

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, [Rule 420 of the Commission's Rules of Practice \(83 Ill. Adm. Code Part 200\)](#) 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 un rebutted.

[Amcor’s arguments on the merits were summarized in the Commission’s Order dated April 2, 2014, as well as other pleadings filed by the parties in this proceedings. Such arguments are incorporated herein by reference.](#)

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.

ComEd’s arguments on the merits were summarized in the Commission’s Order dated April 2, 2014, as well as other pleadings filed by the parties in this proceedings. Such arguments are incorporated herein by reference.

V. COMMISSION ANALYSIS AND CONCLUSION

ComEd is Prohibited from Submitting Evidence Regarding its Post-Removal Testing of the Replaced Meter or What was Wrong With the Replaced Meter

Amcor’s Motion in Limine is granted. ComEd is prohibited from presenting any evidence that the Replaced Meter under-reported Amcor’s electricity usage, including but not limited to evidence of ComEd’s testing of the Replaced Meter after it removed the Replaced Meter from service in April 2009, and ComEd is prohibited from presenting evidence as to what was wrong with the Replaced Meter and/or asserting that the Replaced Meter under-billed or why it under-billed. Paragraph 36 of the Stipulation shall not be considered as evidence in this proceeding.

At the time that ComEd disposed of the Replaced Meter, there was an ongoing dispute between ComEd and Amcor over whether ComEd's attempt to back-bill Amcor was proper. ComEd knew or should have known that litigation was imminent, and ComEd knew or should have known that the Replaced Meter was a key piece of evidence for resolving that dispute. ComEd had a duty to preserve the Replaced Meter. It breached that duty when it disposed of the Replaced Meter, even though ComEd had counsel involved in the dispute.

ComEd's disposal of the Replaced Meter prejudiced Amcor because Amcor was deprived of the ability to test the Replaced Meter. The only way to remedy that prejudice is to prevent ComEd from using the same type of evidence that it prevented Amcor from obtaining—the test results obtained after the Replaced Meter was removed from service.

The Stipulation is the Entire Record in this Proceeding

ComEd's arguments contain numerous references to "facts" that are not contained in the Stipulation. The Stipulation is the entire record in this Proceeding. The Commission is bound to decide this case based exclusively on the record for decision. Section 10-103 of the Public Utilities Act (220 ILCS 5/10-103). Although the Commission declines to specifically identify each and every instance where ComEd has exceeded the Stipulation, the Commission finds that assertions that exceed the Stipulation are not part of the record for decision to be used as a basis for determining this case.

ComEd Cannot Back-Bill Amcor

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

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

The record before us establishes that ComEd programmed the wrong scaling factor into the Replaced Meter, thereby causing it to under-register Amcor's electricity usage by two-thirds. The Replaced Meter's under-registration of electricity usage is a meter error, and this type of meter error falls within the scope of ICC Regulation 410.200(h)(1). Because ComEd failed to conduct the testing required by Part 410 of the ICC's Regulations, ICC Regulation 410.200(h)(1) bars ComEd from adjusting Amcor's bill.

A. ComEd Violated ICC Regulation 410.155

ICC Regulation 410.155 provides in pertinent part as follows:

Installation Inspections.

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

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

ComEd disputes that it violated ICC Regulation 410.155 but its responses are unconvincing and not consistent with the plain meaning of the Regulations or the undisputed facts. For example, ComEd argues that it only stipulated that it did not conduct a post-installation “test,” not that it failed to conduct an “inspection.” To begin with, this is a distinction without a difference: an inspection is a type of test. (See the definition of “inspection” from the Merriam-Webster Dictionary Online (attached to Amcor’s Motion for Judgment as Exhibit A) Second, the Formal Complaint puts ComEd on notice that Amcor claimed it had not conducted a proper post-installation inspection; if ComEd had evidence of such an inspection, it should have brought that evidence forward. The evidence was obviously within ComEd’s control. Even if ComEd had not stipulated that it failed to conduct a post-installation inspection, ComEd’s failure to present any evidence of such an inspection gives rise to an evidentiary presumption against it. Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 504, 840 N.E.2d 767, 779 (2nd Dist. 2005) (“An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control. [citation omitted].”) See also, Illinois Pattern Jury Instructions—Civil, 5.01 Failure to Produce Evidence or a Witness.¹ To the extent this presumption does not establish this fact as a matter of law, it certainly establishes it by a preponderance of the evidence.

ComEd also suggested in some of its briefing and in its oral argument that a post-installation inspection would not have revealed the problem with this meter. This assertion fails for several reasons. First, it is not relevant to whether ComEd conducted the post-installation inspection, and therefore does not address whether ComEd violated ICC Regulation 410.155. Second, there is no evidence in the record to support this factual assertion; it should therefore be disregarded. Section 10-103 of the Illinois Public Utilities Act (the “Act”), 220 ILCS 5/10-103 provides, in part, that “[i]n all proceedings, investigations or hearings conducted by the Commission... any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case....” Finally, it is essentially incorrect by definition. The record establishes that the Replaced Meter was not “accurately measuring [Amcor’s] energy consumption.” Any

¹ See www.state.il.us/court/CircuitCourt/CivilJuryInstructions/5.00.pdf.

proper inspection—one that actually determined whether the Replaced Meter was accurately measuring Amcor’s energy consumption—would have, by necessity, discovered that it was not. The problem here is that ComEd simply never checked to see if the amount of power usage that the Replaced Meter reported when read matched the amount of power going through the Replaced Meter.²

B. ComEd violated ICC Regulation 410.160

ICC Regulation 410.160 provides in pertinent part as follows:

Initial Tests

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

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

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

This conclusion is consistent with basic Illinois law concerning the proper interpretation of statutes and regulations, which provides that words are to be given “their plain and ordinary meaning.” Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc., 2012 WL 4858995 at 6 (1st App. Dist. 2012). Further, “the reason and necessity” for the regulations must be considered in interpreting them. Illinois Insurance Guaranty Fund, 2012 WL 4858995, at 6. The obvious purpose of ICC Regulation 410.160 is to insure that utilities like ComEd install meters that provide accurate energy

² To the extent ComEd is actually arguing that it is impossible for it to measure whether a meter accurately measures a customer’s energy consumption, there is no evidence to support this statement. Further, the Commission harbors strong doubts that such an extraordinary proposition is accurate.

consumption information for billing purposes; there is no rational reason why the Commission would want to insure that only the Meter Engine was performing properly, without caring about whether the meter actually reported accurate information when read for purposes of billing the customer.

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

Tellingly, before litigation, ComEd acknowledged the common sense proposition that the Replaced Meter did not accurately measure Amcor's energy consumption.³ In its December 9, 2009 correspondence to Amcor, ComEd states: "More importantly, both the installation of meters 141521021 and 141379885 as well as the recorder meter test demonstrates that the meter installed prior to the CT installation (meter 140384879) **was faulty.**" (Exhibit B to Stipulation, at p. 1) (emphasis added). "Meter 140384879, installed in 2005, was programmed with incorrect scaling factors thereby creating **incorrect** counts per revolution and **altered the metered usage.** Meaning, **the meter did not register all of the usage flowing** and underbilled Amcor's account by almost one third." (Exhibit B to Stipulation, at p. 2) (emphasis added). Similarly, Michael Pabian, ComEd's Assistant General Counsel, noted in his email of February 17, 2010 (Exhibit E to the Stipulation): "We have discovered that, apparently, at the time the meter was installed, it was incorrectly programmed with a CPR value of 4 instead of the correct value of 12 for a transformer-rated meter. This means that the meter was **undercounting the pulses and under-register[ed] the usage flowing through the meter** by a factor of 3." (emphasis added)

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

³ The parties stipulate that ComEd sent its correspondence to Amcor, not that the contents were accurate. (Stipulation, ¶¶ 17 and 19) However, these statements are admissible against ComEd as admissions of a party opponent. Illinois Rules of Evidence, Rule 801(d)(2).

incorrect scaling factor and therefore reported only one-third of Amcor's energy usage⁴—indeed, ComEd obviously needs to make this claim in order to justify why it sought to adjust Amcor's bill.

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

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

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

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

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

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

Whenever any test made by any entity or by the Commission shows a meter to have an average error of more than 2%, a correction of the metering data shall be determined by the entity providing metering service and that

⁴ Amcor acknowledges that it has no ability to challenge ComEd's assertion, based on the tests conducted by Thomas Rumsey, because ComEd threw the Replaced Meter away before the Formal Complaint was filed.

correction shall be conveyed within 3 business days to the customer and to other entities involved in billing the customer.

Regulation 410.200(b) provides:

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

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

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

Finally, ComEd seems to argue that, even if the provisions of ICC Regulation 410.200 specifically bar it from asserting the back-bill claim, it can still back-bill pursuant to ICC Regulation 280.100 (billing for “Unbilled Service.”). Response, at p. 8. Regulation 410.200(h)(1), however, provides that, if the required testing is not performed, “in no case” may the utility adjust the customer’s bill for under-registration. ComEd’s position would render Regulation 410.200 a nullity. Every time a utility makes a billing adjustment because a meter under-registers, it will be seeking payment for unbilled service; thus, under ComEd’s position, there could never be a situation where a utility would be prohibited from adjusting a customer’s bill for under-registration even if, as here, the utility had ignored the ICC’s regulations regarding meter testing and accuracy. Basic rules of statutory interpretation do not permit interpretations that render parts of a statute a nullity. “Statutes are to be construed to give full effect to each word, clause, and sentence, so that no word, clause, or sentence is surplusage or void. [Citations omitted] Courts avoid interpretations which would render part of a statute meaningless or void [citation omitted] and the presence of surplusage will not be presumed. [citation omitted].” *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, 281 Ill. App. 3d 719, 724 (1st Dist. 1996). See also, *Aurora Manor, Inc. v. Department of Public Health*, 2012 WL 4463237, at 3 (1st Dist. 2012).

Further, the more specific statute (here, Regulation 410.200 regarding when billing adjustments can be and cannot be made for under-billing) controls over the more general statute (here, Regulation 280.100 regarding under-billing in general). Knolls Condominium Association v. Harris, 202 Ill. 2d 450, 459 (2002).

~~After careful reconsideration, the Commission finds that Amcor's Motion in Limine was properly denied.⁵ The Commission affirms that it believes Amcor failed to establish that the sanction that it requested is warranted 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 ~~re~~considered the substantive merits of Amcor's Motion in Limine and it concludes that Amcor ~~has failed to~~ established that granting the motion as a discovery sanction pursuant to Rule 219(c) and Rule 420 of the Commission's Rules of Practice (83 Ill. Adm. Code Part 200) is warranted in this proceeding; ~~and~~
- (6) the Commission finds that the Motion in Limine was properly denied by the ALJ should be granted, that ComEd is barred from presenting any evidence in this proceeding that the Replaced Meter under-reported Amcor's electricity usage, and that Paragraph 36 of the Stipulation shall not be entered into evidence in this proceeding or considered in deciding the merits of Amcor's Complaint; and.
- (7) The Commission also determines that Amcor should be granted judgment on its Complaint, and ComEd should be barred from back-billing Amcor as described in the Complaint, because of the reasons described above, including but not limited to (a) ComEd has no evidence to demonstrate that the Replaced Meter under-reported electricity usage, because such evidence has been barred pursuant to the motion in limine, and (b) even if ComEd were permitted to present such evidence, it is prohibited from adjusting Amcor's bill by 83 Ill. Adm. Code 410.200(h)(1) because ComEd did not comply with the testing requirements of Part 410 of the Commissions' regulations.

(8) ComEd is prohibited from collecting on its \$62,190.07 claim for alleged unbilled services, and ComEd is directed to issue a corrected bill to Amcor that rescinds its back-charge of \$62,190.07.

(6)

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Motion in Limine filed by Amcor Flexibles, Inc. was properly deniedis granted 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
Sonya Teague Kingsley,
Administrative Law Judge

By Order of the Illinois Commerce Commission
This day of , 2015

Signed (Douglas P. Scott)