



SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: <http://www.bcuc.com>

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-45-08

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

Smart Energy (BC) Ltd.
Breach of the Code of Conduct for Gas Marketers

BEFORE: L.F. Kelsey, Commissioner March 19, 2008

O R D E R

WHEREAS:

- A. Smart Energy (BC) Ltd. ("Smart Energy") conducted a sales call to the Customer in Surrey on or about November 15, 2007; as a result of the call, the Customer signed a contract with Smart Energy for the supply of Natural Gas; and
- B. On January 17, 2008, the Customer logged a dispute through the Terasen Gas GEM system identified as Dispute No. 8895, and provided the Commission with an email dated January 17, 2008 as evidence in the dispute; and
- C. Smart Energy provided as evidence a copy of the Customer's contract with Smart Energy and a Third Party Verification ("TPV") recording; and
- D. The Commission subsequently cancelled the Customer's contract with Smart Energy citing statements by Smart Energy during the TPV call as the reason for cancellation; and
- E. The Commission wrote to Smart Energy initiating a written hearing into the conduct of the TPV as provided as evidence by Smart Energy, and the allegations of the Customer against Smart Energy; and
- F. At Smart Energy's request, the Commission provided further clarification as to its concerns in its letter dated February 1, 2008, specifically noting the Scope of the Code of Conduct for Gas Marketers ("Code of Conduct"), Articles 9 and 15 of the Code of Conduct, and Article 31 of the Code of Conduct; and
- G. In its response dated February 15, 2008, Smart Energy submits that the TPV individual in the instant case did not offend anything in Articles 9 or 15 of the Code of Conduct; and
- H. Smart Energy in its response dated February 15, 2008, noted that the TPV individual did not refer to the 10 day right of cancellation; and
- I. The Commission finds that Smart Energy has violated Articles 9, 15, and 31 of the Code of Conduct, and further, that Smart Energy is not in compliance with Commission Order No. G-73-07.

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-45-08

2

NOW THEREFORE pursuant to section 71.1 of the Utilities Commission Act and the Code of Conduct and Rules for Gas Marketers, the Commission orders that within 30 calendar days of the date of this Order, Smart Energy will pay to the Commission a financial penalty of \$3,000.00 for each of the three breaches of the Code of Conduct, for a total penalty pursuant to this Order of \$9,000.00 all as set out in the Reasons for Decision attached as Appendix A.

DATED at the City of Vancouver, in the Province of British Columbia, this 19th day of March 2008.

BY ORDER

Original signed by

L.F. Kelsey
Commissioner

Attachment

Smart Energy (BC) Ltd.
Breach of the Code of Conduct for Gas Marketers

REASONS FOR DECISION

1.0 BACKGROUND

Smart Energy (BC) Ltd. (“Smart Energy”) conducted a sales call to the Blair home in Surrey on or about November 15, 2007 and as a result of the call, Mrs. Blair, the (“Customer”), signed a contract with Smart Energy for the supply of natural gas. On January 17, 2008 the Customer lodged a dispute (No. 8895) through the Terasen GEM system and following the filing of Contract and Third Party Verification call (“TPV”) evidence by Smart Energy, and an emailed letter from the Customer, that dispute came before the Commission for resolution. The focus of the dispute was an allegation on the part of the Customer that the Smart Energy salesperson misrepresented herself as being from Terasen Gas and so the Customer was confused about the contract arrangements. The Commission reviewed the evidence presented in the dispute and ruled that the contract should be cancelled, stating:

“Third Party Verification call provides information in response to a customer question that the Commission considers could be misleading and confusing. The Commission determines the contract is to be cancelled and Terasen Gas will remain your service provider.”

The decision of the Commission was not based on the allegation of the Customer that there was misrepresentation during the sales call but rather on a Code of Conduct for Gas Marketers (“Code of Conduct”) issue that came to the attention of the Commission upon review of the TPV.

Following the decision on the dispute, and based upon a review of the transcript of the TPV call, the Commission wrote to Smart Energy about possible breaches of the Code of Conduct, and advised Smart Energy that the Commission had initiated a written hearing into the matter and requested that Smart Energy provide its written comments to the evidence under consideration. By letter dated February 1, 2008, in response to a request for clarification from counsel for Smart Energy, the Commission clarified its concerns as:

“During the Third Party Verification call (“TPV”) with Mrs. Blair, she asks ‘What if the price goes down?’ The content of the rather lengthy response from the TPV representative is of concern to the Commission, specifically as it relates to Articles 9 and 15 of the Code of Conduct for Gas Marketers (“Code”).

In addition, the Commission notes that the TPV call does not include confirmation of the customer’s cancellation rights under the 10 day cooling off period as required by Article 31 of the Code, and as specifically noted in Commission Order No. G-73-07, Appendix A.

The Code states under ‘**Scope**’ on page 1, that ‘The Code is to be applied in spirit as well as to the letter, bearing in mind the varying degrees of knowledge, experience, and discriminatory ability of Consumers.’”

The Commission also communicated its expectations of the conduct of the TPV caller in these circumstances relative to the Code of Conduct.

“Although the Code refers to ‘salesperson’ in Article 9 and 15, the Commission considers that the TPV representative, particularly when providing information or counsel to a customer, must also adhere to the Code.”

2.0 SMART ENERGY'S REPLY

In its reply dated February 15, 2008 ("Reply"), Smart Energy addresses two issues:

- The response to the enquiry about the possible drop in price ("Price Issue"); and
- The lack of confirmation of cancellation rights ("Cancellation Issue").

Smart Energy notes, on the first page of its Reply, that the TPV in question took place prior to November 27, 2007 when Smart Energy completely revamped its script and TPV recording procedures. It "now conducts random reviews of TPV live calls and recordings and conducts TPV seminars to ensure that TPV personnel are aware of, and comply with the script and the Code of Conduct."

With respect to the Price Issue, Smart Energy submits that there was "no violation of the Code by the TPV individual." Smart Energy quotes the question asked by the Customer "What if the price goes down are we going to stay at the same price?" and states that the response was "Yes, it is a fixed price." It is Smart Energy's view that what followed was "simply an opinion regarding market conditions and is actually posed as a query for the [Customer] to reflect on."

In offering its view on this matter Smart Energy states, "I disagree with your preliminary opinion that the TPV verifier has the same degree of care as the salesperson," arguing that Articles 9 and 15 of the Code of Conduct refer only to a "salesperson." Smart Energy comments "[i]t is noteworthy that at the time the TPV call was made, Mrs. Blair had already signed the agreement. As stated by the TPV individual, he was calling simply to 'verify' information."

Smart Energy concludes that the Customer's concern was properly answered.

With respect to the cancellation issue, Smart Energy acknowledges that the TPV individual did not refer to the 10 day right of cancellation, and "in not doing so the TPV individual breached Smart Energy's policies and did not follow the form of script provided to him." Smart Energy attributes the cause of the departure from script to a query on the part of the Customer. Smart Energy notes that the Customer states in correspondence that they were aware of the 10 day cancellation policy and as such, "any damage caused by the TPV's omission would be non-existent."

In its Reply, Smart Energy states that the Commission has already punished Smart Energy by cancelling this contract on the alleged basis that there was a misrepresentation that Terasen Gas was a party to the Contract and that the TPV recording clearly shows that this is not the case.

3.0 TPV TRANSCRIPT

The TPV transcript is attached as Exhibit A.

4.0 CODE OF CONDUCT: SCOPE, BASIC PRINCIPLES, DEFINITIONS AND ARTICLES 9, 15, 29 AND 31, AND COMMISSION ORDER NO. G-73-07.

The Scope states, in part:

"The Code is to be applied in spirit as well as to the letter, bearing in mind the varying degrees of knowledge, experience and discriminatory ability of Consumers".

The Basic Principles state, in part:

“Gas Marketers shall voluntarily assume responsibility towards the Consumer with respect to fair sales methods and product value, and shall make every reasonable effort to ensure Consumer satisfaction.”

Salesperson is defined in the Code of Conduct as:

“Salesperson means a person who is employed by or otherwise conducts Marketing on behalf of a licensed Gas Marketer, or makes representations to Consumers on behalf of a Gas Marketer for the purpose of effecting sales of Gas to Low-Volume Consumers.”

Article 9 states:

“Salespersons shall in good faith assist Consumers to evaluate the nature of the transactions. Marketing efforts shall be organized and carried out so as not to:

- create confusion in the mind of the Consumer;
- mislead the Consumer or misrepresent any aspect of the Offer or Consumer’s Agreements;
- abuse the trust of the Consumer;
- unduly pressure or harass the Consumer to enter into transactions; and
- exploit the lack of experience and knowledge of the Consumer.”

Article 15 states:

“A Salesperson shall not abuse the trust of individual Consumers or exploit their lack of experience or knowledge, nor play on ignorance or on fear, thereby exerting undue pressure on Consumers. All Offers must, therefore, be clear and honest.

A Salesperson shall not make any statement or take any measure which, directly or by implication, omission, ambiguity or exaggeration, is likely to mislead a Consumer with regard to the terms of the Offer, Consumer’s Agreements or any other matter.

A Salesperson shall, to the best of his or her knowledge and ability, give complete, accurate and clear answers to a Consumer’s questions concerning the Offer or any other matter.”

Article 29 states:

“The primary responsibility for the observance of this Code rests with the Gas Marketer. Failure to comply with, or breach of, the Code may result in fines or the suspension or revocation of the Gas Marketer’s license for a period to be determined by the Commission. A breach of this Code may occur in the course of inducing a person to enter into an Offer or Consumer’s Agreements, even in the absence of a contract.

Gas Marketers shall ensure that their salespersons adhere to the standards required of a Gas Marketer as set out in the Code of Conduct for Gas Marketers, and shall be accountable for the behaviour and performance of their salespersons.”

Article 31 states:

“Third Party Verification is the form of a digitally recorded telephone call either initiated as an outbound call from the Gas Marketer to the consumer or as an inbound call initially dialled by the sales agent to the Gas Marketer with the customer then interacting with the Gas Marketer. The scripting will cover the topics specified by the Commission for this purpose, and be available to the Commission for review and approval. The digital file will be available to the Commission 3 days after the initial recording and retained by the Gas Marketer for the term of the contract.”

Commission Order No. G-73-07 states, in part:

“4. A script containing the major topics which must be canvassed with the customer is listed below and it is up to the Gas Marketer to arrange the script.

- Confirmation of the consumer’s cancellation rights under the 10 day cooling off period.”

4.0 COMMISSION DETERMINATION

The Commission acknowledges that the TPV call took place prior to November 27, 2007, when Smart Energy completely revamped its script and TPV recording procedure. The timing of the TPV call does not, however, in any way lessen Smart Energy’s requirement to conform to the Code of Conduct, which was last updated by Commission Order No. G-73-07 dated June 27, 2007.

The Commission will first clarify the matter of Dispute 8895, raised by Smart Energy in its letter dated February 1, 2008. Smart Energy in its Reply states that “cancelling this contract on the alleged basis that there was a misrepresentation that Terasen Gas was a party to the Contract and that the TPV recording clearly shows that this is not the case.” Smart Energy will find, in a review of the Commission decision in Dispute 8895, the following:

“Third Party Verification call provides information in response to a customer question that the Commission considers could be misleading and confusing. The Commission determines the contract is to be cancelled and Terasen Gas will remain your service provider.”

The Code of Conduct states in the Scope section the expectation that Gas Marketers will apply the Code of Conduct “in spirit as well as to the letter” (“Spirit”). The Commission is of the view that where any ambiguity exists between the “letter” of the Code of Conduct and particular circumstances which arise, Gas Marketers will “voluntarily assume responsibility towards the Consumer with respect to fair sales methods,” as stated in Basic Principles and let the Spirit guide their actions. The Code of Conduct, which was developed with considerable input from Gas Marketers, does not contemplate every circumstance and therefore adherence to the Spirit and Basic Principles is, in the Commission’s view, essential.

Smart Energy makes reference to salesperson as it appears in Articles 9 and 15 and disagrees with the “preliminary opinion” of the Commission in this matter that “the TPV verifier has the same degree of care as the salesperson.” The Code of Conduct includes in its definition of salesperson: “or makes representations to Consumers on behalf of a Gas Marketer for the purpose of effecting sales” which is taken by the Commission to include any person who on behalf of the Gas Marketer interacts with the customer during a period when the outcome of the sale, including cancellation under the cancellation provisions could be effected. It seems reasonable to the Commission that if there is any doubt in the matter of interpretation, the Spirit provides the necessary direction.

In the situation at hand, the TPV call took place after the contract had been signed but before the end of the 10 day cancellation period, or “cooling off” period and the statements of the TPV verifier, in their entirety, could effect the outcome of the sale. The Commission is not persuaded by Smart Energy’s position on this matter and views Smart Energy’s position as a lack of a full understanding of the Code of Conduct at best, or at worst, a purposely narrow interpretation of the Code of Conduct.

With respect to the Price Issue, Smart Energy states the TPV verifier’s response to the Customer’s question “[w]hat if the price goes down are we going to stay at the same price?” was an appropriate answer and that what followed was “simply an opinion regarding market conditions and is actually posed as a query for the [Customer] to reflect on.” A thorough review of the transcript indicates a more lengthy statement than described by Smart Energy in its Reply.

The statement in its entirety is: “Yes it is a fixed rate but then the chance of that happening is, it is slim to none just because how the market is how the market is going right now, its ah and I mean what are the chance of it staying below \$8.96 for the next 5 years right, it’s one of those things where there’s that much demand for it and when there’s demand for it there is no need for the price to go down.”

The Commission is of the view that, as stated above, the TPV verifier must conform to the Code of Conduct requirements of a “salesperson” and the “opinion regarding market conditions” did not in good faith assist the Customer to evaluate the transaction, exploited the lack of experience and knowledge of the Customer, likely mislead the Customer and could well have created confusion in the mind of the Customer with respect to the concerns of the Customer.

The Commission determines that the statements of the TPV verifier as quoted above are not complete, accurate and clear and in the view of the Commission, are likely to create confusion in the mind of the customer and mislead the customer, and are not in compliance with the Code of Conduct, and therefore, Smart Energy is in violation of Articles 9 and 15 of the Code of Conduct.

With respect to the Cancellation Issue, the Commission notes Smart Energy’s acknowledgement that the TPV individual did not refer to the 10 day right of cancellation and the statement “in not doing so the TPV individual breached Smart’s policies and did not follow the form of script provided to him”. Smart Energy attributes the cause of the error on the part of the verifier to a question from the Customer and dismisses the matter by reference to the Customer’s later submission acknowledging the cancellation period and stating, “[a]s such any damage caused by the TPV’s omission would be non-existent.”

The Commission accepts Smart Energy’s acknowledgement that the TPV individual did not refer to the 10 day right of cancellation as required by Commission Order G-73-07 and determines that Smart Energy is in violation of Article 31 of the Code of Conduct.

5.0 RULES FOR GAS MARKETERS

Section 10.0 of the Rules for Gas Marketers states:

“If the Commission finds, after notice and opportunity for the Gas Marketer to be heard in an oral or written hearing, that a Gas Marketer has failed to comply with the Act, the Rules, the Code of Conduct for Gas Marketers or conditions in its Gas Marketer Licence, and in addition to any other remedies or actions that may be applied, the Commission may:

- a. Suspend or cancel the Gas Marketer Licence.

- b. Amend the terms and conditions of, or impose new terms and conditions on the Gas Marketer Licence until the deficiencies are resolved.
- c. Apply penalties pursuant to Section 106(4) and (5) of the Act not to exceed \$10,000 for each day for each day such violation continues.
- d. Order that a portion or all of the performance security (referred to in Rule 9.0) be paid out to consumers, public utilities or other persons that the Commission considers to have been harmed by an act or omission of the Gas Marketer including a breach of the Act, the Rules, the Code of Conduct for Gas Marketers, or conditions of the Gas Marketer Licence.”

The Commission has determined that Smart Energy is in violation of the Code of Conduct in three instances.

In reviewing this matter the Commission is concerned with Smart Energy’s apparent lack of acceptance of primary responsibility for the observance of this Code of Conduct as stated in Article 29. In the Price Issue, Smart Energy rejects the view of the Commission that the TPV verifier must comply with the Code of Conduct on the basis that Articles 9 and 15 refer only to salesperson. Smart Energy makes no reference to the definition in the Code of Conduct of “salesperson” and purposely makes its own narrow interpretation of the term, ignoring both the formal definition of the term and the Spirit of the Code of Conduct.

In the Cancellation Issue, Smart Energy acknowledges that the TPV individual did not refer to the 10 day right of cancellation, which is clearly a Code of Conduct violation but at no place in its Reply does Smart Energy acknowledge that it is not in compliance with the Code of Conduct.

Article 29 contemplates that a Gas Marketer would be aware of the Code of Conduct, manage its affairs proactively to be in compliance and when not in compliance, so advise the Commission. The intention of the Code of Conduct is, at least in part, to encourage self compliance monitoring by the Gas Marketer, a concept that Smart Energy has not, in these instances, demonstrated an understanding of, and a willingness to undertake.

The Commission notes that in 2007, the Commission found that Smart Energy was unable to comply with Commission Order No. G-73-07 which is a requirement under the Code of Conduct and by Order No. G-140-07 and prohibited Smart Energy from signing additional customers to sales contracts under the Residential Commodity Unbundling Program until Smart Energy demonstrated to the satisfaction of the Commission that it can provide digitally recorded TPV calls to comply with Order No. G-73-07.

Commission Order No. G-144-07 stated “The Commission reviewed the TPV script and found that it did not comply with Order No. G-73-07; and [o]n November 27, 2007 Smart Energy provided the Commission with a revised TPV script.” In that Order, the Commission permitted Smart Energy to sign customers to sales contracts under the Residential Commodity Unbundling Program provided that Smart Energy will apply the revised TPV script dated November 27, 2007.

The Commission also notes that by Commission Order No. G-136-07, Smart was found to be in violation of Articles 8 and 9 of the Code of Conduct and a penalty of \$1,000.00 for each of the six breaches of the Code of Conduct was applied. Smart Energy was also required to undertake a regime of training and monthly reporting to the Commission for the period November 2007 through March 2008.

In the face of these three previous incidents it is difficult for the Commission to understand why in the matters under review here, Smart Energy has not, in its business conduct, exhibited an understanding of the Code of Conduct and demonstrated its primary responsibility for the observance of the Code of Conduct.

In arriving at a penalty, the Commission takes into account the previous Orders of the Commission, Smart Energy's demonstrated lack of knowledge of, or narrow interpretation of the Code of Conduct and its willingness to acknowledge a shortcoming in the TPV call but failure to acknowledge non-compliance with the Code of Conduct; instead dismissing the matter by stating "any damage caused by the TPV's omission would be non-existent."

The Commission applies a penalty of \$3,000 against Smart Energy for each of the three violations of the Code of Conduct.

8895 Transcript of TPV Recording

Beverly Blair	Hello
TPV Agent	Hi, may I speak to Beverly please
Beverly Blair	Speaking
TPV Agent	Hi Beverly this is Goushe with customer service at Smart Energy BC, how are you doing today?
Beverly Blair	I'm fine thank you
TPV Agent	Wonderful. I'm just going to verify some really quick information with you here, ah did Ashley leave you a yellow copy of the agreement ma'am?
Beverly Blair	She's just getting it ready now
TPV Agent	Ok perfect, and she was polite and courteous to you right?
Beverly Blair	Yes
TPV Agent	Ok wonderful, and you are the account, oh you are the spouse of the account holder actually
Beverly Blair	That's correct
TPV Agent	Ok wonderful, so this agreement is with Smart Energy a supplier of natural gas for the price protection program and not Terasen Gas or a Government agent. Although no one can guarantee if or how much you can save, no matter how high the price of natural gas goes your rate will be frozen at a guaranteed \$8.96/GJ for the next five years and you'll continue to receive just one bill from Terasen Gas like you normally do and in a few days Terasen will be sending you a letter providing all the important information and will also confirm that you are now protected by the program and just make sure you file that letter along with your bills, OK
Beverly Blair	Ok, now what if the price goes down are we still going save/stay (TPV unclear) at that price
TPV Agent	Yes, it is a fixed rate but then the chance of that happening is, it's slim to none just because how the market is how the market is going right now, its ah and I mean what are the chance of it staying below \$8.96 for the next 5 years right, it's one of those things where there's that much demand for it and when there's demand there is no need for the price to go down (phone ringing in background)
Beverly Blair	Uhh hmm
TPV Agent	So I mean

	BACKGROUND NOISE/YELLING / PHONE RINGING
TPV Agent	it is a fixed rate
Beverly Blair	Ok, are you calling from your office or from your home
	PHONE RINGING IN BACKGROUND
TPV Agent	From my office
	PHONE RINGING IN BACKGROUND
Beverly Blair	From your office
TPV Agent	Yes
Beverly Blair	Oh cause I hear a child, are, is it your office at your home though
TPV Agent	Oh no, no, no it's the head office in Burnaby
Beverly Blair	Oh
TPV Agent	Yeah, a child?
Beverly Blair	Yeah I could hear a child saying open the door or something or get the door or something
TPV Agent	Oh no, no, no I think its one of our employees saying can you get the phone I think on the other side. (Unintelligible) the address is on the top left hand corner of the ah agreement
Beverly Blair	Ok
TPV Agent	Alright
Beverly Blair	You're in Burnaby, yeah ok
TPV Agent	Alright
Beverly Blair	OK, Thank you very much
TPV Agent	Thanks bye
Beverly Blair	Ok then, bye bye