STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Amcor Flexibles, Inc.	:	
-vs-	:	**11-0033**
Commonwealth Edison Company	:	**(on Remand)**
	:	
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).	:	

PROPOSED ORDER ON REMAND

By the Commission:

I. PROCEDURAL HISTORY

On January 11, 2011, Amcor Flexibles, Inc. ("Amcor" or "Complainant") filed a formal Complaint with the Illinois Commerce Commission ("Commission") against Commonwealth Edison Company ("ComEd" or "Respondent") challenging ComEd's charges of $62,190.07 for allegedly unbilled delivery services provided to Amcor's manufacturing facility.

The Commission entered its Final Order denying the Complaint on April 2, 2014. Thereafter, Amcor filed a Second Amended Motion for a Post-Order Stay Pending Rehearing ("Motion to Stay") and an Application for Rehearing and Reconsideration ("Application for Rehearing") on April 29, 2014 and May 2, 2014, respectively. On May 20, 2014, the Commission denied the Motion to Stay and the Application for Rehearing. Amcor subsequently filed an appeal of the Final Order and the Appellate Court issued its Opinion in which, *inter alia*, it reversed the Commission's decision and remanded it for further proceedings in order for the Commission to address the substantive merits of Amcor's Motion in Limine filed on January 26, 2012.

On March 13, 2015, the Appellate Court issued its Mandate to the Commission. On March 25, 2015, the Commission received and posted the Mandate. Pursuant to Section 10-201(e)(iv) of the Public Utilities Act ("Act"), the Commission must issue an order in a remand proceeding within six months after the issuance of the remand. A five-month extension is allowed for the taking of additional evidence. (220 ILCS 5/9-201(e)(iv)).

On April 14, 2015, a status hearing was held before a duly authorized Administrative Law Judge ("ALJ"). At the status hearing, the parties stated that they believed the Motion in Limine had been thoroughly briefed in the initial proceeding and

they therefore did not wish to file any additional briefs in response to the Appellate Court's Opinion. The record was subsequently marked "Heard and Taken".

II. BACKGROUND

On December 22, 2011, Amcor and ComEd jointly filed a Stipulation of Facts and Undisputed Testimony ("Stipulation"). In that Stipulation, the parties agreed that the Stipulation would constitute the entire evidentiary record in this matter and therefore no evidentiary hearing would be held in this proceeding. The Stipulation also notes that Amcor intended to file a Motion in Limine to exclude some or all of the section of the Stipulation entitled "Undisputed Testimony". On January 26, 2012, Amcor filed a Motion in Limine requesting that the Commission prohibit ComEd from presenting evidence or arguing that meter number 140384879 (the "Replaced Meter") under-billed or under-reported Amcor's electricity usage, that ComEd programmed the wrong scaling factor into the Replaced Meter, or from presenting similar evidence or arguments. Amcor also specifically requested that Paragraph 36 of the Stipulation be stricken and the allegations contained in that paragraph not be admitted into evidence for any purpose in this docket. The Motion in Limine was briefed by the parties and oral arguments were held on the motion on May 2, 2012. The ALJ denied the Motion in Limine on July 31, 2012.

Amcor did not file a Petition for Interlocutory Review of the ALJ's ruling. However, in its Brief on Exceptions filed on January 3, 2014, Amcor requested that the Commission reverse the ALJ's ruling denying its Motion in Limine and adopt its exceptions language granting the Complaint. On March 19, 2014, the ALJ submitted a memorandum to the Commission along with the Post-Exceptions Proposed Order recommending that the Commission deny Amcor's request to reverse the ruling. The memorandum states, in pertinent part, as follows:

> Section 200.520(a) of the Commission's Rules of Practice provides that a party may seek interlocutory review of an ALJ's ruling by filing a Petition for Interlocutory Review which must be filed within 21 days after the date of the ruling unless good cause is shown or an extension of the deadline is granted by the ALJ or the Commission. Thus, this request should have been filed as a Petition for Interlocutory Review and it should have been filed in August 2012. Moreover, Amcor never filed a request to extend the deadline for filing a Petition for Interlocutory Review and it has not provided an explanation to show good cause for not complying with the Commission's rules.

Amcor subsequently filed an Application for Rehearing in which it stated that the Commission erred in holding that Amcor waived its objection to the ALJ's ruling denying Amcor's Motion in Limine because it did not file for interlocutory review of that ruling within 21 days of its entry. Amcor argued that the Commission's 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. Amcor also argued that the Commission erred in denying the Motion in Limine and that there would

be no evidence that the Replaced Meter under-billed if the Commission granted the Motion in Limine.

Amcor filed an appeal of the Final Order after the Commission denied its Application for Rehearing. In its Opinion, the Appellate Court stated that it agreed with Amcor that it did not forfeit review of the ALJ's ruling. Specifically, the Appellate Court held that:

> The … Commission erroneously failed to consider the merits of the customer's motion in limine to bar the results of the utility's testing of an allegedly defective electric meter because the meter was discarded by the utility before the customer could conduct its own tests; as a result the appellate court was unable to review the propriety of admitting that evidence in the proceeding. The case is remanded for a hearing on the merits of the customer's motion and such further proceeding as necessary.

(Amcor Flexibles, Inc. v. Illinois Commerce Comm'n, No. 1-14-1964U, 2015 WL 428090 (Ill. App. 1st Dist. Jan. 29, 2015)).

III. COMPLAINANT'S POSITION

Amcor argued in its Motion in Limine, Reply in Support of its Motion in Limine, Brief on Exceptions, and Application for Rehearing that ComEd had a duty to preserve the Replaced Meter. Amcor stated that 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, 121-122, 229 Ill. Dec. 513, 692 N.E.2d 286 (1998)). Amcor observed that 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 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.

Amcor further observed that the Court in Shimanovsky held that the plaintiff's pre-litigation destructive testing violated its duty to preserve evidence. (See also, Kambylis v. Ford Motor Company, 338 Ill.App.3d 788, 793-794, 788 N.E.2d 1 (1st Dist. 2003) (duty to preserve allegedly defective automobile before litigation); American Family Insurance Company v. Village Pontiac-GMC, Inc., 223 Ill.App.3d 624, 626-627, 585 N.E.2d 1115 (2nd 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 (3rd 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)).

Amcor argued that the Commission can and should sanction ComEd for discarding the meter shortly before the filing of the formal Complaint in this dispute. According to Amcor, the Commission has such authority based on its inherent power to regulate the dispute process and in light of Shimanovsky and the other cases previously cited. Amcor pointed to the Commission's Rules of Practice which it argued follow the Illinois rules of evidence as reflected in Section 200.610(b) which states that: "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 200.610(b)). The Commission's Rules of Practice are also identical to the Illinois Supreme Court Rules governing discovery in Amcor's view.

Amcor also argued that ComEd knew or reasonably should have known that further litigation was at least likely, if not obviously imminent at the time the meter was discarded. Amcor noted that it was obvious that it was going to file a formal Complaint because it refused to pay ComEd's back-bill and had been disputing the bill continuously since it was issued in December 2009. (Stipulation at ¶19). The settlement discussions between the parties had failed and the Commission closed Amcor's informal Complaint because it was unable to resolve the parties' dispute. (Stipulation ¶¶4, 20). Amcor further noted that ComEd did not threaten to shutoff its service after the informal Complaint was closed which ComEd should have done if it believed there would be no further litigation.

Amcor asserted that the Commission should deny ComEd the right to use the type of evidence that it prevented Amcor from obtaining. Amcor argued that ComEd's destruction of the key evidence in this case deprived Amcor of the ability to conduct any tests of the Replaced Meter and thus made it impossible for Amcor to respond to ComEd's claims that the Replaced Meter under-billed or that ComEd programmed the wrong scaling factor into it. Amcor stated that granting the Motion in Limine as a sanction is the only action that could negate the prejudice Amcor suffered as a result of ComEd's actions.

Amcor observed that the following factors are used to determine the appropriate sanction to be imposed under Illinois law:

> (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, 229 Ill. Dec. 513, 692 N.E.2d at 286). Amcor maintained that an analysis of the facts in this proceeding using these factors shows that granting the Motion in Limine is the appropriate sanction. First, Amcor stated that it was unfairly surprised because ComEd never notified Amcor that it was going to discard the Replaced Meter. Second, Amcor has suffered severe prejudice because the Replaced Meter is irretrievably lost and it has no ability to test it, making it impossible for Amcor to dispute ComEd's claims about the meter. Third, the evidence ComEd destroyed, according to Amcor, 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 1 ("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 679; Village Pontiac, 223 Ill.App.3d at 627, 585 N.E.2d at 1115 (describing the car that allegedly started the fire as "the most crucial piece of evidence in this case")). Further, Amcor asserted that it has been diligent in raising this issue and objecting to the proffered testimony.

Finally, Amcor argued that the evidence indicates that ComEd did not act in good faith. Amcor asserted that it is clear ComEd was aware of the importance of the meter since ComEd retained the Replaced Meter for its own benefit so that it could test the meter and assert its back-bill claim during the settlement negotiations and the informal Complaint process. Amcor noted that ComEd was represented by counsel and its counsel could have and should have directed ComEd personnel to retain the Replaced Meter. Amcor stated that most damning of all, ComEd disposed of the Replaced Meter only one day after the Commission closed the informal Complaint. Amcor opined that it could be reasonably inferred that someone following the progress of the dispute specifically directed that the Replaced Meter be discarded.

Amcor averred that courts faced with conduct far less wrongful than ComEd's have barred parties from presenting evidence related to destroyed property. For example, in Kambylis, the Court barred evidence related to an automobile with an allegedly defective airbag system and entered summary judgment in favor of the defendant because the plaintiff received notice before the lawsuit began indicating the vehicle was about to be destroyed by the City of Chicago, but the plaintiff did nothing to prevent the destruction. (Kambylis, 338 Ill.App.3d at 792-793, 788 N.E.2d at 1). Additionally, in Lawrence, another example provided by Amcor, the Court following Illinois state law in determining the appropriate sanction when the plaintiff disassembled an allegedly defective motorcycle prior to filing suit, stated that "Only a sanction barring evidence, direct or circumstantial, concerning the condition of the allegedly defective motorcycle will place the two parties on equal footing." (Lawrence, 1999 WL 637172 at 3). Amcor noted that the Court in that case entered the sanction acknowledging that it was the functional equivalent of a dismissal. (Id.).

In conclusion, Amcor argued that if the Commission grants its Motion in Limine, it should prevail on its Complaint because there would be no competent evidence that the Replaced Meter under-billed Amcor. Additionally, ComEd's admission that the Replaced Meter under-registered and was faulty would go unrebutted.

IV. RESPONDENT'S POSITION

ComEd opposed Amcor's Motion in Limine and urged the Commission to deny the motion in its Response to Amcor's Motion in Limine. ComEd maintained that the Commission should not grant the motion because Amcor failed to request a Commission referee test within a reasonable time and also because ComEd's record of the test results must be part of the record in this proceeding since it is a business record.

ComEd acknowledged that the meter was discarded a day after the Commission closed the informal Complaint. It also asserted that the meter remained in its possession for 13 months after it was tested and Amcor never filed an application for referee testing during this entire time period. Thus, ComEd argued it never received notice to retain the meter.

ComEd asserted that the numerous cases and legal authorities relied upon by Amcor to support its motion are irrelevant. ComEd argued that the Commission has established rules that expressly govern what the Complainant appears to have wanted i.e., a test of the meter different from the test that ComEd performed on September 24, 2009. Section 410.190(d) of the Commission's rules specifically provides for referee testing of a customer's meter. (83 Ill. Adm. Code 410.190(d)). This requires a customer to make a written application to the Commission for such test along with a fee. The rule provides that once an entity is notified of the request by a Commission representative, it is put under a duty to "not disturb the meter in any way" according to ComEd. (83 Ill. Adm. Code 410.190(d)(2)). The rule further specifies that the entity must conduct this test under the supervision of a Commission representative within 30 days after receiving notice of the customer's request. ComEd noted that there is no provision in the rule for any other independent or third party customer meter testing.

ComEd argued that Amcor failed to act diligently in requesting referee testing under Section 410.190(d) and this failure has created the situation that Amcor complains about in its motion. ComEd stated that unwarranted delay in pursuing rights raises a number of issues in litigation that can impact the availability of witnesses and evidence, none of which is the result of anything untoward but a reality that requires due diligence. ComEd asserted that it is obvious from Section 410.190(d), that once Amcor knew there was a billing issue allegedly related to a meter, it was incumbent upon Amcor to pursue its right to request referee testing. Amcor received a letter from ComEd indicating that its meter was not registering all of its usage on December 8, 2009, therefore, ComEd stated, Amcor was effectively on notice at that time that if it had a question about the meter readings and wanted a re-test, it needed to exercise its rights under Section 410.190(d).

Moreover, ComEd contended that a reasonable complainant receiving such a letter, particularly if they were not confident in ComEd's testing, would have soon thereafter filed an application for referee testing. Amcor, however, did nothing from the time that it received the letter on December 8, 2009 until February 17, 2011 when it expressed interest in the meter during a status hearing. ComEd asserted that it had discarded the meter by the time Amcor expressed interest in it after keeping the meter for 13 months without any notice of an application for referee testing during this time. ComEd further asserted that the meter was discarded on October 25, 2010 consistent with its practice of discarding meters after one year due to limited shelf space. ComEd noted that the record shows that Mr. Thomas Rumsey, the System Meter Mechanic Specialist of ComEd, who tested the meter, was not told to retain the meter nor was he told that there was an ongoing dispute related to the Replaced Meter.

ComEd agreed with Amcor that Section 410.190(d) does not specify a deadline by which a complainant must request referee testing but ComEd maintained that the "rule of reasonableness" must apply. In ComEd's view, Amcor was under the impression that the condition of the meter was the source of the back-bill when it received the letter from ComEd on December 8, 2009, thus, it was not reasonable for Amcor to wait past the time that the meter was discarded on October 25, 2010 to request a test of the meter. If Amcor asked for the referee testing even on a date concurrent with the filing of the informal Complaint on October 4, 2010 (presumably when the negotiations had broken down), ComEd would have had notice timely enough to protect the meter.

ComEd asserted that contrary to Amcor's claims, it was reasonable for ComEd to discard the meter 13 months after testing it. ComEd stated that Amcor's assertion that ComEd preserved the meter solely for its own testing lacks merit. The meter was not discarded the day after it was tested but stored in ComEd's facility for 13 months with no request during all this time by Amcor to have referee testing done. ComEd stated that it would have taken all necessary steps to retain and "not disturb" the meter had Amcor timely pursued its rights. ComEd pointed out that there are no rules indicating how long it must retain a meter. It elaborated that its meter department's practice of discarding shelved meters after a year meets the "rule of reasonableness." Further, ComEd argued that it acted reasonably, especially given practical considerations such as shelf space, when it discarded the meter after keeping it for 13 months after testing it.

Finally, ComEd also argued that Amcor's Motion in Limine must be denied because the September 24, 2009 test of the meter resulted in ComEd making and retaining a business record of the test results as Section 410.110 of the Commission's rules require. The meter test results were kept in the ordinary course of ComEd's business and meet all of the requirements of a business record. (Chicago & A.R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N.E. 518 (1901)). According to ComEd, the record of the meter test results is a business record and the results must therefore be made part of the record in this proceeding.

V. COMMISSION ANALYSIS AND CONCLUSION

After careful reconsideration, the Commission finds that Amcor's Motion in Limine was properly denied.[1] The Commission affirms that it believes Amcor failed to establish that the sanction that it requested is warranted in this proceeding.

Amcor argued that ComEd had a duty to preserve the Replaced Meter as a potential litigant and that it should be sanctioned for discarding the meter before Amcor had an opportunity to have independent or third party testing performed on the meter. Amcor maintained that the only way to address the prejudice that it suffered due to ComEd's action is to impose a discovery sanction on ComEd pursuant to Rule 219(c). Additionally, it is Amcor's position that if the Commission grants the Motion in Limine, it should prevail on its Complaint since there would be no evidence in the record to support ComEd's claims that the Replaced Meter under-billed Amcor because it was misprogrammed.

As an initial matter, contrary to Amcor's assertions, it is not entirely clear that Amcor had a right to perform independent or third party testing on the Replaced Meter. The Commission is a quasi-adjudicatory body and as such not all discovery procedures that are common place in civil litigation are applicable to cases brought before the Commission. While there is no rule that expressly prohibits independent or third party meter testing by customers, there is also no provision in the Commission's rules that provides for this type of testing. As ComEd noted, the only rule providing for customer requested meter testing is Section 410.190(d) which specifically provides for referee

[1]The Commission notes that it considered the ALJ's ruling on the Motion in Limine when the issue was raised in Amcor's Brief on Exceptions and its Application for Rehearing as reflected in the third ordering paragraph of the Final Order.

testing after a written application has been filed with the Commission. This testing may be performed on a meter after it has been removed.

Assuming *arguendo* that Amcor had a right to test the meter, the Commission is unconvinced that the Motion in Limine should be granted as a sanction. The Commission is not persuaded by Amcor's argument that ComEd knew or should have known that future litigation was at least likely, if not obviously imminent, after the informal Complaint was closed. The mere fact that there was a dispute and the parties were unable to resolve it in the informal Complaint process does not in and of itself establish a basis for ComEd to anticipate that future litigation is likely. A fair amount of informal Complaints are filed against large public utilities like ComEd and many of these cases are closed after the informal Complaint process without progressing to a formal Complaint. Also, as stated by ComEd, the fact that it did not take action to collect Amcor's outstanding balance after the informal Complaint was closed could be attributed to many things, including simply oversight. Accordingly, there is insufficient evidence to support the inference that ComEd knew or should have known that future litigation was likely after the informal Complaint was closed.

Additionally, as stated in Shimanovsky, "a party is not automatically entitled to a specific sanction just because evidence is destroyed or altered." (Shimanovsky, 181 Ill.2d at 127, 229, Ill. Dec. 513, 692 N.E.2d at 286). Rather, the sanction must be just and the unique factual situation that each case presents must be considered. (Id.). An analysis of the factors noted by Amcor to determine what sanction, if any, should be imposed shows that granting the Motion in Limine is not appropriate in this proceeding. The Commission believes that when the facts of this case are applied to these six factors it is clear that most of the factors weigh in ComEd's favor.

First, it does not appear that the facts support Amcor's claim that it was unfairly surprised. Although it was not given notice that the meter would be discarded by ComEd it also never made any attempt to preserve the Replaced Meter which it has argued is the key evidence in this proceeding. It was aware as far back as December 8, 2009 when it received a letter from ComEd regarding the back-bill, that there was a billing issue and that ComEd alleged that a diagnostic read showed the meter was misprogrammed. However, despite the fact that Amcor was represented by counsel since at least 2010, it never inquired about the meter or ComEd's retention policy for meters, or requested to hold the meter or have a referee test performed before engaging in settlement negotiations and filing the informal Complaint. Similar to the defendant in Shimanovsky, Amcor's claim of surprise highlights its own lack of diligence in seeking discovery and preservation of evidence that it describes as critical to its case.

Second, if Amcor had a right to perform additional testing on the meter, it may be true that it suffered some degree of prejudice because it could not test the meter once it was discarded. The record of the test results, however, was retained by ComEd and available for Amcor to review. Unlike two of the cases, Kambylis and Lawrence, cited by Amcor which hold that evidence such as a photograph and a videotape are not sufficient substitutes for the actual missing evidence in those cases, the record of the meter test results could have assisted Amcor in developing its case. The meter test was not performed in preparation for litigation. ComEd appears to have conducted the investigation of the Replaced Meter after receiving complaints from Amcor of high bills

after the Replaced Meter was removed. Moreover, as a regulated public utility, ComEd was required to perform the meter test pursuant to the Commission's rules. And the record of the test was made and retained by ComEd as required under the Commission's rules and in the ordinary course of business pursuant to 83 Ill. Adm. Code 420.290 and 83 Ill. Adm. 410.110 as noted by ComEd.

Further, meter test results proffered by public utilities in consumer complaint cases carry a significant indicia of credibility since they are made and retained in accordance with the Commission's rules. More importantly, Amcor's argument that it suffered severe prejudice because it was deprived of the ability to test the Replaced Meter is weakened considerably by its assertion in its Reply in Support of its Motion in Limine that one of the reasons it did not need to test the meter during settlement negotiations was that it had a completely independent ground for defeating ComEd's claim – its allegation that ComEd failed to conduct the pre- and post- installation testing required under 83 Ill. Adm. Code 410.155 and 83 Ill. Adm. Code 410.160.

Third, as noted above, although the meter was discarded, the record of the test results, which was made and retained as required by the Commission's rules, was available. Additionally, while the meter may have had some probative value to allow Amcor to dispute ComEd's claims that the meter under-billed, Amcor had another completely independent argument that it could pursue in its attempt to prevail on its Complaint as noted above.

Fourth, as previously discussed, the record does not support Amcor's assertion that it diligently sought discovery of the meter. Amcor was made aware of the back-bill issue when it received ComEd's December 8, 2009 letter; it was represented by counsel as early as February 2010; and it believed the meter was the key evidence needed to dispute ComEd's back-bill, yet it failed to take any action regarding the meter from December 8, 2009 to the date it was discarded on October 25, 2010. It did not inquire about the meter or seek referee testing or the testing that it says it was deprived of by ComEd's actions. Further, unlike the cases cited by Amcor to support its position, this case involved settlement negotiations and an informal Complaint, which is a unique aspect of the Commission's administrative process, before the formal Complaint was filed. Therefore, it would appear that it was in Amcor's best interest to inquire about the meter and perform the additional testing it deemed necessary in preparation for the negotiations and informal Complaint process.

Fifth, Amcor appears to have objected to the testing evidence in a timely fashion. Although Amcor did not directly dispute the meter test results early on, it appears Amcor's counsel disputed the back-bill which was based on the test as early as February 2, 2010.

Sixth, the Commission acknowledges the fact that the meter was discarded a day after the informal Complaint was closed may appear suspicious, however, there is no evidence in the record that ComEd acted in bad faith when Mr. Rumsey discarded the meter. There are no Commission rules that govern how long ComEd is required to retain meters. The meter had been retained by ComEd for 13 months after it tested the meter and ComEd retained the record of the test results consistent with the Commission's rules. The record shows that Mr. Rumsey was not aware of the ongoing dispute involving the meter when he discarded it and he was not told to retain the meter. Additionally, as

previously noted, ComEd is a large public utility and it is involved in a fair amount of billing disputes given its size, many of which are brought to the Commission as informal Complaints. Many of these disputes do not proceed to a formal Complaint even when the parties are unable to resolve their differences. Thus, the discarding of the meter by Mr. Rumsey after the informal Complaint was closed without resolution does not support the claim that ComEd must have discarded the meter in bad faith because it knew or should have known litigation was likely.

Finally, the Commission notes that Illinois courts have held that an order of dismissal with prejudice or a sanction which results in a default judgment, which is what Amcor essentially seeks, is a drastic sanction that should only be invoked in those cases where the party's actions show "deliberate, contumacious or unwarranted disregard of the court's authority". (Shimanovsky, 181 Ill.2d at 123, 229 Ill. Dec. 513, 692 N.E.2d at 286); Sanders v. Dow Chemical Company, 166 Ill.2d at 67-68, 209 Ill. Dec. 623, 651 N.E.2d 1071 (1995)). As previously discussed, there is no evidence to support a finding that ComEd acted in bad faith or more specifically that its actions show deliberate, contumacious or unwarranted disregard of the Commission's authority. The record shows that the meter was discarded consistent with ComEd's practice of discarding meters after one year due to its limited shelf space. The employee who discarded the meter was not aware of the ongoing dispute and he was not alerted to retain the meter.

For the foregoing reasons, the Commission concludes that it is not appropriate to grant the Motion in Limine in this proceeding.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) ComEd is a "public utility" as defined in the Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(3) the findings of fact and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and findings of law;

(4) the Appellate Court issued its Opinion in which it reversed the Commission's Final Order denying the Complaint in this proceeding and remanded it for further proceedings in order for the Commission to address the substantive merits of Amcor's Motion in Limine;

(5) the Commission has reconsidered the substantive merits of Amcor's Motion in Limine and it concludes that Amcor failed to establish that granting the motion as a discovery sanction pursuant to Rule 219(c) is warranted in this proceeding; and

(6) the Commission finds that the Motion in Limine was properly denied by the ALJ.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Motion in Limine filed by Amcor Flexibles, Inc. was properly denied by the Administrative Law Judge on July 31, 2012.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:	July 23, 2015
BRIEFS ON EXCEPTIONS DUE:	August 6, 2015
REPLY BRIEFS ON EXCEPTIONS DUE:	August 13, 2015

Sonya Teague Kingsley,
Administrative Law Judge