



Energy & Water
Ombudsman NSW

This is a determination of the Energy & Water Ombudsman NSW under Clause 6 of the Constitution of the Energy & Water Ombudsman NSW scheme.

Introduction

The determination relates to a claim to [the provider] from a customer for compensation for loss incurred for a business – Mr K.

By way of introduction I wish to note that during its six years of operation, EWON has dealt with a large number of complaints from customers in relation to claims for damage. Overall, this has proved to be a complex and difficult area.

There appears to be no certainty for electricity suppliers or customers in relation to responsibility/liability for damage caused by electricity incidents. Although NSW electricity providers generally incorporate into their customer contracts a position of no responsibility/liability for damage caused by electricity incidents, in practice they pay many claims by customers on an ex gratia, without prejudice basis.

Electricity providers have adopted different approaches to customer claims so that there is no consistency in response across NSW utilities.

It appears that insurance companies are increasingly excluding ‘electrical’ incidents from their coverage, and directing policy holders back to their electricity provider for redress.

As a result of these factors, the position regarding claims for customers is not clear.

It is worth noting that the Essential Services Commission of Victoria has issued a guideline about compensation of customers. This guideline has had the effect of significantly reducing the need for the Energy & Water Ombudsman (Victoria) to be involved in customer claims for compensation.

In my view there does not appear to be any sound reason for an inconsistent approach by electricity providers in NSW to customer claims for damage. We cannot see any competitive advantage to a different approach by companies, and it does not seem equitable for customers to be treated differently in relation to claims depending on the distribution area in which they live. We have called for discussion of these issues by relevant stakeholders, including electricity distributors, regulatory bodies, and consumer groups.

In the absence of any clear guidelines for customer claims in NSW, it has been left to my office to investigate claims which have been denied by distributors. My determination in individual matters does not create any precedent, but simply reflects an attempt to resolve each case in relation to its individual circumstances.

I believe that the development of standards for claims in NSW will benefit customers, their electricity providers, and the general community.

The Complaint

Mr K lodged a claim for compensation for losses following an interruption to the electricity supply to his company's food business on 13 February 2003.

Mr K advised that there was an interruption to the electricity supply to the business at approximately 3pm on 13 February 2004. Mr K contacted his supplier during the outage at 3.12pm, 3.57pm and 4.55pm to obtain information about the situation. He says he was initially "assured that power would be restored" and kept his casual staff at work on this basis. The casual staff for the evening also arrived for work as he had contacted them to confirm their attendance was required based on the initial advice he received from his supplier that power would be restored. When he spoke to his supplier at 4.55pm he was advised that power would be restored on a "rotational basis" and may go off and come back on during the evening. On the basis of this information he sent all staff home and closed the store.

Mr K noted the interruption occurred on a Thursday, which is usually a busy period for the business due to late night shopping and its location within a shopping centre.

Mr K subsequently lodged a claim with his supplier on 10 March 2003 for the amount of \$600. Mr K has advised EWON that he considers this a conservative claim to cover losses he incurred from food spoilage, staff wages and loss of trade. Mr K has provided EWON with information supporting the elements of his claim.

The company wrote to Mr K on 24 March 2003 and declined to pay the claim on the basis that while they endeavour to minimise interruptions they cannot guarantee an uninterrupted supply of electricity and in such circumstances it is not their policy to make offers of compensation. Mr K contacted EWON on 2 April 2003 asking for a review of his supplier's decision.

The Supplier's Response

The supplier does not dispute that the first interruption to supply was caused by the actions of their staff when they damaged 33kV cables supplying the Zone Substation. However the company stands by the denial of the claim on the basis of their *Standard Form Customer Connection Contract*.

In their Investigation Report to EWON dated 7 April 2003 the company advised that the cause of the first interruption was "a fault on two underground cables as a result of being damaged by a hole borer". In their subsequent Investigation Report to EWON

dated 18 June 2003, the company confirmed that the hole borer was operated by their staff.

During the course of EWON's investigation, the company have confirmed the following:

- There was a protection operation at 3.03pm on 13 February 2003, which tripped 33kV feeders from a 132kV Sub to Zone Substation.
- The cause of the interruption was damage to underground cables by a hole borer owned and operated by the company.
- The company staff were carrying out an "urgent pole replacement". At approximately 1.30pm on 13 February 2003 an employee observed that a pole had split and moved significantly resulting in the overhead conductor safety clearance being reduced to an unacceptable level. While the damaged pole had already been scheduled for replacement, the planned replacement was brought forward and implemented immediately.
- staff at the worksite although working under pressure to replace a failed pole, exercised caution through checking the area for visible signs of underground services and followed a long standing practice of hand digging to a depth of 900mm to determine the existence of underground services in an emergency. They were not aware of the existence of underground cables in the area.
- There were no cable plans on site.
- 18 131 customers in the [location] and surrounding suburbs were affected by the resulting interruption to supply.
- Supply was progressively restored to all customers over the next three hours.
- Due to the time required to repair the damaged cables, the company decided to make temporary alterations to the network configuration to ensure capacity to meet anticipated peak loads was available and an interruption was planned for the early hours of the morning to carry out configuration alterations.
- The further interruption to supply occurred at 1.44am on 14 February 2003 and supply was restored at 4.24am.

Investigation by EWON

In the course of our investigation of this matter we considered in detail the following:

Information provided by Mr K

Information provided by the supplier

A report by an independent electrical engineer.

Technical Advice

EWON obtained independent technical advice from a qualified and experienced electrical engineer on the events leading to the outage.

The conclusions of this report were:

It is the “*clear view*” of the expert electrical engineer that “*the precautions taken by [the company]a to check for the existence of not only underground cables but any other assets owned by other utilities [were] totally inadequate*” and the initial interruption to supply was a result of the company’s failure to take sufficient care in the circumstances.

The company should have checked their records regarding the presence of underground cables in the area before taking action to bore the hole for a new pole and their failure to do so amounts to a failure to take adequate care in the circumstances.

The company’s Network Standard *Working Near or Around Underground Cables* clearly sets out the risks involved in carrying out excavation without ensuring adequate checks have been carried out, while Network Standard *Specification for Pole Installation and Removal* requires that before hole sinking, checks be made beforehand of the underground construction plans of all utilities to identify where assets are located. The company’s “*long standing practice of field staff digging to a depth of 900mm to determine the existence of underground services in an emergency*”, is not an alternative to the fundamental precaution of checking utility records for the presence of assets.

The critical nature, high value, high repair time and high cost of repairing transmission and sub-transmission assets underlines the need for extreme care in monitoring any risks to these assets. The location of the damaged cables is approximately two hundred metres from the 132kV Substation. It seems a reasonable expectation that this would have led the company to give consideration to the possibility of critical infrastructure being present in such close proximity to the Substation.

The second interruption to supply was a direct consequence of the initial event and as such would also have been avoidable had adequate precautions been taken.

The interruptions to supply “*were not beyond the reasonable control of [the company]”*”.

Analysis of the Information

It appears that the supplier was able to take action that would have avoided the interruption that occurred, and moreover had a duty of care to its customers to ensure the appropriate precautionary steps were all followed. Indeed the independent expert has stated in his report that the company’s own response to his enquiries acknowledges that due regard was not given to the requirements of Network Standard

Working Near or Around Underground Cables to establish whether there were any critical assets installed underground in the area. The company also advised EWON that it has now taken action to ensure that the requirements of this standard are applied to all future unplanned (urgent and emergency) excavations.

EWON acknowledges there is an onus on customers, particularly business customers, to take steps to mitigate and minimise potential losses. Mr K has indicated that he accepts that his supplier cannot guarantee an uninterrupted supply of electricity and would accept the denial of his claim if this was based on the outage being caused by weather conditions or a third party. However he considers the company's denial of the claim unreasonable given the outage was caused by its own actions and that the information initially provided to him stating that supply would soon be restored meant that he contacted his casual staff requiring them to come in for the evening's trading, when he might otherwise have mitigated his losses to some extent by not having them come to work.

As indicated previously, the area of customer claims for compensation for damage in relation to electricity incidents is a difficult and complex one. Currently there is no clear policy position in New South Wales, and electricity providers have different approaches to claims for compensation by their customers.

Claims from domestic customers are difficult, but claims from business customers are even more challenging. Any determination in relation to a business claim should not be seen as setting policy in this area, as this is the responsibility of the electricity industry, regulators, and other relevant stakeholders. This determination is a decision in relation to the particular circumstances of Mr K's claim.

The key elements of this determination are:

the acknowledged event was not outside the reasonable control of the supplier

Mr K took reasonable steps to mitigate his loss by contacting his supplier on several occasions for information

Mr K relied on reasonable information from his supplier in making decisions about his business operation on the day in question

On the basis of information provided to EWON, Mr K's claim for \$600, which includes elements of food spoilage (eg seafood), staff wages and loss of profit, is a quite conservative assessment of losses he incurred as a result of the incident. (His Thursday evening takings for the weeks immediately before the incident – excluding New Year's Eve – averaged in excess of his claim).

While I acknowledge that the company's Standard Form Customer Supply Contract specifically excludes compensation for business loss, this determination primarily relates to the customer service issues raised in this case. There clearly can be no expectation that plans for restoring supply will not alter over the hours required to resolve a large-scale interruption such as the incident on 13 February 2003. Nevertheless, in his early contacts with his supplier, Mr K was clearly informed that supply would soon be restored and that he would be able to remain open for trade. Mr

K acted in good faith on information from his supplier, and this information led to further losses for Mr K terms of casual staff salaries. As a result I believe that it is appropriate that the distributor compensate Mr K for part of the loss he experienced.

Conclusion

The supplier does not dispute the circumstances surrounding the loss of supply to Mr K nor that he contacted the company for information about the restoration of supply and that this information proved not to be correct. In this case a key consideration is that the interruption to supply was caused by the actions of staff of the company, and as such was within the reasonable control of the supplier.

Under the provision of Clause 6 of the Constitution of the Energy & Water Ombudsman NSW I therefore determine that the company should pay the sum of \$600 to Mr K in acknowledgment of his losses and the customer service issues relating to this incident.

Under the EWON Constitution, this decision is binding on the company. Mr K may elect within twenty-one days whether or not to accept this decision. If Mr K accepts the decision, he will fully release his supplier from all claims, actions, etc in relation to this complaint. In the event that Mr K does not accept my decision, he may pursue his remedies in any other forum he may choose, and the company is then fully released from the decision.

Clare Petre
Energy & Water Ombudsman NSW
23 May 2005