ESSENTIAL SERVICES COMMISSION

Customer T and EnergyAustralia – Decision and reasons

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

23 May 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 T and EnergyAustralia – Decision and reasons: Application of s40B of the Electricity Industry Act 2000 (Vic) – Compensation for wrongful disconnection, 23 May

C/18/11282

Contents

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 T.

2. The complaint is about the application of s 40B of the Electricity Industry Act 2000 (Vic) for an alleged wrongful disconnection by EnergyAustralia of Customer T's electricity supply at [address redacted] (the premises), from 10:11 am on 24 September 2015 to 4.30 pm on 25 September 2015 (a period of 30 hours and 19 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 T in circumstances where:

   (a) EnergyAustralia disconnected the supply of electricity to the premises of Customer T; 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 T as soon as practicable after the supply of electricity was reconnected to Customer T's premises.

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

   (a) Whether or not EnergyAustralia disconnected the supply of electricity to the premises of Customer T (see paragraph 30 below);

   (b) Was supply of electricity to Customer T's premises reconnected, and if so, when? (see paragraph 32 below);

   (c) If EnergyAustralia did disconnect the supply of electricity to Customer T's premises, for what period of time did the disconnection occur? (see paragraph 33 below);

   (d) What was the contract between EnergyAustralia and Customer T? (see paragraphs 13 to 15 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 T's premises? (see paragraphs 13 to 15 and 46 below);

   (f) Whether or not EnergyAustralia failed to comply with *those* terms and conditions (see paragraphs 46 and 58 below);

   (g) Was Customer T entitled to receive payment of a prescribed amount because of any wrongful disconnection by EnergyAustralia under s40B of the Act? (see paragraphs 42 and 43 below);

   (h) If so, when was EnergyAustralia obliged to make the payment of the prescribed amount? (see paragraphs 45 and 63 below);

(i) Has EnergyAustralia made the payment to Customer T in accordance with its deemed licence condition under s40B of the Act? (see paragraphs 34 and 43 below);

(j) If EnergyAustralia has not made the payment what are the consequences? (see paragraphs 63 to 67 below).

5. 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 33(3) 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 clauses 111(2) and 72(1)(a)(i) of the code. Regarding clause 111(2), this was because EWOV considered that EnergyAustralia did not appear to have met its obligations in offering Customer T two payment plans in the 12 months prior to the disconnection due to the lack of contact between Customer T and EnergyAustralia. Regarding clause 72(1)(a)(i) it was because EWOV considered that in making the first offer of a payment plan, provided to Customer T on 8 January 2015, EnergyAustralia did not have regard to Customer T's capacity to pay.

6. 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.

7. EnergyAustralia said it generally agreed with the chronology of events as presented by EWOV in its referral memorandum. However, EnergyAustralia provided what it considered to be "additional important details" relevant to the disconnection assessment.

8. To justify its disconnection, EnergyAustralia has submitted that it had regard to Customer T's capacity to pay and other matters under clause 72(1)(a). EnergyAustralia submitted that the requirements of clause 111(2) requires only an offer. It submitted that a customer may choose not to agree to the offer and the fact that Customer T did not agree does not impact on the provision of an offer itself.

9. EnergyAustralia notes the commission's guidance on adequate assessment of capacity to pay at clause 2(e) of Appendix A of the Operating Procedure Compensation for Wrongful Disconnection. EnergyAustralia submitted that it "met the guidance by facilitating receipt of as much information as the customer was prepared to provide, including the amount the customer considered they could pay, during a conversation Mrs Thompson [sic] did not want to participate in."

10. EnergyAustralia also submitted it was unable to provide offers of payment plans due to Customer T's lack of engagement, despite 11 contact attempts via phone calls and SMS

between January and September 2015, and its EnergyAssist letter of 6 July 2015. EnergyAustralia considers that it used best endeavours to make contact to offer a second payment plan compliant with section 72(1)(a) and was unable to make a second offer as a result of an inability to contact Customer T due to her lack of engagement.

Relevant facts

11. The commission analysed EWOV's request for a decision and sought additional information from EnergyAustralia. Having assessed the matter and the information and documents received by the commission, the commission makes the factual findings set out below.

Background

12. At all relevant times, EnergyAustralia was the licensee responsible for supply of electricity to the premises.

13. On 28 May 2012, EnergyAustralia established an account for the supply of electricity at the premises to Customer T. It entered into a Market Retail Contract for the supply of electricity at Customer T's premises. Clause 13 of that contract deals with paying bills and sub-clause 13.3 deals with difficulties in paying bills. Clauses 17 to 19 of that contract contain the terms and conditions specifying the circumstances in which the supply of electricity to the premises may be disconnected. Both clauses 13 and 17 of the contract have incorporated into the contract other terms and conditions by reference. These are EnergyAustralia's Customer Hardship Policy and the provisions of the code.

14. Relevantly, sub-clause 13.3(a) and (b) provide that:

    (a) "If you're a residential customer and have told us that you have difficulty paying your bill, we must offer you the option of paying your bill under a payment plan. However, we are not obliged to do so if you've had 2 payment plans cancelled due to non-payment in the previous 12 months…"; and

    (b) "Additional protections may be available to you under our customer hardship policy and under the National Energy Retail Law and the rules if you're a customer experiencing payment difficulties due to hardship. A copy of our customer hardship policy is available on our website."

15. Relevantly, sub-clause 17.1 provides that "subject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises…"; and sub-clause 17.2 similarly provides that "Before disconnecting your premises, we must comply with relevant warning notice requirements and other provisions in the Rules…"

16. On 6 November 2012, EnergyAustralia established a payment plan for $60 per fortnight, which was cancelled on 8 May 2013. Customer T continued to make regular payments towards her electricity account.

17. Between 27 December 2013 and 23 September 2015, Customer T made 46 payments of varying amounts to the account, totalling $2,760.00.

18. After previous attempts to contact Customer T, on 8 January 2015 EnergyAustralia called Customer T to offer a payment plan. During this call:

(a) EnergyAustralia advised Customer T that she could decrease her gas account payments from $20.00 per fortnight to $10.00 per fortnight in order to increase her electricity account payments from $60.00 per fortnight to $70.00 per fortnight.

(b) EnergyAustralia further advised that the electricity payment plan of $70.00 per fortnight would be established for six payments only and then this would need to be increased as it did not cover her arrears. Customer T advised EnergyAustralia "*she can't help that".*

(c) Customer T then went on to request a *"hardship form"* and EnergyAustralia advised her of the process of sending the application forms for the Utility Relief Grant Scheme (URGS).

(d) EnergyAustralia corrected its earlier advice about the gas payment plan and advised Customer T that the gas payment plan would need to remain at $20.00 per fortnight, with the electricity payment plan to be $70.00 per fortnight.

(e) Customer T advised in that case she would continue to pay $60.00 per fortnight towards the electricity account and $20.00 per fortnight towards her gas account, she also requested EnergyAustralia send out the forms and the call ended.

19. On 1 June 2015, a bill was issued to Customer T in the amount of $1,560.78 with a due date of 19 June 2015, which triggered the disconnection process.

20. On 23 June 2015, a reminder notice was issued in the amount of $1,440.78.

21. On 6 July 2015, a disconnection warning notice was issued in the amount of $1,380.78.

22. On 2 September 2015, EnergyAustralia:

(a) sent to Customer T a letter providing information about its EnergyAssist program;

(b) issued a final disconnection warning notice, and sent it via registered post to Customer T;

(c) created the following entry in its sales contact notes: "**Disconnection for Non-Payment Assessment**: An assessment has been completed and the account is not eligible to be disconnected." And "Reason Assessment Failed: Closed URGS application in premise cases. Hence, for goodwill referring to hardship. Skant/Credit Disconnections Team."

(d) issued a disconnection service order regarding the supply of electricity to Customer T's premises due to the non-payment of the outstanding amount ($1,140.78) and failing to make contact with EnergyAustralia.

23. On 24 September 2015, EnergyAustralia disconnected Customer T's electricity supply for non-payment. The outstanding balance at that date was $1,682.74.

24. From its last point of contact with Customer T on 8 January 2015, EnergyAustralia continued to receive regular fortnightly payments for Customer T's electricity account of $60.00 up until 23 September 2015.

Circumstances leading to the disconnection in September 2015

25. EnergyAustralia made a number of unsuccessful attempts to contact Customer T before raising a service order for disconnection:

    (a) One phone call on 28 February 2015;

    (b) One phone call on each of 4, 13, 14, 18, 19, 24, 25 and 27 of March 2015;

    (c) An SMS on 30 March 2015;

    (d) One phone call each on 2 and 17 April 2015;

    (e) One phone call on 17 June 2015;

    (f) Six phone calls on 19 June 2015;

    (g) One phone call each on 22 and 26 of June 2015;

    (h) An SMS on 29 June 2015; and

    (i) One phone call on 1 July 2015.

26. On 6 July 2015 EnergyAustralia issued a Disconnection Warning Notice to Customer T for her overdue electricity account of $1,380.78 (with a due date of 16 July 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."

27. On 2 September 2015 EnergyAustralia sent Customer T a letter with the bold heading "**We may be able to help you with your payments**". Relevantly, the letter also said:

    (a) The EnergyAssist Program "is designed to support our customers in managing their energy use and costs over an extended period of time. The program lets you set up a personally tailored payment plan to help pay off any existing debt, and also cover future bills in manageable instalments;"

(b) "As part of the program, we can:

Advise you on energy efficiency to help reduce your energy bills…help you apply for State Government grants… give you details of a financial counsellor to help manage your finances;"

(c) "**To accept the offer**

Just **call us on 1800 558 643** in the next 14 business days"; and

(d) "When you call, we'll assign you a case manager who will work with you to put together a payment plan that suits you."; and

(e) "**If you don't call**

If you don't contact us within 14 business days or pay the total outstanding amount, we may have to start the disconnection process."

28. On 2 September 2015 EnergyAustralia sent to Customer T by registered post a final Disconnection Warning Notice for the outstanding amount of $1,140.78 (with a due date of 14 September 2015). Information provided by EnergyAustralia on the front and back of this notice addressed to Customer T included the following:

(a) "Unless we can resolve this matter by 14 September 2015 we'll **disconnect your supply without any more warnings**…"; and

(b) "If you're having trouble paying this bill, just call us on 133 466. We'll be happy to talk to you about payment plan options and government funded charged rebates, concessions and relief schemes that may be available to you."; and

(c) "**Payment Arrangements 133 466**

Please contact our Customer Service Advisers to discuss payment assistance and concessions including …

Utility Relief Grant Scheme".

29. On 2 September 2015, EnergyAustralia raised a service order for disconnection of supply of electricity to Customer T's premises.

Disconnection of electricity supply to the premises

30. At 10:11 am on 24 September 2015 EnergyAustralia disconnected the electricity supply at Customer T's premises for non-payment of the outstanding balance of $1,140.78.

31. At 1:06 pm on 25 September 2015 Customer T called EnergyAustralia regarding the disconnection of her electricity supply. She was informed that the supply was disconnected because of non-payment. Customer T made a payment of $1,140.78 to her account.

EnergyAustralia advised Customer T of the likely timeframes for reconnection of the electricity supply to her premises.

32. At 4:30 pm on 25 September 2015 EnergyAustralia reconnected the electricity supply to Customer T's premises.

33. The premises were disconnected for a period of 30 hours and 19 minutes.

34. EnergyAustralia has not made any wrongful disconnection payment to Customer T.

Relevant obligations

35. In this matter EnergyAustralia's relevant obligations arise from the following:

(a) Sections of the Act:

(i) 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. They require the licensee to provide information specified by the commission about the rights and entitlements of customers. They also deem the terms and conditions decided by the commission to be in the contract;

(ii) section 40B of the Act – deeming a condition into EnergyAustralia's retail licence an obligation to make a payment of the prescribed amount (which, prior to 1 January 2016, was $250 per day or pro rata) to a customer if there has been a wrongful disconnection; and

(iii) sections 41 to 46A dealing with hardship policies and in particular the objects of those provisions (s42) and the reference to community expectations that the electricity supply will not be disconnected solely because of a customer's inability to pay for the electricity supply (s45(2)(c)).

(b) EnergyAustralia's 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 T (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, offering option to pay under a payment plan and additional protections may be available to customers as set out in EnergyAustralia's Hardship Policy; clause 17 – disconnection of supply is subject to compliance with the requirements of the code; 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; clause 71B identifying that a customer in financial hardship is a residential customer who has the intention but not the capacity to make payment within the timeframe required by the retailer's payment terms; clause 72 identifying the requirements in *offering a payment plan* and, also, in *establishing a payment plan*; clauses 107 to 118 – dealing with and specifying the circumstances in which the supply of electricity to premises may be disconnected. In particular, that the retailer must not arrange disconnection of a customer's premises except in accordance with clauses 111 to 118. And clause 111 dealing with disconnection for not paying a bill.

36. EnergyAustralia's obligations are discussed further below in the reasons.

Decision

37. EnergyAustralia is in breach of a condition of its electricity retail licence, deemed into EnergyAustralia's Retail Licence by s40B of the Act ("the deemed licence condition").

38. EnergyAustralia disconnected the supply of electricity to Customer T's premises at 10:11 am on 24 September 2015 (the disconnection).

39. The disconnection was not in accordance with the deemed licence condition.

40. The supply of electricity to Customer T's premises was reconnected at 4.30 pm on 25 September 2015.

41. The supply of electricity to Customer T's premises was wrongfully disconnected for a period of 30 hours and 19 minutes.

42. Therefore, under the deemed licence condition, EnergyAustralia was obliged to pay to Customer T the prescribed amount of $316.

43. No payment has been made as at 23 May 2018.

Reasons

44. EnergyAustralia's 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).

45. 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.

46. Clauses 17 to 19 of EnergyAustralia's contract with Customer T effectively specify the circumstances in which the supply of electricity to Customer T's premises may be disconnected. Clauses 17.1 and 17.2 are subject to compliance with, and incorporate by reference into the contract, the requirements in Part 6 of the code. As noted at paragraph 5 above, it is accepted that EnergyAustralia complied with the relevant requirements of clauses 110 and 111(1)(e) and 33(3) of the code.

47. EWOV has suggested that there may have been non-compliance with the provisions of clause 111(2) and clause 72(1)(a) of the code.

48. On 8 January 2015 Customer T requested a "*hardship form"* indicating that she was experiencing payment difficulties (see paragraph 18 above).

49. On 8 January 2015 EnergyAustralia contacted Customer T and offered her a payment plan, to which Customer T did not agree to.

50. Customer T was clearly a residential customer who had informed EnergyAustralia that she was experiencing payment difficulties (see paragraph 18 above). EnergyAustralia even made an internal note on 2 September 2015 to the effect that Customer T's account was assessed as not being eligible for disconnection (see paragraph 22(c) above). There was

no further contact between EnergyAustralia and Customer T until 25 September 2015. Accordingly, before EnergyAustralia could disconnect the supply of electricity to Customer T's premises it had to comply with the requirements of clause 111(2) of the code.

51. Clause 111(2) of the code required EnergyAustralia not to arrange for disconnection of Customer T's premises unless EnergyAustralia had offered Customer T two payment plans in the previous 12 months, and:

    (a) Customer T had agreed to neither of them; or

    (b) Customer T had agreed to one but not the other of them but the plan to which Customer T agreed had been cancelled due to non-payment by Customer T; or

    (c) Customer T had agreed to both payment plans but the plans have been cancelled due to non-payment by Customer T.

52. EnergyAustralia did not offer Customer T a second payment plan in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 2 September 2015 (see paragraph 29 above). There was no offer of a second payment plan to Customer T in the period 2 September 2014 to 2 September 2015.

53. It should be noted that, while the letter of 2 September 2015 from EnergyAustralia can properly be described as an offer to help Customer T with her payments and even an offer to Customer T to pay her bills by instalments for the purposes of clause 111(1)(b)(ii) of the code, it is not an offer of a payment plan for the purposes of clause 111(2) (see paragraph 35(e) above).

54. An offer of a payment plan for the purposes of clause 111(2) of the code required EnergyAustralia to inform Customer T of:

    (a) the duration of the plan;

    (b) the amount of each instalment payable under the plan, the frequency of instalments and the date by which each instalment must be paid; and

    (c) the number of instalments to pay her arrears.

    (see clause 72(2) of the code).

55. There was no such offer of a second payment plan by EnergyAustralia to Customer T.

56. Irrespective of whether or not EnergyAustralia was able to contact Customer T and whether or not Customer T was engaging with EnergyAustralia in the relevant 12 month period (from 2 September 2014 to 2 September 2015), EnergyAustralia could have made such an offer of a second payment plan by letter, including on 2 September 2015 instead of the letter of help it did send to Customer T by registered post. (EnergyAustralia would then

have needed to wait until the due date for any reply or contact had expired before *arranging* the disconnection).

57. Customer T was a customer who had informed EnergyAustralia that she was experiencing payment difficulties (see paragraph 48 above). There was no further contact between EnergyAustralia and Customer T from 8 January 2015. Therefore, there was no or no reasonable basis for EnergyAustralia to form a different view about Customer T's payment difficulties.

58. Accordingly, EnergyAustralia did not comply with the requirements of clause 111(2) of the code and clauses 17.1 and 17.2 of its contract with Customer T. (see paragraph 15 above).

59. EnergyAustralia was not entitled to disconnect the supply of electricity to Customer T at the premises on 24 September 2015. It breached its deemed licence condition by doing so.

Other considerations

Commission's guidance on need to consider capacity to pay and use of "staff advice".

60. EWOV's referral in this matter suggests that the capacity to pay issue has to be considered at the time of offering a payment plan. However, as clauses 72(1) and (2) of the code provide, the capacity to pay issue is relevant at the time of *establishing a payment plan* rather than at the time of *offering a payment plan*.

61. EWOV's referral in this matter also referred to "staff advice" regarding the offer of a second payment plan. EnergyAustralia took exception to the "retrospective application of staff advice to retailer conduct that occurred before the advice was issued, and in particular, where that advice is not made available to retailers".

62. The staff advice expressly states that it is the opinion of the commission staff and does not prejudice any future consideration of the matter by the commission. The commission does not need to have, and has not had, regard to the staff advice in determining the requirements of an offer of a payment plan. Rather, its current decision is based on the requirements of clause 72(2) of the code (see paragraphs 54 to 56 above).

Enforcement

63. EnergyAustralia has breached its retail licence by failing to make a payment of $316 as soon as practicable after the reconnection of the supply of electricity to Customer T's premises on 24 September 2015.

64. EnergyAustralia is required to rectify the contravention by making the payment.

65. EnergyAustralia should advise the commission in writing when the payment has been made.

66. If EnergyAustralia is unable to make payment it should inform the commission in writing within five business days.

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