



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 vaccines that were lost after an interruption to the electricity supply – Ms W.

By way of introduction I wish to note that during its seven 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

Ms W, Practice Manager, lodged a claim for compensation for the cost of vaccines that were lost after an interruption to the electricity supply to the Practice on the evening of 13 February 2003.

Ms W advised that there was a period of electricity supply loss during the afternoon on 13 February 2003 and then during the night, electricity supply was lost for a further extended period of time.

The vaccines were stored in a commercial-grade glass door refrigerator. The National Health and Medical Research Council Guidelines state that all vaccines must be stored between 2-8 degrees Celsius. Ms W indicated that due to the extended loss of power during the night the fridge temperature elevated to 15 degrees for an unknown period of time and as a result all of the vaccines had to be destroyed.

Ms W subsequently lodged a claim with her provider on 18 February 2003 for the amount of \$9074.31, being the wholesale value of the vaccines that were lost.

The provider wrote to Ms W on 24 March 2003 and declined to pay the claim on the basis that they endeavour to minimise interruptions but cannot guarantee an uninterrupted supply of electricity, and in such circumstances, it is not their policy to make offers of compensation. Ms W contacted EWON on 3 April 2003 requesting a review of the provider's decision.

The Provider's Response

It is not disputed by the provider that the first interruption to supply was caused by the actions of their staff when they damaged 33kV cables supplying the City 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 17 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 16 May 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.
- 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 Ms W
information provided by the provider
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] 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 is EWON's position that the provider 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 provider’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.

The loss suffered in this matter has resulted from the second interruption to supply. 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.

Given the information outlined above, EWON considers that in this instance it appears the provider had responsibility for causation of the events, and as there appears to have been reasonable foreseeability that assets may have been present at the site, it is appropriate that the distributor compensate Ms W who experienced loss as a result.

EWON acknowledges there is an onus on customers, particularly business customers, to take steps to mitigate and minimise potential losses by, for example, installing surge arrestors and taking out appropriate insurance cover. Business customers have a responsibility to mitigate any potential loss as far as practicable, particularly if any part of their business relies on uninterrupted electricity supply. The Practice carries vaccines which must be stored between 2-8 degrees Celsius as required by National Health and Medical Research Council Guidelines. The customer can choose to install protective devices such as a UPS (Uninterruptible Power Supply) or a small generator. Alternatively they can look to insurance cover to compensate them for any loss that might occur. Ms W has advised EWON that the Practice has insurance cover but she feels that “[the company] is responsible” for the loss.

I have taken all factors into consideration in determining a resolution of this matter.

Conclusion

The provider disagrees with the technical advice to EWON by our independent technical adviser. This disagreement is with the conclusion of our adviser rather than with his qualifications or expertise.

Given the available information, EWON is not in a position to comment further on the technical aspects of the claim. However, in a situation where there is credible technical information to support Ms W’s position, I believe it is reasonable for the benefit of any doubt to go to the customer. 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 company.

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 \$5,000 to Ms W as full settlement of her claim.

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

Clare Petre
Energy & Water Ombudsman NSW

8 June 2005