

ESSENTIAL SERVICES COMMISSION
WRONGFUL DISCONNECTION DECISION
UNDER SECTION 48A OF THE *GAS INDUSTRY ACT 2001*
LUMO ENERGY & CUSTOMER C
DECISION AND REASONS

Background

Customer C contacted the Energy and Water Ombudsman (Victoria) (EWOV) with regard to the disconnection of the supply of gas to her premises by Lumo Energy (Lumo) on 25 June 2015. EWOV investigated the matter, but was not able to assist the parties to reach a resolution. On 19 May 2015 EWOV referred the matter to the Essential Services Commission (the Commission) to decide whether the disconnection of gas supply to Customer C's premises was wrongful under section 48A of the *Gas Industry Act 2001* (the Act) and, if so, the amount of any payment Lumo is required to make to Customer C.

Summary of Facts

Customer C had been a dual fuel customer of Lumo since 18 June 2012. Customer C's payment history is summarized in the Chronology of Events.

On 13 May 2015, Lumo issued Customer C a reminder notice for an outstanding amount of \$2,830.56. EWOV submitted that this reminder notice did not comply with the requirements of clause 109(2) of the Code. When the outstanding amount remained unpaid, on 1 June 2015 Lumo issued Customer C a disconnection warning notice for the outstanding balance of \$2977.70. The supply of gas to Customer C's property was disconnected at Lumo's request on 25 June 2015.

Relevant Obligations

Clause 111(1)(c) of the Code states a retailer may not disconnect customers for non-payment unless the retailer has given the customer a reminder notice. Clause 109(2) states that a reminder notice must state the date on which the reminder notice period ends and state that payment of the bill must be made during the reminder notice period. Clause 108 states that a reminder notice period means the period that starts on the date of issue of the reminder notice, and ends no earlier than six business days from the date of issue.

Clause 18 of the terms and conditions of Lumo's Standard Retail Contract states that Lumo may disconnect supply to the customer's premises for failure to pay the customer's bill if:

- the Code does not prohibit Lumo from arranging for disconnection under the circumstances, and
- the customer has received the appropriate reminder notices and disconnection warnings from Lumo in the form and at the times referred to in the Code.

Retailer Submission

The Commission offered Lumo an opportunity to make a submission in relation to the disconnection dispute. In its submission to the Commission Lumo argued that the disconnection was not wrongful because:

- "This matter is not related to... previous ESC decision[s]";
- the definition of "reminder notice period" in the code is instructive (in specifying that the reminder notice period begins on the date of issue of a reminder notice) and does not require reliance on the *Interpretation of Legislation Act*, and that "[f]rom a compliance perspective the provisions of clause 109 have been met by the notice" in this instance; and
- Customer C has not suffered any detriment or prejudice because the duration of the reminder notice period did not have any consequences for the timing of the disconnection.

Chronology

Date	Event
18 June 2012	Lumo established a dual fuel account for Customer C.
4 July 2012 – 4 December 2013	Lumo issued 14 bills and Customer C made \$2,749.59 in payments.
4 December 2013	Lumo issued a bill for both gas and electricity for the amount of \$2,322.12
4 December 2013 – 7 May 2015	Customer C made 13 payments towards the account totalling \$1,490
8 April 2015	Lumo reported systemic breach to the ESC. 63, 724 customers were sent non-compliant reminder notices. Of these 347 were disconnected. Lumo implemented a fix in February 2015, postponed all pending disconnections and reset all affected customers' disconnection cycles, to ensure they all receive a compliant reminder notice.
24 April 2015	ESC Staff acknowledged the breach and informed Lumo of the staff view that any disconnections following the issue of non-compliant reminder notices were wrongful.
13 May 2015	Lumo Issued Customer C a reminder notice for the outstanding balance of \$2,830.56
1 June 2015	Lumo issued Customer C a disconnection warning notice for the outstanding balance of \$2,977.70
25 June 2015	The supply of gas to Customer C's premises was disconnected for non-payment of the outstanding balance of \$3,193.59

Decision

Having considered the information provided by Lumo and EWOV, the Commission finds:

1. In disconnecting the supply of gas to Customer C's premises, Lumo failed to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected. As a result, under s48A of the Act, as a statutory condition of its licence, Lumo has an obligation to pay Customer C a wrongful disconnection payment.
2. The wrongful disconnection payment amount is for the whole of the period during which the gas supply to Customer C's premises was disconnected – 1 day, 5 hours, and 39 minutes.
3. In accordance with s48A(5)(b) of the Act, Lumo is required to pay Customer C a wrongful disconnection payment of \$309.

Reasons

The reasons for the Commission's decision are as follows:

1. According to s48A of the Act, the conditions to which a licence to sell gas by retail is subject include a condition requiring the licensee to make a payment of a prescribed amount to a relevant customer in accordance with this section if the licensee –
 - disconnects the supply of gas to the premises of that customer; and
 - fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected.
2. Clauses 108, 109(c) and 111 of the Code preclude a retailer from disconnecting supply to a customer's premises unless they have, inter alia, given the customer a reminder notice stating that the outstanding amount must be paid within a period that ends no earlier than six business days after the date of issue of the reminder notice.
3. The Commission considers that any notice period expressed to begin on a particular date should not include that date. This is consistent with a reasonable recipient's expectations, several prior wrongful disconnection decisions made by the Commission and the prescribed approach to statutory interpretation in Victoria (which, though not binding in relation to the Commission's interpretation of the Code, is nonetheless instructive)¹.
4. The terms and conditions of the contract between Lumo and Customer C included a clause which precludes Lumo from disconnecting supply to a customer's premises unless that customer has received the appropriate reminder notices and disconnection warnings from Lumo in the form and at the times referred to in the Code. This incorporates the obligations in clauses 108, 109, and 111 of the Code as terms or conditions of the contract specifying the circumstances under which the supply of gas may be disconnected.
5. Lumo sent Customer C a reminder notice stating a five business day reminder notice period (not including the date of issue). In doing so Lumo did not to comply with the obligations in clauses 108 and 109(c) of the Code, as it failed to include in the reminder notice it sent to Customer C a statement that the outstanding amount must be paid on a date no earlier than six business days from the date of issue of the reminder notice.
6. In disconnecting supply to Customer C's premises following the issue of this notice, Lumo failed to comply with the terms and conditions of its contract with Customer C specifying the circumstances in which the supply of gas to her premises may be disconnected. Lumo is therefore required to pay Customer C a wrongful disconnection payment under s48A of the Act.

Richard Clarke
Acting Chairperson
Date: 16 March 2016

¹ *Interpretation of Legislation Act 1984* (Vic), s44(1)