

# Heckington Fen Solar Park

EN010123

## Statement of Common Ground with Network Rail Infrastructure Ltd

Applicant: Ecotricity (Heck Fen Solar) Limited

Document Reference: 7.6j

Pursuant to: APFP Regulation 5(2)(q)

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**STATEMENT OF COMMON GROUND**

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**1. INTRODUCTION**

- 1.1 This Statement of Common Ground (SoCG) has been prepared by Ecotricity (Heck Fen Solar) Limited ("the Applicant") in conjunction with Network Rail Infrastructure Limited ("NR").
- 1.2 The proposed development comprises the construction, operation (including maintenance), and decommissioning of a ground mounted solar photovoltaic (PV) electricity generation and energy storage facility (hereafter referred to as "the Energy Park"), cable route to, and above and below ground works at, the National Grid Bicker Fen Substation (hereafter referred to as "the Proposed Development" (inclusive of Energy Park)) on land at Six Hundreds Farm, Six Hundreds Drove, East Heckington, Sleaford, Lincolnshire.
- 1.3 In the table below of this SoCG:
- "Agreed" indicates where the issue has been resolved; and
  - "Under discussion" indicates where these points are the subject of on-going discussion wherever possible to resolve, or refine, the extent of disagreement between the parties.
- 1.4 It can be taken that any matters not specifically referred to in this SoCG are not of material interest or relevance and therefore have not been considered further. It is recognised however that engagement between all parties will need to continue due to their joint interest in matters arising from the Proposed Development.
- 1.5 The purpose of the SoCG is to identify the areas where the principal parties do not agree and remain in dispute. This will allow the Examination to focus on the most pertinent issues.

Summary of main issues agreed/not agreed

- 1.6 Based on engagement to date, common ground is expected to be agreed prior to the closure of the Examination.

1.7 A commercial agreement in principle has been reached with NR, but this is subject to the ongoing legal mechanisms being negotiated in terms of the acquiring land rights on a voluntary basis.

**2. MATTERS TO BE AGREED**

Reference and Status	Topic	NR's Position	Applicant's Position
1. Under discussion	Effects on operations	<p>NR are in discussions with the Applicant's Solicitors as to the form of the protective provisions that are to be included on the face of the dDCO.</p> <p>NR are not in a position to withdraw their objection to the dDCO unless an agreement is reached in respect of the above.</p> <p>As discussed below, the Proposed Development interferes with the safe and efficient operation of the railway. NR has assessed the details of the proposed works impacting the operational railway and has issued clearance approvals, subject to conditions, in respect of the commercial and technical impacts of such works. Such approvals only form part of the protective requirements of NR and should not be taken, as the Applicant suggests, as confirmation by NR that it is satisfied that the effects of the Proposed</p>	<p>The Applicant has provided some indicative plans for crossing NR's railway, and these will be firmed up and subsequently agreed with NR as part of the process secured under the protective provisions which have been included for the benefit of NR as part of the final dDCO submitted as part of Deadline 5 (the "<b>Protective Provisions</b>").</p> <p>In terms of the indicative plans for the crossing, the Applicant intends to directionally drill underneath the railway in a safe manner, which is a well established approach as evidenced by the construction of the Triton Knoll and Viking link connections. The Proposed Development will not therefore interfere with the safe and efficient operation of the railway, as the proposal is to directionally drill underneath the railway, some 10m below the surface as shown on Figure 4.13 - Indicative HDD Crossing Sections (document reference</p>

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		<p>Development on the operational railway have been agreed and/or resolved between the parties.</p> <p>The most significant protection afforded to NR in order that NR can ensure that the safe and efficient operation of the railway is maintained is to ensure that Protective Provisions are included in the dDCO which include (at provision 4) a restriction on the compulsory acquisition of rights over NR land unless NR's prior consent has been obtained (as further detailed below). Without such protection, NR has no control over the exercise of rights on its land (including on operational railway) which gives rise to a significant, unacceptable risk that the safety of the railway (and persons using it) will be compromised.</p> <p>Crucially, the Applicant should not interpret NR issuing technical and business clearance for the proposed works as NR's approval of the effects of the proposed Development on the operational railway but rather as NR's approval that the</p>	<p>6.2.4/ REP2-039).</p> <p>In response to the indicative plans provided to NR as part of the DCO application, NR has issued both a Business Clearance Certificate (Stage 1) and a Technical Clearance Certificate (Stage 2). The Business Clearance Certificate confirms that the Proposed Development was agreed in principle from a commercial perspective. The Technical Clearance Certificate confirms that NR is in agreement with the proposals provided in the proposed plans for the crossing.</p> <p>Therefore, NR has provided the Applicant with an agreement in principle both from a technical and commercial perspective in relation to its crossing of NR's railway line.</p> <p>Confirmation and agreement with NR on the final technical details of the crossing works and, subsequently, the carrying out of these works in the</p>

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		<p>proposed works can, in theory, be carried out subject to the relevant conditions. However the approvals only specifically concern the works and do no deal with NR's concerns as to being able to properly regulate the exercising of the proposed rights on the railway.</p>	<p>proximity of NR’s operational railway network will be in accordance with the Protective Provisions.</p>
<p>2. Under discussion</p>	<p>Drafting of the dDCO including protective provisions</p>	<p>As a statutory undertaker, NR are under a duty to maintain the safe and efficient operation of the railway and as such, NR's position to date is that they will require their standard form Protective Provisions to be on the face of any dDCO made.</p> <p>NR's standard form Protective Provisions restrict the Applicant from exercising any compulsory acquisition powers over railway property (including the compulsory acquisition of rights as is proposed by the Applicant) unless NR's prior consent to such compulsory acquisition has first been obtained and in granting such consent NR is obliged in the Protective</p>	<p>The Protective Provisions included in the final draft dDCO submitted at Deadline 5 for NR's benefit are based on NR’s standard form of provisions.</p> <p>The Protective Provisions are in agreed form subject to one point, which relates to a restriction on the Applicant from compulsorily acquiring rights and interests required for the delivery of the Proposed Development from NR without NR's prior consent (NR acting reasonably save for in respect of matters concerning safety whereby NR shall have absolute discretion).</p>

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		<p>Provisions to act reasonably (save for in respect of matters which concern safety whereby it requires absolute discretion) as set out at provisions 4(1) and 4(6).</p> <p>NR operates under a Network Licence that is granted to it by the Office of Rail and Road. Under this Network Licence, NR is obliged to ensure they are compliant with a wide number of standards that are imposed by the Rail Safety and Standards Board, and these pertain to maintaining the safe and efficient running of trains on railways. To remain compliant under this licence, NR must retain stringent restrictions, controls, and procedures over any interfaces with the railway by third parties, including by reason of persons exercising rights on, over or under railway land.</p> <p>Where a right is compulsory acquired over railway land, such right is created outside of NR's control, and by reason of which NR cannot ensure that such</p>	<p>The Applicant's position to date has been that, unless the parties have a voluntary agreement in place which grants the Applicant all the rights it requires for the delivery of the Proposed Development (the "<b>Voluntary Agreement</b>"), the restrictions on compulsory acquisition required by NR as part of the Protective Provisions should not be included as it could prevent the Applicant from delivering the Project.</p> <p>The Applicant and NR recently reached a commercial agreement in principle for the granting of the Voluntary Agreement (likely to be in the form of a deed of easement) by NR to the Applicant. Therefore, it is anticipated that the Applicant will not be required to exercise its compulsory acquisition powers under the dDCO over NR's land and agreement will shortly be reached with NR.</p> <p>However, until legal completion of the Voluntary Agreement has taken place, the Applicant requires the certainty that they can deliver the crossing of NR's</p>



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		<p>right is granted subject to the necessary restrictions and conditions that NR would reasonably regard as sufficient so as to enable it to comply with its Network Licence. Any removal of this restriction gives rise to a significant and unacceptable risk that NR would be compromised in its ability to safely manage the railway, the consequences of which could be catastrophic (for example, NR must have the ability to temporarily suspend such rights in the event of an emergency on the railway). It is therefore inconceivable that a third party should be able to exercise rights over the operational railway whereby the nature of such rights and the manner in which they are to be exercised have not first been approved by NR. Moreover, this would also give rise to a risk that NR would not be able to comply with its Network Licence, which is not a position that can be accepted by NR, nor would it be acceptable to the Office of Rail and Road as NR's regulating body. Any absence of this restriction pertains directly to ensuring the safety of the railway.</p>	<p>railway which is necessary for the operation of Proposed Development.</p> <p>For this reason, the Applicant needs to retain the ability to compulsorily acquire rights to deliver the crossing works and retain its cable route beneath NR's railway until such time that the Voluntary Agreement referred to above has been completed (unless otherwise agreed).</p> <p>Alongside the Protective Provisions now included in the dDCO for NR's benefit, the parties are discussing a commercial side agreement. The side agreement is agreed subject to a handful of minor legal drafting points and the agreement on the drafting which restricts the compulsory acquisition of NR's rights.</p> <p>The Applicant has proposed a contractual mechanism in principle, in which the restriction on compulsory acquisition powers will only become operative following completion of the Voluntary Agreement.</p>

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		<p>Further, the restriction on compulsory acquisition of rights over railway land is widely accepted and a longstanding principle, and one that has been accepted by the Examining Authority and Secretary of State on numerous DCO projects, which include (but is not limited to): A47/A11 Thickthorn Junction, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO, South Humber Energy Centre DCO.</p> <p>Accordingly, the requirement to obtain NR's prior consent to the compulsory acquisition of rights over railway property is not a novel concept nor was it considered as an impediment to the deliverability or viability of any of the above referenced DCO schemes (amongst numerous others). Notably, NR has never obstructed the implementation of a DCO scheme and does not seek to utilise this restriction as a means to ransom developers (NR is of course a</p>	<p>Furthermore, the rights to use CA powers are a distinct and separate issue from the notion of public safety and/or serious detriment to NR's undertaking. The two issues should not, in the Applicant's view, be conflated. Compulsory acquisition rights go to the heart of the viability case for the project because without these the Applicant could be ransomed by NR. This in itself could put the delivery of the project at risk and create a dangerous precedent for all NSIPs where statutory undertakers claimed that they should be treated differently to any other landowner.</p> <p>Compulsory acquisition is therefore needed in order to ensure the deliverability of the project. Any ransom value that Network Rail could excerpt should not be a material consideration for the Secretary of State in deciding whether compulsory powers are confirmed, per Section 106(1)(c) Planning Act 2008.</p> <p>In any event (regardless of the compulsory acquisition</p>

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		<p>public body).</p> <p>Further to the above, Section 127 of the Planning Act 2008 provides that where a Written Representation to an application for development consent order has been submitted by a statutory undertaker, and it is not withdrawn, the matter is referred to the Secretary of State to decide whether the specific tests set out in that section are satisfied or not. Statutory undertakers such as NR hold land which is required to discharge specific statutory functions. Section 127 is an aspect of statutory protection that has been put in place to prevent statutory undertaker's duties from being frustrated by the compulsory acquisition of operational land (as defined by the town and Country Planning Act 1990, Section 263).</p> <p>Section 127 serves the same purpose as section 16 of the Acquisition of Land Act 1981, which applies to the compulsory acquisition of land and/or rights</p>	<p>position), NR will still be offered protections in the form of the protective provisions (included at Part 8 of Schedule 13 to the DCO). The protective provisions provide safeguards for NR including with the following:</p> <ul style="list-style-type: none"> <li>• the definition of "railway property" (at paragraph 83) includes references both to any assets or apparatus owned by NR or linked to an NR railway, and any property right or interests of NR, its licencees and tenants which relate to an NR railway.</li> <li>• the Applicant must provide NR with plans of its specified works (i.e. works in proximity to "railway property") for approval by a NR engineer prior to undertaking any works on NR's land not less than 84 days before commencement of the works (paragraph 86, Schedule 13 Part 8);</li> <li>• NR may require such modifications and protective works as reasonably necessary to protect any railway property and to "ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways" (paragraph 86(4), Schedule 13 Part 8);</li> <li>• The ability for NR to require step in rights</li> </ul>

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		<p>belonging to statutory undertakers in the context of a conventional compulsory purchase order. The purpose is to protect NR (and other statutory undertakers) in the event of a proposed order which does not include protection against the compulsory acquisition of operational land or rights over operational land, where that acquisition would frustrate the discharge of a statutory duty.</p> <p>Under S.127, it is NR's position that in light of the risks arising in the absence of this restriction as outlined above:</p> <p>(a) the rights sought by Ecotricity in this DCO cannot be compulsorily acquired without serious detriment to the carrying out of NR's undertaking; and</p> <p>(b) Such detriment cannot be made good by NR by use of other railway property.</p> <p>Therefore, NR submit that the restrictions on compulsory acquisition, the ability for NR to maintain</p>	<p>for NR to undertake any works (at the Applicant's cost) (paragraph 86(3), Schedule 13 Part 8);</p> <ul style="list-style-type: none"> <li>• The requirement for the Applicant to provide NR's engineers access to the crossing works to inspect these during their construction, and to supply them with all information reasonably required in respect of the crossing works or method of constructing them (paragraph 88, Schedule 13 part 8); and</li> <li>• The requirement for the Applicant to design the Proposed Development, consult with NR, modify the Proposed Development, and carry out pre-operation testing to prevent the impact of electromagnetic interference on NR's railway and to ensure the continued safe operation of the railway (paragraph 92, Schedule 13 Part 8).</li> </ul> <p>Accordingly, the Protective Provisions provide adequate safeguards and the ability for NR to approve plans and method statements. This position has previously been supported by Examining Authorities,</p>

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		<p>the safe and efficient operation of the railway, and the ability for NR to carry out their statutory undertaking are intrinsically linked and are not severable. Accordingly, NR requires the restriction on the exercise of powers of compulsory acquisition without NR's prior consent to be included within the Protective Provisions for the protection of railway interests within the dDCO.</p>	<p>and endorsed by the Secretary of State, in both the Hinkley Point C Connection<sup>1</sup> and the Hornsea Project Three Offshore Wind Farm Order<sup>2</sup>. Therefore, the Applicant does not consider that the granting of the DCO would have a serious detriment on NR's undertaking (even if compulsory acquisition was required to deliver the Proposed Development).</p>

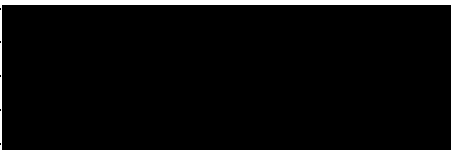
<sup>1</sup> At paragraph 8.5.230 of the Examiner's Report, the Panel considered that it would not be necessary, nor would it be reasonable, to include paragraph 4 [restricting the use of CA powers] of Network Rail's preferred form of the protective provisions and that it could compromise the Applicant's ability to deliver the proposed development.

<sup>2</sup> At Paragraph 19.5.25 of the Examiner's Report, it was noted that the Applicant may not be able to reach an agreement with Network Rail before the end of examination but, in any event, the ExA concluded (at paragraph 19.6.43) that the Applicant's proposed protective provisions (which did not restrict the use of CA powers) were sufficient and that there was no serious detriment to NR's undertaking.

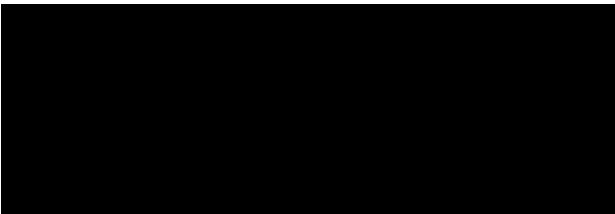
**3. SIGNATORIES**

The above SoCG is agreed between Ecotricity (Heck Fen Solar) Limited (“the Applicant”) and Network Rail, as specified below.

Duly authorised for and on  
behalf of Ecotricity (Heck Fen Solar) Limited

Name:	
Job Title:	
Date:	
Signature:	

Duly authorised for and on  
behalf of Network Rail

Name:	
Job Title:	
Date:	
Signature:	