

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER A-5-09**

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

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



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

and

**An Application by Universal Energy Corporation
for Reconsideration of Commission Order G-157-08**

BEFORE: A.W.K. Anderson, Panel Chair April 24, 2009
D.A. Cote, Commissioner

ORDER

WHEREAS:

- A. The British Columbia Utilities Commission, (the "Commission") by Order G-157-08 dated October 24, 2008, accepted the findings and recommendations of an Inquiry Report filed with the Commission October 22, 2008; and
- B. Pursuant to the terms of Order No. G-157-08 the Agreement between Universal Energy Corporation ("Universal") and Mrs. Kitchen was cancelled on the same basis as if the cancellation had occurred during the normal ten day cancellation period and the costs of the Commission in the amount of \$4,990.90 incurred for the services of the Inquiry Officer were to be recovered from Universal. The Order further provided that the issues raised in the Inquiry Report were to be reviewed by the parties at the next Annual Review of the Code of Conduct (the "Code") in order to seek resolution of any modifications of the Code that the Commission should consider; and
- C. By letter dated December 8, 2008, Universal filed with the Commission a request for reconsideration of Order No. G-157-08 pursuant to Section 99 of the Utilities Commission Act on the grounds that the Inquiry Officer made findings and recommendations in a manner that contravened the basic requirements of procedural fairness and that he exceeded the proper scope of his mandate; and
- D. The Commission by, Order G-201-08A dated December 22, 2008, granted the request for reconsideration of Order G-157-08, and by Order A-2-09, dated January 28, 2009, established a Written Public Hearing process together with a Regulatory Timetable; and
- E. The Commission has reviewed and considered the Inquiry Report and the submissions and responses of Universal and the Kitchens all as set forth in the Decision issued concurrently with this Order.

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NOW THEREFORE the Commission, for the reasons stated in the Decision, orders as follows:

1. Paragraph 1 of Order G-157-08, which accepts the findings and recommendations of the Inquiry Report, is varied and amended to accept only the findings made at pages 14 and 15 of the Inquiry Report relating to the timing for the expiry of the cancellation period and the recommendation to allow cancellation of the Agreement based on those findings.
2. Paragraph 2 of Order G-157-08, which cancels the Agreement between Universal and Mrs. Kitchen, is confirmed.
3. Paragraph 3 of Order G-157-08, which requires the parties at the next Annual Review of the Code of Conduct to review the issues raised in the Inquiry Report to seek resolutions on any modifications of the Code of Conduct that the Commission should consider, is rescinded.
4. Paragraph 4 of Order G-157-08, awarding of costs against Universal, is rescinded.

DATED at the City of Vancouver in the Province of British Columbia, this 24th day of April 2009.

BY ORDER

Original signed by:

D.A. Cote
Commissioner

Attachment

Universal Energy Corporation
Application for Reconsideration of the Commission's Decision and Order G-157-08
regarding the Bradley Kitchen and Jannicke Kitchen Dispute

REASONS FOR DECISION

1.0 INTRODUCTION

On December 8, 2008, Universal Energy Corporation ("Universal") filed a request for reconsideration ("Request") of British Columbia Utilities Commission (the "Commission") Order G-157-08, dated October 24, 2008 pursuant to section 99 of the Utilities Commission Act, R.S.B.C. 1996, c.473 (the "Act") (Exhibit B-2).

Order G-157-08 arose from a complaint to the Commission from Bradley and Jannicke Kitchen ("the Kitchens") filed with the Commission on August 28, 2008 with respect to the alleged conduct of one of Universal's sales agents in the course of entering into a natural gas sales Agreement with Mrs. Kitchen (the "Agreement"). By Order G-133-08, dated September 18, 2008, the Commission appointed an Inquiry Officer to conduct an Inquiry into the complaint, to contact the complainant and Universal and to provide a report to the Commission on or before October 17, 2008. The report of the Inquiry Officer is dated October 21, 2008 (the "Inquiry Report") was filed with the Commission on October 22, 2008 and forms Appendix A to Order G-157-08. The Inquiry Report includes recommendations of the Inquiry Officer. Order G-157-08 accepts the findings and recommendations made in the Inquiry Report.

Order G-157-08 provides as follows:

1. The findings and recommendations in the Inquiry Report are accepted and are attached as Appendix 1 to this Order.
2. The Agreement between Universal Energy and Mrs. Kitchen will be cancelled on the same basis as if cancellation had occurred during the normal ten day cancellation period.
3. At the next Annual Review of the Code of Conduct the issues raised in the Inquiry Report are to be reviewed by the parties to seek resolution on any modifications of the Code of Conduct that the Commission should consider.
4. The costs of the Commission of \$4,990.90 for the services of the Inquiry Officer are to be recovered from Universal Energy.

By Order G-201-08A dated December 22, 2008, the Commission allowed the request for reconsideration and by Order A-2-09 dated January 28, 2009, the Commission established a Written Hearing process for the reconsideration in accordance with the Regulatory Timetable attached as Appendix A to the latter Order.

Pursuant to the Regulatory Timetable, the Commission received a further submission from Universal dated February 6, 2009 (Exhibit B-3), a response from Brad Kitchen dated February 20, 2009 to the Universal submission, a letter from Universal dated February 20, 2009 enclosing a copy of a case from the reporting series used for that case in its materials (Exhibit B-4) and a reply from Universal dated February 28, 2009 to the Kitchen response.

Universal seeks the following relief:

- (a) that Order G-157-08 be set aside and the Agreement be reinstated; or
- (b) in the alternative, that paragraph 2 of the Order remain, but paragraphs 1 and 3 of the Order be varied and revoked to the extent that they accept those parts of the Inquiry Report that make findings that Universal's agent violated the Code of Conduct and that make general findings and recommendations about the practices of gas marketers and the Customer Choice Program.

The Request is based on two principal grounds:

- 1. The Inquiry Officer made findings and carried out the Inquiry in a manner that was in contravention of the basic requirements of procedural fairness; and
- 2. The proper scope of the inquiry mandate had been exceeded.

The Commission Panel considers the issues to be as follows:

- 1. Was the investigation undertaken by the Inquiry Office conducted in accordance with the requirements for procedural fairness?
- 2. Does the evidence support the cancellation of the Agreement between Universal and the Kitchens?
- 3. Was the proper scope of the Inquiry exceeded?

2.0 PROCEDURAL FAIRNESS AND SUFFICIENCY OF EVIDENCE

The Commission Panel finds, with respect to Issue 1, that a basic requirement for procedural fairness – to review and consider necessary evidence – was not fully met.

The Commission Panel bases its finding on the following:

First, while the Inquiry Report states: “[t]he positions . . . are clearly a case of he said versus she said, without clear factual evidence of what exactly happened during the sales call . . .” (Exhibit B-2, Tab A, p. 11) the Inquiry Officer did not interview Universal’s sales agent and accordingly did not consider any evidence he might have provided in response to the matters raised by the Kitchens in the complaint. In an e-mail message to one of Universal’s officials the Inquiry Officer stated: “[a]t this point I think I am complete in my investigation . . . [l]et me know if [the Universal agent] becomes available to talk to but I don’t think it is critical if he can’t be reached.” (Exhibit B-2, Tab B, p. 1) However, the Inquiry Report states that without the opportunity to meet face to face with Universal’s agent and gauge his response to questions, Universal’s denial carries somewhat less weight than a direct response. (Exhibit B-2, Tab A, Appendix 1, p. 11)

Second, the ‘he said, she said’ nature of the evidence concerning this issue leads the Commission Panel to conclude that Universal should have been provided with notice that failure to produce its sales agent to state his version of events, particularly in view of the Inquiry Officer’s statement that he did not think that it was critical if the agent could not be reached, might result in a finding adverse to Universal. In the absence of interviewing the sales agent, the Inquiry Officer could not completely and fairly assess the relative credibility and weigh the evidence of the two parties directly involved in the signing of the Agreement.

The matters of the sufficiency, reliability or weight to be placed on any of the evidence with respect to this issue becomes moot in light of the above finding concerning procedural fairness. However, if the Commission Panel is wrong with respect to whether the evidence issue is moot, a review of the Inquiry Report, the submissions of Mr. Kitchen and Universal, and the transcript of the Third Party Verification (“TPV”) call between Mrs. Kitchen and the Universal representative (Exhibit B-2, Tab L) leads the Commission Panel to conclude that, while the agent may have been aggressive, there was insufficient evidence to persuade the Commission Panel that the Code of Conduct was violated, particularly in light of the absence of any direct evidence from the sales agent.

Accordingly, the Commission Panel concludes that paragraph 1 of Order G-157-08 should be varied and amended to accept only the findings made at pages 14 and 15 of the Inquiry Report relating to the timing for the expiry of the cancellation period and the recommendation to allow cancellation based on those findings.

3.0 CANCELLATION OF THE AGREEMENT

The evidence of the sales agent is not required for the determination of Issue 2, which the Panel considers relates to the timing for the expiry of the cancellation period. The issue of whether the Agreement should be cancelled centres around when the Kitchens were entitled to cancel the Agreement. The Code allows the Kitchens to cancel the Agreement if notice is given to Universal within ten (10) calendar days from the date the enrolment is received by the utility from the gas marketer.

In this case, the timing of events was influenced by some unusual circumstances:

- The transcript of the “TPV” telephone call between Mrs. Kitchen and the Universal representative, indicates Mrs. Kitchen asking “. . .when is that [start of the 10 day cancellation period] day?”, with the representative responding ‘[w]hen you receive the [confirmation] letter from Terasen, from that day onwards, you have 10 days.’ (Exhibit B-2, Tab L, p. 2);
- The date stamp on the enrolment notice from the utility was July 28, 2008 (Exhibit B-2, Tab A, p. 14);
- A rockslide occurred on the Sea to Sky highway July 29, 2008, interrupting transportation to communities north of the slide, including the Kitchen’s home (Exhibit B-2, Tab A, p. 14); and
- Mrs. Kitchen left Canada July 31, 2008, returning with Mr. Kitchen August 21, 2008 at which time the confirmation letter was physically received by the Kitchen’s. (Exhibit B-2, Tab A, p. 14) Mr. Kitchen requested cancellation of the Agreement August 22, 2008. (Exhibit B-2, Tab A, p. 6)

The Commission Panel finds that the transcript of the TPV call, cited above, provides sufficient evidence to establish that Universal extended the cancellation period provisions of the Code by stating that the 10 day cancellation period began when the confirmation letter was received by the Kitchens. The Commission Panel also finds that, (1) based on the July 28 date stamp, the July 29 rockslide and Mrs. Kitchen's July 31 departure, it is more likely that the letter was not received by the Kitchens prior to Mrs. Kitchen’s departure, and (2) the Kitchens could reasonably expect that the 10 day cancellation period began upon their physical receipt of the letter, based on the statement of Universal’s TPV representative. The Commission Panel acknowledges that, while that evidence has not been fully tested by cross-examination, the absence of the Kitchens from Canada

during the period in question is a factor the Commission Panel is prepared to accept in the circumstances of this reconsideration.

The Commission Panel therefore concurs with the conclusion in the Inquiry Report and Order G-157-08 and finds that Universal effectively waived the time limitation contained in the Code and extended that limit to August 31, 2008, 10 days after it was physically received by the Kitchens.

Based on the foregoing, the Commission Panel will not vary paragraph 2 of Order G-157-08.

4.0 SCOPE OF THE INQUIRY

Order G-133-08 authorises “. . . an Inquiry into the complaint made by Mr. Brad Kitchen with respect to Universal Energy Corporation.”, and no more. Accordingly, any commentary and recommendations which deal with issues beyond the evidence pertaining specifically to the Kitchen complaint are beyond the powers of the Inquiry, and should be excluded from the Report.

The Commission Panel finds that in making his recommendations, the Inquiry Officer exceeded the mandate authorised by Commission Order G-133-08. Therefore, the Commission Panel rescinds paragraph 3 of Order G-157-08.

5.0 COSTS

The Commission Panel received no submissions from Universal on paragraph 4 of Order G-157-08 relating to costs if Order G-157-08 was not set aside in its entirety and the Agreement reinstated. The Commission Panel finds that the results of this reconsideration grant Universal substantially the relief sought and accordingly paragraph 4 of Order G-157-08 awarding of costs against Universal is rescinded.