent “*proposals for a voluntary agreement*” to RWE in January 2023 as suggested at para. 4.277 of Mr. Moon’s Proof of Evidence. Mr. Moon now acknowledges that no such proposals were in fact issued.
33. It was only after RWE objected to the Orders in March 2023 that OCC (and its land acquisition agents, Gateley Hamer (“GH”)) started engaging with RWE in land acquisition terms. It should not have taken a formal objection having been made to prompt OCC to negotiate with RWE.
34. No negotiations took place in the Summer of 2023 because OCC stood down GH in the context of the call-in of the HIF1 planning application. However, before GH were stood down, Mr. Miles (Mr. Moon’s predecessor at project lead at GH) had agreed with RWE that a s.106 agreement (in connection with the data centre development at Didcot ‘A’) would be progressed as the mechanism for transferring RWE’s interests to OCC. The rationale for this mechanism was that it would obviate the need to make financial contributions to the HIF1 scheme which would have been required by the LPA if a land transfer package could not be implemented. A similar s.106 agreement had been agreed in respect of another part of the Didcot ‘A’ site (Refs P15/V1304O and P15/S1880/O) and at no point in the Summer of 2023 was it suggested to RWE that such a mechanism was not appropriate.

35. Negotiations resumed in September 2023 and in November 2023 GH issued HOTs in draft to RWE. These HOTs did not, however, reflect RWE's preference (which was thought to have been agreed by OCC) for the land transfer package to be effected by way of a s.106 agreement. Mr. Trigg told Mr. Moon as much the day after GH had issued the 1<sup>st</sup> draft HOTs (see Mr. Moon's Appendices p.45, entry of 23 November 2023). Accordingly, RWE had to re-draft the HOTs and did so in January 2024. Mr. Moon cannot criticise RWE for having done so. In particular:
- (1) the drafting of the s.106 agreement (or HOTs in relation to it) could (and should) have been progressed before the data campus permission was granted (there being no prohibition on executing s.106 agreements before consent is granted, with an appropriate clause to render the agreement effective only in the event consent was later granted);
  - (2) there was precedent for such a mechanism on the same site;
  - (3) at no point was it suggested that such a mechanism was contrary to reg.122 of the CIL Regulations (or any other legal provision); and
  - (4) at no point had the relevant local planning authority, VOWHDC, suggested that the mechanism was inappropriate.
36. Eventually Mr. Moon re-drafted RWE's version of the HOTs to allow for a period of time during which the parties would endeavor to agree a s.106 agreement, but which enabled OCC to exercise options in respect of the required RWE land after a "long stop date" if the s.106 agreement was not finalised by that date. It is not clear why this approach, which reflected RWE's preference for a s.106 agreement, was not advanced by Mr. Moon at an earlier stage in the process. This is the mechanism that is now enshrined in the non-binding HOTs.
37. Overall: OCC should have entered into land acquisition negotiations before the making of the CPO and should have been more willing to accommodate RWE's preference for a s.106 mechanism. If "*meaningful*" negotiations had taken place, it is very likely that a formal binding agreement would be in place as at today's date.

## Alternatives

38. The CPO guidance makes it clear that compulsory purchase is a “*last resort*”. While the CPO guidance also makes it clear that an authority may (1) plan a CPO timetable as a contingency measure and (2) initiate formal procedures (see p.6) that provides no support for the contention that compulsory purchase powers can be confirmed in the event that there is a pathway to voluntary acquisition of the relevant interests. If there is such a pathway, it is incumbent on the authority to progress matters by private treaty rather than relying on compulsory measures.
39. Here, there is a pathway to the voluntary acquisition of RWE’s interests needed to deliver the HIF1 scheme: HOTs are agreed and there is no reason to think that those HOTs will not be progressed to a formal final binding option agreement in the event that OCC deploy sufficient resource to the progressing the final legal agreement.
40. RWE has never been unwilling to dispose of its interests to OCC. In fact, as set out above, it is supportive of the principle of the HIF1 scheme. Mr. Moon confirmed when giving evidence that RWE had never sought exorbitant compensation for its interests. There is no reason to think that RWE will place any spanners in the works. Its only interest is to ensure that its operational interests as a statutory undertaker are adequately protected. This can only be done by way of a private agreement. It follows that RWE is strongly incentivised to have such an agreement in place and will use all reasonable endeavors to do so.

## Conclusions

41. For the above going reasons the Orders should not be confirmed unless RWE’s land is excluded from them.

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**3 May 2024**