



# CLEVE HILL SOLAR PARK

## **OTHER DEADLINE 4 SUBMISSIONS WRITTEN REPRESENTATION BY THE APPLICANT ON ARBITRATION**

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**CLEVE HILL**  
SOLAR PARK

## **1 INTRODUCTION AND SUMMARY**

- 1.1 This document comprises a written representation by Cleve Hill Solar Park Ltd ("the Applicant") in relation to the proposed solar array and energy storage facility which is the subject of a Development Consent Order ("DCO") application ("Cleve Hill Solar Park").
- 1.2 This written representation comprises legal submissions and consolidates the Applicant's points related to arbitration provisions included in the draft DCO for Cleve Hill Solar Park in response to questions from the Examining Authority ("EXA").

## **2 APPLICABILITY OF ARBITRATION TO THE SECRETARY OF STATE**

- 2.1 The principle of the Secretary of State ("SoS") being subject to arbitration in the event of agreement/dispute, as per other parties to a DCO, is not novel. This section sets out the basis for inclusion of such provisions and the Applicant's submissions on the applicability to the SoS. In brief, the Applicant submits that the Planning Act 2008 ("PA08") permits referral of disputes with the SoS to arbitration.

### **2.1.1 Planning Act 2008**

- 2.2 Arbitration is specifically permitted to be included in a DCO by the PA08, and it clarifies the scope of such a provision.
- 2.3 Section 120 prescribes what may be in a DCO, and includes those matters listed in Part 1 of Schedule 5. Paragraph 37 of Schedule 5 prescribes "*The submission of disputes to arbitration*". That reference is not qualified at all. It does not limit or exclude any party to the dispute in question. There is nothing in the PA08 or other legislation that has limited the application of paragraph 37, or otherwise serves to exclude the SoS from arbitration.

### **2.3.1 The Model Provisions**

- 2.4 The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("the Model Provisions"), although no longer in force, provide a useful guidance for DCO practice and still form the basis for the drafting of DCOs.
- 2.5 Article 42 of the Model Provisions states:

*"Any difference under any provision of this order, unless otherwise provided for, shall be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the [insert appropriate body]."*[emphasis added].

- 2.6 As noted in relation to the PA08, this Model Provision is clear and unequivocal. It includes "*Any difference*", without the carving out of the SoS, an option which would have been available when the Model Provisions were drafted if Government had seen fit to do so.

### **2.6.1 Previous DCOs Approach to the SoS and Public Bodies**

- 2.7 Arbitration provisions exist in DCOs granted by the SoS since the PA08 came into force. There is nothing in those provisions that limits or excludes any party to the dispute in question. In other words, the SoS could well be a party to a dispute determined by arbitration under those made DCOs, if an undertaker or other party chose to take that action.
- 2.8 A typical example of arbitration provisions previously endorsed by the SoS can be found in Article 41 of the Hornsea Two Offshore Wind Order 2016, which states: "*Any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the Secretary of State*". This provision is unqualified and applies to any difference and all parties under the Order.

- 2.9 The SoS has previously considered whether a public body, Natural England ("NE"), should be a party to arbitration provisions in a DCO. In respect of both the Triton Knoll Offshore Wind Farm Order 2013 and the Burbo Bank Extension Offshore Wind Farm Order 2014. In relation to both Orders NE submitted that it should be excluded from those provisions on the basis that the exercise of NE's statutory powers should not be subject to arbitration. In both cases, the SoS did not agree.
- 2.10 At para 7.3 of the Triton Knoll decision letter the SoS states: "*The Panel also asked the Secretary of State to consider whether SNCBs should be removed from the provisions for arbitration covered by Article 12 of the draft Order at Appendix E (headed "Arbitration") [ER 5.11.20]. To maintain consistency with other offshore wind farms approved under the Planning Act 2008 since the close of the Panel's Examination, the Secretary of State has decided that the arbitration provisions should apply to SNCBs and has therefore modified the article in the Order accordingly.*" The decision in Triton Knoll was noted by the ExA in its report on Burbo (as noted in para 7.45 and 7.46 of the Report): "*This draft article provides for the appointment of an arbitrator if a dispute arises in respect of any provision of the DCO. Early draft DCOs excluded NE from the operation of the provision, pursuant to an opinion provided by NE to the Triton Knoll Offshore Wind Farm Examining Authority that the exercise of its statutory powers should not be subject to arbitration and should only be adjudicated upon by the court. However, the Secretary of State in the Triton Knoll decision decided not to exclude NE from the arbitration provision in that DCO, on the basis that all issues and parties should be equally subject to arbitration on the same basis. I proposed to delete the exclusion of NE from the arbitration provision in my draft DCO. The applicant and NE did not object to this revision which was sustained in the applicant's draft DCO Version 6 [APP-099]. I am content with the current drafting of this article.*" [emphasis added]. The SoS endorsed the ExA's conclusion in the made Order.
- 2.11 Therefore, Examining Authorities and the SoS have already opined on this point as highlighted above and concluded that "*all issues and parties should be equally subject to arbitration on the same basis*". This includes parties with statutory functions, duties and powers. It should also be noted that in respect of DCOs made to date, the SoS has not sought to exclude itself from arbitration.

#### **2.11.1 Fettering of Discretion**

- 2.12 The Applicant submits that there would be no fettering of the discretion of the SoS, nor any other party exercising a statutory power or function, if subject to arbitration.
- 2.13 The procedure set out in Schedule 9 of the draft DCO makes provision for all parties to the dispute to engage in the appointment of the arbitrator, make submissions to the arbitrator, and for the exchange of evidence. Therefore, the appointed arbitrator would necessarily have regard to the submissions and standing of the SoS, or other public body, when considering and determining the dispute. The possibility that the arbitrator may arrive at a different conclusion on the evidence than that of the SoS would not amount to fettering of discretion, but would provide swift and effective dispute resolution in accordance with well-established principles of natural justice, which does not exist in DCOs made to date.

- 2.14 This situation is analogous to dispute resolution under a planning obligation agreement made pursuant to section 106 of the Town and County Planning Act 1990 ("TCPA"). Those agreements often refer disputes between the local planning authority ("LPA") and the developer to arbitration. The LPA is a statutory body, with statutory functions, duties and powers prescribed by the TCPA (and other legislation). Even so, LPAs regularly adopt arbitration as a means of dispute resolution and subject themselves to the decision of an arbitrator. They do so without concern over the fettering of their statutory function, duties and powers.

#### **2.14.1 Transfer of Benefit Provisions**

- 2.15 The ExA and BEIS will be aware that there is currently no statutory or other formal process, or prescribed timescales for decision making, in relation to an application to the Secretary of State to transfer the benefit of a DCO, nor is there any appeal mechanism. In the absence of such provision the only alternative would be judicial review, which for the reasons set out below, is unsatisfactory and could reasonably be expected to delay or otherwise prejudice a nationally significant infrastructure project being realised. This situation causes uncertainty for the owners of electrical infrastructure who wish to divest their interests and attract new investors to the project, something BEIS and Government have policy objectives to encourage.

- 2.16 The Applicant is of the view that introducing timescales for decision making, and having the ability to defer either refusal of consent to a transfer, or non-determination of a related application, to arbitration is in line with Planning Inspectorate Advice Note 15 Good Practice Note 3 which states:

*"It is recommended that a mechanism for dealing with any disagreement between the Applicant and the discharging authority is defined and incorporated in a draft DCO Schedule. For example, including arrangements for when the discharging authority refuse an application made pursuant to a DCO Requirement, or approve it subject to conditions or fail to issue a decision within a prescribed period."*

- 2.17 Specifically in respect of the draft DCO, Article 5(6) provides clarity on the circumstances under which a referral to arbitration may be made, namely when the SoS considers refusal of an application for consent to a transfer, or when such an application is not determined within eight weeks (or such other period as agreed) of referral. An application for transfer would contain technical and financial information relating to the probity of the transferee. The Applicant is not suggesting that the SoS is unsuitable to determine such an application. The point is that if the SoS made an error or misinterpreted information of a technical nature, without the arbitration provisions the Applicant's only recourse would be to either submit a claim for judicial review or a fresh application for transfer. A claim for judicial review is not an expeditious means of dispute resolution and would be costly in terms of time and resource for all parties (see below). A fresh application would be unlikely to bring about a different result, unless the SoS changed his mind. By applying the arbitration provisions to Article 5, there is an effective means of appeal/dispute resolution, which accords with previously made DCOs (see above) and principles of natural justice.

#### **2.17.1 Arbitration as an Alternative to Judicial Review**

- 2.18 The Applicant notes that in other DCO applications, parties have submitted that the option to pursue a judicial review claim is an alternative to similar arbitration provisions. The applicants for those DCOs have correctly resisted this.

- 2.19 The option to resort to judicial review does not provide for an expeditious alternative mechanism for dispute resolution. Even with the Planning Division of the High Court operating at its most efficient, a judicial review claim can take up to a year to be determined in the first instance and up to three years if the claim goes to the Court of Appeal and Supreme Court. There is also a substantial cost for all parties involved in judicial review litigation firstly in the High Court and potentially thereafter in an appeal. This would result in increased costs and delays, and therefore prejudices the common objective of the industry and Government to reduce the cost of energy, whilst achieving decarbonisation and security of energy supply. Arbitration offers an expedient and structured process for resolving disputes under a DCO, judicial review does not.
- 2.20 The timescales referred to in the arbitration provisions (and the discharge of conditions in the DMLs) have been adopted from the TCPA, e.g. determination in 8 weeks, and are designed to provide for an expeditious procedure in a regime which currently makes no provision for process, determination periods or appeal.

### **3 PURPOSE OF THE CLEVE HILL SOLAR PARK DCO ARBITRATION PROVISIONS**

- 3.1 With one exception, the Arbitration provisions in previously granted DCOs are silent on how the arbitration should be put into effect. The expanded arbitration provisions in the draft DCO would provide greater certainty to all parties potentially involved in a dispute under the DCO, not just in relation to the SoS in terms of Article 5. In nearly all previously granted DCOs, no provision is made, for example, for the appointment of the arbitrator, the terms of reference for the arbitrator, the exchange of evidence, or a determination period. This means that if a party wished to refer a matter to arbitration under those existing DCOs, there is no procedure for doing so, which could render the provision ineffective. The Cleve Hill Solar Park draft DCO simply makes arbitration clearer and has prescribed a process for parties to follow in the event of a dispute.
- 3.2 Objectively, this clarity must be an improvement over the arbitration provisions included in DCOs to date. The Applicant notes that the provisions in Schedule 9 in the Cleve Hill Solar Park draft DCO have been adopted (without challenge) by the SoS in The Millbrook Power (Gas Fired Power Station) Order 2019 (PINS Ref: EN010068). In addition, these are included in Orsted's Hornsea Three Offshore Wind Farm draft DCO (PINS Ref: EN010080), Vattenfall Wind Power Limited's applications for DCOs in respect of the Norfolk Vanguard Offshore Wind Farm (PINS Ref: EN010079) and the Thanet Extension Offshore Wind Farm (PINS Ref: EN010084). The Hornsea Three application is due for decision by 2 October 2019. If it is granted by that date then this will provide the latest decision of the SoS in respect of the terms and application of arbitration provisions, and the ExA may have regard to this before the end of this examination.