

Customer C and Simply Energy – Decision and Reasons

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

20 March 2019

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 C.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to a disconnection by the partnership between IPower Pty Limited and IPower 2 Pty Ltd (trading as Simply Energy) (Simply Energy) of Customer C's electricity supply at [Customer C's premises] (the premises). The electricity supply to the premises was disconnected from 10:09 am on 9 October 2017 to 6:36 pm on 12 October 2017, a period of 3 days, 8 hours and 27 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 electricity retail licence regarding an obligation to make a prescribed payment to Customer C in circumstances where:
 - (a) Customer C was a relevant customer to whom section 40B of the Act applied; and
 - (b) Simply Energy disconnected the supply of electricity to the premises of Customer C; and
 - (c) Simply 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(3) of the Act, Simply Energy was obliged to make the prescribed payment to Customer C as soon as practicable after the supply of electricity was reconnected to Customer C's premises.

The ombudsman's submissions

4. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman considered that it was not clear whether Customer C was a 'relevant customer' to whom section 40B of the Act applied.
5. The ombudsman noted Customer C had never consumed more than 40 megawatt hours (MWh) of electricity taken from the supply point in any calendar year, but had consumed more than 40 MWh of electricity taken from the supply point in a contract year between 14 October 2015 and 13 October 2016.
6. The ombudsman noted that Customer C's consumption had fallen below the 40 MWh threshold in the year prior to the disconnection, and accordingly that Customer C could be a relevant customer.
7. The ombudsman considered that if Customer C was a relevant customer, then Simply Energy was required to comply with the Energy Retail Code (the code) prior to arranging for the disconnection of the supply of electricity to the premises. The ombudsman considered that Simply Energy was prohibited from arranging for the disconnection of Customer C's premises under clause 116(1)(g) of the code, as the outstanding balance on the account was less than \$120 (exclusive of GST).

Simply Energy's submissions

8. Simply Energy was invited to provide any information and documents which it considered the commission should have regard to in making its decision. Simply Energy made submissions for the commission's consideration.

Relevant customer

9. Simply Energy submitted that section 40B of the Act did not apply to Customer C as Customer C was not a relevant customer, and therefore the wrongful disconnection compensation scheme did not apply to the disconnection of Customer C's premises.
10. In support of this argument Simply Energy submitted that in contracting with customers it considers the metered consumption, supply capacity, network tariff, expected usage and other information provided by the customer to determine the nature of the customer's usage. Simply Energy noted that the classification of a customer is fluid and can change when a customer requests a reclassification or renegotiates their contract.
11. Simply Energy noted that no such change in capacity had been requested by Customer C and accordingly 'there was no reason to believe that the property would remain at a rate of consumption below the threshold of 40 MWh per annum.'
12. Further, Simply Energy submitted that Customer C had a very large solar array and this served to mask the true usage at the premises. Simply Energy argued that this generation should be taken into account in considering whether a customer was above or below the threshold for the application of section 40B of the Act.

Reason for disconnection

13. Simply Energy asserted that it had disconnected the premises because another customer, Customer E, had called Simply Energy and informed it that Customer E was now occupying the premises and sought to novate the contract from Customer C.
14. Simply Energy stated it subsequently made several attempts to contact Customer E to arrange the novation of the contract but Customer E refused to engage with Simply Energy.
15. Simply Energy contended it disconnected the premises because there was unauthorised usage at the premises as it did not have a contract in place with Customer E.

Relevant facts

16. The commission analysed the ombudsman's request for a decision and sought additional submissions from Simply Energy. The relevant facts are set out below.

Circumstances leading to the disconnection

17. On 10 October 2014, Customer C and Simply Energy executed a contract for the supply of electricity to the premises.
18. Simply Energy contacted Customer C several times between 12 February 2015 and 28 June 2017 regarding late payment of bills. The account reconciliation shows late payment fees were applied to Customer C's bill by Simply Energy on seven occasions between 2 November 2016 and 3 October 2017.
19. On 29 June 2017, Simply Energy's contact notes record that it had received a call from '[Ms T] from Customer E, she advised [Simply Energy] that they have moved into the site [formerly] occupied by [Customer C] ... She would like [Simply Energy] to contact [Ms T] on [- --] for novation.'
20. On 5 September 2017, Simply Energy issued a bill to Customer C in the amount of \$5,149, due for payment on 19 September 2017.
21. On 6 September 2017, Simply Energy's contact notes record that Simply Energy had made attempts to contact Customer E, but the call taker had refused to talk to Simply Energy.

Disconnection of electricity supply to the premises

22. On 8 September 2017, Simply Energy's contact notes record an internal email exchange, stating that a disconnection service order had been raised for 13 September 2017, but was cancelled as the premises were flagged as having life support equipment present. A subsequent email specified that the life support requirement was selected for the previous customer. A final email specified that Simply Energy had made two attempts to contact Ms T, and that it had left a message informing her of the pending disconnection.
23. On 12 September 2017, Customer C made a payment of \$1,000 to Simply Energy.
24. Also on 12 September 2017, Simply Energy's contact notes record that the life support flag had been removed from the account and a disconnection service order had been raised for 18 September 2017.

25. On 15 September 2017, Simply Energy's contact notes record 'DNP Cancelled and RE-Raised as unauthorised usage directed by United after Credit advised us new tenant paid \$1,000, but isn't signing. Scheduled for Tue 19/09/17.'
26. On 26 September 2017, Customer C made a payment of \$5,149 to Simply Energy, leaving the account in credit to the amount of \$1,000.
27. On 4 October 2017, Simply Energy issued a bill in the amount of \$512.95, due for payment on 18 October 2017.
28. On 9 October 2017 at 10:09 am, the supply of electricity to the premises was disconnected.
29. Subsequently, on 9 October 2017, Simply Energy's contact notes record '[Ms T] called from [Customer C] regarding the DNP that was raised. She said the power is off and she was told Simply Energy requested it. Her number is [---]. I had a look at the notes and it looks like you have tried to sign them in the past.'
30. On 9 October 2017, Customer C raised a complaint about the disconnection with the ombudsman.
31. On 12 October 2017 at 6:36 pm, the electricity supply to Customer C's premises was reconnected following the complaint by Customer C to the ombudsman.
32. The supply of electricity to the premises was disconnected for a period of 3 days, 8 hours and 27 minutes.
33. As at 20 March 2019, Simply Energy has not made any wrongful disconnection payment to Customer C.

Electricity consumption at the premises

34. Simply Energy commenced supplying Customer C with electricity on 14 October 2014.
35. In its referral the ombudsman provided the following electricity consumption figures for Customer C.
36. Between 14 October 2014 and 13 October 2015, Customer C's aggregate consumption of electricity, taken from the supply point, was 34.287 MWh.
37. Between 14 October 2015 and 13 October 2016, Customer C's aggregate consumption of electricity, taken from the supply point, was 41.409 MWh.
38. Between 14 October 2016 and 13 October 2017, Customer C's aggregate consumption of electricity, taken from the supply point, was 12.753 MWh.

39. Customer C had never consumed more than 40 MWh of electricity taken from the supply point in any calendar year.

Relevant obligations

40. In this matter the relevant obligations arise from the following:

(a) The Act:

- (i) Section 40B(1) of the Act deems a condition into Simply Energy's electricity retail licence requiring Simply Energy to make a payment of the prescribed amount to a 'relevant customer' if Simply Energy 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 electricity supply to those premises may be disconnected.
- (ii) Section 40B(5) of the Act specifies that 'relevant customer' has the same meaning as under section 36 of the Act.
- (iii) Section 36(6) of the Act specifies that 'relevant customer' means a person, or a member of a class of persons, to whom an Order under section 36(3) of the Act applies.

(b) Order in Council under section 36(3) of the Act:

- (i) The most recent Order in Council under section 36(3) of the Act (Special Gazette, S315, 25 November 2008; which amended Special Gazette, S11, 11 January 2002) specifies that a person is a relevant customer if either: (a) the person purchases electricity principally for personal, household or domestic use at the supply point; or (b) the person's aggregate consumption of electricity taken from the supply point has not been, or in the case of a new supply point, is not likely to be, more than 40 megawatt hours in any year commencing on or after 1 January 1997.
- (ii) For the purposes of this Order in Council, supply point 'means, in relation to a supply of electricity to a person, the point at which that supply of electricity last leaves a supply facility owned or operated by a distribution company before being supplied to the person, whether or not the electricity passes through facilities owned or operated by any other person after leaving that point before being so supplied.' (Special Gazette, S11, 11 January 2002).

Decision

41. Simply Energy is not in breach of the condition which is deemed into its electricity retail licence by section 40B of the Act.
42. Customer C was not a relevant customer to whom section 40B of the Act applied, and therefore the disconnection was not wrongful.
43. Accordingly, Simply Energy is not obliged to make a wrongful disconnection payment to Customer C under section 40B of the Act.

Reasons

Customer C was the customer at the time of the disconnection

44. Simply Energy contended that it was intending to disconnect Customer E.
45. However, there is little evidence that Customer C was no longer the customer at the premises, beyond a single phone call on 29 June 2017 from Customer E seeking a novation of the contract that was never processed, as Customer E refused to engage with Simply Energy.
46. After the phone call in which Customer E sought the novation, Simply Energy continued to address bills to Customer C and these bills were being paid.
47. The complaint to the ombudsman was raised by Customer C, not Customer E.
48. Accordingly, the commission considers that Customer C continued to be the customer at the premises, and it was Customer C that was disconnected by Simply Energy on 9 October 2017.

Customer C was not a relevant customer

49. The Order in Council under section 36(3) of the Act (see paragraph 40(b) above), specifies that a person is a relevant customer for the purposes of section 40B of the Act if (a) the person purchases electricity principally for personal, household or domestic use at the supply point or (b) the person's aggregate consumption of electricity, taken from the supply point, has not exceeded 40 MWh in any year commencing on or after 1 January 1997.
50. In relation to the first limb of that test, Customer C is a business and did not purchase electricity principally for personal, household or domestic use at the supply point.
51. In relation to the second limb of the test, the commission considers that 'any year' means any continuous period of 12 months commencing at any time on or after 1 January 1997.
52. Customer C consumed more than 40 MWh of electricity, taken from the supply point, in many continuous periods of 12 months ending in 2016. For example, Customer C consumed 41.409 MWh of electricity, taken from the supply point, in the 12 month period between 14 October 2015 and 13 October 2016.
53. Having consumed more than 40 MWh of electricity taken from the supply point in any year commencing after 1 January 1997, Customer C was not a relevant customer at the time Simply Energy arranged for the disconnection of the supply of electricity to the premises.

Other observations

Photovoltaic system

54. Simply Energy contended that the large photovoltaic system installed by Customer C should be taken into account in determining whether Customer C was a relevant customer.
55. The Order in Council under section 36(3) of the Act is only concerned with electricity 'taken from the supply point'. Electricity generated by Customer C's photovoltaic system, and consumed at the premises, was not 'taken from the supply point'. Accordingly any electricity generated by that system cannot be taken into account in calculating Customer C's aggregate electricity consumption to determine whether Customer C is a relevant customer.