



Notification to RWE npower PLC of a penalty under Section 130 of the Communications Act 2003

Notification RWE npower PLC by the Office of
Communications ("Ofcom")

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Notification to RWE npower PLC of a penalty under Section 130 of the Communications Act 2003

Subject of this Notification

1. This Notification is addressed to RWE npower PLC, trading as npower (“npower”), registered company number 03892782 and whose registered address is Windmill Hill Business Park, Whitehill Way, Swindon, SN5 6PB.
2. It notifies npower of the imposition by the Office of Communications (“Ofcom”) of the following penalty under section 130 of the Communications Act 2003 (the “Act”):
 - a) A penalty of £60,000.
 - b) Ofcom imposes this penalty on npower, as it has, in one or more of the respects notified pursuant to a notification under section 128 of the Act, persistently misused an electronic communications network or electronic communications services between 1 February and 21 March 2011.

Background

3. Section 130 of the Act applies where a person has been given a notification under section 128 of the Act; has been given an opportunity to make representations; and the period allowed for making representations has expired.
4. Section 130(2) of the Act allows Ofcom to impose a penalty upon that person if it is satisfied that he has, in one or more of the notified respects persistently misused an electronic communications network or electronic communications service.
5. On 6 July 2011 Ofcom issued to npower, under section 128 of the Act, a notification (the “section 128 notification”) that Ofcom had reasonable grounds for believing that between 1 February and 21 March 2011, npower had persistently misused an electronic communications network or electronic communications service. The section 128 notification is at Annex 1.
6. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which npower had an opportunity of making representations about the matters notified in the section 128 notification. The deadline for npower’s representations was 10 August 2011. Ofcom received written representations from npower on 10 August 2011 (the “August 2011 Representations”) in relation to the matters notified. On 2 December 2011, npower provided additional representations about the matters notified in the section 128 notification (the “December 2011 Representations”). On 3 May 2012, npower provided further additional representations about the matters notified in the section 128 notification (the “May 2012 Representations”).
7. The section 128 notification stated that Ofcom may issue a further notification to npower under section 129 of the Act if, by 5pm on 10 August 2011, Ofcom is satisfied that npower has:

- a) in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service;
 - b) and has not, since the giving of the notification, taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated; and
 - c) has not, since the giving of the notification, taken all such steps as Ofcom considers appropriate for remedying the consequences of the notified misuse.
8. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on npower under section 130 of the Act, if npower has, in one or more of the ways set out in that notification, persistently misused a network or services.
 9. Ofcom considered the August 2011 Representations, the December 2011 Representations, and the May 2012 Representations, and on 2 August 2012 served on npower a provisional notification of a possible penalty under section 130 of the Act (the "Provisional Notification"). The Provisional Notification set out Ofcom's preliminary view that we should impose on npower a penalty of £75,000 under that section in respect of npower's notified contravention of the persistent misuse provisions of the Act between 1 February and 21 March 2011.
 10. In making the provisional determination, Ofcom had regard to the steps taken by npower for securing that its persistent misuse was brought to an end and not repeated; the steps taken for remedying the consequences of the notified misuse; the principles set out in Ofcom's Guidelines¹; and the penalty guidelines published on 13 June 2011² under section 392 of the Act (the "Penalty Guidelines").
 11. The reasons for Ofcom's provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
 12. The Provisional Notification gave npower until 31 August 2012 to make written representations to Ofcom about the matters set out in the accompanying Explanatory Statement. It also gave npower the opportunity to make oral representations to Ofcom in relation to these matters. On 31 August 2012 npower submitted its written representations to Ofcom (the "August 2012 Representations"). On 10 August 2012 npower informed Ofcom that it wished to make oral representations; a hearing was held at Ofcom's offices on 10 September 2012.

Sections 128, 129, 130 and 131 of the Act

13. Section 128 of the Act applies where Ofcom determines that where there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services, they may give that person (the "notified misuser") a notification under section 128 of the Act.

¹ The revised statement of policy on the persistent misuse of an electronic communications network or service 2010, published on 1 October 2010 and annexed to the document entitled Tackling abandoned and silent calls: Statement (<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>). For ease of reference, both these documents are collectively referred to in this notification as the "Guidelines". The Guidelines follow previous statements in 2006 and 2008 and were under consultation between 1 June 2010 and 27 July 2010

² (<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>).
<http://www.ofcom.org.uk/files/2010/06/penquid.pdf>.

14. Ofcom may serve an enforcement notice under section 129 of the Act if, by the end of the period specified in the section 128 notification, Ofcom is satisfied that the notified misuser has persistently misused an electronic communications network or an electronic communications service; and they have not taken all such steps as Ofcom consider appropriate for securing that its misuse is brought to an end and not repeated; and has not remedied the consequences of the notified misuse. Compliance with an enforcement notice under section 129 is enforceable in civil proceedings by Ofcom.
15. Section 130 of the Act applies where-
 - a) a person (“the notified misuser”) has been given a notification under section 128;
 - b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - c) the period allowed for the making of the representations has expired.
16. Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
17. Section 130 provides that the amount of a penalty imposed is to be such amount not exceeding £2,000,000 as Ofcom determine to be –
 - a) appropriate; and
 - b) proportionate to the misuse in respect of which it is imposed.
18. It also provides, amongst other things, that in making that determination Ofcom must have regard to:
 - a) any representations made to them by the notified misuser;
 - b) whether the misuse is brought to an end and not repeated; and
 - c) any steps taken by him for remedying the consequences of the notified misuse.
19. Ofcom may issue an enforcement notification under section 129 of the Act (as referred to above) and impose a penalty under section 130 of the Act (as referred to above).
20. Section 131 of the Act provides that Ofcom, in exercising the powers conferred on it by sections 128 to 130 of the Act, must have regard to the statement of general policy (as referred to at paragraph 21).

Determination made by Ofcom

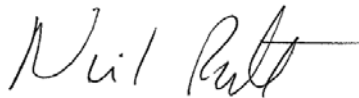
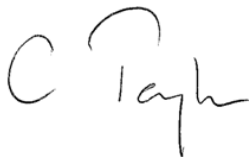
21. Having taken account of the available evidence in this case, npower’s representations, the steps taken by it for securing that its misuse is brought to an end and not repeated; and steps taken by npower for remedying the consequences of the notified misuse, the Guidelines, and our Penalty Guidelines, Ofcom has decided to impose on npower a penalty under section 130 of the Act.

22. This penalty is imposed in respect of npower's persistent misuse of an electronic communications network or electronic communications service for the period 1 February to 21 March 2011.
23. The penalty amount to be imposed is £60,000. npower must pay the penalty imposed on it to Ofcom no later than 30 days after the giving of this Notification.
24. The reasons for Ofcom's decision and determination are set out in the following Explanatory Statement.

Interpretation

25. Words or expressions used in this Notification and/or the Explanatory Statement have the same meaning as in the Act except as otherwise stated.

Chris Taylor (Director of Consumer Policy, Consumer Group) and Neil Pratt, (Director of Economic Analysis, Competition Group) as decision makers for Ofcom



5 December 2012

Explanatory Statement

Section 1

Subject of this notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty (the "Notification") on RWE npower PLC ("npower"), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on npower and our determination of what that penalty should be.
- 1.2 The issue of this Notification follows Ofcom's:
- a) investigation into npower's compliance between the period 1 February 2011 to 21 March 2011 (the "Relevant Period") with section 128 of the Act and the principles set out in the relevant guidelines³;
 - b) determination that there are reasonable grounds for believing that, during the Relevant Period, npower persistently misused an electronic communications network or electronic communications service;
 - c) service on npower on 6 July 2011 of a notification under section 128 of the Act (the "section 128 notification");
 - d) information requests under section 135 dated 12 April 2011 (the "First Information Request"), 12 September 2011 (the "Second Information Request"), 10 November 2011 (the "Third Information Request") and 10 February 2012 (the "Fourth Information Request");
 - e) analysis of npower's response to the First Information Request on 10 May 2011 and analysis of the subsequent corrections by npower to the data contained in the response, on 8 August 2011 (the "August 2011 data");
 - f) analysis of npower's response to the Second Information Request on 23 September 2011 and analysis of the subsequent corrections by npower to the data contained in the response, on 28 October 2011 (the "October 2011 data");
 - g) analysis of npower's response to the Third Information Request on 21 November 2011;
 - h) analysis of npower's response to the Fourth Information Request on 2 March 2012;

³ In accordance with section 131 of the Act, Ofcom has published a statement of its general policy with respect to the exercise of its powers under section 128 to 130 of the Act. The most recent statement is the *revised statement of policy on the persistent misuse of an electronic communications network or service 2010*, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*. For ease of reference, both these documents (the *revised statement of policy*, and *Tackling abandoned and silent calls: Statement*) are collectively referred to in this notification as the "Guidelines".

- i) consideration of representations made by npower on 10 August 2011 (the “August 2011 Representations”), on 2 December 2011 (the “December 2011 Representations”), and on 3 May 2012 (the “May 2012 Representations”) on steps taken for securing the misuse is brought to an end and not repeated, and steps taken by npower for remedying the consequences of the misuse notified in the section 128 notification.
- j) service on npower on 2 August 2012 of a provisional notification of a possible penalty under section 130 of the Act (the “Provisional Notification”),⁴ setting out, amongst other things, Ofcom’s preliminary view:
 - i) that we should impose on npower a penalty in respect of its persistent misuse of an electronic communications network or service between 1 February and 21 March 2011;
 - ii) that the provisional penalty amount should be £75,000;
- k) npower’s written representations of 31 August 2012, in respect to the Provisional Notification (the “August 2012 Representations”)⁵; and
- l) npower’s oral representations of 10 September 2012 (the “Oral Representations”).

1.3 Ofcom’s decision is that a financial penalty be imposed on npower as it has, in one or more of the notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. Ofcom’s determination is that the penalty will be £60,000.

1.4 Ofcom’s determination is that this penalty is appropriate and proportionate to the contravention in respect of which it is imposed. In taking that view, Ofcom has had regard to:

- a) representations made to it by npower;
- b) steps taken by npower for securing that its misuse is brought to an end and is not repeated;
- c) steps taken by npower for remedying the consequences of the notified misuse;
- d) the Guidelines; and
- e) the penalty guidelines in force under section 392 of the Act at the time that the decision to impose the penalty, and the determination of its amount, was made (the “Penalty Guidelines”).⁶

⁴ Annex 23, Provisional Notification.

⁵ Annex 24, npower’s August 2012 Representations.

⁶ On 17 December 2010, Ofcom published a document consulting on changes to its penalty guidelines under section 392 of the Act, which document included proposed new guidelines (see <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/?a=0>). The consultation closed on 11 February 2011. Ofcom received seven responses, which it has considered. Ofcom decided to adopt the proposed new guidelines with some, but not material, changes and published that decision and the new guidelines on 13 June 2011 (see <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>). They

1.5 The reasons for Ofcom's decision and determination, and the regard we have had to the matters in paragraph 1.4 in reaching them, are set out in the following sections of this Notification. In particular, aspects of Ofcom's decision and determination include that:

- a) npower has, in one or more of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period on the following basis by:
 - generating 1,756 abandoned calls which exceeded an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre across campaigns basis; and
 - including marketing content within the information message played in the event of an abandoned call by npower at its in-house call centre during the Relevant Period.
- b) such persistent misuse is serious and therefore warrants the imposition of a penalty in order to create a deterrent effect for npower, and for all those subject to regulation by Ofcom, so as to help ensure widespread compliance with legislation and regulatory rules and to further the interests of citizens and consumers; and
- c) having regard to matters including:
 - the number of occasions that npower was not compliant with the persistent misuse provisions and the Guidelines;
 - the steps npower took to secure that the misuse was brought to an end and was not repeated;
 - the steps npower took to remedy the consequences of its misuse;
 - that the central objective in imposing a penalty and determining its amount, set out in the Penalty Guidelines, is deterrence. The amount of any penalty should be sufficient to ensure that it will act as an effective incentive to comply for npower, having regard to the persistent nature of its infringement, and others to whom the persistent misuse provisions and the Guidelines applies.
 - a penalty amount which would be appropriate and proportionate in the circumstances.

1.6 We have concluded that a penalty of £60,000 is appropriate and proportionate to the contravention.

1.7 It should be noted that based on the evidence provided since the section 128 notification was issued, we have found that there was a reduction in the number of separate occasions where the abandoned call rate exceeded three percent of live calls over a 24 hour period. The section 128 notification referred to 13 separate occasions on a per call centre/across campaigns basis, while the number

are, therefore, the guidelines in force and applicable at the time Ofcom decided to impose a penalty on npower, and determined its amount, in this matter.

subsequently evidenced is 8 separate occasions on a per call centre/across campaigns basis.

- 1.8 In the Provisional Notification we imposed a provisional penalty of £75,000. Having taken account of representations made by npower in relation to its proposed steps to remedy the consequences of its notified misuse and the level of harm likely to have been caused by the marketing message, we have reduced the penalty to £60,000.
- 1.9 The following sections of this Notification set out:
- a) the background detail to this matter, including the applicable statutory framework;
 - b) Ofcom's analysis of the options open to it and the bases for our decision to impose a penalty; and
 - c) Ofcom's determination of the amount of that penalty and the bases on which that determination is made.

Section 2

Background

- 2.1 The following section sets out the background to Ofcom's investigation into npower, both before and after the issue of the section 128 notification to npower on 6 July 2011.

The statutory framework

- 2.2 Ofcom is the national regulatory authority for electronic communications networks and services. We have a number of duties and functions under the Act.

Ofcom's duties and functions

- 2.3 Ofcom's principal duty when performing our functions is set out in section 3(1) of the Act:

“(1) It shall be the principal duty of OFCOM, in carrying out their functions—

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

- 2.4 Section 3(3) of the Act says that:

“(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.”

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles⁷. These include that Ofcom will:

- a) regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- b) operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- c) strive to ensure our interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and
- d) always seek the least intrusive regulatory mechanisms to achieve our policy objectives.

⁷<http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 2.6 In performing Ofcom's relevant functions, we must fulfil the duties above and the powers we have to perform those functions are as follows.

Sections 128, 129 and 130 of the Act

- 2.7 Section 128(1) of the Act enables Ofcom to issue a notification to a person where it determines that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications service. That notification is one which sets out our determination, specifies the use that we consider constitutes persistent misuse and specifies the period, of not less than one month (or not less than seven days in an urgent case), during which the person notified has an opportunity of making representations about the matters notified.

- 2.8 Section 128(5) of the Act defines "misuse" as follows:

"For the purposes of this Chapter a person misuses an electronic communications network or electronic communications services if—

(a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or

(b) he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety."

- 2.9 Section 128(6) of the Act defines what constitutes "persistent" misuse as follows:

"(6) For the purposes of this Chapter the cases in which a person is to be treated as persistently misusing a network or service include any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents –

(a) a pattern of behaviour or practice; or

(b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety."

- 2.10 Section 128(7) of the Act provides further guidance on determining whether misuse occurring on a number of different occasions is persistent as follows:

"(7) For the purpose of determining whether misuse on a number of different occasions constitutes persistent misuse for the purposes of this Chapter, each of the following is immaterial –

(a) that the misuse was in relation to a network on some occasions and in relation to a service on others;

(b) that different networks or services were involved on different occasions; and

(c) that the persons who were or were likely to suffer annoyance inconvenience or anxiety were different on different occasions."

2.11 Section 129 of the Act provides that Ofcom may issue a further notification (known as an “enforcement notification”) in specified circumstances, as follows:

- “(1) This section applies where –
- (a) a person (“the notified misuser”) has been given a notification under section 128;
 - (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - (c) the period allowed for the making of the representations has expired.
- (2) OFCOM may give the notified misuser an enforcement notification if they are satisfied –
- (a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
 - (b) that he has not, since the giving of the notification, taken all such steps as OFCOM consider appropriate for –
 - (i) securing that his misuse is brought to an end and is not repeated; and
 - (ii) remedying the consequences of the notified misuse.
- (3) An enforcement notification is a notification which imposes a requirement on the notified misuser to take all such steps for –
- (a) securing that his misuse is brought to an end and is not repeated, and
 - (b) remedying the consequences of the notified misuse,
- as may be specified in the notification.”

2.12 If the notified misuser fails to comply with the section 129 enforcement notification, then under section 129(6) of the Act Ofcom can enforce compliance with the enforcement notification by way of civil proceedings.

2.13 Under section 130 of the Act, Ofcom may impose a penalty, as well as or instead of, serving a notification under section 129. Section 130 provides as follows:

- “(1) This section applies (in addition to section 129) where –
- (a) a person (“the notified misuser”) has been given a notification under section 128;

- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - (c) the period allowed for the making of representations has expired.
- (2) OFCOM may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
- (3) OFCOM may also impose a penalty on the notified misuser if he has contravened a requirement of an enforcement notification given in respect of the notified misuse.
- (4) The amount of penalty imposed is to be such amount not exceeding £2,000,000⁸ as OFCOM determine to be –
- (a) appropriate; and
 - (b) proportionate to the misuse in respect of which it is imposed.
- (5) In making that determination OFCOM must have regard to-
- (a) any representations made to them by the notified misuser;
 - (b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and
 - (c) any steps taken by him for remedying the consequences of the notified misuse."

Ofcom's relevant guidelines

2.14 In accordance with section 131 of the Act, Ofcom has published a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act.

2.15 This most recent statement is the *revised statement of policy on the persistent misuse of an electronic communications network or service 2010*⁹, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*¹⁰. The revised statement of policy followed previous statements in 2006¹¹ ("2006 Guidance") and 2008¹² ("2008 Guidance") and was under consultation

⁸Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, SI 2010/2291, section 2(1).

⁹<http://www.legislation.gov.uk/uksi/2010/2291/article/2/made>.

⁹<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

¹⁰<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

¹¹http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse_state.pdf

¹²http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/statement/misuse_statement.pdf

between 1 June 2010 and 27 July 2010¹³. For ease of reference, both these documents (the *revised statement of policy*, and *Tackling abandoned and silent calls: Statement*) are collectively referred to in this Notification as the “Guidelines”¹⁴.

2.16 Ofcom has also published penalty guidelines under section 392 of the Act. On 17 December 2010, Ofcom published a document consulting on changing them, and proposed a set of new penalty guidelines (see <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/>). The consultation closed on 11 February 2011. Following consideration of the seven responses received, Ofcom adopted the proposed new guidelines with some, but not material, changes. We published that decision and the new guidelines on 13 June 2011 (the “Penalty Guidelines”).

2.17 The new guidelines were, therefore, in force and applicable at the time Ofcom decided to impose the penalty on npower, and determined its amount. Accordingly, Ofcom has had regard to them in making our determination, as set out in this Notification.

2.18 The Penalty Guidelines¹⁵ provide that:

“Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”¹⁶

2.19 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:

- a) The degree of harm, actual or potential, caused by the contravention;
- b) The duration of the contravention;
- c) Any gain (financial or otherwise) made as a result of the contravention;
- d) Any steps taken for remedying the consequences of the contravention;
- e) Whether the regulated body in breach has a history of contraventions;
- f) Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- g) The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
- h) Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
- i) The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.

¹³ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

¹⁴ Annex 2, the Guidelines.

¹⁵ Annex 3, Ofcom Penalty Guidelines, June 2011.

¹⁶ Paragraph 3, Ofcom Penalty Guidelines, June 2011.

- 2.20 The Penalty Guidelines also require Ofcom to have regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

The investigation and findings

- 2.21 While reference is made in this Notification to all documentary evidence received and made available to Ofcom (representations, responses to statutory information requests and correspondence) and all of this evidence has been considered in reaching the decision, this Notification does not purport to be a comprehensive restatement of all the documentary evidence. All of this evidence is annexed to this Notification.
- 2.22 Some of the data submitted by npower in its representations and responses to statutory information requests was subsequently found by npower to be erroneous and as a result, necessitated the provision by npower of revised information. Our decision in this Notification is based on the final set of corrected data submitted by npower.¹⁷
- 2.23 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement (“the Programme”)¹⁸ to monitor compliance by companies using Automated Calling Services (“ACS”) with the principles set out in the Guidelines.¹⁹ The programme has continued since that time.
- 2.24 On 20 December 2010 (following the publication of the Guidelines on 1 October 2010), Ofcom published an open letter about the threat of enforcement action should our persistent misuse policy not be complied with, and the increased maximum penalty level for persistent misuse which came into effect on 25 September 2010.²⁰
- 2.25 As part of the Programme, Ofcom reviewed complaints data received by the Ofcom Consumer Contact Team (the “CCT”) to consider whether enforcement action was appropriate and if so, in respect of which companies. As part of this review of complaints, Ofcom noted an increase in complaints regarding silent and/or abandoned calls allegedly being generated by or on behalf of npower.
- 2.26 Consequently, on 25 January 2011 Ofcom wrote to npower to alert it to these complaints which were allegedly generated from the telephone number [redacted]²¹. Ofcom set out the purpose of the letter as follows:

“Ofcom is concerned about the level of complaints it has received in respect of abandoned calls allegedly being made by npower. My purpose in writing to you is to bring this concern to your attention and to impress upon you the importance of compliance with section 128 of the Act. You should be aware and take account of Ofcom’s revised guidelines [the Guidelines] and the potential consequences of failure to do so.”

¹⁷ For the purposes of clarity we endeavour not to refer to the inaccurate data on the basis that it is no longer relevant and we have not relied on it in our findings.

¹⁸ Own-initiative investigation: Monitoring and enforcement of principles to reduce harm caused to consumers by silent and abandoned calls, http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

²⁰ http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

²¹ Annex 5, Ofcom letter to npower, 25 January 2011.

Ofcom will continue to monitor complaints received about abandoned calls allegedly being made by npower. Ofcom may at any time make a formal request for information in order to consider whether formal enforcement action against npower would be appropriate.”

2.27 Ofcom also requested that npower set out in writing by 15 February 2011 its comments on what actions npower was taking to ensure it was operating in accordance with the Guidelines. npower responded on 15 February 2011²² (“the 15 February Response”).

2.28 npower stated the following:

- a) *“... testing with sufficient frequency to ensure that the false positives do not cause an excess of 3% of abandoned calls (when added to abandonment for other reasons), adds cost burden that exceeds the efficiency gain of the AMD [Answer Machine Detection]... Accordingly, we do not currently deploy AMD in our internal or outsourced telesales. We intend to review this policy as the technology of AMD and signals at the call recipient end (e.g. a uniform signal stating the existence of an AM [Answer Machine]) advance”;*
- b) *“Since we do not employ AMD, then we can be confident in our figures of calls made, calls picked up and calls abandoned. We monitor these each day, and adjust the dialler speed accordingly”;*
- c) *“Where we have the capability to suppress abandoned calls for a 72 hour period, we (for both internal or outsourced operations) operate a live operator guarantee for callers who have received an abandoned call within 72 hours”;*
- d) *“Where we do not have the capability to suppress the calls, we remove the number from the database.”;*
- e) *“For internal and outsourced telesales, we ensure that if a live operative does not pick up the call, then a brief information message is played within two seconds of pickup”;*
- f) *“We have Caller Line Identification [CLI] on all internal and outsourced lines”;*
- g) *“We have various calling strategies configured on the ‘AVAYA’ dialler system which are applied to different data sets. These are set up with varying spreads of seconds’ ring tone before determining a No Answer, ranging from 17 seconds to 35 seconds ... The ring time on any no answers is also recorded in the AVAYA database to each individual call. This enables us to track and prove compliance with the 15 second rule”;*
- h) *“We have no marketing scripts or business processes that can direct the caller to any marketing activity”;*
- i) *“We monitor abandoned call rates on a daily basis for each call centre and hold the records for at least six months”;* and
- j) *“We use external agencies as well as internal resources for outbound calling. It is a contractual requirement for these agencies to follow Ofcom regulations (and other relevant regulations). The contracts also stipulate specific reporting*

²² Annex 6, npower letter to Ofcom, 15 February 2011.

requirements that equal or exceed the Ofcom requirements. The contracts also cater for rights of audit and inspection, and for remedial action should performance not meet the requirements.”

2.29 In its 15 February Response, npower set out the following in relation to the telephone number [X]:

“This number is managed by an external agency [X] on our behalf.

We have contractual arrangements to ensure that they comply with Ofcom and other regulations, laws and directives. In addition to this we have a process of monitoring compliance.

We are reviewing our end-to-end process for dialler related complaints. The number has a CLI and a message that notes the number, and we are reviewing how these can be used in an integrated complaints management process.

[X] does not use AMD for any npower activities, and therefore we can assume that valid complaints relate principally to the dialler dropping calls when there is an insufficiency of live operatives, which we class as an abandoned call. We recognise the difference between a silent call (resulting from a false AMD positive) and an abandoned call (resulting from insufficient operatives to pick up from the dialler).

For each of the last six months the abandoned call rate is well below 3%²³. There are no false positives as AMD is not used.

The dialler is set not to return calls within 72 hours of an abandoned call. Since the AMD does not operate then we do not have the concern of false positives.

We have given some consideration (see below) on why this number appears to have attracted an apparently high number of complaints to Ofcom.

Since we provide CLI, call back capability to the CLI number, a recorded message, and then a service to enable callers to remove themselves from our database, it seems likely that we are picking up complaints from other companies who may be hard to identify from CLI, hard to contact back on the CLI number or have ineffective processes for handling the removal of call recipients from their databases.

The message length: We concur with Ofcom that the message should be brief. The principal purpose is to avoid fear and thence to avoid nuisance. It may be that some call recipients believe that the message is too brief (not enough detail about the purpose of the call), or too long (50 words and a number).

The call back process: We have investigated the efficiency of the process for the call recipient to call back and remove themselves from the database. We remain confident that this is working effectively, and are reviewing possible causes of complaint.

Population of the Telephone Preference Service (TPS): We screen all of our data against the TPS before they enter the dialler, and upload the TPS refresh

²³ Note the underlying data that npower based this statement on was subsequently discovered by npower to be erroneous.

every 28 days. It may be that people requesting addition to the TPS expect instant results and are therefore surprised to receive calls after their request.”

- 2.30 The CCT continued to receive complaints in respect of calls generated by or on behalf of npower. Accordingly, Ofcom determined that it was appropriate and proportionate to conduct an investigation into npower’s compliance with the persistent misuse provisions in the Act and the Guidelines.
- 2.31 The investigation of npower’s compliance with the Guidelines included²⁴:
- (a) analysis of complaint data in respect of the Relevant Period received by Ofcom’s CCT;
 - (b) issuance of an information request to npower under section 135 of the Act on 12 April 2011 (the First Information Request²⁵). This requested information in relation to npower’s processes and procedures in respect to its use of ACS and whether such processes and procedures adhere to Ofcom’s principles as set out in the Guidelines;
 - (c) analysis of npower’s response to the First Information Request on 10 May 2011 and analysis of the subsequent corrections by npower to the data contained in the response, on 8 August 2011 (the August 2011 data);
 - (d) issuance of an information request to npower under section 135 of the Act on 12 September 2011 (the Second Information Request). This requested information in relation to the August 2011 data and third party call centres used by npower;
 - (e) analysis of npower’s response to the Second Information Request on 23 September 2011 and analysis of the subsequent corrections by npower to the data contained in the response, on 28 October 2011 (the October 2011 data);
 - (f) issuance of an information request to npower under section 135 of the Act on 10 November 2011 (the Third Information Request). This requested information in relation to the October 2011 data and internal audits of npower’s third party call centres;
 - (g) analysis of npower’s response to the Third Information Request on 21 November 2011;
 - (h) issuance of an information request to npower under section 135 of the Act on 10 February 2012 (the Fourth Information Request). This requested information in relation to data previously provided and confirmation that a reasoned estimate of calls abandoned to answer machines had been excluded from the total for abandoned calls used in the abandoned call rate formula and
 - (i) analysis of npower’s response to the Fourth Information Request on 2 March 2011.

²⁴ Note (a) and (b) were prior to the date the section 128 notification was issued and (c) to (i) were after the section 128 notification was issued.

²⁵ Annex 1, section 128 notification.

- 2.32 On 6 July 2011, Ofcom issued the section 128 notification to npower²⁶. This notification set out:
- (a) Ofcom's determination pursuant to section 128(1) of the Act that there were reasonable grounds for believing that, during the Relevant Period, npower persistently misused an electronic communications network or service;
 - (b) the specific use made of an electronic communications network or electronic communications service by npower that Ofcom considered constituted persistent misuse; and
 - (c) the period during which npower had the opportunity to make representations about the matters notified.
- 2.33 npower had until 10 August 2011 to make representations about the matters notified and to take steps for securing that the misuse was brought to an end and not repeated and remedying the consequences of the notified misuse.
- 2.34 A copy of the section 128 notification, which sets out in full the matters referred to here, and an explanatory statement containing the reasons for Ofcom's actions and our determination, is at Annex 1 of this document.

npower's response to the First Information Request and its subsequent corrections to the data provided in the response (the August 2011 data)

- 2.35 On 12 April 2011, npower responded to Ofcom's First Information Request.
- 2.36 npower subsequently submitted that there were errors in the data contained within this response and made corrections on 8 August 2011 (the August 2011 data).
- 2.37 The August 2011 data and npower's reasons for providing this corrected data are set out in general terms below. However, on the basis that the data provided in response to the First Information Request is incorrect, we have not specifically referred to this erroneous data in order to maintain clarity about the data upon which we are relying.

The August 2011 Representations

- 2.38 On 10 August 2011, npower submitted its representations to Ofcom on the matters set out in the section 128 notification (the August 2011 Representations²⁷) together with revised data (the August 2011 data).
- 2.39 The August 2011 Representations set out:
- (a) the reasons for revisions of the data submitted in response to the First Information request;
 - (b) npower's submissions as to why it considered that its actions did not constitute persistent misuse;
 - (c) npower's representations regarding compliance measures; and

²⁶ Annex 1, section 128 notification.

²⁷ Annex 10, August 2011 Representations.

- (d) npower's submissions in respect to the imposition of a financial penalty.

(a) Revisions to the data previously submitted to Ofcom (the August 2011 data)

- 2.40 On the same day as npower provided the August 2011 Representations to Ofcom, it presented Ofcom with revised data in respect of its three third party call centres, [X].²⁸
- 2.41 The August 2011 Representations set out npower's reasons for the revision of data which had been previously provided to Ofcom on 10 May 2011 in response to the First Information Request and also set out how it took action to ensure the data was revised. In summary, npower made the following submissions:
- a) The data previously provided in respect of three third party call centres, [X] was incorrect.
- b) Following its reading of the Notification and re-reading of the Guidelines, npower stated that it appreciated that it "...should when calculating the abandoned call rate have calculated it per campaign or per call centre (i.e. across campaigns) over a 24 hour period." It therefore "included calls made using an Automated Calling System across campaigns from that call centre in a day." This led to revisions of the data.²⁹
- 2.42 Incorrect data had been provided in relation to all npower's third party call centres, however there were some additional errors in relation to the data supplied for [X] and [X] as specified below:
- a) [X] provided data which overlapped for an 8 day period with data previously provided and which "...clearly did not match". Following npower raising the issue with [X], [X] "had gone back to the dialler to take their data from source and had discovered that their original reports were incorrect due to including some other client's data and excluding some npower data sets".
- b) Data provided by [X] contained errors. npower noted that in a 29 July 2011 response to its email about discrepancies [X] confirmed that, "Our investigation has revealed that the query used to produce the original data extract contained formulae errors causing some relevant data to be excluded and some additional data to be included in error. This is due to human error on behalf of the [X] IT employee. This employee is no longer engaged on this activity".
- c) npower decided that there was a need to revise the data provided in respect of [X] and it sent representatives to assist in the process [3 August 2011]. npower explained that, "The final and correct data was therefore compiled by [X] with npower present to validate that the data was correctly extracted, that the querying methods used were correct and that the supporting data supported the final data".
- d) npower decided that there was a need to revise the data provided in respect of [X] and advised [X] of this. By email on 29 July, [X] confirmed to npower that "...all the information that has been provided has been provided correctly and accurately during the last week..." and advised npower that "...they are

²⁹ Paragraph 2.2, the August 2011 Representations.

dealing with the reasons for the inaccuracy in the initial data ‘with the utmost seriousness internally and under no circumstances should this happen again’.”

(b) npower’s submissions as to why it considers its actions did not constitute persistent misuse

- 2.43 The August 2011 Representations set out npower’s reasoning as to why it considered that it had not engaged in persistent misuse. The below are general arguments made by npower which were not based on the incorrect data.
- 2.44 As the data upon which npower based its arguments challenging Ofcom’s methodology was subsequently found to be inaccurate, Ofcom has not referred to this data here. However, we do set out npower’s arguments on the methodology itself as contained in the August 2011 Representations.
- 2.45 npower made the following submissions on the methodology applied to establish the existence of persistent misuse (per campaign or per call centre). npower stated that *“...in contrast to the approach in paragraph 2.34(i) of Ofcom’s Explanatory Statement, that in accordance with paragraph A1.30 the abandoned call rate should be analysed on two bases:*
- a) *On a campaign basis; and*
 - b) *By call centre, encompassing all outbound calls made within a 24 hour period by that call centre.”*³⁰
- 2.46 npower argued that by applying the above interpretation of A1.30 of the Guidelines to its data (which npower subsequently found to be erroneous):
- a) *“...in each of the five campaigns the number of occasions in which 3% was exceeded did not exceed the minimum level of three suggested by Ofcom. On a campaign basis therefore there are no grounds for reaching a finding of persistent misuse. One instance across all campaigns cannot be repetitive misuse or a cycle of repetitive behaviour”.*³¹
 - b) *“...in none of the four call centres did the number of occasions in which 3% was exceeded exceed the minimum level of three suggested by Ofcom. A maximum of two occasions cannot be a cycle of repetitive behaviour. On a call centre basis therefore, there are no grounds for reaching a finding of persistent misuse”.*³²
 - c) *“...in a number of instances the 3% threshold was exceeded on a Saturday when the number of calls are much lower”.*³³
 - d) *“It is not appropriate to add together the number of 24 hour periods in which 3% was exceeded because that is not the approach suggested by the Persistent Misuse Guidelines [the Guidelines]. Paragraph A1.30 requires the abandoned*

³⁰ Paragraph 2.7, August 2011 Representations.

³¹ Paragraph 2.10, August 2011 Representations.

³² Paragraph 2.12, August 2011 Representations.

³³ Paragraph 2.14, August 2011 Representations.

call rate to be calculated per campaign or per call centre. It is clear that these are individual and separate tests."³⁴

- e) npower noted that the Guidelines "...do not refer to any aggregated basis. We were concerned however to refer to it as Ofcom have used such a basis in the Notification."³⁵

2.47 npower made the following representations on whether the application of these approaches demonstrate persistent misuse:

- a) *"Whilst we believe that there can be no basis on which a finding of persistent misuse can be reached as the number of 24 hour periods where the threshold has been reached amount to two or less on a campaign and on a call centre basis, we have also identified and set out above other methods of measuring performance which we believe confirm this conclusion."*
- b) *"there is no indication in paragraph A1.10 of the Persistent Misuse Guidelines of the period of time or quantity of 24 hour periods over which three instances may occur ... this does create some uncertainty where the Act requires (in section 128(6)) that it must be **clear** [npower emphasis] that a pattern of behaviour or practice exists."*
- c) *"...there is evidence of a pattern of compliant behaviour and practice which should therefore be taken into account to arrive at a finding that there has not been persistent misuse. In our view from the evidence presented by Ofcom along with the Notification as amended by the August Data there is not a pattern of behaviour or practice indicating persistent misuse. Indeed it is more appropriate to draw an interpretation that if there is any pattern of behaviour or practice it is a pattern of persistent compliance rather than persistent misuse."*

2.48 npower made the following submissions on marketing content contained within its abandoned call message:

- a) npower asserted that the recorded message played by the npower call centre which contained the wording, "*We were calling to discuss potential savings on your energy bills*", should be set within the context of the full message which was as follows (it has since changed): "*You were called today by npower gas and electricity supplier. Unfortunately, at the time you were called we were unable to make contact with you. We were calling to discuss potential savings on your energy bills. If you do not wish us to contact you in this way in future, please call [~~X~~] and we will remove your details from our telemarketing list. Thank you.*"³⁶
- b) It was npower's view that "...such a message was provided for information purposes in order to assist customers in understanding the nature of the call for reasons of openness and transparency and to enable them to opt out if desired. We do not believe that this is evidence of a pattern of behaviour or practice indicating persistent misuse."³⁷
- c) npower further did not consider that, even if it was alleged that such a message included marketing content, that its playing in one call centre for the duration of

³⁴ Paragraph 2.15, August 2011 Representations.

³⁵ Paragraph 2.16, August 2011 Representations.

³⁶ Paragraph 2.30, August 2011 Representations.

³⁷ Paragraph 2.31, August Representations.

the Relevant Period could amount to persistent misuse and that “...one action cannot by definition amount to a pattern of behaviour or practice.”³⁸

(c) npower’s representations regarding compliance measures

- 2.49 The August 2011 Representations set out compliance measures in place to reduce the level of calls of a persistent misuse nature. In summary, these included the following measures and comments:
- a) npower did not use answer machine detection equipment (“AMD”) at its internal and outsourced call centres.
 - b) npower observed that the CCT complaints referred to in the Notification mentioned “*silence on the line*” and thought this was of concern given that “*npower does not use AMD*”. However, npower acknowledged that there may be some scenarios in which a customer may believe they have received a silent call, such as: when the agent has their headset on mute in error; or the agent disconnects their telephone or there is a system crash at the same time the call is being connected to them. “*So, whilst we have taken the specific decision not to use AMD, there may be rare instances in which a customer may experience a silent call from us. We do not believe that such rare occurrences in exceptional circumstances are evidence of a pattern of behaviour or practice which indicates persistent misuse.*”³⁹
 - c) npower would investigate matters further if Ofcom were able to provide it with any data on when such silent calls were made.
 - d) npower issued a reminder to all of its agents and to the managers of its third party call centres that there must not be any silent calls.
 - e) A recorded information message is played within two seconds after the telephone has been being picked up where a live operator does not pick up the call. The information message “*contains the identity of the company on whose behalf the call was made along with telephone numbers that can be called to opt out of further marketing calls*”;⁴⁰
 - f) All npower call centres leave calls to ring for a minimum period of 15 seconds before being terminated with the actual ring between 15 and 20 seconds for a first call, depending on the call centre;
 - g) Full compliance with the 72 hour policy in the event of an abandoned call;
 - h) Full compliance with the requirement to provide a CLI for return calls;
 - i) Full compliance with the requirement to ensure records are kept for at least six months; and
- 2.50 npower also noted that “...in appointing its outsourced service providers, npower has undertaken rigorous selection processes aimed at appointing reputable service providers. In addition npower included terms in its contracts that its outsourced

³⁸ Paragraph 2.32, August 2011 Representations.

³⁹ Paragraph 2.38, August 2011 Representations.

⁴⁰ Paragraph 2.41, August 2011 Representations.

*service providers must comply with amongst other things the Communications Act 2003.*⁴¹

(d) npower representations on penalty factors

- 2.51 The August 2011 Representations also contained submissions by npower in regard to the imposition of a financial penalty and the amount of such penalty, should Ofcom be minded to impose one on npower. These submissions referred to the penalty factors in the Penalty Guidelines. Again, as the data upon which npower based its arguments was subsequently found to be inaccurate, references to the actual incorrect data (i.e. numerical figures) is not made below. We do however set out npower's representations on the penalty factors where specific reference is not made to inaccurate data. The data was subsequently replaced by data provided in response to additional statutory information requests.

Deterrent effect

- 2.52 In its determination of a penalty having deterrent effect, npower argued that Ofcom should take into account the fact that npower had already endured the consequences of the adverse publicity received because of the Notification under section 128. npower noted that, *"This has caused a significant reputational issue for npower with widespread coverage occurring across all major national and regional print media along with internet news services and news wires ... This coverage is in itself a significant incentive on other operating in telemarketing to ensure compliance."*⁴² npower further stated that *"... it is our view that npower's conduct, in the round, points to a contravention very much at the lower end of seriousness. However we would stress absolutely that we do not believe that there is any basis on which a finding of persistent misuse can be reached against npower. The matters alleged were simply not repeated on a sufficient number of occasions to fall within s128 (6) of the Act."*⁴³

Degree of harm

- 2.53 In terms of the degree of harm suffered by call recipients during the Relevant Period, it is npower's view that the harm is at a low level:⁴⁴
- a) *"...given npower's decision not to use AMD", which, "therefore avoids the harm that can be caused by silent calls which result from its use";*
 - b) *"...several of the days on which the 3% abandonment rate was exceeded were a Saturday and on these days the number of abandoned calls was considerably lower...In other words, although the percentage abandoned is higher than 3%, the numbers of calls made on those days were considerably less than those made on the previous day or on a weekly average..."; and*
 - c) *"...the 'marketing' message was only played on 5,306⁴⁵ recorded messages played on abandoned calls during the relevant period. This represents only 10.14% of all abandoned call recorded messages (based on the August Data) and is therefore again at the very low end of seriousness of contravention of the persistent misuse provisions of the Act."*

⁴¹ Paragraph 2.54, August 2011 Representations.

⁴² Paragraph 3.1, August 2011 Representations.

⁴³ Paragraph 3.2, August 2011 Representations.

⁴⁴ Paragraphs 3.3 to 3.6, August 2011 Representations.

⁴⁵ This figure is 1906 if reasoned estimates of calls to answering machines are deducted from this calculation.

The duration of any contravention

- 2.54 In respect of the duration of the alleged contravention, npower noted that this was taken into account by Ofcom in previous penalty cases. npower also noted that the Ofcom had not previously looked at a Relevant Period of this duration. It believed that, *"...this is relevant and demonstrates the uncertainty that arises under paragraph A1.10 of the Persistent Misuse Guidelines... In this case, on an aggregated basis, over 49 days, there were no 24 hour periods on which the abandoned call rate exceeded 3%; on the campaign basis there was one 24 hour period on which the abandoned call rate exceeded 3%; and on the call centre basis there were two 24 hour periods by npower, two by [redacted], two by [redacted] and one by [redacted] on which the abandoned call rate exceeded 3%. We believe this is evidence of a pattern of compliant behaviour and practice and should therefore lead to a finding that there has not been persistent misuse and, if this is not accepted, to reduce the level of any fine imposed."*⁴⁶

Gains made as a result of the contravention

- 2.55 npower asserted it did not make any gain as a result of any contravention on the basis that:
- a) *"The wording used in the recorded message by the npower call centre in the relevant period would have no commercial benefit to npower. The only phone number given was one to cancel contacts. npower had absolutely no intention or thought that the message referring to potential savings would be of any commercial benefit; we simply thought it best assisted our customers to understand the nature of the call."* and
 - b) *"In any event Ofcom has provided no evidence of any gain."*⁴⁷

Steps taken to remedy the consequences of any contravention

- 2.56 npower acknowledged that to remedy the consequences of misuse, should any exist, compensation might be appropriate. On the issue of remedy in respect of persistent misuse its submissions included the following comments:⁴⁸
- a) *"It is very difficult to identify all those recipients of abandoned calls in order to effect such an approach."*
 - b) *"...we do give such persons the opportunity to seek a remedy. Our recorded messages identify npower as the caller along with a telephone number to call. Any person affected by an abandoned call is therefore able to raise a complaint at this time or to contact npower via our customer services number which is available via directory enquiries or our website, or to raise a specific complaint via our other contact points also mentioned on our website. This includes emailing details of a complaint for which a specific form is provided. As part of this we make a commitment to do our best to put things right."*
 - c) *"We have procedures in place to address complaints together with a policy of awarding compensation in appropriate circumstances. We would, consistent*

⁴⁶ Paragraph 3.9, August 2011 Representations.

⁴⁷ Paragraph 3.10, August 2011 Representations.

⁴⁸ Paragraphs 3.11 to 3.14, August 2011 Representations.

with this policy, naturally consider compensation for persons receiving abandoned calls.”

- d) npower requested details of complainants from Ofcom so that it could *“take remedial action”*. In npower’s view, this demonstrated its *“willingness to take appropriate action to remedy the consequences of any contravention”*.⁴⁹

History of contraventions

2.57 npower stated *“we have no history of contraventions under the Act”*.⁵⁰

Appropriate steps had been taken to prevent any contravention

2.58 npower submitted that prior to the *“enquiry from Ofcom in January 2011, npower already had steps in place to meet Ofcom requirements and to an extent, to exceed them”*, including:⁵¹

- a) Abandonment rate records are, *“held for a minimum of 12 rolling months to an individual phone number level”*.
- b) *“Answer machine Detection (‘AMD’) is not deployed, in order to prevent the potential for silent calls caused by false positives”*.
- c) *“In the event of an abandoned call, call recipients are suppressed permanently by our internal call centre, not just for 72 hours. Outsourced service providers comply with the 72 hour rule”*.
- d) *“...outsourced service providers are obliged contractually to comply with all Ofcom requirements, and report relevant rates historically in their daily acquisitions report”*.
- e) *“Small outbound campaigns with segmented datasets were merged into larger single campaigns on outbound calling to ensure fewer short campaigns are run and allow the dialler to acquire a better understanding of contact rates and run at lower abandonment rates.”*
- f) *“a standard process which takes into account Telephone Preference Service (TPS)⁵² registration as updated periodically.”*

⁴⁹ As of the date of the Provisional Notification, no details of complaints had been released to npower. Following the Provisional Notification, complaints details (only non-confidential details) were provided to npower. In a letter dated 16 November 2012 npower said it had reviewed the information *“to determine what, if any additional steps may be appropriate”*. It confirmed it had requested outsourced call centres to ensure they use new CLIs when working for a different supplier and that it had restated to call centres acting for or on its behalf, to respond promptly and courteously when customers answer their call; and issued a reminder about the importance of minimising and monitoring abandoned calls. This letter is at Annex 28.

⁵⁰ Paragraph 3.15, August 2011 Representations.

⁵¹ Paragraph 3.16, August 2011 Representations.

⁵² The Telephone Preference Service (TPS) is a central opt out register whereby individuals can register their wish not to receive unsolicited sales and marketing telephone calls. It is a legal requirement that companies do not make such calls to numbers registered on the TPS. <http://www.mpsonline.org.uk/tps/whatistps.html>

Whether the (alleged) contravention continued, or timely and effective steps were taken to end it, once npower became aware of it

- 2.59 npower argued that following Ofcom's First Information Request dated 12 April 2011 that it took the following steps to improve controls:⁵³
- a) *"Added ability to 'preview dial' records in the event of an abandoned call to guarantee the presence of a live agent as an additional option to permanent suppression or 72 hours suppression.*
 - b) *"Ending the practice of breaks and lunches being team based, and instead spreading them evenly amongst agents within the shift rules configured in our Work Force Management software to ensure there are fewer large swings in the size of the agent pool. This has been in place since 1st July 2011."*
 - c) *"Reduction in the amount of time spent by agents logged out performing administration tasks and customer call-backs. This will ensure that the number of agents logged in is much closer to what is planned and scheduled in our software and reduce the number of occasions where the agent pool increases and decreases. It will also aid the dialler in placing the correct number of calls and therefore reduce abandoned calls. This has been in place since June 2011."*
 - d) *"Implementation of 90% adherence for agent availability targets to software configured schedules with a stepped increase of 1% per month through to an end target of 95% by November, with a clear, defined management process for agents who do not achieve this. By ensuring agents are following the schedules created correctly this will reduce the risk of large swings in the number of agents available and reduce spikes in abandonment. This was commenced in June 2011. We have defined a clear management process for managing agents' adherence to staffing schedules to promote better adherence levels and reduce swings in resource availability throughout the day."*
 - e) *"Increase in the minimum number of agents from 10 to 15 for which we would plan a predictive dialling mode campaign to operate. For any periods where the planned staff level falls below this, the dialler will be turned to Preview dial generating the calls from the agent rather than the dialler to guarantee the presence of an agent and guarantee no abandonment (in any event this should be prevented with the shift alignments referred to in the second action above). This has been in place since 1st July 2011."*
- 2.60 npower outlined the steps it took in following Ofcom's section 128 notification on 6 July 2011. It considered that these steps had been effective and that abandoned call data for the period 29 July 2011 to 5 August 2011 demonstrated this.⁵⁴ Ofcom has summarised the measures as follows:⁵⁵
- a) it removed the line *'to discuss potential savings on your energy bills'* from its abandonment message for avoidance of any doubt. The recorded message was changed to: *"You were called today by npower. Unfortunately, at the time you were called we were unable to make contact with you. If you do not wish us*

⁵³ August 2011 Representations, paragraph 3.18 to 3.19.

⁵⁴ August 2011 Representations, annex 7, sets out the abandoned call data in respect of 29 July 2011 to 5 August 2011.

⁵⁵ August 2011 Representations, paragraph 3.20.

to contact you in this way in future, please call [redacted] and we will remove your details from our telemarketing list. Thank you." This has been in place since 8 July 2011.

- b) Agent's breaks / lunches to be staggered further.
- c) Alignment of shift patterns so that agents work the same shifts to avoid rotational coverage and the potential for operating with fewer staff at certain times of the working day. This has been in place since 18 July 2011.
- d) Additional dialler analyst being recruited for npower's in-house operation to ensure that the dialler is monitored at all hours of the day and eliminate periods when the dialler could be unmanned for short periods.
- e) A real time analyst for its in-house operation to make and record observations of abandonment rates, agent behaviours, pacing settings throughout operational hours to evidence monitoring of abandonment and in the event of being outside of 3% within a day clear evidence of this being monitored, spotted and actions taken to resolve which should reconcile against the intraday view of abandonment to give a clear view of what happens throughout the shift. Logs will be entered when changes are made to pacing of a campaign. This will then form an audit trail report which will be published daily along with visibility of the abandonment rate each day via a Sharepoint site to improve visibility. Interim measures have been in place since 7 July 2011 with permanent measures in place by 1 August 2011.
- f) Introduction of a process in outsourced telemarketing to provide a daily feed within the day of abandonment rates as per the template used for npower's response to Ofcom's information request. If the abandonment rate exceeds 3% during the day outsource providers will provide an intraday view of their abandonment evidencing what actions are being taken to resolve any potential breaches. This has been in place since 15 July 2011.

2.61 In summary, the additional measures npower maintained it had put in place since the section 128 notification issued on 6 July 2011 were as follows:⁵⁶

- a) an internal audit of processes to inform compliance internally and at outsourced service providers. The audit will cover call activity recording; the accuracy of the reporting of the activity; induction and refresher training; quality assurance, compliance and monitoring procedures (including npower's monitoring and review of the performance of outsourced providers);
- b) individual audits at [redacted] and npower's internal telesales operations (to be completed by 31 October 2011);
- c) implementation of a new policy and process document with npower's outsource telesales service providers entitled "*OFCOM Compliance Monitoring and Escalation – Persistent Misuse of an Electronic Communications Network*" setting out compliance requirements in more detail, along with reporting and escalation processes;
- d) changed management processes in relation to abandonment rate issues internally and at npower's outsourced service providers, managed in one

⁵⁶ Paragraph 3.20, August 2011 Representations.

overall report covering compliance for all call centres and a clear escalation process defined in the event of a breach;

- e) a specifically defined abandoned call complaints process building on npower's existing complaints processes; and
- f) an update of npower's "*Requests for Information*" queries submitted to potential outsource telesales service providers dealing specifically with the persistent misuse provisions of the Act and the Guidelines.

Extent of intentional or reckless contravention including senior management knowledge that contraventions were occurring or would occur

- 2.62 npower stated that it was not the case that, if any contravention occurred, it was intentional.
- 2.63 In relation to recklessness, npower submitted that, "*Recklessness requires a greater degree of culpability than negligence. It is indicated by awareness of the fact that acts or omissions may lead to contraventions but continuing with them regardless of the consequences. Again, it is absolutely not the case that we are responsible for any reckless contravention for reasons similar to those set out in the preceding paragraph.*"⁵⁷
- 2.64 On the issue of the state of knowledge of npower's senior management and responsibility for managing activities, it stated:⁵⁸
- a) "*In relation to senior management knowledge, there is no evidence that npower's senior management was aware that npower was, as alleged, in contravention during the relevant period or ought to have been aware.*"
 - b) "*We do not believe that it is correct that senior management ought to have been aware of any contravention that might have taken place in this case, notwithstanding our view that none exists.*"
 - c) "*As with previous enforcement decisions taken by Ofcom, we believe Ofcom should reach a similar conclusion that npower's senior management's general duty was to oversee the management and operation of the business and that that did not necessarily extend to a position where it ought to have been aware of the number of abandoned calls being made on a daily basis, or of non-compliance with the requirements regarding the content of recorded messages.*"
 - d) "*...internal call centre management and outsourced call centre relationship management had taken responsibility for managing all activities relating to npower's ACS and as npower has not been the subject of any previous contravention, there was no reason for senior management to believe that non-compliance was an issue in this area.*"
 - e) following a management review, [§<] no longer makes telesales calls for npower (with effect from 30 June 2011). npower also intends to terminate the contract for domestic activity with [§<].⁵⁹

⁵⁷ Paragraph 3.22, August 2011 Representations.

⁵⁸ Paragraphs 3.23 to 3.25, August 2011 Representations.

⁵⁹ No date has been provided for this purported termination.

Relevant precedents set by previous cases

- 2.65 npower referred to previous pre-2011 persistent misuse cases, which according to npower, “... demonstrate clearly that the level of seriousness of the alleged contravention by npower is considerably lower than certain previous cases and should therefore be taken into account in any decision that Ofcom may take to impose a penalty.”⁶⁰
- 2.66 It should be emphasised again that the underlying data in relation to npower’s own case and upon which it based its arguments and comparisons in respect of the pre-2011 precedents, was subsequently found to be inaccurate. Therefore references to actual numerical data in the table below in respect of the npower entry are incorrect and have been treated as such in our findings.
- 2.67 npower provided a comparison table (copied below) and stated that: “In relation to abandoned call rates, npower’s proportion of all 24 hour periods measured in which 3% was exceeded is by far the lowest, being considerably lower than Complete Credit Management’s (“CCM” - who were fined £5,000). While we acknowledge that the number of npower’s abandoned calls exceeded those of CCM’s, we repeat the comments made earlier (paragraph 3.5[of the August 2011 Representations]) regarding the quantity of abandoned calls that should be taken into account. In addition, npower’s very low proportion of 24 hour periods exceeding 3% should significantly influence the level of any penalty.
- a) *In all cases (apart from CCM) the number and/or proportion of 24 hour periods exceeding 3%, along with the extent of contraventions is very significantly greater than for npower.*
 - b) *The number and/or seriousness of contraventions in three cases (Carphone Warehouse, Toucan and Barclaycard) is greater than for npower, and in two of those cases (Carphone Warehouse and Barclaycard) significantly so with five contraventions in each case.*
 - c) *There is no previous precedent for marketing content in recorded messages, but it is our view that this alleged contravention and the resultant degree of harm is significantly less serious than including no recorded message at all. In addition, we repeat our comments made in paragraph 3.7 about the degree of harm caused.”⁶¹*

Company	Contravention(s)	Extent of contravention	Penalty
Bracken Bay Kitchens	1. Abandoned call rate 2. Information message	1. 118 24 hour periods where 3% exceeded 2. No message on 100% of calls centres/campaigns	£36,000
Carphone Warehouse	1. Abandoned call rate 2. Information message 3. Abandoned call ringing < 15 secs 4. No CLI 5. 72 hour policy	1. 124 24 hour periods where 3% exceeded 2. No message on 84% of calls centres/campaigns 3. 6% of calls 4. 6% of calls 5. breached in 14% of cases	£35,000
Space	1. Abandoned call	1. 180 (call centre) and	£45,000

⁶⁰ Paragraph 3.26, August 2011 Representations.

⁶¹ Paragraph 3.28, August 2011 Representations.

Kitchens and Bedrooms	rate 2. Information message	94 (campaign) 2. No message on 100% of calls centres/campaigns	
Toucan	1. Abandoned call rate 2. Abandoned call ringing < 15 secs	1. 353 (call centre) and 57 (campaign) 2. 19% of calls (call centre)	£32,500
Complete Credit Management	Abandoned call rate	Across 120 24 hour periods, 29 periods exceeded 3%. This equates to 24.1% .	£5,000
Abbey National	Abandoned call rate	Across 187 24 hour periods, 138 periods exceeded 3%. This equates to 73.7% .	£30,000
Barclaycard	1. Abandoned call rate 2. Information message 3. No CLI 4. 72 hour policy 5. Record keeping	1. 221 24 hour periods where 3% exceeded (= 100% of relevant period) 2. No message on over 91% of calls 3. Approx 80% of calls 4. No procedures in 3 call centres 5. No records in 2 call centres	£50,000 (max)
Equidebt	1. Abandoned call rate 2. Information message	1. Across 150 24 hour periods, 105 periods exceeded 3%. This equates to 70% . 2. No message on " significant proportion " of calls	£36,000
Ultimate Credit Services	Abandoned call rate	Across 160 24 hour periods, 155 periods exceeded 3%. This equates to 96% .	£45,000
npower	1. Abandoned call rate 2. Information message	1. Based on original data, across 193 24 hour periods, 14 periods exceeded 3%. This equates to 7.33% . Based on the August Data, on an aggregated basis, across 42 days, 0 periods exceeded 3%; on the campaign basis across 191 24 hour periods, 1 period exceeded 3%. This equates to 0.52% ; on the call centre basis across 162 24 hour periods, 2, 2, 2, and 1 periods exceeded 3%. This equates to 4.32% . 2. "Marketing" message on 9.86% of abandoned calls (August Data)	

Source: the August 2011 Representations

Co-operation with Ofcom's investigation

2.68 npower submitted that it has given full co-operation to Ofcom throughout Ofcom's enquiries and investigation.

Additional comments

2.69 In respect of complaints made to the CCT at Ofcom, npower repeated its request for details of the complaints and stated, "*we are concerned that there does not appear to*

be evidence that these complaints relate to npower – Ofcom’s comments are that the specific complaints ‘are believed to relate to calls made on behalf of npower’. There appears to be uncertainty.”

Ofcom’s Second Information Request

2.70 Following consideration of the August 2011 Representations, Ofcom determined that further information was required, and issued the Second Information Request to npower on 12 September 2011⁶². Ofcom sought information and/or confirmation regarding the following:

- a) the reasons for the provision of incorrect information in response to the First Information Request;
- b) the nature and content of the communication error which led to the mistaken belief that diallers were not being used in some operations;
- c) the probable causes for increased failure to comply on Saturdays, to include information on the allocation of managerial responsibility, size of the agent pool and work practices on those days as distinct from other days of the week;
- d) details of all call centres making calls to UK consumers acting on behalf or within the control of npower during the Relevant Period;
- e) details of each campaign conducted by each call centre during the Relevant Period;
- f) for third party call centres: the due diligence and selection processes; the steps npower took to satisfy itself of the adequacy of call centres’ compliance arrangements; and the requirements for call centres to provide compliance data to npower;
- g) the call data during the Relevant Period for individual call centres by campaign and at various levels of aggregation, including evidence to substantiate a reasoned estimate of false positives where AMD was used;
- h) confirmation of a recorded information message being played in the event of an abandoned call, provision of the text used, and confirmation that an appropriate CLI was provided⁶³;
- i) the length of time that the ACS was programmed to ring before the call was terminated as unanswered;
- j) procedures in place to ensure compliance with the ‘72 hour rule’;
- k) procedures in place to ensure compliance with the ‘24 hour rule’ where AMD technology is used, including data on all calls made using AMD technology between midnight and midnight on a calendar day;
- l) arrangements put in place by npower to ensure compliance in relation to outbound calling activity and details of consumer complaints handling;

⁶² Annex 11, the Second Information Request issued to npower on 12 September 2011.

⁶³ Special Services (080 – no charge) or a Special Services basic rate (0845 only) or a Geographic Number (01/02) or a UK wide number at a geographic rate (03).

- m) how npower was endeavouring to ensure that any abandoned or silent calls were minimised;
- n) whether npower's statement that the use of AMD technology (section 2.35, the August 2011 Representations) included call centres operating on behalf of or within the control of npower, and whether npower would use AMD technology in the future;
- o) npower's standard process to take account of TPS registration;
- p) topics covered by induction and refresher training and the experience levels of those providing such induction and/or training; and
- q) that [redacted] and [redacted] were no longer acting on behalf of npower.

npower's response to the Second Information Request and its subsequent corrections to the data provided in the response (the October 2011 data)

- 2.71 On 23 September 2011, npower responded to the Second Information Request.⁶⁴ However, it should be noted that npower subsequently submitted that there were errors in the data contained within its response to the Second Information Request and made corrections on 28 October 2011 (the October 2011 data). However, on the basis that the data provided in response to the Second Information Request is incorrect, we have not specifically referred to this erroneous data below in order to maintain clarity about the data upon which we are relying.
- 2.72 npower provided its reasons for the provision of incorrect data in response to the First Information Request which included the following (at this point it had not informed us that there were also errors in this Second Information Request response):
- a) *"...our original response was drafted under a misunderstanding that the data requested referred only to telesales outbound calling activity relating to its energy supply. This arose because of Ofcom's use of the term 'campaign'. This carries a specific meaning within npower which relates to specific product or offer related outbound campaigns with the aim of recruiting new customers."*
 - b) *"Our errors were compounded by our reliance (mistakenly in retrospect) on the accuracy and completeness of data provided by outsource partners."*
 - c) *"The errors in [redacted] provision of data were caused by communication issues between their operations and IT teams, and poor processes in extracting the raw data files used to complete reports by their operational management information team. As a result of these errors, some datasets that should have been included were not, and the abandoned call data of [redacted] clients other than npower were included on certain days... [redacted] took the data from daily operational reports for the period in question instead of going back to the raw data source."* According to npower, [redacted] explanation for mistakes in its data was that there were *"query and formulae errors caused by human error in producing the original reports which meant inclusion and exclusion of some data and outcome codes in error."*

⁶⁴ Annex 12, npower's response to the Second Information Request.

- d) *“Whilst not attempting to excuse any oversight on our part in the preparation of our original response, for which we apologise, the resource we used to coordinate the response to Ofcom’s original section 135 Notice [the First Information Request] were also at the same time very heavily involved in collating information for our sector regulator Ofgem in response to information requests raised related to our sales processes generally.”*
- 2.73 Although npower provided a table in its response to the Second Information Request which set out the incorrect data submitted in response to the First Information Request and setting out the revised data (the August 2011 data) this data was also subsequently found to be incorrect. We therefore do not refer to either the table or to either sets of incorrect data.
- 2.74 npower confirmed that *“We have now received written reassurance from a Director of each of npower’s outsourced service providers that the August data is accurate and complete”*.
- 2.75 npower told Ofcom that the communication error which led to npower’s mistaken belief that diallers were not being used in some operations was *“an incorrect interpretation on the part of our outsourced service providers of the full nature and extent of the information required [in response to the First Information Request], compounded by our own expectations of the ‘campaigns’ we expected to see data for...”*
- 2.76 npower provided the following explanations for its performance based on the incorrect data in its response to the Second Information Request. We consider that that these explanations are still relevant and therefore have been retained in this summary of npower’s response. npower stated that probable causes for increased failure to comply on Saturdays were as follows:
- a) On Saturday, 21 March 2011, at [X] call centre there were [X] agents making outbound calls, and the dialler was managed by a team manager instead of a dialler analyst/manager. *“Although the Team Manager had been trained in how to use the dialler, they were unable to demonstrate the level of proficiency required ...”*
- b) On Saturday, 19 March 2011, at [X] call centre there were [X] agents on the outbound domestic telesales campaign with a team manager acting as cover for the dialler manager and responsible for setting pacing and managing the lines. Because the team manager had other managerial/supervisory responsibilities that day, *“they were unable to monitor the dialler traffic to full effect.”*
- c) On Saturday, 5 February and 12 February, at the [X] call centre there were between [X] agents scheduled to work and, *“the dialler was run without a dedicated dialler manager being present. However, [X] sales managers were responsible for dialler management.”* npower also added that *“on week days, the dialler is managed by a dedicated team of individuals who monitor the abandoned call rate in real time and run the dialler as efficiently as possible without causing excessive abandonment rates.”*⁶⁵
- 2.77 npower stated that all its call centres would now operate subject to the requirements of the new policy and process document entitled *“Ofcom Compliance Monitoring and*

⁶⁵ Response to Question 3, the Second Information Request.

Escalation – Persistent Misuse of an Electronic Communications Network". It said that this policy had been in place since 14 July 2011 and included the following measures:⁶⁶

- a) the requirement that calls centres "*must ensure that any dialler running predictive modes are never set at a pacing method which would cause an excessive abandonment rate (current Ofcom guidance is 3%) and where technology allows a requested abandonment rate, this setting should never exceed 2.5%*";
- b) intraday reporting and escalation processes in the event that call centres believed that the 3% threshold may be exceeded; and
- c) the process for each call centre to provide intraday abandonment reporting covering the previous day which "*is fed into the npower dialler management team who centrally monitor the abandoned call rates for each centre and collate the results into a central compliance report covering all call centres. This report is published daily to the Domestic Telesales Manager and Head of Compliance.*"

2.78 npower provided details of due diligence and selection processes it used in order to select call centres to make calls for or on its behalf. This due diligence and selection process included:

- a) short-listing potential suppliers, based on number of seats and capability to sell energy to business customers;
- b) site visits to audit processes and procedures against evaluation criteria;
- c) examination of processes and procedures
- d) evaluation and scoring; and
- e) a short-term pilot.

2.79 npower also set out the reasons in order of importance for selecting each call centre. These are at Annex 12.

2.80 npower told us that the measures it took to satisfy itself that compliance arrangements at the call centres were adequate included sites visits where the quality of systems, dialler management, reporting, management information, training and complaints handling were examined. Service providers were asked for evidence of previous experience of working with other utility companies or financially regulated companies to demonstrate processes to deliver compliance and adhere to regulation.

2.81 npower confirmed that all of its call centres played a message within 2 seconds of abandoning a call informing the called party that they were called by or on behalf of npower. It further confirmed that details of a Special Services (080 no charge), Special Services basic rate (0845 only) or Geographic Number (01/02) or a UK Wide number at a geographic rate (03) number was provided in the message. npower provided transcripts of the recorded messages (these are contained at Annex 12).

⁶⁶ Response to Question 14, the Second Information Request.

- 2.82 npower provided details of the messages played at its third party call centres. It noted that during the Relevant Period the following message was played by [redacted]:

“Hello. You were called on behalf of npower Home team to discuss our latest offers. Please accept our apologies for inconveniencing you, but our system has failed to connect you to one of our advisers. We hope this call has not caused you any anxiety. If you prefer not to receive any future calls on our behalf, please call us on [redacted]. Thank you

This message was replaced by the following message on 12 September:

“This is a recorded announcement on behalf of npower Hometeam. Unfortunately we were unable to connect this call and apologise for any inconvenience caused. Should you wish to prevent future marketing calls to this number, please call [redacted] and follow instructions given. Your details will then be removed accordingly. Thank you”⁶⁷

- 2.83 npower stated that ACS was programmed to ring between 15 and 20 seconds depending on which call centre was making the call.⁶⁸
- 2.84 npower set out the policy at each call centre for ensuring that it adhered to the 72 hour policy in the event of an abandoned call. It said that npower’s in-house call centre suppressed a dialled number within the data file so that it could not be recalled and also, as a failsafe, configured the recall rule to 72 hours. It also maintained that its in-house call centre configured a ‘preview dial’ campaign in the event that it chose to call customers back who had received an abandoned call, therefore guaranteeing the presence of a live operator. It further submitted that in its third party call centres, pre 14 July 2011, abandoned calls had a 72 hour suppression; post 14 July 2011, calls classified as abandoned were suppressed permanently within a data file, by not including the number in the record selection, over and above the 72 hour rule, although consumers might be contacted via a preview campaign.
- 2.85 npower provided details of the calling line identification (“CLI”) number to which a return call could be made. These are set out in Annex 12.
- 2.86 npower also provided a summary of the compliance arrangements it has implemented in relation to outbound calling activity. These are set out in Annex 12.
- 2.87 On 21 October 2011, [redacted] npower emailed Ofcom stating “I have been made aware today by my colleagues carrying out the audit that as a direct result of their activities, they have discovered that data relating to certain dates on which [redacted] made calls on the domestic campaign are incorrect”.⁶⁹
- 2.88 On 28 October 2011, npower provided corrected data, the October 2011 data.⁷⁰ It also provided its explanation as to why it corrected and revised the data.
- 2.89 npower stated that, “This audit found inconsistencies between the data generated by [redacted] onsite, and the data [redacted] had provided to npower under our OFCOM Compliance Monitoring, Reporting and Escalation Process (a copy of which was sent to Ofcom with our response of 23 September 2011).” npower explained that its Dialler and Technical System Manager attended a number of meetings with [redacted] and concluded

⁶⁷ Annex 12, npower response to the Second Information Request.

⁶⁸ See Annex 12 for details relating to each call centre.

⁶⁹ Annex 13, email from [redacted], dated 12 October 2011.

⁷⁰ Annex 14, npower’s October 2011 submission.

that, "...[X]'s reporting processes contained flaws which resulted in errors in the volume of calls classified as connected and abandoned." npower noted the following flaws:

- a) limitations on the number of excel spreadsheet rows which caused data to be lost in their process;
- b) inbound calls to the CLI number were incorrectly included; and
- c) incorrect outcomes were caused by system crashes on telesales agent computers, where if an agent's computer froze, the previous call outcome was a system generated one.

2.90 npower also noted that [X] confirmed that, "...the data had been intentionally manipulated by an individual in their organisation and that the person concerned has been suspended pending further disciplinary action." As a consequence npower immediately suspended the provision of services by [X] and has since taken action to terminate all [X] telesales service contracts with npower.

Ofcom's Third Information Request

2.91 Following the provision by npower of further revised data Ofcom determined that further information and clarification was required. Consequently a further information request was issued to npower on 10 November 2011 (the Third Information Request).⁷¹ Ofcom sought information regarding the following:

- a) an explanation for the errors in previously supplied information;
- b) confirmation of the call data supplied as part of the October 2011 data; and
- c) information relating to the planned internal audits of call centres generating calls for or on behalf of npower.

npower's response to the Third Information Request

2.92 npower responded to the Third Information Request on 21 November 2011. This confirmed that the October 2011 data was correct. npower noted that "*the data submitted in response to question 2 below is different from that submitted to Ofcom on 23 September 2011 [in response to the Second Information Request] only to the extent of the data relating to [X] and the resulting impact of that corrected data on the aggregated data.*"

2.93 npower stated that, "*We would like to emphasise that as we had previously received director level confirmation of the accuracy and completeness of data provided from [X], we were satisfied with the data submitted to Ofcom with our Response dated 23 September. Nevertheless, we were committed to conducting a complete and thorough audit as notified to Ofcom.*"

2.94 npower conducted an audit at [X] after they had provided their response to the Second Information Request which showed:

⁷¹ Annex 15, Third Information Request issued to npower on 10 November 2011.

“... inconsistencies between the data generated by [X] onsite, and the data [X] had provided to npower under our OFCOM Compliance Monitoring, Reporting and Escalation Process.”

- 2.95 npower stated that these differences arose because [X] reporting processes contained flaws which resulted in errors in the volume of calls classified as connected and abandoned. These flaws included:
- a) limitations on the number of rows in an excel spreadsheet causing data to be lost in processing;
 - b) incorrect inclusion of inbound calls; and
 - c) incorrect outcomes caused by system crashes on telesales agent computers, where if the computer froze, the previous call outcome was recorded on the dialler.
- 2.96 npower explained that it agreed a process for [X] to recompile all of the data to eliminate these issues and requested that they reproduce the entire data set for the Relevant Period.
- 2.97 npower stated that [X] had informed it that the data had been manipulated by an individual and npower *“... immediately suspended the provision of the service by [X] and has since taken action to terminate all contracts under which [X] provides telesales services to npower.”*
- 2.98 npower provided detailed call data for all third party call centres as requested in the Third Information Request on the following basis:
- a) Individual call centre / individual campaign
 - b) Individual call centre / all campaigns
 - c) All call centres / individual campaign
 - d) All call centres / all campaigns
- 2.99 This data provided by npower was again discovered to be incorrect and therefore necessitated a Fourth Information Request to be sent to npower. On the basis that the data provided in response to the Third Information Request is incorrect, we have not specifically referred to this erroneous underlying data. However, while specific reference is not made to the actual data (as in the erroneous numerical data), as npower’s general responses to this Third Information Request remain relevant they have been summarised below.
- 2.100 Following concerns expressed by npower that their internal audit reports could potentially be used for enforcement purposes and, *“for the internal audit function to be truly independent and an effective means for bringing about change and improvement, it must be able to operate free of constraint and pressure in its recommendations”*, Ofcom agreed to npower providing its Audit Actions Report in lieu of its detailed Audit Report. The Audit Actions Report set out the basis for implementing the recommendations arising from npower’s Audit Report.⁷²

⁷² The detailed report also deals with issues relating to telesales operations outside the scope of the current investigation. See annex 18 for the The Audit Actions Report.

2.101 The audit, according to npower was undertaken to supplement and improve upon existing measures and recognised that improvements in process can and have been made. However, npower stated that, “...*the Audit Actions Report must not be read as an admission that existing measures and procedures were non-compliant per se or gave rise to an unacceptable compliance risk.*”

2.102 npower provided a copy of the internal audit “*terms of reference*” which set out that individual audits would be undertaken in four call centres: npower’s in-house call centre; [redacted].⁷³ npower stated that, “*The objectives of these audits will be to identify and assess the accuracy and robustness of the following:*

- a) *logging of call centre activities in core data systems;*
- b) *data extraction routines to ensure that the reporting of activities is accurate;*
- c) *strategies and control frameworks to identify and enact Ofcom regulations;*
- d) *processes to identify and prevent breaches of Ofcom regulations in respect of the use of outbound diallers;*
- e) *coverage of compliance with Ofcom requirements in quality assurance frameworks covering call centre activities;*
- f) *internal RWE npower monitoring mechanisms of outsourced call centres to ensure compliance;*
- g) *management of relationships with outsourced call centres; and*
- h) *the framework for identifying and maintaining regulatory compliance.”*

2.103 A summary of the key findings and measures set out in the Audit Actions Report, is as follows:⁷⁴

- a) [redacted];
- b) [redacted];
- c) [redacted];
- d) [redacted];
- e) [redacted];
- f) [redacted];
- g) [redacted]; and
- h) [redacted].

2.104 npower stated in the Audit Actions Report that, “*Full implementation of these actions will significantly strengthen the accuracy of abandoned call data*”.

⁷³ Annex 17, Internal Audit terms of reference.

⁷⁴ Annex 18, key findings of the Audit Actions Report.

npower further representations dated 2 December 2011 (the December 2011 Representations)

- 2.105 npower wrote to Ofcom on 2 December 2011 to summarise its position in relation to some of the matters raised in the section 128 notification and to provide an audio copy of the recorded message which was played in the event of an abandoned call (“the December 2011 Representations”)⁷⁵.
- 2.106 The December 2011 Representations referred to the following headings:
- a) “1. Silent Calls”;
 - b) “2. Actions in relation to [redacted] Person for the purposes of the Communications Act”;
 - c) “3. Level of Abandoned Calls/Persistent Misuse”;
 - d) “4. Marketing Content”; and
 - e) “Summary”.
- 2.107 The December 2011 Representations stated that in the section 128 notification, “Ofcom identified that [redacted] of the complaints received by the CCT during the relevant period were from consumers alleging they had received silent calls from npower or from numbers related to npower. Specific complaints received by Ofcom, which we believe to relate to calls made on behalf of npower during the relevant period, indicated the annoyance, inconvenience and anxiety that repeat silent calls cause”.⁷⁶
- 2.108 npower argued that, “In fact it seems that these calls were unrelated to npower. Silent calls can be the result of a call where AMD records a false positive. npower has taken the specific decision not to use AMD at our internal and outsourced call centres.”⁷⁷
- 2.109 npower added that it had requested the details of these calls from Ofcom but that nothing had been provided. npower stated that, “It seems as though the original investigation and Notification may have been based on the false premise that silent calls were being made. As we do not use AMD Technology, and as no data has been given to us regarding the silent calls alleged to have been made, we do not believe that any further steps should be taken on the basis of misuse arising from silent calls in relation to this investigation.”⁷⁸
- 2.110 npower submitted that “There can be no finding that npower has itself persistently misused an electronic communications network of electronic communications services. There were only two occasions on which npower exceeded the 3% level. The basis for alleging in the Notification that npower has persistently misused an electronic communications network or electronic communications service is that it has done so through a third party/parties. There is an inherent legal difficulty in making such a claim. [redacted] are not agents of npower. They are independent contractors.” npower continued “The Statement [the Guidelines] seeks to deal with this difficulty by stating, in paragraph A1.7, that ‘misuse may be either direct or

⁷⁵ Annex 19, the December Representations.

⁷⁶ Page 2, December 2011 Representations.

⁷⁷ Ibid.

⁷⁸ Ibid.

indirect'. It is difficult to reconcile this approach with the lack of any such language in the Communications Act 2003."⁷⁹

2.111 npower also added that there is, "...obviously an inherent legal difficulty in extending the reference to a person in the Act to a third party. However, leaving that to one side we would also comment that it would not seem to us right for action to be taken against us in relation to the performance of any of our contractors and certainly not [X] (who are of course the only party which has exceeded the 3% level on three or more 24 hour periods."⁸⁰ npower went on to set out a number of controls in place in relation to its contractors, including:⁸¹

- a) *"the selection process – site visit, check of processes and procedures, evaluation and scoring, and pilot,*
- b) *the contractual obligation to comply with legal etc obligations including those of Ofcom;*
- c) *the contractual obligations to hold meetings, provide records and reports including management information data, give access to information and documentation, have an appropriate quality assurance function and resources; and*
- d) *the service level requirements and obligations to listen to recorded calls."*

2.112 npower stated that, "In addition we have, notwithstanding that we had previously received director level confirmation of the accuracy and completeness of data provided from [X], completely and thoroughly reviewed their activities and data including a specific audit carried out at the offices of [X]"⁸² and that it had taken action to terminate all contracts under which [X] provided telesales services to npower. In npower's view, "It would we believe not be justified for action to be taken against npower in relation to the actions of [X], an independent contractor properly selected by us, with whom we had all appropriate contractual and other controls and against whom we have taken decisive action clearly evidencing our commitment to compliance and transparency."⁸³

2.113 npower's December 2011 Representations referred to paragraph A1.10 of the Guidelines:⁸⁴

"A1.10 The misuse also must be persistent. Section 128(6) states that this is where the misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents:

'a pattern of behaviour or practice'...any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such;

A1.21 A campaign is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period. If calls are made for identifiable purposes

⁷⁹ Ibid.

⁸⁰ Page 3, December 2011 Representations.

⁸¹ Ibid.

⁸² Page 3, December 2011 Representations.

⁸³ Ibid.

⁸⁴ Page 4, December 2011 Representations.

with a single script to single target audience, then Ofcom will continue to regard this as a campaign...

A1.30 The abandoned call rate shall be no more than three percent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period."

2.114 npower then set out why, on the basis of the data previously provided, that it considered that it had not persistently misused an electronic communications network or electronic communications service. On the basis that the data provided in response to the Third Information Request is incorrect, we have not specifically referred to this erroneous data in order to maintain clarity about the data upon which we are relying. However, we do refer in the following summary to npower's general comments which are not data-specific and remain relevant.

2.115 npower referred to paragraph A1.13 of the Guidelines which states that, "*in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment...*". It also referred to paragraph A1.82 which states, "*... We [Ofcom] believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.*"⁸⁵

A1.83 First, there is the degree of harm ... we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and CLI;

A1.84 Second, there is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action;

*A1.85 Third, where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice ..."*⁸⁶

2.116 npower submitted that "*In this instance, in the only case (i.e. [3<]) where three per cent was exceeded on three or more occasions, the numbers of abandoned calls were relatively low and so, based on the test set out in A1.84, there were fewer rather than more people affected by the misuse.*"⁸⁷

2.117 npower further submitted that it did not understand Ofcom's decision in the section 128 notification to consider the abandoned call rate on an aggregated basis rather than on the per campaign or per call centre basis; and that the test for taking enforcement action in paragraph A1.84 of the Guidelines has not been met:

"For reasons that we do not understand and appear to us to be inconsistent with the Statement, you have sought in the Notification and elsewhere to

⁸⁵ Page 5, December 2011 Representations.

⁸⁶ Page 6, December 2011 Representations.

⁸⁷ Ibid.

*consider the abandoned call rate on an aggregated basis rather than on the per campaign or per call centre basis.*⁸⁸

2.118 npower rejected Ofcom's view that npower's abandoned call message contained marketing content. It stated in the December 2011 Representations that:

*"...it was our view, held in good faith, that such a message was provided for information purposes in order to assist customers in understanding the nature of the call for the reasons of openness and transparency and enable them to opt out if desired."*⁸⁹

*"The reason behind the message was our desire to be as clear as possible and inform those called of the reason for the call. If we had simply stated for example 'in relation to your account' then this could have caused concern for those called."*⁹⁰

*"There was no financial gain, nor intent to market on our part. npower had absolutely no intention or thought that the message referring to potential savings would be of any commercial benefit; we simply thought it best assisted our customers to understand the nature of the call. In any event the message does not result in any commercial benefit; when the message is played to the recipient he/she is given a phone number which can be called to opt out of receiving calls from us. If the person calls this number he/she would leave their phone number for us to remove it on an automated system."*⁹¹

2.119 npower provided an audio copy of the recording.

Summary of npower's December 2011 Representations

2.120 npower summarised its position as:⁹²

- a) *"The test for misuse has not been met in that we have specifically ensured through not using AMD technology that we do not make silent calls and the levels of abandoned calls is low;*
- b) *we have not exceeded the guidance set out in the Statement in relation to abandoned calls save in relation to the [X] call centre. We do not consider them to be the same 'person' as npower under the Communications Act 2003, and in any event npower has in place in relation to them full and appropriate controls and has taken decisive action; and*
- c) *we do not believe it fair to classify our old information message as having a marketing content."*

2.121 It contended that it has, *"...already suffered considerably as a result of the issue of the Notification [the section 128 notification] and its publication, including press reports and a Radio 4 interview with our Chief Executive at which it was used to criticise our company", and, "...based on its own guidelines in paragraphs A1.82 – A1.85 of the Statement, this case does not warrant enforcement action. It does not*

⁸⁸ Ibid.

⁸⁹ Page 7, December 2011 Representations.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Page 7, the December 2012 Representations.

meet the qualitative test set out in A1.83; nor does it meet the quantitative test in paragraph A1.84.”⁹³

2.122 It concluded, “*Finally there is no requirement to take action to reflect any activity or unwillingness to act on npower’s part. We have provided a great deal of information about proactive steps we have taken. These steps have not been proscribed by Ofcom or brought about by further enforcement action. We believe the action we have taken does considerably more than is necessary to achieve compliance and has achieved the aim of the action Ofcom has taken to date. This is borne out by performance in our abandoned call rates across campaigns and call centres.*”⁹⁴

Ofcom’s Fourth Information Request

2.123 Following Ofcom’s consideration of the December 2011 Representations and responses to earlier information requests, Ofcom required clarification as to whether npower had taken Ofcom’s published Guidelines properly into account. This related specifically to whether npower’s call data properly reflected calls abandoned to answer machines.

2.124 Ofcom therefore required npower to confirm that its previous call data took account of the Guidelines and, where it did not, to re-submit its data where necessary. Ofcom issued the Fourth Information Request to npower on 10 February 2012.⁹⁵ It sought information regarding the following:

- a) Call data using the following breakdowns:
 - individual call centre / individual campaign;
 - individual call centre / all campaigns;
 - individual campaign / all call centres; and
 - all call centres / all campaigns.
- b) confirmation that the number of ‘live calls to live operators’ did not include calls subsequently terminated because they were connected to answer machines;
- c) whether the abandoned call rate excluded a reasoned estimate of calls abandoned to answer machines;
- d) where call data previously submitted had not accounted for the exclusions set out in 2.124(b) (a requirement) and a reasoned estimate of calls abandoned to answer machines set out in 2.124(c) (optional⁹⁶), that the call data be resubmitted to include any necessary adjustments; and
- e) evidence to support any adjustments made to the previously submitted call data.

⁹³ Page 7, the December 2012 Representations.

⁹⁴ Page 8, the December 2012 Representations.

⁹⁵ Annex 20, the Fourth Information Request.

⁹⁶ A1.49 of the Guidelines: “*The abandoned call rate can exclude a reasoned estimate of calls abandoned to answer machines.*”

2.125 The deadline for npower to respond to the Fourth Information Request was 24 February 2012. On 16 February 2012 npower requested an extension of the deadline on the basis that it was necessary for it to liaise with external service providers to complete its response. Ofcom agreed to a new deadline of 2 March 2012.

npower's response to the Fourth Information Request

2.126 npower responded to the Fourth Information Request on 2 March 2012. However, this response contained an error in respect of the number of abandoned calls referred to on a particular page of the response⁹⁷. On 6 March 2012, Ofcom contacted npower in respect of the error, following which npower confirmed that the number shown was not correct and should have read "1,927" and not "1,897". npower was given an opportunity to correct this and re-submit its response; it did so on 6 March 2012.

2.127 In its response to the Fourth Information Request, npower confirmed that in its responses to the Second and Third Information Requests, the total for 'live calls to live operators' had also included calls answered by answer machines that were then connected to operators. npower noted that:

"The number of calls in column B of all previous responses is a gross total of calls connected to agents and therefore includes answer machines connected to operators. This was balanced by the same approach in the number of abandoned calls, which therefore includes calls abandoned to answer machines, on the basis that the end calculation of the abandoned call rate would be the same on a gross or net basis. We apologise for not making this clear to Ofcom in our previous submissions that data included calls connected and abandoned to answer machines and in particular that we did not make this clear to Ofcom in our response to Ofcom's first section 135 request issued before Ofcom's section 128 Notification."

2.128 npower confirmed that no reasoned estimate of calls abandoned to answer machines had been excluded from the total volume of abandoned calls in previous data.

2.129 npower re-submitted its data and provided evidence to support its calculations for a reasoned estimate of calls abandoned to answer machines.⁹⁸ npower's response stated that the number of abandoned calls made on the days where the abandoned call rate was over 3%, on a 'call centre/across campaigns' basis, fell from 3,773 to 1,927. Overall, the number of abandoned calls made across all days of the relevant period fell from 53,778 to 30,555. npower also stated that, "You will note that in line with our reasoning, the abandoned call rates in each template are the same as previously submitted to Ofcom."

2.130 npower provided a number of tables containing correct and relevant data; these tables have been summarised below.

2.131 npower's call data in those cases where the ACR exceeded 3% are set out in the following tables:

- a) Table 1: per call centre / individual campaign basis
- b) Table 2: per call centre / all campaigns basis

⁹⁷ Page 4.

⁹⁸ Annex 21, npower response to the Fourth Information Request.

c) Table 3: per campaign / all centres basis

d) Table 4: all campaigns / all call centres basis

Table 1: Abandoned call rates above 3%, per call centre /individual campaign basis

	Call Centre		Date	Live calls to a live operator	Unadjusted abandoned calls	Reasoned estimate of calls abandoned to answer machines	Adjusted abandoned calls	ACR %
1	npower	[X]	2-Feb	[X]	[X]	[X]	[X]	3.89
2	npower	[X]	17-Feb	[X]	[X]	[X]	[X]	4.97
3	[X]	[X]	5-Feb	[X]	[X]	[X]	[X]	4.31
4	[X]	[X]	12-Feb	[X]	[X]	[X]	[X]	3.48
5	[X]	[X]	12-Mar	[X]	[X]	[X]	[X]	5.76
6	[X]	[X]	19-Mar	[X]	[X]	[X]	[X]	6.94
7	[X]	[X]	19-Mar	[X]	[X]	[X]	[X]	4.75
8	[X]	[X]	16-Feb	[X]	[X]	[X]	[X]	4.29
9	[X]	[X]	12-Mar	[X]	[X]	[X]	[X]	4.85
TOTALS				[X]	[X]	[X]	1,897	

Table 2: Abandoned call rates above 3%, per call centre / all campaigns basis

	Call Centre	Date	Campaigns	Live calls to a live operator	Unadjusted abandoned calls	Reasoned estimate of calls abandoned to answer machines	Adjusted abandoned calls	ACR %
1	npower	2-Feb	[X]	[X]	[X]	[X]	[X]	3.89
2	npower	17-Feb	[X]	[X]	[X]	[X]	[X]	4.97
3	[X]	5-Feb	[X]	[X]	[X]	[X]	[X]	4.31
4	[X]	12-Feb	[X]	[X]	[X]	[X]	[X]	3.48
5	[X]	12-Mar	[X]	[X]	[X]	[X]	[X]	5.76
6	[X]	19-Mar	[X]	[X]	[X]	[X]	[X]	6.94
7	[X]	19-Mar	[X]	[X]	[X]	[X]	[X]	3.04
8	[X]	16-Feb	[X]	[X]	[X]	[X]	[X]	4.02%
9	[X]	12-Mar	[X]	[X]	[X]	[X]	[X]	4.58%
TOTALS				[X]	[X]	[X]	1,927⁹⁹	

Table 3: Abandoned call rates above 3%, per campaign / all call centres basis

	Campaign	Call Centres	Date	Live calls to a live operator	Unadjusted abandoned calls	Reasoned estimate of calls abandoned to answer machines	Adjusted abandoned calls	ACR %
1	[X]	[X]	12-Mar	[X]	[X]	[X]	[X]	4.21%
2	[X]	[X]	19-Mar	[X]	[X]	[X]	[X]	5.79%
TOTALS				[X]	[X]	[X]	966	

⁹⁹ This column sums to 1,928. However, npower refers to 1,927 in the main body of its response to the Fourth Information Request and we have used that figure when referring to the number of abandoned calls where the 3% threshold has been exceeded.

Table 4: Abandoned call rates above 3%, all campaigns / all call centres basis

	Date	Live calls to a live operator	Unadjusted abandoned calls	Reasoned estimate of calls abandoned to answer machines	Adjusted abandoned calls	ACR %
1	12-Mar	[redacted]	[redacted]	[redacted]	[redacted]	3.99%
2	19-Mar	[redacted]	[redacted]	[redacted]	[redacted]	4.66%
TOTALS		[redacted]	[redacted]	[redacted]	1,021	

2.132 The detailed tables (the above is a summary) can be found in Annex 21.

2.133 In relation to the data provided by npower in response to the Fourth Information Request, it stated:

- a) *“The new data demonstrates a considerable reduction in actual numbers of abandoned calls affecting individuals. The result we believe further suggests that there are very reasonable grounds on which Ofcom is able to find that enforcement action is not warranted, or at most informal assurances are provided by npower.”¹⁰⁰*
- b) *“Significantly, we would draw Ofcom’s attention to the fact that the impact of this revised data is to materially reduce the real number of abandoned calls and therefore reduce materially also any annoyance, inconvenience or anxiety from that which would have been inferred by Ofcom from the previous data submitted.”*
- c) *“As we have previously stated to Ofcom, on a per campaign basis, there were two 24 hour periods, both relating to the domestic campaign, when abandoned call rates were above 3%. These were 12th March and 19th March. On this basis we have not exceeded Ofcom’s threshold of three 24 hour periods.”*
- d) *“On a per call centre basis, the number of occasions on which the 3% abandoned call rate was exceeded was: two occasions (2nd February and 17th February) for npower; two occasions (16th February and 12th March) for [redacted]; one occasion (19th March) for [redacted]; four occasions (5th February, 12th February, 12th March and 19th March) for [redacted].”*
- e) *“On the per call centre basis, Ofcom’s threshold of three 24 hour periods was only exceeded by [redacted] (who are no longer used by npower). On the dates when [redacted] did exceed 3%, it can be noted from the revised data now submitted that there are significant reductions in the actual number of calls abandoned to individuals.”*
- f) *“To repeat our previous submissions therefore, it is relevant only to look at the dates on which [redacted] exceeded 3%. On these 4 dates the total number of calls*

¹⁰⁰ Page 2, npower response to the Fourth Information Request.

abandoned to live individuals is 927 out of a total of calls made by [X] during the relevant period of [X].”¹⁰¹

2.134 npower further added that:¹⁰²

“We believe therefore that the number of abandoned calls about which Ofcom has concerns in relation to npower is so small as not to meet the requirement in the Ofcom Guidelines, namely:

Paragraph A1.13 – ‘in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment ...’

And later in paragraph A1.82 ‘...We believe that the ‘persistent misuse’ powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm causes it the public may be prioritised in three ways’ and the relevant one for these purposes is that which relates to the scale or amount of the misuse:

Paragraph A1.84 – ‘Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.’

2.135 npower stated that since the section 128 notification was issued the position has changed: *“...now that npower has made the position clear, we hope that Ofcom will, based on the huge reduction in abandoned calls that it is evident from the data submitted in this Response, and in view of the fact that the situation has therefore changed compared to that on which the Notification was based, take no further action.”*

2.136 It added that it was not in breach of the persistent misuse provisions of the Act and no enforcement action was warranted because:

- a) *“The levels of abandoned calls are low; we have not exceeded Ofcom’s Persistent Misuse Guidelines in relation to abandoned calls save as a result of the activity of the [X] call centre, where the volumes of calls made on the relevant dates were very low; so the quantitative test and the consumer detriment test have not been met;*
- b) *we do not consider [X] to be the same ‘person’ as npower under the Act;*
- c) *in any event, npower has and had in place in relation to [X] full and appropriate controls and has taken decisive action; and*
- d) *npower has addressed all the issues about which Ofcom was concerned and there is no issue of any ongoing breach, which we believe Ofcom has accepted.”*

¹⁰¹ Page 4, npower response to the Fourth Information Request.

¹⁰² Page 5, npower response to the Fourth Information Request.

npower further representations dated 3 May 2012 (the May 2012 Representations)

- 2.137 On 3 May 2012 (the “May 2012 Representations”) Guy Johnson, Director of Regulation & Public Affairs, Company Secretary & General Counsel, wrote to Lynn Parker, Director of Consumer Protection, setting out further representations in response to the section 128 notification.
- 2.138 Mr Johnson stated that the aim of the May 2012 Representations was to, “...comment on the HomeServe fine and to be clear on the commitments we are prepared to make relating to our future controls and monitoring, which I hope, alongside the other comments we have made to you, will enable you to conclude that your regulatory objectives have been fulfilled and that no further action needs to be taken against npower.”¹⁰³
- 2.139 npower argued that, “...on a per campaign basis there were two 24 hour periods when abandoned call rates were above 3%”. It also noted that, “On a per call centre basis, the number of occasions on which the 3% abandoned call rate was exceeded were two for npower; two for [redacted]; one for [redacted]; and four occasions (5th February, 12th February, 12th March and 19th March) for [redacted].”
- 2.140 npower argued that on a per call centre basis, Ofcom’s threshold of three 24 hour periods was, “only exceeded by [redacted] (and not at all on a per campaign basis). On these four dates the total number of [redacted] calls abandoned to live individuals is 927. Even looking at the number of abandoned calls together on all of the dates mentioned above on a per call centre basis on which the 3% abandoned call rate was exceeded, the total number of calls abandoned to live individuals is 1,927 on nine occasions.”
- 2.141 npower contrasted its position with that of HomeServe where it argued that there were an estimated 14,756 calls on 42 occasions during an identical period to the npower investigation. npower also noted that, “HomeServe of course also breached the rule relating to repeat calls to answer machines within the same 24 hour period, with an estimated 36,218 calls being made in breach of this rule. npower did not breach this rule. Your investigation of HomeServe was also concerned with silent calls as a result of their use of AMD technology. We have previously confirmed that we do not use AMD technology and your investigation of npower has not been in respect of silent calls.”
- 2.142 npower argued that, “Of course, the revised abandoned call levels at [redacted] came to light because npower itself, unprompted, questioned the [redacted] data and subsequently reported this to Ofcom. We do consider that it would be unfair if, thanks to our own initiative and diligence in investigating the [redacted] numbers, we were penalised.” npower argued that its actions demonstrated that it distanced itself from conduct which does not reflect its own approach to compliance and is, “...another reason why in this instance we do not consider [redacted] to be the same person as npower under the Act.” npower noted that as a result of its actions its abandonment rates are consistently below two percent and “It would be very unfair for npower to suffer any detriment as a result of our own diligence and transparency.”
- 2.143 npower said that it would carry out annual internal audits of its telesales calls made using automated systems. It has offered to share the contents of these with Ofcom in relation to the next two annual audits. npower also said that it was commissioning an

¹⁰³ Annex 22, npower’s May 2012 Representations, page 1.

independent external audit of its telesales processes and offered to extend the scope of this to cover dialler management call handling processes and share the results. npower also offered to provide Ofcom with quarterly abandoned call data over the next two years.

2.144 npower commented that, *“In relation to consumer detriment that may have been caused, we have previously requested details of complaints to Ofcom on the basis of which your investigation was launched. We would be pleased to contact all those customers, carry out a thorough review and take appropriate action once we have details of their complaints.”*

Provisional Notification of a possible penalty

2.145 Having taken account of the:

- a) the available evidence;
- b) npower’s August 2011, December 2011 and May 2012 representations;
- c) npower’s responses to the four information requests;
- d) the steps taken for securing the persistent misuse is brought to an end and not repeated and for remedying the consequences of the notified misuse;
- e) the Guidelines; and
- f) the Penalty Guidelines,

Ofcom took the preliminary view that it should impose on npower, a penalty under section 130 of the Act in respect of its persistent misuse of an electronic communications network or service between 1 February to 21 March 2011.

2.146 Accordingly, on 2 August 2012 we issued to npower the Provisional Notification of the possible penalty. The Provisional Notification set out that Ofcom had taken the preliminary view that a penalty of £75,000 be imposed on npower.

2.147 Ofcom’s preliminary view, explained in the Provisional Notification, was that this penalty would be appropriate and proportionate to the contravention in respect of which it would be imposed. The reasons for Ofcom’s preliminary view and provisional determination of the possible penalty were set out in the Provisional Notification and accompanying Explanatory Statement.¹⁰⁴

2.148 The Provisional Notification gave npower until 31 August 2012 to make written representations to Ofcom about the matters set out in it and the Explanatory Statement. It also gave npower the opportunity to make oral representations to Ofcom in relation to these matters.

¹⁰⁴ Annex 23, Provisional Notification

npower's representations on the Provisional Notification

2.149 On 31 August 2012, npower submitted its written representations on the Provisional Notification to Ofcom (the "August 2012 Representations"¹⁰⁵), a copy of which is at Annex 24 to this document. npower also made oral representations to Ofcom on 10 September 2012 (the "Oral Representations"). A transcript of the oral hearing is at Annex 25.

2.150 In this Notification, Ofcom refers to "*the revised statement of policy on the persistent misuse of an electronic communications network or service 2010*", published on 1 October 2010 and annexed to the document entitled "*Tackling abandoned and silent calls: Statement*", as the "*Guidelines*". In its representations, npower refers to them separately by referring to the former as the "*Statement of Policy*" and the latter as "*the 1 October 2010 response to the consultation on the revised statement*".

npower's August 2012 Representations

2.151 npower structured its August 2012 Representations as set out below. For clarity purposes, excerpts of the August 2012 representations are presented under the specified headings:

- a) Introduction;
- b) The Test to be Applied for the Calculation of the Abandoned Call Rate - The Statement of Policy;
- c) Abandoned Call Rate in Accordance with the Statement of Policy;
- d) Analysis of the Number of [X] Abandoned Calls;
- e) Further Guidance on Persistent Misuse in the Statement of Policy;
- f) RWE npower's Actions towards [X];
- g) Abandoned Call Rate on an Aggregated Basis;
- h) Information Message Played in the Event of Abandoned Calls;
- i) Enforcement Action; and
- j) Penalty.

Introduction

2.152 In its introduction to the August 2012 Representations, npower stated:

- a) "*RWE npower does not consider that it persistently misused an electronic communications network or electronic communications services between 1 February*

¹⁰⁵ Annex 24, the August 2012 Representations.

and 21 March 2011 (the “relevant period”). It does not agree with the finding of breach of section 128 of the Act.”¹⁰⁶

- b) it was pleased with several points made by Ofcom in the Provisional Notification, namely that:¹⁰⁷
- *“... [Ofcom] consider that appropriate steps were taken by npower for securing that its persistent misuse contravention was brought to an end and not repeated...”;*
 - *“... Ofcom consider that npower has taken all appropriate steps to bring the notified misuse to an end”; and*
 - *“... npower took further steps following the section 128 notification which secured that its misuse was brought to an end”.*
- c) *“It is extremely important to RWEpower that Ofcom considers that there is no current breach of section 128 of the Act. RWEpower has a very good record over recent years of compliance with regulatory obligations and places great focus on such compliance. The directors state at employee conferences and externally that they have a zero tolerance approach to non-compliance.”*
- d) it is, *“... committed to a programme of continual improvement, whether or not it considers there to be any current breach, in relation to its compliance programmes and practices.”*

The Test to be Applied for the Calculation of the Abandoned Call Rate - The Statement of Policy

2.153 Ofcom’s preliminary view, explained in the Provisional Notification, included that:

npower has, in one or more of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period by exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions on a per call centre/across campaigns basis.

2.154 npower, in the August 2012 Representations, stated that:

- a) section 131(1) of the Act provides that: *“It shall be the duty of OFCOM to prepare and publish a statement of their general policy with respect to the exercise of their powers under section 128 to 130 Section 131(1) of the Act”;*
- b) section 131(4) of the Act provides that: *“It shall be the duty of OFCOM, in exercising the powers conferred on them by sections 128 to 130, to have regard to the statement for the time being in force under this section”;*
- c) the statement of general policy is the document headed *“Revised statement of policy on the persistent misuse of an electronic communications network or service 2010”.*

¹⁰⁶ Page 3, the August 2012 Representations.

¹⁰⁷ Page 2, the August 2012 Representations.

- d) Paragraph 5.57 of the 'Tackling abandoned and silent calls – Statement' does not form part of the statement of general policy.

"This is clear from paragraphs 1.2 to 1.5 of the '1st October 2010 document' [quoted below] which state:

'1.2 Ofcom is required under the Act to prepare and publish a statement of our general policy with respect to our powers to deal with persistent misuse and is required to have regard to this statement when taking enforcement action under the Act.

1.3 Ofcom's Revised Statement of Policy, published on 10 September 2008 (the '2008 Revised Statement') identifies making abandoned or silent calls as one example of persistent misuse. It describes steps call centres can take to avoid – insofar as possible – making abandoned calls; and that when abandoned calls are made, steps are taken to limit harm to consumers. Specifically it sets out Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.

1.4 In June 2010 we consulted on various changes to the 2008 Revised Statement aimed at making our policy more effective and further reducing consumer harm (the "2010 Consultation").

1.5 Ofcom received 63 responses to the 2010 Consultation from a broad range of industry and consumer stakeholders. This document sets out Ofcom's response to the comments we received and includes our final conclusions. These are reflected in Annex 1 to this document ("the Revised Statement") which sets out Ofcom's current approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls'."

- e) While the statement of general policy states the below, there are no such statements in the document which paragraph 5.57 forms part:

"A 1.1 This statement is published in accordance with section 131 of the Communications Act 2003 ('the Act') and sets out Ofcom's general policy with regards to the exercise of its powers under sections 128 to 130 of the Act."

A1.2 The purpose of this statement is to provide clarity about the operation of the 'persistent misuse' provisions in sections 128 to 130 of the Act. These sections enable Ofcom to issue notifications if it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services."

- f) Ofcom's view that npower exceeded an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions on a per call centre/across campaigns basis is *"incorrect as it is based on Ofcom's incorrect reliance on paragraph 5.57 of the consultation response and is therefore an invalid calculation of the abandoned call rate."*
- g) *"Ofcom has not correctly discharged its duty under section 131(4) of the Act 'to have regard to the statement in exercising the powers conferred on it by the relevant sections'. As such RWEnpower contends that Ofcom seeks to*

have regard to a provision which is not contained in the 'Statement' for the purposes of section 131(4) and therefore cannot now move to apply another test that is not in accordance with the Statement of Policy. Ofcom has failed to apply the correct basis in its Provisional Notification and all arguments relating to the allegations of persistent misuse based on the abandoned call rate now fall away...it is also contended that Ofcom was wrong to apply this aggregated approach in the section 128 Notification."

Abandoned Call Rate in Accordance with the Statement of Policy [the Guidelines]

2.155 npower noted that it had been accepted by Ofcom in the Provisional Notification that npower had not been reckless as to whether persons suffered annoyance, inconvenience or anxiety. It referred to section 128(6) of the Act which provides:

"...the cases in which a person is to be treated as persistently misusing a network or service include any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents--

(a) a pattern of behaviour or practice; or

*(b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety."*¹⁰⁸

2.156 It also drew attention to paragraph A1.10 of the Statement of Policy [the Guidelines] which states:

"... 'a pattern of behaviour or practice'. This is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such..."

2.157 On the basis of the above "minimum of three instances of the conduct in question", it submitted that:

- a) *"the only case satisfying the minimum requirement of three instances is [X] based on analysis by call centre. In no other instance, analysed per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) has the minimum of three instances been reached."*¹⁰⁹
- b) on a per campaign basis there were two 24 hour periods, both relating to the domestic campaign, when abandoned call rates were above 3 percent. These were on 12 March and 19 March 2011.
- c) on a per call centre basis, there were the following 24 hour periods of abandoned call rates above 3 percent by call centre:
 - two occasions (2 February and 17 February 2011) for npower (in-house);
 - two occasions (16 February and 12 March 2011) for [X];

¹⁰⁸ Paragraph 2.2, August 2012 Representations.

¹⁰⁹ Paragraph 2.6, August 2012 Representations.

- four occasions (5 February, 12 February, 12 March and 19 March 2011) for [X].
- d) *“The issue therefore, in relation to abandoned calls, is whether no instances of the threshold of three being exceeded on a campaign basis, and one case of four instances on a call centre basis relating to the [X] call centre amounts to persistent misuse by RWEnpower as required under section 128 and section 130 of the Act. Is it a pattern of behaviour or practice, and even if so should action be taken by Ofcom in respect of it?”*

Analysis of the Number of [X] Abandoned Calls

2.158 In the August 2012 Representations, npower set out the following data and analysis and submitted that such data and analysis is relevant to the consideration of whether there was persistent misuse:

- a) *“Over the four dates in question (5 February 2011, 12 February 2011, 12 March 2011 and 19 March 2011) (the [X] dates), (net of calls to an answer machine which applies to all numbers in this and subsequent paragraphs...), the number of abandoned calls was 927.*

We would contrast this with the Homeserve estimated number of 14,756 on 42 occasions over the same period as the npower investigation. Homeserve of course also breached the rule relating to repeat calls to answering machines within the same 24 hour period, with an estimated 36,218 calls being made in reach of this rule. npower did not breach this rule.”

- b) on the days where [X] exceeded 3 percent, the total number of calls abandoned to live individuals was 927 out of a total volume of calls made by [X] during the Relevant Period of [X], representing [X]% of the calls made by [X] over the Relevant Period.
- c) the total the number of calls to all customers over the Relevant Period was [X], so the number of [X] abandoned calls on the non-compliant dates amounts to [X]% of the total number of calls made over the Relevant Period.
- d) [X] made a total of [X] calls over the relevant period, with an average number of calls per day of [X] calls. The total number of calls made by [X] on the non-compliant dates was [X], an average of [X] calls per day and therefore *“The average number of calls made on the [X] dates was therefore 23% of the average number of [X] calls.”*¹¹⁰
- e) the average number of abandoned calls by [X] on the non-compliant dates was 232 calls (927 calls over 4 days). This is [X]% of the average number of [X] calls per day.

¹¹⁰ Paragraph 3.5, August 2012 Representations.

- f) the average number of calls to all customers per day over the Relevant Period was [§<] calls. The average number of calls made by [§<] on the four dates ([§<] calls per day) was 9.0% of the average.
- g) the average number of abandoned calls by [§<] on the four days was 232 calls. This is [§<]% of the average number of calls per day (of [§<] calls).

2.159 npower noted that recklessness had not been alleged and submitted that “*Prima facie it would therefore appear that, in making its assessment, Ofcom should consider the number of occasions on which the misuse takes place. This would of course accord with the normal meaning of the word ‘persistent’.*”¹¹¹ It referred to paragraph A1.10 of the Guidelines and stated “... a minimum of three instances is required. The Statement of Policy does not state that action should be taken in all cases where three or more instances have taken place. It simply states that is the minimum, below which therefore action should not be taken.”¹¹²

2.160 npower submitted that the Guidelines had other sections relevant to this issue as follows:

“Paragraph A1.13 In deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment.

Paragraph A1.82 Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person’s use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the ‘persistent misuse’ powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.

Paragraph A1.83 First, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI. This could be described as a qualitative test.

Paragraph A1.84 Second, there is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.

Paragraph A1.85 Third, is where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice. An example might be where a person provides a commercial service offering to overlay outbound phone calls with an inauthentic CLI number, thus enabling callers to send misleading information about their identity and preserve their anonymity. This could be described as the deterrence test.

¹¹¹ Paragraph 3.10, August 2012 Representations.

¹¹² Paragraph 3.11, August 2012 Representations.

Paragraph A1.86 Ofcom policy on taking action under its section 128 powers will be driven by the three factors set out above. In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will consider observance with the policy criteria set out in Paragraphs A1.12 to 58"

- 2.161 npower asserted that the number of abandoned calls by [X] on the four dates was, "so small as not to meet the requirement in paragraphs A1.13 and A1.84 of the Statement of Policy (paragraph A1.85 is not relevant in this case). Such a low number of calls on the [X] dates, and such a low number of abandoned calls on those dates, does not meet the tests of taking enforcement action set out in this paragraph above. In addition the qualitative test set out in paragraph A1.83 above is not met as RWE npower made no silent calls."
- 2.162 npower considered that the Provisional Notification was not correct when it stated in paragraph 3.25(a): "The overall volume of live calls is only relevant to the calculation of the abandoned call rate as this rate is a ratio of abandoned calls as compared to the overall volume of live calls. It is therefore irrelevant that the particular days on which the three per cent ACR was breached was on days that the overall volume of live calls was lower than usual". It also noted that "Similar, and to our mind incorrect, statements are made in paragraphs 4.46 and 4.47 of the Provisional Notification. For example, it flies in the face of the plain wording of paragraph A1.84 of the Statement of Policy, which states ..."Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action."¹¹³
- 2.163 In summary, it contended that:
- a) "RWE npower did not have three or more instances where the three per cent rate was exceeded on a per campaign basis. There was one occasion where the three per cent limit was exceeded on a per call centre basis on three or more occasions, namely for [X]."
 - b) "Over the four [X] dates, net of calls to an answer machine, the number of abandoned calls was 927. This amounted to [X]% of the calls made by [X] over the Relevant Period. It amounted to [X]% of the total number of calls made over the Relevant Period."
 - c) "The total number of calls made by [X] on the [X] dates was [X]. This is an average of [X] calls per day. The average number of calls per day on the [X] dates was 23% of the average number of [X] calls. It was 9.0% of the average number of calls per customers per day."
 - d) "The average number of abandoned calls by [X] on the [X] dates was 232 calls. This is [X]% of the average number of [X] calls per day. It is [X]% of the average number of calls per customer per day."
 - e) The number of calls made and the number of calls abandoned calls by [X] on the four dates were very low. "This is relevant and should be taken into account by Ofcom in not proceeding with an allegation of breach of section 128 of the Act because of each of the matters set out below."¹¹⁴

¹¹³ Paragraph 3.13, August 2012 Representations.

¹¹⁴ Paragraph 3.14, August 2012 Representations.

- *Section 128(6) gives guidance in that it states that persistent misuse includes any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice.*
- *Paragraph A1.10 of the Statement of Policy states that “a pattern of behaviour or practice is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such”.*
- *Paragraph A1.13 states that In deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment.*
- *Paragraph A1.82 states that Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities.*
- *Paragraph A1.84 provides that Ofcom needs to be guided by the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action.*
- *Section 3(3) of the Act states that in performing their duties Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.*
- *Section 6(1) a) states that Ofcom must keep the carrying out of their functions under review with a view to securing that regulation by Ofcom does not involve the imposition of burdens which are unnecessary.”*

Further Guidance on Persistent Misuse in the Statement of Policy

2.164 The August 2012 Representations stated that there is further guidance on when Ofcom should take enforcement action and referred to the following extracts:

- a) *“Paragraph A1.12 sets out Ofcom’s approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.”*
- b) *“Paragraph A1.13 states that in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps that have been taken by ACS users to reduce the degree of concern that silent or abandoned calls cause including those set out below”.*
- c) *“Paragraph A1.86 Ofcom policy on taking action under its section 128 powers will be driven by the three factors set out above. In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will*

consider observance with the policy criteria set out in paragraphs A1.12 to 58.”

2.165 npower noted that it was fully compliant with the following requirements:

- a) paragraph A1.53, which requires that calls which are not answered must ring for a minimum of 15 seconds before being terminated;
- b) paragraph A1.54, which required that when an abandoned call (other than an AMD false positive), has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator;
- c) paragraph A1.55, which requires that when a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator;
- d) paragraph A1.56, which requires that for each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation numbers; and
- e) paragraph A1.59, which requires that organisations subject to the Guidelines to keep records for a minimum of six months that demonstrate compliance with the policy and procedures.

2.166 It was npower's contention that, *“based on paragraphs A1.12, A1.13 and A1.86 of the Statement of Policy and RWEnpower's compliance as detailed above, Ofcom should decide not to take any enforcement action (beyond the section 128 Notification which has already been issued).”*

RWEnpower's Actions towards [X]

2.167 In the August 2012 Representations, npower stated that *“account should be taken by Ofcom of the fact that [X] was the only company responsible for abandoned calls exceeding 3% on three or more occasions.”* It noted that Ofcom had acknowledged in the Provisional Notification that npower had used sensible selection processes and had conducted due diligence in respect of the third parties it engaged.

2.168 It specified that the reasons (in order of importance) for the selection of [X] were as follows:

- a) Sales experience;
- b) Outbound calling;
- c) Utility experience;
- d) Reporting/IT capabilities;
- e) Recruitment and training;
- f) Capability in business sales;

- g) Flexibility; and
- h) Fitness for business.

2.169 npower then set out the contractual requirements it placed on [X] which included a, “*requirement to listen to recorded calls, produce reports (including abandoned rate reports) and achieve the Service Levels, and the following requirement (extract from Schedule 1 – “SERVICES”:*

“QUALITY ASSURANCE

The Service Provider shall organise a quality assurance department trained appropriately as quality assurance analysts, and including Validators (the “QA Department). The QA Department shall listen to the recorded Calls in relation to each Lead where a Contract has been made and shall check at least the following details that:

- 1) the Validation Script has been followed;*
- 2) the payment details have been recorded correctly;*
- 3) Customer Data has been checked and where appropriate updated;*
- 4) prices, discounts and any other financial requirements have been applied and or complied with correctly; and*
- 5) Legal Requirements have been complied with.*

The Parties shall agree a detailed list that the QA Department shall check. The QA Department will record and compile a Report of results of any non-compliance.”

2.170 It added that it had “*received director-level confirmation and sign-off of the accuracy and completeness of the [X] data*” and it had “*completely and thoroughly reviewed their activities and data including a specific audit carried out at the offices of [X].*”

2.171 npower stated that “*Inconsistencies were found between the data generated by [X] onsite and the data [X] has submitted. As a direct result of these events coming to light npower immediately suspended the provision of services by [X] and have since terminated all contracts under which [X] provides telesales services to npower. Our termination of [X] services has had commercial implications for us and led to the issue being raised with our Chief Executive. We have, however, remained resolute that we will not tolerate non-compliance and inappropriate reporting.*”¹¹⁵

2.172 npower said that in summary, “*the revised abandoned call levels at [X] came to light because npower itself, unprompted, questioned the [X] data and subsequently, and it should be noted again unprompted, reported this to Ofcom.*”¹¹⁶ It considered that, “*it would be unfair if, thanks to our own initiative and diligence in investigating the [X] numbers, we were penalised. Also, we had properly selected the contractor, had full and appropriate controls in our contract with [X] and took the most decisive action once we had identified the issues there. Our actions demonstrate that we distance ourselves completely from any conduct which does not reflect our own approach to compliance. It would, we believe, be very unfair for npower to suffer any detriment as a result of our own diligence and transparency.*”

2.173 It was npower's contention that, “*in this instance, because of the actions of RWE npower in relation to [X], Ofcom should not take enforcement action. Such*

¹¹⁵ Paragraphs 5.5 to 5.7, August 2012 Representations.

¹¹⁶ Paragraphs 5.8, August 2012 Representations.

action does not, for example, meet the priority requirements of paragraphs A1.13 or A1.82 of the Statement of Policy or section 3(3) of the Act.”

Abandoned Call Rate on an Aggregated Basis

2.174 Without prejudice to its comments about the basis for the calculation of the abandoned call rate, npower stated that it would, in the alternative, argue that the volume of calls where the 3% limit has been exceeded is not in the aggregate sufficient to justify this further enforcement action by Ofcom. It continued:

“We do not believe that the abandoned call rate should be considered on an aggregated basis rather than on the per campaign or per call centre basis. However even on that basis there were eight days on which the 3% level was exceeded, four of those relate to days of very low numbers of calls and on none of the days was the volume of calls more than 16% of the average.”¹¹⁷

2.175 In its August 2012 Representations, npower submitted the following:

- on the 8 occasions¹¹⁸ where 3 percent was exceeded (2 February 2011, 5 February 2011, 12 February 2011, 16 February 2011, 17 February 2011, 12 March 2011 (occurring twice) and 19 March 2011), the total number of calls abandoned to live individuals at those call centres was 1,756. It continued, *“The total volume of calls, on the same basis i.e. net of calls to answer machines...made to all customers over the Relevant Period was [x]...So the number of abandoned calls during those dates amount to [x]% of the calls made over the Relevant Period.”¹¹⁹*
- *“The average number of calls to all customers per day over the Relevant Period was [x] calls. The number of calls per day made on the relevant dates was [x] calls, an average of [x] calls per day. So the average number of calls made on the relevant dates was 9.6% of the average number of calls over the Relevant Period.”*
- *“The average number of abandoned calls on the relevant dates was 220 calls (1,756 calls over the relevant dates). This is [x]% of the average number of calls per day (of [x] calls).”¹²⁰*

2.176 It was npower's contention, that *“because the number of calls and number of abandoned calls on the relevant dates were so low (both in absolute and relative terms) Ofcom should not have taken enforcement action in this instance.”¹²¹*

Information Message Played in the Event of Abandoned Calls

2.177 In its August 2012 Representations, npower stated that:

- *“We comply with the requirements of paragraph A1.51 of the Persistent Misuse Guidelines in that a recorded information message is played within two seconds after the telephone has been picked up where a live operative does not pick up the call at our end.”*

¹¹⁷ Paragraph 6.1, August 2012 Representations.

¹¹⁸ npower has referred to these as the “relevant dates”.

¹¹⁹ Paragraph 6.2, August 2012 Representations.

¹²⁰ Paragraph 6.3 and 6.4, August 2012 Representations.

¹²¹ Paragraph 6.5, August 2012 Representations.

- *“the information message that we play is compliant with the Persistent Misuse Guidelines (paragraph A1.52) (subject to the allegations in the Notification relating to the marketing message). It contains the identity of the company on whose behalf the call was made along with telephone numbers that can be called to opt out of further marketing calls.”*

2.178 npower set out the script of the recorded message which was played during the Relevant Period. It read:

“You were called today by npower gas and electricity supplier. Unfortunately, at the time you were called we were unable to make contact with you. We were calling to discuss potential savings on your energy bills. If you do not wish us to contact you in this way in future, please call [3<] and we will remove your details from our telemarketing list. Thank you.”

2.179 In response to Ofcom’s view that the sentence, *“We were calling to discuss potential savings on your energy bill”*, is marketing content; npower stated, *“It was our view, held in good faith that such a message was provided for information purposes in order to assist customers in understanding the nature of the call for reasons of openness and transparency and to enable them to opt out if desired. The reason behind the message was our desire to be as clear as possible and inform those called of the reason for the call. We had included those words out of our wish not to cause concern.”*

2.180 npower then referred to paragraph A1.83 of the Guidelines which states:

“First, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI. This could be described as a qualitative test”.

2.181 It added that the message was, *“intended to avoid worrying the customer and to provide clarity that the call did not for example relate to a requirement for a meter to be inspected, or to payments due. RWEnpower does not believe it should be penalised for seeking to provide this clarity. Given the absence of use of AMD by npower and so the absence of silent calls, the degree of harm caused by npower is reduced by the significant reduction in the extent of anxiety caused. This is further reinforced by the fact that the recorded message was played within two seconds of any abandoned call; again reducing the risk of anxiety.”*

2.182 npower considered that *“account must be taken of the intention behind the message and/or the effect of the message”*. It submitted that there was *“no financial gain, nor intent to market on our part. RWEnpower had absolutely no intention or thought that the message referring to potential savings would be of any commercial benefit; we simply thought it best assisted customers to understand the nature of the call. In any event the message does not result in any commercial benefit; when the message is played to the recipient he/she is given a phone number which can be called to opt out of receiving calls from us. If the person calls this number he/she could leave their phone number for us to remove it on an automated system. This was not a sales line.”*

2.183 In npower’s view the following should be taken into account:

- a) the words, *"to discuss potential savings on your energy bill"* should be considered in the context of the recorded message (with the immediately following sentence being, *"If you do not wish us to contact you in this way in future, please call [redacted] and we will remove your details from our telemarketing list"*);
- b) npower's concern not to cause anxiety to those called but to make clear the reason for the call;
- c) the words *"marketing content"* and *"not used as an opportunity to market to the called person"* must be construed [in npower's opinion] in the light of the intention behind the message and/or the effect of the message;
- d) all of which mean that, the words in question do not amount to *"marketing"* as envisaged in the third bullet point of paragraph A1.52 of the Guidelines.

2.184 It said that the recorded message which contained the wording Ofcom had concerns about, was:

- a) *"only used in recorded messages played from RWE npower. Such words were not in the recorded messages of the [redacted], or [redacted] calls"*;
- b) *"only played 1,906 times"* which represents 6.2% of the total of 30,555 abandoned calls made by npower over the Relevant Period;
- c) *"played on [redacted]% of all calls made over the Relevant Period"*¹²² and
- d) was changed on 7 July 2011.

2.185 It contended that *"because this recorded message was played on a small number of occasions both in absolute and relative terms, and because of the steps taken by RWE npower to minimise anxiety, Ofcom should not take enforcement action in this instance"*.¹²³

Enforcement Action

2.186 npower, in its August 2012 representations, submitted that *"Ofcom should not take any more enforcement action (beyond the section 128 Notification already issued)"* and noted that the option of no further action is recognised in the Provisional Notification. It added that *"...simply because the section 128 Notification has been issued, Ofcom should not consider it inevitable or necessary to take more enforcement action such as imposing a penalty."*¹²⁴

2.187 It stated that Ofcom had confirmed in its letter of 6 September 2011 that no further action may be taken:

"Following a request from npower's Head of Compliance, [redacted], I have outlined below possible action that Ofcom may take in relation to a party which has been given a notification under section 128 of the Act ("notified misuser"). (i) Ofcom may take no further action. This would occur where Ofcom determines that there are not reasonable grounds for believing that the notified misuser had persistently misused

¹²² Paragraph 7.11, August 2012 Representations.

¹²³ Paragraph 7.13, the August 2012 Representations.

¹²⁴ Paragraph 8.1, the August 2012 Representations

an electronic communications network or electronic communications services during the relevant period. In the event that Ofcom determined that no further action should be taken, Ofcom would withdraw the notification issued to npower on 6 July 2011. It is also possible that based on the representations made Ofcom may decide that it is not appropriate and proportionate to take any further action in a case".

2.188 npower, in the August 2012 Representations submitted that, *"the situation now is very different from that which existed when Ofcom issued its Notification under section 128 of the Act on 6th July 2011. That notification was based on the data that npower had submitted before the Notification and which included calls to answer machines. npower has now made that position clear and this results in a huge reduction in abandoned calls. The situation has therefore changed compared to that on which the Notification was based."*

2.189 npower then made reference to the section 128 notification issued on 6 July 2011, in particular, the statement that, as part of the investigation programme:

"Ofcom identified that [x] of the complaints received by the CCT during the relevant period were from consumers alleging that they had received silent calls from npower or from numbers related to npower. Specific complaints received by Ofcom, which we believe to relate to calls made on behalf of npower during the relevant period, indicated the annoyance, inconvenience and anxiety that repeat silent calls cause".

2.190 It quoted from paragraph 1.14 of the Guidelines: *"we [Ofcom] believe that the majority of repeat silent calls are caused by inaccuracies of AMD technology"* and submitted that *"In fact it seems that these calls [the calls referred to at paragraph 2.189 above] were unrelated to npower"* as it does not use AMD. npower further said that *"It seems as though the original investigation and s. 128 Notification may have been based on the false premise that silent calls were being made."*

2.191 npower noted that Ofcom had acknowledged that there was no continuing breach.

2.192 It said it believed that *"there should be no penalty under section 130 or other enforcement action taken by Ofcom in relation to this matter. It is a matter for Ofcom as to whether the section 128 notification should or should not be withdrawn and npower would not seek any such withdrawal were no further action to be taken. Indeed RWEnpower would not seek or take any further action whatsoever if no further action were to be taken. RWEnpower takes the view that no further enforcement action should be taken and no further adverse finding or publicity should occur."*¹²⁵

2.193 npower contended that no further action should be taken for the following reasons:

- a) *"RWEnpower has not persistently misused an electronic communications network or electronic communications service. As such a penalty under section 130 of the Act may not be imposed.*
- b) *The misuse has not been repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice as required under section 128(6) of the Act;*
- c) *It has not been repeated on a sufficient number of occasions, or been repetitive misuse, as required under paragraph A1.10 of the Statement of Policy;*

¹²⁵ Paragraph 8.6, the August 2011 Representations

- d) *It does not reach the level of consumer detriment required under paragraph A1.13 of the Statement of Policy for enforcement action in this particular case and therefore does not satisfy the administrative priority requirement of Ofcom under that paragraph;*
- e) *It does not satisfy the scale of priorities test required under paragraph A1.82 of the Statement of Policy which states:*

'Paragraph A1.82 Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person's use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.'

- f) *It does not meet the qualitative test in paragraph A1.83 nor the quantitative test in A1.84;*
- g) *It does not meet the targeting requirement in section 3(3) of the Act, nor that in section 6(1) of the Act."*

2.194 It is npower's view that *"It is clear from the wording of the Act, the Provisional Notification and the letter from Ofcom of 6th September 2011 that, notwithstanding the issue of the section 128 Notification, a decision to take no further action is a viable, reasonable and proportionate response from Ofcom in this case."*¹²⁶

Penalty

2.195 While npower stated that *"the issue for RWEnpower is about the substantive finding"*, it also requested that its comments set out below be taken into account.

2.196 It noted that paragraphs 4.90 to 4.93 and 4.255 (c) of the Provisional Notification stated that one of the aggravating factors reflected in the penalty amount was, *"that four information requests were required to obtain accurate data. The problems associated with the data led to excessive time and resources being spent by Ofcom on this investigation when had the data been correct from the outset the case could have been resolved sooner"*. npower considered this interpretation to be *"harsh."*¹²⁷

2.197 npower submitted that, *"... these instances arose because of data issues relating to our contractors, not in relation to RWEnpower. As has been accepted by Ofcom (see paragraph 4.88 of the Provisional Notification) RWEnpower used sensible selection processes and conducted due diligence in respect of the third parties it engaged. It had appropriate contractual agreements with those parties and required full reporting and controls."* npower added that it had explained the importance of compliance with

¹²⁶ Paragraph 8.7, August 2012 Representations.

¹²⁷ Page 28, August 2012 Representations.

regulatory requirements and with accuracy of data and had, "... *obtained confirmation (on occasions at director level) that data was accurate.*"¹²⁸

2.198 npower stated that npower itself identified issues with the data and took action to validate it and that this, "... *included attending the contractors premises, and reviewing the basis on which data was compiled, carrying out reviews which found inconsistencies between the data generated by the contractor onsite and the data provided to npower.*"¹²⁹

2.199 Therefore npower submitted that, "... *in relation to the penalty that, rather than the interpretation of the changes in data given by Ofcom in its Provisional Notification, it could equally be construed as evidence of a diligent approach coupled with a commitment to compliance and transparency (all amendments to the data were immediately and voluntarily disclosed to Ofcom).*"¹³⁰

2.200 Npower, in response to Ofcom's preliminary view that it did not take timely steps that were effective in bringing it into compliance once it became aware of its contravention but that it took steps after Ofcom had informed it that it was being investigated and steps which ended the misuse, stated:

"RWE npower in fact answered the factual questions raised of it in Ofcom's letter of 25 January 2011 in 15 February [2011], reviewing its existing procedures and considered what more could be done. We have a policy of continual improvement but inevitably some consideration and planning is required before visible signs of change occur. Prior to the enquiry from Ofcom in January 2011, npower already had steps in place to meet Ofcom's requirements ... RWE npower put in place a series of further actions in 2011, but we feel it would be incorrect to characterise them as being only in response to the section 128 Notification - for example two set out below were commenced in June 2011, two were implemented on 1st July 2011, others implemented on 7th, 15th and 18th July 2011 and therefore were put in place or planned as soon as possible following Ofcom's expressed concern and before the Notification."

2.201 The processes referred to in paragraph 2.176 were:

- a) added ability to "preview dial" records in the event of an abandoned call to guarantee the presence of a live agent as an additional option to permanent suppression or 72 hours suppression (1 July 2011);
- b) staggering breaks and ending the practice of breaks and lunches being team based (in place since 1 July 2011);
- c) Reduction in the amount of time spent by agents logged out performing administration tasks and customer call-backs (in place since June 2011);
- d) Implementation of 90% adherence for agent availability targets to software configured schedules with a stepped increase of 1% per month through to an end target of 95% by November, with a clear, defined management process for agents who do not achieve this (commenced in June 2011);

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

- e) Increase in the minimum number of agents from 10 to 15 for which we would plan a predictive dialling mode campaign to operate. For any periods where the planned staff level falls below this, the dialler will be turned to Preview dial (1 July 2011);
- f) Agents breaks/lunches to be staggered further;
- g) Alignment of shift patterns so that agents work the same shifts (18 July 2011);
- h) Additional dialler analyst being recruited for our in-house operation;
- i) A real time analyst of in-house operation. Interim measures have been in place since 7th July 2011 with permanent measures in place by 1st August 2011;
- j) Daily feed within the day from outsourced telemarketing of abandonment rates as per the template used for npower's response to Ofcom's information request so that if the abandonment rate exceeds 3% during the day outsource providers will provide an intraday view of their abandonment evidencing what actions are being taken to resolve any potential breaches (since 15th July 2011);
- k) Implemented new policy and process document with our outsource telesales service providers which reflects Ofcom requirements, along with reporting and escalation processes.

2.202 Therefore npower contended that, "*... in relation to the penalty that the number and timing of these measures show that in fact RWE npower took timely action immediately following Ofcom's expressed concerns. All steps cannot be taken at once but action was immediately put in train and implemented speedily and this therefore should be taken into account in relation to the penalty.*"¹³¹

2.203 In response to the assertion at paragraph 4.255 of the Provisional Notification "*that npower has not taken all such steps as we consider appropriate for remedying the consequences of the notified misuse*".¹³² npower stated, "*Any requirement to take remedial steps is based on a finding that RWE npower is in breach of the Act and has engaged in persistent misuse.*" It submitted that persistent misuse has not been shown to have occurred. It noted that, "*...without prejudice to those views, but with the intent of demonstrating RWE npower's commitment to going beyond what Ofcom describes as merely a willingness to put things right, we would like to propose certain steps that npower will take should the findings in Ofcom's Provisional Notification be upheld, notwithstanding these Representations and those made in the oral hearing on 10th September.*"¹³³

2.204 npower set out the measures it proposed to take, as follows:

- a) to write to those individuals who received an abandoned call from the npower, [X] and [X] call centres on each of the dates that those call centres were responsible for the abandoned call rate exceeding 3% during the Relevant Period (namely 2 February, 5 February, 12 February, 16 February, 17 February, 12 March and 19 March 2011);

¹³¹ Page 30, August 2012 Representations.

¹³² Page 31, August 2012 Representations.

¹³³ Paragraph 9.6, August 2012 Representations.

- b) to provide to each recipient who received an abandoned call (as outlined above) a goodwill gesture of a £10 high street shopping voucher.

2.205 npower asked Ofcom, *“to note three important points concerning this proposal.”*¹³⁴

- a) npower *“would not propose to add any conditions or criteria requiring such individuals to demonstrate that they have actually suffered annoyance, inconvenience or anxiety”*;
- b) npower’s aim is to *“write rather than telephone relevant individuals recognising that in the circumstances, telephone contact may not be appropriate”*; and
- c) *“organising a cash or cheque payment arrangement may create inconvenience, complication or delay for the individuals concerned. A voucher arrangement is more widely adaptable to the circumstances of the range and number of individuals concerned.”*

2.206 npower added that *“notwithstanding that such arrangements are subject to a final decision that RWE npower has been responsible for persistent misuse in contravention of the Act, we are prepared to undertake immediate steps at our cost to identify and obtain details of the affected individuals in readiness for a communications and payment exercise. In the event that we cannot identify all affected individuals and obtain details sufficient for written contact, we will look at other means of encouraging those individuals to contact us.”*¹³⁵

Oral representations on the Provisional Notification

2.207 On 10 September 2012 npower made oral representations on the Provisional Notification to Ofcom. A transcript is at annex 25.

2.208 npower set out its views on compliance and stated *“we do take compliance extremely seriously within our organisation. It is extremely high on our agenda, on the whole board’s agenda. We do have a zero-tolerance approach to compliance. And we not only address compliance from a historic perspective, but we also have a programme of continual improvement in order to try and ensure that, if you like, we are better on a continuing basis.”* [36], Head of Compliance, also explained that npower has a zero tolerance approach to non-compliance and that it is seeking to continually improve. npower outlined the matters which it intended to make submissions on, as follows:

- whether enforcement action should be taken *“...we see two tests. We see the persistent misuse test. And then we see, separately and as a second test, the – what for want of a better term I will call – priority tests.”*;
- Other persistent misuse cases and *“...whether they were precedents for Ofcom taking enforcement action in this case”*;
- *“the deterrent effect of the publicity that’s already occurred”*, and
- *“finally we just want to pick up on a few other factors.”*

¹³⁴ Page 32, August 2012 Representations.

¹³⁵ Ibid.

- 2.209 npower submitted that there were two separate and distinct “tests” which it referred to as the “persistent misuse test” and the “priority test”. It argued that it did not satisfy either.
- 2.210 Referring to the first “test”, it stated that the question to be considered was: *“Has npower persistently misused an electronic communications network under section 128(6) of the Act by reason of the level of abandoned calls or the wording of the recorded message?’ In other words, do those amount to persistent misuse?”*
- 2.211 Referring to the second “test”, it stated that the question was: *“...whether enforcement action should be taken, even if there is a finding of persistent misuse.”*
- 2.212 npower submitted that its behaviour did not represent persistent misuse and that the persistent misuse test had not been passed. It stated *“We don’t think the provisional notification is right when it says, ‘The overall volume of live calls is only relevant to the calculation of the abandoned call rate. It is therefore irrelevant that the particular days on which 3% ACR was breached was on days that the overall volume of live calls was lower than usual.’ And particularly we refer to A1.84 of the statement of policy. And that says: ‘Other things being equal, the more people are affected by an act of misuse, the more likely it is that Ofcom will take action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action.”*
- 2.213 npower put forward its view that only the 24 hour periods where there was an abandoned call rate over 3% should be taken into account when assessing whether there was persistent misuse and so therefore only the four days at the [X] call centre where it exceeded 3% should be considered. It added *“So our contention is that an average of 232 abandoned calls per day for [X] on the four days out of an average number of calls per day of [X] – i.e. [X]% - is not a significant number and doesn’t justify a finding of persistent misuse.”*
- 2.214 npower submitted that even looking at matters on an aggregated basis, any misuse was not persistent *“...So even if you don’t accept the [X] only basis, and look at the aggregated level of eight 24 hour periods in which 3% was exceeded, then again we would contend that doesn’t amount to persistent misuse. And looking at the relevant numbers here, and again I’ll just highlight a few – those eight days were again days where the number of calls made were very low. The average number of calls per day was [X]% of the average number of calls that we were making. So we’re talking about, as I say, low call days on which the number was exceeded, the 3% number was exceeded. The total number of calls abandoned to live individuals on those eight days was 1,756.”*
- 2.215 It explained that *“The average number of calls per day over those eight days was [X]. The average number of calls, as I’ve said, on a normal day is [X]”. npower also argued that eight 24 hour periods out of the total number of one hundred and sixty two 24 hour periods during in the Relevant Period does not demonstrate persistent misuse, “...we’re looking at 4.9% - 8 over 162 – being the number of 24 hour periods, out of a total of 24 hour periods.”*
- 2.216 In npower’s view, these figures indicate that npower was generally compliant as *“...when we’re talking about 8 out of 162 instances of misuse, that also means 154 instances of absolutely no misuse and completely proper use. And so if you’re talking about a pattern of practice or behaviour, it seems to us clear which way, which side of the coin, the instances that we’re talking about fall on.”*

- 2.217 npower made submissions on whether the information message played by the npower call centre constituted, persistent misuse.
- 2.218 It queried the meaning of the reference to “marketing content” in the Guidelines. It stated, “*And that’s obviously difficult. And what does ‘not used as an opportunity to market the called person’ – what we say is that you’ve got to take account of the intention behind the message and you’ve got to take account of the effect of the message. So on intention: there was no financial gain; there was no intent to market on our part; and we simply, as I said, thought it best assisted customers to understand the nature of the call.*”
- 2.219 It stated that, “*...we’re sorry that you consider we were overzealous. But we were overzealous in trying to ensure that customers weren’t confused or concerned by our message. I mean, in good faith our intention was to be clear, not to cause anxiety – which obviously you’re concerned to prevent – that consumers shouldn’t have been worried about the reason behind a call from an energy company. Obviously, calls can be about a meter read, calls can be about arrears, calls can be about other issues. And we were concerned not to cause anxiety. And, as I say, if we have done anything wrong here it’s overzealousness in being concerned not to cause that anxiety. And given the absence of use of AMD by us, although obviously we could have used that technology – and so the absence of silent calls, we believe that the degree of harm is actually reduced by the clarity of the message, reinforced by the fact that we played the recorded message within two seconds of any abandoned call. So, again, all reducing the risk of anxiety.*”
- 2.220 npower highlighted that the Information Commissioner’s Office regards direct marketing as covering a wide range of activities including “*promoting the aims and ideals of an organisation.*”¹³⁶ It continued, “*And I think there’s quite a leap from providing an explanation for the reason for the call to then suggesting that that is promoting the aims and ideals of npower as an organisation. And we think that that element, that part of the message, does not fall within that meaning of what marketing is.*”
- 2.221 npower also noted that that it was only the npower call centre that included the additional wording; and that in its view this wording was intended to be helpful and this outweighed any harm caused by the message. npower stated that, “*...I think it’s also important to make the point, from our point of view, that we did include an information message ... and I think if you look at the benefits to consumers who received calls from us and this information message, the benefit of having that information message far, far outweighs what – we don’t believe there’s any harm anyway, but if you were to take the decision that there is harm in including that one sentence within our recorded message, we believe that benefit far, far outweighs any harm that might result from hearing that message.*”
- 2.222 npower also noted that the message was only played on 1,906 abandoned call messages; that it was only on a relatively small percentage of the total number of recorded messages; and of these only a small number of consumers (6.2%) would have listened to the full wording of the message before hanging up. It contended that,

¹³⁶ The Information Commissioner’s Office (ICO) website states: “*Section 11 of the Data Protection Act 1998 refers to direct marketing as ‘the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals. We [ICO] regard direct marketing as covering a wide range of activities that apply not just to the offer for sale of goods or services, but also to the promotion of an organisation’s aims or ideals’.*”

“...we actually think it would be grossly excessive for this to be classified as persistent misuse, or indeed to consider it as of sufficient priority to take enforcement action.”

- 2.223 npower explained that the wording of the message was intended to reduce anxiety and its drafting would have been led by the marketing team. It considered that the marketing team understood the risk for anxiety to be caused and would have sought to minimise it. npower observed that, *“... the retail business, as you say, has a lot of experience of trying to ensure that the message is clear and is as transparent as we can be. And I think that we would largely view that retail business as being expert in that area. And it would be true to say that this message was led by them. And indeed, you know, you can see – because it wasn’t in the others; this was more, if you like, npower specific. But it is – what I can assure you of is that it was led by them from a – I mean, I don’t know whether the right word is ‘compliance’, but led by them from a transparency perspective.”*
- 2.224 npower said in relation to its use of the line ‘to discuss potential savings’ that, *“And all the time you try to empathise to the customer’s position and would you feel if you got a call saying ‘I’m from npower, I’ve been trying to call you and I’ll ring again’. Your immediate reaction might be very negative. As opposed to, ‘I’m from npower and this is what I was calling about you about’.”*
- 2.225 npower also considered that the message in question complied with Ofcom’s Guidelines, *“I think it is fair to say as well that, given the content of the recorded message and given the requirements of your guidelines, it ticks the boxes. And all but for these 1,906 messages in which you allege there is marketing content, that doesn’t tick a box but then we didn’t think it was necessarily in breach of your guidelines anyway. So I think it’s clear that where the wording does come from are your own requirements.”*

Priority test

- 2.226 npower then went on to outline its arguments in relation to what it considers is a ‘priority test’ for further enforcement action. It argued that the construction of A1.12, A1.82 and A1.83 of the Guidelines does not support further enforcement action. npower stated that, *“The statement of policy says in A1.12: ‘This section sets out Ofcom’s approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.’ So it doesn’t say, ‘This section sets out Ofcom’s approach for assessing whether there’s been persistent misuse’. It says, ‘Sets out Ofcom’s approach when assessing whether to take enforcement action for persistent misuse’. In other words, it’s accepted in A1.12 that persistent misuse has happened but it doesn’t mean that enforcement action has to be taken; you have to look at the second element. That’s the only construction, I think, of A1.12.”*
- 2.227 To support its argument npower also quoted A1.13 of the Guidelines, *“In deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment.”* It also drew attention to sections 3(3) and 6(1) of the Act which refer to *“the need for action to be proportionate and not involving the imposition of burdens which are unnecessary.”*
- 2.228 npower argued that the construction of A1.82 and A1.83 does not support further action:

- *“And, again, A1.82 which I think makes it clear that there are two tests, as does A1.12, and says, “Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person’s use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities.” It then goes to say, “We believe that the ‘persistent misuse’ powers are primarily about protecting consumers and that the more likely a particular form of misuse is to cause harm by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action.” So again it seems to me clear there are two tests. It’s not saying persistent misuse is the test; it’s saying persistent misuse and then you have to decide whether it is of such priority as to require enforcement action to be taken.*
- *A1.82 then goes on to say, “In general terms misuse and the harm it causes the public may be prioritised in three ways.” The third way is not relevant in this case but the first two are, in A1.83, where it talks about: “First, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI. This could be described as the qualitative test.” There’s no silent calls in our case and perhaps we were bending over backwards to limit any risk of annoyance or inconvenience. And then it says, and I referred to this already, in A1.84: “Second, there is the scale or amount of the misuse.” And then the quote I gave you before, “Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.”*

2.229 npower argued that there was no evidence from its own complaints that its abandoned calls had caused harm or annoyance and stated that *“... in terms of causing annoyance, I mean it is true to say that we haven’t received any complaints. There have been no allegations made against us that these calls have caused anybody any annoyance or any inconvenience.”* npower also referred to the complaints received by Ofcom and pointed to the reduction in the number of complaints as demonstrating that there is no evidence of significant harm, *“... I think you’re also continuing to receive complaints, although on a very much reduced level than was originally the case when you sent us your section 128 notification”*.

2.230 npower argued that the circumstances of the case had changed since the section 128 was issued and that this should be taken into account when considering enforcement action under section 129 and 130: *“So what we say is that the section 128 notification has been issued. Since then, or since it was issued, the premise on which it was issued has changed substantially. And we believe that that needs to be taken into account in looking at whether enforcement action should be taken.”*

2.231 npower also drew attention to the statement at A1.86 of the Guidelines to support its view that no further action should be taken, *“In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will consider observance with the policy criteria set out in A1.12 to A1.58.”* It noted that it was compliant with all other elements of the Guidelines. Guy Johnson also referred to Lynn Parker’s letter of 6 September 2012, which recognised that, *“... Ofcom needn’t take any more enforcement action.”*

2.232 npower summarised its position by stating that, “... we contend that 927 abandoned calls for [§<], or even 1,756 calls on an aggregated basis, we contend that four 24-hour periods for [§<] or eight 24-hour periods if you were looking at it on an aggregated basis – we contend that 1,906 recorded messages containing the alleged marketing message, on 6.2% of all abandoned call recorded messages, don’t satisfy any test of regulatory priority required for further enforcement action.”

Precedents

2.233 At the oral hearing npower provided a table setting out earlier persistent misuse precedents.¹³⁷ npower referred to the table to support its contention that the statistics in the npower case and those from earlier cases do not support further enforcement action or a finding of persistent misuse. npower used its table to demonstrate that, “On all cases where Ofcom has taken action before, it has done so in scenarios where the numbers are massively different from npower’s numbers, never mind the fact that in an awful lot of these cases there were further aggravating factors as well.”

2.234 npower argued that, “... looking at the precedents in relation to both tests, that’s the tests as to whether there is persistent misuse and then the test as to whether enforcement action should be taken, there appears to us to be a clear distinction taking into account the numbers of abandoned calls, the proportion of abandoned calls above 3% across all calls and the additional compliance breaches involved in those other cases.”

2.235 npower contended that it is not clear that there is a pattern of behaviour or practice involving misuse on its part. It argued that its position can be contrasted with the cases where, “companies just haven’t been concerned about abandoned call rates ... what you have with us is the vast majority of the days in the relevant period where we were compliant.”

Deterrent effect

2.236 npower raised the issue of negative press coverage and in particular noted the appearance on Radio 4’s ‘The Today Programme’ of its chief executive, where npower was asked about making annoying sales and silent calls. npower considered that, “... anybody who heard that, whether it be npower or whether it be external, would understand the importance of not getting a section 128 notification. You don’t need any more deterrent effect than that.”

2.237 npower voiced its concerns over the deterrent effects and argued that the widespread media coverage resulting from the section 128 notification meant that, “there has been a massive deterrent effect as a result, not just for us but for the wider companies who are subject to these obligations.” It also argued that, “... the clear impression is that we’ve been tried and convicted. And that’s obviously not the case.”

2.238 npower raised concerns about the negative impact on its business of enforcement action and stated that, “... any enforcement action here is just hugely, hugely damaging for our business. I mean, that’s not a reason. You’ve obviously got to make your decision. But the level of coverage that we will get, were there to be a finding, will be massive.”

2.239 npower set out its wish that no further action be taken and that no further publicity be generated in this case. It noted that, “If there is absolutely no further coverage about

¹³⁷ Annex 26, npower table of precedents.

this, that is what we're seeking. If somebody asks, in due course, 'what about that investigation?' and we give the answer 'a section 128 notification was issued against us but nothing further happened in relation to it or no further action was taken' or whatever, then that's fine; we have no problem with that. And in fact, in many ways, any publicity on this is bad publicity."

Remedy

- 2.240 npower explained, how, if it was found to be non-compliant, it would remedy the consequences of the non-compliance. It noted that it would write to all those people who received abandoned calls on the eight days (or 4 depending on Ofcom's decision); and send them a £10 shopping voucher "*because we think that's a better way – and, again, that's our experience – rather than sending £10 in cash or post office vouchers or cheque or whatever may be appropriate.*" It also explained its rationale for choosing a value of £10 for the voucher and stated, "*... what we've done here is we've looked at what might be right. We were conscious that CCM did £5 which was the only other example I've seen of abandoned call payment. I know Homeserve did £10 and that was silent calls. But we sort of thought, you know, maybe time's moved on, but it didn't sound quite right. So we would make a payment of £10 through vouchers, as we've said.*"
- 2.241 npower confirmed that payment of the voucher would be conditional on the finding of a breach. It stated, "*I think that our feeling is that the effect of – you know, what is so important to this business is the effect of an adverse finding ... If we were to do it and you hadn't made a finding, then it might almost be like a finding. And there are definitely some journalists out there who would seize on it.*"¹³⁸

Other issues

- 2.242 npower provided some additional clarity on the timing of the internal audit at [X] and its compliance monitoring programme at outsourced call centres (at least four times per year). It explained that an internal audit of [X] had been scheduled for later in the year but because of Ofcom's investigation this was brought forward to coincide with the compliance audit. As a result, it established that data had been manipulated possibly 4-5 months earlier than would have been the case.

¹³⁸ On this point, npower also stated "*we very much hope that the right conclusion is that it doesn't need to be done and a finding is of no further action. But if the only basis on which you could find no enforcement action is if we did that, then we would do that.*" And that "*...If you were minded only to find that were we to communicate with customers who had the abandoned calls on the relevant days, then we would do that communication to our customers. We believe that the right finding is no enforcement action and therefore no need for that communication to take place. That's our point. But without prejudice to that point, were you to find that you could only conclude that no further enforcement action should be taken by you were we to write to our customers in the way that we've suggested, then we will do that.*"

However, for the avoidance of doubt npower confirmed in the August 2012 Representations at paragraph 9.6 that if found in breach the remedial steps referred to will be fully executed: "*Any requirement to take remedial steps is based on a finding that RWEpower is in breach of the Act and has engaged in persistent misuse. RWEpower's views that persistent misuse has not been shown to have occurred are set out in these Representations and those made in the oral hearing on 10 September.*"

Closing comments

- 2.243 npower used its closing comments to summarise its position. npower stated the following, *“I suppose our fundamental – and obviously we’re here today, the reason we’re here today – is because compliance is so important to us. But, I mean, our view is just we don’t belong in this club. We’re not comparable with this club in terms of our volumes, our patterns, the consumer detriment. And, you know, the difference between what one might infer from this, which is a disregard for compliance, and our position. And our position, we believe, is so very different and doesn’t lead to any suggestion of persistent misuse or it having the priority for enforcement action to be taken.”*
- 2.244 It continued: *“... we think the right finding is that we don’t belong in this club. If you were minded only to find that were we to communicate with customers who had the abandoned calls on the relevant days, then we would do that communication to our customers. We believe that the right finding is no enforcement action and therefore no need for that communication to take place. That’s our point. But without prejudice to that point, were you to find that you could only conclude that no further enforcement action should be taken by you were we to write to our customers in the way that we’ve suggested, then we will do that.”*

Section 3

Ofcom's decision to impose a penalty

- 3.1 The following section sets out Ofcom's decision to impose a penalty on npower under section 130 of the Act and Ofcom's decision not to impose a notification under section 129 of the Act.
- 3.2 Ofcom's options were:
- (a) taking no further action;
 - (b) issuing a notification under section 129 of the Act; and
 - (c) imposing a penalty on npower under section 130 of the Act, additionally to, or instead of, a notification under section 129.

Ofcom's approach

- 3.3 Ofcom considers each case on its merits. Our approach to enforcing compliance with the persistent misuse provisions contained in the Act and the principles set out in the Guidelines is as follows.
- 3.4 The purpose of imposing a penalty is set out in Ofcom's Penalty Guidelines:
- "The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement."*
- 3.5 The imposition of an appropriate and proportionate punishment (penalty) for wrongful conduct including, in appropriate cases, an element designed to have a proportionate deterrent effect, and the threat of such punishment (penalty) in future cases, should provide an incentive for compliance, and a corresponding deterrent to non-compliance. This helps to secure Ofcom's objective of furthering the interests of citizens and consumers by helping to foster widespread compliance with legislation and regulatory rules.
- 3.6 Not taking action where it is appropriate and proportionate risks undermining not only the persistent misuse provisions but also the entire regulatory regime. It would mean that Ofcom was not providing appropriate incentive to compliance and deterrent to non-compliance.
- 3.7 Ofcom has considered the options available to us in the present case, in light of the above, in line with our statutory duties and powers. Having done so, we take the view that a penalty should be imposed on npower for the reasons we set out.

No further action

- 3.8 This option would be available to Ofcom if it were to determine that npower had not, in one or more the notified respects, persistently misused an electronic communications network or electronic communications service during the Relevant Period.

3.9 The section 128 notification which was based on the information npower provided in its response to the First Information Request (and which information was subsequently discovered to be erroneous), set out that Ofcom had reasonable grounds to believe that npower had persistently misused an electronic communications network or service, by exceeding the abandoned call rate of three percent of live calls over a 24 hour period on 13 separate occasions during the Relevant Period and had included marketing content within an information message played in the event of an abandoned call during the Relevant Period.

3.10 Representations and responses to information requests provided since the section 128 notification issued have subsequently confirmed that that there were 8 separate 24 hour periods where the abandoned call rate exceeded three percent of live calls over a 24 hour period per call centre (i.e. across campaigns) during the Relevant Period rather than 13 occasions as set out in the section 128 notification.

3.11 On the basis of the revised evidence obtained during the investigation, including npower's response to information requests, together with consideration of npower's representations¹³⁹, and correspondence, Ofcom now has determined that npower has, in one or more of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period as:

- it generated 1,756 abandoned calls, exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre across campaigns basis (Table 5); and
- during 1,906 abandoned calls, it played an information message which contained marketing content.

3.12 Table 5 below summarises the occasions where the ACR on a per call centre/across campaigns basis exceeded the 3% threshold. For the reasons set out in paragraphs 3.14 to 3.19, the ACR percentages presented in Table 5 are different to those presented in Table 2 in respect of [redacted] and in Table 5 the [redacted] call centre does not feature as its ACR percentage was below the 3% threshold.

Table5: Abandoned call rates above 3%, per call centre / across campaigns

	Call Centre	Date	Campaigns	Live calls to a live operator	Unadjusted abandoned calls	Reasoned estimate of calls abandoned to answer machines	Adjusted abandoned calls	ACR %
1	npower	2-Feb	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	3.89
2	npower	17-Feb	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	4.97
3	[redacted]	5-Feb	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	4.31
4	[redacted]	12-Feb	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	3.48

¹³⁹ The August 2011 Representations, the December 2011 Representations, the May 2012 Representations, the August 2012 Representations, and the Oral Representations.

5	[redacted]	12-Mar	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	5.76
6	[redacted]	19-Mar	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	6.94
7	[redacted]	16-Feb	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	4.03
8	[redacted]	12-Mar	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	4.57
TOTALS			[redacted]	[redacted]	[redacted]	[redacted]	1,756	

3.13 We discuss calculation of the abandoned call rate in the paragraphs below.

Calculation of the abandoned call rate (“ACR”)

3.14 The Guidelines¹⁴⁰ state that the abandoned call rate can be calculated excluding a reasoned estimate of calls abandoned to answer machines; npower’s estimate of its abandoned call rate takes into account this exclusion and was performed in the following way which is consistent with the example given in paragraph A1.50 of the Guidelines:

- a) Firstly, npower calculated the reasoned estimate of calls abandoned to answering machines. npower calculated this by determining the percentage of answer machine calls which were passed to a live operator and multiplied the unadjusted abandoned calls total by this percentage;
- b) Secondly, npower calculated the total number of abandoned calls net of calls abandoned to answer machines. It calculated this by subtracting the estimate of calls abandoned to answer machines from the unadjusted abandoned calls total; and
- c) Thirdly, npower calculated the ACR. This was calculated by dividing the total number of abandoned calls by the sum of total abandoned calls plus the number of live calls to a live operator.

3.15 The Guidelines state that the ACR shall be no more than three percent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period¹⁴¹. In order to assess npower’s compliance with the Guidelines we therefore may look at calculations of the ACR on either a per call centre (i.e. across campaigns) or per campaign (i.e. across call centres) basis.

3.16 npower had provided calculations of the ACR on the above two bases as well as on a more disaggregated basis (i.e. per call centre/per individual campaign, Table 1, Section 2). We noticed however that npower’s calculation of the ACR is not consistent between these different bases, i.e. its calculations of the ACR at a more aggregated level such as the per call centre/across campaigns basis cannot be reconciled with its calculations at the more disaggregated level of per call centre/individual campaigns.

3.17 For example, this inconsistency can be seen in Table 6 which shows data provided by npower for the [redacted] call centre on 19 March 2011. Table 6 shows that npower’s

¹⁴⁰ Paragraph A1.49, the Guidelines.

¹⁴¹ Paragraph A1.30 of the Guidelines

estimate of the ACR for [X] on the more aggregated call centre/across campaigns basis is 3.04%, but this is greater than the ACR of 2.80% implied by the per call centre/individual campaign disaggregated data.

- 3.18 This difference in ACR is caused by npower's estimates of the number of calls abandoned to answer machines, which as explained previously, it can exclude from the figure of total abandoned calls when calculating the ACR. In the example of [X], npower's estimate of the total number of calls abandoned to answer machines at a disaggregated per call centre/individual campaigns level is 98 ([X]) but its estimate at an aggregated call centre/across campaigns level is 83.
- 3.19 We consider that the figure of 98 is a more accurate estimate of the number of calls abandoned to answer machines at an aggregated call centre/across campaigns level because it takes into account the fact that the proportion of calls abandoned to answer machines differs between campaigns. In [X] for example, the proportion of calls abandoned to answer machines was 39% for "[X]" and 18% for "[X]".

Table 6: Analysis of calculation of ACR for [X] call centre on 19 March 2011

[X]

Note: The figure of 4.75% for [X] campaign is the same as that shown in Table 1, Section 2; the figure of 3.04% is the same as that shown in Table 2, Section 2. Table 2 is an aggregation of the data across individual campaigns run by each call centre. This table shows that [X] made calls across [X] campaigns on 19 March which have been added up to derive the totals on a call centre/across campaigns basis.

- 3.20 Our assessment of npower's compliance with the Guidelines has therefore been carried out using data consistent with the disaggregated data at a call centre/individual campaign level provided by npower. This means that our calculations of the ACR on the aggregated per call centre/across campaigns (reported in Table 5) and per campaign/across call centres bases differ slightly from the calculations provided by npower. The main impact of this is that our estimate of the ACR for the [X] call centre across campaigns (2.80%) is below the 3 percent threshold compared to npower's calculation (3.04%) which is above it. There are also small differences between our calculations for [X] but none of these differences are large enough to switch the ACR from above 3% using npower's calculations to below 3% using Ofcom's.
- 3.21 Consequently, there were 8 separate occasions where an abandoned call rate of three percent of live calls was exceeded over a 24 hour period on a per call centre (i.e. across campaigns) basis:
- a) two occasions on which the 3 percent abandoned call rate was exceeded for npower's in-house call centre (2 February and 17 February);
 - b) two occasions on which the 3 percent abandoned call rate was exceeded for [X] (16 February and 12 March); and
 - c) four occasions on which the 3 percent abandoned call rate was exceeded for [X] (5 February, 12 February, 12 March and 19 March).
- 3.22 We are of the view that making 1,756 abandoned calls on a per call centre (i.e. across campaigns) basis where an abandoned call rate exceeded three percent of live calls over a 24 hour period and playing information messages containing

marketing content on 1,906 abandoned calls, is persistent misuse, as the misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice. Therefore, our view is that npower has persistently misused a communications network or service and that it is appropriate to take further action.

- 3.23 We have assessed the points raised in npower's representations and information requests in the next section.

Issuing a notification under section 129 of the Act

- 3.24 The following is Ofcom's consideration of whether any further enforcement action should involve serving on npower a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.
- 3.25 In order to issue a notification under section 129 of the Act, Ofcom must be satisfied that: the notified misuser has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; that he has not, since the giving of the notification taken all such steps as Ofcom consider appropriate for securing that his misuse is brought to an end and not repeated; and that he has not remedied the consequences of the notified misuse.¹⁴²
- 3.26 As noted above, Ofcom considers that npower has in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service. However, having considered the representations made by npower, together with assessing the complaint levels following the issuance of the section 128 notification, Ofcom is of the view that npower has taken all such steps as we consider appropriate for securing that its notified misuse has been brought to an end and not repeated.
- 3.27 We consider that appropriate steps were taken by npower for securing that its persistent misuse contravention was brought to an end and not repeated, based on the following:
- (a) Ofcom's CCT team reported a reduction in the number of complaints received alleging that npower or parties acting for or on its behalf generated abandoned and/or silent calls (a total of [X] were received in a six month period from 11 July 2011 to 18 January 2012 as compared to [X] during the seven week Relevant Period)¹⁴³; and
 - (b) the measures taken by npower (described in detail in Sections 2 and 4) including:
 - an ability to "preview dial" records in the event of an abandoned call to guarantee the presence of a live agent as an additional option to permanent suppression or 72 hour suppression;

¹⁴² Section 129(2) of the Act.

¹⁴³ Complainants to Ofcom's CCT may have referred to the calls they received as "silent" when they would more accurately be described as "abandoned" and therefore references to complaints to the CCT in respect of silent calls in the section 128 notification should be construed as complaints in respect of silent and/or abandoned calls.

- the ending of the practice of breaks being team based and instead spreading them evenly amongst agents to ensure fewer large swings in the size of the agent pool;
- a reduction in the amount of time spent by agents logged out performing administrative tasks and customer call-backs;
- implementation of 90 percent adherence to agent availability targets to software configured schedules with a target of 95 percent by November 2011;
- a clear management process for managing agents' adherence to schedules to reduce swings in resource availability;
- increased the minimum number of agents from 10 to 15 for which npower would plan a predictive dialling mode campaign to operate. For any periods where the staff levels fall below this, the dialler will be turned to 'preview dial' generating calls from the agent;
- removal of the lines "*to discuss potential savings on your energy bills*" and "*latest offers*" from the abandoned call messages;
- further staggering of agent breaks;
- alignment of shift patterns so that agents work the same shift to avoid rotational coverage and the potential for operating with fewer staff at certain times of the day;
- recruitment of an additional dialler analyst for npower's in-house operation to ensure dialler monitored at all times of the day;
- real time analysis of in-house operations, including abandonment rates, agent behaviours and pace setting with clear evidence of actions being taken to resolve abandonment rates above three percent. Logs published on a daily basis to give visibility on abandonment rates;
- introduction of a process in outsourced telemarketing to provide a daily feed (within the day) of abandonment rates as per the template used for npower's response to Ofcom's information request and providers will need to evidence actions taken to resolve potential breaches;
- internal audit of its compliance procedures and an agreed action plan;
- action to terminate all contracts under which [X] provides telesales services to npower; and
- action to terminate its contracts with [X] and [X].

3.28 In respect as to whether npower has taken all such steps as we consider appropriate for remedying the consequences of the notified misuse, we make the following comments.

3.29 Section 129(7) of the Act provides:

(7) References in this section to remedying the consequences of misuse include references to paying an amount to a person –

(a) by way of compensation for loss or damage suffered by that person; or

(b) in respect of annoyance, inconvenience or anxiety to which he has been put.

3.30 In relation to remedial steps, the August 2011 Representations stated that:

- a) *“...in order to remedy the consequences of misuse, should any exist, a misuser may be required to pay the person who has suffered the effects of misuse an appropriate sum of money by way of compensation.”*
- b) it has procedures in place to address complaints and its recorded messages provide a telephone number for a person affected by an abandoned call to ring so that they are, *“therefore able to raise a complaint at this time or to contact npower via our customer services number which is available via directory enquiries or our website, or to raise a specific complaint via our other contact points also mentioned on our website.”*
- c) npower has, *“...a policy of awarding compensation in appropriate circumstances. We would, consistent with this policy, naturally consider compensation for persons receiving abandoned calls.”*
- d) npower requested details of complainants who made complaints to the CCT in order to address those complaints. It argued that, *“Our offer was not taken up by Ofcom and no information has been provided and so we have not been able to take remedial action. We believe our requests further demonstrate our willingness to take appropriate action to remedy the consequences of any contravention.”*¹⁴⁴

3.31 Without prejudice to its view that persistent misuse had not been shown, in its August 2012 Representations, npower proposed certain steps it would take *“should the findings in the Provisional Notification be upheld”*. These included:

- a) *“RWEnpower proposes to write to those individuals who received an abandoned call from the npower, [X] and [X] call centres on each of the dates that those call centres were responsible for the abandoned call rate exceeding 3% during the Relevant Period (namely 2 February 2011, 5 February 2011, 12 February 2011, 16 February 2011, 17 February 2011, 12 March 2011 and 19 March 2011)”*¹⁴⁵;
- b) *“We propose to provide each recipient a goodwill gesture of a £10 high street shopping voucher”*¹⁴⁶; and
- c) *“In the event that we cannot identify all affected individuals and obtain details sufficient for written contact, it will look at other means of encouraging those individuals to contact us”*.¹⁴⁷

¹⁴⁴Paragraph 3.24, August 2011 Representations.

¹⁴⁵ The August 2012 Representations, paragraph 9.7.

¹⁴⁶ The August 2012 Representations, paragraph 9.7.

¹⁴⁷ The August 2012 Representations, paragraph 9.8.

- 3.32 In the Oral Representations, npower advised that it had commenced the process of identifying the individuals who would have received an abandoned call on those occasions where an ACR of 3% was exceeded.
- 3.33 As set out in further detail in Section 4 of this Notification, Ofcom, following consideration of npower's representations, has determined that npower has committed to put in place all such appropriate steps to remedy the consequences of the notified misuse. While npower has not actually implemented the steps outlined above, we expect it to follow through on this commitment to remedy the consequences of its persistent misuse in a timely manner following the issuance of this notification.
- 3.34 Our view is that npower has taken such steps as we consider appropriate to secure that its misuse was brought to an end and not repeated; and has committed to take such steps as we consider appropriate to remedy the consequences of the notified misuse.
- 3.35 Following npower's representations, we consider that serving such a notification under section 129 would be a disproportionate regulatory intervention in this case.
- 3.36 In taking the above position, we have also considered a previous persistent misuse case where a section 129 (and section 130) notification was issued. This case concerned an investigation into Ultimate Credit Services Limited ("UCS") in 2007.¹⁴⁸
- 3.37 The UCS case can be distinguished from the present case as UCS continued to contravene the persistent misuse provisions *after* the section 128 notification had been issued and therefore it did not take appropriate steps to end its contravention.
- 3.38 Ofcom's has concluded that it will not in this case, issue a notification under section 129 of the Act to npower.

Further enforcement action: imposing a penalty under section 130 of the Act

- 3.39 The following is Ofcom's consideration of whether any further enforcement action should involve imposing on npower a penalty under section 130 of the Act. Ofcom's decision is that we should do so for the following reasons.
- 3.40 Ofcom may impose a penalty, as provided under section 130 of the Act, in circumstances, where-

"...

- (a) a person ("the notified misuser") has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and

¹⁴⁸ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

- (c) the period allowed for the making of the representations has expired.”¹⁴⁹

3.41 Under section 130(2) of the Act:

“Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services”.

3.42 As previously set out, Ofcom served a section 128 notification on npower on 6 July 2011. We allowed npower the opportunity of making representations on the matters notified.

3.43 On 10 August 2011 npower submitted its representations on the matters notified (the August 2011 Representations). Then, on 2 December 2011 it submitted further representations (the December 2011 Representations) and again on 3 May 2012 (the May 2011 representations). npower submitted representations on 31 August 2012 in response to the Provisional Notification issued to it on 31 August 2012 and attended an oral hearing on 10 September 2012.

3.44 npower provided corrected data to Ofcom on two occasions (the August 2011 data and the October 2011 data) after previous data furnished by npower was found to be erroneous. As a consequence of the multiple revisions to data supplied, Ofcom was required to issue a total of four section 135 information requests. The Second, the Third and the Fourth Information Requests were necessitated by the need to obtain accurate data upon which to carry out our analysis of npower’s compliance.

3.45 As set out in this document, and having taken account of npower’s representations and responses to section 135 information requests, Ofcom is satisfied that npower persistently misused an electronic communications network or electronic communications service as it:

- a) generated 1,756 abandoned calls as a result of exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre across campaigns basis; and
- b) included marketing content within an information message played in the event of 1,906 abandoned calls during the Relevant Period.

3.46 On this basis, npower is liable to the imposition of a penalty under section 130 of the Act and in our view we should impose a penalty on npower.

3.47 We consider that the imposition of a penalty would help to secure Ofcom’s objective of furthering the interests of citizens and consumers by helping to foster widespread compliance with legislation and regulatory rules, and be proportionate and targeted in this case.

3.48 Following consideration of the evidence including npower’ representations (our assessment of these is in section 4), we are of the view that npower’s notified misuse is serious and that it is necessary and appropriate to impose a penalty on it so as to give npower and other companies sufficient incentive to comply with the persistent misuse provisions of the Act, and to follow the requirements set out in the

¹⁴⁹ Section 130(1) of the Act.

Guidelines, and to deter non-compliance, thereby protecting and furthering the interests of citizens and consumers.

3.49 Accordingly, we have decided to impose a penalty in this case under section 130 of the Act.

3.50 The following section sets out Ofcom's determination of the penalty amount, which includes taking account of:

- (a) any representations made by npower;
- (b) any steps taken by npower for securing that the notified misuse was brought to an end and not repeated;
- (c) any steps taken by npower for remedying the consequences of the notified misuse;
- (d) the Guidelines; and
- (e) the Penalty Guidelines.

Section 4

Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of any penalty imposed on npower. It explains why we consider, a penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, it explains the regard we have had in reaching that view to:
- a) the increased maximum level of penalty under the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291;
 - b) the representations npower has made to us;
 - c) steps taken by npower for securing that the misuse is brought to an end and not repeated;
 - d) steps taken by npower for remedying the consequences of the notified misuse;
 - e) the Guidelines; and
 - f) the Penalty Guidelines.

Legal framework

- 4.2 Ofcom may impose a penalty if a person notified under section 128 of the Act has persistently misused an electronic communications network or an electronic communications service. The applicable legal framework is set out in detail in section 2 of this document.
- 4.3 Sections 130(4) and 130(5) of the Act set out the maximum level of penalty that Ofcom may impose and the factors that Ofcom must have regard to when setting the level of the penalty.
- 4.4 The maximum level of penalty was increased following an order made by the Secretary of State under section 130(9) of the Act.¹⁵⁰ The maximum level of penalty is now £2 million.
- 4.5 The upward revision of the maximum penalty followed a consultation by the Department of Business, Innovation and Skills ("BIS") entitled, "Raising the maximum penalty for the persistent misuse of an electronic communications network or service, 2009."¹⁵¹ After consideration of 137 responses, the Government decided to proceed to increase the maximum penalty from £50,000 to £2 million to, "*broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current level failed to reflect the harm that was caused to consumers by silent and abandoned*

¹⁵⁰ [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

¹⁵¹ <http://www.bis.gov.uk/Consultations/maximum-penalty-for-misuse-of-an-electronic-comms-network>

calls and this feeling was particularly strong where respondents had received calls and tried various methods to combat the problem.”¹⁵²

4.6 This increased penalty was, “*designed to act as a stronger deterrent to potential offenders of persistent misuse, which includes a range of behaviours including silent and abandoned calls.*”¹⁵³ In its impact assessment on the matter, the Government stated, “*the objective of the policy proposal is to minimise the number of silent and abandoned calls, which lead to anxiety and distress. To do that, full compliance with the current legislation needs to be incentivised by increasing the level of penalty that is applied to offending businesses. The current maximum penalty of £50,000 may be too low to act as an effective deterrent for companies where the productivity gains achievable by using predictive dialling technologies are very large.*”¹⁵⁴

4.7 The Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291 was enacted and consequently, Ofcom may now impose a penalty of up to £2 million.

4.8 Section 130 states:

“...

(4) The amount of a penalty imposed is to be such amount not exceeding £2,000,000 as OFCOM determine to be-

(a) appropriate; and

(b) proportionate to the misuse in respect of which it is imposed.

(5) In making that determination OFCOM must have regard to-

(a) any representations made to them by the notified misuser;

(b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and

(c) any steps taken by him for remedying the consequences of the notified misuse.”

4.9 As previously noted, in accordance with section 392 of the Act, Ofcom prepared and published a statement containing the guidelines it follows in determining the amount of penalties imposed by it under the provisions of the Act or any other enactment apart from the Competition Act 1998 (the Penalty Guidelines¹⁵⁵). By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in

¹⁵² Explanatory Memorandum to the Communications Act 2003 (Maximum penalty for persistent misuse of network or service) Order 2010, page 2:

http://www.legislation.gov.uk/uksi/2010/2291/pdfs/uksiem_20102291_en.pdf

¹⁵³ Explanatory Memorandum to the Communications Act 2003 (Maximum penalty for persistent misuse of network or service) Order 2010, page 1:

http://www.legislation.gov.uk/uksi/2010/2291/pdfs/uksiem_20102291_en.pdf

¹⁵⁴ http://www.legislation.gov.uk/uksi/2010/2291/pdfs/uksiem_20102291_en.pdf, page 5.

¹⁵⁵ Annex 3, Ofcom Penalty Guidelines, June 2011.

force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the Guidelines.¹⁵⁶

- 4.10 The effect of section 130 is that Ofcom may impose a penalty on npower that it considers to be appropriate and proportionate to the persistent misuse.
- 4.11 In taking a view as to the amount of the appropriate and proportionate penalty that may be imposed on npower, we must have regard to the representations so far made to us by npower. Likewise, we must have regard to any steps npower has taken to secure its misuse was brought to an end and not repeated; and any steps taken for remedying the consequences of its contravention. And, we must have regard to our Guidelines and Penalty Guidelines.
- 4.12 The maximum amount of any penalty we may impose on npower is £2,000,000 for the Relevant Period.
- 4.13 Ofcom sets out below its application of the issues relevant to the factors identified in paragraph 4.11 above.

The penalty guidelines and relevant factors

- 4.14 The particular factors we have considered in our determination of the penalty amount, including those in the Penalty Guidelines, are set out below.
- 4.15 Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty.
- 4.16 The particular factors we have considered are:¹⁵⁷
- a) that *“The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, giving regard to the seriousness of the infringement,”*
 - b) the following which appear to us to be relevant in this case in determining an appropriate penalty, that secures the objectives and purposes referred to, and is proportionate to the contravention in respect of which it is imposed:
 - i. *“the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants”;*
 - ii. *“the duration of the contravention”;*
 - iii. *“any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention”;*
 - iv. *“any steps taken for remedying the consequences of the contravention”*
 - v. *“whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties”;*

¹⁵⁶ Annex 2, the Guidelines, Annex 1, A1.100 to A1.104.

¹⁵⁷ Annex 3, Ofcom Penalty Guidelines, <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

- vi. *“whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention”*;
- vii. *“the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur”*;
- viii. *“whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it”*; and
- ix. *“the extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body”*.

4.17 We have also had regard to the Guidelines, representations made by npower, relevant precedents set by previous cases, and to the need for transparency in applying the Penalty Guidelines, particularly as regards the weighting of the factors considered in making our determination. Likewise to the level of co-operation npower has given to Ofcom’s investigation.

Deterrence and seriousness of the contravention

4.18 Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety.¹⁵⁸

4.19 Harm caused by abandoned and silent calls maybe compounded when individuals receive a number of calls over a short period of time. Section 128 of the Act provides Ofcom with enforcement powers so that it may take action to protect consumers and citizens from harm resulting from persistent misuse of an electronic communications network or an electronic communications service.

4.20 Deterrence is one key consideration, in our determination of the appropriate amount of any penalty. Another consideration, particularly in light of the requirement of proportionality, is the need for the penalty to reflect the seriousness of the contravention. Ofcom is mindful of the need to strike a fair balance between those considerations.

4.21 In this regard, Ofcom considers that, whilst, there should be a relationship between the size and seriousness of npower’s contravention and the amount of the penalty, this is not necessarily a linear relationship. Some factors weigh more heavily than others in Ofcom’s determination, as set out in this document.

4.22 These points ensure that:

- a) the penalty both appropriately and proportionately penalises npower’s contravention notified to it in the section 128 notification; and
- b) creates an appropriate and proportionate deterrent effect for both npower and other companies using an electronic communications network or electronic communications service.

4.23 In its August 2012 Representations, npower submitted that:

¹⁵⁸ Annex 2, the Guidelines, Section 1, paragraph 1.6.

- the section 128 notification referred to [§<] complaints made to Ofcom's CCT "from consumers alleging that they had received silent calls from npower or from numbers related to npower..." The Guidelines state at paragraph 1.14 that "the majority of repeat silent calls are caused by inaccuracies in AMD technology". As npower "has taken the specific decision not to use AMD...it seems as though the original investigation and s. 128 notification may have been based on the false premise that silent calls were being made."; and
- "the situation is now very different from that which existed when Ofcom issued its Notification under section 128 of the Act on 6th July 2011. That notification was based on the data that npower had submitted before the Notification and which included calls to answer machines. RWE npower has now made the position clear and this results in a huge reduction in abandoned calls."¹⁵⁹

4.24 Ofcom uses data on complaints received by the Ofcom CCT to consider whether investigation and enforcement actions are appropriate and if so, in respect of which companies. As part of this review of complaints, Ofcom noted an increase in complaints regarding silent and/or abandoned calls allegedly being generated by or on behalf of npower. However, it should be noted that, complaints made to the CCT at Ofcom are only indicative of potential non-compliance by a party, as, for example, complainants may misdescribe the type of persistent misuse and not all recipients of silent and/or abandoned calls lodge complaints with Ofcom's CCT. Therefore complaints to the CCT are treated by Ofcom as indicators of potential non-compliance and are not relied on as evidence of non-compliance for the purposes of imposing a penalty.

4.25 Following further investigation after the section 128 notification issued on 6 July 2011 and based on the revised evidence as corrected by npower, we consider that npower contravened section 128 and Ofcom may impose a penalty for its contravention during the Relevant Period. This contravention involved:

- a) generating 1,756 abandoned calls as a result of exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre across campaigns basis; and
- b) including marketing content within the information message played in the event of an abandoned call by npower's in-house call centre, which was played during 1,906 calls made in the Relevant Period¹⁶⁰.

4.26 As a result of the above view, our decision is that it is appropriate and proportionate to impose a penalty that will help provide npower, and others, with an effective incentive to comply with the Act and the Guidelines, with the object of deterring non-compliance in order to protect citizens' and consumers' interests.

4.27 In reaching our view in respect of the imposition of a penalty, we have noted, and taken account of npower's representations, including its submissions in respect of adverse publicity, including that:

- "... when considering the level of any penalty as a deterrent, Ofcom should also consider the consequences of Ofcom's public act of issuing the

¹⁵⁹ Paragraph 8.3, the August 2012 Representations.

¹⁶⁰ This figure has been arrived at following subtraction of the reasoned estimate of calls abandoned to answer machines. When calls to answering machines are included, the figure is 5,306.

Notification against npower and the media coverage as a result. This has caused a significant reputational issue for npower with widespread coverage occurring across all major national and regional print media along with internet news services and new wires. For example, in the Meet the Boss section of Radio 4's Today Programme of 29th July the interviewer referred to the Ofcom investigation, referring to it incorrectly as relating to silent calls. The coverage is in itself significant incentive on others operating in telemarketing to ensure compliance.”¹⁶¹

- *“the deterrent effect of the publicity that’s already occurred”¹⁶²*
- *The widespread media coverage resulting from the section 128 notification has meant that “there has been a massive deterrent effect as a result, not just for us but for the wider companies who are subject to these obligations.”¹⁶³*
- *“any enforcement action is just hugely, hugely damaging for our business”¹⁶⁴*

4.28 While npower may have suffered some reputational damage following issuance of the section 128 notification, we do not consider that this adverse publicity, in and of itself, has sufficient deterrent effect on npower and others so as to obviate the need for the imposition of a penalty and the deterrence effect of that penalty. It is our view that the imposition of a penalty will provide npower, and industry, with an effective incentive to comply with the Act and the Guidelines with the object of deterring non-compliance.

4.29 Moreover, we have taken into account the fact that the threat of penalties for persistent misuse has been in the public domain since the Act came into force in 2003. Ofcom has also fined a number of companies. We consider that clearly there remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with the persistent misuse provisions of the Act and the Guidelines.

4.30 npower stated in the August 2011 Representations that *“We are aware from previous decisions by Ofcom in relation to silent and abandoned calls that Ofcom considers that harm or likely harm is linked to the number of such calls which were made and has taken into account the number of abandoned calls made during the relevant periods in those cases along with considering the level of consumer harm in light of this in determining the seriousness of the case. It is therefore appropriate to look only at those 24 hour periods during the relevant period when the 3% threshold was exceeded ... This amounts to [x%] of the total calls made over the period 1st February to 21 March 2011”¹⁶⁵.*

4.31 In its August 2012 Representations, npower stated *“The average number of calls to all customers per day over the Relevant Period was [x] calls. The number of calls per day made on the relevant dates was [x] calls, an average of [x] calls per day. So the average number of calls made on the relevant dates was 9.6% of the average number of calls over the period. The average number of abandoned calls on the*

¹⁶¹ Paragraph 3.1, August 2011 Representations.

¹⁶² Oral Representations, see page 4 of transcript, Annex 25.

¹⁶³ Oral Representations, see page 16 of transcript, Annex 25.

¹⁶⁴ Oral Representations, see page 18 of transcript, Annex 25.

¹⁶⁵ Paragraph 3.4, August 2011 Representations.

relevant dates was 20 calls (1,756 calls over the relevant dates). This is [x<] % of the average number of calls per day (of [x<] calls).¹⁶⁶

- 4.32 A1.10 of the Guidelines states in relation to “a pattern of behaviour or practice” that “...this is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonable be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such...” In the present case, the conduct in question is the generation of abandoned calls and on the facts, the behaviour or practice was the generation of 1,756 abandoned calls which took place over 8 x 24 hour periods and this therefore exceeds a minimum of three instances of the behaviour or practice.
- 4.33 For the purposes of the persistent misuse provisions in the Act, section 128(5) provides that a person misuses an electronic communications network or electronic communications service if the effect or likely effect of the use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.
- 4.34 Persistent misuse is not based on an assessment of the overall use of the electronic communications network or electronic communications service by the party concerned such that it includes use which is proper use. We consider the overall number of calls generated by npower and third parties acting for or on behalf of npower (which includes calls where there was proper use of the network or service) to be relevant only for the purposes of calculations to identify any misuse and provide Ofcom with a picture of the performance of a company’s outbound dialling activity operations.
- 4.35 So as to identify any misuse, we may aggregate the data and then use this data to calculate the abandoned call rate which should be “no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period”. The Guidelines state at paragraph 5.57 that “where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate by using an aggregation of data across all call centres and/or campaigns run by or on behalf of the company”.
- 4.36 As explained earlier in this Notification, the document “Tackling abandoned and silent calls: Statement” annexed the document “the revised statement of policy on the persistent misuse of an electronic communications network or service 2010” were published together on 1 October 2010. These policy documents are both relevant to our policy on persistent misuse and our enforcement of the persistent misuse provisions in the Act. Paragraph 5.57 is contained within the “Tackling abandoned and silent calls: Statement”.
- 4.37 npower, in its August 2012 Representations said “RWE npower did not have three or more instances where the three per cent rate was exceeded on a per campaign basis. There was one occasion where the three per cent limit was exceeded on a per

¹⁶⁶ The August 2012 Representations, paragraph 6.3 and 6.4.

call centre basis on three or more occasions, namely for [redacted] (5 February, 12 February, 12 March and 19 March).¹⁶⁷

- 4.38 In relation to the assertion that it had exceeded the abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions on a per call centre/across campaigns basis during the Relevant Period, in the August 2012 Representations npower submitted that:
- *“Ofcom has relied on paragraph 5.57 [the Guidelines]. RWE npower believes, with respect, that Ofcom is incorrect in doing so, We do not consider that paragraph 5.57 forms part of the published statement of general policy referred to in sections 131(1) and 131(4) of the Act.”*
 - *This element of the Provisional Notification was “wrong because Ofcom has not correctly discharged its duty under section 131(4) of the Act ‘to have regard to the statement in exercising the powers conferred on it by the relevant sections’ As such RWE npower contends that Ofcom seeks to have regard to a provision which is not contained in the ‘Statement’ for the purposes of section 131(4) and therefore cannot now move to apply another test that is not in accordance with the Statement of Policy. Ofcom has failed to apply the correct basis in its Provisional Notification and all arguments relating to the allegations of persistent misuse on the abandoned call rate now fall away. In addition therefore, it is also contended that Ofcom was wrong to apply this aggregated approach in the section 128 notification.”*
- 4.39 npower in its August 2012 Representations, submitted *“the volume of calls where the 3% limit has been exceeded is not in aggregate sufficient to justify this further enforcement action by Ofcom. We do not believe that the abandoned call rate should be considered on an aggregated basis....However, even on that basis there were eight days on which the 3% level was exceeded, four of those relate to days of very low numbers of calls and on none of the days was the volume of calls more than 16% of the average.”* It contended that, without prejudice to its contention that the abandoned call rate should not be calculated on an aggregated basis, that *“because the number of calls and number of abandoned calls on the relevant dates were so low (both in absolute and relative terms) Ofcom should not have taken enforcement action in this instance.”¹⁶⁸*
- 4.40 To confirm, we have had regard to the statement of our general policy in taking enforcement action in this case and as required under section 131(4) of the Act.
- 4.41 In the present case, we have assessed npower’s compliance with the Guidelines on a per call centre/across campaigns basis for each of the call centres acting for or on npower’s behalf. This identified 8 separate 24 hour periods (2 at npower’s in house call centre, 2 occasions at [redacted], 4 occasions at [redacted]) where npower exceeded an abandoned call rate of 3%; which amounted to 1,756 abandoned calls on these days.
- 4.42 As set out in the Guidelines, Ofcom’s approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls has been and continues to be to ensure that users of ACS technology take steps to avoid

¹⁶⁷ The August 2012 Representations, paragraph 2.6.

¹⁶⁸ The August 2012 Representations, paragraph 6.1 and 6.5.

making abandoned and silent calls; and that when such calls are made, steps are taken to reduce the degree of harm caused.¹⁶⁹

- 4.43 ACS technology, which was used in this case, is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Companies using ACS may pass on to consumers the costs savings that this technology allows. However, if not robustly and properly managed, a side effect of this technology may be the generation of calls of a persistent misuse nature, resulting in consumer harm.
- 4.44 Ofcom recognised that a balance was needed between the positive benefits of ACS technology on the one hand, and the potential for this technology to cause consumer harm on the other. In recognition of the benefits of ACS technology when properly managed, Ofcom did not prohibit the use of the technology and put in place policy criteria in respect of its use (the Guidelines) so as to reduce the possibility of harm. One such policy criteria is the “*abandoned call rate formula*” which provides that the abandoned call rate shall be no more than three percent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period.
- 4.45 Ofcom has not adopted a zero tolerance approach and therefore as a minimum we expect companies to adhere to the specified three percent of live calls per campaign or per call centre over a 24 hour period. Where there is a breach of this three percent threshold, we are likely to consider the persistent misuse to be serious.
- 4.46 In the present case, npower exceeded the specified three percent on eight 24 hour occasions, which amounted to 1,756 abandoned calls. There has therefore been a breach of the three percent threshold which we consider to be serious.
- 4.47 npower made representations on the wording of the information message it had played during abandoned calls over the Relevant Period, these submissions included:
- a) *“It was our view held in good faith that such a message was provided for information purposes to assist customers in understanding the nature of the call for reasons of openness and transparency and to enable them to opt out if desired.... We had included those words out of our wish not to cause concern.”*¹⁷⁰
 - b) *“If Ofcom believed that RWEnpower have erred in this wording, it should be noted that the statement was simply intended to avoid worrying the customer and to provide clarity that the call did not for example relate to a requirement for a meter to be inspected, or to payments due.”*¹⁷¹
 - c) *“..because this recorded message was played on a small number of occasions both in absolute and relative terms, and because the steps taken by RWEnpower to minimise anxiety, Ofcom should not take enforcement action in this instance.”*¹⁷²
 - d) That it should be taken into account:

¹⁶⁹ Paragraph 4.1 of the Guidelines.

¹⁷⁰ The August 2012 Representations, paragraph 7.6.

¹⁷¹ The August 2012 Representations, paragraph 7.7.

¹⁷² The August 2012 Representations, paragraph 7.13.

- *“that the words ‘to discuss potential savings on your energy bill’ should be considered in the context of the recorded message (with the immediately following sentence being ‘If you do not wish us to contact you in this way in future, please call [X] and we will remove your details from our telemarketing list’)”;*
- *“our concern not to cause anxiety to those called but to clear the reason for the call”;*
- the reference to ‘marketing content’ and ‘not used as an opportunity to market the called person’ in paragraph A1.52 of the Guidelines *“must be construed in light of the intention behind the message and/or the effect of the message”.*

4.48 Following consideration of npower’s representations and taking into account the circumstances of this case in the round, although Ofcom’s view is that the particular wording *“to discuss potential savings”* of the message played during 1,906 calls, constituted marketing content and that this behaviour was persistent misuse, we consider that the harm caused was not at a serious level. On this basis, we have treated this breach as more minor and have appropriately and proportionately reflected this in the final penalty amount.

4.49 The further factors that are relevant to that determination, and to the proportionality of the penalty are as follows.

Degree of harm caused by the contravention

4.50 We have given consideration in this case to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.

4.51 Section 128(5) of the Act provides that a person misuses an electronic communications network or electronic communications service if the *effect or likely effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety*. As set out in the Guidelines¹⁷³ and in the section 128 notification, it is Ofcom’s view that the effect or likely effect of making abandoned and silent calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety.

4.52 Firstly we have concluded that npower generated consumer harm by:

- a) exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre/across campaigns basis. This breaks down as follows:
 - two occasions on which the 3 per cent abandoned call rate was exceeded for npower’s in-house call centre (2 February and 17 February);
 - two occasions on which the 3 per cent abandoned call rate was exceeded for [X] (16 February and 12 March);

¹⁷³ Annex 2, paragraph 1.6 of the Guidelines.

- four occasions on which the 3 per cent abandoned call rate was exceeded for [redacted] (5 February, 12 February, 12 March and 19 March); and
- b) failing to exclude marketing content within 1,906¹⁷⁴ information messages played following abandoned calls during the Relevant Period.
- 4.53 Secondly, we have concluded that the level of harm is evident from the number of abandoned calls npower made during the Relevant Period. On a per call centre/across campaigns basis, npower made a total of 1,756 abandoned calls across the 8 occasions, an average of 219 abandoned calls per day.
- 4.54 The level of harm is further evidenced by the extent to which npower exceeded the three percent abandoned call rate. On the basis of the data provided by npower in its response to the Fourth Information Request, the abandoned call rate was over 5 percent on one occasion (5.76% at [redacted] on 12 March) and over 6 percent on another occasion (6.94% at [redacted] on 19 March). These rates clearly exceed the three percent threshold set out in the Guidelines.
- 4.55 In the August 2011 Representations, npower submitted that any harm generated was at a low level for the following reasons:
- a) if any persistent misuse existed (which it denied), it was likely to be in the form of abandoned calls and not silent calls. And as “...*silent calls are more likely to cause anxiety, the degree of harm in this case is very much at a lower level given npower’s decision not to use AMD and therefore avoid the harm that can be caused by silent calls which result from its use*”.¹⁷⁵ However, npower did also state “...*there may be rare instances in which a customer may experience silent call from us*”¹⁷⁶;
 - b) several of the 24 hour periods where the abandoned call rate exceeded three percent were Saturdays and on these days the number of abandoned calls was considerably lower;
 - c) in previous penalty decisions in respect of persistent misuse, Ofcom “*considers that harm or likely harm is linked to the number of such calls which were made and has taken into account the number of abandoned calls made during the relevant periods in those cases along with considering the level of harm in light of this in determining the seriousness of the case*”¹⁷⁷ and on the revised data submitted the total number of calls abandoned where three percent was exceeded, on a per call centre basis/all campaign basis, totalled 1,927 calls and the number of live calls abandoned on days where the 3 per cent threshold was exceeded represented [redacted]%¹⁷⁸ of total calls made over the Relevant Period¹⁷⁹.

¹⁷⁴ This figure has been arrived at following the subtraction of the reasoned estimate of calls abandoned to answer machines. If the number of times the message was played to answer machines was included, the total figure would be 5,306.

¹⁷⁵ August 2011 Representations, paragraph 3.3.

¹⁷⁶ August 2011 Representations, paragraph 2.38.

¹⁷⁷ August 2011 Representations, paragraph 3.5.

¹⁷⁸ Note this percentage was calculated on the basis of data which was subsequently found to be incorrect.

¹⁷⁹ Response to Fourth Information Request.

4.56 As we stated earlier, persistent misuse is not based on an assessment of the overall use of the electronic communications network or electronic communications service so that it includes use which is proper use; rather, it is based on the misuse and the effect or likely effect of that misuse on a person. The percentage of calls where there was misuse (worked out as a percentage of the total number of live calls, including where there was proper use of the network or service) is used to perform calculations so as to:

- a) expose any misuse in an undiluted way (undiluted by the proper use of the network or service); and
- b) enable any instances of misuse to be distinguished from the proper use of the network or service.

4.57 The overall percentage/volume of calls is not otherwise relevant to establishing: whether the effect or likely effect of the use of the network or service has caused a person unnecessarily to suffer annoyance, inconvenience or anxiety; or that a person has used the network or service to engage in conduct the effect or likely effect of which was to cause another person to unnecessarily to suffer annoyance, inconvenience or anxiety.

4.58 npower's references in its representations to:

- a) the number of abandoned calls expressed as a percentage of total calls made during the Relevant Period; and
- b) the fact that fewer calls were made on a Saturday so it was then easier to breach the three percent threshold;

are not relevant to establishing whether there was persistent misuse.

4.59 In the December 2011 Representations, npower summarised its position as follows: that [X] was the only case where three percent was exceeded on 3 or more occasions; and, that the numbers of abandoned calls were relatively low. npower referred to A1.84 of the Guidelines which sets out Ofcom's priorities on issuing notifications and provides, "...the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action...". npower then submitted in the present case that "there were fewer rather than more people affected by the misuse."

4.60 In its August 2012 Representations, npower said:

- *"The Statement of Policy [the Guidelines] states that a pattern of behaviour (as required by section 128(6) of the Act) 'is likely to require a minimum of three instances of the conduct in question in order to be recognised as such.' RWE npower did not have three or more instances where the three per cent rate was exceeded on a per campaign basis. There was one occasion where the three per cent limit was exceeded on a per call centre basis on three or more occasions, namely for [X]."*¹⁸⁰
- *"Over the four [X] dates, net of calls to answer machines, the number of abandoned calls was 927. This amounted to [X]% of the calls made by [X]"*

¹⁸⁰ The August 2012 Representations, paragraph 3.14.

over the Relevant Period. It amounted to [X]% of the total number of calls made over the Relevant Period.”

- *“The total number of calls made by [X] on the [X] dates was [X]. This is an average of [X] calls per day. The average number of calls per day on the [X] dates was 23% of the average number of [X] calls. It was 9.0% of the average number of calls per customers per day.*
- *“The average number of abandoned calls by [X] on the [X] dates was 232 calls. This is [X]% of the average number of [X] calls per day. It is [X]% of the average number of calls per customer per day.”*
- *“The number of calls made, and of abandoned calls, by [X] on the [X] dates were very low. This is relevant and should be taken into account by Ofcom in not proceeding with an allegation of breach of section 128 of the Act...”*

- 4.61 Firstly, we do not accept npower’s argument that only the four occasions identified at the [X] call centre should be considered when assessing non-compliance. Ofcom considers that in the circumstances of this case, it is appropriate to assess matters taking account of the 1,756 abandoned calls made across eight 24 hour periods where npower exceeded an ACR of 3%. This equates to 491 abandoned calls made in two days at npower’s in-house call centre; 927 abandoned calls made in four days at the [X] call centre; and 338 abandoned calls made in two days at the [X] call centre. On this basis, it is evident that the persistent misuse was not isolated to only one call centre; but rather it extended to three call centres (in-house and third party call centres) generating calls for or on behalf of npower.
- 4.62 Secondly, if Ofcom were to only take into account the non-compliance at [X] and ignore the non-compliance at the other call centres generating calls on behalf of npower it would understate the level of harm caused. This would lead to an unsatisfactory outcome for persons who, as a matter of fact, suffered harm as a result of calls generated at its other call centres (the in-house call centre and the [X] call centre) for or on behalf of npower.
- 4.63 Our view is that the recipients of npower generated abandoned calls during the Relevant Period suffered annoyance, inconvenience or anxiety unnecessarily.
- 4.64 The second way in which npower generated consumer harm, was by playing a recorded message that included content which Ofcom considers to be marketing content. Although the message identified npower and provided a 0845 number for the call recipient to use in order to decline further calls from npower, in Ofcom’s view it also included marketing content. The Guidelines require that such messages should not include marketing content and are not used as an opportunity to market the called person¹⁸¹. This is an important consumer protection principle as information messages played in the event of an abandoned call are intended to be informative thereby protecting consumers. If it were permissible (which it is not) to include marketing material in these messages, it could, perversely, have the effect of acting as an incentive to generate abandoned calls as the companies would be able to convey their marketing message even when they abandoned the call.
- 4.65 Although the inclusion of the particular sentence is considered inconsistent with the Guidelines, Ofcom acknowledges that npower did at least play information messages. The absence of a recorded information message would have resulted in

¹⁸¹ Annex 2, A1.52 the Guidelines.

silent calls and recipients may have suffered greater harm as a consequence of the anxiety and distress caused by not knowing the identity of the caller. Furthermore, following consideration of npower's representations, Ofcom did not consider the harm caused in respect of this particular misuse to be at a serious level.

4.66 npower, in its August 2012 Representations submitted that Ofcom "*should decide not to take any enforcement action (beyond the section 128 notification which has already been issued)*" based on A1.12¹⁸², A1.13¹⁸³ and A1.86¹⁸⁴ of the Guidelines and npower's compliance in relation to the following:

- a) calls which are not answered must ring for a minimum of 15 seconds before being terminated (paragraph A1.53 of the Guidelines);
- b) when an abandoned call (other than an AMD false positive), has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator (paragraph A1.54 of the Guidelines);
- c) when a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator (paragraph A1.55 of the Guidelines);
- d) for each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation numbers (paragraph A1.56 of the Guidelines); and
- e) organisations subject to the Guidelines to keep records for a minimum of six months that demonstrate compliance with the policy and procedures (A1.59 of the Guidelines).

4.67 We acknowledge that npower was compliant in relation to the above and have considered observance with the policy criteria set out in paragraphs A1.12 to 58 of the Guidelines.

4.68 Moreover, npower had taken some steps to limit the harm caused by abandoned calls, during the Relevant Period, for example playing an information message identifying npower and as mentioned above, complying with the 72 hour policy.

4.69 In its August 2012 Representations, npower said "*Prior to enquiry from Ofcom in January 2011, npower already had steps in place to meet Ofcom requirements. ...RWEnpower put in place a series of further actions in 2011, but we feel it would be incorrect to characterise them as being only in response to the section 128*

¹⁸² A1.12 "*This section sets out Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.*"

¹⁸³ A1.13 "*In deciding whether to take enforcement action in any particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps that have been taken by ACS users to reduce the degree of concern that silent or abandoned calls cause including those set out below.*"

¹⁸⁴ A1.86 "*Ofcom policy on taking action under its section 128 powers will be driven by the three factors set out above. In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will consider observance with the policy criteria set out in A1.12 to 58.*"

*notification ...and were put in place or planned as soon as possible following Ofcom's express concern [in January 2011] and before the Notification.*¹⁸⁵

- 4.70 We also acknowledge that the potential level of harm involved was mitigated by npower implementing some revised processes after receipt of the First Information Request, despite the fact it considered itself compliant. Although the revised processes implemented after the First Information Request were not enough to end the contravention, npower implemented further steps after the section 128 notification had been received which secured that its misuse was brought to an end. We accept that the revision of processes involves some lead time and therefore the actual effect of steps which were commenced prior to the section 128 notification may have only been realised after the section 128 notification had been received.
- 4.71 npower contended that it had not persistently misused; the misuse had not been repeated on a sufficiently number of occasions for it to be clear it represented a pattern of behaviour or practice *"or been repetitive misuse , as required under paragraph A1.10"*; it did not reach the level of consumer detriment required for under paragraph A1.13 for enforcement action and therefore does not satisfy the administrative priority requirement; and does not satisfy the *"scale of priorities text required under paragraph A1.82"*.¹⁸⁶
- 4.72 Where there is a breach of the abandoned call rate threshold of three percent per campaign or per call centre, we are likely to consider the persistent misuse arising from this to be serious and therefore meriting enforcement action.
- 4.73 Taking account of the above considerations, including the scale of the contravention, the annoyance, inconvenience and anxiety suffered by the recipients of the abandoned calls during the Relevant Period, Ofcom's view is that although the harm arising out of npower's notified contravention of section 128 was serious, npower's conduct points to a contravention of low seriousness.

The duration of the contravention

- 4.74 In the August 2011 Representations, under the heading *"duration of any contravention"* npower stated that:

*"...Ofcom has not previously looked at the period of time over which alleged non-compliant behaviour has occurred, namely the Relevant Period. We believe that this is relevant and demonstrates the uncertainty that arises under paragraph A1.10 of the Persistent Misuse Guidelines [the Guidelines]...In this case, on an aggregated basis, over 49 days, there were no 24 hour periods on which the abandoned call rate exceeded 3%; on the campaign basis there was one 24 hour period on which the abandoned call rate exceeded 3%; and on the call centre basis there were two 24 hour periods by npower, two by [X], two by [Y] and one by [Z] on which the abandoned call rate exceeded 3%. We believe this is evidence of a pattern of compliant behaviour and practice and should therefore lead to a finding that there has not been persistent misuse and, if this is not accepted, to reduce the level of any fine imposed."*¹⁸⁷

¹⁸⁵ The August 2012 Representations, paragraph 9.4.

¹⁸⁶ The August 2012 Representations, paragraph 8.7. References contained within quotations are references to the Guidelines.

¹⁸⁷ Annex 10, paragraph 3.9 of npower's 10 August 2011 Representations.

- 4.75 In relation to the issue of the duration of the convention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so as to reduce the information burden on the party being investigated, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the relevant period and its duration is determined on a case by case basis.
- 4.76 In the present case, a seven week period was selected as the Relevant Period in order to promote efficient enforcement. It is our view that a seven week period is, in itself, a substantial duration for a contravention of a provision designed to prevent persons unnecessarily suffering annoyance, inconvenience or anxiety. In this case we identified 8 separate occasions in a seven week period, where npower exceeded an ACR of 3% over a 24 hour period.
- 4.77 npower was on notice of the period of investigation when Ofcom sent the First Information Request on 12 April 2011.
- 4.78 Prior to the investigation, Ofcom took the following actions to raise npower's awareness of the importance of compliance:
- a) Ofcom published an open letter on 20 December 2010¹⁸⁸ addressed to industry stating that enforcement action would be taken should the Guidelines not be complied with and that companies would be expected to be in compliance with these new Guidelines by 1 February 2011 ("implementation period"). In particular, it alerted industry to the increase in the maximum financial penalty for persistent misuse from its previous level of £50,000 to £2 million. This letter was e-mailed directly by Claudio Pollack, Consumer Group Head, to key industry stakeholders, one of whom was [redacted], Head of Retail Regulation at RWE npower; and
 - b) Ofcom also wrote to npower directly again on 25 January 2011 following concerns regarding persistent misuse.
- 4.79 Notwithstanding the above explicit actions to raise npower's awareness of the importance of compliance and the allowance of an implementation period, npower was still found to be in contravention after this.
- 4.80 Our view is that the duration of the notified non-compliance with section 128 is, in itself, a substantial period of time for contravention of the persistent misuse provisions to occur.

Any gain (financial or otherwise) made by npower as a result of the contravention

- 4.81 In its representations npower stated that it had not made any gain as a result of any contravention.
- 4.82 We understand from npower's representations that although npower did not use AMD, it did however use ACS. As stated earlier in this Notification, ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Companies using ACS may pass on to consumers the cost savings that this technology allows. However, if not robustly and

¹⁸⁸ Annex 4, Open letter to industry, 20 December 2010.

properly managed, a side effect of this technology may be the generation of calls of a persistent misuse nature, resulting in consumer harm.

- 4.83 In recognition of the benefits of ACS when properly managed, Ofcom did not prohibit its use and put in place policy criteria to be adhered to in the use of this technology to minimise harm to consumers. An example of such criteria is the abandoned call rate formula.
- 4.84 We consider that by not complying with the three percent limit on the abandoned call rate, npower would have been able to run its ACS diallers more efficiently to contact a greater number of consumers and in so doing could have potentially benefitted from additional efficiency gains afforded to it by using ACS in an unrestrained way. As the particular campaigns concerned, were sales campaigns ([§<]), this may have given npower scope for additional gain by way of an increased take-up of npower's services.
- 4.85 In relation to the information messages which in Ofcom's view contained marketing content, npower stated that the wording used "*...would have no commercial benefit to npower. The only phone number given was one to cancel contracts. npower had absolutely no intention or thought that the message referring to potential savings would be of any commercial benefit; we simply thought it best assisted our customers to understand the nature of the call. In any event Ofcom has provided no evidence of gain.*"¹⁸⁹
- 4.86 npower stated in the August 2012 Representations that "*there was no financial gain, nor intent to market on our part.*"
- 4.87 The Guidelines require that information messages do not include marketing content and are not be used as an opportunity to market the called person¹⁹⁰. This is an important consumer protection principle as information messages played in the event of an abandoned call are intended to be informative thereby protecting consumers. If it were permissible (which it is not) to include marketing material in these messages, it could, perversely, have the effect of acting as an incentive to generate abandoned calls as the companies would be able to convey their marketing message even when they abandoned the call.
- 4.88 Although the inclusion of marketing content in npower's information messages is considered inconsistent with the Guidelines, Ofcom acknowledges that npower did at least provide messages which identified npower as the caller and provided a number to call to be removed from the marketing list; and that this number did not relate to a sales line. We consider that npower could have fulfilled its desire not to cause concern by choosing more neutral wording in the information message.
- 4.89 npower asserted that it did not make any financial gain as a result of its non-compliance. We consider that it is likely that it did make some efficiency gains by operating outside the principles set out in the Guidelines. However, on the basis that we do not have direct evidence of such gain in this case, we have not taken this factor into consideration in the determination of any penalty amount.

¹⁸⁹ The August 2011 Representations, Paragraph 3.10.

¹⁹⁰ Annex 2, A1.52 the Guidelines.

Steps taken by npower to remedy the consequences of the contravention

- 4.90 Section 129(7) of the Act provides a useful indicator of one form of remedy. It states that remedying the consequences of persistent misuse includes paying an amount to a person by way of compensation for loss or damage suffered by that person; or in respect of annoyance, inconvenience or anxiety to which he has been put. Although compensation is not the sole way in which a notified misuser may remedy the consequences of its contravention, we recognise it as one way in which the notified misuser may discharge its obligation to remedy the consequences of a contravention.
- 4.91 Ofcom does not prescribe methods for which the notified misuser may remedy the consequences of their contravention, and places the onus on the notified misuser to select the appropriate remedy in the circumstances and then once selected, to implement it. Ofcom expects a company to actively remedy any consequences of its breach and to not place the burden on consumers to seek out redress themselves.
- 4.92 In the August 2011 Representations, npower submitted that it was very difficult to identify those recipients of abandoned calls in order to compensate them for any harm suffered. It added however, that *“at the very least we do give such persons the opportunity to seek a remedy”* which was as follows:

“Our recorded messages identify npower as the caller along with a telephone number to call. Any person affected by an abandoned call is therefore able to raise a complaint at this time or to contact npower via our customer service number which is available via directory enquiries or our website, or to raise a specific complaint via our other contact points also mentioned on our website... We have procedures in place to address complaints together with a policy of awarding compensation in appropriate circumstances. We would, consistent with this policy naturally consider compensation for persons receiving abandoned calls.”

- 4.93 It further stated that it had requested complainants’ details from Ofcom so that it could *“take remedial action”* and in npower’s view, this demonstrated its *“willingness to take appropriate action to remedy the consequence of any contravention”*.¹⁹¹
- 4.94 As stated earlier in this Notification, complaints made to the CCT at Ofcom are only indicative of potential non-compliance by a party, as, for example, not all recipients of silent and/or abandoned calls lodge complaints with Ofcom’s CCT¹⁹².
- 4.95 Without prejudice to its view that persistent misuse has not been shown, in its August 2012 Representations, npower proposed certain steps it would take *“should the findings in the Provisional Notification be upheld”*. These included:
- a. *“RWEnpower proposes to write to those individuals who received an abandoned call from the npower, [X] and [X] call centres on each of the dates that those call centres were responsible for the abandoned call rate exceeding 3% during the Relevant Period (namely 2 February 2011, 5 February 2011, 12 February 2011, 16 February 2011, 17 February 2011, 12 March 2011 and 19 March 2011)”*¹⁹³;

¹⁹¹ The August 2011 Representations

¹⁹² This should be noted in relation to comments made by npower in its letter dated 16 November 2012.

¹⁹³ The August 2012 Representations, paragraph 9.7.

- b. *“We propose to provide each recipient a goodwill gesture of a £10 high street shopping voucher”¹⁹⁴; and*
- c. *“In the event that we cannot identify all affected individuals and obtain details sufficient for written contact, it will look at other means of encouraging those individuals to contact us”.¹⁹⁵*

- 4.96 In the Oral Representations, npower advised that it had commenced the process of identifying the individuals who would have received an abandoned call on those occasions where an ACR of 3% was exceeded.
- 4.97 Ofcom considers the above representations indicate positive complaints handling procedures and proactive steps to remedy the consequences of the notified misuse.
- 4.98 Taking account of npower’s representations, particularly its August 2012 Representations and Oral Representations, it is Ofcom’s view that npower has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse. This has been taken into account in the level of penalty.

Whether npower has a history of contraventions

- 4.99 npower does not have a history of notification of contraventions in respect of the persistent misuse provisions or any other provisions of legislation falling under Ofcom’s regulatory jurisdiction. Accordingly, we do not consider this to be an aggravating factor that should be reflected in an increased penalty.

Whether in all the circumstances npower took appropriate steps to prevent the contravention

- 4.100 Ofcom’s view is that npower failed to take all appropriate (and timely) steps in order to prevent its notified contravention.
- 4.101 The notified contraventions in this case occurred following:
- a) Ofcom’s open letter to industry on 20 December 2010 which specified that companies were expected to be in compliance with the Guidelines by 1 February 2011 (the implementation period);
 - b) Ofcom’s specific contact with npower on 25 January 2011 about a number of complaints regarding abandoned calls allegedly being generated by npower from the telephone number [redacted]. The purpose of this contact was to bring this concern to npower’s attention and impress upon it the importance of compliance with Ofcom’s (then) guidelines and the potential consequences of a failure to comply. npower was therefore alerted to concerns that it was generating these calls prior to Ofcom commencing its investigation; and
 - c) the expiration of the implementation period.

¹⁹⁴ The August 2012 Representations, paragraph 9.7.

¹⁹⁵ The August 2012 Representations, paragraph 9.8.

- 4.102 We consider that had prompt and robust action been taken by npower following Ofcom's contact, on 20 December 2010 or 25 January 2011, the notified contravention could have been prevented.
- 4.103 Compliance in respect of the persistent misuse provisions set out in the Act and the principles set out in the Guidelines is a fundamental and ongoing obligation. That compliance is within a company's own control and responsibility. Companies must have processes for compliance as part of their ordinary course of business. Ofcom's Guidelines explain the following in relation to the engagement of a third party to use the network or service on behalf of another company:
- a) *"Section 128 of the Communications Act 2003 applies where 'a person has persistently misused an electronic communications network or electronic communications services'. In Ofcom's view, such misuse may be either direct or indirect. This means a person may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person to use the network or service on their behalf."*¹⁹⁶
 - b) *"An example of this may arise in the context of network or service misuse by a call centre. Where a person engages representatives, such as a third party call centre to contact UK consumers on its behalf, that person may be the target of an investigation and ultimately action under the Act for persistent misuse by its representatives. This includes where the representative is an offshore centre."*¹⁹⁷
 - c) *"To be clear, there may be circumstances where the representatives are also persons who are misusing a network or service in their own right. In those circumstances, Ofcom may also consider investigating these individuals or companies. This decision would be taken on a case by case basis."*¹⁹⁸
- 4.104 Following consideration of the particular circumstances of this case, Ofcom determined that it had reasonable grounds to believe that npower persistently misused an electronic communications network or service. In Ofcom's view this persistent misuse included misuse generated where npower engaged call centres to use the network or service for or on its behalf.
- 4.105 A party procuring a third party company to act for or on its behalf in the generation of calls, is expected to take reasonable steps to monitor and assess ongoing compliance by that third party with the Guidelines and the persistent misuse provisions. Acceptance of assurances and/or the imposition of contractual obligations on a third party in respect of compliance, without the procuring party seeking regular evidence that the assurances are substantiated or that the contractual obligations are being consistently adhered to, falls short of a practice of ongoing monitoring and assessment.
- 4.106 In the December 2011 Representations, npower submitted that *"we have not exceeded the guidance set out in the Statement in relation to abandoned calls save in relation to the [B&C] call centre. We do not consider them to be the same 'person' as npower under the Communications Act 2003, and in any event npower has in place in relation to them full and appropriate controls and has taken decisive action."* It further maintained that it should be able to rely on its contractual arrangements with

¹⁹⁶ The Guidelines, A1.7

¹⁹⁷ The Guidelines, A 1.8

¹⁹⁸ The Guidelines, A1.9

its outsourced providers (i.e. third party call centres), including its selection processes, compliance obligations and service level agreements and consequently it would not “...be justified for action to be taken against npower in relation to the actions of [X], an independent contractor properly selected by us, with whom we had all appropriate contractual and other controls and against whom we have taken decisive action clearly evidencing our commitment to compliance and transparency.”¹⁹⁹ npower by letter dated 15 February 2011²⁰⁰ stated it “is a contractual requirement for these agencies [third party call centres] to follow Ofcom’s regulations (and other relevant regulations). The contracts also stipulate specific reporting requirements that equal or exceed the Ofcom requirements. The contracts also cater for rights of audit and inspection and for remedial action should performance not meet the requirements.”²⁰¹

4.107 npower submitted in its August 2012 Representations that “account should be taken by Ofcom of the fact that [X] was the only company responsible for abandoned calls exceeding 3% on three or more occasions”²⁰². It cited its reasons (in order of importance) for the selection of [X] as: sales experience; outbound calling; utility experience; reporting/IT capabilities; recruitment and training; capability in business sales; flexibility; and fitness for business.²⁰³

4.108 It added that the [X] contract included a requirement to listen to recorded calls, produce reports (including abandoned rate reports), achieve Service Levels and organise a trained quality assurance department to, amongst other things, record and report on any non-compliance. It said it also had “received director-level confirmation and sign-off of the accuracy and completeness of the [X] data”²⁰⁴.

4.109 Following a review of [X]’s activities and data including a specific audit at the offices of [X], and the subsequent discovery of “inconsistencies”, npower “immediately suspended the provision of services by [X] and have since terminated all contracts under which [X] provides telesales to npower.”²⁰⁵

4.110 npower contended that:

“We consider it would be unfair if, thanks to our own initiative and diligence in investigating the [X] numbers, we were penalised. Also we had properly selected the contractor, had full and appropriate controls in our contract with [X] and took the most decisive action once we had identified the issues there.”²⁰⁶

4.111 In the present case, although the third party call centres may have provided assurances and may have been subject to contractual obligations requiring they operate compliantly, when in fact they were not compliant, we consider that this failure would have become evident to npower had it had an effective compliance strategy in place which routinely monitored and assessed compliance. We do however acknowledge that npower used sensible selection processes and conducted due diligence in respect of the third parties it engaged.

¹⁹⁹ December 2011 Representations, page 3.

²⁰⁰ In response to Ofcom’s letter dated 25 January 2011.

²⁰¹ npower letter dated 15 February 2011

²⁰² The August 2012 Representations, paragraph 5.1.

²⁰³ The August 2012 Representations, paragraph 5.3

²⁰⁴ The August 2012 Representations, paragraph 5.5.

²⁰⁵ The August 2012 Representations, paragraph 5.6.

²⁰⁶ The August 2012 Representations, paragraph 5.8.

4.112 The August 2011 Representations set out the compliance measures npower maintains it had in place *“prior to the enquiry from Ofcom in January 2011”*²⁰⁷ and prior to the commencement of the Relevant Period. These included:

- a) holding records of abandonment rates for a minimum of 12 rolling months to an individual phone number level;
- b) not deploying answer machine detection (“AMD”), in order to prevent the potential for silent calls caused by false positives;
- c) in the event of an abandoned call, the permanent suppression of calls to particular call recipients by npower’s internal call centre, not just for 72 hours. Outsourced service providers comply with the 72 hour rule;
- d) outsourced service providers are obliged contractually to comply with all Ofcom requirements;
- e) outsourced service providers are obliged to report relevant rates historically in their daily acquisitions report;
- f) small outbound campaigns with segmented datasets were merged into larger single campaigns on outbound calling to ensure fewer short campaigns are run and allow the dialler to acquire a better understanding of contact rates and run at lower abandonment rates; and
- g) standard process to take account of TPS registration, as updated periodically.

4.113 npower in its August 2012 Representations, said that *“Prior to enquiry from Ofcom in January 2011, npower already had steps in place to meet Ofcom requirements...”* and that it had *“put in place a series of further actions in 2011, but we feel it would be incorrect to characterise them as being only in response to the section 128 Notification”*.

4.114 We acknowledge that certain steps may have been planned or in place prior to the section 128 notification issued on 6 July 2011, however they did all not take place before the commencement of the Relevant Period on 1 February 2011. On the basis that steps taken after 1 February 2011 cannot be considered to have been preventative steps we do not consider them here, they are however taken into account later on in this Notification when considering whether the contravention continued or whether timely and effective steps were taken to end it.

4.115 During the course of the investigation, on a number of occasions, npower had to revise the monitoring and compliance data it had provided to Ofcom. It had to be revised as the data npower had previously supplied to Ofcom had been erroneous. npower submitted that the errors were *“...compounded by our reliance (mistakenly in retrospect) on the accuracy and completeness of data provided by outsource partners [third party call centres]”* and that *“...as we had previously received director level confirmation of the accuracy and completeness of data provided from [X], we were satisfied with data submitted to Ofcom with our Response dated 23 September.”*²⁰⁸ Consequently npower was *“very disappointed that our quality and assurance processes, which are usually rigorous and robust, failed to live up to our*

²⁰⁷ Paragraph 3.16, August 2011 Representations.

²⁰⁸ Annex 16, npower response to the Third Information Request, question 1.

*normal standards in this instance.*²⁰⁹ This issue is discussed further under the factor headed, “Co-operation”.

- 4.116 It is our view that prior to providing the data to Ofcom during the investigation, npower would have identified the inaccuracies had it been more robustly and directly involved in the monitoring and assessment of this data. Rather than being reliant on the third party call centres to provide all data, npower could have, for example, obtained the raw data from all of its third party call centres and used ‘control reports’ to ensure the completeness and correctness of the data supplied to it by third parties. We consider that it should not have relied solely on data prepared by the third party to satisfy itself of its own compliance. In our opinion these compliance failures point to a failure by npower to effectively monitor compliance at its third party call centres and that npower should have substantiated the compliance claims of its third party call centres.
- 4.117 If a company has an effective compliance strategy in place which monitors and assesses compliance on an ongoing basis, it is our view that it increases the likelihood that possible compliance failures will be prevented. In this case, we consider that effective steps were not taken to prevent non-compliance. For example, it is reasonable to expect that a company upon being informed by Ofcom that there were indicators of compliance failings, would have assessed for itself the reports it was receiving from its call centres as against the call centres’ data, and then taken action to prevent the misuse. We note that npower did bring forward its internal audit of [redacted] by several months and this enabled it to identify problems with its data earlier than would have been the case.
- 4.118 Taking account of the above, we consider that npower failed to follow the Guidelines’ principles and procedures (or to do so effectively and promptly), or to take other appropriate steps for preventing the notified contravention, as evidenced by its contravention of the persistent misuse provisions during the Relevant Period. The absence or ineffectiveness of npower’s procedures for monitoring and assessing call centre compliance demonstrates npower’s failure to take appropriate (and timely) steps to prevent its notified contravention. This has been taken into account in Ofcom’s determination of the penalty amount.

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.

- 4.119 In the August 2011 Representations, npower stated that: *“it is absolutely not the case that, if any contravention has occurred, it has occurred intentionally. Given that it is our view that if any pattern of behaviour or practice exists, it is a pattern of compliance, it would be wrong to suggest that, in any 24 hour period where the abandoned call rate exceeded 3%, this is done intentionally.”*²¹⁰
- 4.120 It added that, *“...there is no evidence that npower’s senior management was aware that npower was, as alleged, in contravention during the relevant period or ought to have been aware...As with previous enforcement decisions taken by Ofcom, we believe Ofcom should reach a similar conclusion that npower’s senior management’s general duty was to oversee the management and operation of the business and that did not necessarily extend to a position where it ought to have been aware of the number of abandoned calls being made on a daily basis, or of non-compliance with*

²⁰⁹ Annex 12, npower response the Second Information Request, question 1.

²¹⁰ npower 8 August 2011 Representations, paragraph 3.21.

the requirements regarding the content of recorded messages."²¹¹ npower sought to reinforce its submission by stating that as it had not been the subject of any previous contravention "...there was no reason for senior management to believe that non-compliance was an issue in this area."²¹²

4.121 On 25 January 2011 Ofcom wrote to npower to inform it that it had concerns about the level of complaints in respect of abandoned calls allegedly generated for or on behalf of npower and to ask npower how it was planning to achieve compliance with the Guidelines (companies were expected to be in compliance with the Guidelines by 1 February 2011). npower's Head of Retail Regulation, [redacted], responded by letter dated 15 February 2011²¹³ stating "*since we do not employ AMD, then we can be confident in our figures of calls made, calls picked up and calls abandoned. We monitor these each day, and adjust the dialler speed accordingly.*" On marketing to inbound callers from the CLI, it stated that it had no "*business process that can direct the caller to any marketing activity*". The letter continued "*We monitor abandoned call rates on a daily basis for each call centre and hold the records for at least six months...we use external agencies as well as internal resources for outbound calling. It is a contractual requirement for these agencies to follow Ofcom's regulations (and other relevant regulations). The contracts also stipulate specific reporting requirements that equal or exceed the Ofcom requirements. The contracts also cater for rights of audit and inspection and for remedial action should performance not meet the requirements.*"

4.122 We understand that prior to the commencement of Ofcom's investigation, npower was in receipt of the following:

- a) Ofcom's open letter to industry on 20 December 2010;
- b) a letter from Ofcom on 25 January 2011 addressed to npower's Regulatory Affairs Manager expressing serious concerns about alleged contraventions;
- c) daily monitoring of abandoned calls ("*we monitor these each day*");
- d) regular and robust reporting ("*reporting requirements that equal or exceed the Ofcom requirements*") from all call centres generating calls on its behalf. According to the August 2011 Representations this included a daily acquisitions report which contained "*relevant rates*".

4.123 It therefore appears that neither the daily monitoring of abandoned calls nor the "*reporting requirements that equal or exceed the Ofcom requirements*" operated to alert senior management to compliance failings, and that senior management were still not aware of that the contravention was occurring or would occur upon receipt of Ofcom's letter dated 25 January 2011.

4.124 We concur with npower's submission that its contravention of the persistent misuse provisions did not occur intentionally.

4.125 The strict legal definition of recklessness means being aware of risk in a course of action and deciding to take that course ignoring the risk, or paying no heed to whether any such risk exists. Following consideration of all of npower's representations and responses to information requests, we do not consider npower's

²¹¹ npower 8 August 2011 Representations, paragraph 3.23.

²¹² npower 8 August 2011 Representations, paragraph 3.24.

²¹³ Note that the Relevant Period had already commenced on the date of this letter.

notified contravention to have been reckless on the basis that they did not ignore the risk, or pay no heed to the existence of such risk.

- 4.126 We accept that senior management at npower did not know that a contravention was occurring or would occur. However, we consider that compliance teams should alert senior management to warnings by a regulator that their company is potentially in breach of statutory provisions and a regulator's guidelines.
- 4.127 Consequently, in determining the level of any penalty amount we have taken into account that senior management were not aware that a contravention was occurring.
- 4.128 As to the effectiveness or otherwise of the steps npower took towards compliance once it became aware of its contravention, we return to those in the sections below.

The extent to which the level of penalty is proportionate, taking into account the size and turnover of npower

- 4.129 npower is one of the leading electricity suppliers in the UK, serving around 6.7 million homes and businesses and one of the UK's largest energy companies. It is a wholly-owned subsidiary of RWE AG, a leading international multi-utility company. The company produces more than 8 percent of the electricity used in Great Britain and has a strong supply position in the UK market. It holds a 14 percent share of the residential market in the UK.
- 4.130 npower's statutory reporting accounts as at 31 December 2010, submitted to Companies House, disclosed a turnover of £3.130 billion.²¹⁴
- 4.131 In Ofcom's view, these factors indicate that npower is a sizeable business with a significant turnover. As such, there is an expectation that it would have a robust compliance strategy in place with respect to its outbound calling activities. In accordance with our Penalty Guidelines, we consider that npower's size and turnover is a relevant consideration and has been taken account of in determining the proportionality of any penalty amount.

Whether the contravention continued, or timely and effective steps were taken to end it, once npower became aware of it

- 4.132 In establishing the point at which npower became aware of the contravention, Ofcom is of the view that npower:
- a) upon receipt of Ofcom's letter dated 25 January 2011 was aware of the possibility of its contravention under the persistent misuse provisions of the Act and the Guidelines;
 - b) upon receipt of the First Information Request dated 12 April 2011 was aware that Ofcom was investigating whether there were reasonable grounds to believe there had been a contravention; and
 - c) upon receipt of the section 128 notification on 6 July 2011 was aware that Ofcom considered there were reasonable grounds to believe that npower had contravened the persistent misuse provisions and Act. This is confirmed in the August 2011 Representations as npower states: "*following receipt of the*

²¹⁴ Annex 23, npower's Directors' report and financial statements year ended 31 December 2010.

*Notification, npower became aware of Ofcom's view that the contravention has occurred.*²¹⁵

4.133 Following our consideration of the representations, responses to information requests, correspondence and CCT complaint data, our view is that although npower did take some steps once it became aware of its contravention²¹⁶ they were not effective to end the contravention, however this is mitigated by certain steps npower took after Ofcom had issued the section 128 notification which ended the notified misuse.

4.134 The following paragraphs set out the measures taken by npower to end the contravention.

4.135 After the First Information Request (dated 12 April 2011), npower maintains it implemented several measures, these included²¹⁷:

- a) an ability to "preview dial" records in the event of an abandoned call to guarantee the presence of a live agent as an additional option to permanent suppression or 72 hour suppression (1 July 2011);
- b) the ending of the practice of breaks being team based and instead spreading them evenly amongst agents to ensure fewer large swings in the size of the agent pool (1 July 2011);
- c) a reduction in the amount of time spent by agents logged out performing administrative tasks and customer call-backs (June 2011);
- d) implementation of 90 percent adherence to agent availability targets to software configured schedules with a target of 95 percent by November 2011 (June 2011).
- e) a clear management process for managing agents' adherence to schedules to reduce swings in resource availability; and
- f) increasing the minimum number of agents from 10 to 15 for which npower would plan a predictive dialling mode campaign to operate. For any periods where the staff levels fall below this, the dialler will be turned to 'preview dial' generating calls from the agent (1 July 2011);

4.136 After the section 128 notification was issued on 6 July 2011, npower maintains it took the following steps²¹⁸, including:

- a) removal of the line "*to discuss potential savings on your energy bills*" from the information message²¹⁹;

²¹⁵ The August 2011 Representations, paragraph 3.20.

²¹⁶ Ofcom is of the view that it has now (after the section 128 notification was issued) taken steps for securing that its notified misuse was brought to an end and not repeated.

²¹⁷ The August 2011 Representations, paragraph 3.18.

²¹⁸ The August 2011 Representations, paragraph 3.19.

²¹⁹ The sentence in the particular information message was notified in the section 128 notification.

During the course of the investigation and after the section 128 notification issued, npower informed Ofcom that another information message was played by the [X<] call centre which contained the line "*to discuss our latest offers*". npower confirmed however that the marketing element has been removed from the message.

- b) removal of the line “to discuss our latest offers”;
- c) further staggering of agent breaks;
- d) alignment of shift patterns so that agents work the same shift to avoid rotational coverage and the potential for operating with fewer staff at certain times of the day (18 July 2011);
- e) recruitment of an additional dialler analyst for npower’s in-house operation to ensure dialler monitored at all times of the day;
- f) real time analysis of in-house operations, including abandonment rates, agent behaviours and pace setting with clear evidence of actions being taken to resolve abandonment rates above three percent. Logs published on a daily basis to give visibility on abandonment rates (interim measures 7 July, permanent measures by 1 August 2011); and
- g) introduction of a process in outsourced telemarketing to provide a daily feed (within the day) of abandonment rates as per the template used for npower’s response to Ofcom’s information request and providers will need to evidence actions taken to resolve potential breaches (since 15 July 2011).

4.137 In addition to the above measures, in the August 2011 Representations npower stated it had commenced an internal audit process to better inform its compliance. Further details of this audit, and updated compliance measures introduced as a result, were provided by npower in its response to the Third Information Request. This noted that the, *“Internal Audit Department was requested to identify and assess the effectiveness of RWE npower’s existing dialler data collection, regulatory compliance, performance reporting and invoicing processes in relation to its telesales activities (at both internal and outsourced call centres) and to provide a basis for any improvements that could be made in such processes.”*²²⁰

4.138 The audit objectives were to identify and assess the accuracy and robustness of the following:²²¹

- a) logging of call centre activities in core data systems;
- b) data extraction routines to ensure that the reporting of activities as accurate;
- c) strategies and control frameworks to identify and enact Ofcom regulations;
- d) processes to identify and prevent breaches of Ofcom regulations in respect of the use of outbound diallers;
- e) coverage of compliance with Ofcom requirements in quality assurance frameworks covering call centre activities;
- f) npower monitoring mechanisms of outsourced call centres to ensure compliance;
- g) management of relationships with outsourced call centres; and

²²⁰ Annex 18, Audit Actions Report, provided in response to the Third Information Request.

²²¹ Annex 17, Internal Audit Terms of Reference 003-99, provided in response to the Third Information Request.

h) framework for identifying and maintaining regulatory compliance.

4.139 According to npower a number of findings were discovered as a result of the audit. These included irregularities and errors in the abandoned call data; inconsistent management information report queries; and issues with performance against intra-day reporting requirements of outsourcers in relation to abandoned call rates.

4.140 The key conclusions and recommendations from the audit²²² was:

a) [redacted]

b) [redacted]

c) [redacted]

d) [redacted]

e) [redacted]

f) [redacted]

4.141 npower maintained that it has an agreed action plan to address each of the issues set out above.²²³ It noted that, "*All actions agreed from this audit will be formally followed up by Internal Audit, including those at outsourcers.*"²²⁴

4.142 The August 2011 Representations further stated that [redacted] "*no longer make telesales for npower (with effect from 30 June 2011). The contract with [redacted] is also terminating for domestic activity.*"²²⁵ These contract terminations followed a management review of [redacted]'s performance of outbound calling on behalf of npower prior to receipt of the section 128 notification²²⁶.

4.143 npower also told us in its 28 October revised data submission that as a result of [redacted]'s intentional manipulation of data, "*... npower immediately suspended the provision of services by [redacted] and has since taken action to terminate all [redacted] telesales service contracts with npower.*"²²⁷

4.144 As stated in the May 2012 Representations, npower also intends to carry out an annual internal audit of its telesales calls made using automated systems. It is also commissioning an independent external audit of its telesales processes.

4.145 npower in its August 2012 Representations, said that it had "*put in place a series of further actions in 2011, but we feel it would be incorrect to characterise them as being only in response to the section 128 Notification – for example two set out below were commenced in June 2011, two were implemented on 1 July 2011, others implemented on 7, 15 and 18 July 2011 and therefore were put in place or planned as soon as possible following Ofcom's expressed concern and before the Notification [section 128 notification].* The steps npower stated it took, included:

²²² Annex 18, Audit Actions Report, provided in response to the Third Information Request.

²²³ Annex 18, Audit Actions Report, pages 3 to 6, provided in response to the Third Information Request.

²²⁴ Annex 18, Audit Actions Report.

²²⁵ The August 2011 Representations, paragraph 3.25

²²⁶ No date was provided for when the management review took place. No date was provided for the termination of [redacted]'s contract.

²²⁷ Annex 14, npower revised submission, 28 October 2011.

- a) Provision of an added ability to "preview dial" records in the event of an abandoned call to guarantee the presence of a live agent as an additional option to permanent suppression or 72 hours suppression;
- b) Arranging agent breaks and lunches to be staggered to ensure fewer swings in the size of the agent pool. (in place since 1 July 2011);
- c) Reducing the amount of time spent by agents logged out performing administration tasks and customer call-backs (in place since June 2011);
- d) Implementing 90% adherence for agent availability targets to software configured schedules with a stepped increase of 1% per month through to an end target of 95% by November, with a clear, defined management process for agents who do not achieve this (commenced in June 2011);
- e) Increasing the minimum number of agents from 10 to 15 for which we would plan a predictive dialling mode campaign to operate. For any periods where the planned staff level falls below this, the dialler will be turned to Preview dial (in place since 1 July 2011);
- f) The alignment of shift patterns so that agents work the same shifts (in place since 18 July 2011);
- g) The recruitment of an additional dialler analyst for npower's in-house operation;
- h) Provision of a real time analyst of in-house operation to make and record observations of matters including, abandonment rates and agent behaviours. Interim measures have been in place since 7th July 2011 with permanent measures in place by 1 August 2011;
- i) Provision of a daily feed within the day from outsourced telemarketing of abandonment rates so that if the abandonment rate exceeds 3% during the day, outsource providers will provide an intraday view of their abandonment evidencing what actions are being taken to resolve any potential breaches (in place since 15 July 2011); and
- j) Implemented new policy and process document with our outsource telesales service providers which reflects Ofcom requirements, along with reporting and escalation processes.

4.146 npower further added *"it is therefore npower's contention in relation to the penalty that the number and timing of these measures show that in fact RWE npower took timely action immediately following Ofcom's expressed concerns. All steps cannot be taken at once but action was immediately put in train and implemented speedily and this therefore should be taken into account in relation to the penalty."*²²⁸

4.147 We acknowledge that npower took some steps before the section 128 notification issued. We further accept that the implementation of steps may involve some lead time so that the full effect of the first series of steps npower took may not have been realised until after the section 128 notification issued on 6 July 2011. However, on the facts, we consider that the steps taken prior to the section 128 notification were not in themselves sufficiently effective to end the contravention. It is our view that the steps

²²⁸ The August 2012 Representations, paragraph 9.4.

npower took after the section 128 notification (possibly assisted by the steps it had taken earlier) operated to end the contravention.

4.148 Although the CCT has received complaints regarding silent and/or abandoned calls allegedly being generated by or on behalf of npower since the section 128 notification was issued, this number has declined.²²⁹

4.149 Following our consideration of the representations, responses to information requests, correspondence and CCT complaint data, our view is that although npower did take some steps once it became aware of its contravention these were not sufficient to end the contravention. However this is mitigated by certain steps npower took after Ofcom had issued the section 128 notification which ended the notified misuse. Ofcom is of the view that npower has now (after the section 128 notification was issued) taken steps for securing that its notified misuse was brought to an end and not repeated. We have acknowledged npower's steps referred to above, in determining the level of penalty.

Co-operation with Ofcom's investigation

4.150 Ofcom's Penalty Guidelines state that, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation.*" We have considered the possible impact on any penalty of the cooperation npower gave to Ofcom's investigation of this matter.

4.151 npower were punctual in their responses to Ofcom's statutory information requests and in the delivery of their representations. However, the underlying data contained within its responses to the information requests and representations was inaccurate on numerous occasions. npower did acknowledge that the information it had submitted was erroneous and supplied revised data, only to subsequently advise Ofcom (on multiple occasions) that the revised data was also erroneous. These repeated inaccuracies led to delays in the progress of Ofcom's investigation.

4.152 npower, submitted in its August 2012 Representations that "*These instances arose because of data issues relating to our contractors, not in relation to RWEnpower.*" It also said "*RWEnpower itself identified issues with the data and took action to validate that data. This included attending the contractors premises, and reviewing the basis on which data was compiled, carrying out reviews...*"²³⁰ npower considered that it would be unfair to penalise it "*thanks to its own initiative and diligence in investigating the [x] numbers*" and contended that, "*it could equally be construed as evidence of a diligent approach coupled with commitment to compliance and transparency (all amendments to the data were immediately and voluntarily disclosed to Ofcom).*"²³¹

4.153 While we accept that npower was responsive to Ofcom's requests during the course of the investigation, the numerous and repeated inaccuracies rendered a significant portion of their submitted material irrelevant. It is in this way that Ofcom considers that there has been a failure to adequately co-operate and consequently this serves as an aggravating factor and increases the amount of any penalty we may impose.

²²⁹ Note that the complaints to CCT are merely indicative of possible non-compliance.

²³⁰ The August 2012 Representations, paragraph 9.2.

²³¹ The August 2012 Representations, page 28.

Relevant precedents set by previous cases

4.154 Our Penalty Guidelines published on 13 June 2011 also indicate that we will, in determining a penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We have considered them here. For the sake of clarity, this section is structured as follows:

- a) qualifications as to any weight which may be attached to the persistent misuse precedents prior to 2011²³²;
- b) comparison and distinction between the present case and persistent misuse cases prior to 2011 in respect of penalty factors considered in common,²³³
- c) comparison and distinction between the present case and a recent post 2011 persistent misuse case²³⁴ in respect of penalty factors considered in common;
- d) comparison and distinction between the present case and other cases in which penalties were imposed; and
- e) summary of relevance of previous precedents.

4.155 Under section 128 of the Act, Ofcom has taken action against companies for persistently misusing an electronic communications network or service, most notably in relation to the making of silent and/or abandoned calls. Under section 130 of the Act, Ofcom has imposed penalties for persistent misuse in respect of ten companies since June 2006.²³⁵

4.156 npower provided a table of precedents which it had prepared, during the oral hearing held on 10 September 2012.²³⁶ This table is at Annex 26. npower used this table to compare its case with earlier persistent misuse cases.

Qualifications as to any weight which may be attached to the pre-2011 persistent misuse cases

4.157 While, as noted above, Ofcom imposed penalties for persistent misuse of an electronic communications network or service prior to 2011, we consider these pre-2011 precedents to be of limited assistance in the determination of this case for the following reasons:

- a) the pre-2011 cases were determined prior to the introduction of secondary legislation²³⁷ increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;

²³² For ease of reference, we have referred to persistent misuse cases before 2011 as the “pre-2011 cases” in this document.

²³³ These pre-2011 cases are considered as a group. See:

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

²³⁴ To-date this is the only persistent misuse case after 2011 where a penalty has been imposed.

²³⁵ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

²³⁶ Annex 26, npower’s table of precedents.

²³⁷ http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/uksi_20102291_en.pdf

- b) the pre-2011 cases were determined on the basis of penalty guidelines which have now been superseded by the current Penalty Guidelines published on 13 June 2011;
- c) the pre-2011 cases related to non-compliance in respect of persistent misuse guidelines which have now been superseded by the current Guidelines published on 1 October 2010;
- d) the period of investigation (i.e. relevant period) has been reduced in duration, for the purposes of assisting efficient enforcement, from approximately 7 months to 7 weeks²³⁸ and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and
- e) the penalty in each case is assessed against the circumstances of that particular case in the round.

4.158 We do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and therefore this section does not purport to be a comprehensive analysis of each case as compared and distinguished from the present case.

Comparison and distinction between the present case and persistent misuse cases prior to 2011 in respect of penalty factors considered in common

4.159 These pre-2011 cases in which Ofcom set penalties in respect of persistent misuse did not use the current Guidelines or the current Penalty Guidelines and were prior to the introduction of an increased maximum penalty. They imposed a penalty for persistent misuse using previous penalty guidelines and in which the maximum financial penalty that could be imposed at the time was £50,000. These pre-2011 cases are as follows:

- a) Barclays Bank Plc (“Barclaycard”), September 2008
- b) Ultimate Credit Services Limited (“UCS”), January 2008
- c) Equidebt Limited (“Equidebt”), December 2008
- d) Abbey National Plc (“Abbey”) , March 2008
- e) Complete Credit Management Limited (“CCM”), March 2008
- f) Bracken Bay Kitchens (“Bracken Bay”), January 2007
- g) Space Kitchens and Bedrooms (Holdings) Limited (“Space Kitchens”), January 2007
- h) Carphone Warehouse Group Plc (“Carphone”), January 2007
- i) Toucan Residential Limited, formerly IDT Direct Limited (“Toucan”), January 2007

4.160 In the above pre-2011 cases, Ofcom imposed penalties for persistent misuse ranging from £5,000 to the then statutory maximum penalty of £50,000. In terms of severity, the pre-2011 cases were considered by Ofcom to range from serious to very serious.

²³⁸ Note the duration of the relevant period in a particular case may vary depending on the facts and circumstances of that case.

These cases concerned non-compliance in respect of abandoned call rates in excess of three percent of live calls over a 24 hour period but some also concerned other forms of persistent misuse,²³⁹ including failure to present a (valid or accurate) CLI and failure to play information messages after the occurrence of an abandoned call. Therefore these cases also include factual issues which are different to those in the present case.

- 4.161 Pursuant to section 130(5) of the Act, in making its determination, Ofcom must have regard not only to any representations by the notified misuser but also to any steps taken by the notified misuser for securing that the misuse is brought to an end and not repeated; and any steps taken by the notified misuser for remedying the consequences of the notified misuse. These two factors set out under section 130(5)(a) and (b) of the Act were considered in all the pre-2011 cases.
- 4.162 There are certain penalty factors which remain common to both the previous penalty guidelines and the current Penalty Guidelines and therefore, subject to the caveats at paragraph 4.157, these pre-2011 cases are useful but only insofar as they provide an indication of the application of such common factors.
- 4.163 The application of factors common to both the present case and the pre-2011 cases are set out below.

Common factor 1: Deterrent effect

- 4.164 These cases considered the deterrent effect of the imposition of a penalty.
- 4.165 Ofcom stated its position particularly clearly in the CCM case. In the CCM case, CCM submitted that by understanding its own non-compliance, this was sufficient incentive to have remedied that situation and ensure compliance in the future. Ofcom disagreed, stating it “*considered the question of incentives to comply relates to industry as a whole and not only to the persistent misuser.*” Ofcom further stated it considered that there remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 and the (then) guidelines in respect of persistent misuse. Ofcom, in the pre-2011 cases took into account whether the contraventions at issue continued even after Ofcom had fined other companies for persistent misuse.
- 4.166 Comparably, in the present case, Ofcom has taken into account the fact that the threat of penalties for persistent misuse has been in the public domain since the Act came into force in 2003 and Ofcom fined a number of companies. Recently, it again featured prominently in the public domain, particularly within industry circles, following the introduction of the increased financial penalty and the revised Guidelines²⁴⁰.
- 4.167 Ofcom has taken into account that in the present case, the contravention occurred:
- a) after the imposition of penalties in the pre-2011 cases; and

²³⁹ As stated in the Guidelines at 1.24 “*Abandoned and silent calls are just two examples of persistent misuse that call centres may be responsible for...*”

²⁴⁰ The imposition of a penalty on HomeServe PLC also featured prominently in the public domain in April 2012, however as this particular penalty was imposed on HomeServe *after* the Relevant Period, the deterrent effect of the HomeServe case is not relevant to the present case and consequently not taken into account.

- b) after Ofcom issued an open letter to industry advising of new Guidelines and Ofcom's expectations of implementation by February 2011.

4.168 We consider that clearly there is and remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 of the Act and the Guidelines across industry and for npower specifically.

Common factor 2: Seriousness and degree of harm caused by the contravention

4.169 Seriousness and degree of harm caused by the contravention are relevant to both the present case and the pre-2011 cases. In the pre-2011 cases, Ofcom was guided by the degree of harm or likely harm which results from the persistent misuse. In these cases, Ofcom's position was that harm is linked to the number of abandoned and/or silent calls made and took this into account in determining the seriousness of a case.

4.170 This approach to ascertaining seriousness remains relevant. The issue of the harm or likely harm is presently considered to be linked to the number of abandoned and/or silent calls. This is set out in the Guidelines which state:

"Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action".²⁴¹

4.171 Notwithstanding that the total number of abandoned and/or silent calls made during the relevant periods in respect of each pre-2011 case varied considerably, the persistent misuse in all these cases was considered at the very least to be, "serious".

4.172 The abandoned call rate was deemed to be relatively low, for example in the CCM case. The total number of abandoned calls made during the relevant period (between 1 October 2006 and 18 April 2007) was 815 and CCM exceeded the three percent abandoned call rate on 29 of the 120 days on which it made calls during the relevant period. Ofcom in assessing the level of seriousness in that case, took into account the fact that (i) the total amount of abandoned calls was relatively low; (ii) that the three percent abandoned call rate was exceeded on less than a quarter of the days on which CCM made calls during the relevant period; (iii) in almost half of the 24 hour periods where CCM exceeded the three percent limit, this was by a very small number of calls (less than two). Yet Ofcom remained of the view that there was a serious contravention of section 128 (in as much as CCM had used an ACS technology to make and repeat), on a sufficient number of occasions so as to represent a pattern of behaviour or practice.

4.173 In the present case, the period of investigation was shorter in duration than in the CCM case, as the Relevant Period spanned from 1 February 2011 to 21 March 2011.

4.174 In the seven week period of investigation, the number of abandoned calls together on all the dates on a per call centre basis on which the 3% abandoned call rate was exceeded, the total number of calls abandoned to live individuals was 1,756. This can be contrasted with 815 abandoned calls in a 6.5 month period in the CCM case.

4.175 npower exceeded an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period (1 February 2011 to 21 March 2011). This occurred at in-house and third party call centres acting for or on

²⁴¹ Annex 2, The Guidelines, A1.84.

behalf of npower on the following number of occasions: two at npower in-house call centre (on 2 and 17 February 2011); two at [§<] (16 February and 12 March 2011); and four at [§<] (5 February, 12 February, 12 March and 19 March 2011).

- 4.176 While npower acknowledged that the number of abandoned calls generated for or on its behalf exceeded those in the CCM case, it argued that it *“is appropriate to look only at those 24 hour periods during the relevant period when the 3% threshold was exceeded.”*²⁴²
- 4.177 Although Ofcom, as in the CCM case, considers npower’s contravention to be serious, the CCM case can be distinguished from the present case as, within a shorter period of time, npower, or parties acting for or on its behalf, generated a greater amount of non-compliant calls than in the CCM case.
- 4.178 Moreover, in the present case, another notified misuse related to the playing of an information message containing (in Ofcom’s view) marketing content during an abandoned call. Following consideration of npower’s representations and taking into account the circumstances of this case in the round, although Ofcom’s view is that the particular wording of the message played during 1,906 calls, constituted marketing content and that this behaviour was persistent misuse, we consider that the harm caused was not at a serious level. On this basis, Ofcom considers this breach as more minor and this is reflected appropriately and proportionately in the final penalty amount.
- 4.179 Although we consider that the inclusion of marketing content within the information message played by npower’s in-house call centre in the event of an abandoned call is inconsistent with the Guidelines, Ofcom acknowledges that in some pre-2011 cases²⁴³, the notified party failed to play *any* information message at all, which resulted in silent calls due to the absence of a recorded message and *“the likelihood that the consumer will suffer anxiety and distress is greater, given that they will not know the identity of the caller.”*
- 4.180 In relation to the issue of duration and assessment of non-compliance within the relevant period, the present case can be distinguished from the pre-2011 cases.
- 4.181 The duration of a relevant period is not in itself an indicator of a whether non-compliance has occurred to any greater or less extent. The reason for a comparatively shorter relevant period in the present case to the pre-2011 cases is simply Ofcom’s need to maximise administrative efficiency in the course of investigations.
- 4.182 The fact that the periods of investigation differ greatly between these pre-2011 cases and the present case is not relevant to the level of non-compliance.

Common factor 3: Whether senior management knew, or ought to have known, that a contravention was occurring or would occur.

- 4.183 Another factor considered in both the pre-2011 cases and the present case is the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur. In the majority of the pre-2011 cases, Ofcom found no direct evidence to suggest that senior management were aware or ought to have been aware of the respective contraventions. For example, in the case

²⁴²The August 2011 Representations.

²⁴³For example, the Bracken Bay case and the Space Kitchens case.

of Barclaycard (in which Ofcom imposed the maximum statutory penalty applicable at the time), Ofcom stated that there was no direct evidence to suggest senior management were aware or ought to have been aware of the contravention and that *“the senior management’s general duty was to oversee the management and operation of the business and that did not necessarily extend to a position where it ought to have been aware of the number of calls on a daily basis, or of non-compliance with the other procedures.”*

4.184 However, and by way of contrast, in the case of Toucan, Ofcom considered that as the company had previously been the subject of an investigation into the making of silent and/or abandoned calls, then as a result of that investigation, the company’s senior management ought to have been aware of Ofcom’s guidelines and, critically ought to have known that a contravention was occurring or could occur in the circumstances.

4.185 Ofcom’s position set out in the Space Kitchens case is of note. In this case the company asserted that it experienced technical problems and other difficulties with its dialler manufacture which affected the number of abandoned calls made. In the section 130 notification, Ofcom stated that:

“Ofcom considers that it is the Company’s responsibility to ensure that its call centres comply with its legal obligations, and in particular, to comply with the Persistent Misuse Statement.²⁴⁴ In these circumstances Ofcom does not consider that the Company’s contraventions can be attributed to circumstances beyond the control of the Company nor to the actions of a third party.”

4.186 In the present case, npower asserted that *“we do not believe that it is correct that senior management ought to have been aware of any contravention that might have taken place in this case, notwithstanding our view that none exists”* and that their general duty was *“to oversee the management and operation of the business and that that did not necessarily extend to a position where it ought to have been aware of the number of abandoned calls being made on a daily basis, or of non-compliance with the requirements regarding the content of recorded messages²⁴⁵.”* Ofcom accepts that senior management at npower did not know that a contravention was occurring or would occur.

Common factor 4: Whether in all the circumstances the company took appropriate steps to prevent the contravention

4.187 The issue of whether in all the circumstances the company took appropriate steps to prevent the contravention was considered in both the pre-2011 cases and in the present case. Common to many of the pre-2011 cases is Ofcom’s statement that during the relevant period there were ineffective or repeated failures of internal procedures or that procedures were absent altogether. In Barclaycard it was concluded that Barclaycard only put in place the steps to achieve compliance after it had received a first draft information request from Ofcom.

4.188 Ofcom stated in the pre-2011 cases that it expects companies to pro-actively and of their own accord take steps to identify and mitigate external factors that might lead to a contravention of section 128 of the Act. This remains the position. Compliance is considered to be within a company’s own control and responsibility and companies are expected to have processes for compliance in place.

²⁴⁴ i.e. the guidelines in existence at the time.

²⁴⁵ The August 2011 Representations.

- 4.189 In the present case, Ofcom is of the view that npower failed to take appropriate (or to take effective and prompt) steps in order to *prevent* its notified contravention.

Common factor 5: Whether any steps have been taken by the misuser for securing that their misuse is brought to an end and not repeated

- 4.190 The issue as to whether any steps have been taken by the misuser for securing that their persistent misuse is brought to an end and not repeated is considered in the pre-2011 cases and the present case.
- 4.191 In the pre-2011 cases, the notified parties made representations to the effect that they had taken steps which applied to their structure, technology, personnel, processes and best practice of the company. For example, in the Abbey case, action taken was evidenced in the areas of (a) technology and processes; (b) key performance indicators and reporting; (c) real-time dialler operation and; (d) senior management capability. In the Equidebt case, Equidebt even went as far as to elect not to rely on the use of AMD technology in its outbound calling operations. CCM took steps relative to five areas; that of (a) agent behavioural change (b) management of the ACS technology; (c) external support; (d) reporting of compliance data; and (e) audit trails.
- 4.192 In the UCS case, Ofcom determined that the misuser had not secured that the misuse had been brought to an end as evidence indicated an excessive number of abandoned calls during 24 hour periods occurred *after* the section 128 notification. Ofcom therefore in that case considered that UCS continued the contravention after being notified. Whereas in the present case, Ofcom's view is that although it did take some steps once it became aware of its contravention²⁴⁶, they were not effective to end the contravention, however this was mitigated by certain steps npower took after Ofcom had issued the section 128 notification and which ended the misuse. Ofcom acknowledged npower's steps in determining the final level of penalty.

Common factor 6: Any steps taken by the notified misuser for remedying the consequences of the notified misuse

- 4.193 Any steps taken by the notified misuser for remedying the consequences of the notified misuse is considered in the pre-2011 cases and the present case.
- 4.194 Provision of "*formalised complaints procedures*" were considered in respect of this issue, for example in Equidebt. In Equidebt, allowance was made for payment of financial compensation in the event of a complaint. Ofcom stated that Equidebt's policy in relation to compensation "*goes some way to remedy the consequences of its misuse*". In Barclaycard, Ofcom noted that a compensation gesture "*goes to recognition by the misuser that their conduct may have caused harm, and that some level of compensation is due*" and that it "*would have expected Barclaycard to have offered a similar gesture or suitable alternative remedy*".
- 4.195 However, in the Abbey case, Ofcom stated that:

"Ofcom would usually expect a company to actively remedy any consequences of its breach, whereas in this case Abbey appears to have placed the burden on customers to seek out redress themselves."

²⁴⁶ Ofcom is of the view that it has now (after the section 128 notification was issued) taken steps for securing that its notified misuse was brought to an end and not repeated.

4.196 In the present case, in its August 2012 Representations and during the oral hearing npower stated that, should Ofcom confirm its finding of persistent misuse, npower will make a goodwill payment of a £10 shopping voucher to the 1,756 consumers who received an abandoned call on one of the eight days when npower exceeded an abandoned call rate of three per cent on a per call centre/across campaigns basis. It is Ofcom's view that npower has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse. We expect npower to follow through on its commitment.

Common factor 7: Co-operation with Ofcom

4.197 Co-operation was also considered in terms of responses to statutory information requests issued to it by Ofcom under section 135 of the Act during the course of the investigation.

4.198 In the UCS case, Ofcom did not consider UCS to have co-operated in a satisfactory manner with the investigation or responded adequately to statutory information requests. Ofcom stated that UCS had caused substantial delays in the progress of Ofcom's investigation by its failure to respond with the requested information in a timely or accurate manner. This issue arose again in the representations, where UCS admitted previous data was inaccurate and supplied revised data which was also found to be inaccurate. This culminated in the need to send a second information request to UCS, for which the company failed to meet the deadline. In the course of any investigation, Ofcom expects industry to engage in a professional and responsive manner, and UCS failed to do so on repeated occasions.

4.199 The present case can be distinguished from UCS insofar as npower were punctual in their responses to statutory information requests and in the delivery of their representations. However, the underlying data contained within npower's responses to statutory information requests was, on numerous occasions, inaccurate, as was the data contained in some of their representations. Similarly to the UCS case, npower acknowledged on multiple occasions that the information it submitted was erroneous and supplied revised data, only to subsequently advise Ofcom (on multiple occasions) that the revised data was also erroneous.

4.200 While it is acknowledged that npower was responsive to Ofcom's requests during the course of the investigation, the numerous and repeated inaccuracies rendered a significant portion of their submitted material, irrelevant. It is in this way that Ofcom considers there has been a failure to adequately co-operate and consequently this serves as an aggravating factor.

Common factor 8: History of contravention

4.201 The majority of the pre-2011 cases concerned companies with no previous history of persistent misuse.²⁴⁷ Likewise, npower has no previous history of persistent misuse.

Common factor 9: Any gain or extra cost incurred by consumers and other market participants

4.202 Ofcom concluded in the pre-2011 cases, that there was no direct evidence of any gain or extra cost incurred by consumers and other market participants. We have concluded the same here.

²⁴⁷ Except for example in the Toucan case, the company had previously been the subject of an investigation into the making of silent or abandoned calls in the context of section 128 of the Act.

*Comparison and distinction between the present case and a recent post 2011 persistent misuse case, HomeServe PLC (“HomeServe”)*²⁴⁸

- 4.203 The most recent persistent misuse case was determined on 19 April 2012 and imposed a penalty of £750,000 on international home emergency and repairs company, HomeServe for its contravention of section 128 of the Act between 1 February 2011 and 21 March 2011.
- 4.204 The HomeServe case is instructive, as it was determined:
- a) on the basis of the Guidelines published on 1 October 2010;
 - b) on the basis of the Penalty Guidelines published on 13 June 2011;
 - c) after the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
 - d) in respect of a period of investigation (i.e. relevant period) of 7 weeks; and
 - e) against the circumstances of the case in the round.
- 4.205 The key features of the HomeServe case and the present case are considered below in terms of the factors set out in the Penalty Guidelines.
- Deterrence and seriousness of the contravention*
- 4.206 Ofcom considered that the contravention in HomeServe was properly characterised as serious. The contravention of section 128 during the seven week relevant period, was significant, involving 42 x 24 hour periods where it exceeded the three percent abandoned call rate and of those 42 days, 27 of them involved HomeServe making one or more calls to the same number within the same 24 hour period, resulting in 36,218 calls which did not adhere to the 24 hour policy set out in the Guidelines.
- 4.207 Ofcom also considers the contravention in npower to be serious in relation to its breach of the three percent abandoned call rate threshold. npower exceeded an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period (1 February 2011 to 21 March 2011), resulting in 1,756 calls abandoned to live individuals. In the particular circumstances of the npower case, Ofcom did not consider its breach in relation to information messages containing marketing content to have caused harm at a serious level. On this basis, Ofcom treated the breach as more minor and this is reflected in the final penalty amount.
- 4.208 In the HomeServe case and in the present case it has been deemed appropriate to impose a penalty reflecting a serious contravention which would send a deterrent message to the notified party and to industry. However, the level of harm and seriousness in the HomeServe case is considered to be greater than that in the npower case.

²⁴⁸ To-date this is the only persistent misuse case after 2011 where a penalty has been imposed.

Degree of harm caused by the contravention

- 4.209 Ofcom was of the view that HomeServe generated a considerable degree of harm. It took into account the scale of the contravention, the harm suffered by recipients of the silent and abandoned calls during the relevant period.
- 4.210 Ofcom considered the level of harm to be evident from the extent to which HomeServe exceeded the three percent abandoned call rate and further emphasised by the number of calls made which did not adhere to the 24 hour policy. In HomeServe, a call centre acting for HomeServe, produced an aggregated abandoned call rate of nearly double the three percent abandoned call rate specified in the Guidelines²⁴⁹ and HomeServe's failure to adhere to the 24 hour policy resulted in "*instances the same telephone number was called five times after it had initially been classified as picked up by an answer machine*".
- 4.211 It was Ofcom's view that the recipients of the abandoned and silent calls generated for or on behalf of HomeServe during the relevant period had suffered harm.
- 4.212 In the npower case, the scale of the contravention is not considered to be as great as in HomeServe. Furthermore, the harm suffered was primarily limited to harm generated as a result of abandoned calls.

Duration of the contravention

- 4.213 In HomeServe, Ofcom considered that the seven week period²⁵⁰, which was the duration of the notified non-compliance with section 128 in that case, was, in itself, a substantial duration for contravention of a provision designed to protect persons unnecessarily suffering annoyance, inconvenience or anxiety.
- 4.214 Furthermore, it was noted in HomeServe, that notwithstanding that explicit actions were taken by Ofcom to raise HomeServe's awareness of the importance of compliance, it was still found in contravention after this.
- 4.215 On the facts in npower, Ofcom made direct contact with npower prior to carrying out its investigation so as to warn npower of the high levels of complaints made to the CCT in respect of persistent misuse calls alleged to have been on or behalf of npower. npower therefore failed to heed Ofcom's direct warnings of non-compliance prior to Ofcom commencing an investigation.
- 4.216 The seven week period of investigation in npower is, in Ofcom's opinion, in itself, a substantial duration for contravention of the persistent misuse provisions in the Act.

Any gain (financial or otherwise) made by HomeServe as a result of the contravention

- 4.217 In the HomeServe case, HomeServe asserted that it did not make any direct financial gain. However, Ofcom considered that it was likely that it did make some additional gain by operating outside the principles set in the Guidelines. In Ofcom's view, as HomeServe continued calling consumers which it had not been able to get in contact with earlier that day in contravention of the 24 hour policy, it potentially benefitted from additional efficiency gains afforded to it by using AMD technology in an unrestrained way.

²⁴⁹ The pro-rata false positive rate when added to the number of abandoned calls made during the relevant period produced this aggregated abandoned call rate.

²⁵⁰ The relevant period in the HomeServe case.

- 4.218 Although Ofcom considered it likely that HomeServe did make *some* additional gain, on the basis that Ofcom did not have direct evidence of such gain, it did not take this factor into consideration in the determination of penalty amount.
- 4.219 By way of comparison, the notified misusers in both npower and HomeServe submitted that they did not make any direct financial gain.
- 4.220 In npower, Ofcom considered that it is likely that it did make some efficiency gains by operating outside the principles set out in the Guidelines. However, on the basis that Ofcom does not have direct evidence of such gain in this case, this factor was not taken into consideration in the determination of any penalty amount.

Steps taken by HomeServe to remedy the consequences of the contraventions

- 4.221 HomeServe made representations regarding the steps it would take to remedy the consequences of its notified misuse.²⁵¹In summary, these stated that HomeServe would:
- a) provide compensation to a claimant upon HomeServe establishing from its records that the CLI of the claimant matched the CLI contacted while AMD was in operation;
 - b) issue a statement on its website about the offer of compensation;
 - c) communicated the offer of compensation in response to all press enquiries made to it; and
 - d) provide compensation to the individuals who lodged a complaint with Ofcom during the relevant period and to the individuals who had complained to HomeServe during the relevant period.
- 4.222 Ofcom concluded that HomeServe had committed to putting in place such steps as it considered appropriate for remedying the consequences of the notified misuse and did not deem it to be an aggravating factor that increased the penalty.
- 4.223 In the present case, in its August 2012 Representations and during the oral hearing npower stated that, should Ofcom confirm its finding of persistent misuse, npower will make a goodwill payment of a £10 shopping voucher to the 1,756 consumers who received an abandoned call on one of the eight days when npower exceeded an abandoned call rate of three per cent on a per call centre/across campaigns basis. It is Ofcom's view that npower has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse.

History of contravention

- 4.224 HomeServe did not have a history of notification of contraventions in respect of the persistent misuse provisions or any other provisions of legislation falling under Ofcom's regulatory jurisdiction. Consequently, in the HomeServe case, Ofcom did not consider this to be an aggravating factor.
- 4.225 Similarly, npower has no previous history of notification of contraventions in respect of persistent misuse provision or other legislative provisions within Ofcom's regulatory remit.

²⁵¹ These representations were made following issuance of the provisional section 130 notification in the case.

Whether in all the circumstances appropriate steps were taken to prevent the contravention

- 4.226 In HomeServe, it was Ofcom's view that HomeServe should have and could have (given its knowledge of the problems and their causes, and the timeframe over which it was aware of them) taken appropriate steps to prevent the notified contravention from occurring.
- 4.227 Prior to commencing its investigation, Ofcom had alerted HomeServe to concerns that it was generating silent and abandoned calls. Also prior to investigation, Ofcom published the Guidelines which clarified the methodology in respect of testing the AMD false positive rate yet HomeServe continued to rely on an unaccepted method.
- 4.228 While Ofcom acknowledged that HomeServe had been given an assurance from its call centre, that the call centre was operating compliantly when in fact it was not, Ofcom considered that this compliance failure would have become apparent to HomeServe had HomeServe had an effective compliance strategy in which monitored and assessed ongoing compliance. Ofcom stated "*A party procuring a third party company to act for or on its behalf in the generation of calls, is expected to take reasonable steps to monitor and assess ongoing compliance by that third party with the Guidelines and the persistent misuse provisions. Acceptance of assurances that the third party is complaint without the procuring party seeking evidence that the assurances are substantiated, falls short of a practice of monitoring and assessment.*"
- 4.229 Ofcom acknowledged, however, that HomeServe had of its own volition, contracted an independent body to assist its review of its dialling operations and also carried out due diligence of each of third party call centre prior to engaging them. HomeServe submitted evidence that the due diligence exercise included assessment (such as reporting, Ofcom compliance audits and independent audits) of the adequacy of the compliance arrangements at the third party call centres.
- 4.230 Taking account of the above, Ofcom considered that HomeServe had failed to follow the Guidelines' principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified contravention. It considered that the absence or ineffectiveness of the procedures had demonstrated HomeServe's failure to take appropriate (and timely) steps to prevent its notified contravention. This was taken into account in the determination of the penalty amount.
- 4.231 In the present case, Ofcom is of the view that npower failed to take appropriate (or to take effective and prompt) steps in order to *prevent* its notified contravention. This is dealt with in detail at paragraph 4.100 *et seq.*

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.

- 4.232 In both the HomeServe case and the present case, following consideration of the notified misusers' respective representations and responses to information requests, Ofcom concluded that their contravention of the persistent misuse provisions did not occur intentionally; and, was not reckless on the basis that they had not ignored the risk, or paid no heed to the existence of such risk.
- 4.233 In HomeServe, the senior management had received a report (during the relevant period) from an independent body engaged to assist review of dialler operations. This

report detailed findings and recommendations, and included a list of non-compliant matters. Ofcom stated that *“it is apparent to Ofcom that senior management, upon receipt of this report, would have been aware not only that the Guidelines were not being followed but also of the seriousness and extent of the contraventions”* and that notwithstanding this was the state of their knowledge, it was not until two months later that testing was conducted which revealed a rate significantly higher than the 3 per cent abandoned call rate.

4.234 Prior to the investigation, Ofcom had contacted HomeServe and raised concerns about the number of silent and abandoned call complaints it had received. In its determination, Ofcom stated that this suggested that senior management were aware at this time, that Ofcom had concerns regarding HomeServe’s compliance with the persistent misuse provisions.

4.235 Whereas in the present case, npower was not in receipt of a report detailing non-compliant matters and it is Ofcom’s view that npower’s senior management were not aware, prior to receipt of the section 128 notification on 6 July 2011, that a contravention was occurring or would occur.

The extent to which the level of penalty is proportionate, taking into account the size and turnover of HomeServe

4.236 Ofcom considered that HomeServe had a sizeable business with a significant turnover²⁵² and as such, there was *“an expectation that it would have a robust compliance strategy in place with respect to its outbound calling activities.”*

4.237 Similarly, with a turnover of £3.130 billion, Ofcom considers that npower is a sizeable business.

4.238 For this reason, we consider that the size and turnover of npower is a relevant consideration in the determination of the proportionality of the penalty imposed. This was also the case in the HomeServe decision.

Whether the contravention continued, or timely and effective steps were taken to end it, once HomeServe became aware of it

4.239 In HomeServe, Ofcom took the view that:

- a) HomeServe had not taken timely steps that were effective in bringing it into compliance once it had become aware of its contravention; and
- b) This was another factor which added to the amount of any penalty imposed; but
- c) That exacerbation was mitigated by certain steps HomeServe took after Ofcom informed HomeServe that it was being investigated.

4.240 Ofcom stated that there were delays between the point at which HomeServe was expressly advised of non-compliance and it was taking action to address that non-compliance. This view was reinforced by the fact that HomeServe was in possession of a report (referred to above) which unequivocally stated there was non-compliance at one of its call centres, and that, among other things, the compliance environment

²⁵² Its statutory reporting accounts as at May 2011, disclosed a turnover of £467.1m and a profit of £104.8m.

was “weak”. HomeServe did not engage the party which prepared the report to implement its recommendations until two months after the report had been received.

4.241 Ofcom considered that given the extent of the problems revealed by the report, HomeServe should have found a way to expedite its procurement process (and in the meantime ensured that the AMD technology had been switched off) or at the very least it should have taken steps to implement some of the report’s recommendations.

4.242 Ofcom accepted that the steps HomeServe had taken had brought it closer to compliance. These steps included:

- a) the retention of the independent body which produced the report to assist in implementing the recommendations contained in that report and to conduct internal audits of the in-house and outsourced call centres;
- b) the review and revision of compliance policies and procedures, followed by production of a revised compliance standards document;
- c) confirmation from each third party call centre that AMD was not to be used on any HomeServe campaign at any point in the future without the express consent of HomeServe; and
- d) the appointment of a full time compliance officer to undertake regular audits and to implement the compliance standards document referred to at (b) above.

4.243 However, Ofcom held the view that although HomeServe had taken some steps these were: after Ofcom had advised it of the investigation; not sufficiently expedited; and not all the steps necessary to end the contravention once it had become aware of it²⁵³.

4.244 In the present case, although the delay between the point at which npower was directly advised of the contraventions was not as significant as in HomeServe, Ofcom considers that it was not until it received the section 128 notification on 6 July 2011, that npower took further steps which were effective to end the contravention.

4.245 Similarly, in npower, Ofcom’s view is that although it did take some steps once it became aware of its contravention²⁵⁴, they were not effective to end the contravention, however this was mitigated by certain steps npower took after Ofcom had issued the section 128 notification and which ended the misuse. Ofcom acknowledged npower’s steps in determining the final level of penalty.

Co-operation with Ofcom’s investigation

4.246 Ofcom acknowledged that in general HomeServe had provided full co-operation with the investigation. It had promptly provided the information as required and Ofcom stated that it “*had no reason to believe that the information provided was inaccurate in any way.*”

4.247 In contrast and as discussed in further detail at paragraph 4.150, although npower was responsive to Ofcom’s statutory information requests and its invitation to make

²⁵³ For the avoidance of doubt, Ofcom was of the view that HomeServe had, after the section 128 notification had been issued, taken steps for securing that its notified persistent misuse had been brought to an end and not repeated.

²⁵⁴ Ofcom is of the view that it has now (after the section 128 notification was issued) taken steps for securing that its notified misuse was brought to an end and not repeated.

representations on the section 128 notification, npower made numerous and repeated errors in its submissions. It is in this respect that Ofcom considers there has been a failure to adequately co-operate and consequently this serves as an aggravating factor and increases the amount of any penalty we may impose.

Relevant precedents

- 4.248 At the time a decision was taken to impose a penalty in the HomeServe case, there had been no previous cases which were determined on the basis of the current Penalty Guidelines and the current Guidelines; and following the introduction of the increased statutory maximum penalty in respect of persistent misuse.
- 4.249 Consequently, in the absence of a more relevant precedent, the TalkTalk Telecom Limited and Tiscali U.K. Limited case, referred to below (the “TalkTalk case”), was considered to be instructive, or at least more so than the pre-2011 cases. However, the TalkTalk case was still observed to be limited in its usefulness and distinguishable in a number of respects, including primarily that it concerned a different conduct and different provisions of the Act.
- 4.250 In the present case, HomeServe is considered to be a more relevant precedent for all the reasons set out in the summary below at paragraph 4.273.

Comparison and distinction between the present case and other penalty cases

General Conditions penalty cases

- 4.251 The TalkTalk case, was determined on the basis of the current Penalty Guidelines²⁵⁵ on 17 August 2011. Ofcom imposed a penalty of £3,037,120 on TalkTalk for its contravention of General Condition 11.1. Although this case provides an indication of the factors that were taken into account when determining the amount of the penalty, as it concerned different provisions of legislation (sections 94 to 96 of the Act rather than persistent misuse) and conduct which was significantly different to the present case, it is of limited use for present purposes.
- 4.252 The key features of the TalkTalk case and present case are considered below.
- 4.253 First, it is noteworthy that General Condition 11.1 is an important consumer protection rule. Ofcom must ensure compliance with such rules in accordance with its principal duty to further the interests of citizens and consumers. Compliance with General Condition 11.1 is a fundamental and ongoing obligation.
- 4.254 Likewise, the persistent misuse provisions set out in the Act, further the interests of citizens and consumers by endeavouring to protect them from harm or likely harm of persistent misuse.
- 4.255 Second, both cases involved allegations of a pattern of behaviour resulting in a breach. In the TalkTalk case, TalkTalk Telecom and Tiscali had been erroneously billing end-users for services not provided (in particular for cancelled services). In the present case, npower’s actions are considered to amount to a pattern of behaviour in breach of the Guidelines.

²⁵⁵ See: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/notification.pdf

- 4.256 The duration and severity of the contravention were key features of the TalkTalk case. TalkTalk was only penalised for its contravention of General Condition 11.1 between January and November 2010, and TalkTalk's breach of the relevant general condition continued until March 2011. Although TalkTalk issued far fewer erroneous bills after November 2010, and took steps to remedy the consequences of doing so for those who received the bills, Ofcom considered that the steps it took for complying with the relevant general condition were insufficient and that its breach was still of significant magnitude after November 2010. Ofcom therefore imposed a penalty (in respect of the relevant period).
- 4.257 Third, in neither the present case nor the TalkTalk case was the practice considered to be intentional. In the TalkTalk case, Ofcom considered that senior management had knowledge of the contravention and that it did not take its contravention of General Condition 11.1 sufficiently seriously and demonstrate enough care to comply with that Condition. In the present case, Ofcom is of the view that senior management was not aware of that the contravention was occurring or would occur.
- 4.258 Fourth, npower and TalkTalk did ultimately take steps to end the contravention.
- 4.259 Fifth, the adequacy of co-operation of both companies can be distinguished. In the present case, the information provided was incorrect on a number of occasions, whereas in contrast, TalkTalk provided accurate information from the outset.
- 4.260 In the TalkTalk case, goodwill payments of £1,041,441 were made to 62,055 affected end-users, believed to have "*experienced inconvenience, annoyance or anxiety by such billing issues.*" TalkTalk also gave bill credits of £1.7 million to the 61,719 customers to whom bills had erroneously been issued between 1 January and 1 November, and also set up a dedicated customer complaint team to which affected customers could refer complaints about such bills. In the present case, in its August 2012 Representations and during the oral hearing npower stated that, should Ofcom confirm its finding of persistent misuse, npower will make a goodwill payment of a £10 shopping voucher to the 1,756 consumers who received an abandoned call on one of the eight days when npower exceeded an abandoned call rate of three per cent on a per call centre/across campaigns basis. It is Ofcom's view that npower has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse.
- 4.261 Despite these actions by TalkTalk, Ofcom considered that it was necessary to impose the penalty, to reflect the severity and length of TalkTalk's contravention and to ensure that TalkTalk complied with General Condition 11.1 and serve as a deterrent and prevent the future breach of General Conditions.
- 4.262 There are other precedents in which we have imposed a penalty for contraventions of other General Conditions, namely General Condition 1.2 in the Telephonics case²⁵⁶ and General Condition 14.3 in the Just Telecomms case.²⁵⁷ They also concerned factors which are significantly different to those in the present case and the penalties in those cases were set at ten percent of relevant turnover.
- 4.263 First, both cases involved either an intentional and planned practice of deceiving customers (in the Just Telecomms case) or actively and knowingly preventing

²⁵⁶ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/CW_998/

²⁵⁷ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_857/

customers from transferring to other providers (in the Telephonics case). And further, in the Telephonics case, engaging in additional aggravating behaviour.

- 4.264 By contrast, in the present case npower's contravention was not intentional or a planned practice.
- 4.265 Second, in the Just Telecomms case and the Telephonics case, the providers' behaviour had the effect of frustrating the competitive process. In the case of Telephonics by seeking to retain customers that it would not otherwise have retained, and preventing them from switching providers, at the expense of those competing providers who are abiding by regulatory requirements. And, in the Just Telecoms case, attracting customers by deceiving them and entering them into long minimum contract terms, preventing them from transferring to providers who were compliant with sales and marketing rules.
- 4.266 In the present case we have not investigated whether npower's actions have had any specific anti-competitive ramifications as we are concerned with harm to consumers through persistent misuse.
- 4.267 Third, Telephonics took no steps for complying with the relevant General Condition or to remedy the consequences of its contravention and Just Telecomms took only minimal and insufficient steps (and only then belatedly, once Ofcom issued a draft enforcement and penalty notice).
- 4.268 By way of distinction, npower has now taken adequate steps for securing the misuse is brought to an end and not repeated and in its representations (if Ofcom made a finding that there had been persistent misuse) committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse.
- 4.269 Finally, both Telephonics' and Just Telecomms' senior management were not only involved in the contravening behaviour, but actively encouraged it. Whereas in npower we consider that npower's senior management were not aware of its contravening behaviour and there is no evidence to suggest they were encouraging it.

Broadcasting Sanctions penalty cases

- 4.270 Pursuant to the Act, the Broadcasting Acts 1990 and 1996, and the Broadcasting Code ("the Code"), Ofcom has the power to impose sanctions on broadcasters for deliberate, serious or repeated breaches of the Code. The Code sets out rules and guidance for broadcasters in relation to television and radio which cover standards in programming, sponsorship, fairness and privacy. One of the sanctions Ofcom can impose is a financial penalty.
- 4.271 Significant fines have been imposed in relation to breaches of the Code. However, the broadcasting cases concern different conduct and provisions of the Act, as well as other Acts. Our view, therefore, is that they do not provide relevant precedents for the present case.

Summary of relevance of previous precedents

- 4.272 In summary and to re-iterate, we consider the pre-2011 precedents to be of limited assistance to our determination of the present case for the following reasons:

- a) they were determined prior to the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
- b) they were determined on the basis of penalty guidelines which have now been superseded by the current Penalty Guidelines published on 13 June 2011;
- c) they related to non-compliance in respect of persistent misuse guidelines which have now been superseded by the current Guidelines published on 1 October 2010;
- d) the period of investigation (i.e. relevant period) has been reduced in duration, for the purposes of assisting efficient enforcement, from approximately 7 months to 7 weeks and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and
- e) the starting point in each case is assessed against the circumstances of that particular case in the round.

4.273 In terms of determining a penalty in the circumstances of the present case, while the TalkTalk case is more useful than the pre-2011 cases, we consider the HomeServe case to be the most relevant and instructive of all the precedent cases referred to in this notification. This is primarily because the HomeServe case concerns similar conduct (persistent misuse) and the same provisions of the Act. However, we assess each case on its own merits, and we acknowledge that the facts and context of the HomeServe and npower cases differ.

4.274 In this case, the penalty under the Act is determined in an “*in the round*” assessment under our now applicable Penalty Guidelines.

Ofcom’s conclusions on the penalty amount

4.275 Any penalty Ofcom imposes on npower must be appropriate and proportionate to the contravention in respect to which it is imposed. Ofcom’s central objective in setting a penalty is deterrence. An appropriate penalty would be one that secures this objective (doing so in a proportionate way). We have set out above the particular factors relevant to those requirements.

4.276 In particular, we have noted that npower contravened the persistent misuse provisions during the Relevant Period by:

- a) generating 1,756 abandoned calls as a result of exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 8 separate occasions during the Relevant Period on a per call centre across campaigns basis; and
- b) including marketing content within the information message played in the event of an abandoned call by npower’s in-house call centre, which was played during 1906²⁵⁸ calls made in the Relevant Period.

4.277 We note that while this is not at the high-end of the scale of contraventions of the persistent misuse provisions, when compared with other relevant cases, it is still a

²⁵⁸ This figure has been arrived at following the subtraction of the reasoned estimate of calls abandoned to answer machines. If the number of times the message was played to answer machines was included, the total figure would be 5,306.

failure to comply with the Act and the Guidelines that are in place to protect consumers from abandoned and silent calls. We consider that this failure to comply is therefore still serious and has resulted in consumers suffering annoyance, inconvenience and anxiety. This indicates that it is appropriate to impose a penalty reflecting such behaviour in breach of the Act, and which would send a deterrent message to npower and industry.

- 4.278 However, Ofcom acknowledges that npower's contravention was at the lower end of the scale. The potential level of harm involved was mitigated by npower implementing revised processes, despite the fact it considered itself compliant. Furthermore, we note that npower had taken some steps to limit the harm caused, during the Relevant Period, for example playing an information message identifying npower, terminating calls after ringing no less than 18 seconds and complying with the 72 hour policy. We also acknowledge that npower has now taken appropriate steps to secure that its misuse has been brought to an end.
- 4.279 npower has also committed to taking steps to remedy the consequences of its persistent misuse and offered to provide a £10 high street shopping voucher to the consumers who received an abandoned call on one of the eight 24 hour periods where it exceeded an abandoned call rate of 3%. We will expect npower to meet this commitment.
- 4.280 Taking account of these above factors would suggest, in Ofcom's view, a penalty which would be towards the lower end of the scale. In imposing this fine we have kept in mind that a fine of £2 million would be the maximum amount that could be imposed. A fine of £2 million would suggest the contravention was the most severe and damaging contravention of the persistent misuse provisions; Ofcom does not consider npower's contravention to be at this level.
- 4.281 We consider that a penalty would have a deterrent effect by sending a clear message (in particular, to users of ACS and/or AMD technology) that strong enforcement action will be taken where the Guidelines and/or persistent misuse provisions are not adhered to. In recognition of the benefits of AMD and ACS technology when properly managed, Ofcom permits the use of AMD and ACS technology in accordance with defined compliance principles as set out in the Guidelines. Ofcom's enforcement priority has been set at a three percent abandoned call rate rather than a zero tolerance approach and this approach has allowed industry to benefit from the use of ACS and AMD technology. Where non-compliance does occur, we will take strong enforcement action providing a message to both the notified misuser and industry that persistent misuse is a breach of the Act. Therefore, we expect companies to make appropriate investment in compliance measures.
- 4.282 As regards the weighting of the factors considered, it is our view that the following factors are of particular importance in the circumstances of this case and in the consideration of a penalty amount:
- a) the contraventions were serious, but at a lower end of the scale;
 - b) npower's failure to take all appropriate steps to prevent the contravention, particularly given the opportunities afforded to it by Ofcom; and
 - c) that four information requests were required to obtain accurate data.
- 4.283 We also note that npower has committed to remedy the consequences of its breach by offering a £10 high street shopping voucher to the 1,756 consumers who received

an abandoned call on one of the eight 24 hour periods where an ACR of 3% was exceeded.

- 4.284 Considering all of these factors in the round, we are imposing a penalty of £60,000.
- 4.285 We consider that this amount is appropriate and proportionate taking account of all the evidence in this case. This penalty reflects the seriousness of npower's contravention of the misuse provisions, but also takes account of the mitigating factors in this case as set out in paragraphs 4.278 to 4.279. We also are of the view that this penalty will have a deterrent effect by sending a clear message (in particular, to users of ACS) that appropriate enforcement action will be taken where the Guidelines are not complied with.
- 4.286 The penalty amount is proportionate taking into account the size and relevant turnover of npower. As previously noted, npower's statutory accounts as at 31 December 2011 disclosed its turnover as £3,130 million (see annex 27). In our view, these factors indicate that npower's business is significant and that it should have the resources employed to ensure it, and its outsourced calling partners, are compliant with the Guidelines and the Act.
- 4.287 Furthermore, in our view, the penalty imposed must not only mark the seriousness of npower's contravention of section 128, but also be sufficient, consistent with principles of appropriateness and proportionality, to minimise the risk of it contravening in a similar way in future. Likewise, to alert other providers to the importance of avoiding such conduct.

Section 5

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