IN ENFORCEMENT PROCEEDINGS UNDER SECTION 27A OF THE ELECTRICITY ACT 1989

BETWEEN

THE OFFICE OF THE GAS AND ELECTRICITY MARKETS

-and-

NPOWER DIRECT LIMITED, NPOWER LIMITED, NPOWER NORTHERN LIMITED AND NPOWER YORKSHIRE LIMITED

DETERMINATION OF THE ENFORCEMENT DECISION PANEL AND NOTICE OF A PROPOSAL TO IMPOSE A FINANCIAL PENALTY UNDER SECTION 27A(3) OF THE ELECTRICITY ACT 1989

A. Introduction

1. The Office of the Gas and Electricity Markets ("**Ofgem**") contends that npower Direct Limited, npower Limited, npower Northern Limited and npower Yorkshire Limited (collectively referred to as "**npower**") have contravened Standard Licence Conditions ("**SLCs**") 12.18 and 12.21 of the Electricity Supply Licence.

2. In summary,

(a) SLC 12.18 as applied to npower required that, on and after 6 April 2009, npower replaced electricity meters only with "Advanced Meters" at defined "relevant premises". "Relevant premises" are defined in SLC 12.17. An "Advanced Meter" is defined by SLC 12.19 to mean an electricity meter that, either on its own or with an ancillary device, and in compliance with the requirements of any relevant industry code, (a) provides measured electricity consumption data for multiple time periods, and is able to provide such data for at least half-hourly time periods; and (b) is able to provide the licensee with remote access to such data. (This in turn allows the licensee to ensure that a customer supplied with electricity at relevant

premises through an Advanced Meter, or its nominated agent, has timely access, on request, to the data provided by that meter, as required by SLC 12.20); and

(b) SLC 12.21 required that as from 6 April 2014 ("**the Deadline**"), a licensee must not supply electricity to any relevant premises other than through an Advanced Meter. The five year period between between 6 April 2009 and 6 April 2014 has been referred to by the parties as **"the Roll-Out Period"**, during which period licensees were expected to install Advanced Meters at all relevant premises. However, SLC 12.22 provided for the prohibition imposed by SLC 12.21 to be disapplied in any case where the licensee was unable to install or arrange for the installation of any Advanced Meter at the relevant premises in question despite taking all reasonable steps to do so.

3. The essence of Ofgem's case against npower is that:

(a) During the period from 15 October 2009 to 30 November 2015, npower replaced between c.192 and c.272 electricity meters at defined relevant premises with meters which were not Advanced Meters, in contravention of SLC 12.18;

(b) As at 6 April 2014, npower was supplying electricity to defined relevant premises other than through an Advanced Meter in respect of c. 5,460 to 5,560 relevant meter points ("**RMPs**"), in contravention of SLC 12.21. In that connection, Ofgem contends that npower had failed to take all reasonable steps to install or arrange for the installation of an Advanced Meter at the relevant premises in question, with the result that npower could not rely on the disapplication of the prohibition imposed by SLC 12.21, as provided for by SLC 12.22. In particular, Ofgem submits that npower:

(i) failed adequately to plan for timely compliance with SLC 12.21;

(ii) failed adequately to engage with customers (including failing to engage with customers sufficiently early in the Roll-Out Period); and

(iii) failed adequately to resolve interoperability and communications issues during the Roll-Out Period.

(c) A penalty of at least £3.7m should be imposed in respect of these contraventions.

4. The essence of npower's response is that:

(a) npower accepts that during the period from 15 October 2009 to 30 November 2015, it replaced between c.174 and c.194 electricity meters at defined relevant premises with meters which were not Advanced Meters, in contravention of SLC 12.18;

(b) npower admitted that it had failed to take all reasonable steps to install or arrange for the installation of Advanced Meters at all relevant premises in one respect, in that it had disbanded its SME team (see definition at paragraph 55) (which would have been responsible for engaging SME customers and arranging for the installation of Advanced Meters at their premises) for a period of almost two years. However, it contended that this admitted failure had affected at most c.900 RMPs, and in respect of all other RMPs in which Ofgem alleged a contravention, npower had taken all reasonable steps to install or to arrange for the installation of Advanced Meters; and

(c) no penalty, or alternatively only a nominal penalty, is appropriate in respect of its admitted contraventions.

5. The Enforcement Decision Panel makes the following determination finding liability for breaches of SLC 12.18 and SLC 12.21 against npower, and proposes to impose a financial penalty of £2.4 million.

B. The statutory framework

6. The Gas and Electricity Markets Authority ("**the Authority**") grants licences for the supply of electricity pursuant to section 6 of the Electricity Act 1989 ("**EA 1989**"). Such licences are subject to, inter alia, SLCs: section 8A EA 1989.

7. Under section 25 of the EA 1989, the Authority has power to impose a final order for securing compliance with a relevant condition or relevant requirement, in circumstances where the Authority is satisfied that a regulated person is contravening, or is likely to contravene, any such relevant condition or relevant requirement. As defined in section 25(8) EA 1989, a "relevant condition" in

relation to a regulated person means any condition of any licence held by that person.

8. Section 27A provides for the Authority to impose a penalty on a regulated person of such amount as is reasonable in all the circumstances of the case, where it is satisfied that a regulated person has contravened or is contravening any relevant condition. The maximum penalty that may be imposed on a regulated person in respect of a contravention may not exceed 10% of the person's turnover: section 27O(1). Section 27C(1) provides a limitation period for the imposition of a penalty, in that the Authority may not impose a penalty in respect of a contravention later than the end of the period of five years from the time of the contravention or failure, unless before the end of that period notice under section 27A(3) relating to the penalty is served on the regulated person under section 27A(7), or where a notice relating to the contravention is served under section 28(2), or where a final or provisional order has been made in relation to the contravention.

9. The Enforcement Decision Panel ("**the EDP**" or "**the panel"**) is an independent panel to which the Authority has delegated powers to determine disputed allegations of contravention of the SLCs, and (in a case where it finds such a contravention to be established) to determine any appropriate penalty: Schedule 1 to the Utilities Act 2000 and paragraph 17 of the Rules of Procedure of the Authority.[1]

10. The EDP's decision therefore forms part of the Authority's administrative decision-making process, but is made independently of Ofgem. The EDP determines the contested matters on the basis of the evidence and submissions put before it by both Ofgem and the licensees alleged to have contravened the SLCs.

11. This is the first contested case for the EDP since it was established in 2014. At all times, the EDP has been concerned to ensure the fairness of proceedings. An apparent challenge in the pleadings to the role and constitution of the EDP was not in the event pursued by npower.

[1] https://www.ofgem.gov.uk/system/files/docs/2018/07/rules_of_procedure_approved_by_gema_14_june_2018_0.pdf

C. The procedural steps leading to the EDP's determination

12. On 14 October 2014, Ofgem opened its investigation into npower's compliance with the Advanced Metering Obligations. A series of six information requests were made, largely in 2014-2015 (the other being made on 13 April 2017).

13. On 15 January 2016, Ofgem provided npower with a Summary Statement of Initial Findings ("SSIF"). On 7 February 2016, npower responded to the SSIF. On 24 May 2016, Ofgem produced a SSIF supplement. On 27 June 2016, npower responded. These documents were produced primarily for the purposes of consideration by a separate settlement committee appointed by the Authority and were confidential to it. No settlement having been reached, they were produced in evidence before the EDP in the current contested proceedings by agreement between the parties (save certain passages which were redacted as remaining confidential).

14. On 13 July 2017, Ofgem provided its Statement of Case ("**STOC**") to the EDP. On 24 October 2017, npower provided its written Response, accompanied by witness statements from npower staff members hereafter referred to as "JN" and "GM". On 31 January 2018, Ofgem provided its Reply. On 6 March 2018, npower filed a Rejoinder, accompanied by a supplementary witness statement from GM, and an expert report by Alaric Marsden of FTI Consulting LLP. The pleadings were also accompanied by bundles of documentary evidence, to which reference is made insofar as is necessary below.

15. On 15 March 2018, npower invited the EDP to determine two preliminary issues, relating to the burden of proof and to the "duration" of the contraventions. The EDP decided not to deal with those matters as preliminary issues, but to deal with them as part of the substantive decision at the conclusion of the process.

16. On 30 April 2018, Ofgem provided its skeleton argument for the EDP hearing. On 8 May 2018, npower provided its skeleton argument.

17. Having reviewed the above materials, the panel considered that it was not clear how the parties put their cases with respect to whether, and in what respects, npower had fulfilled (or failed to fulfil) the duty to take all reasonable steps to install or arrange for the installation of Advanced Meters at relevant premises. The

panel therefore requested the parties to provide a schedule identifying the evidence relied upon in respect of each "reasonable step" that Ofgem contended had not been taken by npower at the appropriate time, and npower's response to it. Although an initial draft of that schedule was produced by Ofgem in advance of the hearing, the schedule went through a number of iterations following the hearing, as the parties sought to agree its contents insofar as was possible. Final versions were produced on 12 June 2018. The panel is grateful for the assistance that it provides.

18. On 14-15 May 2018, the EDP hearing took place. Submissions were made by counsel for both parties. Presentations were also made on behalf of npower, supported by Powerpoint slides, by Jason Scagell, Director of Corporate Affairs and Development, and by Dr Chris Harris, Head of Regulation. There was no opportunity given to either party to cross-examine any witness: Ofgem produced no witnesses but relied on its written cases and the documents, along with oral submissions, while npower opted not to produce either witness who had given a witness statement for questioning. The panel regarded it as a matter for each party as to how each presented its case, and has ascribed such weight to the evidence as it thinks appropriate in all the circumstances.

19. In response to questions from the panel, the parties provided further evidence and written submissions following the hearing. They included:

(a) An email from Ofgem's junior counsel, dated 15 May 2018;

(b) Ofgem's Responses to the EDP's Questions, dated 16 May 2018;

(c) npower's comments on issues raised by Ofgem's note, dated 5 June 2018;

(d) npower's response to the EDP's questions on 'Simple Steps', dated 29 May 2018; and

(e) npower Note to the EDP to accompany Ofgem's final version of the factual matrix, dated 12 June 2018.

D. The factual background: the introduction of the Advanced Metering Obligations

20. The roll-out of Advanced Meters is part of a national infrastructure project to modernise the energy sector and provide a better service to non-domestic energy companies. The government policy underpinning the project was the subject of consultation by the Department for Business, Enterprise and Regulatory Reform ("**BERR**") in 2007-2008.

21. In May 2007, BERR's predecessor department (the Department for Trade and Industry) had published an Energy White Paper (following an earlier consultation). The Energy White Paper set out a range of billing and metering measures designed to give consumers direct access to information about their energy use to help them manage that use and reduce carbon emissions. The Energy White Paper outlined three core billing and metering activities that would heighten awareness of energy use and reduce consumption. They included ensuring that business customers in those sectors of the market where it was then cost effective would receive smart meters over the next five years. More broadly, the White Paper set out the Government's expectation that smart meters would be provided to all business and domestic customers over the next decade.

22. In August 2007, BERR consulted further on those policies and their implementation, and on whether it would be appropriate to apply those policies to smaller businesses. The consultation also sought views on options for the deployment of smart meters. BERR noted that advanced types of meters which provide readings on either an automatic half-hourly basis for electricity or on a daily basis for gas were already mandatory for large users of energy. It stated that the data provided by these types of meters, combined with energy saving advice, allows businesses to make informed decisions about investment in energy efficiency. The Government proposed that energy suppliers should extend smart metering to all but the smallest business users within the following 5 years. More particularly, it proposed that smart metering be installed for specific segments of the SME market (namely profile classes 5-8 of the electricity markets). For these segments of the SME market, the Government proposed that all remaining non-smart meters should be replaced with smart meters over the following 5 years.

23. The Government further recognised in the August 2007 consultation that there may be interoperability issues around the installation of such meters (that is, the ability of customers to switch supplier without meters being replaced), and observed that subject to interoperability issues being addressed and with regulatory requirements in place by May 2008, it considered that the 5 year timescale for roll out of smart meters to this sector was feasible. However, amongst the questions on which it consulted was whether asset-stranding represented a significant commercial problem in the larger business market to which it proposed that smart meters be provided, whether interoperability arrangements were necessary to underpin a roll-out of smart meters to this sector, whether 5 years was an appropriate period in which to roll out smart meters in the business sector, and on what the stranding and other cost drawbacks of this proposal and the 5 year timescale were and whether they were material. The proposal was accompanied by a draft licence condition (set out in Schedule 3 to the consultation document), whose effect would have been to require a licensee to use only a smart meter when installing or arranging the installation of an electricity meter after a certain date, and to require licensees not to supply any electricity to a relevant customer other than through a smart meter after a then as yet unspecified date in 2012.

24. In April 2008, the BERR published the Government's response to that consultation. It decided to adopt its proposal, following generally positive consultation responses and a positive impact assessment. On the question of interoperability, it recorded the different views of respondents to the consultation. Ofgem had said that whilst interoperability was desirable, the market was operating without formal arrangements, and Government should not impose them. Others felt that the Government should set an interoperability requirement. The Government decided not to make any arrangements in respect of stranding or interoperability. It would, however, discuss with Ofgem what might be done to facilitate interoperability arrangements among suppliers and other meter-owners.

25. In July 2008, the Government published a further short consultation on a draft licence modification for the provision of Advanced Metering for larger business sites. It noted that it anticipated that the roll-out of Advanced Metering to larger business sites would lead to a good deal of product differentiation on the basis of

quality and cost of billing, data provision and other information services, and the means of delivering that information. It envisaged that such action would contribute to suppliers' undertakings under the voluntary agreements made under the Energy Services Directive. It set out a new draft licence condition, which included a new provision disapplying the requirement not to supply electricity other than through a smart meter (now from 1 January 2014), where the licensee was unable to install or arrange the installation of such a meter, "*despite taking all reasonable steps to do so*."

26. The Government explained the purpose of that new provision (which would later become SLC 12.22) in its consultation document, as follows:

"The changes from the draft licence condition published in August 2007 are:

- *the introduction of arrangements to reflect the fact that, where there is not already an appropriate meter, the supplier may, because of the nature or operation of a business site (for instance, a hospital or factory) be unable to change the meter by 31 December 2013. This change protects the supplier from enforcement action arising from non-compliance with the licence condition, and avoids a situation whereby the supplier might feel obliged, because of the threat of enforcement action, to disconnect a customer."*

27. On the issue of interoperability, it said:

"Advanced metering is already being provided in these parts of the gas and electricity market without any arrangements on interoperability. Nonetheless, the Government considers that it would be desirable, as far as possible, to promote interoperability. It therefore welcomes Ofgem's intention in the light of this consultation, to host discussions with interested parties within the industry with a view to identifying current problems of non-interoperability, and finding ways to address them."

28. Ofgem held a total of eight meetings on interoperability between 1 September 2008 and 6 November 2009, to facilitate discussion between relevant parties including DECC, National Grid, electricity and gas suppliers and the suppliers of Advanced Meters. The discussions led to the setting up of an Advanced Meters Expert Group, which led to a number of industry code modifications being agreed with industry aimed at resolving interoperability issues. Ofgem held further discussions in 2012 with a sample of eight energy suppliers regarding interoperability. npower emphasised that the meetings did not in themselves find ways to "*address*" the interoperability problems in the sense of resolving those problems.

29. With effect from 6 April 2009, SLC 12.17 to 12.22 ("**the Advanced Metering Obligations**") of the Electricity Supply Licence was introduced, requiring Advanced Meters to be supplied after that date, and providing for a Roll-Out Period until 5 April 2014. The full text of the new licence conditions is as follows:

*"**Advanced meters for Non-Domestic Premises***

12.17 This paragraph has effect on and after 6 April 2009 and applies where the licensee installs or arranges for the installation of an Electricity Meter at Non-Domestic Premises where the metering point falls within profile class 5, 6, 7 or 8 as defined in the Balancing and Settlement Code (for this condition only, "relevant premises").

12.18 If paragraph 12.17 applies, the Electricity Meter installed at the relevant premises must be an advanced meter.

12.19 For the purposes of this condition, an advanced meter is an Electricity Meter that, either on its own or with an ancillary device, and in compliance with the requirements of any relevant Industry Code:

(a) provides measured electricity consumption data for multiple time periods, and is able to provide such data for at least half-hourly time periods; and

(b) is able to provide the licensee with remote access to such data.

12.20 The licensee must ensure that a Customer supplied with electricity at relevant premises through an advanced meter, or that Customer's nominated agent, has timely access, on request, to the data provided by that meter.

12.21 As from 6 April 2014, the licensee must not supply electricity to any relevant premises other than through an advanced meter.

12.22 The prohibition imposed by paragraph 12.21 does not apply where the licensee is unable to install or arrange for the installation of any advanced meter at the relevant premises in question despite taking all reasonable steps to do so."

30. From May 2012 (although, it appears, not before), Ofgem states that it regularly monitored supplier progress in meeting SLC 12 obligations.

31. In December 2012, Ofgem issued a clarification to suppliers to assist them in understanding the functionality a meter must have to be considered advanced, and in particular that Advanced Meters were required to provide the functionality of allowing remote data collection ("polling") without any further technical intervention. (The panel agrees that it was not enough to provide what Ofgem now refers to as an Advanced-Capable Meter, being merely one designed to have the

functionality specified in SLC 12.19, but which was unable to perform such functions without further technical intervention: that is, it must in fact be *able* to provide such polling data, not simply be capable of doing so with further technical intervention.)

32. On 28 February 2013, nearly four years into the Roll-Out Period, Ofgem wrote to non-domestic suppliers (and others) about suppliers' progress towards completing the roll-out of Advanced Meters, and to remind suppliers of the importance of ensuring licence obligations are complied with. It set out a non-exhaustive list of factors Ofgem might consider when deciding whether a supplier had met the Advanced Meter obligations under SLC 12.21. It referred to the term "all reasonable steps" as being a "high threshold for compliance". It stated that there was a range of measures at the disposal of the supplier to ensure that an Advanced Meter is installed in compliance with the obligation. For illustrative purposes, it set out some examples of the measures that it would consider when making enforcement decisions. They included:

(a) the supplier's strategy for engaging with the consumer to attempt to gain access to the relevant premises;

(b) the technical solution(s) the supplier utilised in order to ensure a high probability of success when installing Advanced Meters; and

(c) the information and options presented to the consumer when seeking their agreement to install an Advanced Meter.

33. In September and October 2013, around 6 months before the Deadline, Ofgem wrote to most suppliers to express concern with their progress and asked them to outline their plans to ensure compliance with the Advanced Meter obligation.

34. On 12 August 2014, just over four months after the Deadline, Ofgem wrote an open letter to suppliers noting that on its initial assessment, the roll-out of Advanced Meters was only 75% complete. It noted that "*What constitutes all reasonable steps can change over time and will depend on individual facts and circumstances. Advances in technology and improvements in supplier and industry processes can make more advanced meter installations possible. This means that a supplier that*

has already attempted an installation and was not successful may need to attempt to install the meter again."

35. Neither Ofgem nor Government has ever publicly set out any requirement on suppliers to achieve interoperability, nor to engage in 'systematic meter exchange', beyond the requirement in SLC12 that licensees take all reasonable steps to install Advanced Meters.

E. Decision on Contravention of SLC 12.18

36. Ofgem alleges that during the period from 6 April 2009 to 30 November 2015, npower replaced between 259 and 339 electricity meters at defined relevant premises with meters which were not Advanced Meters, in contravention of SLC 12.18. Any penalty sought in relation to allegations of earlier breaches from 6 April 2009 until 14 October 2009 is time barred pursuant to section 27C(1) EA 1989, and so Ofgem invites the EDP to impose a penalty in relation to between 192 and 272 meters installed in the period from 15 October 2009 until 30 November 2015. For its part, npower accepts that during the period from 15 October 2009 to 30 November 2015, it replaced between c.174 and 194 electricity meters at defined relevant premises with meters which were not Advanced Meters.

37. The panel is prepared to assume that c.192 such meters were installed at relevant premises, being a figure which falls within both parties' calculated range. While it is noted that the potential range covers from 174-272 non-Advanced Meters installed during this period, the panel considers that the difference is not material for present purposes, and does not propose to seek to resolve it.

38. The panel accordingly finds that npower contravened SLC 12.18 to the extent of the assumption adopted in the preceding paragraph, namely as to the installation of c.192 meters.

F. Decision on Contravention of SLC 12.21

(i) Introduction

39. As from 6 April 2014, npower was supplying electricity to relevant premises other than through an Advanced Meter at 7,164 RMPs (out of a total of 22,386 RMPs). However, given the terms of SLC12.22, such supply would not amount to contravention of SLC 12.21 in respect of any given RMP if npower was "*unable*" to install or arrange for the installation of any Advanced Meter at the relevant premises in question "*despite taking all reasonable steps to do so*": in those circumstances, the prohibition imposed by SLC 12.21 would not apply in respect of the premises in question.

40. Ofgem's case was that npower was supplying electricity to defined relevant premises other than through an Advanced Meter, and without having taken all reasonable steps to install one, in respect of approximately 5,460-5,560 out of those 7,164 RMPs. Put another way, Ofgem accepted that in c.1,650 cases npower had been unable to install an Advanced Meter at an RMP before the Deadline despite having taken all reasonable steps to do so. For its part, npower accepted that it had not taken all reasonable steps in respect of c.900 out of those c.5,500 RMPs but contended that it had done so in respect of the remaining c.4,600 RMPs.

41. It follows that the real issue between the parties was not whether npower had breached SLC 12.21, but to what extent and in respect of how many RMPs it had done so, by reason of a failure to have taken all reasonable steps to install Advanced Meters at those sites.

(ii) Legal analysis: "all reasonable steps"

42. Both parties were concerned to establish the meaning of the words "*all reasonable steps*" in SLC 12.22. Ofgem drew attention to various authorities drawn from the context of contractual disputes where those words had been interpreted by the courts. The panel found those authorities to be of limited value. In the panel's view, the words must be given their ordinary meaning in light of the specific context in which they are used. The present context is not directly analogous to the position where two commercial parties have entered into mutual contractual obligations

freely negotiated between themselves, where the task of interpretation may require identification of what was in the contemplation of the parties. Instead, it is specifically a regulatory context, where obligations are imposed under the terms of a licence which are neither negotiable nor voluntarily undertaken.

43. The panel has formulated and applied the following general principles as to the effect of the obligation to take "*all reasonable steps*" to achieve the required outcome of installing or arranging for the installation of an Advanced Meter at each relevant premises, such that any electricity supplied to the relevant premises is supplied through an Advanced Meter ("the required outcome").

(a) Whether or not a particular "step" would be "reasonable" is an objective question for the panel to determine on the evidence: it does not depend upon the subjective view of the licensee or of Ofgem.

(b) There is no fixed measuring stick by which the reasonableness of any particular measure at any particular time can be assessed. It will depend on all the circumstances.

(c) It is insufficient for a licensee to take a single "reasonable step" to supply electricity only from Advanced Meters, if that step is insufficient to ensure that that requirement is in fact achieved. The requirement is to take "all" reasonable steps to achieve the outcome. It follows that reasonable steps must continue to be taken until the required outcome is achieved in respect of each relevant premises (save where there is no prospect of any such step succeeding).

(d) It is not necessarily "reasonable" to take all possible steps from the outset. It may be reasonable to seek to resolve a problem through the least costly/disruptive means first, unless there is objectively good reason to anticipate that that will not be adequate. However, if a given problem is not resolved within a reasonable time, the requirement to take all reasonable steps to achieve the required outcome may then require further more effective measures to be taken, even if more costly, disruptive or complex. Put another way, whether a particular step would be proportionate may be relevant to whether it is reasonable to take it at that time.

(e) It is not for Ofgem to identify every possible reasonable step that a licensee could or should have taken. Equally, however, it would be inadequate for Ofgem simply to rely upon the mere fact that the required outcome was not met as in itself demonstrating that the licensee failed to take all reasonable steps. Ofgem must therefore identify on the facts of each case one or more respects in which the licensee's action was inadequate, and a licensee will then be entitled to show either that it did in fact take such steps or that it would not have been a reasonable step to take at the relevant time (including because it would not have been effective).

(f) The panel does not consider it helpful to characterise the words "*all reasonable steps"* as used in SLC 12.22 as establishing a "*high threshold*", as Ofgem suggested: that is an unwarranted gloss which adds nothing of substance to the application of the natural meaning of the words in the manner set out above, and is not the test that the panel has to apply.

44. npower submitted that the SLC must be read as requiring licensees to take all reasonable steps "*if supply is to continue post-deadline*" (Response §67). It is correct that any supplier who had exited the market by 6 April 2014 could not be said to be in breach of SLC 12.21 (and hence need not have invested in ensuring all RMPs had Advanced Meters installed in advance of that Deadline). npower went on to suggest that it followed that "*there is no requirement to take positive steps to roll out AMR meters found in SLC 12"* (skeleton §10). That is only true in the limited sense that there is no requirement not to exit the market by 6 April 2014. Any supplier (like npower) who wished to continue to supply electricity to relevant premises after that date was under an obligation to take all reasonable steps to install Advanced Meters before 6 April 2014, if it was not to be in breach of SLC 12.21 after that date. npower is therefore incorrect to suggest that "*there can be no breach (any previous steps, sufficient or insufficient as to 12.22 are irrelevant) as there will be no supply contrary to 12.21*": if, as at 6 April 2014, a supplier was supplying electricity to relevant premises other than through an Advanced Meter, it would be in breach of SLC 12.21 unless it had been unable to install such a meter despite having taken all reasonable steps to do so.

45. The parties made two further legal submissions as to how the panel should assess whether and to what extent npower had been unable to install an Advanced Meter at a particular RMP despite taking all reasonable steps to do so.

46. First, there was a debate between the parties in their written statements of case as to whether SLC 12.22 should be interpreted so as to be consistent with Article 13 of Directive 2006/32/EC, in accordance with the *Marleasing* principle of interpretation. npower contended that it was necessary to do so in order to import a requirement of proportionality; Ofgem contended that the principle did not apply to licence conditions, and that the licence conditions in question here did not in fact implement Article 13, which only set minimum requirements. In the event, however, in view of Ofgem's acceptance that the concept of "*all reasonable steps*" will contain some assessment of the proportionality of the step, neither party contended that anything turned on the point.

47. Secondly, there were also submissions made as to where the burden of proof lies in establishing a breach of SLC 12.21. In particular:

(a) npower submitted that Ofgem was wrong to refer in its STOC to there having been a "*prima facie*" breach of SLC 12.21, subject to the "*defence*" provided by SLC 12.22, and was further wrong to have stated that the burden lay on npower to prove that it had been unable to install an Advanced Meter at relevant premises despite having taken all reasonable steps to do so, before it could take advantage of that "*defence*". npower submitted that SLC 12.22 had not been drafted to provide a "*defence*", but rather to make clear that the prohibition in SLC 12.21 "*does not apply*" where the terms of SLC 12.22 are fulfilled.

(b) Ofgem contended (relying on *Davies v Health and Safety Executive* [2002] EWCA Crim 2949) that its position did not constitute an impermissible reversal of the burden of proof, as in a regulated context a licensee had accepted the controls and obligations which accompanied its decision to work in that area; moreover, it was in a position to demonstrate what steps were reasonably practicable for it to take.

(c) npower responded distinguishing *Davies* and relying on case law on the Competition Act 1998 as a closer analogy, and submitting that whilst it was unobjectionable to assume an evidential burden was placed on a licensee, the effect

of SLC 12.21-22 could not be taken to be to impose a legal (or persuasive) burden on a licensee. It was entitled to a presumption of innocence, requiring compelling evidence to establish a breach of its obligations.

(d) In its skeleton argument, Ofgem maintained its position, but accepted in any event that the burden of proof was unlikely to be determinative: it submitted that Ofgem had undertaken significant evidence gathering and analysis in its Statement of Case to demonstrate that all reasonable steps had not been taken in respect of the RMPs in dispute.

(e) In response, npower observed that since both parties had in fact presented evidence, it agreed that based on a civil standard of proof, the question of which party faces the burden of proof would in these circumstances rarely be decisive.

48. In the event, therefore, little turned on this debate: it was not in dispute that electricity was being supplied to relevant premises other than through an Advanced Meter at 7,164 RMPs, and Ofgem had in fact identified the respects in which it contended that npower had failed to take reasonable steps to install Advanced Meters at those RMPs. npower was then able to respond to that evidence with its own evidence, to seek to establish (to the extent that it could) that it had in fact taken all reasonable steps in relation to the matters relied upon by Ofgem. In the circumstances, the panel has not found that the question of burden of proof has been determinative of any matter it has been necessary to decide. For the avoidance of doubt, however, the panel records that it has <u>not</u> approached the matter on the basis that npower carries the legal (or persuasive) burden of proof to establish a "*defence*" that all reasonable steps to install Advanced Meters have been taken.

(iii) The RMP tables

49. In response to an information request dated 31 March 2014 (prior to its concession of the c.900 RMPs in respect of which it had not taken all reasonable steps), npower set out its position in respect of the 7,164 RMPs at which no Advanced Meter had then been installed. In its skeleton argument, Ofgem summarised that information in two tables. In Table 1, Ofgem identified that:

(a) In respect of 1,331 RMPs, npower alleged that it had taken all reasonable steps to install Advanced Meters, but had been unable to do so. That number was broken down into further sub-categories, to identify the ultimate reason why npower had been unable to do so (respectively: "customer declined", "customer not yet ready", "3rd party agent", "customer no contact", "no comms signal", or "works required").

(b) In respect of the remaining 5,833 RMPs, npower stated that it was in the process of taking all reasonable steps. That number was broken down into further sub-categories (respectively: "appointment booked", "appointment left to book", "intermittent (has previously worked)", or "interoperability and comms issues").

50. In Table 2, the "appointment booked" and "appointment left to book" sub-categories were further broken down.

51. Alongside all of those numbers in each of the categories and sub-categories, Ofgem identified the approximate number of RMPs in which it alleged a breach of SLC 12.21 – that is, the number of RMPs in which it contended that npower had failed to take all reasonable steps.

52. Following the hearing, Ofgem provided updated versions of the two tables, which slightly reduced the number of RMPs in which it maintained a breach, as compared with the position set out in its pleaded case, in the light of the evidence produced by npower. (The sources identified by Ofgem through footnote references were to the pleadings and exhibits, which have been omitted for present purposes.)

Updated Table 1:

Table 1	Total number of RMPs as alleged by npower (Ofgem's analysis, if different, in brackets)		Approx. number of RMPs where breach of SLC 12.21 alleged in Statement of Case	Approx. number of RMPs where breach of SLC 12.21 alleged in final pleadings
Fully operational Advanced Meters	**15,222**		**0**	**0**
RMPs alleged by npower to have completed npower's 'ARS Working Procedures' (taken all reasonable steps)	**1,331**		**c.700 + 13**	**c.650 +13**
	Customer declined	468	468	420[1]
	Customer not yet ready	49	49	49
	3rd party agent	144	85	85
	Customer no contact	30	0	0
	No comms signal	332	13	13
	Works required	308	101+	100+ [2]
RMPs alleged by npower as being managed within the 'ARS Working Procedures' (in process of taking all reasonable steps)	**5,833**		**4,847-4,947**	**4,797- 4,897**
	Appointment booked	337 (342)	1,100	1,050
	Appointment left to book	1,124 (1,111)		
	Intermittent (has previously worked)	1,425	800-900	800-900
	Interoperability & comms issues	2,947	2,947	2,947

Updated Table 2:

Table 2

Categories of RMPs npower claims were being managed within the 'ARS Working Procedures'		**Number of RMPs (Ofgem's analysis)**	**Approx. RMPs where breach of SLC 12.21 alleged in Statement of Case**	**Approx. RMPs where breach of SLC alleged in final pleadings**
Appointment Booked	Appointment booked in future	269 (274)[3]	246	246[4]
	Job outstanding/ awaiting results of Meter Exchange Visit	68	62	62
	Appointment booked sub-total	**337 (342)**	**308**	**308**
Appointment left to book	In customer contact strategy	461	438	438[5]
	Pending Customer Contact	75	48	0[6]
	Sites Gained – Awaiting Meter Technical Details	241 (228)[7]	94	108[8]
	Incomplete Change of Supply or Agent	79 (80)[9]	23	23
	Awaiting first polling cycle	185 (184)[10]	97	97
	Supplier/Customer Billing Query	77	77	76[11]
	Suspected Theft/Warrant Outstanding	4	3	3
	Disconnection Pending	2	0	0
	Left to book sub-total	**1,124 (1,111)**	**780**	**745**
Total		**1,461 (1,453)**	**1,088 (c. 1,100)**	**1,053 (c. 1,050)**

53. In respect of those RMPs where Ofgem alleged a breach of SLC 12.21, its case was that npower had failed to adopt one or more of the following reasonable steps:

(a) adequately to plan for timely compliance with SLC 12.21;

(b) adequately to engage with customers (including doing so sufficiently early in the Roll-Out Period); and

(c) adequately to resolve interoperability and communications issues during the Roll-Out Period.

(iv) Failure adequately to plan for timely compliance

- *Ofgem's case*

54. In 2007, npower initiated a project to install Advanced Meters throughout its portfolio of business customers using its commercial "Encompass" product, called 'Project ROLO', which received Board approval in December 2008. The Encompass product was a service for which customers would pay a subscription fee to have an Advanced Meter installed to measure and monitor energy consumption and receive energy management services, including multi-utility tracking, site comparison and advice on actions to reduce energy consumption. However, the focus of Project ROLO was to promote Encompass, rather than to achieve regulatory compliance. npower continued to rely on the model established by Project ROLO until late 2012. Ofgem argues that a reasonable step (once the Roll-Out Period commenced) would have been to treat customers equally whether they were interested in the commercial product or not, rather than to adopt this "merely commercial" approach.

55. In 2009, npower decided to hand over the deployment of Advanced Meters to npower's operational divisions on a "business as usual" ("**BAU**") basis. The Energy Services ("**ES**"), Industrial and Commercial ("**I&C**") and Small and Medium Enterprises ("**SME**") divisions were responsible for engaging customers.

56. An SME AMR team was established in October 2009 (i.e. after the start of the Roll-Out Period on 6 April 2009). However, from January 2011 to November 2012, the npower SME AMR team was disbanded. Ofgem argues that a reasonable step would have been to maintain the SME AMR team with a view to achieving regulatory compliance.

57. The SME AMR team was re-formed in November 2012, to continue activity, with additional resources (sufficient for that work to continue) being allocated in early 2013. Further, in February 2013, npower first produced the 'Reasonable Endeavours Working Procedure' document ('the Working Document'). There followed many iterations and amendments to reflect improvements at least until May 2014, when it first received full regulation sign-off. However, npower failed take any or any major compliance steps prior to February 2013, being the date that

npower set out its working procedures in a written Working Document. Ofgem referred to npower's own description as follows: "*prior to the creation of our [Working Document] there was no common agreed method across all segments of npower for dealing with issues identified during deployment. An early form of the SME and I&C deployment tracker spreadsheets were being utilised but this was more to enable an awareness of which meters had been made advanced rather than to enable tracking and management of deployment issues."*

58. While Ofgem does not dispute that some steps were taken by npower prior to the Working Document, it argues that the steps taken prior to any systematic attempt at regulatory compliance were materially insufficient. It contends that the Working Document evidences a failure of planning before Feb 2013 (and continuing failures until sign off in May 2014). In each iteration of the Working Document, npower refined its processes and included additional steps. The Working Document was not a mere reflection of steps that were already being taken, but led to various new steps being introduced late in 2013. The Working Document was given "Final Regulation Sign Off" (that is, final authorisation by the npower's Retail Compliance Department) only on 27 May 2014, which was after the Deadline. As late as July 2013, npower's position as expressed in its internal minutes was that it was *"unable to work towards reasonable endeavours until the process is signed off"*.

59. Introducing this approach only in February 2013 meant that for much of the Roll-Out Period npower lacked a basis on which it could have reliably estimated the rate at which it could install Advanced Meters at the remaining RMPs. npower left itself with insufficient time (i) to take specific steps designed to meet its obligation and (ii) to adapt and refine those steps to deal with issues that subsequently arose.

60. A reasonable step would have been for npower to have adopted a common agreed method for dealing with issues, and to enable tracking and management of deployment issues, earlier in the Roll-Out Period.

61. The absence of a "spike" of installations in the annually-reported figures after the Working Document was produced does not demonstrate that the Working Document failed to make a difference to installation rates, as npower contends. It

is to be expected that an installation graph would show a high installation rate early in the Roll-Out Period (responding to 'easy' cases), with the rate slowing towards the end of the period (dealing with 'hard' cases).

62. Further, there was inadequate oversight: adequate oversight would have identified and acted upon the fact that npower was not properly progressing/resolving the installation of Advanced Meters during the Roll-Out Period. Although Project ROLO was agreed by the Retail Executive Meeting in 2009 as "*the vehicle to deliver the [SLC 12.21] obligation*", that appears to be the last time npower's Board formally considered the obligation until after the Deadline. Prior to 2012, there was not any monitoring of npower's progress against its regulatory obligation. Once additional oversight was belatedly introduced from May 2012, npower identified key issues with its approach. For example, in March 2013, it noted *"I&C cannot demonstrate all reasonable steps have been taken to ensure all AMR meters are polling".* The same concern was repeated in relation to the SME team on 8 April 2014 (two days after the Deadline).

63. These failures of adequate planning also contributed to npower's failures in respect of customer engagement and interoperability (as to which see below).

- *npower's case*

64. As to Project ROLO, npower initially adopted existing infrastructure and processes for AMR deployment by Board decision. The fact that Project ROLO's assumptions were unduly optimistic does not mean it was ineffective as an approach; in any event, by 2011, installation rates had improved dramatically. The allegedly "merely commercial" approach of only promoting the Encompass product (which is a mischaracterisation) was in fact effective, achieving the highest rates of roll out. Regardless of whether the customer wished to take Encompass or not, there was additional customer contact to discuss Advanced Meter installation.

65. As to the disbanding of the SME AMR team, the bald assertion that "*npower's breach in disbanding the SME was a symptom of its general overarching breach [and] therefore affects, to a greater or lesser extent*" other categories of RMPs is impossible to understand as the only other category is I&C. npower accepts that it cannot benefit from SLC 12.22 in respect of the RMPs affected by disbandment of

the SME AMR team, but the impact was limited. There are infelicities arising by the use of Ofgem of data compiled for different purposes (recognised by both Ofgem and npower). It is nonetheless possible to identity a period of relatively low installation that correlates precisely with the SME team disbandment: the (temporary, not permanent) effect of disbandment can be quantified by calculating the difference in the installation rate of AMRs for SME customers even without any discounting for actually installed; this would be in the range of 766 to a maximum of 900 RMPs on a worst case scenario. Even then, whilst the numbers of installations reduced, nevertheless 774 AMRs were installed at SME premises over the period of the SME team disbandment. In terms of relevance under the SLC, there is no 'roll-out duty' (such as that provided by SLC 39 in respect of domestic smart metering, imposing a duty to take all reasonable steps to ensure that a Smart Metering System is installed on or before 31 December 2020 at each domestic premises). The impact must be assessed as at 6 April 2014.

66. So far as the Working Document is concerned, a range of actions were being taken prior to February 2013, beginning prior to the start of the Roll-Out Period. High levels of installation were achieved prior to the Working Document, and no significant change is to be seen either side of February 2013 when it was introduced. To the contrary, the alleged link between the Working Document and effect on roll-out is demonstrably false, because the highest roll-out rates were achieved before the Working Document was produced, and there is no demonstrable or demonstrated correlation between success in installation and the Working Document. This contrasts with an observable drop off in installation rates in SME when the team was disbanded.

67. The Working Document was simply a record: npower's compliance activities were reflected in the Working Document not driven or caused by it. Exception management processes (setting out how to deal with customers in certain scenarios) and tracking were in place from Project ROLO and were simply developed into the Working Document. By the time of the Working Document, processes were already in place to deal with problematic customers as evidenced by Working Procedure Documents, including where 'site de-energised', 'DNO [Distribution Network Operator] action required' or 'no signal'. The suggestion that a failure to

document steps in a single document was the cause of low installation rates is therefore misconceived.

68. Tracking of deployment also pre-dated the Working Document as it was in place from Project ROLO. Significant steps were taken to monitor and track progress throughout the Roll-Out Period. From October 2009, Energy Services produced a flight path report. The SME and I&C trackers were implemented in October 2012 and September 2012 respectively. The Regulatory Compliance Team carried out assurance checks on a regular basis from May 2012. Energy Services still uses the Deployment Manager system.

69. It only becomes apparent after a period of time what steps are successful and which are not. Developing the Working Document at the time it was developed allowed npower to take stock of deployment processes and issues across all business sectors.

70. On oversight, npower had significant compliance and governance measures in place during the Roll-Out Period. npower rolled out Advanced Meters through business units as it was a reflection of the expertise and knowledge gained in relation to its customers. Throughout the Roll-Out Period, there was regular reporting on progress to senior managers and senior level oversight. The business segments responsible for Advanced Meter roll-out had established governance structures in place and the staff within those segments were experienced in managing Advanced Meter roll-out and offered appropriate senior level oversight. There was no need to add a further layer of governance above this base. The Board was of course aware of npower's obligations and provided attention on the project where merited through established routes of escalation, as evidenced by the ROLO/Bambi Business Case Review dated January 2011, which clearly shows that npower continued to have in mind the regulatory context/requirement after 2009. From 2012, npower's compliance departments became involved in monitoring. Since 2013, a group has met on a monthly basis. This group provides oversight across Retail and gives an over-arching view of risks and issues across the compliance landscape.

71. As to the alleged contribution of inadequate planning to failings in customer engagement and interoperability, Ofgem's criticism is wrong and necessarily requires the benefit of hindsight. Ofgem's letter dated 28 February 2013 was the first communication npower received from Ofgem in relation to what constituted 'all reasonable steps', nearly 4 years into the Roll-Out Period, but failed to give any or any useful 'guidance'.

- *The EDP's assessment*

72. The challenge for each relevant licensee in the course of the five year Roll-Out Period was to ensure the systematic meter exchange of its existing traditional meters with Advanced Meters.

73. In the course of the pleadings npower conceded that it had not taken all reasonable steps in the completion of this process, admitting that the diversion of employees in its SME division to other tasks in 2011 to 2012 amounted to a failure to take all reasonable steps. In the judgment of the panel, this was a substantial failure.

74. npower contended that as a result it had missed its target by 900 RMPs. Ofgem contended that the failure was not limited to the diversion of SME personnel but was broader, consisting of more general inadequate planning for the roll out, and that where there was planning it was, in short, "too little and too late".

75. The panel agrees with Ofgem. The fact that the personnel making up the SME team were diverted to other functions at that point indicates the relative priority given to compliance with SLC 12.21 at that time.

76. The panel further accepts Ofgem's case that the early efforts to replace meters under Project ROLO were concerned primarily with the goal of promoting npower's commercial Encompass product, rather than achieving regulatory compliance. That might not have led to any breach if it had been accompanied at the time by an effective plan for the later stages. However, it was not until February 2013 that there is clear evidence of npower focusing on the regulatory requirements and actively monitoring its progress towards meeting its obligations, through the use of the Working Document. Even then, it took further time before the necessary action was signed off. While the panel accepts npower's point that the contents of

the Working Document reflected in part some pre-existing practices, it remains the position that this was the earliest that npower systematically sought to plan how to meet its regulatory obligations (rather than simply tracking existing progress), nearly four years into the five year Roll-Out Period. The panel does not accept that the Working Document was simply a formalisation of what had gone before in that sense.

77. Contemporaneous internal compliance reports dating from 2012 identified the failure to ensure that meters were being replaced with Advanced Meters, but despite Mr Scagell's characterisation of such reports as 'critical friends', they do not appear to have been used to improve performance.

78. Similarly, the panel accepts Ofgem's view that the lack of clear and consistent oversight over the regulatory compliance process contributed to the failure to begin taking planned action to meet the requirements of SLC 12.21 until 2013.

79. Taken together, these omissions amount to a failure to take all reasonable steps to plan for timely compliance with the Advanced Metering Obligations. The extent of the consequences of that failure are not confined to the 900 RMPs identified by npower. Although npower contended that the failure was limited to the direct consequences of the disbandment of the SME team, the panel does not agree: the lack of preparedness affected the lack of early customer engagement (addressed further below). Consideration of the number of RMPs affected is best assessed by reference to the categories set out in Ofgem's updated Tables 1 and 2, given the difficulty in disaggregating the precise effects of a lack of preparation on the one hand and inadequate customer engagement on the other.

(v) Failure adequately to engage customers

- *Ofgem's case*

80. Ofgem's case on the adequacy of npower's customer engagement strategy is that npower left adequate engagement with customers close to the end of the Roll-Out Period which did not amount to the taking of all reasonable steps.

81. Since npower's position is that its 'Business as Usual Timescales' (developed after the Deadline) satisfy the requirement of all reasonable steps, Ofgem used those subsequently-developed BAU timescales where they are applicable to assess whether all reasonable steps were taken during the Roll-Out Period.

82. As to the adequacy of npower's re-engagement strategy, Ofgem's case is that all reasonable steps have not been taken unless there is adequate re-engagement with the customer after an obstacle to installation has been identified. It argues that npower recognised this, because it introduced six-monthly re-engagement as part of the Working Document by October 2013. However, it was only after the Deadline that all customers were systematically put back through these procedures. Ofgem's case is that npower failed to re-engage with customers at approximately 650 RMPs, which re-engagement would have had a significant prospect of successfully resolving a problem preventing the installation of an Advanced Meter.

83. Ofgem also contends that it would have been a reasonable step to offer out of hours appointments as standard during the Roll-Out Period. By a letter dated 24 October 2013 from npower to Ofgem, npower stated *"during our meeting we agreed to look into whether it would be possible to make arrangements to install meters at weekends, which may help with issues for some customers who do not want their process interrupted during the week. Initial investigation indicates that this could be something we will be able to build in to the process."* Out of hours appointments were offered on an ad hoc basis only when customers specifically requested this non-standard option. Evidence of ineffective offering of out of hours appointments undermined npower's assertion as to its willingness to offer out of hours appointments when it was clear that a customer needed it. npower's allegation that it would have been at risk of failing Guaranteed Standards of Service requirements if it offered such appointments is wrong, because npower did subsequently offer such appointments.

84. Ofgem contended that all reasonable steps had not been taken in respect of RMPs at the Deadline in respect of various categories of RMPs as listed in the sub-categories of Table 1:

(a) First, where, at the Deadline, the issue was "Customer declined", Ofgem's case is that it would have been a reasonable step to have re-contacted customers who had declined (every six months). Customers who declined by phone were sent a customer refusal letter only from 21 October 2013 and were re-engaged on a six-monthly basis from then on, meaning that such customers were not systematically re-engaged before the Deadline. A further reasonable step in respect of this category would have been to have offered out of hours appointments as standard.

(b) Secondly, where the issue was "Customer not yet ready", had npower taken the reasonable step of contacting customers earlier in the Roll-Out Period, it would have been better able to arrange a mutually convenient appointment and would have re-engaged with these customers on a 6-monthly basis.

(c) Thirdly, in the case of "3rd party agent", Ofgem's case is that, where a customer says that it will deal with installation of Advanced Meters in its own way, it would be a reasonable step for a licensee periodically to contact that customer to check the position remains the same**.** npower did not contact 85 RMPs in the category at all prior to the Deadline. A single example given by GM was unsupported by evidence that this was representative for the remainder of RMPs in this category, nor was evidence provided for what triggered the customer to "change its mind".

(d) Fourthly, in the case of "Works required before installation", it would have been a reasonable step for npower periodically to have checked whether the required work had been undertaken, and to book and finalise installation where the work had been completed. However, npower had left the implementation of its all reasonable steps working procedures too late in the Roll-Out Period to re-engage effectively with those customers. Further, it would have been a reasonable step to introduce a systematic process to escalate matters to DNOs. npower introduced this only after the Deadline.

85. Ofgem further contended that all reasonable steps had not been taken in respect of RMPs at the Deadline in respect of various categories of RMPs as listed in the sub-categories of Table 2.

(a) First, as to "Appointment booked in future", simply to have arranged a date after the Deadline for the installation of an Advanced Meter for a long-standing

customer (taken by Ofgem to be one who was acquired before 1 January 2014) does not of itself demonstrate that all reasonable steps had been taken. The evidence includes an example where the RMP was acquired on 1 December 2011, but it was first contacted only on 29 April 2013 (or on npower's account, on 20 March 2013 which would in any event be too long a period).

(b) Secondly, as to "Job Outstanding / Awaiting Results of Meter Exchange Visit", to be unaware of the relevant premises' status as at the Deadline, despite having supplied that premises for over 3 months, demonstrates that all reasonable steps had not been taken.

(c) Thirdly, as to "In customer contact strategy", it does not constitute taking all reasonable steps to wait until 91 days or less before the Deadline before commencing its initial customer contact strategy. The single example referred to by GM had not been shown to be representative of the 438 RMPs at issue under this category, nor whether the customer's change of mind was due to improved customer engagement steps that npower adopted in around October 2013.

(d) Fourthly, as to "Sites Gained – Awaiting Meter Technical Details", processes should be in place to obtain meter technical details within a reasonable period (e.g. 60 days) of acquiring the meter (and to manage delays in receiving meter details). If there had been effective processes in place to expedite the receipt of meter technical details, there should not have been RMPs acquired where the meter technical details were still unknown by the Deadline. npower did not have a process in place systematically to pursue previous agents for missing data, to conduct a site visit to identify meter type, nor to ask the customer to identify the meter type.

(e) Fifthly, as to "Incomplete change of supply or agent", all reasonable steps have not been taken if a licensee still has not confirmed, after a period of 60 days, whether its Meter Operators ("MOPs") could support the acquired meter. The fact that a RMP would have transitioned into a subsequent category cannot be an excuse for failing properly to progress RMPs within any particular category.

(f) Sixthly, as to "Awaiting first polling cycle", all reasonable steps have not been taken if a licensee is still awaiting at the Deadline a first polling cycle for a RMP supplied before January 2014 (by virtue of late installation in the Roll-Out Period).

(g) Seventhly, as to "Supplier/Customer Billing Query", all reasonable steps have not been taken if there has been no installation due to a supplier or customer billing query if a licensee has failed to resolve it within a reasonable period (45 days).

(h) Eighthly, as to "Suspected Theft / Warrant Outstanding", all reasonable steps have not been taken where a suspected theft or warrant issue had not been resolved within a reasonable period (122 days). The fact that a RMP would have transitioned into a subsequent category cannot be an excuse for failing properly to progress RMPs within any particular category.

(i) Even if it was a possibility that a RMP may have moved between one or more of the above categories, npower had not provided evidence of the number of RMPs (if any) it says are affected by multiple BAU categorisation. If an extreme "worst case scenario" (of an RMP taking 399 days to move through each of the BAU timeframes) were applied to all RMPs, it would only increase the number of RMPs to be excluded from approx. 300 to approximately 700 RMPs.

- *npower's case*

86. On the adequacy of npower's customer engagement strategy, the further suggested 'reasonable steps' are only advanced by Ofgem with the benefit of hindsight, and many are in any event flawed because Ofgem did not take into account: (a) customer appetite and impact of earlier steps, (b) whether the proposed 'reasonable steps' are appropriate, (c) whether Ofgem's scrutiny of the data is clear and accurate, and (d) the limitations on npower's ability to influence industry processes.

87. When Ofgem refers to the time by which npower had first contacted customers, it typically ignores the fact that there will have been previous telephone discussions, voicemails, and that there may have been a great number of failed *attempts* to contact a customer. Numerous attempts to make contact by phone and then in writing show an extensive and comprehensive communications strategy.

88. BAU timeframes are based on the relevant team's extensive experience of the time it normally takes (i.e. one might expect to achieve this for a large number, but not all RMPs) to make progress within a category when all reasonable steps are being

taken. It does not however automatically follow that if BAU timeframes were not achieved in respect of all RMPs, all reasonable steps were not being taken.

89. In focussing on the output of the all reasonable steps npower was taking, Ofgem has failed to recognise at all, or put any weight on, the significant efforts put in to install Advanced Meters at RMPs either prior to 1 January 2014 or in a BAU process at the Deadline (depending on the approach taken by Ofgem).

90. As to the adequacy of npower's re-engagement strategy, during the early stages of the mandate period, npower utilised the structure it had already developed for roll-out, resulting in minimal disruption and immediate results. The sensible approach npower took was to deploy to willing customers first. Other methods of re-engagement were tried to varying degrees of success.

91. It is entirely reasonable not to offer out of hours appointments on a standard basis. If npower had adapted its working hours to make out of hours as a standard option it then would have had to amend its standard operating hours which would have put npower at risk of failing Guaranteed Standards of Service ('GSOS') requirements. npower nonetheless offered out of hours and weekend appointments throughout the Roll-Out Period, subject to engineer availability. These were considered on a case-by-case basis. Ofgem has misinterpreted npower's position: if it was clear that a customer needed an out of hours visit, that would be accommodated. npower's approach enabled it to balance the requirements of commerciality, regulatory requirements and customer need.

92. All reasonable steps had been exhausted in respect of RMPs (other than Recently Acquired RMPs) where, at the Deadline, the issue was:

(a) "Customer declined": npower took steps to engage and re-engage all customers who were in the customer declined category at the Deadline. npower have expert staff instructed to explain the potential benefits to customers of having an Advanced Meter. However, npower cannot force a customer to have an AMR. This c.2% of npower's total RMP number (Ofgem relies on 420 RMPs) have taken the conscious decision that they do not want an advance meter installed. There was a process in place during Project ROLO to deal with customers that refused an AMR. Throughout the Roll-Out Period various media were used to contact customers.

After 6 months, Energy Services reviewed the status of any customer refusals and from 2013 a letter was sent to understand if a customer's circumstances had changed. The average number of site visits for an installation is approximately 2. On one site with over 10 aborted visits, npower did not stop trying to install unless the customer actually declined. npower came up against significant consumer resistance, and so it is incomprehensible to include these customers within the scope of breach. Sending letters did not significantly impact Advanced Meter uptake. Between October 2013 and April 2014, npower wrote to over 400 customers who had declined and of these only 13 had an Advanced Meter installed at 6 April 2014. Of the 468 who had declined at 6 April 2014, only 48 had an Advanced Meter installed 4 years later as at 6 April 2018. Further, there are reasons for declining an Advanced Meter unrelated to customer engagement. There is no evidence that the additional steps proposed by Ofgem would have significantly reduced the number of RMPs in this category.

(b) "Customer not yet ready": The customer is driving the timeline of installation. There is no evidence that the additional steps proposed by Ofgem would have significantly reduced the number of RMPs in this category.

(c) "3rd party agent": The customer is driving installation including the customer's wish to have an Advanced Meter arranged and installed through their own preferred agent, and/or in their own time, to suit their individual needs. The individual examples given are representative of broader issues.

(d) "Works required before installation": It is incorrect that npower did not have a process for the systematic re-engagement of customers, because there were exception codes in place from Project ROLO. Notwithstanding that processes to engage with DNOs were in place prior to the Working Document, there is no obligation on DNOs to act on a job unless the site is deemed to be unsafe or it is an emergency job. npower went over and above with an offer of financial support for the work required: an additional step of offering a contribution to customer for work was introduced in December 2013. For example, one RMP was visited around 30 times, and was either vacant or occupied by squatters. This category can be subject to delays. There is no evidence that the additional steps proposed by Ofgem would have significantly reduced the number of RMPs in this category.

93. Further, as to the sub-categories of Table 2, all reasonable steps had been taken in respect of RMPs (other than Recently Acquired RMPs) at the Deadline:

(a) First, on "Appointment booked in future", the average time taken from first contact with customer to the date of install is much longer than 91 days: even for customers acquired before 1 January 2014, npower cannot guarantee that an appointment for install would have been booked as appointments may be cancelled, for example. The appointment in situ at the end of the Roll-Out Period may not have been the first appointment booked. One RMP had 14 appointments scheduled prior to installation on 1 March 2017. There is no evidence that the additional steps proposed by Ofgem would have significantly reduced the number of RMPs in this category.

(b) Secondly, on "Job outstanding / awaiting results of Meter Exchange Visit", if an Advanced Meter was installed the day before the Deadline, it is reasonable for npower not to have received the relevant data-flows.

(c) Thirdly, on "In customer contact strategy", Ofgem has misunderstood npower's submissions. Appointments were confirmed for visits prior to 5 April 2014 and npower were awaiting results at the Deadline. Until the outcome of the appointment was known, npower could not have determined next steps required. npower has expert staff instructed to explain the potential benefits to customers of having an Advanced Meter. The customer contact strategy started with a data cleanse to obtain correct customer details. A customer may have been put back into this category late in the Roll-Out Period having been a customer for a period of time but having been in other categories. For example, a large publicly listed customer had planned a third party agent installation, and then changed its mind just 5 months before the Deadline.

(d) Fourthly, on "Sites Gained – Awaiting Meter Technical Details", the recognised industry process is that agents are responsible for providing and receiving all Meter Technical Details flows and there is an industry escalation process which was followed by npower. It is unrealistic to ask a customer to identify meter type. SME had an agent performance function that managed agent escalation.

(e) Fifthly, on "Incomplete Change of Supply or Agent", even if the issues relating to this cohort had been resolved in the weeks prior to the Deadline, these RMPs would have transitioned into the 'In Customer Contact Strategy' cohort.

(f) Sixthly, on "Awaiting first polling cycle", Ofgem continues to interpret the meaning of this category incorrectly. There is no connection between the length of time npower has supplied a customer and the polling of an Advanced Meter.

(g) Seventhly, on "Supplier/Customer Billing Query", despite persistent engagement, Advanced Meter installation could have been delayed by an issue at site and by a customer's delay. Completing a meter exchange mid-dispute could increase the time taken to resolve any issue for the customer.

(h) Eighthly, on "Suspected Theft/Warrant Outstanding", this category now relates to only 3 RMPs. npower considered taking out the traditional meter on warrant and replacing it with an Advanced Meter; however, the warrants procured were entry warrants and do not include the provision to exchange the meter. For chain of evidence reasons, the meter can only be removed from the wall with Revenue Protection Agent permission and industry procedures advise against removing the meter unless there is a safety issue. Even if the issues relating to RMPs in this cohort had been resolved prior to the Deadline, they would have transitioned into the 'In Customer Contact Strategy' cohort.

(i) Finally, Ofgem's approach fails to take into account that RMPs move through a number of categories. As a worst case scenario, it could take 399 days for an RMP to move through npower's BAU processes without going outside of BAU timeframes. Ofgem has never asked for information on a meter by meter level until its Reply. Assessing compliance based on the status of a meter at the end of the Roll-Out Period does not take into account the efforts made during the Roll-Out Period.

- *The EDP's assessment*

94. To summarise the position as between the parties, it was agreed that as at the Deadline npower had 22,386 qualifying RMPs of which 15,222 were Advanced Meters, fully functioning and thus falling within the definition under SLC 12.19.

In particular, all of them had polled within the appropriate last polling cycle, between 25 March and 5 April 2014.

95. npower admitted that 7,164 RMPs were being supplied other than through a polling Advanced Meter, which indicated that 68 per cent of the relevant premises were being supplied via fully operational Advanced Meters. However, npower argued that its level of compliance was significantly higher having regard to the provisions of SLC 12.22.

96. Those arguments were developed over the course of the proceedings. But the basis of npower's case remained broadly the same. Out of the 7,164 RMPs, and excluding the cohorts under the headings of interoperability, communications and intermittency, there were two classes of RMPs. The first class, of 1,331 RMPs, was said to benefit from having completed npower's All Reasonable Steps Working Procedure (see the top half of Ofgem's updated Table 1, above). The second class, distinct from the first, of 1,461 RMPs, was said to be being "managed within the All Reasonable Steps Working Procedure" (see the bottom half of Ofgem's updated Table 1, excluding interoperability and communications, and Ofgem's updated Table 2, above).

97. The distinction is of some importance. The second category of "*being managed within ARS Working Procedure*" has to be treated with some caution. The obligation is to install a working Advanced Meter or to have taken all reasonable steps, not to be working toward them. However, there must be cases where a licensee has acquired a meter before the Deadline and where it would not be reasonable to expect it to have completed all reasonable steps. In the present case, npower argued that not less than 1461 meters fell into such a class. In its turn, Ofgem adopted a cut-off of 1 January 2014 which, by necessary implication, and allowing for some exceptional cases, would remove only about 300 meters from breach. Moreover, the boundary between the first and second classes is somewhat unclear, as it would, in some instances, depend on a judgement by npower as to on which side of the line the RMP fell.

98. Nevertheless, even allowing for those differences, Ofgem was prepared to accept that, on the specific facts applying to each of the two classes, npower could, if the

evidence was there, establish the appropriate disapplication under 12.22. The panel has therefore followed that process itself.

99. Two important points are relevant, at the outset. The first is that in the course of the proceedings npower conceded that it was in breach of 12.21 through the disbandment of the SME team. In evidence to the panel it estimated that that breach would have led to up to 900 RMPs not qualifying for the disapplication of 12.21. Ofgem claimed that, applying better methodologies, the figure would be between 1464 and 1904 RMPs, but that such an exercise could not adequately give effect to the overall failures in planning. The advantage of seeking to quantify the effects of an admitted breach, even where the differences between the parties are significant, is that it gives at least a minimum indication of the level of breach, as a starting point. However, this is no substitute for some form of qualitative assessment of whether all reasonable steps have been taken in the respective classes, and then forming a view on the numbers. Thus the second point is that within both the first and second classes the issue as to whether a disapplication could properly be applied depended, for each cohort, on a judgment as to whether the steps taken could properly be regarded as falling within the appropriate test. "All reasonable steps" requires an objective assessment of the facts, in the context, including not only the position as at 6 April 2014 but events from at least 2009, which might throw some light on why npower had reached the position it was in at the Deadline. Moreover, the fact that npower has described its processes as All Reasonable Steps or described its Business as Usual (BAU) timescales cannot be conclusive of the matter, although it may be persuasive. The panel's task was made simpler by Ofgem's acceptance that not only would the second class be examined on its merits but also that the BAU timescales would be regarded as falling within the requirement of all reasonable steps, provided of course that the action taken was in accordance with the timescales, where applicable.

100. The first class is examined first – the 1331 RMPs alleged to have completed the ARS Working Procedures. As noted above, the ARS Working Procedures document was finalised only after the Deadline, but applying it as a test, the salient feature of this first class is that npower had completed or, as it were signed off, the

process. It argued that it had done all it reasonably could before the Deadline and its actions should be judged on that basis.

101. To recap, there were five sub cohorts within the first class: Customer Declined (468), Customer Not Yet Ready (49), 3rd party agent (144), Customer No Contact (30), No Comms Signal (332), Works Required (308). Ofgem analysed each of these sub cohorts with great diligence, rightly examining whether the subjective judgement of npower could pass the objective test. It concluded, after further consideration of new evidence put before it, that npower could make out a case for disapplication for about half the number: see Table 1 above.

102. The panel concluded that the arguments are finely balanced as between the parties. Nevertheless, on the cohort of Customer Declined, where Ofgem already accepted 48 of the RMPs, the evidence and the arguments of npower are more persuasive. The objectives of the Government and of Ofgem in securing that all RMPs should be Advanced Meters by 6 April 2014 have to take into account the fact that the final decision is that of the customer, which may not share those objectives, or be prepared to risk disruption to its business or be forgetful or ignorant or a combination of all those factors. There comes a point at which it is neither economically sensible nor socially prudent to keep on at a customer after it becomes clear that the answer is or probably is "No".

103. So the panel is satisfied on the evidence that npower did take all reasonable steps in respect of all the RMPs in that cohort. As to the others, it accepts the evidence of Ofgem. The panel thus concludes that the numbers in breach in this first class are **230** out of the 1,331: that is, Ofgem's final figure of 650, minus the 420 'customer declined' group.

104. In seeking to arrive at numbers in breach in the second class, the panel notes that the parties were far apart in their assessment of whether all reasonable steps had been taken. Ofgem's approach broadly requires the panel to accept that almost all of the 1,461 meters, that is excluding the 300 or so meters acquired after 1 January 2014, should either have been installed as Advanced Meters or have been included in the first class. By contrast, npower argues that such a cut off point is unrealistically short, that there is a process using BAU timescales that may involve

significant work being done while still qualifying as "all reasonable steps" and that the Ofgem methodology in its approach to quantification is flawed.

105. Again, to recap, the second class of 1,461 RMPs was presented by npower as follows, some of the cohorts being very small in number. In the category Appointments Booked, the sub-cohorts were: booked in future (269); job outstanding/awaiting results of meter exchange visit (68). In the category Appointments Left to Book, the sub-cohorts were: in customer contact strategy (461), pending customer contact (75), sites gained – awaiting meter technical details (241), incomplete change of supply or agent (79), awaiting first polling cycle (185), supplier/customer billing query (77), suspected theft/warrant outstanding (4), disconnection pending (2): a total of 10 sub-cohorts.

106. It should be added that in some of those sub-cohorts, Ofgem did not accept the accuracy of the numbers and substituted its own, when considering the application of the test, but the difference in total only amounted to 8 RMPs and does not concern us.

107. When analysing this second class, Ofgem decided that it would exclude all RMPs acquired after 1 January 2014, on the ground that a reasonable time would be needed after acquisition for the installation of an Advanced Meter. In the STOC this number was stated to be 350. It was later amended, in Ofgem's skeleton, to 300. But apart from that concession, Ofgem claimed that there was no evidence to justify a finding of all reasonable steps in the majority of the remaining RMPs. In a minority of cases, after thorough analysis and giving its reasons in the STOC, Ofgem was prepared to admit specific cases, even where the RMP had been acquired before 1 January 2014. Of the total of 1,461, Ofgem claimed that about 1000 were in breach, the difference being largely accounted for by the date of the acquisition of the RMP. However, the panel finds that the use of the cut off point of 95 days, that is from 1 January 2014, does not properly reflect the fact that the BAU timescales, which Ofgem has accepted as reasonable, plainly are designed to accommodate a period longer than 95 days, where the allocation of a meter to one category, as at the Deadline, may conceal the fact that all reasonable steps may have been taken at an earlier stage.

108. But the panel does not accept npower's position, that all 1,461 meters benefit from the disapplication. The panel has already found that npower acted "*too little and too late*" in its compliance with SLC 12.21 and, as a consequence, concludes that a substantial portion of the 1,461 meters would have been either installed as Advanced Meters or have completed the ARS process. In the evidence of GM, npower argued, in the course of seeking to demonstrate why Ofgem's methodology was flawed, that in an extreme case a meter could have taken 399 days from acquisition to installation as an Advanced Meter. npower, therefore, claimed that rather than 95 days Ofgem should have taken a period of at least 399 days as its cut off point. Ofgem's response was that such a cut off would increase the number of meters disapplied by reason of time of acquisition from about 300 to 700. Both parties agreed that in seeking to quantify meters in breach it was wholly impracticable to do so on a meter by meter basis, although specific examples might be relevant to prove or disprove the arguments of the other side.

109. This is eminently a case in which the panel has to use its judgement, taking into account (i) npower's justified, if limited, criticism of the Ofgem methodology and its adhering to a position that all 1,461 meters benefit from disapplication, and (ii) Ofgem's main point that the numbers were far in excess of what they should have been had all reasonable steps been taken during the Roll-Out Period. The panel concludes that, on the limited evidence available to it, and even adopting the somewhat unrealistic proposition of npower that the cut off should be 399 days before the Deadline, the actual numbers in breach of SLC 12.21 in this second class was 737 of the 1,461 RMPs. In reality, the period of 399 days is, in the view of the panel, likely to have been substantially longer than was required. Taking a more realistic approach would lead to the number of RMPs in breach being as high as 1,053. However, the panel has for the purposes of this determination assumed in npower's favour that the true figure for the number of RMPs in breach in the second class is **737**, calculated as follows:

EDP's calculations based on Ofgem's Updated Table 2

	No. RMPs (Ofgem's analysis)	STOC figures	Excluding within 399 days	Ofgem final pleadings	Excluding within 399 days
Appointment booked in future	274	246	180	246	180
Job outstanding/awaiting results of Meter Exchange visit	68	62	49	62	49
In customer contact strategy	461	438	320	438	320
Pending Customer Contact	75	48	41	0	0
Sites Gained - Awaiting Meter Details	228	94	60	108	60
Incomplete Change of Supply or Agent	80	23	14	23	14
Awaiting first polling cycle	184	97	60	97	60
Supplier/Customer Billing Query	77	77	51	76	51
Suspected theft/warrant outstanding	4	3	3	3	3
Disconnection pending	2	0	0	0	0
Total	**1453**	**1088**	**778**	**1053**	**737**
Reduction in breaches relative to 1453 total RMPs		*365*	*675*	*400*	*716*

(Figures (including those for 399 days) extracted from Ofgem's STOC)

110. Although the panel has adopted a different cut off point from that advocated by Ofgem, the difference between Ofgem's figure of c.1,000 in breach and the panel's figure of 737 is not, in the panel's view, of such materiality as to disturb its overall conclusion, in agreement with Ofgem, that this class is distinct from the first class, rather more resembling work in progress to resolve compliance after 6 April 2014 than disapplication of the prohibition.

111. Taking the first and second classes together, the total number of RMPs in breach of SLC 12.21 (before considering the third class, relating to interoperability and communications issues) is **967 RMPs.**

(vi) Failure adequately to resolve interoperability and communications issues

112. Over a prolonged period, npower competed successfully for many customers who already had Advanced Meters. These had been installed by their previous supplier, and worked in that context. However, due to differences in meter type, passwords and other communications issues, many of them did not work effectively as Advanced Meters following the move to npower. The precise technical nature of

the problems, and thus the potential solutions, varied across these different RMPs, but are referred to collectively as being "interoperability issues".

113. In other cases, npower's agent could support the installed Advanced Meter, but its agents had nonetheless been unable to communicate with it remotely at any point prior to the Deadline, owing to communications problems with obtaining mobile network signal. The cause might be either that there was no (or insufficient) mobile network signal at that site, and/or that the meter equipment itself was faulty, and not communicating for that reason. These are referred to collectively as "communications issues".

- *Ofgem's case*

114. On the issue of interoperability, Ofgem contends first that npower failed to take all reasonable steps to overcome the difficulties caused by a lack of interoperability of Advanced Meters. In particular, it would have been a reasonable step to engage with or contract with the incumbent or alternative MOPs to address interoperability issues well in advance of the Deadline.

115. By way of background:

(a) In July 2006, npower had contracted with [redacted][2], a MOP, to install EDMI Advanced Meters and provide data retrieval and processing services using the Global System for Mobile (GSM) communications network. In August 2011, npower had also contracted with [redacted], which also installed the EDMI brand of Advanced Meters, and used an EDMI-specific technology meter solution.

(b) npower subsequently inherited a wide variety of other (non-EDMI) types of meters, including 958 Elster Advanced Meters.

(c) npower's contract with [redacted] provided for the submission of monthly reports of failed meter readings; however, the timescales for identifying communications failure were not adhered to in practice. npower's internal Compliance Assurance Team reports in May 2012 (for SME & I&C), and Q1 2013 (SME) found that there

[2] The Panel considers it appropriate to make this and following redactions marked onto the text of this decision in order to protect confidential information.

was non-compliance with SLC 12 because there was no process between raising a query and the rectification of a possible fault.

(d) Similarly, npower's internal compliance report for I&C in March 2013 continued to find that *"there is no internal process to rectify"* communications issues, and its report in September 2013 found that the working procedure created for the processing of reports of non-communicating meters was yet to be fully implemented: 80% of sampled sites took more than two consecutive months to appear on the report, with most taking 3-4 months.

(e) In Q1 2014, the npower Compliance Assurance Team (SME) sampled 20 non-polling sites, and found there was no evidence of any action having been taken to rectify the issue in 90% of cases.

116. Ofgem submitted that npower had failed to take all reasonable steps in respect of this matter because:

(a) Although npower ultimately contracted with alternative MOPs to resolve interoperability, it only did so after the Deadline. It was not until late 2014 that npower decided to progress commercial discussions with [redacted]. Once implemented, this achieved communication with a further 1,300 RMPs in the first half of 2015. npower was aware, or ought to have been aware, of interoperability issues during the Roll-Out Period that ought to have been addressed during the Roll-out period.

(b) JN's evidence on behalf of npower in response points to the problems associated with interoperability, but does not address why this identified reasonable step was not reasonable for npower to take.

(c) npower was not, during the Roll-Out Period, applying the test of whether a step would be reasonable for it to take in order to achieve regulatory compliance. For example, npower could not find any contemporaneous documentation stating a figure of the cost of implementing this as a reasonable step with [redacted]. npower was not carrying out the analysis required to determine whether this step was a reasonable one for it to take.

(d) npower's approach in its response to the panel of focusing on "*certain categories of non-EDMI meters (specifically: Elster, Iskra and PRI)*" (§86) ignores those other categories of RMPs, such as ABB meters, of which there were consistently high numbers of non-communicating meters during the Roll-Out Period;

(e) npower had significant concerns that contracting with an alternative MOP would not be commercially viable, as was initially reinforced by their failed negotiations with [redacted], which preceded the eventually successful negotiations with [redacted]. Ofgem argues that (i) that does not address the reasonableness of a solution for Elster meters with [redacted] in January 2013, given that this number ought to have been enough to merit npower engaging [redacted] to service them – but npower did not open any negotiations in this regard until the end of 2013, which was too late to meet the Deadline; (ii) the fact that negotiations failed does not mean that it was not a reasonable step – it might just mean that npower was applying a financial limit that was too low, or [redacted] was charging too much; and (iii) npower was able to reach a successful requirement subsequently with [redacted] (another alternative MOP), which npower notes was significantly cheaper.

(f) npower also argues that it could not opt for a solution during the Roll-Out Period, in case it was a "VHS v Betamax situation" and one solution took precedence. Ofgem says that this is no excuse for a failure to take steps towards regulatory compliance – in particular as late in the Roll-Out Period as January 2013, which is when Ofgem says npower should have identified a solution for its Elster meters.

117. Secondly, Ofgem contends that it would have been a reasonable step for npower to require its existing MOP to develop the capability to support the inherited meter type and thereby promote interoperability. Since, in January 2013, npower's portfolio contained 958 Elster meters which npower could not read, this volume was sufficient for npower reasonably to take steps in respect of it. In respect of contracting with its existing MOP, npower's evidence was that this was not an option which it wanted to (or felt it needed to explore). This was not an approach of taking all reasonable steps.

118. Thirdly, Ofgem contends that it was a reasonable step, as a last resort (i.e. when less-interventionist measures have not been able to resolve the problem), to replace the meter with one that the licensee can support.

(a) npower undertook meter exchange only from 2012, and on a 'case by case' / ad hoc basis.

(b) The position in relation to domestic smart meters is not an appropriate analogy: the policy and regulatory frameworks for Advanced Meters and domestic smart meters are different and not comparable. While npower argues that, given Ofgem's position as to interoperability in the domestic smart meter context, it was reasonable for npower to take the same view in relation to Advanced Meters, this does not follow: there was a co-ordinated body being set up to resolve smart meter issues, in stark contrast to the position for Advanced Meters. A single approach would not have been appropriate for both. Nor is it npower's view of what is reasonable that is the relevant test under SLC 12.22.

(c) After the Deadline, by adopting this step, npower chose to use UPL and systematic meter exchange, reducing the scale of interoperability issues from 2,362 in 2014 to 40 in 2016. npower's reference to the majority of those non-interoperable meters simply being moved into its customer contact strategy while they await meter exchange (and thus being said not to have resolved interoperability in respect of those meters) should be read in light of its admission that a systematic approach involving meter exchange would have been effective to render compliant the vast majority of RMPs in breach at the Deadline.

119. On the issue of communications, Ofgem contends first that it was a reasonable step to put in place effective processes for monitoring non-communicating meters and considering solutions for communications issues relating to signal. npower had no such process until at least May 2013, but even then the process was not properly implemented. Discussions between npower and [redacted] regarding communications issues in 2012 and data from February 2013 demonstrated that npower did not have an effective process for monitoring polling performance at sufficiently frequent intervals to generate sufficient data to identify whether the installed meter had the requisite functionality. During the Roll-Out Period

timescales were not kept; data was not processed and there was no training material or quality checks; and no process had been created between raising a query and the rectification of a fault. Monitoring improved in late 2013 but remained "not fully compliant", yet action was not taken to remedy communication problems.

120. Ofgem contends secondly that it was a reasonable step to require agents to resolve communications issues: in circumstances where npower considered that [redacted] had not adhered to its contractual terms, it would have been reasonable to take steps to require contractual performance (or seek compensation for breach). A licensee can contract out the work, but it cannot contract out the regulatory obligation. It is the licensee's responsibility to ensure that the work performed by a third-party contractor is compliant and, if not, to take steps in respect of it to ensure compliance. [text redacted].

121. Thirdly, Ofgem contends that it would have been a reasonable step to use roaming SIMs to resolve communications issues relating to signal. After the Deadline, when npower started using roaming SIMs, it led to a 40% decrease in abortive visits due to poor signal; and, for 476 fault appointments where a roaming SIM was installed, 465 have polled successfully since. While npower has asserted that it did use roaming SIMs, this consisted of a trial at 100 RMPs less than a month before the Deadline; and one roaming SIM card being deployed in December 2013. npower suggests that the step of implementing roaming SIMs was adopted as soon as it was reasonable to take it. However, there is evidence of npower dismissing roaming SIMs in September 2013 over concerns about stock levels, and its trial in December 2013 appears to have involved only one SIM (not even the 10 alleged).

122. Although npower argues that rolling out roaming SIMs two months after the Deadline is a de minimis breach, npower should have been in the position where this reasonable step was fully implemented as at the Deadline.

123. On the issue of intermittency, Ofgem contends first that it was a reasonable step to put in place a process to ensure that agents inform the licensee about communication faults, where previously installed Advanced Meters have failed to poll on or around 6 April 2014. Where a meter is not able to provide the licensee

with remote access to data, it does not have the functionality required by SLC 12.19.

124. However, Ofgem contended that it was a reasonable step to put in place processes to resolve communication issues within the BAU period of 91 days, from the Deadline. npower did not meet that test, as only 37% of the 1,425 intermittent RMPs as at the Deadline regained advanced functionality within 91 days.

- *npower's case*

125. On the interoperability issues, npower did not consider it a reasonable step for it to engage with or contract with the incumbent or alternative MOP to address interoperability issues. In its view, interoperability issues are not capable of being fully "resolved" by individual suppliers for the reasons explained by JN. Instead, they can be mitigated to a degree over time, which is what npower had done. For instance, any change in communications systems/protocols, use of different passwords, different SIMs, different meter types by any existing supplier or new entrant will cause new interoperability issues. There is no regulatory requirement (unlike in SLC 25B as introduced by Ofgem in 2011-12 for this purpose) for suppliers to cooperate as regards AMR to ensure maximum interoperability. npower has nonetheless always sought to cooperate with its competitors to resolve issues within the constraints of competition law. npower did not think (for good reason) that it was commercially viable for a single supplier to have developed a set of contractual relationships to allow it to communicate with all meter types, due to very high costs involved and the contractual complexities before 6 April 2014. As npower's first negotiations with [redacted] in respect of a much larger pool of meters demonstrated, Ofgem's proposed steps would not have been proportionate; nor would it have been so for npower to engage with alternative MOPs prior to 6 April 2014. The nature and scope of many issues presented only gradually during the Roll-Out Period.

126. Secondly, it was not reasonable to require its existing MOP to develop the capability to support the inherited meter type and thereby promote interoperability. The arrangement with [redacted] would only have been a partial solution (for one meter type) and so was considered commercially impractical/insufficient. Ofgem

has no evidenced basis for its assertion that there would have been a proportionate solution at an earlier stage, even if Ofgem is correct that a solution could have been found if price was no object.

127. Thirdly, as to the last resort of meter replacement, this was an extreme step and would lead to asset stranding and a poor customer experience. Meter exchange does not resolve interoperability. npower considered that it was a last resort to only be used on an ad hoc basis. Systematic meter exchange was carried only after the Deadline had passed because the Ofgem case team suggested it was a necessary step (i.e. to avoid ongoing breach during the investigation). npower did not resolve interoperability and reduce the scale from 2,362 down to 40 in 2016, but simply moved the majority of interoperable meters into its customer contact strategy, to see if the customer was prepared to have a further meter exchange.

128. On the communications issue, npower put in place a regular reporting process with [redacted]. npower introduced the "communications fault process" to improve the way of identifying and taking action in relation to meters where it had not been possible to take a remote read. Further, npower initiated difficult conversations with [redacted] regarding its overall performance, serious enough to raise the issue of contract termination, [text redacted]; nor was it reasonable to pursue court action in order to demonstrate it had taken all reasonable steps: [text redacted].

129. npower took the decision to contract with [redacted] in order to spread the risk for npower. This demonstrates that npower did take strategic and practical action to improve the remote access of Advanced Meter data. In any event, there were very limited steps that any agent could take to resolve signal issues (as Ofgem appreciates more generally in relation to the "No Signal" category). Other than roaming SIMs, Ofgem does not suggest what solutions npower's agents were expected to have come up with.

130. As to roaming SIMs, this became a reasonable step only once the product was available, not linked primarily to one network, and had been tested and trialled. npower carried out an initial trial of roaming SIMs in December 2013 and a larger trial of 100 roaming SIMs in March 2014. Roaming SIMs did not present a

potentially viable solution to mobile signal issues until very late in the Roll-Out Period; even now, a roaming SIM can sometimes complicate the issue further.

131. As to intermittency, npower's primary answer was provided by JN's witness statement at paragraph 9.30 *et seq*, where the arguments were presented as an adjunct to the broader description of signal issues. npower further submitted that the real solution was roaming SIMs, and npower adopted this on a widespread basis as soon as it was available and had been trialled (late 2013/early 2014) in June 2014.

- *The EDP's assessment*

132. The issues raised under these headings reflect a second and different type of challenge presented to licensees by SLC 12.21, going beyond the simple need to replace existing traditional meters with Advanced Meters. This challenge is caused directly by the degree of competitive activity in this segment of the market, during a period in which there was a substantial degree of switching by customers. Thus, npower's installed base of customers as at 6 April 2014 was significantly different from that five years earlier. In particular, following the acquisition of inherited Advanced Meters, 2,947 RMPs were nonetheless not functioning as Advanced Meters as a result of interoperability and communications issues. A further 1,425 RMPs were not polling as Advanced Meters on 6 April 2014 as result of intermittency issues.

133. In respect of this second set of challenges, there was only limited common ground between the parties. Ofgem accepted that all reasonable steps had been taken in respect of approximately 525 to 625 out of the 1,425 RMPs under the intermittency cohort (see Table 1) but argued that all reasonable steps had not been taken in respect of any of the RMPs affected by interoperability issues – almost 3,000 out of a total installed base of over 22,000.

134. In relation to intermittency, the issue is whether Ofgem was correct that of the 1,425 RMPs affected, 800-900 were in breach.

135. Although the intermittency cohort is substantial in number, it receives scant treatment in the pleadings. Indeed, npower barely addresses the problem: see, for

example, JN's witness statement at paragraph 9.30 *et seq* where the arguments are an adjunct to the broader description of signal issues.

136. Ofgem argued in its Statement of Case that if npower failed to fix intermittency issues within 91 days of the Deadline, then it had failed to take all reasonable steps. The 91 day period was taken from a subsequent BAU timescale. That approach leads Ofgem to find that all reasonable steps were not taken in 800-900 cases, as they were not fixed within the 91 days.

137. The key argument in the STOC is at §207: "*npower cannot be said to have been in the process (as npower claims) of taking all reasonable steps to install or arrange for the installation of Advanced Meters as at the deadline at RMPs where that process demonstrably did not lead to the resolution of communication faults at those RMPs within a reasonable timescale.*"

138. However, the intermittency cohort, by definition, applies only to those RMPs where there has been an npower Advanced Meter falling within the definition operating before the Deadline, but where the npower Advanced Meter did not poll in the window of 25 March to 6 April 2014.

139. The panel considers that the test adopted by Ofgem is too strict: where the evidence is that all reasonable steps have been taken successfully to install an Advanced Meter before the Deadline, whatever steps npower took after the Deadline are relevant only to its continuing duties to comply with ongoing obligations under SLC 12.21. However, that argument was not pressed on us by npower, other than obliquely in JN's evidence, when she relied on a passage in a DECC Guidance of November 2008 in which it was said that "*the licence condition does not specify the intervals at which the supplier must obtain data from the meter or provide it to the customer.*"

140. The panel take the view that when the evidence shows that npower had installed an Advanced Meter by 6 April 2014 then, even if it was not polling in that narrow window of about ten days, that should not count against it, at least in circumstances where it was employing a system of checks and where the evidence shows that 82 per cent of the 1,425 meters had been fixed after 91 days. The panel therefore

reject the "less than 91 day" criterion put forward by Ofgem, and concludes that, in respect of that cohort, there should be no finding of breach.

141. However, in respect of interoperability and communications (insofar as distinct from the intermittency matters), the panel concluded that npower had failed to take all reasonable steps. In particular, there was no evidence that, with effect from April 2009, and throughout the period, npower had any appropriate plan for deciding how it would manage the challenge of inheriting meters that would not function as Advanced Meters within npower's systems. Its internal documents appeared to be largely directed to the issue of replacing traditional meters with Advanced Meters, rather than addressing non-functioning Advanced Meters.

142. Further, there was no evidence as to what steps, if any, were in place at any period up to and including April 2014 so as to indicate some proximate date by which some, and if so which, of this substantial cohort of almost 3,000 meters might function as Advanced Meters. The contrast with the detail of the steps taken for systematic replacement of traditional meters is marked, and would tend to support the argument of Ofgem that npower had listed a number and type of problems of communication that needed to be resolved but had no plan for their resolution.

143. The evidence relied on by npower, however, did support a series of attempts and actions that it had taken or considered taking with one or more agents or suppliers of hardware, software, and IT services at various times, but that none of these actions had been effective in resolving the problem. Ofgem identified routes to solutions through contracts with third parties which, it would appear from the limited evidence put before the panel and relating to events after the Deadline, were practicable, affordable and effective. npower, for its part, argued that none of the routes identified were practicable and /or affordable during the Roll-Out Period.

144. These are matters that, when examined on an individual basis, such as whether npower could or should have contracted with [redacted] to support almost 1,000 Elster non compatible meters or whether roaming SIMs were available as a product for use in the resolution of communication problems in time for compliance by 2014, are beyond the powers of the panel to determine, since each issue would require far more evidence than has been put before it. The panel, in these

circumstances, is content to accept the evidence of npower, which was not seriously challenged by Ofgem, that it was neither practicable nor commercially prudent for npower to take through those contractual options to completion.

145. However, that is not an answer to the question whether in respect of the almost 3,000 RMPs in issue all reasonable steps were taken to make them compliant as functioning Advanced Meters. The panel refers again to the wording of SLC 12.21 and 12.22. The ability to install a functioning Advanced Meter in place of an inherited no longer functioning Advanced Meter was always within the control of any licensee. Indeed, systematic exchange of meters was the obvious means to compliance through the replacement of the traditional meter by an Advanced Meter, even though the new Advanced Meter could readily become a stranded asset on loss of the customer to a rival. The issue for the panel is whether, in default of successful attempts to arrive at a solution through contract, npower should nevertheless have treated those customers in the same way as if they had traditional meters, for which the only solution was meter exchange.

146. Every licensee had the opportunity to develop through contractual arrangements a solution to communications short of meter exchange. The panel does not criticise npower for initially waiting for better and more affordable opportunities during the Roll-Out Period to resolve the interoperability issues. But the nearer it got to the Deadline and the further away the likelihood of one or more contractual solutions being realised became, npower could and should have planned for and executed meter exchange, as a necessary and controllable solution. To have paused and done nothing and, in effect, rejected meter exchange as an appropriate step was a policy decision for which npower alone must take responsibility. It was practicable. It would have been effective. As to affordability, npower's evidence did not establish that, in all the c.3000 cases, it was beyond the standard of all reasonable steps. The test is objective. Meter exchange should not be confined to replacement of traditional meters, nor can that solution be rejected on grounds that the acquisition cost of a customer would be rendered unprofitable if meter exchange was an additional cost that it would be unreasonable to meet. Voluntary acts by a licensee to acquire a customer through competitive pricing do not excuse that licensee from

the prohibition under SLC 12.21, if an Advanced Meter is not installed by the Deadline or if all reasonable steps have not been taken.

147. Finally, the panel notes npower's argument that Ofgem had not taken responsibility itself for resolving interoperability difficulties across the industry. As the panel took npower ultimately to accept, the Government's consultation documents and policy statements in 2007-2008 did not relieve licensees of the responsibility to comply with the Advanced Metering Obligations, even if the meetings hosted by Ofgem in 2008-2009 were less productive in identifying a solution than npower had hoped. Interoperability, or the lack of, was always recognised as a problem to which a solution might be found in the Roll-Out Period; equally, it was recognised that it might not be. Nonetheless, the policy objectives which the Government sought to realise were treated as being sufficiently important that the licence obligations should be introduced in any event. The practicable fall back was always meter exchange. All that Ofgem did was to offer the licensees a route to compliance through conversion, if that was practicable, but any subjective view of npower that it was less practicable or affordable to follow that route, could never relieve the licensees of their obligations under the licence, in the event that the conversion route was a cul de sac with no other route available.

148. The panel accordingly concludes that npower breached SLC 12.21 in respect of 2,947 RMPs affected by interoperability and communications issues.

(vii) Overall conclusion on contravention of SLC 12.21

149. Taking all those circumstances into account the Panel has concluded that npower did not take all reasonable steps in respect of approximately an overall total **3,914** RMPs.

G. Penalty

(i) Introduction

150. Section 27A of the Electricity Act 1989 provides for the Authority to impose a penalty on a regulated person of such amount as is reasonable in all the circumstances of the case, where it is satisfied that a regulated person has contravened or is contravening any relevant condition. In deciding whether to impose a penalty, and in determining the amount of any penalty, the Authority is to have regard to its statement of policy most recently published at the time when the contravention or failure occurred: section 27B(2).

151. It is common ground between the parties (and the panel agrees) that the applicable statement of policy in the present case is the Authority's "*Statement of Policy with respect to Financial Penalties"* (October 2003) ("**the 2003 Penalty Statement**"). Ofgem does not rely on a further open letter published by the Authority on 27 March 2014 to its stakeholders, known as the "Chairman's Letter", and the panel accordingly has had no regard to it.

152. The panel agrees with Ofgem that it is appropriate to consider the contraventions of both SLC 12.18 and 12.21 together in considering whether to impose a penalty and in determining the quantum of any penalty. Both contraventions relate to the Advanced Metering Obligations; the set of related obligations in SLC 12.17-12.22 was together designed to contribute to the objective of the provision of Advanced Meters to relevant premises before the Deadline, to achieve the benefits identified by the Government in its published policy statements. The panel agrees that it is neither necessary nor practical to quantify and allocate a separate penalty sum against the alleged contravention of the separate SLCs.

(ii) The 2003 Penalty Statement

153. Under the 2003 Penalty Statement, two questions for consideration arise. The first is whether it is appropriate to impose a financial penalty in respect of the contraventions identified above. If so, the second question is what the quantum of any penalty should be.

154. As to the first question concerning whether it is appropriate to impose a penalty:

(a) The 2003 Penalty Statement explains at paragraph 4.2 that in deciding whether it would be appropriate to impose a penalty, "*the Authority will take full account of the particular facts and circumstances of the contravention under consideration, including the extent to which the circumstances from which the contravention or failure arose were outside the control of the licensee. It will also take full account of any representations made to it by interested parties.*"

(b) Thereafter, at paragraphs 4.3-4.4, the Authority lists a series of (non-exhaustive) factors which tend to make the imposition of a financial penalty more or less likely to be imposed. Those factors which may make a penalty more likely are where the contravention or failure has damaged the interests of customers or other market participants, and where it would be likely to create an incentive to compliance and deter future breaches. Conversely, a penalty would be less likely to be imposed where a contravention is of a trivial nature, where the principal objectives and duties of the Authority preclude the imposition of a penalty, and where the breach or possibility of breach would not have been apparent to a diligent licensee.

(c) These listed factors are not intended to be exhaustive of the matters that may be taken into account by the Authority, nor determinative of the issue of whether a penalty is appropriate. The key point from the 2003 Penalty Statement in this regard is that the Authority will take full account of the particular facts and circumstances of the contravention under consideration. While further particular factors are identified, it is to be remembered that the guidance is given at a high level of generality, and without detailed consideration of any specific approach which might be justified in respect of a specific breach of a specific licence condition.

155. As to the second question concerning the quantum of any penalty:

(a) Paragraph 5.1 of the 2003 Penalty Statement explains: "*The quantum of any penalty must be reasonable in all the circumstances of the case. Accordingly, the Authority, in setting the level of any penalty will consider all the circumstances.*"

(b) It continues, at paragraph 5.2: *"In general, the Authority is likely first to consider the following factors in determining the general level of any penalty:*

- *the seriousness of any contravention or failure;*
- *the degree of harm or increased cost incurred by consumers or other market participants after taking account of any compensation paid;*
- *the duration of the contravention or failure; and*
- *any gain (financial or otherwise) made by the licensee."*

(c) The 2003 Penalty Statement then proceeds to list a number of factors which may tend to increase or decrease the level of any penalty, while making clear that those lists were non-exhaustive.

(d) It concludes at paragraph 5.5 that "*Having considered, to the extent appropriate, the factors listed above and all of the circumstances of the matter under consideration, the Authority will determine an appropriate amount for a financial penalty.*"

156. As is clear from the above, the 2003 Penalty Statement emphasises in relation to both questions that the Authority will consider all the circumstances, and that each of the lists of factors that may be relevant in any particular case are indicative only and non-exhaustive. It follows that they are not to be applied as if they were statute, and any application of them must be sensitive to the context and circumstances of the breach.

(iii) Is it appropriate to impose a financial penalty?

157. The Advanced Meter Obligations imposed two specific requirements.

(a) The first was not to replace meters at relevant premises with traditional meters, but to replace them only with Advanced Meters (with effect from 6 April 2009). During the period from 15 October 2009 to 30 November 2015, npower replaced c.192 electricity meters at defined relevant premises with meters which were not Advanced Meters, in breach of SLC 12.18.

(b) The second was not to supply electricity to relevant premises other than through an Advanced Meter (with effect from 6 April 2014, the Deadline), except in the specific cases to which SLC 12.22 applies. As at 6 April 2014, npower was supplying electricity to a total of 3,914 RMPs otherwise than through an Advanced

Meter, having failed to take all reasonable steps in respect of the premises in question, in breach of SLC 12.21.

158. The latter failure is particularly serious. The purpose of the imposition of such a Deadline was to ensure that licensees progressed with a timely and effective programme (or as effective a programme as was reasonably practicable) for the installation of Advanced Meters, while recognising that a period of five years would be required to allow a proper opportunity for such work to be completed.

159. As such, the Deadline in SLC 12.21 has a particular significance which is independent of the justification for the precise choice of date. Its importance is established by the simple fact that it is Government policy (set out *inter alia* in the Energy White Paper of May 2007 and the BERR consultation document of August 2007: see section D above) that a programme of Advanced Meter installation should be promptly completed by all licensees supplying electricity to relevant premises by that Deadline, and by the fact that the Government equally decided that the requirement to complete that programme should be a condition of each supplier's licence (and hence capable of being enforced accordingly).

160. Self-evidently, the applicability of the Deadline does not depend on individual licensees' views of the justification for the Advanced Meter Obligations as a whole or the date of the Deadline in particular. Equally, neither does the importance of meeting that Deadline. Licensees were required to meet it wherever the prohibition in SLC 12.21 was applicable.

161. Ofgem's approach to the contravention of SLC 12.21 took account of the Deadline-based nature of the contravention. It made clear in its STOC (at §244 and §267) that it had assessed the breach "*as at the Deadline*", when it "*crystallised*", and not afterwards. In the view of the panel, it was wholly open to Ofgem to take that approach. It recognises the centrality of the Deadline in any consideration of the context and circumstances of the breach.

162. npower submitted that, in consequence of Ofgem's approach, "*At the minimum the failure to allege breach of 12.21 (i.e. supply from the deadline onwards) means no penalty is appropriate based on a finding of 'bare' breach – certainly no assessment is possible of extent of breach, duration, consumer impact or many*

issues fundamental to determining what is appropriate 'in all the circumstances of the case' … Alternatively, it may prevent any lawful finding of breach of 12.21" (npower skeleton §8).

163. The panel rejects npower's submission. In short, it fails to recognise the significance of the Deadline imposed by SLC 12.21, and the importance of the fact that in breach of that condition, npower was continuing to supply electricity to relevant premises (on the panel's findings, in respect of 3,914 RMPs) at the time of the Deadline. Far from indicating that there was only a "*bare*" breach of SLC 12.21, the failure to meet that Deadline – given the continuation of the supply of electricity to relevant premises after it had passed – amounts to a critical failure by npower of the fulfilment of its regulatory obligations. Not only was Ofgem's finding of a breach of SLC 12.21 lawful, it was correct on the merits (albeit in respect of fewer RMPs than Ofgem had identified).

164. Taking account of all the facts and circumstances of the present case, and taking those two breaches together, the panel is in no doubt that it is appropriate to impose a financial penalty in the present case. The breach of SLC 12.21 in particular is of such seriousness, in view of the importance of the Deadline (as described above), that only a financial penalty would recognise the gravity of the case. Given the terms of SLC 12.21, it would have been open to Ofgem in theory to seek to enforce the condition by prohibiting npower from continuing to supply electricity at the relevant premises concerned. However, in practical terms, that is unrealistic: it would risk causing considerable detriment to customers. A financial penalty is the only realistic alternative.

165. In reaching that conclusion, the panel has taken account of the particular factors listed in the 2003 Penalty Statement as making the imposition of a financial penalty more or less likely, as set out below.

- *Incentive to comply and deterrence of future breaches*

166. As to the factors which may make the imposition of a financial penalty more likely, in the circumstances of this case the panel attaches particular weight to its view that a penalty would be likely to create an incentive to compliance and deter future breaches. As Ofgem correctly stated at STOC §224, "*SLC 12.21 contains a*

mandatory deadline with which the licensee was required to comply. SLC 12.18 imposes an unambiguous and unqualified prohibition which npower failed to comply with, albeit to a limited extent. Moreover, npower had a five year Roll-Out Period in which to make preparations for and implement compliance with the deadline imposed by SLC 12.21. Imposing a penalty in this case is important to reinforce the significance of licensees' obligations and the importance of adhering to deadlines specified in the licence. A penalty may act as a deterrent against the failure to observe future deadlines and create an incentive to better observe the timely roll-out of any future mandatory initiatives that licensees are obligated to undertake such as, for example, the smart meter roll out." (For the smart meter roll out, see SLC 39 of the Electricity Supply Licence and SLC 33 of the Gas Supply Licence, which require all licensees to use reasonable steps to ensure smart meters at relevant premises on or before 31 December 2020.)

167. npower responded that the interests of deterrence should not lead to a disproportionate penalty. The panel agrees, and would not expect to impose a disproportionate penalty. If and to the extent that it is suggested that <u>any</u> penalty would be disproportionate, the panel disagrees.

- *Damage to the interests of consumers or other market participants*

168. The other factor that Ofgem's 2003 Penalty Statement indicates may increase the likelihood of a financial penalty is where the contravention or failure has damaged the interests of customers or other market participants. With that factor in mind, Ofgem included in its STOC at §§220-223 a summary of the reasons why the Advanced Meter Obligations were considered to bring immediate and future benefits to customers. It inferred that any failure to meet the Deadline in itself gave rise to damage to customers through a delay to the accrual of those benefits. In short summary:

(a) The introduction of the policy was premised upon the desirability of (among other things) allowing customers to access up-to-date information on consumption with a resulting ability to better plan for consumption reduction, to obtain more accurate and timely billing and time saving, to obtain accurate information on alternative offers and thereby to make switching energy provider easier and more attractive, and to be better able to perform more accurate energy forecasting and budgeting.

(b) The Government had further previously identified (in a DECC Impact Assessment relating to smart meters for domestic customers and smaller non-domestic customers) potential environmental benefits of Advanced Meters as including reduction in carbon emissions (due to consumption reduction), reduction in EU Emissions Trading System credits purchased (due to energy demand reduction and demand side flexibility) saving costs for market participants, and air quality improvements due to reduced generation corresponding to reduced consumption.

169. In its Response of 24 October 2017, npower took issue with the existence and extent of the claimed benefits of the introduction of the Advanced Meter Obligations, describing them as being "*negligible*". Further, npower accompanied its Rejoinder of 6 March 2018 with an expert report by Alaric Marsden of FTI Consulting LLP. Mr Marsden had been instructed to consider "*whether Ofgem's allegation that Advanced Meters may generate potential future benefits to (i) the environment; (ii) consumers; and (iii) network and generation companies, is a reliable finding, in light of the relevant facts and economic justifications relied upon by Ofgem as set out in STOC, §221-223 and §240*". Mr Marsden was further instructed "*to provide initial views, subject to time availability, on whether Ofgem's allegations of immediate benefits (as set out in STOC §220) are a reliable finding or not in light of the relevant facts and economic justifications relied upon by Ofgem."* Mr Marsden's instructions related only to the impact of the breach of SLC 12.21 and not SLC 12.18.

170. Mr Marsden reported that he had found that Ofgem's "*allegation*" that Advanced Meters may generate such future benefits was supported by very limited quantitative analysis in the STOC, and only qualitatively by reference to the DECC Impact Assessment. He had assessed the extent of the benefits of Advanced Meters over a period of one year, rather than one day (being 6 April 2014). He found no reliable source for the extent of the claimed reduction in consumption, no direct empirical evidence to support Ofgem's "*findings*", and had not explained why the alleged benefits were directly attributable to the installation of Advanced Meters themselves. He estimated the true level of gross financial savings from consumption reduction. He stated that Advanced Meters require complementary equipment and/or savings to be made available to consumers to enable them to

unlock their benefits, and that Ofgem's evidence had not reliably demonstrated that all other necessary conditions for delivering the alleged benefits from Advanced Meters were in place as at 6 April 2014. Ofgem's "*allegation*" of future benefits was not therefore reliable, as the benefits had not been shown to be directly and solely attributable to the installation of Advanced Meters.

171. In the view of the panel, npower's submission and Mr Marsden's report are beside the point. It misunderstands the nature of the SLCs in question, which were designed to give effect to government policy. A failure to achieve that requirement cannot be dismissed (or its significance diminished) on the basis of evidence that the missing of the Deadline (rather than the ultimate achievement of the objective of installing Advanced Meters) does not in itself give rise to damage to the interests of customers or other market participants; nor on the basis of evidence to the effect that the achievement of the required ends is not otherwise of significance. Where the Government has lawfully determined that as a matter of policy it is appropriate to introduce a licence condition requiring specific action by a specific time, a failure to achieve that end is inherently serious. The benefits of the policy do not have to be proven by Ofgem before it becomes appropriate to enforce against a breach, or before the Authority may impose a penalty in respect of it.

172. It follows that the panel does not accept the suggestion that it should not impose any financial penalty in respect of npower's failure to meet the Deadline in view of npower's criticisms of the claimed benefits of the policy. Nor was it necessary for Ofgem to have formed its own view of the benefits of the policy and to have concluded that specific damage to the interests of consumers would be caused by any delay to the full achievement of those benefits.

- *Factors which may make the imposition of financial penalty less likely*

173. The panel agrees with Ofgem that the contraventions were not of a trivial nature, either in respect of SLC 12.18 or SLC 12.21. Although the breach of SLC 12.18 was limited in extent, it continued for a considerable time after the prohibition applied, and npower was aware of the continuing breach. npower's argument that consumers benefited from the breach as they avoided a "power down" is met by the objection that SLC 12.18 creates no such exception (although it is relevant to

mitigation in respect of quantum). As to the breach of SLC 12.21, the magnitude of the breach cannot be said to be trivial.

174. The panel agrees with Ofgem that the Authority's principal objective and duties do not preclude the imposition of a financial penalty in this case.

175. The panel agrees with Ofgem that the breach or possibility of breach would have been apparent to a diligent licensee:

(a) npower was aware of the breach of SLC 12.18, as it is acknowledged in its internal compliance reports.

(b) So far as SLC 12.21 is concerned, a diligent licensee was required to plan effectively in order to be able to meet the condition by the time of the Deadline.

176. With respect to the latter point, npower submitted that to the extent that the breach was caused by failures in interoperability, no penalty should be applied: it considered that such breach resulted from Ofgem's own failures in resolving the problem of interoperability on a cross-industry basis. However, the burden under SLC 12.21 lay on licensees, not on Ofgem. The panel does not accept that anything said by the Government in its consultation papers in 2007-2008 gave rise to any basis for licensees to believe that they could rely on Ofgem to resolve the difficulties that interoperability may present. To the contrary, the Government's decision to introduce SLC 12.21 clearly recognised that there was a risk posed by the problem, but nonetheless placed a burden on licensees to comply with it. Although it recorded that Ofgem had offered to host discussions with industry with a view to identifying problems of non-interoperability "*and finding ways to address them*", this did not have the effect that it became Ofgem's responsibility to resolve problems of interoperability, or that licensees were released from the obligation to comply with SLC 12.21 even in the absence of an identified solution. The practical problems associated with interoperability are instead relevant to mitigation, and hence to the issue of the quantum of any penalty, discussed below.

(iv) What is the appropriate quantum of the financial penalty?

177. The quantum of any penalty must be reasonable in all the circumstances of the case. In deciding what is reasonable, the panel has had regard in particular to the four factors listed at paragraph 5.2 of the 2003 Penalty Statement. However, as set out above, those four factors must be applied in a manner which reflects the nature of the contravention in question, and not as if they were statutory limitations on the power of the Authority to set a penalty.

- *Seriousness of the contravention and failure*

178. In the circumstances of the present case, the seriousness of the contravention is the most important factor influencing the appropriate level of the penalty. For the reasons set out above, the panel considers that the breach of SLC 12.21 is particularly serious. As Ofgem submitted, compliance by licensees with deadlines imposed was a vital component of the implementation of the government's policy. Meeting deadlines which apply universally to relevant licensees is of utmost importance to maintain a properly regulated and competitive market. npower's failure in the present case prejudiced that aim.

179. The panel agrees with Ofgem that the seriousness of the contravention of SLC 12.21 is to be assessed predominantly by reference to the fact that npower was supplying electricity other than through an Advanced Meter after the Deadline, when it had had a five year Roll-Out Period to take all reasonable steps to avoid that circumstance (where possible to do so). It is not open to licensees to choose their own timetable for compliance, when a Deadline has been set by way of licence condition, beyond any flexibility provided by the terms of the licence conditions themselves. The failure to meet the Deadline is therefore intrinsically serious.

180. The quantification of the number of RMPs in breach is also useful in determining the seriousness of the contravention. On the panel's findings, the number of RMPs in breach was c.3,914 which is approximately 30% fewer than the 5,550-5,650 RMPs initially identified by Ofgem at the time it first proposed the penalty of £3.7m. It would be overly mechanistic to assume that this should lead to a 30% reduction in the proposed penalty, however: the panel repeats that the real

seriousness is the failure to meet the Deadline, with the extent of that failure only being one indication as to the level of seriousness overall.

181. The panel further agrees with Ofgem that npower's clear (but limited) breach of SLC 12.18 in c.192 cases should also be taken into account, in particular given npower's knowledge that such installations were being made in breach of condition.

- *Degree of harm or increased cost incurred by consumers and other market participants*

182. The harm to npower's customers was its failure to install Advanced Meters at 3,914 RMPs, which resulted in those customers being denied the benefits of Advanced Meters. However, as Ofgem recognised in its STOC at §242, Advanced Meters are an enabling technology for a range of benefits to customers and, as is to be expected with a new technology not yet fully embedded in the market, many of the benefits are yet to become fully quantifiable and/or realised. Nonetheless, their aim is to benefit customers by reducing electricity usage.

183. In the panel's view, the possibility of harm to customers is, in the circumstances of the present case, subsidiary to the question of the seriousness of the failure to meet the Deadline (and of the continued installation of traditional meters in breach of SLC 12.18). The significance of the policy objective of bringing the benefits of Advanced Meters to customers within a defined timescale is already captured by the consideration of the seriousness of the breach discussed above.

- *Duration of the contravention or failure*

184. The panel notes that the breach of SLC 12.18 continued for more than six years after the prohibition was imposed.

185. So far as SLC 12.21 is concerned, Ofgem stated in its STOC at §244: "*Ofgem has assessed the breach of the obligation in SLC 12.21 as at the Deadline. SLC 12.21 is an ongoing obligation, meaning that a licensee may continue to be in breach of it unless the licensee takes all reasonable steps to install or arrange to install Advanced Meters at all relevant premises. npower's current status of compliance*

with SLC 12.21 is not within the scope of Ofgem's investigation for the purpose of this Statement of Case; therefore. Ofgem does not take into consideration, when assessing the appropriate penalty, any potential continuing breach by npower past 6 April 2014."

186. The panel agrees with that approach. In short, this is not a case where "*duration"* of the breach is indicative of its seriousness: the seriousness lies in the failure to meet the Deadline. The panel agrees with Ofgem that had there been evidence that the delay in meeting the Deadline was only fleeting, that fact would have amounted to substantial mitigation. However, no such case has been advanced. In those circumstances, the "*duration*" of the breach is not applicable as a material factor in the present case.

187. As indicated above, npower argued that absent any defined duration of the breach, the breach was only a "*bare*" breach, of not or very limited significance. The panel disagrees: that analysis fails to recognise the intrinsic importance of the Deadline.

- *Any gain (financial or otherwise) made by the licensee*

188. Ofgem's case as set out in its STOC at §265 contended that overall, "*npower made a gain of between £1.1-£1.2m primarily through deferring costs that it should have incurred earlier.*"

189. The fact that npower has necessarily incurred expense since the Deadline passed in its continuing efforts to comply with SLC 12.21 is an important one. As §265 recognises, it is likely that the "*gain*" to npower in failing to take all reasonable steps early enough to meet the Deadline lies primarily in the benefit to it of deferring the required expenditure, rather than in avoiding the expenditure altogether.

190. Ofgem divided its analysis of npower's gain into three sections, dealing respectively with the gain arising from npower's:

(a) failure to take reasonable steps to deal with customer engagement;

(b) failure to take reasonable steps to deal with meters that were never read with current agent; and

(c) failure to take reasonable steps to deal with intermittent meters where npower received a notification of a failed meter reading and meters identified as requiring investigation.

191. It is helpful to take the second and third of those categories first.

192. As to the second, Ofgem's case on gain at STOC §260 was that npower should have contracted with additional MOPs (beyond those who were unable to support the new Advanced Meter) at least 2 years earlier than it did, so that the benefits would have been delivered before the Deadline. Ofgem said that "*npower gained because it incurred these costs at least 2 years later than it should have done."* Ofgem indicated that it was unable to quantify this gain as no data was available, but continued: "*the figure in unlikely to be significant as npower did eventually incur all these costs by contracting with other MOPs after the Deadline.*" While Ofgem also acknowledged at STOC §261 that npower may in the meantime have incurred lower charges to its existing MOPs than it would have done had it switched to the additional MOPs earlier on, Ofgem was unable to quantify that element of gain.

193. As to the third, even on Ofgem's case as to intermittency (which the panel has not accepted), it recognised at STOC §263 that it was appropriate to consider gain "*through deferred or avoided costs in respect of these RMPs*". Its analysis of gain on that basis resulted in a tiny total figure, perhaps as low as £14,400.

194. The vast bulk of the claimed gain was accordingly attributable to the first category set out above.

195. On that issue, Ofgem considered the "gain" resulting from the disbandment of its AMR team in the SME division from January 2011 to November 2012 at §§248-254, concluding that the gain was approximately £518,500. It did so on the basis of a comparison between "*the costs npower would have incurred if it had maintained the 2010 staffing levels in this team with the actual costs npower did incur*" (STOC §249). Ofgem chose 2010 as the benchmark because it represented "*a period when the AMR team was already established and npower was engaging with its customers (albeit primarily on a commercial basis)*" (STOC §250). Ofgem "*assumed"* that even though the number of customers requiring engagement would

have reduced over this period, the level of engagement required would have remained constant, as the remaining customers would have been more reluctant, would have been unpersuaded by npower's commercial offering, and/or may have faced encumbrances to installation. Ofgem used a mixture of actual and approximated salaries, and assumed that salaries increased at a constant rate. Ofgem also assumed an additional third of salary costs for other employer costs. Theoretical and actual costs were then rolled forward to 1 April 2017 to obtain the present value of those costs.

196. In the panel's view, there are considerable difficulties with that approach. The first difficulty is that contrary to STOC §265 it does not amount to a calculation of the gain to npower through the *deferral* of costs. It includes a calculation of the costs avoided before the Deadline, but fails to give credit for the costs which were then incurred to make up for the lack of progress in the SME division after the Deadline. The second difficulty is that it is premised upon a series of assumptions, not least that the expenditure incurred in 2010 would still have been required throughout the relevant period, notwithstanding the reducing level of customers who were required to be engaged. Put shortly, the panel was not persuaded that there was an adequate evidential basis upon which to reach such a conclusion.

197. The difficulties with Ofgem's approach to the I&C division are even more marked. Ofgem accepted at STOC §256 that in the absence of detailed I&C division staffing information, it was not possible to calculate the gain by producing a comparison between the level of staffing required and the actual level of staffing, as had been done for SME. In the absence of such information, Ofgem used the results of the SME calculation as a basis for estimating the gain in I&C. It then assumed that the smaller number of customers would have been "balanced out" by the added complexity in arranging installation where more meters, and potentially more sites, were involved. On that basis, it asserted that npower had gained £561,800 by reason of its contraventions in respect of the I&C division, giving a total of £1,080,300.

198. Again, however, there is no evidential basis for that series of assumptions adopted, and Ofgem makes no allowance for the fact that additional costs would have had to be incurred subsequently, after the Deadline. Further, since the I&C team was

not disbanded, there is no well-evidenced basis for extending the analysis from SME to I&C in this way.

199. Although the 2003 Penalty Statement was silent on the point, the panel regards it as necessary to approach the inclusion of "gain" as a factor to be considered in the calculation of the quantum of any penalty as being designed to ensure that a licensee does not enjoy the benefit of any demonstrated financial or other gain arising from its own wrong. Where such a gain is demonstrated, it should be taken account of in any penalty calculation, over and above any penalty which would otherwise be appropriate in order to punish a licensee, or to deter contraventions and incentivise compliance, or to compensate for customer harm.

200. In the present case, the panel is not prepared to treat npower as having made a gain of £1,080,300 as a result of its contraventions.

201. That is not the end of the point, however. Although no reliable figure for a "gain" has been established by the evidence, the fact remains that it cannot be left open to licensees to choose whether and to what extent to defer expenditure required to comply with a mandatory deadline of this kind. The fact that npower opted to defer expenditure in preference to meeting the Deadline is a fact that increases the seriousness of the contraventions established. The result of the panel's decision on this point is <u>not</u> that the overall level of penalty should simply be reduced by £1.1-1.2m from the figure proposed by Ofgem. A broader based judgment is required, so as to reflect all the circumstances of the case, including the fact that npower chose to defer its own efforts to comply with the Deadline, and thereby missed it.

- *Other factors tending to increase the level of penalty*

202. Ofgem considered the five factors listed at §5.3 of the 2003 Penalty Statement at STOC §§266-275. With one exception, it found that they did not apply, or else the points relied upon have already been considered above. The only additional point of substance was that Ofgem made explicit findings that npower's roll-out of Advanced Meters through its I&C and SME divisions had been managed by the senior managers responsible for those divisions. Senior management had failed adequately to plan for regulatory compliance until late in the Roll-Out Period, and

had taken little account of the acknowledged breaches of SLC 12.18. The panel agrees that this is a material factor, and takes it into account.

- *Other factors tending to decrease the level of penalty*

203. So far as SLC 12.18 is concerned, the panel notes npower's evidence that this breach resulted from engineers replacing broken traditional meters, rather than leaving customers without any working meter. The panel regards that evidence as providing some mitigation in respect of this admitted breach.

204. Ofgem acknowledged at STOC §277 that npower had taken steps to secure compliance with SLC 12.21 by installing approximately 15,000 Advanced Meters (as it calculated at that time) by the Deadline, but emphasised that it had failed to take all reasonable steps. It further noted at STOC §278 that since the Deadline, npower had installed further Advanced Meters, but stated that it had not assessed npower's current level of compliance. (Ofgem had noted, however, that in 2016, npower had reduced the scale of its interoperability issues from 2,362 RMPs in 2014 to just 40 (STOC §185), and that communication had been achieved with a further 1,300 RMPs in 2015 (STOC §177)). In all other respects, Ofgem credited npower with no further mitigation.

205. In the view of the panel, it is appropriate to take into account both the extent to which npower had taken steps to secure compliance, and appropriate action taken by npower to remedy the contravention following the Deadline. In particular, the panel notes that npower adopted technical solutions when they became available, and installed new meters over time.

206. On the specific question of interoperability, the panel acknowledges the difficulty of npower's position. npower knew from the beginning of the Roll-Out Period (or should have known) that it would be hard to find a solution using its own resources, as the problem of interoperability would be beyond the power of any one licensee to solve. It followed that a bilateral or multilateral agreement would be needed if the problem was to be overcome, the achievement of which could not be enforced by regulation.

207. It was not suggested by npower's witnesses that npower had stopped making progress on compliance because it believed that Ofgem was dealing with the difficulty of interoperability. For the reasons set out above, it remained npower's responsibility to secure compliance even absent such an agreement, and npower's alone. However, it is right to acknowledge both that npower was working in the absence of any institutional support of any significance during the Roll-Out Period, despite the fact that interoperability was an objective recognised by BERR. In the view of the panel, it is right to recognise that, subject to meter replacement, compliance could only be achieved through a series of contracts in which the licensee might not be able to achieve required or financially reasonable results. There is evidence of significant reluctance on the part of agencies to assist npower. Given the lack of technical advances in communications, these matters casts doubt on the ability of a licensee to arrive at the objective without resorting to meter exchange.

208. Nonetheless, the ultimate backstop was the availability of meter exchange, and the ultimate reason why npower was unable to comply with SLC 12.21 was the fact that it left too many RMPs until the end of the Roll-Out Period (or later) before taking action. There does not appear to have been any monitoring of the project plan as to how to deal with inherited meters, such as those inherited from [redacted].

(v) Conclusion on penalty

209. npower knew that, in common with other energy suppliers, it had the responsibility of taking action to meet the Government's clearly stated objective that in an important sector of the business community, traditional meters should be replaced by Advanced Meters over a five year period. There had been full consultation with the industry and with the Authority before the licence conditions were introduced, both as to the substance of the conditions and the length of the roll out. The potential sanction for breach was heavy. The Authority was empowered to prohibit a licensee from supplying energy to a customer with effect from 6 April 2014 other than through an Advanced Meter, unless the licensee had taken all reasonable steps to install such a meter. If such enforcement action had been taken, and the breach was serious, the licensee's business could have been put in jeopardy. The possible

use of those powers by the Authority was clearly intended to send a strong signal to the market that these licence conditions were being introduced to promote a most important public interest objective, the attainment of which lay in the hands of the licensees.

210. In deciding not to take the route of enforcement by means of such an order, but to proceed by way of penalty for serious breaches, Ofgem was acting reasonably and in a proportionate manner, taking into account the likely adverse effects on customers were such enforcement action to be taken. Nevertheless, in determining the level of penalty, and taking all circumstances into account, as the EDP is required to do, the EDP is mindful of the purpose of any penalty, which is to reflect not merely the gravity of the infringement but to act as a deterrent against the repetition of the same or other breaches.

211. By any standard, the shortfall between what npower had five years to accomplish and what it succeeded in doing was substantial, even though the EDP has not accepted the full scale of that shortfall, as alleged by Ofgem. To have almost 4,000 of its installed base of about 22,000 meters, as at 6 April 2014, not functioning as Advanced Meters and with no justification for their not functioning, is not acceptable behaviour by any licensee charged with such public interest responsibilities.

212. In carrying out those responsibilities, npower admitted that it had diverted critically important personnel to what it perceived to be a more important priority for a period of almost two of the five years, and that such action had been the cause of its missing the regulatory target by up to 900 customers. But that was not the sole failure. The evidence clearly pointed to a more systemic failure: through its own compliance reports; by the late adoption of an ARS Working Procedure; and by not grasping the importance of systematic meter exchange when its efforts to convert inherited meters through the use of agents or communications technology were not succeeding or not being pursued. For all those reasons, npower conspicuously failed in meeting its obligations. A substantial penalty is thus required.

213. However, the EDP considers that Ofgem's proposed penalty of £3.7 million is too high. The fact that npower was in breach in respect of almost 3000 meters because

it had failed to deal with the problem of lack of interoperability and communications, should not conceal the very real difficulties faced by all licensees in solving that problem, either unilaterally or through agency agreement or both, while at the same time competing with each other on a substantial scale and thus contributing to the problem itself. npower did try to solve the problem, even though its efforts were not successful, and for those efforts the EDP must give some recognition. If its efforts were too late, nevertheless the procedures it had in place before the end of the Roll-Out Period and the success rate in its performance post-April 2014, so as to secure greater compliance with that regulatory obligation, are evidence of serious attention to its responsibilities. It is important to recall that Ofgem has made no allegation that npower is in continuing breach of SLC 12.21 after 6 April 2014.

214. Moreover, the EDP has found against Ofgem in its calculation of gain and has also found that Ofgem has given insufficient weight to certain conduct of npower, which has led the panel to reduce the number of meters in breach by about 30 per cent.

215. Taking all the circumstances into account, including the breaches of SLC 12.18 and SLC 12.21, and also mindful of the Authority's principal objective to protect the interests of existing and future energy consumers, the panel concludes that the appropriate penalty, reasonable in all the circumstances of the case, is **£2.4 million**.

(vi) Consistency with other decisions

216. In arriving at its proposed penalty, Ofgem considered whether its decision was consistent with previous comparable cases, and concluded that it was. The panel has reached its own conclusion on the merits of the present case alone. However, by way of cross-check, it has satisfied itself that its proposed penalty is reasonable having regard to the other cases to which Ofgem has referred.

(vii) npower's vires argument

217. In its pleadings, npower raised a question as to the basis for Ofgem's approach of treating all four npower licensees as jointly liable for the penalty. At the hearing before the panel, however, npower confirmed that it was not pursuing the issue

further. In those circumstances, there is no need to say anything further about it here.

(viii) Section 27O(1) Electricity Act

218. In accordance with section 27O(1) of the Electricity Act, the Authority may impose a financial penalty of up to 10 per cent of the turnover of the relevant licence holder. Turnover is defined in the Electricity and Gas (Determination of Turnover for Penalties) Order 2002 (SI 2002 No. 1111). The relevant figure is the turnover shown in published or prepared accounts for the business year preceding the date of this notice.

219. According to npower's Annual Reports and Financial Statements for the financial year ended 31 December 2017, npower's total turnover was £5.75 billion: npower Direct Limited's was £269 million, npower Limited's was £3.441 billion turnover, npower Northern Limited's was £1.889 billion, and npower Yorkshire Limited's was £151 million. The EDP is satisfied that the proposed penalty of £2.4 million does not exceed 10% of the turnover of the companies collectively or individually.

FORMAL DECISION

In exercise of its delegated powers and on behalf of the Gas and Electricity Markets Authority, the Enforcement Decision Panel hereby gives notice of its proposal under section 27A(3) of the Electricity Act 1989 to impose a single joint penalty of **£2.4 million** on npower Direct Limited, npower Limited, npower Northern Limited and npower Yorkshire Limited in respect of their non-compliance with their obligations under conditions 12.18 and 12.21 of the Standard Conditions of the Electricity Supply Licence. The contraventions which have been found and which attract that penalty are:

(a) the installation of c.192 traditional meters at relevant premises between 15 October 2009 and 30 November 2015, in breach of the requirement in Standard Licence Condition 12.18 that electricity meters installed at relevant premises as defined by Standard Licence Condition 12.17 must be Advanced Meters; and

(b) the supply of electricity to relevant premises as at 6 April 2014 at c.3,914 relevant meter points other than through an Advanced Meter, in breach of the prohibition imposed by Standard Licence Condition 12.21.

Any written representations on the proposed penalty must be received by the Enforcement Decision Panel Secretariat at 10 South Colonnade, Canary Wharf, London, E14 4PU or Secretariat@ofgem.gov.uk by **5.00pm on 31 August 2018**.

Any representations received may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly. Any such requests will be considered by the Enforcement Decision Panel on a case by case basis and may or may not be approved.

John Swift QC

Professor Amelia Fletcher

Andrew Long

For and on behalf of the Gas and Electricity Markets Authority

Dated: 1 August 2018