ESSENTIAL SERVICES COMMISSION

Customer B and EnergyAustralia – decision and reasons

Application of section 40B of the Electricity Industry Act 2000 – compensation for wrongful disconnection

19 October 2020

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Referral from the ombudsman

1. On 30 August 2019, the Energy and Water Ombudsman (Victoria) referred this matter to the commission for decision. The matter arises from a complaint made to the ombudsman by a residential customer, Customer B.
2. The referral concerns the application of section 40B of the Electricity Industry Act 2000 (the Act) to a disconnection by EnergyAustralia Pty Ltd (ACN 086 014 968) of Customer B's electricity supply at the relevant premises. The electricity supply to the premises was disconnected by EnergyAustralia at 10:07am on 1 August 2018 and was reconnected by AGL at 9:55am on 6 September 2018.
3. The parties agree that the disconnection of electricity to the premises was wrongful. The issue the commission has been asked to provide guidance on is how the compensation amount should be calculated.

Issues for decision

4. EnergyAustralia and the ombudsman agree that the disconnection was wrongful under section 40B of the Act, and that consequently EnergyAustralia has an obligation to make a wrongful disconnection compensation payment to Customer B in respect of that disconnection as a condition of its electricity retail licence.

5. The issue which the commission has been asked to provide guidance on is what amount of compensation EnergyAustralia should pay to Customer B.

Relevant facts

6. The commission analysed the ombudsman's request for a decision and sought additional submissions from Customer B and EnergyAustralia. Having assessed the matter and the submissions, the commission makes the factual findings set out below.

Disconnection of electricity supply to the premises

7. On 1 August 2018 at 10:07am, the electricity supply to Customer B's premises was disconnected.

8. On 4 August 2018 (Saturday), Customer B contacted EnergyAustralia via its live chat service. During this live chat:

    - Customer B informed EnergyAustralia that there was no electricity supply at the premises and requested reconnection as soon as possible.
    - EnergyAustralia advised that the team responsible for reconnections would not be available until the Monday and there was no option to reconnect until then.
    - EnergyAustralia requested that Customer B call back on Monday to arrange reconnection and provided the relevant contact number for this purpose.
    - Customer B stated, 'that's just not good enough' and that he would go to another retailer.

Reconnection of electricity supply to the premises

9. On 28 August 2018, Customer B's wife (Mrs B) made a complaint to the ombudsman about the disconnection, on behalf of Customer B. The ombudsman raised an investigation and notified EnergyAustralia on the customer's behalf the same day.

10. Later that day, EnergyAustralia attempted to organise a reconnection by contacting the ombudsman but was told by the ombudsman on behalf of the customer that they did not wish to be reconnected.

11. Before doing so, the ombudsman made a call to Mrs B. During this conversation:

    - The ombudsman asked Mrs B, 'Your resolution doesn't state you want a reconnection? Do you want a reconnection at the property?'

      Mrs B responded, 'No, I want to go to another provider. I've already cleaned out the fridge and everything. I want to get this resolved before school holidays and then will connect with another company. I don't want to be with EnergyAustralia anymore. We don't really

need electricity because it a holiday home. When we needed it, it wasn't on. Now that I've cleaned out the whole house, the smell and everything. I'm hoping to get this matter resolved so I can move onto another retailer.'

- The ombudsman also advised Mrs B of the need for the main switch to be in the off position if she wished to get reconnected in the future.

The ombudsman then informed EnergyAustralia that Customer B and Mrs B were not seeking reconnection as it was a holiday home, and that they intended to arrange reconnection with another retailer.

12. In its submission to the commission, EnergyAustralia noted it was unable to raise the reconnection of supply without the customer's consent and informing the customer of the need to have the main switch in the off position.

13. On 6 September 2018 at 9:55am, the electricity supply to Customer B's premises was reconnected with another retailer (AGL).

Relevant obligations

14. The relevant obligations in this matter arise from the following:

(a) The Electricity Industry Act (2000):

(i) Section 40B(1) of the Act deems a condition into EnergyAustralia's electricity retail licence requiring EnergyAustralia to make a payment of the prescribed amount to a relevant customer if it disconnects the supply of electricity to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.

(ii) Section 40B(1A) of the Act provides that, where a customer does not notify the licensee of the disconnection with 14 days after the date of disconnection, the maximum payment is the prescribed capped amount.

(iii) Section 40B(3) of the Act requires such payment to be made as soon as practicable after the supply of electricity is reconnected.

(iv) Section 40B(5) of the Act provides that the prescribed amount is $500 for each whole day and a pro rata amount for any part of a day that the supply of electricity is disconnected.

(b) EnergyAustralia's electricity retail licence

(i) Clause 7.1 of the licence requires EnergyAustralia to ensure its contracts for the sale of electricity expressly deal with each matter which is the subject of term or condition of the code.

(ii) Clause 7.3 of the licence requires each term or condition of EnergyAustralia's contracts for the sale of electricity to be consistent with each term and condition of the code.

(iii) Clause 7.4 of the licence requires EnergyAustralia to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

(iv) Clause 14.1 of the licence requires EnergyAustralia to comply with all applicable provisions of the code.

(v) Clause 21 of the licence requires EnergyAustralia to comply with all applicable laws.

(c) EnergyAustralia's market retail contract with Customer B:

(i) Clause 17.1 of the contract provided that EnergyAustralia may arrange for the disconnection of the premises subject to it satisfying the requirements in the Rules, or as it was otherwise entitled or required to do so by law.

(ii) Clause 27.1 of the contract defined 'Rules' to mean the National Energy Retail Rules made under the National Energy Retail Law. Clause 27.1 also defined 'Energy Laws' to mean national and State and Territory laws and rules relating to energy and the legal instruments made under those laws and rules.

Submissions

The ombudsman's submissions

15. Through its letter of referral and accompanying memorandum, the ombudsman acknowledged that EnergyAustralia demonstrated compliance with clauses 109 and 110 of the code, which concern the obligations for reminder notices and disconnection warning notices respectively. The commission acknowledges that compliance with these clauses is not in dispute.

16. The ombudsman noted that it was agreed between the parties that EnergyAustralia did not comply with the terms and conditions of its contract with Customer B that specified the circumstances in which the supply of electricity to Customer B's premises may be disconnected.

17. The ombudsman asked the commission to advise whether the wrongful disconnection payment should be capped in this instance, despite Customer B contacting EnergyAustralia within 14 days from the date of disconnection.

18. The ombudsman was of the view that EnergyAustralia may be required to pay compensation from the date of disconnection on 1 August 2018 to the date of reconnection on 6 September 2018, albeit with another retailer. The ombudsman relied on the commission's previous decision in the matter of Customer W and Red Energy to support its position.

Customer B's submissions

19. The ombudsman's referral provided a short customer statement about the matter. Mrs B, on behalf of Customer B stated:

> He arrived at the property on 1 August 2018 and noticed that the electricity was disconnected.
>
> He checked the mailbox and had received a bill issued on 7 June 2018 for $562.20 with a pay-by-date of 27 June 2018. He had also received a disconnection warning notice requesting payment of $562.20 by 6 August 2018.
>
> He had previously asked for bills to be sent via email.

20. The commission invited further submissions and information from Customer B, however nothing further was provided.

EnergyAustralia's submissions

21. The ombudsman's referral noted that EnergyAustralia had confirmed that it did not meet the minimum standard of conduct required for compliance with the code and consequently failed to meet the conditions of its contract with Customer B. However, that EnergyAustralia believed that any payment of compensation should be capped to 28 August 2018, being the date that Mrs B, on behalf of Customer B declined reconnection of the electricity supply to the premises by EnergyAustralia.

22. The commission invited EnergyAustralia to provide any information and documents it considered the commission should have regard to in making its decision. EnergyAustralia made submissions for the commission's consideration.

23. In its submissions, EnergyAustralia confirmed that they were not disputing that the disconnection was wrongful, and that it was seeking a decision on the amount of compensation payable to Customer B.

24. EnergyAustralia was of the view that calculation of compensation should be limited to 28 August 2018, being the date that Customer B declined EnergyAustralia's attempt to arrange reconnection. EnergyAustralia relied on the commission's previous decision in the matter of Customer M and Alinta Energy to support its position.

25. EnergyAustralia also contended that it was unable to raise reconnection of the electricity supply without the customer's consent, because it was required to advise the customer that the main switch must be placed in the off position and that clear and unhindered access must be provided in order for the distributor to attend the site.

Decision

26. The commission has had regard to the submissions of the ombudsman, EnergyAustralia, and the customer's statement.

27. If EnergyAustralia wrongfully disconnected the supply of electricity to Customer B's premises (as it concedes to the ombudsman and also in its submissions to the commission), then it is in breach of a condition of its electricity retail licence, deemed under section 40B(1) of the Act.

28. EnergyAustralia disconnected the electricity supply to Customer B's premises at 10:07am on 1 August 2018.

29. Customer B notified EnergyAustralia of the disconnection of the supply of electricity to the premises in the live chat on 4 August 2018. This was within 14 days after the date of the disconnection. Therefore, the amount payable to Customer B is not subject to the cap specified in section 40B(1A) of the Act.

30. On 28 August 2018, EnergyAustralia tried to arrange reconnection and the ombudsman, on behalf of the customer, advised EnergyAustralia that the customer did not want to be reconnected.

31. As EnergyAustralia was willing and able to reconnect the customer on 28 August 2018, but for the customer's lack of consent to reconnect, the compensation amount is calculated to that date.

32. The supply of electricity to Customer B's premises was reconnected at 9:55am on 6 September 2018 via another retailer. Accordingly, EnergyAustralia is required to make a wrongful disconnection payment to Customer B.

33. The commission does not have evidence of the exact time on 28 August 2018 that any reconnection would have been effected. The commission accepts that in normal circumstances the request would have been a 'same day' reconnection and accordingly, has taken the approach that reconnection would have occurred at midnight on 28 August 2018. Therefore, the amount payable to Customer B by EnergyAustralia is calculated on the basis of reconnection having occurred at midnight on 28 August 2018 (the premises being disconnected for a total of 27 days, 13 hours and 53 minutes), being an amount of $13,789.

Reasons

34. As noted above, EnergyAustralia and the ombudsman have agreed that the disconnection of the electricity supply to the premises of Customer B was wrongful.

35. Accordingly, the commission has only addressed the question it has been asked. That being what amount of compensation EnergyAustralia should pay to Customer B.

Calculation of prescribed payment

36. Section 40B(1A) provides that if the relevant customer does not notify a retailer of the disconnection within 14 days after the disconnection, the maximum payment is the prescribed capped amount.

37. The term relevant customer is defined in section 40B(5) as having the same meaning as in section 36 of the Act. Section 36(6) provides that relevant customer means a person or class of persons to whom an order in council under section 36(3) applies. Under the relevant Order in Council, the term 'relevant customer' is defined in clause 4 as the person who purchases electricity principally for personal, household or domestic use.

38. Customer B contacted EnergyAustralia on 4 August 2018 via its live chat service. During this live chat he informed EnergyAustralia there was no electricity supply at the premises. There is no question that at the time that Customer B made the requisite notification he was the relevant customer. Therefore, having informed EnergyAustralia of the disconnection within 14 days, the prescribed capped amount under section 40B(1A) does not apply.

39. On 28 August 2018, EnergyAustralia tried to arrange reconnection and the ombudsman, on behalf of the customer, advised EnergyAustralia that the customer did not want to be reconnected.

40. As EnergyAustralia was willing and able to reconnect the customer on 28 August 2018, but for the customer's lack of consent to reconnect, the compensation amount is calculated to that date.

41. The commission therefore considers that the prescribed amount is calculated from the time of disconnection until the time the premises would have been reconnected on 28 August 2018 but for the customer's refusal of EnergyAustralia's offer to be reconnected.

42. In its referral to the commission, the ombudsman was of the view that EnergyAustralia may be required to pay compensation from the date of disconnection on 1 August 2018 to the date of reconnection on 6 September 2018, albeit with another retailer. The ombudsman relied on the

commission's previous decision in the matter of Customer W and Red Energy to support its position that EnergyAustralia may be required to pay compensation to the date of reconnection on 6 September 2018. The commission notes that in the matter of Customer W and Red Energy, Red Energy chose to advise Customer W that if she could not make payment she would need to find a new retailer. It was in response to advice from Red Energy that Customer W transferred to a new retailer which led to Red Energy losing its billing rights and ability to reconnect supply to Customer W's premises. In this matter, EnergyAustralia was willing and able to reconnect supply to the customer's premises on 28 August 2018 and reconnection would have been effected but for the customer declining that offer by EnergyAustralia.

43. In its submissions, EnergyAustralia relied on the commission's previous decision in the matter of Customer M and Alinta Energy to support its position that calculation of compensation should be limited to 28 August 2018, being the date that the customer declined its attempt to arrange reconnection.

44. Section 40B of the Act does not expressly set out the time for payment and the quantum of the prescribed amount in circumstances where the electricity supply to the premises is not reconnected because the customer refuses the retailer's offer of reconnection.

45. As the commission noted in Customer M and Alinta Energy, in circumstances where supply is not reconnected by that retailer as offered because the customer refuses reconnection, a purposive construction of section 48A of the Gas Industry Act 2001 may, in some circumstances, allow for identification of the time for payment and quantum of the prescribed amount, for example:

    (a) up to the point where reconnection would have occurred but for the customer's refusal, if that point in time can be ascertained with sufficient certainty,

    (b) or up to the point of the refusal by the customer, if a point in time for reconnection cannot be ascertained with sufficient certainty.

46. In this matter, the commission is able to apply a purposive construction of section 40B of the Act to this dispute to determine the time for payment and the quantum of the prescribed amount by reference to the point where reconnection would have occurred but for the customer's refusal on the basis that the point of time can be ascertained with sufficient certainty.

47. As in the matter of Customer M and Alinta Energy where there is no reconnection at all the obligation to make a payment does not crystalise.

Enforcement

48. On the basis of the information available, the commission considers that EnergyAustralia was in breach of a condition of its electricity retail licence under section 40B(1) of the Act and was required to make a payment of the prescribed amount of $13,789 to Customer B as soon as practicable after the reconnection of the electricity supply to Customer B's premises on 6 September 2018.

49. There is no information available to the commission to confirm that EnergyAustralia has made this payment. EnergyAustralia may therefore have breached a condition of its electricity retail licence by failing to make the payment to Customer B as soon as practicable after the reconnection.

50. EnergyAustralia should rectify the breach by making the payment and advise the commission in writing when the payment has been made.

51. If EnergyAustralia is unable to make payment, it should inform the commission in writing within five business days of receipt of this decision and reasons.

52. If the payment is not made within five business days of EnergyAustralia receiving this decision and reasons, the commission may take enforcement action against EnergyAustralia under Part 7 of the Essential Services Commission Act 2001 (Vic) in relation to a breach of section 40B(1) of the Act.

Other observations

53. In circumstances in which a customer requests reconnection of their energy supply and a retailer is unable to process that request on that occasion, a retailer should take active steps to contact the customer once the retailer is able to process that reconnection request. In this circumstance, EnergyAustralia could have contacted the customer on the following Monday (6 August 2018) to inquire whether the customer wished to reconnect their supply.