

Notice of reasons pursuant to section 38A(1)(f) and 38A(2) of the Gas Act 1986 ('the Gas Act') and Section 49A(1)(f) and 49A(2) of the Electricity Act 1989 ('the Electricity Act') for the decision of the Gas and Electricity Markets Authority ('the Authority') to confirm a Provisional Order under section 25(4) of the Electricity Act and section 28(4) of the Gas Act

1 Background: the making the Provisional Order

- 1.1 This document sets out the reasons why, on 26 November 2018, the Authority confirmed a provisional order with modifications in respect of contraventions or likely contraventions by Npower Direct Limited (company number 03782443), Npower Limited (company number 03653277), Npower Northern Limited (company number 03432100), Npower Northern Supply Limited (company number 02845740), Npower Yorkshire Limited (company number 03937808), Npower Yorkshire Supply Limited (company number 04212116), all of Windmill Hill Business Park, Whitehill Way, Wiltshire, SN5 6PB (referred to collectively in the rest of this document as 'npower').
- 1.2 Each of the npower entities referred to above hold licences to supply gas and electricity granted respectively under sections 6(1)(d) of the Electricity Act and 7A(1) of the Gas Act.

The Authority made and served a provisional order on npower pursuant to section 25(2) of the Electricity Act and section 28(2) of the Gas Act on 24 September 2018 ("the PO"). A copy of the PO can be found at:

https://www.ofgem.gov.uk/system/files/docs/2018/09/provisional_order_issued_to_npower_-_24_september_2018.pdf

- 1.3 The background to the reasons for issuing the PO of 24 September 2018 is set out in the reasons document dated 26 September 2018 which can be found at:

https://www.ofgem.gov.uk/system/files/docs/2018/09/notice_of_reasons_for_issue_of_provisional_order_to_npower_-_26_september_2018_0.pdf

2 Background: Notice of Proposal to confirm the PO and representations made to the Authority

- 2.1 The Authority published a notice of its proposal to confirm the PO on 31 October 2018 and invited representations and objections to the notice to be made to it. The notice of proposal to confirm the PO can be found at:

https://www.ofgem.gov.uk/system/files/docs/2018/10/notice_of_proposal_to_confirm_provisional_order_dated_29_october_2018_002.pdf

- 2.2 As well as explaining the reasons why the Authority proposed to confirm the PO, the notice of proposal published on 31 October 2018 explains what contravention the PO was originally made in respect of, namely npower's failure to comply with certain requirements of a Direction issued by the Authority on 31 August 2018 ('the Direction') under Standard Licence Condition 32A ('SLC 32A'). The notice of proposal to confirm the PO also explains why and how the Authority applied to the High Court (Chancery Division) and obtained an injunction compelling npower to comply with the requirements of the PO (and hence the Direction and SLC32A).
- 2.3 Npower made written representations to the Authority's proposal to confirm the PO, objecting to the Authority's proposal to confirm the PO. In summary, npower suggested in its representation that:
- a. the Authority should wait for the outcome of npower's judicial review of the Authority's decision to issue the Direction on 31 August 2018 (to be heard by the Administrative Court on 28 and 29 November 2018) before deciding to confirm the PO; and
 - b. that npower will comply with the Direction should the Administrative Court not quash the Direction in the above legal proceedings.

3 Reasons for the Authority's decision to confirm the PO

- 3.1 Pursuant to sections 25(4) of the Electricity Act and section 28(4) of the Gas Act, the Authority '*shall confirm a provisional order, with or without modifications if:*
- a. *it is satisfied that the regulated person to whom the order relates is contravening or is likely to contravene any condition or requirement; and*
 - b. *the provision made by the order (with any modifications) is requisite for the purpose of securing compliance with that condition or requirement'.*
- 3.2 Section 25(5A) of the Electricity Act and Section 28(5A) of the Gas Act state that the Authority is '*not required to.....confirm a provisional order if it is satisfied*
- a. *The regulated person [npower] has agreed to take and is taking all such steps as it appears to the Authority for the time being to be appropriate for the regulated person to take for the purpose of securing or facilitating compliance with the condition or requirement in question; or*
 - b. *That the contraventions were or the apprehended contraventions are of a trivial nature'.*
- 3.3 In the above context, when making its decision to whether to confirm the PO, the Authority was aware that the PO would lapse on 23 December 2018 if it did not

confirm the PO on or before that date and that the Direction requires npower to carry out certain actions post that date. In particular, paragraph 28 of the Direction requires npower to record and collect certain data relating to the collective switch trial and to provide that data to the Authority. Importantly, some of this data, which is essential to enable the Authority to properly assess customer behaviour during the collective switch trial, will need to be provided to the Authority after 23 December 2018.

- 3.4 The Authority did not consider that it was likely that npower will breach the injunction granted on 5 October 2018 (with the related risk of contempt proceedings) by not complying with the terms of the PO and therefore was not likely to contravene the terms of the Direction and SLC 32A, so long as the PO and the injunction (which compels npower to comply with the PO) remained extant.
- 3.5 However, the Authority was satisfied that, if and once the PO lapsed (and the injunction and related threat of contempt proceedings consequently fell away), npower was likely to contravene SLC 32A by not complying with the remaining requirements of the Direction that it should comply with post 23 December 2018. The Authority concluded that should npower fail to comply with these remaining requirements of the Direction, that these contraventions would not be of a trivial nature and would adversely affect the Authority's ability to conclude the trial successfully.
- 3.6 The Authority's assessment of the likelihood of npower not complying with the Direction and therefore contravening SLC 32A post 23 December 2018 was informed by npower's conduct in the context of complying with the Direction and its approach to its participation in the collective switch trial. In particular, it was necessary for the Authority not only to make the PO in the first place, but to make an application to the High Court for an injunction compelling npower to comply with the PO, in order to secure npower's participation in the initial key stages of the collective trial (namely sending certain letters to customers) and thus bring npower into belated compliance with the Direction and SLC 32A.
- 3.7 The Authority considered npower's suggestion made in its representation that npower will abide by the terms of the Direction should the Direction not be quashed in the judicial review of the Authority's decision to issue the Direction. However, given npower's conduct in the context of this particular matter up to date on which the Authority made its decision to confirm the PO, the Authority did not place much weight on this promise, and npower's promise did not dissuade the Authority from concluding that npower are likely to again contravene the terms of the Direction and hence SLC32A should the PO not be confirmed and be allowed to lapse.
- 3.8 The Authority considered the possibility that npower may comply with the terms of the Direction after 23 December 2018, even if the PO lapses, due to any alleged adverse commercial impacts having already been felt by npower by that

time. However, notwithstanding this possibility, and again based on npower's conduct up to the date on which it made its decision to confirm the PO, the Authority was satisfied that it is likely npower will not comply with the Direction after 23 December 2018 and therefore contravene SLC 32A.

- 3.9 The Authority also considered whether the existence of legal proceedings initiated by npower in the High Court under Section 27(1) of the Electricity Act (and its equivalent identical provision in the Gas Act) challenging the Authority's decision to make the PO and the challenge to the Authority's decision to issue the Direction in the first place (referred to above) should preclude or prevent the Authority from confirming the PO.
- 3.10 In their representation to the Authority, npower suggested that the Authority should wait until the outcome of these legal proceedings is known before confirming the PO. However, the Authority concluded that the existence of these legal proceedings should not preclude it from confirming the PO prior to the outcome of the legal proceedings being known. Until (and unless) those proceedings are concluded and result in the PO and / or Direction being quashed, the PO remains extant (unless it is not confirmed). Furthermore, The Authority has a duty to act in the best interests of consumers, in accordance with its principal objective, and considered that this objective was best served in this context by taking such steps as it considered necessary to ensure that the collective switch trial is concluded within the timescales envisaged by the Direction. The Authority concluded therefore, that confirming the PO was appropriate, notwithstanding the existence of the legal proceedings referred to above.
- 3.11 The Authority concluded that the terms on which it proposed to confirm the PO with minor modifications were requisite for the purposes of securing npower's compliance with SLC 32A, namely to require npower to comply with the terms of the Direction in full and to remediate any non-compliance with the Direction that has occurred or may occur. The PO as made on 24 September 2018 specifically required npower to send out specific correspondence by 12 noon on 26 September 2018. Npower did this on 8 October 2018 (albeit after the injunction had been granted), therefore the Authority was satisfied that it was unnecessary to include this element in the confirmed PO.
- 3.12 In reaching its conclusion to confirm the PO, the Authority had regard to the matters set out in section 25(4A), (4B), (5) and (5A) and section 26 of the Electricity Act and section 28(4A) (4B), (5) and (5A) and section 29 of the Gas Act. Section 25(5) of the Electricity Act 1989 and Section 28(5) of the Gas Act 1986 refer to the Authority's principal objective as set out in section 3A of the Electricity Act and Section 4AA of the Gas Act respectively.
- 3.13 For the above reasons the Authority decided to confirm the PO.

Dated: 27 November 2018

Signed

**JOHN SWIFT QC
TREVOR JONES
ANDREW LONG
Enforcement Decision Panel**

Duly authorised on behalf of the Gas and Electricity Markets Authority