

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

AMCOR FLEXIBLES, INC.,

Complainant,

V.

COMMONWEALTH EDISON COMPANY,

Respondent.

Docket No. 11-0033

Complaint pursuant to Sections 9-250 and  
10-108 of the Illinois Public Utilities Act  
(220 ILCS 5/9-250 and 220 ILCS 511 0-1 08)  
and Section 200.170 of the Rules of Practice  
(83 Ill. Adm. Code 200.170)

ILLINOIS COMMERCE  
COMMISSION  
2012 MAY 11 A 10:09  
CHIEF CLERK'S OFFICE

**The Respondent's Motion to Strike Portions of Amcor's Pleadings and  
Legal Argument on Its Motion in *Limine*.**

Respondent Commonwealth Edison Company ("ComEd") comes before the Illinois Commerce Commission ("Commission") and respectfully moves to Strike Portions of Amcor's Reply Pleadings and also certain of the Legal Authority on which Amcor relies. With respect to the first count of the Motion to Strike, ComEd is attaching hereto the Amended Affidavit of Thomas R. Rumsey as Exhibit A. The reasons for the instant Motion are set out here below.

**1. Introduction**

Amcor's Motion in *Limine* seeks to bar ComEd from "presenting evidence or arguing that the Replaced Meter under-billed or under-reported Amcor's electricity usage,[and] that ComEd programmed the wrong scaling factor into the replaced meter." (Reply in support of Amcor's Motion at 8). As such, it would have ComEd be precluded from introducing the evidence on which basis ComEd back-billed Amcor. This effectively amounts to a default judgment in favor of Amcor.

The case law authority on which Amcor bases its Motion in *Limine* explains that:

An order of dismissal with prejudice or a sanction which results in a default judgment is a drastic sanction to be invoked *only* in those cases where the

party's actions "show a deliberate, contumacious or unwarranted disregard of the court's authority." *Shimanovsky v. General Motors Corp.*, 692 N.E. 2d 286, 291 (1998) Emphasis added.

In reliance on the *Shimanovsky* opinion for its requested relief, and as *Adams v. Bath and Body Works*, 830 N.E. 2d 645 (1st Dist. 2005) makes abundantly clear, the record must show, among other things, a bad faith discarding of the meter at issue. Amcor has attempted to do so in this proceeding but only on the basis of improper and prejudicial arguments and not on fact.

The line of "products liability" cases on which Amcor relies are inappropriate to the matter at hand, and ComEd is mightily concerned with the unfounded assertions of bad faith Amcor has levied against it. These assertions are baseless and without relevant factual support, with Amcor relying on unsustainable inferences of its own making. See Amcor Reply at 3-5. A party's good faith is always an important factor to be considered in any dispute and ComEd is entitled to defend itself against unwarranted charges in this respect. It is largely for this reason that ComEd moved the Commission for an evidentiary hearing on the Motion in *Limine*. See Respondent's Motion to Set an Evidentiary Hearing on the Motion in *Limine* (April 16, 2012). It is also the reason that ComEd brings this Motion to Strike on grounds of improper argument and attaches hereto the Amended Affidavit of Thomas R. Rumsey.

## **2. Identifying Improper Argument on Motion to Strike (Count I)**

ComEd's Motion to Strike is directed, in the first instance, to arguments in Amcor's Reply in Support of its Motion in *Limine* (filed on March 9, 2012) and, specifically, to the entirety of pages 3 and 4 and through the paragraph that concludes at the top of page 5. These arguments must be stricken. In addition, the conclusory statement at page 6 of the Reply, i.e., "there is unrebutted evidence that ComEd disposed of the meter because it did not want the meter available when formal proceedings began," must be stricken. The Affidavit of Mr. Rumsey provided in ComEd's Response reasonably precluded such argument.

## **3. Argument in Support of Motion to Strike Portions of Reply Pleadings**

### **(a) There is no good faith basis for Amcor's arguments**

This Commission must strike the arguments in Amcor's Reply which charge that ComEd acted purposefully in discarding the evidence, i.e., meter. (Reply at 3). Such a claim is wrong and Amcor knows it is wrong to make such spurious and inflammatory accusations without a factual basis. Yet, and in the face of Mr. Rumsey's Affidavit, Amcor still did so. Based on improper arguments in its Reply, Amcor would have the Commission incorrectly conclude that "someone told Rumsey to discard the meter on October 25, 2011," i.e., the day after the informal complaint was closed. (Reply at 3-5).

Amcor derives this conclusion in part from the coincidence that the meter was disposed of one day after the informal complaint was closed and on other inferences based on non-telling facts. Most egregiously, it makes these arguments in utter disregard of Mr. Rumsey's explanation for the discard of the meter.

In its Reply, Amcor flatly concludes that ComEd "did not provide any evidence" to dispute that it threw the meter away with knowledge of impending litigation. (Reply at 3). ComEd's Response, however, had attached thereto the Affidavit of Thomas R. Rumsey which clearly and simply stated why he discarded the meter. He states in paragraphs 6 and 7, that:

- "6) [I]t has been our practice of holding complaint tested meters for the period of 1 year since I joined the Dept. in July of 1985.
- 7) At the time Meter No. 140384879 was tested, there was room for approximately 400 complaint tested meters on the shelving unit. Based on available shelf space, meters are discarded after they are checked to make sure they have been held for a least 1 year.

While ComEd believed that Mr. Rumsey's Affidavit honestly and openly answers the essential question as to why the meter was discarded, it was obvious that Amcor thought otherwise and saw fit to make mockery of this Affidavit. For this reason, ComEd pointed out, it was critical that an evidentiary hearing be held on the Motion in *Limine*. In other words, ComEd's request for an evidentiary hearing on the Motion in *Limine* (Response at 6) was made absolutely necessary by virtue of Amcor's Reply in Support of its Motion. In the alternative, and in the interests of judicial economy, ComEd observed that the Commission might want to conduct the hearing on the Motion together with the evidentiary hearing on the complaint. ComEd's motion was denied without comment. An oral argument on the Motion in *Limine*, however, was heard on May 2, 2012.

**(b) ComEd's Oral Argument Shows the Impropriety of Amcor's Assertions.**

Amcor's Reply was the last in the order of pleadings on the Motion in *Limine*. Thus, ComEd had no opportunity to reply in writing. Further, it was denied a hearing on the Motion. Thus, in the course of oral argument, ComEd challenged Amcor's "bad faith" argument. At the outset, ComEd noted Amcor relied on a set of inferences, not facts of record, to support its contentions of "bad faith." At oral argument, ComEd explained that:

An "inference" is a rule of logic applied to evidence at a trial in which a fact is drawn by presenting other facts which lead to only "one" reasonable conclusion. An inference is not reasonable, however, if it is only a guess or a possibility.

In argument, ComEd went on to demonstrate why Amcor's assertions, and the ultimate conclusion or inference it draws and would have the Commission draw, are unreasonable.

1. Amcor states, as fact, that "ComEd knew that litigation was imminent." That is an "inference or proposition" that Amcor draws itself. As argued above,<sup>1</sup> however, there are substantial facts to rebut that inference. (e.g., no request for hold and no Referee testing application as would suggest the meter diagnostic being in issue, etc.). Moreover, even the proposition Amcor states is wrong - the pertinent question is not whether ComEd knew litigation was imminent, but (given what Amcor itself said about the settlement negotiations), whether ComEd knew the meter diagnostic would be litigated.
2. Amcor states, as alleged relevant fact, that ComEd made no attempt to collect the unpaid balance of the electricity charges "after the informal complaint was closed," and from this non-event draws the "inference or conclusion" that "ComEd knew of further litigation." (The problem here is that ComEd's not taking action to collect might be attributable to many things - some as simple as being overlooked if indeed Amcor was making payments on its account). Thus, this assertion rests on an unproven fact. Again, litigation is not the right question to begin with.
3. Amcor suggests that the fact that ComEd tested the meter demonstrates that the meter was critical to the pending dispute. The inference that Amcor tries to derive from the testing is absurd. ComEd tested the meter as it is required to do under Commission rules, and a record, also required under the rules, was generated. It happens that these records that are now critical to the dispute.

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<sup>1</sup> ComEd asserted that the appropriate question here is: Did ComEd have a reasonable basis to anticipate litigation Involving the Meter Diagnostic that required a hold on the meter in the absence of a request? In looking to the relevant facts & circumstances set out in the Stipulation, the answer is No. Those facts and circumstances being that:

- In correspondence - no mention by Amcor of challenging the meter diagnostic result.
- Lack of application by Amcor for Referee testing as provided for under Rule 410.
- No request by Amcor for a meter hold. See Laura Braxton v. Peoples Gas, Docket 06-0023 (where the Commission well understood that the Gas Utility-Respondent cannot contact each and every customer who receives a high estimated bill and ask if they want to establish a payment plan. (Order at 11). By the same token, ComEd cannot be put to the burden of questioning each complainant to see if they want a Referee test of a meter. Pursuit of such an option lies, in a timely fashion, with the customer.
- No application for referee testing in preparation for the "informal hearing." Yet, this itself is a meaningful process that a reasonable complainant would diligently prepare for.
- The complaint itself, some 13 pages and filed on January 11, 2011 (or some 15 months after the meter read), does not challenge meter diagnostic read results.

4. Amcor suggests as alleged fact that ComEd's lawyers were aware of the dispute. This argument fails as well, because Amcor does not specify the actual nature of the dispute. See again Amcor's allegations about the settlement discussions at page 7 of Amcor's Reply. Accordingly, no inference can legitimately be drawn concerning the need to preserve the meter for Referee testing. Moreover, Amcor's lawyers were better aware of the specifics of the dispute and should have advised Referee testing at the outset if they were putting the meter read diagnostics into issue.
5. Amcor notes the fact that ComEd disposed of the meter the day after the Commission closed its Informal Complaint proceeding. From this fact, Amcor wants to derive something more sinister than mere coincidence. It has not, however, presented any authority about the frequency or scarcity of coincidences.

ComEd argued that it was only on the totality of these "improper inferences - and not facts" that Amcor asserted, and to the Respondent's grave prejudice, that: "Someone at ComEd specifically directed that the meter be discarded."

This conclusion, ComEd argued, does not follow from the facts. Further, Amcor wrongfully claimed that "ComEd did not provide any 'evidence' to dispute that it threw the meter away because it was aware of impending litigation." (Reply at 3). Instead, Amcor asserts that ComEd submitted the somehow non-responsive yet "artfully worded affidavit" of Thomas R. Rumsey, in which he states that:

- (a) it has been ComEd's practice to hold meters for one year, and,
- (b) ComEd generally discards meters after holding them for one year because of an alleged lack of shelf space. *See Affidavit, paragraphs 6-7.*

ComEd noted that, according to Amcor, "What the affidavit does not say, *is that Mr. Rumsey discarded this meter pursuant to ComEd's normal practices; the affidavit also does not dispute that someone told Rumsey to discard the meter on October 25, 2011, the day after the commission dismissed the Informal Complaint; finally, the affidavit does not provide any explanation for the otherwise miraculous coincidence that Rumsey discarded the meter on October 25, 2011.*" (Amcor Reply at 3-4, March 9, 2012).

Amcor continues in its Response to say that:

*Obviously, Rumsey does not state these facts in his affidavit because he cannot--because such statements would not have been true. The meter was obviously discarded because someone at ComEd ordered it thrown away after closure of the Informal complaint but before Amcor could file a formal complaint. Id. at 3-4.*

ComEd had good reason to defend against these spurious allegations and improper conclusions in Amcor's Reply (notably, the last pleading on the Motion in *Limine*). As such, ComEd pointed out, it prepared an important pleading, i.e., Respondent's Motion to Set an Evidentiary Hearing on the Motion in *Limine* or, in the Alternative, to Take the Motion with the Case. But, on April 27, 2012, and as it was preparing a reply, ComEd's Motion was denied.

Because ComEd was denied the right to present testimony at a hearing that would rebut the conclusory accusations made by Amcor, it is submitting the Amended Affidavit of Thomas Rumsey with this Motion to Strike, i.e., Exhibit A. Both the oral arguments that ComEd presented and this Amended Affidavit show Amcor to have treated the issue of bad faith improperly. The purpose of this Amended Affidavit is to respond in the particulars on which Amcor has challenged the earlier Affidavit of Mr. Rumsey and on which it has fabricated improper arguments and conclusions in both its Reply pleading and on oral argument. Whereas ComEd maintains that the earlier Affidavit fully answers the question as to why the meter in question was discarded, it intends to leave no doubt in the Commission's mind as to the circumstances surrounding the discard of the meter in question. This Amended Affidavit, as a matter of due process, must be made part of the record.

#### **Conclusion (Count I of Motion to Strike)**

In conclusion and as set out above, both ComEd's Motion for an Evidentiary Hearing and the oral arguments that ComEd presented on May 2, 2012, warrant the striking of Amcor's Reply Pleading on the Motion in *Limine* in those identified parts where, without factual support and against Mr. Rumsey's initial Affidavit, Amcor improperly draws a conclusion of bad faith on the part of ComEd. Respondent respectfully asks the Commission for just this relief.

#### **4. Motion to Strike Legal Authority (Count II)**

In addition to *Shimanovsky*, Amcor relies on a number of different case law authority to support its Motion in *Limine*. There is, however, serious question as to the relevance of this other authority to Amcor's purposes. Further, the Commission will encounter difficulty and confusion in its decision-making (which it should not attempt without a hearing) unless it is provided with the correct law on the Motion in *Limine* brought by Amcor.

ComEd directs attention to the opinion in *Adams v. Bath and Body Works*, 830 N.E. 2d 645 (1st Dist. 2005). This opinion establishes that the two remedies established by case law, i.e., a claim for negligent spoliation of evidence in *Boyd v. Travelers Insurance Co.*, 652 N.E.2d 267, and dismissal as a sanction under Rule 219(c) in *Shimanovsky*, are separate and distinct. *Adams* makes clear that the latter requires conduct that is "deliberate [or] contumacious or [evidences an] unwarranted disregard of the court's

authority” and should be employed “only as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” *Id.* at 652. But, the Adams opinion goes further. It rejects any reliance on *Boyd* or its progeny as support in the Rule 219(c) sanction case before it.

Moreover, in *Adams*, the Appellate court rejected the defendants’ reliance upon those cases which have found “that negligent or inadvertent destruction or alteration of evidence may result in a harsh sanction, including dismissal, when a party is disadvantaged by the loss.” *Id.* Among this list of cases that the Adams court rejected are:

*Graves v. Daley*, 526 N.E.2d 679 (1988); and,  
*Kambylis v. Ford Motor Company*, 788 N.E.2d 1 (2003)

Amcor relies on both these opinions. Under the analysis and authority of *Adams*, the Commission would likewise be put to rejecting Amcor’s arguments in pleadings and on oral argument that reference or are supported by these opinions. For its part, ComEd moves to strike the following:

In Amcor’s Motion in *Limine*:

The *Graves* opinion is cited and relied on in argument at pages 5, 7, 8, 9, 10.  
The *Kambylis* opinion is cited and argued at page 5, 8, 11.

In addition, ComEd seeks to strike portions of the oral argument presented by Amcor on May 2, 2012 that rely on these opinions. The arguments are identified as appearing on pages 13, 37, 77, 78 (relying on *Kambylis* or “Camulas in phonetic”) of the transcript of proceedings.

**Conclusion (Count II of Motion to Strike)**

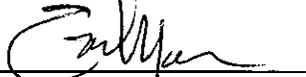
ComEd observes that *American Family v. Village of Pontiac*, 585 N.E.2d 1115, another opinion that Amcor relies on, is also questionable. This is so because that opinion itself follows *Graves*. *Id.* at 117,118. It is only right that Amcor be put to the burden of showing through analysis that each and every opinion it has relied on is in accord with the pronouncements of *Adams*. ComEd will itself study these opinions and determine if another motion to strike is appropriate. For the moment, however, ComEd requests that it be granted its Motion to Strike in the premises detailed above.

**5. Final Conclusion**

For all the reasons set out above, and for reason of the Amended Affidavit of Thomas Rumsey attached hereto, Respondent prays the Commission to strike the improper arguments set out by Amcor in its Reply in Support of Its Motion in *Limine*. Further, and as importantly, Respondent asks the Commission to strike all references and arguments

in both Amcor's pleadings and in oral argument that pertain to the opinions that *Adams* determined to be no good authority.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eve Moran", written over a horizontal line.

Eve Moran

128 S. Halsted Street

Chicago, IL 60601

(312)720-5803

*Of Counsel and for*

Mark L. Goldstein

Law Offices of Mark L. Goldstein

3019 Province Circle

Mundelein, IL 60060

Attorney for Respondent

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Amcors Flexibles, Inc.</b>	)	
<b>-vs-</b>	)	<b>11-0033</b>
<b>Commonwealth Edison Company</b>	)	
	)	
<b>Complaint pursuant to Section 9-250 and 10-108</b>	)	
<b>of the Illinois Public Utilities Act and Section</b>	)	
<b>200.170 of the Rules of Practice</b>	)	

**NOTICE OF FILING**

TO: Parties on Certificate of Service

PLEASE TAKE NOTICE that on May 9, 2012, I filed with the Chief Clerk of the Illinois Commerce Commission The Respondent's Motion to Strike Portions of Amcor's Pleadings and Legal Argument on Its Motion in *Limine*, a copy of which is attached hereto, and are hereby served upon you.



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Eve Moran  
128 S. Halsted Street  
Chicago, IL 60601  
*Of Counsel and for*  
Mark L. Goldstein  
Law Offices of Mark L. Goldstein  
3019 Province Circle  
Mundelein, IL 60060

Attorney for Respondent

## CERTIFICATE OF SERVICE

I, Eve Moran, hereby certify that on May 9, 2012, I served a copy of the attached The Respondent's Motion to Strike Portions of Amcor's Pleadings and Legal Argument on Its Motion in *Limine* in the above-captioned docket, by causing a copy thereof to be placed in the U.S. Mail, first class postage affixed, addressed to each of the parties below:

Ms. Elizabeth A. Rolando  
Chief Clerk  
Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, IL 62701

Paul Neilan, Esq.  
55 W. Monroe St., Suite 3950  
Chicago, IL 60603

Bradley Block, Esq.  
401 Huehl Rd., Suite 2B  
Northbrook, IL 60062

Ms. Sonya Teague  
Administrative Law Judge  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago, IL 60601