ESSENTIAL SERVICES COMMISSION

Customer F and Simply Energy – Decision and Reasons

Application of section 48A of the Gas Industry Act 2001 (Vic) – Compensation for wrongful disconnection

12 December 2018

Commissioners:

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

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Essential Services Commission 2018, Customer F and Simply Energy – Decision and Reasons: Application of section 48A of the Gas Industry Act 2001 (Vic) – Compensation for wrongful disconnection, 12 December

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Contents

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 48A of the Gas Industry Act 2001 (Vic) (the Act) to a disconnection by IPower Pty Ltd and IPower 2 Pty Ltd (trading as Simply Energy) (Simply Energy) of Customer F's gas supply at *[address redacted]* (the premises). The gas supply to the premises was disconnected from 11:20am on 24 August 2017 until 4:50pm on 25 August 2017 (a period of one day, five hours and 30 minutes).

Issues for decision

3. The issue for decision by the commission on the complaint is whether or not Simply Energy has breached a condition of its gas retail licence regarding an obligation to make a prescribed payment to Customer F in circumstances where:

   (a) Simply Energy disconnected the supply of gas to the premises of Customer F; and

   (b) Simply Energy 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.

   If so, then under section 48A of the Act, Simply Energy was obliged to make the prescribed payment to Customer F as soon as practicable after the supply of gas was reconnected to Customer F's premises.

4. This requires the commission to make findings and reach conclusions regarding the following matters:

   (a) Whether Simply Energy disconnected the supply of gas to the premises of Customer F, and if so, when (see paragraph 28 below);

   (b) Whether the supply of gas to Customer F's premises was reconnected, and if so, when (see paragraph 29 below);

   (c) If Simply Energy did disconnect the supply of gas to Customer F's premises, the period of time for which supply to the premises was disconnected (see paragraph 30 below);

   (d) What was the contract between Simply Energy and Customer F? (see paragraphs 32(c) and 44 below);

   (e) What were the terms or conditions of that contract which specified the circumstances in which Simply Energy may disconnect the supply of gas to Customer F's premises? (see paragraph 32(c) below);

   (f) Whether Simply Energy failed to comply with those terms and conditions (see paragraphs 35 and 65 below);

   (g) Whether Customer F was entitled to receive payment of a prescribed amount because of any wrongful disconnection by Simply Energy under section 48A of the Act (see paragraphs 40 and 66 below);

   (h) If so, when was Simply Energy obliged to make the payment of the prescribed amount? (see paragraph 40 below);

(i) Whether Simply Energy has made the payment to Customer F in accordance with its deemed licence condition under section 48A of the Act (see paragraph 41 below);

(j) If Simply Energy has not made the payment, what are the consequences? (see paragraph 68 below).

5. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman acknowledged that Simply Energy had demonstrated compliance with clauses 109, 110, 111(1)(e) and 33(3) of the Energy Retail Code (version 11) (the code) prior to the disconnection. However, the ombudsman considered that it was unclear whether Simply Energy had complied with clauses 111(2) and 72 of the code. The ombudsman considered that Customer F had identified herself to Simply Energy as a customer experiencing payment difficulties and that Simply Energy was therefore required to offer Customer F two payment plans in the 12 months prior to arranging for disconnection, in line with clause 111(2) of the code. The ombudsman acknowledged that Simply Energy offered one payment plan to Customer F in compliance with the code. However, the ombudsman considered it was unclear whether the second payment plan offered by Simply Energy to Customer F was compliant with clause 72 of the code. The ombudsman considered that it did not appear Simply Energy had regard to Customer F's capacity to pay in respect of the second payment plan, which the ombudsman considered is required under clause 72(1)(a)(i) of the code. Furthermore, the ombudsman considered that the second payment plan did not include the date by which each instalment was required to be paid under the payment plan as required by clause 72(2)(b) of the code.

6. Simply Energy was invited to provide any information and documents it considered the commission should have regard to in making its decision. Simply Energy was also invited to make submissions on the complaint for the commission to consider. Simply Energy made submissions for the commission's consideration.

7. Simply Energy generally agreed with the chronology of events as presented by the ombudsman in its referral memorandum. However, Simply Energy provided an expanded chronology with additional events it considered relevant. Furthermore, Simply Energy submitted that the time of reconnection on 25 August 2017 was 4:50pm whereas the ombudsman stated that the time of reconnection was 2:50pm. Following subsequent inquiries, Simply Energy provided confirmation from the distributor that supply to Customer F's premises was reconnected at 4:50pm on 25 August 2017.

8. Simply Energy submitted that "…the only guidance available at the time of disconnection, in terms of regulatory interpretation, was the Final Decision issued by the Essential Services Commission (ESC) regarding 'Obligations to Customers: Disconnection and Reconnection (2012 Final Decision)'…" where the commission decided the circumstances in which a retailer

could disconnect a customer for non-payment who has not engaged with the retailer. Simply Energy claimed that the disconnection of the gas supply to Customer F's premises was consistent with the 2012 Final Decision, as it had used its best endeavours to engage with Customer F up until the disconnection.

9. Simply Energy stated that it did not rely upon the offer of a second payment plan to Customer F to meet its obligations under the code. Simply Energy considered that it had been compliant with clauses 111(2) and 72 of the code by way of it using its best endeavours to contact Customer F after the initial payment plan was established up until the time of the disconnection of the gas supply, consistent with the 2012 Final Decision.

Relevant facts

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

Circumstances leading to the disconnection

11. On 4 October 2013, Simply Energy established an account for the supply of gas to Customer F's premises.

12. On 30 September 2015, Simply Energy sent a Utility Relief Grant Scheme (URGS) application form to Customer F.

13. On 18 November 2015, a URGS payment of $500.00 was applied to Customer F's gas account.

14. Simply Energy's contact notes indicate that over the course of four years from the establishment of Customer F's gas account on 4 October 2013 to the disconnection on 24 August 2017, Simply Energy disconnected and reconnected the gas supply to Customer F's premises four times due to non-payment of her account.

15. On 9 September 2016, Customer F called Simply Energy. Customer F advised that her gas supply had been disconnected. Customer F advised that she did not make payment towards her gas account because she was experiencing mental health issues. Simply Energy accepted Customer F onto its hardship program and established a payment plan of $100.00 per fortnight towards her gas account commencing on 23 September 2016.

16. On each of 23 September, 7 October and 21 October 2016, Customer F made payments of $100.00 towards her gas account in line with the payment plan.

17. On 5 December 2016, Simply Energy issued a letter to Customer F advising that it had cancelled the payment plan due to insufficient payment. Simply Energy also stated in the letter, in part:

    (a) "What Do I Need to Do?

        Please select one of the following options:"

    (b) "Option 3: Pay by Instalments: You are eligible for the following payment plan of $169.57 per fortnight for a period of 12 months. This amount has been re-calculated based on your current account balance of $2,964.90 and your expected energy charges for the next 12 months of $1,443.93. If you would like to accept this offer or the offer is not

acceptable to you please contact us on 1800 065 475 strictly within 5 business days of the date of this letter."

(c) "What Happens If I Don't Respond?

It is important that you contact us. If you do not select one of the above and respond to us within 5 business days of this letter, we will continue with collection action which may include disconnection of your Gas supply."

18. Customer F did not make contact with Simply Energy within five business days of the date of the letter.

19. On 10 June 2017, Simply Energy issued a bill to Customer F for an amount of $3,911.73.

20. On 28 June 2017, Customer F called Simply Energy. Simply Energy asked Customer F why her account was unpaid and then the call ended.

21. On 29 June 2017, Customer F called Simply Energy. Customer F advised that she had not paid the bill because she was not working, was receiving Centrelink benefits and was experiencing mental health issues. Customer F advised Simply Energy that she could only afford to pay $100.00 per fortnight towards her gas account. Simply Energy attempted to refer Customer F to its hardship team, however the call ended before the referral could be completed.

22. Simply Energy's contact notes for Customer F's account indicate that during the period between Customer F's final call to Simply Energy on 29 June 2017 until the disconnection, Simply Energy attempted to contact Customer F in relation to her gas account 13 times via a combination of letters, telephone calls and text messages. Simply Energy's contact notes for Customer F's account do not contain any record of Customer F having responded to any of these contact attempts.

23. On 4 July 2017, Simply Energy issued a reminder notice to Customer F for an amount of $3,911.73.

24. On 18 July 2017, Simply Energy issued a disconnection warning notice to Customer F for an amount of $3,911.73.

25. On 19 July 2017, Simply Energy issued a letter to Customer F advising her that she had failed to meet the pre-conditions for entry to Simply Energy's hardship program because she had failed to contact Simply Energy.

26. On 27 July 2017, Simply Energy issued a final disconnection warning notice to Customer F by registered post.

Disconnection of gas supply to the premises

27. On 17 August 2017, Simply Energy raised a disconnection service order for the gas supply to Customer F's premises.

28. On 24 August 2017, at 11:20am, the supply of gas to Customer F's premises was disconnected. Later that day, Customer F called Simply Energy and advised that the gas supply to her premises had been disconnected. Simply Energy advised Customer F of the amount overdue on her gas account. Customer F stated that she had applied for a grant under the URGS. Simply Energy advised Customer F that the grant had not been approved because she had applied in September 2015 and that she could re-apply after September 2017 (as a customer is only eligible to receive a grant under the URGS once every two years, if they meet the other eligibility criteria). Customer F stated that she could not make payment and that she would report the matter to the ombudsman, and then ended the call.

29. On 25 August 2017, at 4:50pm, the supply of gas to Customer F's premises was reconnected.

30. The supply of gas to the premises was disconnected for a period of one day, five hours and 30 minutes.

31. As at 12 December 2018, Simply Energy has not made any wrongful disconnection payment to Customer F in respect of this disconnection.

Relevant obligations

32. In this matter, Simply Energy's relevant obligations arise from the following:

(a) The Act:

(i) Section 48A(1) of the Act deems a condition into Simply Energy's gas retail licence of an obligation to make a payment of the prescribed amount to a customer if Simply Energy disconnects the supply of gas to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the gas supply to those premises may be disconnected.

(ii) Section 48A(3) of the Act requires such payment to be made as soon as practicable after the supply of gas is reconnected to the premises of the customer.

(iii) From and after 1 January 2016, section 48A(5) of the Act provides that the prescribed amount is $500.00 for each whole day and a pro rata amount for any part of a day that the gas supply is disconnected.

(b) Simply Energy's gas retail licence as varied on 24 October 2007, being the gas retail licence held by Simply Energy at the time of the disconnection:

(i) Clause 6.4 of the licence requires Simply Energy to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.

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

(i) Clause 8.1(b) of the contract which states, in part:

"In accordance with the law, and only if we comply with all of the requirements under the law, we may request your distributor to de-energise your premises: 1. if you fail to pay us an amount we have billed by the pay-by date or do not agree to or do not adhere to the terms of an instalment plan…"

(ii) Clause 8.2 of the contract which states, in part:

"We must comply with restrictions under the law on de-energising your premises…"

(iii) Clause 12.1 of the contract which states, in part:

"In selling you energy, we will comply with the law…"

(iv) Clause 13.2 of the contract which states, in part:

"The laws of the State in which your premises are located govern the contract."

(v) Clause 13.5 of the contract which states, in part:

"In these contract terms: …law means any law or regulatory or administrative document…"

(d) The code:

(i) Clause 3 of the code defines payment plan as a plan for a hardship customer or residential customer experiencing payment difficulties to pay a retailer, by periodic instalments in accordance with the code, any amounts payable by the customer for the sale and supply of energy.

(ii) Clause 72(1)(a)(i) of the code requires that a payment plan must be established having regard to the customer's capacity to pay.

(iii) Clause 72(2)(b) of the code requires that a retailer who offers a payment plan for a customer must inform the customer of the amount of each instalment payable under the plan, the frequency of instalments and the date by which each instalment must be paid.

(iv) Clause 72(2)(c) of the code requires that a retailer who offers a payment plan for a customer must, if the customer is in arrears, inform the customer of the number of instalments to pay the customer's arrears.

(v) Clause 111(2) of the code in relation to disconnection for non-payment of a bill or failure by a customer to adhere to a payment plan requires that where a residential customer informs a retailer that the customer is experiencing payment difficulties, the retailer must not arrange for the disconnection of the energy supply to the customer's premises unless the retailer has offered the customer two payment plans in the previous 12 months.

33. Simply Energy's obligations are discussed further below in the reasons.

Decision

34. Simply Energy is in breach of a condition of its gas retail licence, deemed into Simply Energy's gas retail licence by section 48A of the Act (the deemed licence condition).

35. Simply Energy failed to comply with the terms and conditions of the contract between Simply Energy and Customer F that specified the circumstances in which the supply of gas to those premises may be disconnected.

36. Simply Energy disconnected the supply of gas to Customer F's premises at 11:20am on 24 August 2017.

37. Accordingly, both conditions that must be satisfied for section 48A of the Act to apply were satisfied.

38. The supply of gas to Customer F's premises was reconnected at 4:50pm on 25 August 2017.

39. The supply of gas to Customer F's premises was wrongfully disconnected for a period of one day, five hours and 30 minutes.

40. Therefore, under the deemed licence condition, Simply Energy was obliged to pay Customer F the prescribed amount of $615.00 as soon as practicable after the supply of gas was reconnected to Customer F's premises on 25 August 2017.

41. As at 12 December 2018, Simply Energy has not made any wrongful disconnection payment to Customer F in respect of this disconnection.

Reasons

42. Simply Energy's gas retail licence required Simply Energy to comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 6.4).

43. The deemed licence condition required Simply Energy to make a prescribed payment to a customer as soon as practicable after the supply of gas to the customer's premises is reconnected, where it:

    (a) disconnects the supply of gas 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 gas to those premises may be disconnected.

44. The relevant contract between Simply Energy and Customer F was a market retail contract. The terms and conditions of that contract required Simply Energy to comply with restrictions under the law on disconnecting the gas supply to Customer F's premises (clause 8.2) and defined "law" to include any regulatory document in the State of Victoria (clauses 13.2 and 13.5). The commission considers that the terms and conditions of Simply Energy's contract with Customer F required Simply Energy to comply with the code.

45. The ombudsman submitted that it was unclear whether Simply Energy complied with clauses 72(1)(a)(i), 72(2)(b) and 111(2) of the code in relation to the disconnection of the gas supply to Customer F's premises.

Clause 72(1)(a)(i) of the code – Is capacity to pay relevant in making an *offer* of a payment plan?

46. The ombudsman's referral memorandum referred to and suggested that there was a need to comply with clause 72(1)(a) of the code when considering compliance with clause 111(2) of the code. The ombudsman specifically referred to an obligation for Simply Energy to have had regard to Customer F's capacity to pay in offering the second payment plan to Customer F on 5 December 2016 (see paragraph 17 above).

47. The requirement in clause 111(2) of the code is that the retailer must not arrange for the disconnection of the customer's premises "…unless the retailer has offered the customer 2 payment plans in the previous 12 months." Clause 72(1)(a) of the code is concerned with *establishing* a payment plan and is not concerned with *offering* a payment plan.

48. For the purposes of clause 111(2) of the code, clause 72(1)(a) of the code is not relevant. The relevant clause is 72(2) of the code. Simply Energy was not required under clause

72(1)(a)(i) of the code to have regard to Customer F's capacity to pay in *offering* the second payment plan to Customer F.

Clause 72(2)(b) of the code – Did Simply Energy inform Customer F of the date by which each instalment must be paid under the second payment plan?

49. The ombudsman considered that it was unclear whether Simply Energy complied with clause 72(2)(b) of the code on the basis that Simply Energy did not inform Customer F of the date by which each instalment must be paid under the second payment plan.

50. Simply Energy's letter to Customer F on 5 December 2016 stated, in part:

"Option 3: Pay by Instalments: You are eligible for the following payment plan of $169.57 per fortnight for a period of 12 months. This amount has been re-calculated based on your current account balance of $2,964.90 and your expected energy charges for the next 12 months of $1,443.93. If you would like to accept this offer or the offer is not acceptable to you please contact us on 1800 065 475 strictly within 5 business days of the date of this letter."

51. Although Simply Energy informed Customer F of the 12 month duration of the plan and the fortnightly frequency of the instalments in the letter, Simply Energy did not inform Customer F of the date by which each instalment was required to be paid.

52. The commission considers that Simply Energy did not comply with clause 72(2)(b) of the code with respect to the second payment plan it offered to Customer F.

Clause 72(2)(c) of the code – Did Simply Energy inform Customer F of the number of instalments that were required to pay Customer F's arrears?

53. Clause 72(2)(c) of the code applies where a customer is in arrears to require that a retailer who offers a payment plan for a customer must inform the customer of the number of instalments to pay their arrears.

54. At the time that Simply Energy purported to offer the payment plan by way of its letter to Customer F on 5 December 2016, Customer F was in arrears in the amount of $2,964.90 (see paragraphs 17(b) and 50 above).

55. Simply Energy did not inform Customer F of the number of instalments that were required to be paid by Customer F in order to pay her arrears.

56. The commission considers that Simply Energy did not comply with clause 72(2)(c) of the code with respect to the second payment plan it offered to Customer F.

Clause 111(2) of the code – Did Simply Energy offer Customer F two payment plans within the 12 months before arranging for disconnection?

57. The ombudsman considered that Simply Energy may not have complied with its obligations to offer Customer F a second payment plan within the 12 months before arranging for the disconnection as required by clause 111(2) of the code. The ombudsman considered that Simply Energy's offer of the second payment plan had not been compliant because Simply Energy had not complied with clauses 72(1)(a)(i) and 72(2)(b) of the code.

58. As discussed above (see paragraphs 46 to 48), the commission considers that clause 72(1)(a)(i) of the code is not relevant to the offer of a payment plan and that clause 72(2) is relevant. Simply Energy did not comply with clauses 72(2)(b) and 72(2)(c) of the code (see paragraphs 49 to 56 above).

59. The commission concludes that because Simply Energy's offer of the second payment plan to Customer F did not comply with clauses 72(2)(b) and 72(2)(c) of the code, Simply Energy did not validly offer a second payment plan to Customer F as required by clause 111(2).

60. Simply Energy submitted that it did not rely upon the offer of the second payment plan to comply with the code but that the commission should consider that Simply Energy was compliant with its obligations in accordance with the 2012 Final Decision (see paragraph 9 above). Simply Energy submitted that Customer F was not engaging with Simply Energy, and that Simply Energy used its best endeavours to contact Customer F until the disconnection.

61. Simply Energy referred to a part of the 2012 Final Decision titled "FINAL DECISION 1: Offering a second Instalment Plan", which stated:

    "FINAL DECISION 1: Offering a second Instalment Plan

    In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principles in their dealings with customers and that in the event of any escalated dispute, these principles will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute.

    - Where a customer has engaged with the retailer since coming to attention for non-payment, the retailer must offer a second detailed instalment plan which fulfils all the requirements of clause 12, or the disconnection will be found to be wrongful;
    - Where a customer has not engaged with the retailer since coming to attention for non-payment, by having failed to:

        a) make some payment under a first instalment plan before it failed; and

b) engage in discussion when telephoned or visited; and

c) reply to correspondence from the retailer; and

d) otherwise contact the retailer –

then in order to avoid a subsequent disconnection being found wrongful, the retailer must have already offered a first detailed instalment plan which fulfils all the requirements of clause 12 and made genuine attempts to engage the customer, including (as a final step before a disconnection warning) sending a registered letter or similar, separate from any bill or demand.

The final letter must actively encourage the customer to contact the retailer to discuss payment arrangements, all forms of financial assistance and their hardship program, giving the customer five business days to respond to avoid disconnection for non-payment.

Provision by the retailer of comprehensive evidence of attempts to contact the customer, including a letter meeting the above specifications*, will be deemed by the Commission to have fulfilled the requirement under clause 11.2 for a second detailed instalment plan to have been offered, despite it not reflecting the customer's capacity to pay, as specified by clause 12.2(a).*" (emphasis added)

62. The commission notes that the 2012 Final Decision was made at a time when the code required retailers to have regard to the customer's capacity to pay in order to make a valid offer of a payment plan. Further, the decision was made partially in response to retailers' concerns about the difficulty of complying with this obligation when customers refuse to engage. The commission further notes that the 2012 Final Decision states that it is made "…in lieu of further amendment to the… code." The code has been amended extensively since the 2012 Final Decision, and the obligation to have regard to a customer's capacity to pay when offering a payment plan no longer exists. Hence, the commission considers that Simply Energy was not entitled to rely on the 2012 Final Decision to be deemed by the commission to have fulfilled its requirements under the current version of the code.

63. Under the current version of the code, Simply Energy could have made a second compliant offer of a payment plan in writing to Customer F even if Customer F did not engage with Simply Energy subsequent to the first payment plan.

64. Simply Energy was not entitled to arrange for the disconnection of the gas supply to Customer F's premises without validly offering two payment plans within the previous 12 months. Simply Energy made one valid offer of a payment plan to Customer F on 9 September 2016 (see paragraph 15 above), but failed to make a valid offer of a second

payment plan to Customer F within 12 months prior to arranging for the disconnection of the gas supply to her premises.

65. Simply Energy breached the terms and conditions of the contract between Simply Energy and Customer F that specified the circumstances in which the supply of gas to those premises may be disconnected. It therefore also breached the deemed licence condition.

66. The disconnection of the gas supply to Customer F's premises on 24 August 2017 was wrongful. As a result, Simply Energy was required to make a wrongful disconnection payment to Customer F.

Enforcement

67. Simply Energy has breached its retail licence by failing to make a payment of $615.00 as soon as practicable after the reconnection of the supply of gas to Customer F's premises on 25 August 2017.

68. Simply Energy is required to rectify the contravention by making the payment.

69. Simply Energy should advise the commission in writing when the payment has been made.

70. If Simply Energy is unable to make payment, it should inform the commission in writing within five business days.

71. If the payment is not made within five business days, the commission may take enforcement action against Simply Energy under Part 7 of the Essential Services Commission Act 2001 (Vic).

Other observations

Simply Energy's submissions regarding the commission's 2012 Final Decision 'Obligations to Customers: Disconnection and Reconnection'

72. Simply Energy stated in its submission that it did not rely upon its letter to Customer F on 5 December 2016 to meet its obligations under clauses 72 and 111(2) of the code, but that the commission should have consideration for Simply Energy using its best endeavours to contact Customer F in accordance with the 2012 Final Decision (see paragraphs 8 and 9 above).

73. The commission notes that the 2012 Final Decision raised by Simply Energy referred to an older version of the code, version 8 dated April 2011 as set out in appendix A at page 45 of the 2012 Final Decision. At that time, clause 12.2(a) of that version of the code required capacity to pay to be addressed at the time of offering an 'instalment plan'. That is significantly different from the equivalent provision contained in version 11 of the code (see clause 72) which came into operation on 13 October 2014 and covers the conduct which is the subject of the complaint made by the customer.

74. The commission considers that the regulatory obligations of retailers have significantly changed since the 2012 Final Decision, including by way of the introduction of further versions of the code and the harmonisation of the code with the National Energy Customer Framework. The part of the 2012 Final Decision titled "FINAL DECISION 1: Offering a second Instalment Plan" is therefore irrelevant in interpreting the obligations under the current version of the code.