STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

LAZ PARKING LTD, LLC	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 12-0324
	)	
COMMONWEALTH EDISON COMPANY	)	
	)	
Respondent.	)	
	)	
Complaint pursuant to Sections 9-250 and	)	
10-108 of the Illinois Public Utilities Act and	)	
Section 200.170 of the Rules of Practice of the	)	
Illinois Commerce Commission.	)	

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

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RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent, the Commonwealth Edison Company ("Respondent" or "ComEd"), comes pursuant to Section 200.190 (a) and (f) of the Commission's Rules of Practice and Section 2-1005 (b) of the Illinois Civil Practice Act, and respectfully moves the Illinois Commerce Commission ("Commission") to grant it summary judgment on the formal Complaint filed by LAZ Parking LTD, LLC ("LAZ Parking" or "LAZ") on May 2, 2012. ("Complaint").

In support of its Motion for Summary Judgment, Respondent states the following:

I. INTRODUCTION

The Commission will observe that this case is essentially a dispute over which law applies in the situation, Part 280 or Part 410 of the Commission's rules.[1] ComEd

[1] For the Commission's convenience, ComEd provides an Appendix. This appendix contains: (1) a copy of 83 Ill. Admin. Code 280.100; (2) a copy of 83 Ill. Admin. Code 410.200; and (3) a copy of LAZ's *Motion to*

recovered unbilled delivery services charges from LAZ Parking in accord with Part 280 of the Commission's rules. The only reason for the under-billing, as explained to LAZ, was an "incorrect meter constant," in ComEd's billing software. (Complaint, Ex. D).

LAZ, however, tries to allege "meter error" under Part 410 of the Commission's rules and seeks as its relief under a subsection of that rule, the amounts it claims (directly or indirectly) to have paid ComEd for the under-billing, i.e., $259,937.85. (LAZ Complaint at page 11, subsection (b)). So, in Count II of its complaint, LAZ contends that ComEd's charges for unbilled delivery service are in violation of Section 410.200 (h)(1) and Section 410.155 of the Commission's rules. And, in Count V, LAZ claims that ComEd's charge of $36,625.07 (that Complainant alleges to have paid on or about October 4, 2010) was untimely billed under Section 280.100 and thus, unlawful.

The Commission will see that LAZ has complicated the record with a set of Sp. Ct. Rule 216 admissions.[2] (LAZ was able to obtain these ten admissions by convincing the ALJ that - despite ComEd's timely answers in opposition to certain of LAZ's statements - the hyper-technical requirements of this Court rule were better than the Commission's own rule on the subject of requests to admit, i.e., 200.410). But, as ComEd will demonstrate, these admissions are completely irrelevant and immaterial to the central question here - whether the under-billing of LAZ arose from a billing error or a meter error. Likewise, these admissions fail to provide any evidentiary support for LAZ's uncertain claim that a payment it made, alleged to be in the amount of *$36,625.07,* was for untimely

Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto with Appendix B to this Motion (Filed on e-docket in this proceeding on November 13, 2012.

[2] Rule 216 admissions are a new and novel thing at the Commission. But, even the Illinois Supreme Court does not favor Rule 216's harsh application. See Vision Point of Sale v. Haas, 226 Ill.2d 334 (2007). (Despite ComEd's best efforts to save Commission Rule 200. 410 from becoming a nullity or, alternatively, gain leave and direction to have its responses satisfy the court rule, the Rule 216 admissions stand on record).

issued "unbilled charges." (LAZ Complaint at ¶46). The facts that ComEd brings here show an altogether different situation.

When considering ComEd's motion for summary judgment, the Commission will examine the elements of the two very different laws at issue, i.e., Section 410.200 (h)(1) and Section 280.100. It will look to the pleadings, admissions and affidavits in order to ferret out the material facts that will allow the Commission to determine which law applies to the situation at hand.

Respondent provides the Commission with ample facts demonstrating that this is a case of a billing error under Part 280 (and not a meter error under Part 410). Incorporated into, and made part of this Motion are five affidavits that contain the facts in support of ComEd's motion. [3]These are: Affidavit of Thomas R. Rumsey (ComEd Ex. A with Attachment A-1.0 and Attachment A-2.0); Affidavit of Marisa Spitz (formerly Canestrini) (ComEd Ex. B with Attachment B-1.0, Attachment B-2.0, and Attachment B-3.0); Affidavit of Derrick Moore (ComEd Ex. C with Attachment C-1.0); Affidavit of Trishaun Jamison (ComEd Ex. D with Attachments D-1.0, D-2.0, D-3.0) and the Affidavit of John Selenica (ComEd Ex. E with Attachment E-1.0).

ComEd's evidence will affirmatively show the Commission that:

1. The under-billing of LAZ (for which Rule 280.100 authorizes corrected billing) arose from a defaulted meter constant in the billing software -and <u>not</u> from any inaccuracy in the meter. (Count II).

2. The amount of $36,625.07 that LAZ claims to have paid on or about October 4, 201, was for its "regular" billed service and <u>not</u> for any "un-billed charges" such that Rule 280.100 is inapplicable. (Count V).

Given its own vast technical expertise and experience, the Commission will know that an defaulted "meter constant" is nothing other than a billing error and, as such, falls

[3] These affidavits and the supporting attachments conform with the requirements of Sp. Ct. Rule 191.

under the dictates of Part 280. Thus, it will reject outright those "admissions" that muddle the record with technically illogical and untrue statements.

The entirety of what is presented here, will persuade the Commission that ComEd is entitled to judgment, as a matter of law, on both Count II and Count V of the instant Complaint.

II. PRELIMINARY MATTERS

A. Background - Procedural History

1. On May 2, 2012, LAZ filed a 5-count formal complaint ("Complaint') against ComEd challenging the Respondent's charges for unbilled service.

2. Discovery began on July 16, 2012 with LAZ's sending interrogatories and data requests to ComEd. These were responded to by ComEd on August 13, 2012 (and when LAZ counsel claimed no receipt, the responses were resent on August 21, 2012).

3. On November 13, 2012, LAZ filed, pursuant to Sp. Ct. R. 216, its "Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto." ComEd responded on December 17, 2012. LAZ filed a reply on January 11, 2012.

4. On June 7, 2013, ComEd filed a "Motion to Dismiss Complaint On the Merits" together with four supporting affidavits.(It was held in abeyance due to the pending motion filed by LAZ in connection with its Rule 216 Requests to Admit).

4. On February 13, 2014, the ALJ granted LAZ's Sup. Ct. Rule 216 Motion To Deem Certain Facts Admitted. Ten "Rule 216 admissions" were established. The ALJ further made clear that "Counts 2 and 5 will be considered for all pending motions in this docket."). (ALJ Ruling, Feb. 13, 2014).

5. One day later, on February 14, 2014, LAZ filed a "Motion to Strike Respondent's Motion to Dismiss Complaint on the Merits. (This motion had been pending in abeyance since June 7, 2013

6. On February 27, 2014, ComEd filed a "Motion to Reconsider ALJ Ruling of Feb. 13, 2014." LAZ responded on March 27, 2014 and on April 17, ComEd filed its reply.

7. On March 9, 2015, the ALJ denied ComEd's Motion to Reconsider

8. At a status hearing on March 11, 2015, ComEd was granted leave to file an "amended" motion to dismiss and a schedule was established.

9. On April 30, 2015 ComEd filed its Amended Motion to Dismiss with five supporting affidavits.

10. On May 14, 2015, LAZ filed a "Motion to Clarify, to Strike and To Continue Generally the Hearing on ComEd's Amended Motion to Dismiss."

11. Pursuant to discussion at a status hearing on May 29, 2015, ComEd submits this timely Motion for Summary Judgment.

B. Standard For Summary Judgment

Summary judgment "is an important tool in the administration of justice, and its use in a proper case is to be encouraged because its benefits inure not only to the litigants in the savings of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials. Allen v. Meyer, 152 N.E.2d 576 (1958)

It has been noted that granting summary disposition in an administrative proceeding is comparable to granting summary judgment under section 2-1005 of the Code of Civil Procedure. 735 ILCS 5/2-1005. Cano v. Village of Dolton, 250 Ill. App.3d 130, 138, 620 N.E.2d 1200 (1st. Dist. 1993). Bloom Township v. Illinois Commerce Commission, 309 Ill. App.3d 163, 722 N.E.2d 676 (1st Dist.1999).

Pursuant to Section 2-1005 (b) of the Illinois Civil Practice Act**,** a defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her. 735 ILCS 5/2-1005(b).

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 1998); Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 517-18 (1993).

Issues of fact must be material, i.e., they must be relevant to determine the outcome of the case. Facts that do not matter to the result are immaterial. Whitman v. Lopatkiewicz, 152 Ill.App.3d 332, 337, (2nd Dist.1987). Accordingly, immaterial facts, even if disputed, do not preclude the grant of summary judgment. (Id.)

C. Matters of Law

This case is a straightforward dispute rooted in a disagreement over which of two Commission rules govern in the back-billing of LAZ, i.e., Section 280.100 or 410.200 (h)(1). As such, the Commission will need to look closely at the elements of each law and determine where the facts fall in line. (For the Commission's convenience in reviewing the law, ComEd is providing copies of each rule in an Appendix to this Motion).

1. Section 410.200

For its relief on Count II of the complaint, LAZ relies on the prohibition against adjusting a customer's billing for meter under-registration "if all testing and accuracy requirements have not been met" as is set out in 410.200 (h)(1) of the Commission's rules. See Complaint at page 11, subsection b). But, this subsection does not stand alone. It is part of a bigger rule. To understand the terms used in this subsection, derive meaning from its language and determine its applicability in these premises, the Commission will need to read and consider the entirety of Section 410.200.

Doing so, the Commission will see that Section 410.200 is titled "Corrections and Adjustments for Meter Error." 83 Ill. Adm. Code 410. 200. The key term here is "meter error." When read as a whole (as it must be),4 this rule shows itself to apply only in the situation where a meter is "tested" and shows a 2% error in either under-registering or over-registering a customers's usage. See Section 410.200 (a). In such an instance, the rule requires the meter service provider (such as ComEd here) to prepare "a correction of metering data." Id. The remaining provisions, subsections (b) through (g), instruct the meter provider on the specific ways it is to prepare the requisite meter correction data depending on the results of the error found on testing, e.g., running fast or slow, etc. These provisions also detail presumptions that apply and set limits on the periods of inaccuracy to be used by the meter service provider when preparing the meter data correction data. It is only near the very end, after the preceding elements have been met, that subsection (h) (1) comes into focus. It states, in full, that:

> 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 Il. Admin Code 410.200 (h)(1).

With respect to the matter at hand, ComEd has no evidence of any of the events described in the whole of Section 410.200 (a)-(g). Nor can it be expected to prove a

[4] It is a fundamental rule of statutory construction that statutes are to be read as a whole.

negative. Hence, the Commission will look to LAZ for the facts that would establish the applicability of Section 410.200.

Inconsistency

The Commission will see an obvious disconnect or mismatch in LAZ's complaint here. In Count II, for example, what LAZ effectively is saying is that the under-billed charges it here seeks to recover from ComEd should have been billed under Rule 410.200. But, in its Count V, LAZ effectively admits the validity of Section 280.180 in respect to the under-billed charges by alleging (incorrectly) that a $36, 625.07 payment it puts into issue was untimely billed by ComEd in violation of Section 280.100's two-year restriction. These two (2) claims are legally inconsistent.

2. Section 280.100

ComEd maintains that Section 280.100 is the only law pertinent to the facts in this proceeding. 83 Ill. Admin. Code 280.100. This Rule applies in the situation where there has been an error in billing for any reason other than meter error.

In effect during the relevant time of this case, Section 280.100 of the Commission's rules was titled *Unbilled Service.* It provided, in relevant part, that:

a) A utility may render a bill for services or commodities provided to:

1) A residential customer only if such bill is presented within one year from the date the services or commodities were supplied, or

2) A non-residential customer only if such bill is presented within two years from the date the services or commodities were supplied. 83 Ill. Adm. Code 280.100.

Newly adopted Section 280.100 (a) of the Commission's rules (Previously Unbilled Service), likewise provides for the billing and payment of previously unbilled service

caused by “errors in measuring or calculating” a customer's bills. Subsection (b)(2) of this Rule specifies that:

> Bills for any utility service, including previously unbilled service, supplied to a non-residential customer shall be issued to the customer within 24 months after the provision of that service to the customer. 83 Ill. Adm. Code 280.100 (b)(2)

ComEd’s affidavits will show the Commission that the under-billing of LAZ was for reason of an incorrect meter constant in its billing system. As this is a “billing error,” Section 280.100 is the pertinent law in this proceeding.

III. ARGUMENT ON FACTS AND LAW

On a motion for summary judgment, a court will consider the “affidavits,” if any, submitted by the parties. 735 ILCS 5/2-1005(c). The facts set out in the five affidavits that ComEd’s provides to the Commission here, show that Section 280.100 is the only relevant law that governs in the situation of LAZ being under-billed for usage.

ComEd’s facts will show the Commission the nature of the billing error (a default meter constant in ComEd’s billing systems); how the billing error revealed itself (via a meter constant discrepancy report generated for the Billing Department); how the billing error was verified and corrected in ComEd’s billing systems (by a technician’s on-site visit to determine the size/type of current transformers needed to set the meter constant); and, how the default meter constant resulted in the under-billing of LAZ for its actual usage. Further, ComEd’s affidavits will show the Commission that the 2-year corrected billing of LAZ, based on an incorrect meter constant, was fully compliant with the provisions of Section 280.100.

A. Respondent's Evidence - COUNT II

It is "undisputed" that LAZ is a non-residential customer. It is further "undisputed" that on October 28, 2010, ComEd employee Vanessa Williams-Anderson sent LAZ Parking a letter explaining, in part, that:

> Our records indicate you have been billed for electricity recorded on meter 141362866 located at 25 N Michigan, Chicago, Illinois, with an **incorrect meter constant** that resulted in your being **billed for less electricity than you actually used**. (Complaint, Ex. D) (emphasis added).

The term "meter constant" is key to this case. It is a technical term. It is a term that absolutely must be defined, on record, in this proceeding.5 Rule 702 of the Illinois Rules of Evidence states that:

> **If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.**

Mr. Rumsey, a Meter Mechanic Special, with over 23 years of metering experience defines what a "meter constant" is, and his expertise shows that a meter constant has nothing to do with the meter itself, i.e., it is not a meter function. (ComEd Ex. A, Rumsey Aff. at ¶7). He explains that it is simply a multiplier, critical to actual-usage billing, when the customer's meter is of a type associated with current transformers (CT's) (Id. at ¶6).

There is no other definition of "meter constant" on record. Hence, Mr. Rumsey's definition of a meter constant is "undisputed" and raises no genuine issue of material fact.

1. The Under-Billing of LAZ Arose from an Incorrect Meter Constant in ComEd's Billing Software (and Not From a Faulty Meter.)

[5] Even as the Commission will know what a meter constant is, it is essential that the record contains this evidence.

Mr. Rumsey identifies Meter No. 141362866 as being a "transformer-rated meter." (ComEd Ex. A, Rumsey Aff. at ¶ 4). This type of meter means that the customer is using more current than any of ComEd's meters can actually record. (*Id.*) Thus, a piece of equipment known as current transformer ("CT") is required for each of the three phases that supply power to the customer. [6]The CT "steps down" the current being used to the meter at a certain ratio. (Id. at ¶ 6) Mr. Rumsey offers the example where the ratio is 3000:5 amps or 600:1. In this example, he explains, it means that for every 600 kWhs used by the customer, only 1 is registered on the meter. (Id.) It is for this reason that a multiplier, i.e., a "meter constant," is needed for actual-usage billing of the customer. (Id.)

Mr. Rumsey shows the Commission that certain specifics of the current transformer ("CT") - and nothing in the meter itself - is what will determine the correct "meter constant" for ComEd's billing of the customer. As he puts it, a meter constant is "not a meter function." (Id. at ¶ 7). Mr. Rumsey explains that a meter constant is not something programmed into a ComEd meter because up until the time the meter is installed at a customer's premises, there is just no way to know what "size" or "type" of current transformer will be associated with that meter. (Id.). According to Mr. Rumsey, the specifics of the current transformer, i.e., type, size, etc., (needed to set the meter constant into the billing system) are first confirmed upon meter installation and then entered into ComEd's Customer Information Management System ("CIMS") by the ComEd technician who installs the meter. (*Id.*). This billing system will then generate the meter constant. (*Id.* at 7).

[6] LAZ's Complaint suggests an awareness of this CT equipment. It admits that the subject meter is connected to current transformers ("CT's) such that current does not pass through the meter but through the CT's. See Complaint at ¶¶ 21 - 22. Another undisputed fact is that meter No. 141362866, installed at LAZ's parking garage located at 25 N. Michigan Avenue, is an instrument transformer metering installation. (Complaint at ¶ 22).

Even though meter inaccuracy was not the reason for the ComEd's back-bill of LAZ Parking, Mr. Rumsey assures the Commission that Meter No. 141362866 was accuracy-tested before being installed at LAZ's premises (*Id*. at 10). Attached to his affidavit is a copy of the meter test report for Meter No. 141362866. This record indicates that the subject meter was tested on October 25, 2007 (prior to its installation on December 14, 2007), and details the results showing that the meter passed testing (*Id*. at 10).

To remove all doubt, Mr. Rumsey explains that no meter test or installation inspection would have shown an incorrect meter constant in the way that LAZ would suggest. (*See* Complaint at ¶¶ 30-31). This is logically so, because the "meter constant" is nothing more than a "billing software" calculation.

The sole and "undisputed" reason for ComEd's issuing a back-bill to LAZ was because of an incorrect meter constant having been in the billing system for years (Complaint at ¶ 15, Ex. D). Mr. Rumsey's affidavit is the only evidence that defines, for the Commission, what a "meter constant" actually is, how it is derived, where it resides, and why it is necessary for the billing of actual customer usage. What the Commission will reasonably conclude from this evidence, is that an "incorrect meter constant" is a billing error (not a meter error).

2. An Incorrect Meter Constant, Being Solely a Billing Function, Did Not Disturb The Meter Readings

Further proof that the meter was not in error comes from Exhibit D to the LAZ Complaint. In a certain portion of this letter, ComEd employee Vanessa Williams-Anderson explained the process behind the back-bill. She wrote that:

> We have calculated the billing from 6/3/08 - 5/5/10 based on **actual reads taken from the meter** and made appropriate corrections.

This letter, sent out prior to LAZ's filing of the complaint, is evidence that the meter was recording accurately. Indeed, the above passage makes clear that ComEd used the "actual meter readings" in order to compute the revised billing of LAZ caused by the incorrect meter constant. The Affidavit of Marisa Spitz shows the same.

3. A Meter Constant Issue Falls Under the Jurisdiction of ComEd's Billing Department

Marisa Spitz does not just tell the Commission that LAZ was underbilled because of an incorrect meter constant, she provides the Commission with a copy of a "meter constant discrepancy report" that listed LAZ's meter No. 141362866 as having a meter constant of "1." (ComEd Ex. B, Spitz Aff. Attachment B- 1.0). In reviewing the constant discrepancy report, Ms. Spitz saw that Meter No. 141362866 is a size 26 meter and, as such, would require a current transformer. (ComEd Ex. B at ¶ 5). Given her upteen years of experience in the Billing Department, and her knowledge of different meter types, Ms. Spitz knew that "when a meter requires equipment, the meter constant is never "1." (ComEd Ex. B at ¶ 5).

Marisa Spitz wanted the "constant discrepancy report" data for Meter No. 141362866, to be "verified." (Id. at ¶ 6). Thus, she requested that an investigation be made by ComEd's Field and Meter Department (*Id.*). The fact that CT specifics are the requisite inputs for setting the appropriate meter constant for billing purposes is made clear by her directives. Indeed, Ms. Spitz tells the Commission that she was very specific in making her request, i.e., she wanted the "size and type" of the CT's associated with the LAZ meter. (Id. at ¶ 7).

4. ComEd Verified the Meter Constant Before Revising the Billing

ComEd employee Derrick E. Moore (then working as a technician in the Field & Meter Services department) was dispatched to LAZ Parking's premises (ComEd Ex. C, Moore Aff. at ¶ 2). A business record attached to his affidavit shows that he went to 25 N. Michigan on April 6, 2010. (ComEd Ex. C, Moore Aff. Attachment C-1.0). Further, this record shows that the purpose of Mr. Moore's visit was to update CIMS ("Customer Information Management System") with missing current transformer (CT) information with respect to Meter No. 141362866 (ComEd Ex. C, Moore Aff. at ¶ 3).

To update CIMS, Mr. Moore explains, he uses hand-held equipment and makes certain standard entries into the program (*Id.* at ¶ 5). On April 6, 2010, and after verifying the Meter No. (141362866), and model type (D3LS62), Mr. Moore proceeded to enter the current transformer number, its size, and ratio into CIMS (*Id.* at ¶ 6).

5. The Revised Billing of LAZ Parking Was in Accord With Rule 280.100

After Mr. Moore verified the specifics of the current transformer associated with the subject meter, ComEd's billing software calculated the correct constant for the subject meter for future billings (ComEd. Ex. B, Spitz Aff. at ¶ 8).

And, Ms. Spitz had the information she needed to calculate a "meter constant" for Meter No. 141362866. To perform this tasks, she used a "job-aid" that is more formally titled "Calculating Meter Constants For Recording Meters" and a copy of this formula is attached to her Affidavit (ComEd Ex. B, Spitz Attachment B-2.0). In her affidavit, at paragraph 9, Ms. Spitz shows the Commission precisely how she applied the formula to calculate the correct meter constant for the LAZ meter, i.e., 600/.18. (*Id*. at ¶ 9).

Due to the incorrect meter constant of "1" having been in the billing system, Ms. Spitz cancelled the incorrectly-issued bills for the period of June 3, 2008 through May 3, 2010 (*Id.* at ¶ 10). She then re-billed for this same period, i.e., June 3, 2008 through May 5, 2010 (*Id*. at ¶ 11).

Ms. Spitz's back-billing of LAZ was in compliance with Section 280.100 of the Commission's rules. Despite her observation that LAZ had been billed incorrectly from the period beginning December 14, 2007 (when there was a meter exchange), Ms. Spitz limited her re-bill to a 2-year period. (*Id*. at ¶ 12).

According to Ms. Spitz, the total amount that LAZ Parking owed on the re-bill and for the period June 3, 2008 - May 5, 2010 was $ 225,484.52. This amount, set out in Ms. Spitz's own handwriting at the time, appears on an attachment to her Affidavit. See ComEd Ex. B, Spitz Attach. B-3.0. As Ms. Spitz also points out from her notations, the original billed charges to LAZ for this period (with payment thereof duly credited) had been $44,541.37 (*Id.* at ¶ 13).

In another reference to her attachment 3.0, Ms. Spitz points out the effects of having an incorrect meter constant in the billing system. The Commission will see from the electronic data on this record, the significant difference between the usage billed *before* the meter exchange on December 14, 2007 and the usage billed *after* the meter exchange when the meter constant defaulted to "1." It is reasonable to presume that LAZ observed this substantial drop in its billing charges. But, it did not inquire into the situation.

In addition to the above evidence, ComEd refers the Commission to the Affidavit of its Sr. Business Analyst, Trishaun Jamison. She explains that on May 18, 2010, ComEd

issued the first re-bill associated with the "constant correction" for service from June 3, 2008 to July 2, 2008 (ComEd Ex. C, Affidavit at ¶ 4). She further states that "regular" billing of LAZ - with the "corrected" constant - began in July, 2010 (*Id.*). Ms. Jamison explains that ComEd sends its billing information to LAZ's retail energy supplier (*Id.* at ¶ 3). Then, the retail energy supplier bills LAZ, on one bill, for both energy charges and ComEd delivery charges (*Id.*)

The Complaint is consistent in showing that LAZ has elected the single billing option which means that it is billed for both energy and delivery, by MidAmerican (Complaint at ¶ 2). Further, LAZ attaches to its Complaint what it terms as a "re-bill breakout" and which it received from MidAmerican (Complaint, Ex. B). According to LAZ, this document shows that the additional ComEd delivery charges MidAm re-billed on July 12, 2010 totaled $223,312.78 (Complaint at ¶ 10). This amount, if well-calculated by LAZ,[7] is less than what Ms. Spitz calculated presumably because MidAm appears to be adjusting LAZ's billing with the period July 2, 2008-August 5, 2008 (*See* LAZ's Complaint, Ex. B). The Complaint itself asks for $ 259,937.85.[8] But, the real question here is what LAZ actually paid ComEd for unbilled service charges and the documents it provides with its pleading do not answer that question. In any event, this is not the central issue in this case.[9] Thus, for present purposes, there is no issue of material fact here.

6. Current Circumstances Are Telling Evidence

The Commission may rightly question where Meter No. 14136286 is today. The Affidavit of John Selenica, attached to this Motion, shows that it still remains in operation

[7] LAZ does not offer the underlying calculation.
[8] To make things even more complicated, one of the Rule 216 admissions binds ComEd to LAZ's figure.
[9] It is not an issue that the Commission would reach unless it would find in favor of LAZ on the Complaint. At that stage, however, the Commission would surely require hard proof of the amount for recovery.

on LAZ's premises (ComEd Ex. 5, Selenica Aff. Attachment E-1.0). Further, his affidavit shows that, at no relevant time, did LAZ apply to the Commission for referee testing pursuant to 83 Ill. Adm. Code 200. 410(d). A reasonable person, that truly believed his or her meter was "faulty," would surely have asked the Commission for a Referee test. The evidence of these circumstances further supports ComEd's legal right to judgment.

7. Summary

All of the above evidence shows the Commission that the under-billing of LAZ was owing to an incorrect meter constant in ComEd's billing system and not to any error with the subject meter. Thus, Section 280.100 is the law that governs here. But, given the Commission's own vast technical expertise and experience, a good part of this evidence only confirms and substantiates what the Commission already knows. There being nothing of relevance or materiality to dispute the Respondent's evidence, the Commission may confidently enter judgment for ComEd.

B. RESPONDENT'S EVIDENCE - COUNT V

In Count V, the central issue is whether the $36,625.07 that LAZ alleges to have paid on October 4, 2010 was for under-billed service under 280.100 (as LAZ suggests) or for its ordinary and regular service charges (as ComEd's facts here show).

1. LAZ's Claim Under Count V

Count V of the Complaint alleges that ComEd's "unbilled service" charges to LAZ, in the amount of $36,625.07, came "more than two years after the service was allegedly provided," and thus, in violation of Section 280.100 of the Commission's rules (Complaint at ¶ 46).

Further incorporating ¶¶ 26 - 29 of the Complaint into Count V, LAZ alleges that on September 28, 2010 it received a disconnection notice from ComEd, which claimed that LAZ Parking owed $36,625.07 (Complaint at ¶ 26; Ex. C). LAZ asserts that it paid this very amount on or about October 4, 2010 to avoid disconnection (*Id.* at ¶ 27). LAZ speculates that this amount in charges arose from the June and July 2008 billing periods when it took supply service from Pepco (*Id.* at ¶ 28). According to LAZ, the September 20, 2010 disconnection notice was the "first notice" it received from ComEd of any past due amounts (*Id*. at ¶ 28).

2. The Amount of $36,625.07 Set Out In The Disconnection Notice Was For "Regular" Delivery Service. Thus, Rule 200.100 Does Not Apply

Each single bill that a customer receives gives notice of what amount is due and owing. Being single-billed by MidAmerican, LAZ has the relevant bills in its possession.

The Affidavit of ComEd employee Trishaun Funches Jamison shows that the period of non-payment by LAZ Parking (which resulted in a Disconnection Notice being sent to LAZ on September 20, 2010) had <u>no</u> relation to any "unbilled services charges." (ComEd Ex. D, Jamison Aff. at ¶¶ 5, 9). This disconnection notice was the result of "regular" service billings issued by ComEd, and unpaid by LAZ, during the period of July 9, 2010 to September 1, 2010 (*Id.* at ¶¶ 6, 7, 9). Each of the details pertinent to ComEd's regular service billings during this period are clearly described, explained and calculated in paragraph 8 (a)-(l) of Ms. Jamison's affidavit. (ComEd Ex. D. Jamison Aff. at ¶ 8).

The Commission will find attached to Ms. Funches Jamison's affidavit, copies of "ComEd Account Activity Statements" that reflect all of the regular billing and late charges for this period, that by September 1, 2010, had grown to $36,625.07. ComEd Ex. D.

Jamison Aff. Attachment D-2.0. Other records attached to her affidavit further support Ms Jamison in showing that ComEd waived late charges of $481.77 such that LAZ Parking satisfied its unpaid balance by a payment of $36,143.30 on October 6, 2010 (*Id.* at ¶ 7, ComEd Ex. D. Jamison Aff., Attachment D-3.0). Notably, LAZ offers no proof for the claim that it paid $36,625.07.

The facts that Ms. Jamison provides show the Commission that Section 280.100 does not apply, at all, in these premises. This rule only addresses the situation where a customer has not been billed or has been mis-billed for service. 83 Ill. Adm. Code 280.100. Here, LAZ Parking had been provided with "regular" service billings, but simply did not pay over several months, i.e., for the period of July 9 - September 1, 2010. It was for this reason that a disconnection notice issued to LAZ on September 20, 2010. Thus, LAZ's complaint of a Section 280.100 violation is shown to be wrongful speculation.

3. Summary on Count V

ComEd's facts show no violation of law. Thus, ComEd rightfully asks the Commission for summary judgment on Count V of the instant Complaint.

IV. The Rule 216 Admissions Add No Relevant or Material Facts In Support of LAZ's Complaint.

On a motion for summary judgment, a court will consider the "admissions." 735 ILCS 5/2-1005(c). There are ten Sp. Ct. Rule 216 admissions here, as established by the ALJ's Ruling on February 13, 2014.

A. Background for the Rule 216 Admissions

On November 13, 2012, and pursuant to Sp. Ct. R. 216, LAZ filed its "Motion To Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses

Thereto." Despite ComEd's reasonable reliance on Section 200. 410(c) of the Commission's Rules of Practice in answering LAZ's requests to admit, the ALJ's unprecedented ruling found that Supreme Court Rule 216 (with its hyper-technical requirements) was the better rule. (ALJ Ruling, Feb. 13, 2014). So, ComEd's timely and honest responses fell away and several technically illogical statements by LAZ were deemed Rule 216 admissions.[10] Of particular concern are Admission No. 4 and Admission No.9 (discussed below).

ComEd sought relief from the harshness of this ruling that, for the first time, found Sp.Ct. R. 216 to apply in a Commission proceeding. But, ComEd's motion to reconsider which included an alternative request for leave to conform its responses to Rule 216, was denied by the AlJ's Ruling on March 9, 2015.

B. Nature of the Rule 216 Admissions

Ordinarily, Rule 216 admissions are deemed judicial admissions (meaning for example that, in this proceeding, ComEd is precluded from contradicting or explaining away what is set out in the so-called "admitted" statement. Such admissions also inure to the benefit of the requesting party, LAZ here, because a Rule 216 admission means that LAZ does not have to prove any of the facts it set out for "admission."

According to Illinois court law, "`judicial admissions are not evidence at all but rather have the effect of withdrawing a fact from contention.'" *Pryor v. American Central Transport, Inc.*, 260 Ill. App. 3d 76, 85, 629 N.E.2d 1205 (5th Dist. 1994). Somewhat ironically, the purpose behind the judicial admission doctrine "is to remove the temptation

[10] The LAZ "requests to admit" and ComEd's responses are included in the Appendix to the instant Motion.

to commit perjury." In re Estate of Rennick, 181 Ill.2d 395, 407, 692 N.E.2d 1150, 1156 (1998).

C. The Commission's Higher Duty

While ComEd may be constrained by the ALJ's ruling from disputing the Rule 216 admissions established in this proceeding, the Commission itself is under no such compulsion. In the exercise of its broad discretion, the Commission is free to reject an admission outright and demand proof of the fact asserted or take any such other action as will aid its decision-making function. [11]

In Antioch v. Public Service Company, 4 Ill. 2d 200, 210 (1954), the Illinois Supreme Court made clear that:

> The commission is not just an umpire. It has been given active functions of policy making and supervision. It may initiate hearings on its own motion, and it has a wide discretion in shaping proceedings brought by others. (emphasis added).

Here and now, the Commission's concern with the "integrity" of the record comes squarely into view. As such, the Commission will need to consider if it is desirous or prudent to have any untruthful admissions - most particularly admissions 4 and 8 - be on record. In this situation, ComEd trusts that the Commission, will be guided by the duty to exclude "irrelevant, immaterial evidence" as Rule 200. 610 (a) requires.[12] At the least, the Commission will want to treat these admissions, not as judicial admissions, but as

[11] A good example of the Commission's broad authority and insistence on a well-developed record shows itself in Rule 200.630. Generally, facts set out in stipulations are considered judicial admissions. *Rosbottom v. Hensley*, 61 Ill. App. 2d 198, 209 N.E.2d 655 (4th Dist. 1965) But, Section 200.630 of the Rules of Practice provides, in relevant part that:
Notwithstanding the stipulation of the parties, the Commission or the Hearing Examiner ***may require proof by evidence of the facts stipulated to, where the public interest requires.***

[12] Section 200.610 (a) of the rules of practice provides, in full, that:
> **In all proceedings subject to this Part, irrelevant, immaterial or unduly repetitious evidence shall be excluded. [5 ILCS 100/10-40]**

"evidentiary" admissions that leave it free to determine how much weight an admission deserves. *Serrano v. Rotman*, 406 Ill. App.3d 900 (1st Dist. 2011) Or, the Commission may want to strike outright from the record an admission "where the admitted fact is clearly untrue." *New Amsterdam Casualty Company v. Waller*, 323 F.2d 20, 24 (4th Cir. 1063). Taking any or all of such actions will surely contribute to an accurate record in these premises. 83 Ill. Adm Code 200.25.

While not conceding to the accuracy of the other admissions on record (which show themselves irrelevant to the central issue here), ComEd is compelled to draw the Commission attention to Admission No 4 and Admission No. 9. These particular admissions, to be discussed below, will raise concerns for the integrity of the record.

For its part, ComEd will show that many of the 10 admissions on record are simply irrelevant and immaterial to the issues of the case. As such, they provide no facts to support for LAZ's Complaint in either Count II or Count V and do not in any way weaken ComEd's legal right to judgment.

D. The Admissions Raise No Genuine Issue of Material Fact

At the evidentiary stage, the ten admissions established on February 13, 2014, must be considered in the context of their making, sufficiency, and in terms of what each admission means for the central issues of the case when considered in light of the of all the other evidence. A trial court will treat judicial admissions in just this way. *Smith v. Pavlovich*, 394 Ill. App.3d 458 (2009); *Rath v, Carbondale Nursing & Rehabilitation Center*, Inc., 374 Ill. App. 3d 536 (5th Dist. 2007).

1) Admissions Not Needing Analysis (Nos. 1,2,3,7)

At the start, the Commission will observe that four (4) of the admissions were either not disputed by ComEd or disputed in minor part (when it answered the requests to admit). These are:

- *The amount claimed by Commonwealth Edison Company in the Disconnection Notice is $36,625.07 (Admission No. 1).*
- *Commonwealth Edison calculated its alleged unbilled service amount from the June 2008 billing period through the May 2010 billing period for LAZ Parking's ComEd Account number 2931008045 (Admission No. 2).*
- *Commonwealth Edison's claim of $36,625.07 represented ComEd's alleged delivery services charges (Admission No. 3).*
- *ComEd tested meter number 141362866 on October 25, 2007 (Admission No. 7).*

2) Admissions Are Irrelevant To The Ultimate Issues (Nos. 5, 6, 8, 10)

Admission No. 5 states that:

Prior to the date of the Disconnection Notice, ComEd had not notified LAZ Parking of the amount of any claim of ComEd for alleged unbilled service charges.

This admission is irrelevant to the ultimate issue at hand - Whether the under-billed charges were the result of billing error (as ComEd shows) or meter error (as LAZ only claims). Stated another way, it adds no material factual support to LAZ's complaint. In terms of form, it is also ambiguous.

Thus, this admission does not raise a genuine issue of material fact.

Admission No. 6 states that:

The total amount of Commonwealth Edison's alleged unbilled delivery services charges from the Account's June 2008 billing period through the May 2010 billing period was $259,937.85.

This admission is irrelevant to the ultimate issue at hand - Whether the under-billed charges were the result of billing error (as ComEd shows) or meter error (as LAZ only claims). Stated another way, it adds no material factual support to LAZ's complaint.

For purposes of this motion, this admission raises no genuine issue of material fact.

Admission No. 8 states that:

Commonwealth Edison tested Meter # 14362866 on April 6, 2010.

This admission is irrelevant to the ultimate issue at hand - Whether the under-billed charges were the result of billing error (as ComEd shows) or meter error (as LAZ only claims). Stated another way, it adds no material factual support to LAZ's complaint.

For purposes of the instant motion, this admission raises no genuine issue of material fact.

Admission No. 10 states that:

Subsequent to its test of meter number 141362866 on October 25, 2007, Commonwealth Edison did not test the meter again until April 6, 2010.

This admission is irrelevant to the ultimate issue at hand - Whether the under-billed charges were the result of billing error (as ComEd shows) or meter error (as LAZ only claims). Stated another way, it adds no material factual support to LAZ's complaint.

For purposes of the instant motion, this admission raises no genuine issue of material fact.

3) Admissions That Are Fatally Incomplete and Otherwise Flawed, i.e. They Are Untrue.

There are two (2) Rule 216 admissions, i.e., No. 4 and No. 9, that fall into this group. It is highly questionable if these even qualify as judicial admissions. What is without doubt, however, is that these Rule 216-created admissions are patently untrue.

In matters of what evidence it will consider, the Commission, like a court, has broad discretion. Indeed, the Commission has adopted a rule that sets the standards for the exercise of its broad and sound discretion.

Section 200.25 of the Rules of Practice provides, in relevant part, that;

All Commission discretion under this Part shall be exercised so as to accomplish the goals set forth in the remainder of this Section.

a) Integrity of the fact-finding process – The principal goal of the hearing process is to assemble a complete factual record to serve as basis for a correct and legally sustainable decision. 83 Ill. Adm. Code 200.25 (a).(emphasis added).

This rule makes clear that the Commission "shall" exercise the discretion necessary to preserve the "integrity" of the record. ComEd will show the Commission that the exercise of its discretion is warranted here, where untrue facts (actually technologically impossible facts) have been made part of the record in this proceeding despite ComEd's strenuous and reasonable objections. See Respondent's Response in Opposition to LAZ Parking's Motion To Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto. (filed on e-docket, Dec. 17, 2012).

Presumably, these Rule 216 admissions (being incontrovertible) were intended to stand as obstacles to ComEd showing the Commission the truth of the matters at issue. This is a reasonable presumption given that LAZ ignored ComEd's responses (explaining

why its statements were erroneous) when it moved the ALJ to have the statements admitted for technical reasons. But, by the good fortune of LAZ's deficient drafting, ComEd found itself able to give the Commission the honest facts it wants in order make a correct decision in these premises.

ComEd urges the Commission to reject Admission No. 4 and Admission No. 9 . In support of this request, ComEd will show, among other things, how these particular admissions fail the test of reasonableness.

Admission No. 4 states that:

> *Meter Number 141362866 was programmed with an incorrect meter constant.*[13]

It is undisputed that an "incorrect meter constant" was the cause for ComEd's back-billing (or revised billing) of LAZ for delivery service (Complaint at 15, Ex. D). But, the term "meter constant" is not defined in this admission nor in any other admission. It is also not defined in LAZ's Complaint. Thus, standing alone, this admission is not "plenary" enough to bar other evidence essential to the Commission's understanding and determination of the issues. *Rath v. Carbondale Nursing & Rehabilitation Center, Inc.,* 374 Ill. App.3d 536 (2007) (noting that, under the law of admissions, it is necessary to determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances), and citing 9 J. Wigmore, *Evidence* § 2591, at 824-25 (Chadbourn rev. ed. 1981).

[13] ComEd response this statement, set out in LAZ Req. 1.6 is as follows:

ComEd objects to this request as it assumes facts not in evidence and directly contradicts ComEd's responses to Interrogatories and Request to Produce. Notwithstanding the objection, ComEd denies that the above-listed meter was "programmed" incorrectly. As stated in its previous responses the issue with the account was a billing function in that the wrong constant was entered in ComEd's billing software ("CIMS"). See Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto, Exhibit B (filed on e-docket on 11-13-2012) Attached to ComEd's Appendix .

Without question, "meter constant" is a technical term and it is a term that absolutely *must* be defined on the record. It is a term that must be explained in any Commission's order on this proceeding. Indeed, the entirety of this case hinges on just what a meter constant actually is. Thus, the very incompleteness of this admission will not preclude ComEd from providing, or the Commission from considering, an expert definition of meter constant, a term central to the legal issues.

Thomas Rumsey provides the Commission with the only expert definition of this technical term (See Rumsey Aff., ComEd Ex. A). And, in his explanation of what a "meter constant" actually is, Mr. Rumsey is definitive in stating that it is *not* programmed into a meter (Id. at ¶ 5). (Indeed, he makes clear that a meter constant is not a meter function but a multiplier for billing purposes). Hence, Admission No. 4 is shown to be untrue. (Perhaps what LAZ actually intended to say in its statement was that the meter information was programmed into ComEd's billing system with an incorrect meter constant).

Under the law, this incomplete and ambiguous admission more in the nature of an "opinion" or "uncertain summary" and thus, not a viable judicial admission. *Thomas v. Northington*, 134 Ill. App.3d 141, 147, 479 N. E. 2d 976 (1985) (stating the long-established principle that, in order to constitute a judicial admission, a statement must not be a matter of "opinion, estimate, appearance, inference or uncertain summary"). *Rath v. Carbondale, 374 Ill. App. 3d 536* (5th Dist. 2007) (observing that the mere categorization of a statement as "judicial" is insufficient). *Serrano v. Rotman*, 406 Ill. App.3d 900 (1st Dist. 2011) (rejecting the Rule 216 admission, and treating it as an "evidentiary" admission because the request to admit was itself ambiguous). Owing to the many

shortcomings in the "admission" statement here, it does not qualify as a true judicial admission.

Aside from other defects, Admission No. 4 is flatly at odds with the Commission's interest in technical accuracy and would blindly lead it into error. Mr. Rumsey makes clear that meters do not house meter constants. More significantly, however, and owing to its long-term supervisory oversight of meters and metering installations, the Commission itself will know that admission No. 4 statement sets out a technologically impossible fact. Given its expertise and experience, the Commission will find Mr. Rumsey's account to be the only relevant and credible evidence on record. Given the Commission's interest in maintaining the integrity of the record, it may further want to reject this "admission" and require proof from LAZ of the matters asserted.

For purposes of the instant motion, this admission fails and raises no genuine issue of material fact.

Admission No. 9 states that:

> *Commonwealth Edison did not discover that Meter #141362866 had been programmed with an incorrect meter constant until it tested the meter on April 6, 2010.*[14]

The Commission will see that the first part of this compound admission repeats the very same erroneous proposition - *that Meter #141362866 had been programmed with an incorrect meter constant* - that appears in Admission No. 4 above. For all the reasons

[14] ComEd responded to LAZ's request to admit this statement, LAZ Req.1.14 as follows:

ComEd objects to this Request as it mischaracterizes ComEd's responses to discovery and presupposes facts not in evidence. Notwithstanding the objection, ComEd denies that it did not discover the above-listed meter had been programmed with an incorrect meter constant until it tested that meter on April 6, 2010. As explained previously, the billing issue related to this account has nothing to do with the testing or the meter nor with the programming of the meter, the correction was based on the billing of the account and the wrong constant being entered in ComEd's billing system ("CIMS"). See, Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto, Exhibit B (filed on e-docket on 11-13-2012).

expressed in the discussion of Admission No. 4 above, and to maintain the integrity of the record, the Commission is urged to reject this admission.

The second part of the admission builds upon the initial erroneous assertion to speculate that - *until it tested the meter on April* 6, 2010, *Commonwealth Edison did not discover that Meter #141362866 had been programmed with an incorrect meter constant.* But ComEd did not test meter on April 6, 2010. As Derrick Moore explains in his affidavit, he went out to LAZ's premises on April 6, for the purpose of confirming CT information. (See ComEd Ex. C at ¶ 3). This was the very information needed to set the correct meter constant for the billing.

Further, this admission sets out a technical impossibility, i.e., that a billing multiplier which resides in ComEd's billing systems, would somehow show itself on a meter accuracy test. While this proposition would even give pause to a layman, the Commission, with its vast experience in these technical matters, will certainly not be fooled. To maintain the integrity of its record, the Commission should reject Admission 9 and require proof of the matters asserted.

For purposes of the instant motion, and in light of other evidence on record, ComEd submits that this "admission" raises no genuine issue of material fact.

4) Summary on Admissions

While LAZ succeeded in having the ALJ adopt Sp. Ct. Rule 216 standards in place of the Commission's own Section 200.410 (c) of the Rules of Practice, it gained little. These admissions are add absolutely no relevant or material facts in support of either Count II or Count V of the Complaint. There is nothing here for the Commission to

consider as it goes about determining which law applies to the facts in the instant situation.

V. CONCLUSION

In the courts, the granting of a motion for summary judgment is not a matter of discretion, and if no genuine issue exists, the motion should be granted and the cause terminated in the moving party's favor. Manahan v. Daily News-Tribune, 50 Ill. App. 3d 9, 12, 365 N.E. 2d 104 (3rd Dist. 1977). Similarly, the Commission will grant a motion to dismiss under the same circumstances i.e., where there is no genuine issue of material fact to be decided at a hearing and the movant is entitled to judgment as a matter of law.

The law, the facts and argument above make clear ComEd's legal right to judgment. Accordingly, ComEd asks the Commission to grant its Motion for Summary Judgment.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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