

Customer F and Red Energy – Decision and Reasons

**Application of section 40B of the Electricity Industry Act 2000 (Vic)
– Compensation for wrongful disconnection**

14 November 2018

Commissioners:

Dr Ron Ben-David, Chairperson,
Mr Richard Clarke, Commissioner, and
Ms Kate Symons, Commissioner.

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The complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) (the ombudsman) to the Essential Services Commission (the commission) of a complaint by Customer F.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to a disconnection by Red Energy Pty Ltd (Red Energy) of Customer F's electricity supply at *[address redacted]* (the premises). The electricity supply to the premises was disconnected from 9:10am on 7 June 2017 to 6:49pm on 24 October 2017 (a period of 139 days, 9 hours and 39 minutes).

Issues for decision

1. The issue for decision by the commission on the complaint is whether or not Red Energy has breached a condition of its electricity retail licence regarding an obligation to make a prescribed payment to Customer F in circumstances where:
 - (a) Red Energy disconnected the supply of electricity to the premises of Customer F; and
 - (b) Red Energy 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 section 40B(1) of the Act, Red Energy was obliged to make the prescribed payment to Customer F as soon as practicable after the supply of electricity was reconnected to Customer F's premises.
2. This requires the commission to make findings and reach conclusions regarding the following matters:
 - (a) Whether or not Red Energy disconnected the supply of electricity to the premises of Customer F, and if so, when? (see paragraph 19 below);
 - (b) Was the supply of electricity to Customer F's premises reconnected, and if so, when? (see paragraph 21 below);
 - (c) If Red Energy did disconnect the supply of electricity to Customer F's premises, for what period of time was supply to the premises disconnected? (see paragraph 22 below);
 - (d) What was the contract between Red Energy and Customer F? (see paragraphs 24(c) and 34 below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which Red Energy may disconnect the supply of electricity to Customer F's premises? (see paragraph 24(c) below);
 - (f) Whether or not Red Energy failed to comply with *those* terms and conditions (see paragraphs 28 and 39 below);
 - (g) Was Customer F entitled to receive payment of a prescribed amount because of any wrongful disconnection by Red Energy under section 40B of the Act? (see paragraphs 31 and 40 below);
 - (h) If so, when was Red Energy obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises);

- (i) Has Red Energy made the payment to Customer F in accordance with its deemed licence condition under section 40B of the Act? (not applicable as, in this instance, no such obligation arises);
 - (j) If Red Energy has not made the payment, what are the consequences? (not applicable as, in this instance, no such obligation arises).
- 3. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman acknowledged that Red Energy had demonstrated compliance with clauses 109, 110 and 111(1)(e) of the Energy Retail Code (version 11) (the code) prior to the disconnection. However, the ombudsman considered that it was unclear whether Red Energy had complied with clause 116(1)(b) of the code. The ombudsman considered that because Customer F had made a complaint about his outstanding balance which directly related to the reason for the disconnection, and that complaint was unresolved at the time of disconnection, it was unclear if Red Energy had complied with its obligations under clause 116(1)(b). The ombudsman also considered that because a service order for disconnection had been raised by Red Energy, a “reasonable time” for Red Energy to respond to Customer F’s complaint would mean contact prior to the disconnection of Customer F’s electricity supply.
- 4. Red Energy was invited to provide any information and documents it considered the commission should have regard to in making its decision. Red Energy was also invited to make submissions on the complaint for the commission to consider. Red Energy made submissions for the commission’s consideration.
- 5. Red Energy generally agreed with the chronology of events as presented by the ombudsman in its referral memorandum. However, Red Energy provided additional information that was relevant to the commission’s assessment of the disconnection. Red Energy submitted the following events to the disconnection timeline:
 - (a) On 16 May 2017, Red Energy raised the first disconnection service order for the supply of electricity to Customer F’s premises.
 - (b) On 17 May 2017, Red Energy was informed by the distributor that disconnection was unsuccessful as the distributor was unable to gain access to the meter at Customer F’s premises.
 - (c) On 22 May 2017, Red Energy raised a second disconnection service order for the supply of electricity to Customer F’s premises.
 - (d) On 23 May 2017, Red Energy was informed by the distributor that disconnection was unsuccessful again because the distributor was unable to gain access to the meter at Customer F’s premises.

6. Red Energy submitted that it had complied with its obligations under the code. Red Energy considered that because Customer F did not send his complaint to the channel stipulated in the Red Energy Complaint Management and Dispute Resolution Policy, the complaint was only processed on 9 June 2017 – two days after the disconnection. Red Energy noted that Customer F’s email did not pass Red Energy’s privacy requirements because Customer F sent his complaint from an email address that was not registered on his account. Red Energy also submitted that, in determining whether Red Energy responded to Customer F’s complaint in a “reasonable time”, the chronology of events that led to the disconnection service order should be considered.

Relevant facts

7. The commission analysed the ombudsman's request for a decision and sought additional submissions from Red Energy. Having assessed the matter and the submissions received, the commission makes the factual findings set out below.

Circumstances leading to the disconnection

8. On 6 March 2017, Red Energy issued a bill in the amount of \$388.60.
9. On 29 March 2017, Red Energy issued a reminder notice in the amount of \$388.60.
10. On 12 April 2017, Red Energy issued a disconnection warning notice in the amount of \$388.60.
11. Red Energy's contact notes for Customer F's account indicate that over the 12 months prior to disconnection, Red Energy attempted to contact Customer F in relation to his electricity account 35 times via a combination of letters, emails, telephone calls and text messages. The contact notes do not contain any record of Customer F having responded to any of these contact attempts.

Disconnection of electricity supply to the premises

12. On 16 May 2017, Red Energy raised a disconnection service order for the premises.
13. On 17 May 2017, Red Energy was advised by the distributor that disconnection was unsuccessful as the distributor was unable to gain access to the meter at Customer F's premises.
14. On 22 May 2017, Red Energy raised a second disconnection service order for the premises.
15. On 23 May 2017, the distributor again advised Red Energy that it was unable to gain access to the meter and, as a result, disconnection was unsuccessful.
16. On 5 June 2017, at 10:20am, Red Energy sent Customer F an email which requested that Customer F contact Red Energy as soon as possible by telephone in relation to his electricity supply at the premises. Red Energy also sent Customer F a text message advising that his "energy supply is at risk of disconnection".
17. On 5 June 2017, at 10:22am, a third disconnection service order was raised for the premises.
18. On 6 June 2017, at 3:25pm, Customer F sent an email to Red Energy's debt management email address advising Red Energy that he disputed the overdue balance on his account because of high estimated meter reads which were used to calculate the outstanding balance.

19. On 7 June 2017, at 9:10am, Customer F's electricity supply was disconnected from the street, by isolating the customer's service fuse.
20. On 9 June 2017, a customer service agent for Red Energy allocated Customer F's email, dated 6 June 2017, to his account pending verification by Customer F. An email was then sent to Customer F requesting that he verify his account details. Customer F did not respond to this email.
21. On 24 October 2017, at 6:49pm, Customer F's electricity supply was reconnected following a complaint by Customer F to the ombudsman.
22. The premises were disconnected for a period of 139 days, 9 hours and 39 minutes.
23. As at 14 November 2018, Red Energy has not made any wrongful disconnection payment to Customer F.

Relevant obligations

24. In this matter Red Energy's relevant obligations arise from the following:

(a) The Act:

- (i) Section 40B(1) of the Act deems a condition into Red Energy's electricity retail licence of an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection.
- (ii) Section 40B(1A) of the Act imposes a maximum payment as being the prescribed capped amount, if the relevant customer does not notify the retailer of the disconnection within 14 days after the disconnection.
- (iii) From and after 1 January 2016, section 40B(5)(b) of the Act provides that the prescribed capped amount is \$3,500.00.

(b) Red Energy's electricity retail licence:

- (i) Clause 7.1 of the licence requires Red Energy 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.
- (ii) Clause 7.3 requires each term or condition of Red Energy's contracts for the sale of electricity to be consistent with each term and condition of the code.
- (iii) Clause 7.4 requires Red Energy to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

(c) Red Energy's market retail contract, established with Customer F:

Clause 8.2 which states, in part:

"After taking certain steps as set out in the Retail Code, we may disconnect you; and... Where required by the Retail Code, we will give you a disconnection warning stating when we will disconnect you if you continue to not comply with the relevant requirement. We may disconnect you if you cannot pay your bill because you lack sufficient income, provided we carry out our obligations under the Retail Code including trying to contact you to offer you an instalment plan and you fail to accept our offer to take up an instalment plan within 5 Business Days of us making the offer."

Clause 16.5 which states, in part:

“You and we agree to comply with all requirements in the Relevant Laws except where this Contract is different to those requirements and where that difference is permitted by the Relevant Laws, in which case this Contract will apply.

If you are a Residential or Business Customer, in particular, the Retail Code sets out our obligations to you and your obligations to us and this Contract cannot be inconsistent with the Retail Code. If a term or condition of this Contract is inconsistent with the Retail Code, it is void and the corresponding term or condition in the Retail Code is incorporated into and applied under this Contract.”

(d) The code:

Clause 116(1)(b) provides that a retailer must not arrange for the disconnection of a customer’s premises where the customer has made a complaint, directly related to the reason for the proposed disconnection, to the retailer under the retailer’s standard complaints and dispute resolution procedures, and the complaint remains unresolved.

25. Red Energy’s obligations are discussed further below in the reasons.

Decision

26. Red Energy is not in breach of a condition of its electricity retail licence, deemed into Red Energy's electricity retail licence by section 40B of the Act (the deemed licence condition).
27. Red Energy disconnected the supply of electricity to Customer F's premises at 9:10am on 7 June 2017.
28. There was no failure on the part of Red Energy to comply with the terms and conditions of the contract between Red Energy and Customer F that specified the circumstances in which the supply of electricity to those premises may be disconnected.
29. Accordingly, the second condition that must be satisfied for section 40B of the Act to apply was not satisfied.
30. The supply of electricity to Customer F's premises was not wrongfully disconnected.
31. Red Energy was not required to make any prescribed payment to Customer F under the deemed licence condition.

Reasons

32. Red Energy's electricity retail licence requires that:
- (a) Red Energy 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 Red Energy'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) Red Energy must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
33. The deemed licence condition requires Red Energy 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.
34. The relevant contract between Red Energy and Customer F was a market retail contract. The terms and conditions of that contract expressly required Red Energy to comply with the code.
35. Clause 8.2 of Red Energy's contract with Customer F specified the circumstances in which the supply of electricity to Customer F's premises may be disconnected. Clause 16.5 of Red Energy's contract with Customer F incorporated clause 116(1)(b) of the code into their agreement.

Was there an unresolved complaint for the purposes of clause 116(1)(b) of the code?

36. Clause 116(1)(b) of the code prohibits a retailer from arranging for the disconnection of a customer's premises where the customer has made a complaint, directly related to the reason for the proposed disconnection, to the retailer under the retailer's standard complaints and dispute resolution procedures, and the complaint remains unresolved.
37. The contact notes provided by Red Energy for Customer F's account indicate that:

- (a) On 5 June 2017, at 10:22am, Red Energy raised a third disconnection service order for the premises. Two previous disconnection attempts (on 17 May and 23 May 2017) were unsuccessful because the distributor was unable to gain access to the meter at Customer F's premises.
 - (b) On 6 June 2017, at 3:25pm, Customer F sent an email to Red Energy complaining about the basis on which his bill was calculated.
 - (c) On 7 June 2017, at 9:10am, the electricity supply to Customer F's premises was disconnected.
38. Red Energy arranged for the disconnection of the electricity supply to Customer F's premises on 5 June 2017, by raising the disconnection service order which requested that the distributor disconnect the electricity supply to Customer F's premises. On 6 June 2017, Customer F advised Red Energy that he disputed the overdue balance on his account. Accordingly, for the purposes of clause 116(1)(b) of the code, there was no unresolved complaint at the time that Red Energy arranged for the disconnection of the electricity supply to Customer F's premises.
39. Therefore, the commission considers that Red Energy complied with the requirements of clause 116(1)(b) of the code in arranging for the disconnection of the electricity supply to Customer F's premises.
40. The disconnection of the electricity supply to Customer F's premises on 7 June 2017 was not wrongful. As a result, Red Energy was not required to make any wrongful disconnection payment to Customer F.

Other observations

41. Clause 116(1)(b) of the code prohibits a retailer from arranging for the disconnection of a customer's premises where there is an unresolved complaint that is directly related to the reason for the proposed disconnection. The commission notes that the provision does not impose an obligation on the retailer to respond to the customer in relation to that complaint within a specified timeframe. The provision only operates to prohibit disconnection.
42. Given paragraph 38 above, the commission is not required to decide on the other matters raised by Red Energy regarding the email sent by Customer F to Red Energy on 6 June 2017 (see paragraph 6 above).