

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMCOR FLEXIBLES, INC.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 11-0033
	:	
COMMONWEALTH EDISON COMPANY,	:	
	:	
Respondent.	:	
	:	
Complaint pursuant to Sections 9-250 and	:	
10-108 of the Illinois Public Utilities Act	:	
(220 ILCS 5/9-250 and 220 ILCS 5/10-108)	:	
and Section 200.170 of the Rules of Practice	:	
(83 Ill. Adm. Code 200.170).	:	

AMCOR’S PROPOSED FINAL ORDER

By the Commission:

This matter comes before the Commission pursuant to the Formal Complaint of Amcor Flexibles, Inc. (“Amcor”) against Commonwealth Edison Company (“ComEd”). The Final Order of the Commission is as follows:

I. Jurisdiction

Amcor is a Washington State corporation with a manufacturing facility located at 1919 South Butterfield Road, Mundelein, Illinois 60060 (the “Mundelein Plant”). At all relevant times, the Mundelein Plant has used electricity supplied by Mid-American Energy Company and delivered by ComEd. The Mundelein Plant’s ComEd account number is 0284425001.

Stipulation of Facts and Undisputed Testimony (the “Stipulation”),¹ ¶ 1. ComEd is an Illinois corporation with an office located at 440 South LaSalle Street, Chicago, Illinois 60605. ComEd

¹ The parties filed the Stipulation on or about December 22, 2011. According to its terms and the parties’ agreement, the Stipulation provides the entire evidentiary record in this proceeding.

is a public utility under Section 3-105 of the Illinois Public Utilities Act (the “PUA”) (220 ILCS 5/3-105) and is regulated by the Illinois Commerce Commission (the “Commission” or “ICC”) pursuant to the PUA (220 ILCS 5/1-102). Stipulation, ¶ 2. In accordance with 83 Ill. Adm. Code 280.170, on October 1, 2010, Amcor filed an informal complaint (Informal Complaint No. 2010-19403) with the Commission regarding the matters at issue in this Complaint. Amcor was subsequently advised by the Commission that it was unable to resolve the informal complaint to the satisfaction of the parties. Stipulation, ¶ 4. The Informal Complaint (No. 2010-19403) was closed on October 24, 2010 (Stipulation, ¶ 20), and Amcor filed a Formal Complaint on January 11, 2011.

Jurisdiction before the Commission is proper pursuant to Section 10-101 of the PUA (220 ILCS 5/10-101). Stipulation, ¶ 3.²

II. Facts

A. Amcor’s Meters

All of the meters at issue in this matter (the “Amcor Meters”) were and are “instrument transformer metering installations,” rather than “self-contained metering installations,” as described in ComEd’s tariffs at Ill. C.C. No. 10 Original Sheet No. 190. (Stipulation, ¶7). All of the Amcor Meters were and are “associated with an instrument transformer” with the meaning of 83 Ill. Adm. Code. Section 410.10. Amcor installed the instrument transformer (*i.e.*, current transformer) and ComEd sized the meter in accordance with that equipment. (Stipulation, ¶ 8).

² The Commission continues to have jurisdiction because the parties have entered into repeated agreements to extend the date for hearing.

B. Amcor's Mundelein Plant

Amcor manufactures flexible packaging products for food, beverage, medical and other industries at the Mundelein Plant, employing approximately 350 people. Amcor or its predecessors have operated the Mundelein Plant since 1971. Amcor manufactures its packaging using heavy equipment known as extrusion lines. (Stipulation, ¶ 9)

In 2008, Amcor decided to add a new extrusion line at the Mundelein Plant. In August 2008, Amcor contacted ComEd regarding the need to upgrade the electricity service at the Mundelein Plant to accommodate the new extrusion line, indicating that the new extrusion line would increase Amcor's load by an estimated 1000kW. (Stipulation, ¶ 10) ComEd and Amcor installed equipment to accommodate the expected increased load from the new extrusion line, which was completed in April 2009. (Stipulation, ¶¶ 11-12)

Also in April 2009, ComEd replaced meter number 140384879 (the "Replaced Meter") with meter number 141521021. (Stipulation, ¶ 13) Amcor did not operate the new extrusion line until after the Replaced Meter was replaced. (Stipulation, ¶ 14)

C. The Dispute

This dispute involves the Replaced Meter. On December 8, 2009, ComEd sent Amcor a letter, a copy of which is attached to the Stipulation as Exhibit B (the "December 8, 2009 Letter"), asserting that the Replaced Meter was programmed with an incorrect "scaling factor," so that "the meter did not register all of the usage flowing and underbilled Amcor's Account by almost one-third." (Stipulation, ¶ 17)³ ComEd then claimed that it was entitled to back-bill Amcor for unbilled delivery charges from December 2007 through April 2009 in the amount of

³ Amcor stipulated that the December 8, 2009 letter was sent but not that the contents of that letter were accurate. (Stipulation, ¶ 17)

\$62,190.07 (the “Back-Bill Claim”). ComEd calculated the amount it claims should have been billed to Amcor by tripling the amount of power usage reported by the Replaced Meter for various periods, and then applying applicable rates and other charges. (Stipulation, ¶ 18) ComEd calculated the amount of the Back-Bill by subtracting the amount actually billed from the amount that ComEd claims should have been billed. (Stipulation, ¶ 18)

Amcor has disputed the Back-Bill Claim since December 2009 and has not paid it. (Stipulation, ¶ 19) After the December 8, 2009 Letter, the parties had several communications regarding the Back-Bill Claim, but failed to resolve their dispute. Copies of some of these communications are attached to the Stipulation as Exhibits C-G.⁴ (Stipulation, ¶ 19)

D. How the Replaced Meter Billed

The Replaced Meter No. 140384879 was a solid state meter. A solid state meter does not have a mechanical wheel that turns as current runs through the meter. However, the meter is programmed to mimic the function of a mechanical wheel (*i.e.*, it has a “virtual disk”). (Stipulation, ¶ 23) The “meter engine” calculates the energy (measured in watt-hours) running through the meter by multiplying the voltage, the current and time (voltage x amps x hours = watt-hours). The meter engine sends this information to the “microcontroller.” (Stipulation, ¶ 24) In the absence of a scaling factor, the microcontroller would send one “billing pulse” to the internal billing memory, or EEPROM, for every .05 watt-hours of power flowing through the meter. Further, every 24 billing pulses (totaling 1.2 watt-hours) equates to one “revolution” of the virtual disk. For every revolution of the virtual disk, the microcontroller sends one test pulse to the “optiport,” an external port from which readings can be taken. (Stipulation, ¶ 25) In the

⁴ The parties stipulated that these communications occurred, not that the statements made in the communications were accurate. (Stipulation, ¶ 19)

absence of a scaling factor, the microcontroller would send 24 pulses to the Billing Memory for every “revolution” of the virtual disk, leading to a “counts per revolution” or “CPR” of 24.

(Stipulation, ¶ 26)

ComEd asks the manufacturer to program a scaling factor into the meter or ComEd programs meters with a scaling factor in its meter shop. (Stipulation, ¶ 27) The scaling factor determines how many pulses are sent to the Billing Memory for billing purposes.

- A scaling factor of 6 means that the microcontroller sends one pulse to the Billing Memory for every 6 units of .05 watt-hours (*i.e.*, 0.3 watt-hours of power flowing through the meter for every billing pulse, because $6 \times .05 = 0.3$). The scaling factor, however, does not impact the amount of power in a revolution of the virtual disk. Therefore, for every revolution of the virtual disk (*i.e.*, 1.2 watt-hours), the microcontroller would send four pulses to the Billing Memory ($1.2 \div 0.3 = 4$). Therefore, a scaling factor of 6 leads to a “CPR,” or “counts per revolution,” of 4. (Stipulation, ¶ 27)
- A scaling factor of 2 means that the microcontroller sends one pulse to the Billing Memory for every 2 units of .05 watt-hours (*i.e.*, 0.1 watt-hours of power flowing through the meter for every billing pulse, because $2 \times .05 = 0.1$). For every revolution of the virtual disk (*i.e.*, 1.2 watt-hours), the microcontroller will send 12 pulses to the Billing Memory ($1.2 \div 0.1 = 12$). In other words, a scaling factor of 2 leads to a CPR of 12. (Stipulation, ¶ 28)

The scaling factor does not affect the test pulse. Regardless of the scaling factor, one test pulse should be generated for every revolution of the virtual disk (*i.e.*, every 1.2 watt-hours of power flowing through the meter). (Stipulation, ¶29)

To gather information for billing, a meter reader puts a probe in the optiport to download the number of pulses that have been sent to the Billing Memory during the billing period. The meter reader then transmits this information to a computer that runs ComEd's billing software. (Stipulation, ¶ 30) The billing software includes a database with a list of different meter types and their corresponding CPRs. The billing software calculates a customer's electricity usage from the number of pulses in the Billing Memory, adjusted according to the CPR applicable to the customer's meter type. (Stipulation, ¶ 31)

ComEd was supposed to program the Replaced Meter with a scaling factor of 2 (resulting in a counts per revolution, or CPR, of 12). (Stipulation, ¶ 32) ComEd contends that it erroneously programmed the Replaced Meter with a scaling factor of 6 (resulting in a counts per revolution, or CPR, of 4). ComEd therefore contends that Amcor was billed for only one-third of the power that it used. (Stipulation, ¶ 33)

E. Testing of the Replaced Meter

The Replaced Meter was installed at Amcor's premises on or about August 1, 2005. ComEd performed a pre-installation test on the Replaced Meter on July 19, 2005. ComEd did not perform additional testing on the Replaced Meter prior to the Replaced Meter's removal from service for Amcor's account in April 2009. (Stipulation, ¶ 21)

When ComEd tested the Replaced Meter, before installation, it tested only the test pulses sent to the "optiport." In other words, ComEd confirmed that, for every 1.2 watt-hours of power flowing into the Replaced Meter, the optiport received one test pulse. (Stipulation, ¶ 34) Before installation, ComEd did not confirm that the microcontroller on the Replaced Meter was sending the information to the Billing Memory based on a scaling factor of 2, or that the information downloaded by the meter reader was accurate. In other words, ComEd did not test whether the

microcontroller was sending 12 billing pulses to the Billing Memory for every revolution of the virtual disk (*i.e.*, 1.2 watt-hours of power flowing into the Replaced Meter), or whether a meter reader inserting a probe into the optiport would download the correct number of pulses per watt-hour of power. (Stipulation, ¶ 35)

On September 24, 2009, Thomas Rumsey, System Meter Mechanic Special of ComEd, tested the Replaced Meter and determined that one test pulse was sent to the optiport for every 1.2 watt-hours of power flowing through the Replaced Meter. He then conducted a “long diagnostic” examination and found that the scaling factor was inaccurate. In particular, Mr. Rumsey determined that ComEd had programmed the Replaced Meter with a scaling factor of 6 (resulting in a CPR of 4) rather than the correct scaling factor of 2 (resulting in a CPR of 12). Diagnostic test results are attached to the Stipulation as Exhibit I. (Stipulation, ¶ 36)⁵

III. Standard of Proof

This matter comes before the Commission for a final decision and order. The Stipulation contains the entire evidentiary record as the basis of decision, and was submitted as a substitute for an evidentiary hearing. Therefore, the standard of proof is preponderance of the evidence. Illinois Administrative Procedure Act, Section 10-15 (5 ILCS 100/10-15).

IV. Amcor’s Position

Amcor argues that ComEd failed to test the meter as required by ICC Regulations 410.155 and 410.160. Therefore, ComEd is barred from adjusting ComEd’s bill by ICC Regulation 410.200(h)(1).

⁵ The allegations of Paragraph 36 are contained in a section of the Stipulation titled “Undisputed Testimony.” Amcor made a Motion in Limine to prohibit ComEd from entering this testimony into evidence because ComEd threw the meter away on October 25, 2009 (Stipulation, ¶ 37), thereby preventing Amcor from testing it. The Administrative Law Judge denied Amcor’s Motion in Limine, so the allegations contained in Paragraph 36 of the Stipulation are considered part of the agreed record unless the Commission reverses that decision. *See* Footnote 3 to the Stipulation.

A. No Post-Installation Inspection

ICC Regulation 410.155 required ComEd to conduct an inspection of the Replaced Meter under load and within 90 days after installation to determine “if the meter is accurately measuring customer energy consumption.” In Paragraph 21 of the Stipulation, ComEd agreed that it did not perform any post-installation test of the Replaced Meter until it was removed from service 4 years after installation (*i.e.*, not within 90 days of installation, and not under load). Stipulation, ¶ 21. Therefore, Amcor argues that ComEd violated ICC Regulation 410.155.

B. Inadequate Pre-Installation Inspection

ICC Regulation 410.160 required ComEd to conduct an “initial test” of the Replaced Meter, in the meter shop before installation, and “the accuracy of the meter shall be within the tolerances permitted by this Part.” ComEd admits in the Stipulation that it only tested whether the Meter Engine and Microcontroller parts of the Replaced Meter sent proper test pulses (Stipulation, ¶ 34); it never tested whether the Microcontroller sent the proper number of billing pulses to the Billing Memory, or whether the Billing Memory reported the proper number of pulses when read. Stipulation, ¶ 35.

Amcor argues that, if a meter gives the wrong information when read, it is not accurate. According to Amcor, ComEd only tested part of the Replaced Meter, not the entire meter. Because ComEd never tested the Replaced Meter to see if it was reporting accurate information when read, Amcor argues that ComEd failed to test the entire Replaced Meter to determine that it was accurate, and ComEd’s pre-installation testing failed to comply with ICC Regulation 410.160.

C. ICC Regulation 410.200(h)(1) Prohibits ComEd from Back-Charging Amcor

ICC Regulation 410.200(h)(1) prohibits ComEd from adjusting Amcor's bill for "under-registration if all testing and accuracy requirements of this Part have not been met."

Amcor notes that ICC Regulations 410.155 and 410.160 constitute some of the "testing and accuracy requirements of this Part." Because ComEd failed to conduct any post-installation inspection as required by ICC Regulation 410.155, and because ComEd's pre-installation testing did not determine whether the Replaced Meter was accurate, Amcor argues that ComEd is prohibited from back-billing it.

D. Responses to ComEd Arguments

Amcor characterizes ComEd's response as arguing that words do not mean what they ordinarily mean. ComEd argues that a meter that under-reports Amcor's electricity usage is nevertheless "accurate," and that a test of a meter that does not look at whether the meter is giving accurate information for billing the customer is nevertheless a sufficient test of meter accuracy. According to Amcor, only lawyers could make these arguments. Amcor contends that ComEd's arguments violate the fundamental tenet of statutory interpretation that words be given "their plain and ordinary meaning." Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc., 2012 WL 4858995 at 6 (1st App. Dist. 2012).

1. Response to Arguments Concerning ComEd's Violation of ICC Regulation 410.155

ComEd asserts that "Amcor is flatly wrong in asserting that 'ComEd did not test the Replaced Meter within 90 days of installing it'" because ComEd tested the meter on July 19, 2005 (*i.e.*, prior to the August 1, 2005 installation of that meter). Response, at p. 14. Amcor argues that, since Regulation 410.155 requires a "post-installation inspection" to be made "under

load” and “[w]ithin 90 days after installation,” ComEd’s argument simply makes no sense. ComEd also references its alleged testing in September 2009, after the Replaced Meter was removed from service (Response at pp. 14-15); Amcor argues that since this testing occurred more than four years after installation of the Replaced Meter (as opposed to within 90 days after installation), and was not conducted “under load,” ComEd’s response is simply irrelevant.

In Paragraph 21 of the Stipulation, ComEd acknowledges that it did not perform any testing of the Replaced Meter until four years after the Replaced Meter was installed. ComEd argues that this admission (that it did not “test”) does not mean that it did not perform an “inspection to determine if the meter is accurately measuring customer energy consumption.” Response at p. 14 (emphasis added). Amcor characterizes this response as an effort at verbal gymnastics that fails. It argues, pointing to the common understanding of the word “inspection” and its definition in the Merriam-Webster dictionary, that an “inspection” is a type of test; there is no meaningful distinction between a test of the meter and an inspection to determine if it is accurate.

Second, Amcor argues that, were there any significance to ComEd’s point (in other words, if ComEd actually had conducted a post-installation inspection within 90 days after installation of the Replaced Meter), ComEd would have presented evidence of an inspection. ComEd did not present evidence of a post-installation inspection because, according to Amcor, ComEd did not conduct one. Amcor notes that Illinois law codifies common sense: ComEd’s failure to produce evidence in its control (*i.e.*, that it conducted a post-installation inspection) leads to an evidentiary presumption that no such inspection occurred. Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 504, 840 N.E.2d 767, 779 (2nd Dist. 2005); Illinois Pattern Jury

Instructions—Civil, 5.01 Failure to Produce Evidence or a Witness.⁶ Amcor argues that, even if ComEd had not stipulated that it failed to conduct a post-installation test of the Replaced Meter, an evidentiary presumption establishes this fact (or at least establishes it as more likely than not).

2. Response to Arguments About ComEd's
Violation of ICC Regulation 410.160

ComEd tested the Replaced Meter to confirm that the Meter Engine and Microcontroller generated one test pulse for every 1.2 watt-hours of power going into the meter. ComEd then declares that this means the Replaced Meter was accurate. *See* Response at pp. 3, 4, 5, 9, 11, 12 and 15. Amcor notes, however, that it is undisputed that ComEd never tested to see if the data that the Replaced Meter (through the Billing Memory) reported when read was accurate. Stipulation, ¶ 35. Amcor therefore argues that ComEd did not test the full Replaced Meter to determine if it was accurate, and that testing only part of the Replaced Meter did not constitute a test for accuracy as required by ICC Regulation 410.160.

Amcor notes that the internal billing memory of the Replaced Meter, which allegedly received the incorrect number of billing pulses and which then gave the incorrect number of billing pulses to meter readers (*see* Stipulation, ¶¶ 25-28, 30 and 33), is a part of the Replaced Meter—if it is inaccurate, then the meter is inaccurate. Amcor argues that meters exist to record customer usage and provide usage information for billing purposes; they do not exist to generate test pulses. In directing that meters be accurate and tested for accuracy, the Commission obviously cares about the information reported for billing purposes, not test pulses. Amcor notes that, under Illinois law, “the reason and necessity” for the regulations must be considered in

⁶ *See* www.state.il.us/court/CircuitCourt/CivilJuryInstructions/5.00.pdf.

interpreting them. Illinois Insurance Guaranty Fund, 2012 WL 4858995, at 6 (discussing rules of statutory construction).

Amcor argues that ComEd's assertions that the Replaced Meter was accurate lead to absurd results. According to ComEd, a meter that gives completely inaccurate information when read is nevertheless accurate. The meter is accurate even though the information contained in the meter's internal billing memory is completely wrong.

Amcor notes that ComEd's position in this litigation contradicts ComEd's contemporaneous documents. ComEd's December 9, 2009 correspondence to Amcor states that the Replaced Meter was "faulty," that it "altered metered usage," and that "the meter did not register all of the usage flowing (Exhibit B to Stipulation, at p. 1). Similarly, Michael Pabian, ComEd's Assistant General Counsel, noted in his email of February 17, 2010 (Exhibit E to the Stipulation) that "the meter was undercounting the pulses" and was "under-register[ing] the usage flowing through the meter."

In its Response, ComEd also asserts that meters are programmed after it tests them (Response, at pp. 5, 12 and 15) and that programming zeros out any usage the meter records from testing. Response, at 12. Amcor argues that these assertions must be disregarded because they are merely unsworn, unsupported statements by lawyers in a brief—they are not part of the Stipulation and not part of the evidentiary record in this proceeding. Even if true, Amcor argues that these claims do not have much import because ComEd could still easily test meters for accuracy after programming.

ComEd also asserts that "the meter is not giving wrong information to the meter reader in terms of usage." Response, at p. 12; *see also* Response at p. 15. Amcor argues that this claim is inconsistent with common sense, given ComEd's claims that the Replaced Meter caused Amcor

to be under-billed, and this claim is also inconstant with ComEd's pre-litigation correspondence from its account representative (Exhibit B to the Stipulation) and from its Assistant General Counsel (Exhibit E to the Stipulation).

3. Response to Arguments About Whether
ICC Regulation 410.200 Applies

ComEd initially responds by arguing that ICC Regulation 410.200 does not apply because the Replaced Meter was accurate. Amcor notes, however, that ComEd's argument that the Replaced Meter was accurate depends on word-play, is inconsistent with the common meaning of the term "accurate," and contradicts its own pre-litigation correspondence describing what occurred. ComEd also argues that Regulation 410.200 contains a specific list of the meter errors it covers, thereby creating a specialized definition of the term "meter error." Amcor notes that the text of the Regulation does not support ComEd's contention; ICC Regulations 410.200(a) and (b) simply reference "errors" generally, and the balance of the Regulation makes repeated references to corrections of "meter data" generally (410.200(a)-(d), (f) and (h)).

ComEd also hints that the Replaced Meter's under-billing is somehow different from under-registration, which ICC Regulation 410.200(h)(1) specifically addresses. Response, at p. 11. Amcor argues that, not only is the Replaced Meter's alleged under-billing consistent with the common sense understanding of under-registration, but ComEd's pre-litigation correspondence explicitly uses this term to describe how the Replaced Meter performed. (*See Exhibits B and E to Stipulation*)

In addition, ComEd seems to argue that, even if the provisions of ICC Regulation 410.200 specifically bar it from asserting the back-bill claim, it can still back-bill pursuant to ICC Regulation 280.100 (billing for "Unbilled Service."). (Response, at p. 8) Amcor notes that

Regulation 41.200(h)(1) provides that, if the required testing is not performed, “in no case” may the utility adjust the customer’s bill for under-registration. Amcor argues that ComEd’s position would render Regulation 410.200 a nullity, violating basic rules of statutory interpretation under Illinois law. Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd., 281 Ill. App. 3d 719, 724 (1st Dist. 1996). *See also*, Aurora Manor, Inc. v. Department of Public Health, 2012 WL 4463237, at 3 (1st Dist. 2012). Further, Amcor argues that the more specific statute (here, Regulation 410.200) controls over the more general statute (here, Regulation 280.100). Knolls Condominium Association v. Harris, 202 Ill. 2d 450, 459 (2002).

V. ComEd’s Position

[To Be Supplied By ComEd]

VI. Commission Analysis and Conclusion

The Commission concludes that ICC Regulation 410.200(h)(1) prohibits ComEd from adjusting Amcor’s bill to assess the back-charge against Amcor. The agreed-upon record establishes by far more than a preponderance of the evidence that:

- ComEd did not conduct the post-installation inspection required by ICC Regulation 410.155; and
- ComEd’s pre-installation testing was not adequate to meet the requirements of ICC Regulation 410.160.

The record before us establishes that ComEd programmed the wrong scaling factor into the Replaced Meter, thereby causing it to under-register Amcor’s electricity usage by two-thirds. The Replaced Meter’s under-registration of electricity usage is a meter error, and this type of meter error falls within the scope of ICC Regulation 410.200(h)(1). Because ComEd failed to

conduct the testing required by Part 410 of the ICC's Regulations, ICC Regulation 410.200(h)(1) bars ComEd from adjusting Amcor's bill.

A. ComEd Violated ICC Regulation 410.155

ICC Regulation 410.155 provides in pertinent part as follows:

Installation Inspections.

Within 90 days after installation or exchange of any meter with associated instrument transformers and/or phase-shifting transformers, a post-installation inspection shall be made under load to determine if the meter is accurately measuring customer energy consumption.

(Emphasis added) Paragraph 21 of the Stipulation states that ComEd did not conduct on-site testing of the Replaced Meter within 90 days of installation; ComEd did not test the meter until 4 years after the installation, and after the meter was removed from service (not under load, as required by the Regulation). The Commission therefore finds, by far more than a preponderance of the evidence, that ComEd violated ICC Regulation 410.155 by failing to conduct the inspection required by the Regulation.

ComEd disputes that it violated ICC Regulation 410.155 but its responses are unconvincing and not consistent with the plain meaning of the Regulations or the undisputed facts. For example, ComEd argues that it only stipulated that it did not conduct a post-installation "test," not that it failed to conduct an "inspection." To begin with, this is a distinction without a difference: an inspection is a type of test. (*See* the definition of "inspection" from the Merriam-Webster Dictionary Online (attached to Amcor's Motion for Judgment as Exhibit A) Second, the Formal Complaint puts ComEd on notice that Amcor claimed it had not conducted a proper post-installation inspection; if ComEd had evidence of such an inspection, it should have brought that evidence forward. The evidence was obviously

within ComEd’s control. Even if ComEd had not stipulated that it failed to conduct a post-installation inspection, ComEd’s failure to present any evidence of such an inspection gives rise to an evidentiary presumption against it. Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 504, 840 N.E.2d 767, 779 (2nd Dist. 2005) (“An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control. [citation omitted].”) *See also*, Illinois Pattern Jury Instructions—Civil, 5.01 Failure to Produce Evidence or a Witness.⁷ To the extent this presumption does not establish this fact as a matter of law, it certainly establishes it by a preponderance of the evidence.

ComEd also suggested in some of its briefing and in its oral argument that a post-installation inspection would not have revealed the problem with this meter. This assertion fails for several reasons. First, it is not relevant to whether ComEd conducted the post-installation inspection, and therefore does not address whether ComEd violated ICC Regulation 410.155. Second, there is no evidence in the record to support this factual assertion; it should therefore be disregarded. Section 10-103 of the Illinois Public Utilities Act (the “Act”), 220 ILCS 5/10-103 provides, in part, that “[i]n all proceedings, investigations or hearings conducted by the Commission... any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case....” Finally, it is essentially incorrect by definition. The record establishes that the Replaced Meter was not “accurately measuring [Amcor’s] energy consumption.” Any proper inspection—one that actually determined whether the Replaced Meter was accurately measuring Amcor’s energy consumption—would have, by necessity, discovered that it was not. The problem here is that ComEd simply never checked to

⁷ See www.state.il.us/court/CircuitCourt/CivilJuryInstructions/5.00.pdf.

see if the amount of power usage that the Replaced Meter reported when read matched the amount of power going through the Replaced Meter.⁸

B. ComEd violated ICC Regulation 410.160

ICC Regulation 410.160 provides in pertinent part as follows:

Initial Tests

Initial tests are tests made before installation, regardless of whether the meter and associated devices have previously been in service. Each meter and associated devices (unless including in the sample testing plan in Section 410.180) shall be inspected and tested in the meter shop of the entity or other location that meets the requirements of this Part before being placed in service, and the accuracy of the meter shall be within the tolerances permitted by this Part....

ComEd did conduct a pre-installation test of the Replaced Meter in its meter shop.

However, ComEd only tested whether the Replaced Meter sent the proper number of test pulses—ComEd only tested the Meter Engine part of the meter. ComEd did not test whether the Microcontroller sent the correct number of billing pulses to the Billing Memory, or whether the Billing Memory reported the proper amount of energy consumption when read.

The purpose of a meter, however, is to report energy consumption—without testing the information reported by the Replaced Meter when read, ComEd could not have tested whether the meter was accurate. ComEd therefore did not properly test the Replaced Meter for accuracy as required by ICC Regulation 410.160. Further, it is undisputed that the Replaced Meter reported only one-third of actual usage; therefore, the Replaced Meter was not accurate within the tolerances permitted by Part 410 of the Regulations (*see* ICC Regulation 410.150).

⁸ To the extent ComEd is actually arguing that it is impossible for it to measure whether a meter accurately measures a customer's energy consumption, there is no evidence to support this statement. Further, the Commission harbors strong doubts that such an extraordinary proposition is accurate.

This conclusion is consistent with basic Illinois law concerning the proper interpretation of statutes and regulations, which provides that words are to be given “their plain and ordinary meaning.” Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc., 2012 WL 4858995 at 6 (1st App. Dist. 2012). Further, “the reason and necessity” for the regulations must be considered in interpreting them. Illinois Insurance Guaranty Fund, 2012 WL 4858995, at 6. The obvious purpose of ICC Regulation 410.160 is to insure that utilities like ComEd install meters that provide accurate energy consumption information for billing purposes; there is no rational reason why the Commission would want to insure that only the Meter Engine was performing properly, without caring about whether the meter actually reported accurate information when read.

An analogy or two helps explain this point further. Imagine a digital thermometer in a bucket of water. If the probe in the water functions properly, but the thermometer has an electrical problem that causes the thermometer to display a temperature that is 20 degrees off, no one would say that the thermometer is accurate. Imagine a human-shaped robot coming off the assembly line; if quality control tested the right arm, but not the left arm, no one would claim that the robot had been fully tested to determine if it functioned properly.

Tellingly, before litigation, ComEd acknowledged the common sense proposition that the Replaced Meter did not accurately measure Amcor’s energy consumption.⁹ In its December 9, 2009 correspondence to Amcor, ComEd states: “More importantly, both the installation of meters 141521021 and 141379885 as well as the recorder meter test demonstrates that the meter installed prior to the CT installation (meter 140384879) **was faulty**.” (Exhibit B to Stipulation,

⁹ The parties stipulate that ComEd sent its correspondence to Amcor, not that the contents were accurate. (Stipulation, ¶¶ 17 and 19) However, these statements are admissible against ComEd as admissions of a party opponent. Illinois Rules of Evidence, Rule 801(d)(2).

at p. 1) (emphasis added). “Meter 140384879, installed in 2005, was programmed with incorrect scaling factors thereby creating **incorrect** counts per revolution and **altered the metered usage**. Meaning, **the meter did not register all of the usage flowing** and underbilled Amcor’s account by almost one third.” (Exhibit B to Stipulation, at p. 2) (emphasis added). Similarly, Michael Pabian, ComEd’s Assistant General Counsel, noted in his email of February 17, 2010 (Exhibit E to the Stipulation): “We have discovered that, apparently, at the time the meter was installed, it was incorrectly programmed with a CPR value of 4 instead of the correct value of 12 for a transformer-rated meter. This means that the meter was **undercounting the pulses** and **under-register[ed] the usage flowing through the meter** by a factor of 3.” (emphasis added)

ComEd’s responses to these conclusions are again unavailing. For example, ComEd repeatedly declares, without explanation, that the Replaced Meter was accurate because it generated proper test pulses. *See* Response at pp. 3, 4, 5, 9, 11, 12 and 15. Mere repetition does not make it so, however. ComEd cannot point to any language in any statute or ICC Regulation that supports the conclusion that the terms of ICC Regulation 410.160 have specialized or restricted meanings. ComEd has not provided any support for a contention that “accurate” is a term of art. In the absence of such a showing, the only reasonable construction of the ICC Regulation 410.160 is that an accuracy test has to include the information the meter reports when read. ComEd also asserts that “the meter is not giving wrong information to the meter reader in terms of usage.” Response, at p. 12; *see also* Response at p. 15. This assertion is contradicted by the tests conducted by Thomas Rumsey indicating that the Replaced Meter had an incorrect

scaling factor and therefore reported only one-third of Amcor's energy usage¹⁰—indeed, ComEd obviously needs to make this claim in order to justify why it sought to adjust Amcor's bill.

C. ICC Regulation 410.200(h)(1) bars
ComEd from Adjusting Amcor's Bill

ICC Regulation 410.200(h)(1) provides in pertinent part:

For electric utilities...Corrections made to metering data for under-registration may be accompanied by an adjustment to a customer's billing. However, if an electric utility is providing metering service, **in no case** shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.

(emphasis added) It is undisputed that the Replaced Meter reported only one-third of Amcor's electricity usage. This constitutes under-registration of Amcor's energy consumption, according to the common understanding of the term. Indeed, ComEd's pre-litigation correspondence (Exhibits B and E to the Stipulation) use this same term. It is also clear that ComEd did not meet all of the testing and accuracy requirements of Part 410 of the ICC Regulations. Therefore, ICC Regulation 410.200(h)(1) expressly prohibits ComEd from adjusting Amcor's bill to assert a back-charge.

Once again, ComEd attempts to respond to this straight-forward application of the Regulation to the facts with convoluted but unavailing arguments. For example, ComEd responds by arguing that the Replaced Meter was accurate, and that there was therefore no "meter error" under ICC Regulation 410.200. (Response, pp. 9-11, 15) As discussed above, however, ComEd's argument that the Replaced Meter was accurate is inconsistent with the plain meaning of the Regulations and contradicts its own pre-litigation explanations of what occurred.

¹⁰ Amcor acknowledges that it has no ability to challenge ComEd's assertion, based on the tests conducted by Thomas Rumsey, because ComEd threw the Replaced Meter away before the Formal Complaint was filed.

ComEd also argues that Regulation 410.200, titled “Corrections and Adjustments for Meter Error,” describes the specific types of meter errors that fall within its purview, and that incorrect scaling factors are not one of the meter errors specifically identified in the Regulation. ComEd also argues that the “metering data” referenced in the Regulation is not billing information. A review of the Regulation, however, contradicts ComEd’s assertions. Nowhere does Regulation 410.200 purport to provide a special definition of “meter error” or “meter data.” Indeed, Regulations 410.200(a) and (b) discuss meter errors generally. Regulation 410.200(a) provides:

Whenever any test made by any entity or by the Commission shows a meter to have an average error of more than 2%, a correction of the metering data shall be determined by the entity providing metering service and that correction shall be conveyed within 3 business days to the customer and to other entities involved in billing the customer.

Regulation 410.200(b) provides:

When a meter is found to have an average error of more than 2%, the entity providing metering service shall determine the metering data correction using the actual percentage of error as determined by the test, not the difference between the allowable error and the error found as a result of a test.

Regulation 410.200 also repeatedly references “meter data” generally. (ICC Regulation 410.200(a)-(d), (f) and (h)) Nothing in the text of Regulation 410.200 provides a specialized or restrictive definition of the term “meter error,” and the common understanding of the term includes a meter that under-reports energy consumption by two-thirds. Further, nothing in the Regulation provides a specialized or restrictive definition of “meter data,” and ComEd can point to no “data correction” that could be performed or reported to the customer (as required by Regulation 410.200(a)) that would not involve or be based on billing information.

ComEd also tries to imply that the Replaced Meter's under-billing is somehow different from under-registration. Response, at p. 11. Not only is the Replaced Meter's under-billing consistent with the common sense understanding of under-registration, but ComEd's pre-litigation correspondence explicitly stated that the Replaced Meter had "altered the meter usage" and "did not register all of the usage flowing." ComEd's December 9, 2009 Correspondence (Exhibit B to Stipulation), at p. 2; *see also* Michael Pabian email of February 17, 2010 (Exhibit E to the Stipulation) (noting that the Replaced Meter was "undercounting the pulses" and "under-register[ed] the usage.").

Finally, ComEd seems to argue that, even if the provisions of ICC Regulation 410.200 specifically bar it from asserting the back-bill claim, it can still back-bill pursuant to ICC Regulation 280.100 (billing for "Unbilled Service."). Response, at p. 8. Regulation 410.200(h)(1), however, provides that, if the required testing is not performed, "in no case" may the utility adjust the customer's bill for under-registration. ComEd's position would render Regulation 410.200 a nullity. Every time a utility makes a billing adjustment because a meter under-registers, it will be seeking payment for unbilled service; thus, under ComEd's position, there could never be a situation where a utility would be prohibited from adjusting a customer's bill for under-registration even if, as here, the utility had ignored the ICC's regulations regarding meter testing and accuracy. Basic rules of statutory interpretation do not permit interpretations that render parts of a statute a nullity. "Statutes are to be construed to give full effect to each word, clause, and sentence, so that no word, clause, or sentence is surplusage or void. [Citations omitted] Courts avoid interpretations which would render part of a statute meaningless or void [citation omitted] and the presence of surplusage will not be presumed. [citation omitted]."

Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd., 281 Ill. App. 3d 719, 724 (1st Dist. 1996). *See*

also, Aurora Manor, Inc. v. Department of Public Health, 2012 WL 4463237, at 3 (1st Dist. 2012). Further, the more specific statute (here, Regulation 410.200 regarding when billing adjustments can be and cannot be made for under-billing) controls over the more general statute (here, Regulation 280.100 regarding under-billing in general). Knolls Condominium Association v. Harris, 202 Ill. 2d 450, 459 (2002).

VII. Findings and Ordering Paragraphs

The Commission, having reviewed the entire record, is of the opinion and finds that:

- (1) ComEd is an Illinois corporation with an office located at 440 South LaSalle Street, Chicago, Illinois 60605. ComEd is a public utility under Section 3-105 of the Illinois Public Utilities Act (the “PUA”) (220 ILCS 5/3-105) and is regulated by the Illinois Commerce Commission (the “Commission” or “ICC”) pursuant to the PUA (220 ILCS 5/1-102).
- (2) The Commission has jurisdiction over Amcor and ComEd, and over the subject matter herein.
- (3) The facts recited and factual conclusions reached above are supported by the record and are hereby adopted as findings of fact.
- (4) The legal conclusions reached above, including but not limited to the interpretations of ICC Regulations, are hereby adopted as findings of law.
- (5) Amcor is granted the relief sought in its Formal Complaint filed on January 11, 2011.
- (6) ComEd is prohibited from collecting on its \$62,190.07 claim for unbilled services.

(7) ComEd is directed to issue a corrected bill to Amcor that rescinds its back-charge of \$62,190.07.

By Order of the Commission this ___ day of _____, 2013.

(Signed) Douglas P. Scott
Chairman

Proposed Order prepared by:

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