

ESSENTIAL SERVICES COMMISSION

Re: Customer P and EnergyAustralia

Application of s40B of the *Electricity Industry Act 2000* (Vic) (“the Act”) –
Compensation for wrongful disconnection.

DECISION AND REASONS

Dr Ron Ben-David, Chairperson;

Mr Richard Clarke, Commissioner

Ms Kate Symons, Commissioner;

The Complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) (“EWOV”) to the Commission of a complaint by Customer P.
2. The complaint is about the application of s40B of the Act for an alleged wrongful disconnection by EnergyAustralia of Customer P’s electricity supply at [address redacted] (“the premises”), from 9:30am on 23 March 2016 to 2:05pm on 23 March 2016 (a period of 4 hours and 35 minutes).

Issues for decision

3. The issue for decision by the Commission on the complaint is whether or not EnergyAustralia has breached a condition of its retail licence regarding an obligation to make a prescribed payment to Customer P in circumstances where:
 - (a) EnergyAustralia disconnected the supply of electricity to the premises of Customer P; and
 - (b) EnergyAustralia failed to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.

If so, then under sub-s40B(3) of the Act, EnergyAustralia was obliged to make the prescribed payment to Customer P as soon as practicable after the supply of electricity was reconnected to Customer P’s premises.
4. This requires the Commission to make findings regarding the following matters:
 - (a) Whether or not EnergyAustralia disconnected the supply of electricity to the premises of Customer P (see paragraph 32, below);
 - (b) Was supply of electricity to Customer P’s premises reconnected, and if so, when (see paragraph 34, below);
 - (c) If EnergyAustralia did disconnect the supply of electricity to Customer P’s premises, for what period of time did the disconnection occur (see paragraph 35, below);
 - (d) What was the contract between EnergyAustralia and Customer P (see paragraph 10, below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which EnergyAustralia may disconnect the supply of electricity to Customer P’s premises (see paragraphs 10 and 47, below);
 - (f) Whether or not EnergyAustralia failed to comply with *those* terms and conditions (see paragraph 51, below);
 - (g) Was Customer P entitled to receive payment of a prescribed amount because of any wrongful disconnection by EnergyAustralia under s40B of the Act (see paragraphs 41-44, below);

- (h) If so, when was EnergyAustralia obliged to make the payment of the prescribed amount (not applicable given the Commission's conclusions with respect to (g) above);
 - (i) Has EnergyAustralia made the payment to Customer P in accordance with its deemed licence condition under s40B of the Act (no such payment obligation arose – see paragraph 53, below);
 - (j) If EnergyAustralia has not made the payment what are the consequences (not applicable, see paragraphs 52 and 53, below).
5. EnergyAustralia was invited to provide any information and documents it considered that the Commission should have regard to in making its decision. EnergyAustralia was also invited to make submissions on the complaint from its point of view for the Commission to consider. EnergyAustralia did provide information and documents and made submissions for the Commission's consideration.
 6. Through its formal letter of referral and the memorandum accompanying the letter EWOV acknowledged that EnergyAustralia had demonstrated that it had complied with clauses 110, 111(1)(e) and 111(2) of the Energy Retail Code (Version 11) ("the Code") prior to the disconnection. However, EWOV considered that it was unclear whether EnergyAustralia had complied with clause 33(3) of the Code, because EWOV considered that the information on the availability of the Utility Relief Grant Scheme ("URGS") "provided to Customer P on 1 November 2013 does not appear specific to the customer's circumstances in relation to the disconnection on 23 March 2016".
 7. To justify its disconnection, EnergyAustralia has submitted that it complied with the requirements of clause 33(3) of the Code dealing with payment difficulties and an obligation to inform the customer about the Utility Relief Grant Scheme. Sub-clause 33(6) of the Code applies Clause 33 of the Code to market retail contracts.

Relevant Facts

8. From the Commission's investigation of the matter and information and documents received by the Commission, the Commission makes the factual findings set out below.

Background

9. At all relevant times, EnergyAustralia was the licensee responsible for supply of electricity to [address redacted] ("the premises").
10. In September 2010 EnergyAustralia established an account for the supply of electricity at the premises to Customer P. EnergyAustralia entered into a market offer contract for the sale and supply of electricity to Customer P's premises. Clauses 17-19 of that contract set out the terms and conditions specifying the circumstances in which the supply of electricity to Customer P's premises may be disconnected.
10. Until about the start of 2012, Customer P was able to pay his electricity bills for the supply of electricity by EnergyAustralia to the premises.
11. On about 16 October 2012, EnergyAustralia's Contact Notes record that there was a discussion between a representative of EnergyAustralia and Customer P regarding an application for the Utility Relief Grant Scheme ("URGS").

13. On 5 December 2012 Customer P received a payment of \$500 by way of a Utility Relief Grant. This URGS payment reduced Customer P's outstanding EnergyAustralia electricity bill balance at the time to \$1,039.40.
14. On 7 May 2013 Customer P asked EnergyAustralia for a \$45 per fortnight payment plan. EnergyAustralia advised Customer P to contact his financial counsellor. Customer P also asked EnergyAustralia if he could get the URGS again. EnergyAustralia advised him that he could not get the URGS again until December 2014.
15. On 8 August 2013 Customer P called EnergyAustralia and advised EnergyAustralia that he was in hardship because of a low back injury and no source of income. EnergyAustralia and Customer P set up an agreed \$221 per month payment plan for one year.
16. On 1 November 2013 Customer P called EnergyAustralia regarding his outstanding account. EnergyAustralia offered Customer P a payment plan of \$40 per month. Customer P said that because he was injured he could not pay anything. Either of his own volition or following discussions with Customer P or at his request, EnergyAustralia raised an internal request for URGS – but it was not sent to Customer P because of his ineligibility for it at that time.
17. In the period from 27 June 2014 to 19 August 2014 Customer P spoke with EnergyAustralia and advised it that he could not make any payments to his electricity account because he didn't have any money and he was awaiting the outcome of a compensation case for his injury.
18. On 2 December 2014 EnergyAustralia called and spoke with Customer P who informed it that he would be able to make a payment of \$3,395.96 on 15 January 2015 by cheque because he had just won his case and would be receiving a large sum of money. EnergyAustralia set up a payment extension. As at 2 December 2015 \$3,395.96 was the amount outstanding on Customer P's electricity account with EnergyAustralia.
19. On 29 April 2015 EnergyAustralia called Customer P and advised him of the outstanding balance on his electricity account of \$3,663.49. Customer P said he could not pay anything on that day as he was waiting for his compensation benefits. EnergyAustralia advised him of the need to set up a regular payment plan. Customer P agreed to set up an \$84 per week payment plan to start from 8 May 2015 to 29 June 2016.
20. On 2 July 2015 EnergyAustralia called Customer P. He informed EnergyAustralia that he had an injury and had won his case against his employer for it. EnergyAustralia offered Customer P a \$90 per week payment plan however Customer P advised EnergyAustralia that he was unsure what he could afford to pay on a weekly basis. The call was terminated from Customer P's end before the conversation was concluded.
21. On 14 September 2015 EnergyAustralia sent Customer P a letter about his overdue electricity account balance.
22. On 21 September 2015 Customer P called EnergyAustralia and advised that he would have the money as soon as he had worked out the legal issues he has been going through.

23. On 19 October 2015 EnergyAustralia called Customer P and discussed the overdue amount and possible payment arrangements. Customer P advised EnergyAustralia that he was unable to make any payment or commit to any payment arrangement. Further he said that he was waiting for compensation for his work injury. He had no source of funds, as he was currently unemployed and had no Centrelink benefits. Customer P said that he could only pay EnergyAustralia in full once he got money from the compensation claim. EnergyAustralia provided Customer P an extension to pay in full by 30 November 2015. Customer P's outstanding balance at that time was \$4,818.70.
24. On 4 November 2015 Customer P called EnergyAustralia and advised that it was the insurance company which would pay the bill and offered the claim number for payment of the bill. EnergyAustralia advised Customer P that they could not accept a claim number for payment of a bill and there was already an active payment arrangement on his account until 30 November 2015.

Circumstances leading to the disconnection in March 2016

25. On 9 November 2015 EnergyAustralia issued a bill to Customer P for the supply of electricity to the premises for the period 7 August 2015 to 4 November 2015. The amount outstanding on the bill was \$5,264.10 with a due date of 26 November 2015. On the back of EnergyAustralia's bill was the notice under the heading "Contact Information" which said "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including ... Utility Relief Grant Scheme...."
26. On 30 November 2015 EnergyAustralia sent to Customer P a reminder notice for the outstanding balance of \$5,264.10 (with a due date of 10 December 2015). On the front of the notice EnergyAustralia placed the following heading – "Where to get help if you need it". Underneath that heading was the following: "If you are having trouble paying this bill, ..., just call us on 133 466 and we'll be happy to talk to you about payment options that may help you." On the back of the Notice was the following: "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including ... Utility Relief Grant Scheme...."
27. On 11 December 2015 EnergyAustralia issued a Disconnection Warning Notice to Customer P for his overdue electricity account of \$5,264.10 (with a due date of 22 December 2015). On the front of this warning notice was the following heading "Where to get help if you need it". Underneath that heading was the following: "If you are having trouble paying this bill, just call us on 133 466 and we'll be happy to talk to you about payment options and government funded rebates, concessions and relief schemes that may be available to help you." On the back of the Disconnection Warning Notice was the following: "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including ... Utility Relief Grant Scheme."
28. On 18 January 2016 EnergyAustralia sent an SMS message to Customer P to collect the outstanding balance of \$5,264.10.
29. On 2 March 2016 EnergyAustralia sent to Customer P by registered post a final Disconnection Warning Notice for the outstanding amount of \$5,264.10 (with a due date of 15 March 2016). Information provided by EnergyAustralia on or with this notice addressed to Customer P included the following:
- (a) "Where to get help if you need it.

If you're having trouble paying this bill, take a look at the information included, call us on 1800 336 611 or text the word 'CALL' to 0429 222 444 and we'll call you. We'll be happy to discuss your situation and the payment options that may be available to you.”;

- (b) “Payment Arrangements 133 466
Please contact our Customer Service Advisers to discuss payment assistance and concessions including ...
Utility Relief Grant Scheme.”; and
- (c) an accompanying one page notice that included:
“Services we offer that may help you with paying your energy bills.”
“The EnergyAssist Program...
As part of the Program, we can also:...
Help you apply for State Government grants...”

“Government schemes that may also help you with paying your energy bills...”

“Some state governments also provide help for customers who are unable to pay their energy bills due to a short-term financial crisis or emergency...
Utility Relief Grant Scheme (URGS) – VIC customers only
For more information, visit
dhs.vic.gov.au/for-individuals/financial-support/concessions/hardship/utility-relief-and-non-mains-utility-grant-scheme”; and
- (d) “If you have any questions about what we offer, the various assistance schemes that are available or finding a financial counsellor, call us on 1800 336 611”.

30. On 9 March 2016 EnergyAustralia sent an SMS message to Customer P advising him that his outstanding balance was \$5,615.00.

31. Customer P did not contact EnergyAustralia in the period from about 4 November 2015 to 23 March 2016.

Disconnection of electricity supply to the premises

32. At 9:30 am on 23 March 2016 EnergyAustralia disconnected the electricity supply at Customer P's premises for non-payment of the outstanding balance of \$5,264.10.

33. At 9:41 am Customer P called EnergyAustralia regarding the disconnection of his electricity supply. A payment arrangement was agreed between EnergyAustralia and Customer P for him to pay the full amount outstanding from his worker's compensation claim proceeds and EnergyAustralia advised Customer P of the likely timeframes for reconnection of the electricity supply to his premises.

34. At 2.05 pm on 23 March 2016 EnergyAustralia reconnected the electricity supply to Customer P's premises.

35. The premises were disconnected for a period of 4 hours and 35 minutes.

36. EnergyAustralia has not made any payment to Customer P.

Relevant Obligations

37. In this matter EnergyAustralia's relevant obligations arise from the following:
- (a) Sections of the Act: sub-sections 36(1) and (2) – rendering void any term or condition of EnergyAustralia's contract for the supply of electricity to the extent that it is inconsistent with terms and conditions decided by the Commission that specify the circumstances in which the supply of electricity to premises may be disconnected and require the licensee to provide information specified by the Commission about the rights and entitlements of customers, and instead deeming the terms and conditions decided by the Commission to be in the contract; and section 40B of the Act – deeming a condition into EnergyAustralia's electricity retail licence an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection;
 - (b) EnergyAustralia's Electricity Retail Licence (clause 7.1- requiring EnergyAustralia to ensure its contracts for the sale of electricity expressly deal with each matter which is the subject of a term or condition of the Code; clause 7.3 – requiring each term or condition of EnergyAustralia's contracts for the sale of electricity to be consistent with each term and condition of the Code; and clause 7.4 – requiring EnergyAustralia to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer);
 - (c) EnergyAustralia's market contract with Customer P (clause 8.1 – EnergyAustralia agrees to meet its obligations as set out in the contract and to comply with the energy laws; clause 13.3 – difficulties in paying, additional protections may be available to customers as set out in EnergyAustralia's Hardship Policy; clause 17 – disconnection of supply; and clause 18 – reconnection after disconnection);
 - (d) EnergyAustralia's Hardship Policy which effectively states that EnergyAustralia will inform customers experiencing hardship about government grants and relevantly including the URGS (clauses 7.1 and 7.1.6)
 - (e) The Code (clauses 33(3) and (6) requiring EnergyAustralia to provide information to a hardship customer or a customer experiencing payment difficulties about the availability of relief schemes including the URGS; clauses 110 to 115 – dealing with and specifying the circumstances in which the supply of electricity to premises may be disconnected).
38. EnergyAustralia's obligations are discussed further below in the reasons.

Decision

39. EnergyAustralia is not in breach of a condition of its electricity retail licence, deemed into EnergyAustralia's Electricity Retail Licence by s40B of the Act ("the deemed licence condition").
40. EnergyAustralia disconnected the supply of electricity to Customer P's premises at 9:30am on 23 March 2016 (the disconnection).
41. However, there was no failure on the part of EnergyAustralia to comply with the terms and conditions of the contract between EnergyAustralia and Customer P

specifying the circumstances in which the supply of electricity to those premises may be disconnected.

42. Accordingly, the second condition that has to be satisfied for s40B of the Act to apply was not satisfied.
43. The supply of electricity was **not** wrongfully disconnected.
44. EnergyAustralia was not required to make any payment under the deemed licence condition.

Reasons

45. EnergyAustralia's electricity retail licence effectively requires that:
 - (a) EnergyAustralia not enter into a contract for the sale of electricity with a relevant customer unless the terms and conditions of the contract expressly deal with each matter which is the subject of a term or condition of the Code (clause 7.1); and
 - (b) Each term or condition of EnergyAustralia's contract for the sale of electricity to a relevant customer must not be inconsistent with the terms or conditions of the Code (clause 7.3); and
 - (c) EnergyAustralia must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
46. The deemed licence condition requires EnergyAustralia to make a prescribed payment to a customer as soon as practicable after the supply of electricity to the customer's premises is reconnected where it:
 - (a) Disconnects the supply of electricity to the premises of that customer; and
 - (b) Fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.
47. Clauses 17 to 19 of EnergyAustralia's contract with Customer P effectively specify the circumstances in which the supply of electricity to Customer P's premises may be disconnected. The relevant clauses are consistent with the provisions in Part 6 of the Code dealing with the disconnection of premises. It is not suggested that EnergyAustralia failed to comply with any of these provisions. As noted at paragraph 6 above, it is accepted that EnergyAustralia complied with the relevant requirements of clauses 110 and 111 of the Code.
48. It is suggested by EWOV that there may have been non-compliance with the provisions of clause 33(3) of the Code.
49. Clause 13.3 of EnergyAustralia's contract (which incorporates its Hardship Policy) with Customer P requires it to inform Customer P about the URGS (see paragraphs 37(c) and (d) above).
50. Clause 33(3) is in Part 3 of the Code which is headed Customer Retail Contracts and Division 4 which is headed Customer retail contracts - billing. It is not a term or condition – "specifying the circumstances in which the supply of electricity to premises may be disconnected".

51. Similarly, clause 13.3 of EnergyAustralia's contract with Customer P is not a term or condition – "specifying the circumstances in which the supply of electricity to premises may be disconnected". These are at clauses 17 and 18 of the contract.
52. Accordingly any breach of clause 33(3) of the Code or 13.3 of the contract would not satisfy the requirements for the condition at sub-section 40B(1)(b) of the Act. Therefore, there would not be any breach of the deemed licence condition.

Conclusion

53. EnergyAustralia has not breached its electricity retail licence by failing to make a payment of the prescribed amount as soon as practicable after the reconnection of the supply of electricity to Customer P's premises on 23 March 2016. This is because EnergyAustralia was under no obligation to make any such payment to Customer P.

Other Considerations

54. EnergyAustralia submitted that it did comply with the requirements of clause 33 of the Code. On the facts of this matter, the Commission would agree with EnergyAustralia's submission if it were necessary to do so (see paragraphs 25 to 27 and especially 29 above). However, because of the matters at paragraphs 48 to 52 above it is not necessary for the Commission to make a finding in this regard.
55. Leaving aside the important historical facts at paragraphs 12 to 14 above, even if, as EWOV suggested, the obligation that clause 33(3) of the Code creates, is to provide a customer with information about the URGS "at a time specific to the customer's circumstances in relation to the actual disconnection" (in this case on 23 March 2016), EnergyAustralia did provide such information at the relevant time on 9 and 30 November 2015, 11 December 2015 and 2 March 2016. (see paragraphs 25 to 27 and especially 29 above) - Customer P having become eligible for the URGS again on 5 December 2014.
56. If it was necessary to do so for the application of s40B of the Act (especially s40B(1)(b)), the Commission would find that in this case, there was no failure by EnergyAustralia to comply with the requirements of Clause 33(3) of the Code in respect of Customer P.

Dated: 2 May 2018

Essential Services Commission