



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 from a customer for compensation for loss incurred for a business – Mr D.

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 D operates a nightclub which is the official venue sponsor of a competition. -A major event was planned for the evening of 13 February 2003. Mr D has lodged a claim for compensation for business losses suffered as a result of the cancellation of this event.

At 3.03pm on 13 February 2003, two high voltage cables were damaged by a work crew replacing a power pole. The pole borer struck two of the three oil-filled cables that supply Zone Substation. The blackout affected customers in the [location] and surrounding suburbs. The total outage time was 3 hours 12 minutes.

The company carried out repairs to the network by means of a reconfiguration of the 33kV arrangement at [location], together with some load transfer switching to the adjacent Zone Substations. This involved a planned outage, which was originally to start at 10.30pm that evening, but due to some unforeseen complications with the reconfiguration, was eventually carried out from 1.44am - 4.24 am on the following morning, 14 February 2003.

An outage planned for the late evening to carry out repairs would not significantly affect a large number of businesses in this area, as most would have ceased trading for the day. The nature of Mr D's business, however, made it very important that he receive accurate information, a point he has informed EWON he made clear to the company in three calls he made to their information hotline during the afternoon and early evening of 13 February 2003.

Mr D contacted the call centre soon after the initial outage to enquire if this would affect his business plans for the evening. He was told that little was known at the time. He asked to be contacted as soon as information became available.

Mr D again contacted the call centre at approximately 6pm when he had not heard anything from his provider about the supply problems. When told that there would be a planned outage from 10.30pm and that he should not open for business, he asked to speak with a supervisor to alert them of his circumstances. The supervisor informed Mr D specifically that "If you open, you will be in the dark". Mr D informed EWON that he expressed his concerns about the effect this would have on his business and asked that his call be documented. Nevertheless, he provided his supplier with his contact numbers and also diverted all incoming business calls to his mobile phone so that he could be provided with any updated information that would allow him to open for business for all or part of the night. He has stated that he specifically requested

the company to contact him if there was any change to the schedule for the planned outage.

Immediately before 7.30pm he again contacted the call centre upon seeing an alert on his television that the supply would be interrupted at 10.30pm. He has informed EWON that he once more emphasised in this call the importance for him of being contacted with this information. As Mr D received no information that the supply would not be interrupted at 10.30pm he felt he had no choice but to cancel the event.

The company issued a News Release at 7.30 pm on 13 February 2003 advising that there was to be a planned outage from 10.30 pm that evening in order to carry out the repairs. The company issued a revised News Release at 8.00pm changing the timing of the outage to 1.00am the following morning. No personal contact was made to Mr D to advise him of this change. Although he normally trades until 3am, he would have been able to trade until 1am, and not lose the whole evening's business. As it turned out, the planned outage did not start until 1.44am the next morning, so he could have held the event after all.

Mr D lodged a claim with the company on 14 February 2003, seeking compensation for losses of \$12,800.00 associated with the cancellation of the event. He made the claim on the basis that he was disadvantaged by the specific advice he was given by the company, as well as the failure by the company to advise him of subsequent changes to the planned outage of supply which would have allowed him to conduct his business instead of cancelling the event. (The event could not be rescheduled as there was no alternative time to hold it due to the timeframe for the rest of the Competition.)

Mr D's losses included turnover, wages, advertising, sponsorship.

The company wrote to Mr D 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. In such circumstances, it is not the company's policy to make offers of compensation.

Mr D contacted EWON on 31 March 2003 asking for a review of the company's decision.

### **The supplier's response**

The company 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 clause 12.3 of their *Standard Form Customer Supply Contract*, November 2002, which excludes liability for loss or damage "*arising from anything beyond [their] reasonable control*".

The company also relies on their Claims Policy not to pay claims for business loss. This is reflected in clause 12.4 (a) of their *Standard Form Customer Supply Contract*, which provides that:

*[the company] is not liable for any indirect, economic, special or consequential losses or damages of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind)*

During the course of EWON's investigation, the company 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 company owned and operated hole borer.

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.

There were no cable plans on site and the staff involved were not aware of the existence of underground cables in the area.

staff at the worksite, although working under pressure to replace a failed pole, had exercised caution through checking the area for visible signs of underground services and following a long standing practice of hand digging to a depth of 900mm to determine the existence of underground services in an emergency.

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.

The company made efforts to keep the public advised of the timing of the second interruption, based on the best information available to them at the time.

At approximately 6.30pm, the Contact Centre began calling commercial customers in the [location] advising them of the current situation, and that repairs would impact on the continuity of supply. Part of the script provided to

Contact Centre staff gave this advice:

*For tonight only, you might prefer to cease trading. However should you continue, it would be beneficial to us if you could reduce your electricity consumption by turning off all non-essential appliances, lighting, and air conditioning systems.*

There is no record of a call logged against Mr D's account with respect to the event on 13 February 2003, but the company does not dispute the fact that he rang them.

The following News Releases were issued to local media outlets:

- (i) 7.30 pm on 13 February 2003 advising that there was to be a planned outage from 10.30 pm that evening.
- (ii) 8.00 pm on 13 February 2003, changing the timing of the outage to 1.00 am the following morning.

The company has informed EWON that after the second News Release the Contact Centre again tried to contact commercial customers to advise of the revised timing of the outage. The company has stated to EWON that:

*Every reasonable effort was made to keep major commercial customers informed of developments throughout the evening so that they could make an informed business decision about the operation of their businesses.*

Further,

*[the company] provided affected customers (particularly commercial customers) with as much information as possible about the incident and the restoration program. The information was updated on a regular basis so customers could make decisions based on accurate data.*

### **Investigation by EWON**

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

- information provided by Mr D
- information provided by the supplier
- a report by an independent electrical engineer.
- The company's *Standard Form Customer Supply Contract*, November 2002
- the provisions of the *National Electricity (NSW) Law*.

### **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] 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 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 company 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 taken. 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 0156 *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.

Given the information outlined above, EWON considers that in this instance it appears the company had responsibility for causation of the event. As there appears to have been reasonable foreseeability that assets may have been present at the site, it is appropriate that the distributor look favourably upon the claim brought by Mr D who experienced loss as a result of the incident.

As I understand it, the company consider that the planned interruption from 1.44am to 4.24am on 14 February 2003 was “unavoidable” and note that it was carried out to avoid prolonged, rotating interruptions across areas of the [location] while repairs were carried out. However, the technical advice obtained supports the position that the first event, which led to the second interruption to allow for major network repairs, was preventable and could have been avoided if due care was taken by the company to check their own records for the presence of underground cables in this part of the network prior to operating the hole borer.

Mr D relied on his supplier’s advice as to the timing of this planned interruption. The timing was subsequently changed, but Mr D was not notified. Mr D suffered direct financial loss as a consequence. Mr D was not notified of the change of timing despite having specifically identified his situation to his supplier on the afternoon and evening in question.

It is noted that clause 12.4 (a) of the company’s *Standard Form Customer Supply Contract*, November 2002 specifically excludes business loss:

*[the company] is not liable for any indirect, economic, special or consequential losses or damages of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind)*

As indicated previously, the area of customer claims for compensation 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 context of Mr D's claim and is made in recognition of the quite exceptional circumstances that combined to lead to his demonstrated losses.

The key elements of this determination are:

1. The acknowledged event was not outside the reasonable control of the company
2. Mr D took all reasonable steps to mitigate his loss by contacting his supplier on several occasions during the afternoon and evening of 13 February 2003 for information, and reiterating that if at all possible he would open for trade, even for a part of the evening. It is difficult to see what more Mr D might have done to mitigate his losses. He made it quite clear to his supplier that the nature of his business and of the planned event meant he needed up-to-date information as to the supply interruption and, dissatisfied with the level of information provided, asked during one call to speak with a supervisor. Mr D has stated that the supervisor informed him categorically that he should not open for business that evening ("If you open, you will be in the dark"). Mr D expressed his concerns regarding the effect this would have on his business and asked that his call be documented. Though the company have no record of this call or the calls made before or after it, EWON has been informed that there is no dispute that such a call was made:

*[the company has] reviewed the claimant's account records and can advise that there are no notes attached that relate to the supply event of 13/2/03. However, [the company] is not disputing the fact that a call was made by the claimant.*

3. Mr D relied on reasonable information from his supplier in making decisions about his business operation on the day in question. Mr D has informed EWON that he provided his supplier with various contact numbers during his calls and was at all times contactable during the afternoon and evening of 13 February 2003. Mr D has stated that he left his phone numbers with the company and, indeed, diverted both his office and the venue phones to his

mobile phone so that he could be contacted at any time should there be any opportunity for him to open for trade.

4. the company was well placed to provide information to Mr D that would have allowed him to trade for the evening. The failure to do so demonstrates a lack of appropriate customer service, as indicated by the following:
  - a. the company's News Release of 8.00pm noted that the planned outage would not occur until the following morning at 1.00 am (it did not in fact occur until 1.44 am) yet it appears no attempt was made to provide this information to Mr D though he appears to have called twice in the two hours before 8.00pm
  - b. the company was aware of the impact the closure would have had upon the staging of the event and of Mr D's reasonable and repeated requests to be provided with appropriate information (including asking to speak with a supervisor) but did not act on this information
  - c. It appears that Mr D had made all reasonable attempts to be contactable by his supplier by providing relevant phone numbers and diverting his office phones to his mobile number but received no call in response.

Given the information outlined above, EWON considers that in this instance it appears the company had responsibility for causation of the network event and reasonable foreknowledge that assets may have been present at the site.

I acknowledge that the company's Standard Form Customer Supply Contract specifically excludes compensation for business loss. However, this determination primarily relates to the customer service issues raised in this case.

The customer service that Mr D could reasonably have anticipated from his network service provider was lacking on 13 February 2003 and it appears that this was the direct cause of a significant loss which he sustained.

There clearly can be no expectation that the company or any other network provider will be able to contact every customer affected by an interruption to supply. In fact, distributors often rely on customers advising them of interruptions so that faults on the network can be identified and repaired. Once they are aware of problems on the network, distributors ensure that recorded information is available for customers about the areas impacted by the interruption. Where possible, they will try to indicate the likely length of the interruption for the information of customers, although where this is difficult, the message is likely to be general in nature, ie 'we are working to restore supply *as soon as possible*'.

There are some limited exceptions to this. For example, network operators maintain a register of customers on life support equipment so that they can ensure alternative supply if necessary in case of interruption of electricity supply.

I believe that Mr D also established himself as 'an exception' because he specifically identified himself to his supplier as having a particular need for information about the



electricity supply on the evening of 13 February 2003. Mr D initiated personal contact with his supplier during the afternoon and evening of 13 February 2003 and identified himself to his supplier as a large customer with a supply requirement for that particular day. He left contact details with the company so that he could be advised of any changes to the announced timetable for supply interruption and ensured, via phone diversion, that he would always have been available to receive such a call.

Staff of the supplier were responsible for the original loss of supply, and then did not provide information to Mr D that would have allowed him to trade before the subsequent planned outage (though they were well situated to do so). Mr D has suffered loss as the result of poor customer service by the company. As a result I believe that it is appropriate that the distributor compensate Mr D for the loss he experienced.

## **Conclusion**

The company does not dispute the circumstances surrounding the loss of supply to Mr D. They also do not dispute that Mr D initiated contact with them about a special event that was scheduled for the night in question. I believe that the failure in this case is one of customer service by the company to Mr D.

Under the provision of Clause 6 of the Constitution of the Energy & Water Ombudsman NSW scheme I therefore determine that the company should pay the sum of \$9,500.00 to Mr D as full settlement of his claim for a significant failure in customer service.

Under the EWON Constitution, this decision is binding on the company. Mr D may elect within twenty-one days whether or not to accept this decision. If Mr D accepts the decision, he will fully release the company from all claims, actions, etc in relation to this complaint. In the event that Mr D 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  
6 May 2005