

The Electricity Act 1989 and Gas Act 1986

Notice of proposal to confirm Provisional Order

Proposal of the Gas and Electricity Markets Authority (“the Authority”) to confirm a provisional order pursuant to section 26(1) and 26 (2) of the Electricity Act 1989 (“Electricity Act”) and section 29(1) and 29 (2) of the Gas Act 1986 (“Gas Act”).

1 Background

- 1.1 Npower Direct Limited (company number 03782443), Npower Limited (company number 03653277), Npower Northern Limited (company number 03432100), Npower Northern Supply Limited (company number 02845740), Npower Yorkshire Limited (company number 03937808), Npower Yorkshire Supply Limited (company number 04212116), all of Windmill Hill Business Park, Whitehill Way, Wiltshire, SN5 6PB (referred to collectively in the rest of this document as “npower”) each hold licences to supply gas and electricity granted respectively under sections 6(1)(d) of the Electricity Act and 7A(1) of the Gas Act.
- 1.2 The Authority made and served a provisional order on npower pursuant to section 25(2) of the Electricity Act and section 28(2) of the Gas Act on 24 September 2018 (“the PO”).
- 1.3 The PO was made in respect of npower’s failure to comply with certain elements of a direction issued by the Authority to npower on 31 August 2018 under Standard Licence Condition 32A (“SLC 32A”) (“the Direction”), namely npower’s failure to send initial notification of the commencement of a collective switch trial (the “Letters”) to a given number of its customers by noon on 20 September 2018. Npower’s failure to do this and comply with the Direction was a contravention of SLC 32A.
- 1.4 The PO requires npower to comply with the terms of the Direction and to remediate any non-compliance with it. In that regard, the PO required npower to send the Letters by noon on 26 September 2018. Npower failed to send the Letters by that deadline, thereby being in contravention of the terms of the PO, the Direction and SLC 32A.
- 1.5 As a consequence of npower’s failure to comply with the terms of the PO, on 27 September 2018 the Authority applied to the High Court for an injunction compelling npower to comply with the PO, the terms of the Direction and SLC 32A, under Section 27(7) Electricity Act (and its identical equivalent provision under the Gas Act). The Court granted the Authority’s application for an injunction on 5 October 2018. The injunction requires npower to comply with the terms of the PO and thereby the

Direction in full, and in particular required npower to send the Letters by noon on 8 October 2018. Npower complied with this requirement.

- 1.6 The PO will cease to have effect on 23 December unless confirmed by the Authority on or before that date. If the PO ceases to have effect, the injunction requiring compliance with it will no longer be effective either. The Direction requires actions by npower to be undertaken after that date.
- 1.7 A copy of the PO and the Notice of reasons for making the PO can be found at <https://www.ofgem.gov.uk/publications-and-updates/npower-provisional-order>.
- 1.8 The Authority proposes to confirm the PO with modifications (to remove the requirement to send the Letters which has been complied with), as it is satisfied that npower is likely to contravene the requirements of the Direction and thereby SLC 32A if the PO were to be allowed to lapse, given it did not comply with the Direction without the combined effect of the PO and court injunction. The Authority therefore considers it requisite to confirm the PO and accordingly proposes to do so in the form set out in the Annex to this notice.
- 1.9 Pursuant to sections 25(4) of the Electricity Act and section 28(4) of the Gas Act, the Authority shall confirm a provisional order with or without modifications if:
 - a. The Authority is satisfied that the regulated person to whom the order relates is contravening or is likely to contravene any condition or relevant requirement; and
 - b. The provision made by the provisional order is requisite for the purpose of securing compliance with that condition or requirement.
- 1.10 In reaching its conclusion that it should propose to confirm the PO in the form at Annex to this notice, the Authority has had regard to the matters set out in section 25(4A), (4B), (5) and (5A) and section 26 of the Electricity Act and section 28(4A) (4B), (5) and (5A) and section 29 of the Gas Act. Section 25(5) of the Electricity Act 1989 and Section 28(5) of the Gas Act 1986 refer to the Authority's principal objective as set out in in section 3A of the Electricity Act and Section 4AA of the Gas Act respectively.
- 1.11 In accordance with section 26(1) of the Electricity Act and section 29(1) of the Gas Act, the Authority gives notice that:
 - a. SLC 32A is the relevant condition for the purpose of the PO;
 - b. The acts or omissions which, in the Authority's opinion, constitute or would constitute contraventions of those conditions and requirements, and other factors which in the Authority's opinion justify the confirmation of the PO are those set out at paragraph 2 below.

- c. Any representations or objections with respect to the proposed confirmation may be made to the Authority by 21 November 2018 (see paragraph 3 below).

1.12 SLC 32A imposes the following obligation on npower: -

'Condition 32A. Power to direct suppliers to test consumer engagement measures

Power of direction

32A.1 For any purposes connected with the Authority's consideration of measures or behaviours which may impact on consumer engagement ('consumer engagement measures'), the licensee must comply with a direction issued by the Authority in respect of Relevant Matters for Standard Condition 32A.

32A.2 The licensee is not required to comply with a direction issued pursuant to 32A.1 unless the Authority has given the licensee at least 1 month's prior Notice.

32A.3 A direction issued under paragraph 32A.1 may include a requirement to comply with any instructions from the Authority or a third party agent appointed by the Authority for the purposes of conducting any test of consumer engagement measures.'

2 Reasons for the Authority's decision to propose to confirm the Provisional Order

- 2.1 Unless the PO is confirmed by the Authority prior to or on 23 December 2018 it will lapse. The Direction requires npower to carry out certain actions post that date. In particular, paragraph 28 of the Direction requires npower to record and collect certain data relating to the collective switch trial and to provide that data to the Authority. Importantly, some of this data, which is essential to enable the Authority to properly assess customer behaviour during the collective switch trial, will need to be provided to the Authority after 23 December 2018.
- 2.2 The Authority does not consider that it is likely that npower will breach the injunction granted on 5 October 2018 (with the related risk of contempt proceedings) by not complying with the terms of the PO and therefore is not likely to contravene SLC 32A, so long as the PO and the injunction (which compels npower to comply with the PO) remain extant.
- 2.3 However, the Authority is satisfied that, if and once the PO lapses (and the injunction and related threat of contempt proceedings consequently fall away), npower is likely to contravene SLC 32A by not complying with the remaining requirements of the Direction that it should comply with post 23 December 2018.
- 2.4 The Authority's assessment of the likelihood of npower not complying with the Direction and therefore contravening SLC 32A post 23 December 2018 is informed by npower's conduct in the context of complying with the Direction and its approach to its participation in the collective switch trial to date. In particular, it was necessary for the Authority not only to make the PO in the first place, but to make an application to the High Court for an injunction compelling npower to comply with the PO, in order to

secure npower's participation in the initial key stages of the collective trial (namely sending the Letters to the requisite number of customers) and thus bring npower into belated compliance with the Direction and SLC 32A.

- 2.5 The Authority has considered the possibility that npower may comply with the terms of the Direction after 23 December 2018, even if the PO lapses, due to any alleged adverse commercial impacts having already been felt by npower by that time. However, notwithstanding this possibility, based on npower's conduct to date, the Authority is satisfied that it is likely npower will not comply with the Direction after 23 December 2018 and therefore contravene SLC 32A.
- 2.6 The Authority considers that the terms on which it proposes to confirm the PO are requisite for the purposes of securing npower's compliance with SLC 32A. The proposed terms simply require npower to comply with the terms of the Direction in full and to remediate any non-compliance with the Direction that has occurred or may occur. The PO as made on 24 September 2018 specifically required npower to send out the Letters by 12 noon on 26 September 2018. As noted above, npower did this on 8 October 2018 (albeit after the injunction had been granted), therefore it is not necessary to include this in the confirmed PO. This is the only proposed modification to the form of the PO.
- 2.7 The Authority has considered whether the existence of legal proceedings initiated by npower in the High Court under Section 27(1) of the Electricity Act (and its equivalent identical provision in the Gas Act) challenging the Authority's decision to make the PO should preclude or prevent the Authority from confirming the PO and has concluded that they should not. Until those proceedings are concluded and result in the PO being quashed, the PO remains extant (unless it is not confirmed). The Authority has a duty to act in the best interests of consumers in accordance with its principal objective and considers that objective is best served in this context by taking such steps as are necessary to ensure that the collective switch trial is concluded within the timescales envisaged by the Direction.
- 2.8 For these reasons the Authority proposes to confirm the PO in the form set out in the Annex to this notice.

3 Representation or Objections

- 3.1 The Authority invites representations or objections in relation to its intention to confirm the PO in the form at the Annex to this notice.
- 3.2 Any representations or objections with respect to this proposed notice to confirm the PO must be made in writing on or before 21 November 2018 (being not less than 21 days from the date of issue of this notice) and sent to Heather Swan, Senior Manager, The Authority, Floor 3, Commonwealth House, 32 Albion Street, Glasgow G1 1LT or by email to Heather.Swan@ofgem.gov.uk.

- 3.3 If a respondent does not wish its response or part of its response to be published, it should clearly mark its response or the relevant parts "not for publication" and give reasons.
- 3.4 Any representations or objections which are duly made within the timeframe specified above and not withdrawn will be duly considered by the Authority.

Dated:29 October 2018

Signed

Sarah Cox
Chief Operating Officer

Duly authorised on behalf of the Gas and Electricity Markets Authority

Annex: Form of provisional order proposed to be confirmed by the Authority

**Electricity Act 1989 and Gas Act 1986
Provisional order confirmed under section 25(4) of the Electricity Act 1989
and section 28(4) of the Gas Act 1986**

To:

Npower Direct Limited (company number 03782443), Npower Limited (company number 03653277), Npower Northern Limited (company number 03432100), Npower Northern Supply Limited (company number 02845740), Npower Yorkshire Limited (company number 03937808), Npower Yorkshire Supply Limited (company number 04212116) (together, 'npower'), all of Windmill Hill Business Park, Whitehill Way, Wiltshire, SN5 6PB.

WHEREAS:

A: On 31 August 2018 the Gas and Electricity Markets Authority ("Authority") issued a direction to npower pursuant to Standard Licence Condition 32A of the gas and electricity supply licences ("the Direction").

B: The Direction required npower to participate in a consumer engagement trial known as the Active Choice Collective Switch Autumn Trial.

C: On 20 September 2018 npower failed to comply with paragraph 14 of the Direction in that it refused or failed to send particular communications to a number of its customers.

D: On 24 September 2018 the Authority made a provisional order under Section 28(2) of the Gas Act and Section 25(2) of the Electricity Act requiring npower to comply with the terms of the Direction and SLC 32A ('the PO').

E: The Authority made a proposal to confirm the PO with modifications on 29 October 2018 under Section 26(1) and 26(2) of the Electricity Act 1986 and Section 29(1) and 29(2) of the Gas Act ('the Proposal to Confirm').

F: Having considered representations made to the Authority in response to the Proposal to Confirm and having had regard to the matters set out in Section 25 of the Electricity Act and Section 28 of the Gas Act, the Authority is satisfied that npower is likely to contravene SLC 32A, which is a relevant requirement for the purposes of section 25 of the Electricity Act 1989 and section 28 of the Gas Act 1986, and that the provisions of the PO are requisite for the purposes of securing npower's compliance with the terms of the Direction and SLC32A *[This recital F is included for completeness to show the form of the PO if the Authority decides to confirm the PO and does not predetermine the Authority's decision to confirm or not confirm the PO in any way – the text in italics will not appear in the confirmed PO].*

NOW THEREFORE:

The Authority, pursuant to section 25(4) of the Electricity Act and section 28(4) of the Gas Act, and for the purpose of securing compliance with SLC 32A of the gas and electricity supply licences, confirms the provisional order requiring npower to:

1. Comply in all respects with the Direction issued on 31 August 2018, save for where compliance has become impossible because the relevant deadline has already passed; and
2. Where the time for compliance with any action specified in the Direction has already passed, remediate its non-compliance with that provision as soon as reasonably practicable.

Dated: 29 October 2018

Signed:

Duly authorised on behalf of the Gas and Electricity Markets Authority