

---

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

---

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

**APPLICATION FOR REHEARING AND RECONSIDERATION**  
**BY**  
**AMCOR FLEXIBLES, INC.**

LAW OFFICES OF PAUL G. NEILAN, P.C.  
LAW OFFICES OF BRADLEY BLOCK  
Paul G. Neilan  
Bradley Block  
33 North LaSalle Street  
Suite 3400  
Chicago, IL 60602-2667  
312-580-5483  
312-674-7350  
[pgneilan@energy.law.pro](mailto:pgneilan@energy.law.pro)  
[brad.block@bradblocklaw.com](mailto:brad.block@bradblocklaw.com)

I.	INTRODUCTION.....	<a href="#"><u>3</u></a>
II.	FACTS.....	<a href="#"><u>5</u></a>
	A. Background.....	<a href="#"><u>5</u></a>
	B. ComEd Failed to Perform the Required Post-Installation Testing. . . . .	<a href="#"><u>6</u></a>
	<b>C. ComEd’s Testing of the Replaced Meter.. . . . .</b>	<a href="#"><u>7</u></a>
	1. How the Replaced Meter Functioned and Billed.. . . . .	<a href="#"><u>7</u></a>
	2. ComEd’s Pre-Installation Testing. . . . .	<a href="#"><u>8</u></a>
	D. Facts Related to the Motion in Limine.. . . . .	<a href="#"><u>9</u></a>
III.	ERRORS IN THE COMMISSION’S ORDER. . . . .	<a href="#"><u>10</u></a>
	<b>A. The Commission Erred in Considering Matters That are Not Part of Record in This Docket.. . . . .</b>	<a href="#"><u>10</u></a>
	B. The Commission Erred in Holding That Section 410.200(h)(1) Does Not Apply Unless a Meter Test Shows That the Meter Was Inaccurate.. . . . .	<a href="#"><u>12</u></a>
	1. Section 410.200(h)(1) Contains No Prerequisites to Be Effective.. . . . .	<a href="#"><u>12</u></a>
	C. The Commission Erred in Holding That ComEd Did Not Violate Section 410.200(h)(1) in this Case. . . . .	<a href="#"><u>15</u></a>
	D. The Commission Erred in Refusing to Consider the Merits of Amcor’s Motion in Limine and in Holding That Amcor Waived its Objection to the ALJ’s Denial of Amcor’s Motion in Limine Because it Did Not Then Seek Interlocutory Review. . . . .	<a href="#"><u>16</u></a>
	E. The Commission Erred in Not Granting Amcor’s Motion in Limine... . . . .	<a href="#"><u>17</u></a>
	1. ComEd Had a Duty to Preserve the Replaced Meter.. . . . .	<a href="#"><u>17</u></a>
	2. The Commission Should Deny ComEd the Right to Use the Type of Evidence It Prevented Amcor from Obtaining.. . . . .	<a href="#"><u>20</u></a>
	3. The Evidence Indicates That ComEd Did Not Act in Good Faith.. . . . .	<a href="#"><u>23</u></a>
	4. Impact of Granting Amcor’s Motion in Limine.. . . . .	<a href="#"><u>25</u></a>
	F. If the Commission Ultimately Finds Against Amcor, the Commission Erred in Ordering That Amcor Pay the Alleged Backcharge Amount to ComEd. . . . .	<a href="#"><u>26</u></a>

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).	:	

**APPLICATION FOR REHEARING AND RECONSIDERATION  
BY  
AMCOR FLEXIBLES, INC.**

Now comes AMCOR FLEXIBLES, INC. (“Amcor”), pursuant to Section 10-113 of the Illinois Public Utilities Act (the “Act”), 220 ILCS 5/10-113, and Section 200.880 of the Rules of Practice (the “Rules of Practice”) of the Illinois Commerce Commission (the “Commission”), and hereby submits this Application for Rehearing and Reconsideration (this “Application for Rehearing”) of the Commission’s Final Order entered on April 2, 2014 (the “Order”) denying Amcor’s Complaint against Commonwealth Edison Company (“ComEd”) in this Docket. In support of this Application for Rehearing, Amcor states as follows:

## **I. INTRODUCTION.**

Amcor seeks rehearing and reconsideration by the Commission on several aspects of the Order.

First, the Order relies on facts outside the stipulated record in this Docket, and therefore violates Section 10-103 of the Act. 220 ILCS 5/10-103. This section requires that the Commission base its orders exclusively on the record in the case before it. The parties agreed that the Stipulation was the entire evidentiary record in this Docket, but the Order and the accompanying Bench Memo purport to go outside that record to rely on supposed testimony of ComEd's employee Mr. Thomas Rumsey, and even to unsworn arguments of ComEd's counsel. There is no witness testimony in this Docket. ComEd tried repeatedly to undermine the Stipulation to which it had agreed after six months of negotiation by filing numerous affidavits, all of which were stricken from the record. ComEd's lawyers' arguments are not evidence.

Second, the Order erroneously holds that Section 410.200(h)(1) of the Commission's Regulations (hereafter, the "Regulations"), 83 Ill. Adm. Code Section 410.200(h)(1), applies only when "a test has been conducted and the results of such test show that there is an average error of more than two percent." (Order, pg. 20). This is contrary to law because, by its express terms, Section 400.200(h)(1) also prohibits a backbill when the utility providing metering service (ComEd in this case) has failed to perform all testing required by the Regulations.

Third, the Commission erred in holding that ComEd did not violate Section 400.200(h)(1) in this case. This is contrary to the facts and the law because the Stipulation – the entire evidentiary record in this Docket – shows that ComEd failed to perform any post-installation testing of the Replaced Meter<sup>1</sup>, as required by the Regulation 410.160. Further, the Stipulation shows that ComEd's pre-installation testing, which tested only part of the Replaced Meter, was inadequate

---

<sup>1</sup> As defined below.

to meet the requirements of the Regulations. The Commission's conclusion that ComEd's failure to comply with testing Regulations was irrelevant to its decision, and its refusal to make findings on these factual issues also is contrary to law. Because of ComEd's failure to test the Replaced Meter, its attempt to back-bill Amcor violated Regulation 410.200(h)(1), and the Commission's contrary conclusion is erroneous.

Fourth, the Commission erred in holding that Amcor waived its objection to the denial by the Administrative Law Judge (the "ALJ") of Amcor's motion in limine (the "Motion in Limine") because it did not file for interlocutory review of that order by the full Commission within 21 days of its entry. Contrary to the ALJ's ruling, the Commission's own Rules expressly provide that such an interlocutory review is optional, not mandatory, and that all such objections are preserved regardless of whether the party requests interlocutory review.

Fifth, the Commission erred in denying Amcor's Motion in Limine in this Docket. If the Order had granted the Motion in Limine there would have been no competent evidence that the Replaced Meter under-billed, so on these grounds as well the Order erred in finding that there was any under-billing or any basis to backcharge Amcor.

Finally, should the Commission ultimately rule against Amcor, the Commission still erred in ruling that Amcor should pay the alleged backcharge to ComEd. During all billing periods to which the alleged backcharge applies, Amcor had in effect an election under ComEd's Rider SBO/Single Billing Option. As Amcor's Second Amended Motion for a Post-Order Stay shows, Amcor has already received bills from both ComEd and MidAmerican Energy Company, Amcor's alternative retail electric supplier during the billing periods in question, for the same amounts. Should Amcor owe any backcharge amount, under Rider SBO that amount would properly be payable not to ComEd, but to MidAmerican Energy Company.

## II. FACTS.<sup>2</sup>

### A. Background.

Amcor is a Washington State corporation with a manufacturing facility located at 1919 South Butterfield Road, Mundelein, Illinois (the “Mundelein Plant”). (Stipulation, par. 1). Amcor manufactures flexible packaging products for food, beverage, medical and other industries at the Mundelein Plant, and employs approximately 350 people. (Stipulation, par. 9). Amcor or its predecessors have operated the Mundelein Plant since 1971. *Id.* Amcor manufactures its packaging using heavy equipment known as extrusion lines. *Id.* In 2008, Amcor decided to add a new extrusion line at the Mundelein Plant. (Stipulation, par. 10). In August 2008, Amcor contacted ComEd regarding the need to upgrade the electric service at the Mundelein Plant to accommodate the new extrusion line, indicating that this new line would increase Amcor’s load by an estimated 1000kW. *Id.*

Amcor completed construction of the new extrusion line in April 2009. (Stipulation, par. 11). At the same time, ComEd and Amcor completed construction of the electricity infrastructure upgrades needed to accommodate the additional load. *Id.* Also in April 2009, ComEd replaced Amcor’s existing meter, no. 140384879 (the “Replaced Meter”), with a new meter. (Stipulation, par. 13). Amcor did not operate the new extrusion line until after the electricity infrastructure upgrades were completed and the Replaced Meter was replaced. (Stipulation, par. 14).

On December 8, 2009, ComEd sent Amcor correspondence claiming that ComEd had mis-programmed the Replaced Meter by using the wrong “scaling factor,” so that the Replaced

---

<sup>2</sup> On December 22, 2011, Amcor and ComEd entered into a Stipulation of Facts and Undisputed Testimony (the “Stipulation”) which was filed in this docket. A copy of the Stipulation is attached as Exhibit A to this Application. Amcor and ComEd agreed that the Stipulation is the entire evidentiary record for this proceeding. (Stipulation, pg. 1).

Meter under-reported Amcor's electricity usage. (Stipulation, par. 17). In particular, in this letter ComEd claimed that it was therefore entitled to back-charge Amcor for \$62,190.07. (Stipulation, par. 18). In this letter ComEd admitted that the meter was "faulty," that it "altered the metered usage" and that "the meter did not register all of the usage flowing." Amcor disputed this back-charge claim from its inception. (Stipulation, par. 19). ComEd's attorney confirmed that the December 8, 2009 letter "accurately relates the facts involved in this situation." (February 17, 2010 email from M. Pabian to P. Neilan, attached to the Stipulation as Exhibit E). Mr. Pabian of ComEd also confirmed that the Replaced Meter "under-counted the pulses and under-register [*sic*] the usage flowing through the meter." (*Id.*)

Amcor filed an informal complaint against ComEd on October 1, 2010. (Stipulation, par. 20). The Commission closed the informal complaint on October 24, 2010 because it could not resolve the dispute between the parties. *Id.* It is undisputed that on the very next day, October 25, 2010, ComEd threw the Replaced Meter away without informing Amcor of its intention to do so or, afterwards, informing Amcor that it had done so. (Stipulation, par. 37).

Amcor filed a formal complaint commencing this docket on January 11, 2011. The Complaint seeks, among other relief, to prevent ComEd from back-charging Amcor.

**B. ComEd Failed to Perform the Required Post-Installation Testing.**

ComEd installed the Replaced Meter at Amcor's premises on or about August 1, 2005. (Stipulation, par. 21). On July 19, 2005, prior to the installation, ComEd performed some tests on the Replaced Meter, as described below. *Id.* However, ComEd admits that it did not perform any other tests on the Replaced Meter until after the Replaced Meter was removed from service in April 2009. *Id.* In other words, ComEd did not perform any post-installation tests within 90 days after installation of the Replaced Meter. *Id.*

## **C. ComEd's Testing of the Replaced Meter.**

### **1. How the Replaced Meter Functioned and Billed.**

Understanding ComEd's pre-installation programming of the meter and its pre-installation testing requires an understanding of how the Replaced Meter functioned. (Stipulation, par. 22).

The Replaced Meter was a solid state meter. (Stipulation, par. 24). A solid state meter does not have a mechanical wheel that turns as current runs through it. *Id.* Instead, a solid state meter contains a "meter engine" that calculates the energy flowing through the meter. *Id.* Further, a solid state meter has a "virtual disk" that imitates the function of a mechanical wheel. *Id.* The virtual disk "revolves" once for every 1.2 watt-hours that flow through the meter. (Stipulation, par. 25).

The meter engine sends information to the meter's "microcontroller." (Stipulation, par. 24). For every 1.2 watt-hours of energy flowing through the meter, the microcontroller sends a "test pulse" to the "optiport," which is an external port on the meter from which readings can be taken (Stipulation, par 25). Further, in the absence of a scaling factor, the microcontroller sends one "billing pulse" to the meter's internal billing memory for every 0.05 watt-hours. *Id.* 24 billing pulses equate to 1.2 watt-hours ( $0.05 \times 24 = 1.2$ ), and therefore equate to one revolution of the virtual disk. *Id.* Since the virtual disk revolves one time for every 24 billing pulses, the meter has a "counts per revolution" ("CPR") of 24 in the absence of a scaling factor. (Stipulation, par. 26).

A scaling factor changes the number of pulses that are sent to the billing memory for billing purposes, but it does not change the amount of power associated with a revolution of the virtual disk or the amount of power per test pulse. (Stipulation, pars. 27, 29). A scaling factor of

six means that the microcontroller sends one pulse to the billing memory for every six billing pulses. (Stipulation, par. 27). Therefore, with a scaling factor of six, the microcontroller sends only four pulses to the billing memory for every revolution of the virtual disk (*i.e.*,  $24 \text{ billing pulses} \div 6 = 4$ ), or a CPR of four. *Id.* Similarly, a scaling factor of two means that the microcontroller sends one pulse to the billing memory for every two billing pulses; so the microcontroller sends 12 pulses to the billing memory per revolution of the virtual disk (*i.e.*,  $24 \text{ billing pulses} \div 2 = 12$ ). (Stipulation, par. 28). Accordingly, a scaling factor of two leads to a CPR of 12. *Id.*

A meter reader puts a probe in the optiport to download the number of pulses sent to the internal billing memory. (Stipulation, par. 30). ComEd claims that it mis-programmed the Replaced Meter with a scaling factor of 6 (corresponding to a CPR of 4) rather than a scaling factor of 2 (corresponding to a CPR of 12). (Stipulation, par. 33). Therefore, according to ComEd, the microprocessor sent only one-third as many pulses to the billing memory as it should have; when meter readers read the Replaced Meter, it reported fewer billing pulses, and less electricity usage, than it should have. *Id.*

## **2. ComEd's Pre-Installation Testing.**

On July 19, 2005, the date of ComEd's pre-installation testing, ComEd only tested whether the microcontroller sent a test pulse to the optiport for every 1.2 watt-hours of power flowing through the meter. (Stipulation, par. 34). ComEd did not test whether the microprocessor was sending the correct number of pulses to the billing memory, or whether a meter reader would download the correct number of pulses, when reading the meter. (Stipulation, par. 35). Because ComEd never tested whether the Replaced Meter's billing memory accurately reported the

proper number of pulses when read, it never tested the Replaced Meter for accuracy, as required by Regulation 410.160.

ComEd itself admits of record in this Docket that it is the number of pulses sent to the billing memory, which depends on the scaling factor, that determines whether the meter is accurately measuring usage:

“Meter 140384879 [i.e., the Replaced Meter], installed in 2005, was programmed with incorrect scaling factors thereby creating incorrect counts per revolution (CPR) and altered the metered usage. Meaning, the [Replaced Meter] did not register all of the usage flowing and underbilled Amcor’s account by almost one third [*sic*].

Letter dated December 8, 2009, C. Bartel (ComEd) to T. Missbach (Amcor), attached as Exhibit B to Stipulation.

#### **D. Facts Related to the Motion in Limine**

The Stipulation contains a section titled “Undisputed Testimony, ” which is described as testimony that “ComEd states” but which “Amcor admits that it does not have any evidence to dispute” because ComEd threw away the Replaced Meter. The Stipulation also notes that at the outset of this Docket Amcor intended to file, and did file, the Motion in Limine to exclude some or all of this evidence. *See* Footnote 3 to the Stipulation.

This is the only portion of the Stipulation that contains ComEd’s allegations as to what was wrong with the meter. In particular, paragraph 36 of the Stipulation provides:

On September 24, 2009, Thomas Rumsey, System Meter Mechanic Special of ComEd tested Replaced Meter Number 140384879 and determined that one test pulse was sent to the optiport for every 1.2 W-hours of power flowing through the Replaced Meter. He then conducted a “long diagnostic” examination and found that the scaling factor was incorrect. 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 attached hereto as Exhibit I.

Paragraph 37 of the Stipulation states that ComEd discarded the meter on October 25, 2010, only one day after the Commission closed the informal complaint because it could not resolve the dispute between ComEd and Amcor (see Stipulation, paragraph 20). Paragraph 38 of the Stipulation states that no one at ComEd told Mr. Rumsey to retain the meter, even though ComEd’s counsel was involved in the ongoing dispute) see Stipulation, paragraph 19, and Exhibits D, E and F to the Stipulation).

Amcor therefore made its Motion in Limine to prohibit ComEd from introducing any evidence regarding its testing, including Paragraph 36 of the Stipulation, because ComEd had denied Amcor the ability to conduct its own tests of the meter by throwing it away in the middle of the parties’ dispute.

### **III. ERRORS IN THE COMMISSION’S ORDER**

#### **A. The Commission Erred in Considering Matters That are Not Part of Record in This Docket**

Section 10-103 of the Act provides that:

“...any finding, decision, or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding...”

220 ILCS 5/10-103.

Page 2 of the Bench Memo, on which the Commission in part relies in making its decision, states that “the [Stipulation]...includes testimony from Thomas Rumsey, System Meter Mechanic Special of ComEd, which shows that the meter was **registering** power usage accurately at all times that it was on Amcor’s premises.” (Bench Memo, pg. 2; emphasis added). The Stipulation contains no testimony either by Mr. Rumsey or any other person, nor does the Stipulation state that the Replaced Meter was “registering power usage accurately at all times” it was on Amcor’s premises. To the contrary, the only times that the Stipulation mentions “registering” is when ComEd admits in its correspondence that the Replaced Meter was under-registering usage. This is the same correspondence in which ComEd admits that the meter was “faulty” and under-counted pulses. Paragraph 36 of the Stipulation simply states that when Mr. Ramsey checked, one test pulse measured 1.2 watt-hours.

The Order also states that “...the record shows that when ComEd tested the meter for accuracy, during its pre-installation test and on September 24, 2009 when Mr. Rumsey tested the meter after it was removed, the meter **tested accurate.**” (Order, pg. 21; emphasis added).

Again, the Stipulation makes clear that, prior to installation, ComEd only checked test pulses, and that Mr. Rumsey initially only checked test pulses; ComEd did not check whether the Replaced Meter reported accurate usage information. The counter-intuitive idea that a meter that under-reports usage by two-thirds is supposedly accurate is addressed below.

The Order also goes outside the record when it purports to describe how meter testing works:

When a meter is tested to determine if it meets the accuracy requirements specified in this section [410.150], it is connected to a power source and compared to another meter, a standard meter, that has been previously verified as accurate. The standard meter is also connected to the same power source and electricity is sent through both meters simultaneously for the same duration and at the same voltage. The meter’s registration

of energy is then compared to the standard meter's registration of energy to determine the meter's percentage of accuracy.

Order, pg. 21.

The Commission's statement has no support in the Stipulation. Rather, it comes directly from ComEd's briefs.

The Order also strays from the record when it attempts to blame the under-billing on ComEd's billing software. In particular,

“In this situation, the billing software recognized the data was from a transformer meter and that it should have a CPR of 12. Therefore, it assigned a value of 0.1 watt-hours to the number of pulses downloaded by the meter reader. ... The billing software misinterpreted how it should bill the usage recorded on the meter, which is why the billing of Amcor's usage was wrong by two thirds and it was only billed for one third of the power that it actually used.”  
(Order, pg. 23).

Nothing in the Stipulation supports these statements; indeed, the Stipulation makes it clear that the meter was the source of the problem. ComEd did not even make this claim and its correspondence admits that the meter was “faulty,” that the meter “under-counted,” and that the meter “under-registered.” (Stipulation, Exhibit B).

**B. The Commission Erred in Holding That Section 410.200(h)(1) Does Not Apply Unless a Meter Test Shows That the Meter Was Inaccurate.**

The Commission ruled that Section 410.200(h)(1) applies only “whenever a test pursuant to Section 410.150 has been conducted and the results of such test show there is an ‘average error of more than 2%.’” (Order, pg. 20). This statement is incorrect because it contradicts the express language of the Regulation. In addition, although not a prerequisite, the Replaced Meter was inaccurate.

**1. Section 410.200(h)(1) Contains No Prerequisites to Be Effective.**

Section 410.200(h)(1) provides as follows:

h) Billing adjustments

1) For electric utilities. Any correction to metering data for over-registration shall be accompanied by an adjustment to customer billing by any electric utility that rendered service that is affected during the period of adjustment. 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.**

83 Ill. Adm. Code Section 410.200(h)(1). (Emphasis added.)

This Regulation prohibits adjustment of a bill for under-registration if the “testing and accuracy requirements” of Part 410 of the Regulations have not been met. The Commission’s conclusion reads the term “testing” right out of the Regulation in violation of basic rules of statutory construction (e.g., avoid interpretations that make a nullity out of parts of statutory language), not to mention the abandonment of ordinary reading skills. To begin with, this part of the Order renders part of 410.200(h)(1) a nullity, since the prohibition against adjusting a customer’s bill would never apply in any circumstance in which a utility simply ignored its obligation to test a meter. Beyond the Order’s contravention of the obvious purpose of the regulation, “[s]tatutes 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 (1<sup>st</sup> Dist. 1996). *See also, Aurora Manor, Inc. v. Department of Public Health*, 2012 WL 4463237, at 3 (Ill. App., 1<sup>st</sup> Dist. 2012). Here, ComEd failed to conduct the testing required by the Commission’s Regulations. The idea that ComEd could ignore the Commission’s testing requirements and be held not to have violated a Commission Regulation that specifically requires testing makes no sense whatsoever.

This error in construing the Regulation may not matter because the Replaced Meter was not accurate in any event, at least not according to ComEd. ComEd asserts that the Replaced Meter reported only one third of Amcor's usage. ComEd admitted that the meter was "faulty." ComEd admitted that the Replaced Meter under-counted the pulses and under-registered usage. To conclude that the Replaced Meter was accurate in these circumstances, as the Order does, is clear error and makes a mockery of the Commission's Regulations.

The Order reaches this erroneous conclusion by adopting ComEd's argument that "accuracy" only refers to test pulses, not to what the meter actually reports when read. (*See* Order, pgs.21-23). Yet there is nothing in the Commission's Regulations to support such a narrow, and indeed bizarre, definition of the word "accurate." The Order does contain repeated references to Regulation 410.150, but it does not cite any part of Regulation 410.150 that indicates a utility should look only at test pulses, and not at the reporting of the meter when read. There is a good reason for this – Regulation 410.150 says nothing that could be construed, or even misconstrued, to indicate that the information the meter reports when read is irrelevant, and only test pulses matter.

Common sense and Illinois law make it clear that the Order's adoption of ComEd's special and counter-intuitive definition of the term "accurate" is wrong as a matter of law. First, statutes must give words their ordinary meanings unless defined elsewhere. It should come as no surprise that, under basic Illinois law, the words of a statute or regulation must be given "their plain and ordinary meaning." *Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc.*, 2012 WL 4858995, at 6 (1<sup>st</sup> Dist. 2012). In ordinary speech, any assertion that a meter that reports only one third of usage is "accurate" would be patently absurd. Statutes must also be interpreted to further their purpose. *Id.* Regulations requiring accuracy testing can only have one purpose: to

ensure that meters report usage correctly. Regulation 410.155 makes this explicit and requires ComEd to test meters after installation to determine if the meter is “accurately measuring customer energy consumption,” and not just whether it they generate a proper test pulse. Under ComEd’s and the Order’s view, a meter could be “accurate” but nevertheless fail this test. Therefore according to ComEd and the Order, a meter could fail the test required by Regulation 410.155 but ComEd could nevertheless adjust a customer’s bill despite 410.200(h)(1) -- an absurd result.

Equally significant, ComEd’s actions are inconsistent with this result. According to ComEd’s December 8, 2009 letter, when it became concerned about the accuracy of the Replaced Meter, it installed a recorder meter “to meter power at the transformer.” ComEd did not rely on test pulses.

**C. The Commission Erred in Holding That Comed Did Not Violate Section 410.200(h)(1) in this Case.**

The Commission’s failure to hold in this Docket that ComEd violated Section 410.200(h)(1) is contrary to the undisputed evidence. Although the Order refuses to make any finding, it is obvious that ComEd failed to comply with the “testing ...requirements of this part.” (Regulation 410.200(h)(1)). ComEd failed to conduct any post-installation test within 90 days of installation as required by Regulation 410.155. It is therefore necessary to determine whether the pre-installation test, which never tested whether the Replaced Meter was reporting the correct customer usage when read, was adequate (although a conclusion that it was would be wrong).

The Order nevertheless claims that Regulation 410.200 (h)(1) does not apply because the Replaced Meter did not under-register Amcor’s usage even though it reported only one third of that usage. (Order, pgs. 21-22). This conclusion appears to be driven by the Order’s adoption of ComEd’s special definition of “accurate,” namely, that even though the Replaced Meter under-

registered usage by two thirds, it was still “accurate.” This leads to undeniably absurd results. Suppose that ComEd had bothered to comply with Regulation 410.155 in 2005 (after installation of the Replaced Meter) and installed a recorder meter at the transformer, just as it did in the December 8, 2009 letter. Suppose further that ComEd had discovered then that the Replaced Meter was under-billing Amcor but, for some reason, had done nothing about it. Under ComEd’s and the Order’s reasoning it could still adjust Amcor’s bill because Regulation 410.200(h)(1) would not apply. The Order cannot create specialized definitions of terms without any support in the Regulations to reach a result that obviously thwarts their intent.

**D. The Commission Erred in Refusing to Consider the Merits of Amcor’s Motion in Limine and in Holding That Amcor Waived its Objection to the ALJ’s Denial of Amcor’s Motion in Limine Because it Did Not Then Seek Interlocutory Review.**

The Order does not mention the Motion in Limine, even though Amcor’s Exceptions to the ALJ’s proposed order contains extensive argument and references concerning the Motion in Limine. The Order does not even reference the Motion in Limine as something that Amcor argued. The Commission apparently adopted the ALJ’s position in the Bench Memo, which stated that Amcor should have made an interlocutory appeal at the time of the ALJ’s original ruling pursuant to Commission Rule 200.520 (83 Ill. Adm. Code Section 200.520), and therefore Amcor waived its objections to denial of the motion. This is clearly wrong because Rule 520 makes an interlocutory review voluntary, not mandatory. Consistent with Illinois Supreme Court Rule 304 and F.R. Civ. P. 54, Commission Rule 520(a) provides in pertinent part that:

Any ruling by a Hearing Officer...**may** be reviewed by the Commission, **but failure to seek immediate review shall not operate as a waiver of any objection to such ruling.**

83 Ill. Adm. Code Section 520(a). (Emphasis added).

Therefore, Rule 520(a) specifically prohibits exactly what the ALJ proposed (and the Commission adopted) in this Docket. Accordingly, this ruling by the Commission should be reversed, and for the reasons set forth above, Amcor's Motion in Limine should be granted.

**E. The Commission Erred in Not Granting Amcor's Motion in Limine.**

As described below, the Commission should have granted Amcor's Motion in Limine because (a) ComEd had a duty to preserve the Replaced Meter, which duty ComEd breached by throwing away the Replaced Meter one day after the Commission closed the Informal Complaint, and (b) the only way to level the playing field and remedy the prejudice Amcor suffered as a result of ComEd's breach of duty is to prohibit ComEd from presenting evidence or argument regarding its post-service testing and the results thereof.

**1. ComEd Had a Duty to Preserve the Replaced Meter.**

Sixteen years ago, the Illinois Supreme Court made it clear that potential litigants have a duty to take reasonable measures to preserve the integrity of relevant and material evidence before litigation is filed. *Shimanovsky v. General Motors Corporation*, 181 Ill.2d 112, 121-22, 692 N.E.2d 286, 290 (1998). In *Shimanovsky*, the Court upheld the trial court's decision to sanction the plaintiff under Illinois Supreme Court Rule 219(c) for destructive testing of an allegedly defective part that caused a car accident, even though the testing occurred before the litigation was commenced. The Court noted that Rule 219(c) authorizes sanctions only for unreasonable failure to comply with a court order, but held that the Rule nevertheless authorizes a court to impose sanctions for pre-litigation conduct:

Thus, the appellate court has determined that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court's concern that, were it unable to sanction a party for the presuit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. [citations omitted] We agree with the appellate court that a potential litigant does indeed owe such a duty.

*Id.* The *Shimanovsky* Court held that the plaintiff's pre-litigation destructive testing violated its duty to preserve evidence.

The rules provide that both parties are entitled to full disclosure by discovery of any relevant matter, including matters which relate to the defense of a party. 166 Ill.2d R. 201(b)(1); *Yuretich v. Sole*, 259 Ill. App. 3d 311, 317, 197 Ill. Dec. 545, 631 N.E.2d 767 (1994). Moreover, either party may seek production of evidence for testing whenever the condition of such item is relevant. 166 Ill.2d R. 214. Thus, defendant had a right to perform tests on the power-steering components in order to formulate its defense to the products liability action. However, plaintiffs' destructive testing interfered with defendant's right to such discovery. Under the specific circumstances of this case, we cannot say that the trial court abused its discretion in determining that plaintiff's actions were an unreasonable noncompliance with discovery rules.

181 Ill.2d at 122-23, 692 N.E.2d at 290. *See also, Kambylis v. Ford Motor Company*, 338 Ill. App. 3d 788, 793-94, 788 N.E.2d 1, 5 (1<sup>st</sup> Dist. 2003) (duty to preserve allegedly defective automobile before litigation); *American Family Insurance Company v. Village Pontiac-GC, Inc.*, 223 Ill. App. 3d 624, 626-27, 585 N.E.2d 1115, 1118 (2<sup>nd</sup> Dist. 1992) (duty to preserve automobile that allegedly caused fire, even if no preservation order has been entered); *Graves v. Daley*, 172 Ill. App. 3d 35, 38, 526 N.E.2d 679, 681 (3<sup>rd</sup> Dist. 1988) (duty to preserve allegedly defective furnace after fire but before litigation); *American Family Insurance v. Black & Decker*, 2003 WL 22139788, at 2, CCH Prod. Liab. Rep. ¶ 16,748 (N.D. Ill. 2003) (duty under Illinois law to preserve fire scene before litigation); *Lawrence v. Harley-Davidson Motor Company, Inc.*, 1999 WL 637172, at 2 (N.D. Ill. 1999) (disassembly of allegedly defective motorcycle before filing suit violated Illinois state law duty to preserve evidence).

The policy concerns raised in these precedents are identical to those confronting the Commission in this Docket: a potential litigant should not be able to circumvent discovery rules or escape liability simply by destroying the evidence prior to the filing of a formal complaint. Based on its inherent power to regulate the dispute process, and in light of *Shimanovsky* and the other cases cited above, this tribunal can and should sanction ComEd for throwing away the meter shortly before the filing of the formal complaint in this dispute. The Commission's own Rules of Practice follow the Illinois rules of evidence: "In contested cases...the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed." 83 Ill. Adm. Code Section 200.610(b). Further, the Commission's Practice Rules are nearly identical to the Illinois Supreme Court Rules governing discovery. For example, Commission Rule 420 (83 Ill. Adm. Code Section 200.420) tracks Ill. S. Ct. Rule 219(c) and provides in pertinent part:

If a person fails to comply with...a discovery order...or if the person who fails to comply is a party to the proceeding,...the Hearing Examiner may...refuse to allow the party to support designated claims or defenses, or take such further action as may be appropriate under the circumstances and as provided by law.

Ill. S. Ct. Rule 219(c) provides in pertinent part: "If a party...fails to comply with any order entered under these rules, the court, on motion, may enter...such orders as are just, including, among others, the following:... (iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint or defense relating to that issue; (iv) That a witness be barred from testifying concerning that issue...." Further, the Commission's Practice Rules also provide for written discovery, including the inspection of property, comparable to that available under the Illinois Supreme Court Rules. Rule 340 (83 Ill. Adm. Code 200.340) provides that "It is the policy of the Commission to obtain full disclosure

of all relevant and material facts to a proceeding.” *Cf.* Ill. S. Ct. Rule 201(b)(1), cited in *Shimanovsky* (see above). Further, Rule 360(c) (83 Ill. Adm. Code 200.360(c)) provides:

...[A]ny party may utilize written interrogatories to other parties, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].

In addition, Commonwealth Edison knew or reasonably should have known that further litigation was at least likely, if not obviously imminent. Amcor had refused to pay ComEd’s Back-Charge Claim and had been disputing it continuously since December 2009 (Attachment A, Stipulation, ¶ 19 and Exhibits C, D, E, F and G). The parties had engaged in settlement discussions, which failed. ComEd had threatened to shut off the electricity at Amcor’s Mundelein Plant, and Amcor had responded by filing an Informal Complaint with the Commission. (Attachment A, Stipulation, ¶¶ 19 and 20). The Commission closed the Informal Complaint precisely because it was unable to resolve the parties’ dispute (Attachment A, Stipulation, ¶¶ 4 and 20), so the dispute was patently very much alive at that point. Then, on the very next day after the Commission closed the Informal Complaint, ComEd threw away the Replaced Meter. (Attachment A, Stipulation, ¶¶ 20 and 37). Indeed, ComEd did not threaten to shut off Amcor’s power after the Informal Complaint was closed, which was the obvious next step if ComEd, sitting on a bill it considered long past due, thought no further legal proceedings would occur. The next step for Amcor was even more obvious, to file a formal complaint, which it did.

**2. The Commission Should Deny ComEd the Right to Use the Type of Evidence It Prevented Amcor from Obtaining.**

Both Illinois law and basic principles of fairness provide that because ComEd’s actions prevented Amcor from testing the Replaced Meter, ComEd should not be able to use its own

tests of the Replaced Meter. “As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it.” *Village Pontiac*, 223 Ill. App. 3d at 627-28, 585 N.E.2d at 1118-19. *See also*, *Kambylis*, 338 Ill. App. 3d at 798; 788 N.E.2d at 8 (holding that access to photographs and some parts of defective product were inadequate where “the most important evidence”—the product itself—is unavailable.); *Lawrence*, 1999 WL 637172 at 2 (videotape of disassembly of motorcycle was not a substitute for allowing a party to conduct its own inspection of the motorcycle). ComEd’s destruction of the key evidence in this case deprived Amcor of the ability to conduct any tests of the Replaced Meter. ComEd has thus made it impossible for Amcor to respond to ComEd’s claims that the Replaced Meter under-billed, or that ComEd had programmed the wrong scaling factor into it.

Only one action can negate the prejudice that ComEd has inflicted on Amcor: prohibit ComEd from presenting claims and evidence that, because of ComEd’s actions, Amcor cannot rebut—namely, the claims that the meter under-billed and had an improper scaling factor, as well as ComEd’s alleged testing results.

Under Illinois law, a tribunal looks to the following factors in determining the appropriate sanction:

- (1) the surprise to the adverse party;
- (2) the prejudicial effect of the proffered testimony;
- (3) the nature of the testimony or evidence;
- (4) the diligence of the adverse party in seeking discovery;
- (5) the timeliness of the adverse party’s objection to the testimony or evidence; and
- (6) the good faith of the party offering the testimony.

*Shimanovsky*, 181 Ill.2d at 124, 692 N.E.2d at 291. These factors, which incorporate basic fairness into the analysis, militate against admission of ComEd’s test evidence and its assertions that the Replaced Meter under-billed.

First, Amcor was unfairly surprised because ComEd did not notify Amcor that it was going to dispose of the Replaced Meter. *See Kambylis*, 338 Ill. App. 3d at 796-97, 788 N.E.2d at 7-8 (noting that a party even has a duty to inform an opponent that evidence outside of its control is about to be destroyed).

Second, Amcor has suffered severe prejudice because the Replaced Meter is irretrievably lost and Amcor has no ability to test it; ComEd's actions prohibited Amcor from disputing ComEd's claims about the meter. *See Kambylis*, 338 Ill. App. 3d at 795, 788 N.E.2d at 6 (barring evidence related to allegedly defective automobile where automobile was destroyed because "the destruction of the evidence greatly prejudiced the defendant such that it prohibited it from effectively defending against plaintiff's claims"); *Village Pontiac*, 223 Ill. App. 3d at 628, 585 N.E.2d at 1118-19 ("Under these particular circumstances, the existence of the two wires and the photographs is not a substitute for the car, the object on which plaintiffs based the complaint."); *Lawrence*, 1999 WL 637172, at 3 (defendant could not properly defend itself absent inspection of the motorcycle's condition at time of accident).

Third, the evidence ComEd destroyed is the central piece of evidence in this case, analogous to the allegedly defective product in a products liability case. *Kambylis*, 338 Ill. App. 3d at 793, 788 N.E.2d at 5 ("Illinois courts have long held that '[t]he preservation of an allegedly defective product is of the utmost importance in both proving and defending a strict liability claim."); *Graves*, 172 Ill. App. 3d at 38, 526 N.E.2d at 681; *Village Pontiac*, 223 Ill. App. 3d at 627, 585 N.E.2d at 1118 (describing the car that allegedly started the fire as "the most crucial piece of evidence in this case"). Further, Amcor has been diligent in raising this issue and objecting to the proffered testimony.

### 3. The Evidence Indicates That ComEd Did Not Act in Good Faith.

Finally, there is evidence that ComEd did not act in good faith. To begin with, the Replaced Meter was obviously the most critical evidence in this dispute. *See, e.g., Village Pontiac*, above. Common sense dictates that the Replaced Meter should be retained until the dispute is resolved. And if common sense is not enough, ComEd's conduct reflects its knowledge of the importance of the Replaced Meter because it kept custody and control of the Replaced Meter for its own benefit so that it could test the meter. *See Kambylis*, 338 Ill. App. 3d at 794, 788 N.E.2d at 6 (“There can be little question that plaintiff and his family recognized that the preservation of the Escort was of crucial relevance to the case they intended to file against defendant because plaintiff's father went to the automotive pound to photograph the Escort prior to its destruction.”); *Village Pontiac*, 223 Ill. App. 3d at 627, 585 N.E.2d at 1118 (noting that insurance company “unquestionably” knew of importance of the automobile to potential claims because it “allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire.”). ComEd also kept the Replaced Meter while it asserted the Back-Charge Claim, while the parties were attempting to resolve their dispute, after ComEd threatened to shut off Amcor's electricity, and while the Informal Complaint was pending.

Equally significant, ComEd's lawyers were aware of and involved in this dispute. *See* Paul Neilan's February 2, 2010 correspondence to Darryl Bradford, General Counsel to ComEd; and emails from Michael Pabian, Assistant General Counsel of Exelon Legal Services, dated February 17, 2010 and August 26, 2010 (Exhibits D, E and F to the Stipulation). ComEd was represented by counsel when the parties failed at efforts to settle this dispute, when ComEd made its shut-off threat, when Amcor filed its Informal Complaint, and when that Informal

Complaint was closed without resolution. ComEd's counsel could have and should have directed ComEd personnel to retain the Replaced Meter; as the Stipulation makes clear, they did not do so. (Attachment A, Stipulation, ¶38). The obligation to preserve evidence is not some recent or obscure legal rule known only to a few specialists. Perhaps most damning of all, ComEd disposed of the Replaced Meter only one day after the Commission closed the Informal Complaint. One may very reasonably infer that someone following the progress of the dispute specifically directed that the Replaced Meter be thrown away.

Courts faced with conduct far less wrongful than ComEd's have barred parties from presenting evidence related to destroyed property. For example, in *Kambylis*, 338 Ill. App. 3d at 792-93, 788 N.E.2d at 4-5, the plaintiff alleged that a defect in his automobile's airbag system contributed to his injuries in an accident; the Court barred evidence related to the automobile and entered summary judgment in favor of the defendant because the plaintiff had received a notice before the lawsuit began indicating that the City of Chicago (which had towed the vehicle) was about to destroy the car, but the plaintiff did nothing to prevent the destruction. In Marriage of Daebel, 404 Ill. App. 3d 473, 488, 935 N.E.2d 1131, 1143-44 (2<sup>nd</sup> Dist. 2010), the Court found that the trial court abused its discretion when it did not bar the petitioner's testimony; the petitioner had failed to show up for her deposition and then raised new defenses at trial. Significantly, the Court remanded with instructions to the trial court to prohibit the petitioner from testifying even if the trial court held a new hearing. In Village Pontiac, the plaintiff had allowed a car that allegedly caused a fire to be destroyed. The Court barred all evidence concerning the condition of the car, which ultimately led to entry of summary judgment against the plaintiff. 223 Ill. App. 3d at 626, 585 N.E.2d at 1117. The Court specifically rejected the plaintiff's argument that the sanction was overly broad because some evidence of the condition

of the car remained, noting that the “Defendants would be able to observe only evidence gathered by the plaintiffs without reference to the object alleged to have caused the damage.” 223 Ill. App. 3d at 628, 585 N.E.2d at 1119. In Graves, 172 Ill. App. 3d at 37-38, 526 N.E.2d at 680-81, the plaintiff’s expert determined that a defective furnace had caused a fire, but the plaintiff then disposed of the furnace before filing suit; the Court barred the plaintiff from presenting any evidence, including expert testimony, regarding the furnace. In Black & Decker, 2003 WL 22139788, at 1, the plaintiff concluded that the defendant’s toaster had caused a fire but failed to inform the defendant before allowing the fire scene to be renovated. The Court, applying Illinois state law, barred the plaintiff from introducing evidence regarding the cause of the fire: “because plaintiff failed to preserve evidence which may have been, or shed light upon, an alternative cause of the fire, plaintiff has deprived defendant of the ability to establish its case.” *Id.*, at 2. In Lawrence, the Court followed Illinois state law in determining the appropriate sanction when the plaintiff had disassembled the motorcycle prior to filing suit. 1999 WL 637172, at 2-3. “Only a sanction barring evidence, direct or circumstantial, concerning the condition of the allegedly defective motorcycle will place the two parties on an equal footing.” 1999 WL 637172, at 3. The Court entered the sanction acknowledging that it was the functional equivalent of dismissal. *Id.*

#### **4. Impact of Granting Amcor’s Motion in Limine.**

If the commission grants Amcor’s motion in limine, then Amcor should prevail on its Complaint. First, there is no competent evidence that the meter under billed Amcor. Second ComEd’s admissions that the meter under-registered and was faulty would go un rebutted.

**F. If the Commission Ultimately Finds Against Amcor, the Commission Erred in Ordering That Amcor Pay the Alleged Backcharge Amount to ComEd.**

Finally, the Order of April 2, 2014 erroneously directs Amcor to make payments to

ComEd, when during the period at issue in this Docket Amcor had in place an election under under ComEd's Rider SBO/Single Billing Option, pursuant to which MidAmerican Energy Company ("MidAm"), Amcor's alternative retail electric supplier, bills Amcor for both electricity supply and delivery services. See Rider SBO, Ill. C.C. No. 10, Orig. Sheet No. 366. While this docket properly addressed ComEd because ComEd was providing the metering service and because it was ComEd who threatened to disconnect Amcor's service (see Ill. C.C. No. 10, Orig. Sheet No. 372, which allows ComEd to disconnect a retail customer for nonpayment), the result is not properly an order for Amcor to pay ComEd, which may not bill Amcor directly. As a result, Amcor has received demands for payment from both ComEd (made pursuant to the Order of April 2, 2014) and MidAm (made pursuant to its normal billing practices) for the same sum. See Exhibit A. Any payment by Amcor should be made in accordance with the applicable supply contracts and tariff elections, and Amcor should not have to pay the same amount twice.

WHEREFORE, Amcor respectfully requests that the Commission rehear and reconsider its Order of April 2, 2014, specifically by finding and/or ruling that:

- a. Section 410.200(h)(1) of the Commission's Regulations applies to this case;
- b. ComEd violated Commission Regulation Section 410.155 by failing to conduct a post-installation inspection of the Replaced Meter within 90 days of the installation thereof;
- c. ComEd may not adjust its bill on Amcor's account;
- d. Amcor did not waive its objection to the ALJ's ruling denying its Motion in Limine because it did not then file for interlocutory review;

- e. Granting Amcor's Motion in Limine;
- f. In the alternative, if the Commission ultimately finds against Amcor, ruling that any payment obligation by Amcor runs not to ComEd but to MidAmerican Energy Company;  
and
- g. Granting such further relief as the Commission deems proper.

**AMCOR FLEXIBLES, INC.**

Date: May 2, 2014

By: *Paul G. Neilan*

One of its Attorneys

Bradley Block  
Law Offices of Bradley Block  
401 Huehl Road  
Suite 2E  
Northbrook, Illinois 60062  
224-533-1075  
224-533-1076 (fax)  
[brad.block@bradblocklaw.com](mailto:brad.block@bradblocklaw.com)

Paul Neilan  
Law Offices of Paul G. Neilan, P.C.  
33 North LaSalle Street  
Suite 3400  
Chicago, Illinois 60602  
312-580-5483  
312-674-7350 (fax)  
[pgneilan@energy.law.pro](mailto:pgneilan@energy.law.pro)