

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMCOR FLEXIBLES, INC.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 11-0033
	:	(ON REMAND)
COMMONWEALTH EDISON COMPANY,	:	
	:	
Respondent.	:	
	:	
Complaint pursuant to Sections 9-250 and	:	
10-108 of the Illinois Public Utilities Act	:	
(220 ILCS 5/9-250 and 220 ILCS 511 0-1 08)	:	
and Section 200.170 of the Rules of Practice	:	
(83 Ill. Adm. Code 200.170)	:	

RESPONDENT’S REPLY TO EXCEPTIONS

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(83 Ill. Adm. Code 200.170)	:	

RESPONDENT’S REPLY TO EXCEPTIONS

The Respondent, Commonwealth Edison Company (“ComEd” or “Respondent”), respectfully submits to the Illinois Commerce Commission (“Commission”) this Reply to Exceptions, being filed in opposition to the Exceptions and Brief on Exceptions of Amcor Flexibles, Inc. (“Amcor” or “Complainant”).

On July 23, 2015, a Proposed Order on Remand was issued in this proceeding. Thereafter, on August 6, 2015, Amcor filed a Brief on Exceptions (“BOE”) and a separate document of Exceptions (“Exceptions”).

For its Reply, ComEd states that:

INTRODUCTION

In every matter put before it, the Illinois Commerce Commission demands a full, complete and accurate record. 83 Ill. Adm. Code 200.25(a). This is owing to its broad supervisory authority and its duties under the Public Utilities Act. In this proceeding, however, Amcor wanted the Commission to have *less* evidence than what it would need to correctly resolve the merits of the complaint. Its Motion *in Limine* sought to exclude evidence in the parties' Stipulation showing that (1) the meter removed from Amcor's premises was tested on September 24, 2009, and found to be accurate; and (2) the results of a diagnostic examination found an incorrect scaling factor for billing purposes. (Stipulation at para. 36, filed December 22, 2011.)

The reason for excluding this relevant evidence, Amcor argued, is because ComEd disposed of the meter before Amcor itself could itself test it and confirm that the meter was indeed accurate. Of course, ComEd kept secure the meter test records as it is required to do under the Commission's rules. ComEd further held onto the meter for 13 months. In all that time, Amcor never asked ComEd to "preserve" the meter. It never asked the Commission for a Referee test under Section 410.190(d). It never sent out an independent or third-party (as Amcor claims was its right) to re-test the meter. There is much that Amcor could and should have done if it were truly wanting to have the meter tested again.

In early 2010, however, Amcor itself asserted that the meter was running accurately (which is precisely what the meter test on September 2009 showed). Despite this objective evidence, Amcor expected ComEd to surmise that Amcor would want to someday re-test the meter in order to essentially "confirm" this test result. *See Motion in Limine* at 2 (filed January

26, 2012). Amcor asked too much from ComEd. And, it now asks too much from the Commission.

While Amcor is heard to claim that this case was all about the meter, ComEd never, ever, shared this view. From the very beginning and throughout this proceeding, ComEd made known and consistently explained to Amcor that the underbilling in dispute arose from a scaling factor mishap uncovered through a diagnostic exam. This type of error simply does *not* reveal itself on a meter test (because it is an element of billing and not usage registration). For this reason ComEd never thought the meter of any importance in the case. And, given that the meter tested accurate, ComEd did not even imagine the idea that Amcor would want, at some point down the line, to re-test it.

The ALJ's ruling, denying the Motion *in Limine* on the basis of an extensive record, was correct. (July 31, 2012.) Neither Amcor's subsequent and one-sided Brief on Exceptions which attacked that ruling, nor its Application for Rehearing gave the Commission any reason to reverse the ALJ's ruling. The reviewing Court needed a fuller record, however, and thus mandates that the Commission "address the substantive merits of Amcor's exceptions to the ALJ's ruling on the motion in limine."

The Proposed Order on Remand ("PO") fully satisfies this directive. It does so fairly and squarely by assessing the evidence and arguments of both of the parties. In light of certain arguments set out in Amcor's Brief on Exceptions, however, ComEd is proposing some additional language for the PO. It is being offered for the Commission's consideration.

Form of ComEd's Reply to Amcor's Exceptions

ComEd has found it difficult to align its reply arguments in orderly fashion with the extensive exceptions arguments set out by Amcor. It appears to ComEd, however, that the only actual challenges to the PO are all set out under Amcor's Exception No. 2. But, even there, the multiple variety arguments excepting to the PO are not separately numbered as Rule 200.830 (b) requires. Instead, these arguments appear in bulk at pages 15-21 under what Amcor identifies as Section 4. As best as ComEd can determine from the bold language headings in this particular section, Amcor takes issue with the PO in seven (7) main respects.

In **Part I** below, ComEd replies to the arguments that Amcor sets out a pages 15-21 of its Brief on Exceptions. As ComEd understands it, these arguments correspond with exceptions substitute language beginning at page 7 (last paragraph) and continuing to the 2nd full paragraph on page 8. In addition, Amcor includes related exceptions substitute language at page 14 for Findings and Ordering Paragraphs Nos. 5 and 6. ComEd asks the Commission to reject these Amcor exceptions.¹

In **Part II** below, ComEd explains why many of Amcor's arguments at pages 6-7, and all of the arguments at pages 21-34 are outside the scope of the matter at hand. Accordingly, the Commission should reject outright Amcor's exceptions substitute language beginning at page 8 (3rd full paragraph under the heading "The Stipulation is the Entire Record in this Proceeding") and continuing through to page 15; including Findings Nos. 7 and 8).

In sum, ComEd's arguments in each of these Parts demonstrate that the entirety of Amcor's exceptions to the PO are infirm.

I. Contrary to Amcor's Arguments, the Proposed Order Is Exactly Right.

¹ At page 15 of its BOE, Amcor attacks a footnote in the PO. ComEd is not addressing this challenge because it is essentially dicta.

In its Brief on Exceptions, Amcor claims that the reasons set out in the PO for denying the Motion *in Limine* either contradict the record, ignore the record, or find no basis in the record. (Amcor's BOE at 15). As shown here below, Amcor is wrong on all counts.

A. The PO correctly observes that Amcor had no clear right to perform independent or third-party meter testing.

(ComEd's reply to Amcor's argument that it had the right to test the meter itself - BOE at pages 15 -16).

Amcor claims that the PO on Remand is wrong for not recognizing that Amcor had the right to test the meter for itself. (Amcor BOE at 16.) But, Amcor points to *no* Commission rule to support this assertion. There is no such rule.

But, the Commission offers something better. The PO points out that Section 410.190 (d) of the Commission's rules provides for "customer requested" meter testing. (PO at 8.) The provisions of this rule are meaningful. At the outset, the Rule gives a customer the "right" to a meter test supervised by a Commission representative. As such, the Commission's rules do "better" than allow for third-party testing. Indeed, Rule 410 provides a customer with an expert at minimal expense. As such, the process ensures that there will be no debate as to whether some other independent or third-party expert is qualified or competent to test the meter. Rule 410.190 (d)(2) also provides customer with what is effectively a "preservation hold." Under this provision, once a request for a referee test is made, the utility is given notice to "not disturb the meter in any way." (*Id.*) Amcor has not shown the Commission why the process provided for under Rule 410.190 (d) was insufficient.

Instead, Amcor tries mightily to confuse the Commission by misdirecting its attention to a discovery rule, *i.e.*, Section 200.360 (c) which ostensibly states, among other things, that a party may utilize discovery tools commonly utilized in court civil actions. (BOE at 16.) Drawing

from this Commission rule, Amcor then injects some of the language in Sp. Ct. Rule 214 that allows a party to make a “written request” to another party to produce an object for “testing.” (*Id.*). But, these rules are just a distraction. At bottom, Amcor does not, and cannot explain why the Commission would place a customer’s “right” to Referee testing into its Part 410 rules and not do the same for independent or third-party testing. The only reasonable conclusion to be derived from this scenario, is that the Commission did *not* intend to give a customer the right to pursue independent, third-party testing.

The PO correctly observes that the Commission is a quasi-adjudicatory body and as such not all discovery procedures that are commonplace in civil litigation are applicable to cases brought before the Commission. (PO at 8.) Indeed, the Commission has its own rules. This is directly owing to provisions of the Illinois Administrative Procedure Act (“IAPA”) and the Illinois Public Utilities Act (“PUA”). The IAPA requires all agencies – including the Commission – to “adopt rules establishing procedures for contested case hearings.” 5 ILCS 100/10-5.

Further, the Commission has another extensive set of rules and regulations. These rules set out the rights and obligations not only for utilities but also for customers. Relevant here, Rule 410.190 (d) gave Amcor an important customer right which for reasons unknown, it did not deem sufficient or timely exercise.

Suggested Language - to be inserted at page 8 of the PO following the 1st full paragraph on that page.

In its exceptions brief, Amcor contends that Section 200.360(e) and Sp. Ct. Rule 214 suffice to establish a customer’s right to independent or 3rd party testing. (Amcor BOE at 16). We disagree. If the Commission intended to permit independent or third-party meter testing, it would have set out this right in Part 410. Indeed, this is exactly where our Rule 410.190 (d) gives customers the right to ask for Referee testing. There being no rule, Amcor’s claim of a right fails.

B. The PO applied sound judgment in rejecting Amcor's argument that ComEd knew or should have known that future litigation was likely.

(ComEd's reply to Amcor's argument that ComEd knew or should have known that future litigation (centering on the meter) was likely after the informal complaint was closed. BOE at 16-18; Exceptions at 8.)

Amcor takes exception to the PO on Remand by directing the Commission to correspondence exchanged between the parties prior to the filing of the instant Complaint. (Amcor BOE at 16.) But, this correspondence only undermines Amcor's assertions that ComEd knew or should have known of the key importance of the meter in the dispute and that litigation would ensue with respect to the meter test results after the informal complaint process was closed. (Amcor BOE at 16-18; Exceptions at 8.)

On February 2, 2010, Amcor's counsel sent a letter complaining that ComEd "failed to provide any evidence that this meter gave inaccurate readings." *See* Stipulation, Ex. D. This is true. ComEd had no test results that showed the Replaced meter to be anything less than accurate. Indeed, this is why ComEd considered the meter to be a non-issue in this dispute.

On February 17, 2010, ComEd responded *via* email to Amcor's counsel. *See* Ex. E to Stipulation (February 17, 2011). Significantly, ComEd did *not* dispute Amcor's insistence that the Replaced Meter was giving accurate readings - because it was. There was a different issue altogether, *i.e.*, an incorrect value scaling factor which caused Amcor to be under-billed, and this communication attempts to explain the situation to Amcor.

From the very start, ComEd's knew the scaling factor issue was cause of the underbilling. As such, ComEd never considered the meter itself to be key in this proceeding. This is because the actual cause of the billing error, was *not* something that shows itself on a meter test. Hence, Amcor's claim that the meter was the central piece of evidence - and that ComEd should have known this, is simply wrong. (Amcor BOE at 12.)

At bottom, ComEd is not responsible for imagining what another party's particular strategy will be at any given time. Given Amcor's early position with respect to accuracy of the Replaced Meter together with the testing results showing the Replaced Meter to be accurate, ComEd reasonably believed the meter was not at issue. Having no preservation letter from Amcor or notice from the Commission to not disturb the meter, ComEd had no reason to hold on to the Replaced Meter after it sat on a shelf for over a year.

In a different vein, Amcor asserts that a number of courts have found that "a party's decision to test the evidence is itself evidence that it knew the evidence so tested was important for likely litigation." (Amcor BOE at 16.) Such a proposition, useful as it might be in certain types of court litigation, has no bearing on the facts and circumstances here. ComEd did not test the meter in anticipation of litigation. It was, as the PO correctly notes, attempting to find out why Amcor's billings went up after the Replaced Meter was removed from Amcor's premises. (PO at 9.) This is a situation far removed from the case law situations on which Amcor relies.

So too, Amcor makes much of the notion that ComEd did not immediately attempt to collect the disputed charges after the informal complaint closed. It claims that there is no actual proof that this was an “oversight” by ComEd. (Amcor BOE at 18.) Amcor’s argument amounts to having ComEd prove a negative, *i.e.*, why something was not done - a daunting task which in the end is worth little or nothing. This argument is a distraction and belies common sense.

Finally, Amcor chides the PO for stating, without record support, that “a fair amount” of informal complaints at Commission never progress to a formal complaint. (PO at 8.) But, the Commission is doing nothing more here than drawing on its own experience and applying good judgment in considering the sufficiency of Amcor’s claim that ComEd knew future litigation was likely. What Amcor complains of here, is exactly what a reasonable decision-maker is expected to do.

Suggested Language - new paragraph to be inserted after 2nd full paragraph on page 8 of PO on Remand:

In its BOE and proposed exceptions language, Amcor claims that “ComEd knew or should have known that the Replaced Meter was a key piece of evidence for resolving the dispute.” In support of its claim, Amcor directs the Commission’s attention to certain correspondence had between the parties at an early time and that is part of the parties’ Stipulation. According to ComEd, however, this very exchange between the parties in early 2010 (where Amcor essentially asserts that the meter was accurate and where ComEd does not dispute that claim) serves to objectively show that it had no knowledge that meter accuracy would be an issue. We agree. ComEd cannot be held responsible for Amcor’s undisclosed new strategy that would someday involve having the meter, which tested accurate, be subject to another test by an independent or third-party.

C. The PO correctly observes that Amcor took no timely action to preserve the meter.

(ComEd's reply to Amcor's argument that it was "unfairly surprised by ComEd's discarding of the meter." BOE at pages 18-19.)

Amcor understands the PO to acknowledge its argument that ComEd did not give Amcor notice that it was discarding the meter. (PO at 8.) ComEd is compelled to point out, however, that no rule requires customer notification when a meter is being discarded. In any event, what Amcor attempts to challenge here, is the PO's telling observation that Amcor "never made any attempt to preserve the meter." (Amcor BOE at 18.)

Amcor complains that there is no requirement for a party to conduct actual discovery during pre-litigation settlement discussions. (Amcor BOE at 18.) The particular proposition that Amcor sets out may be true, but it has no relevance to what is at hand. A reasonable litigant will investigate and gather whatever evidence it can far *before* filing a complaint. A reasonable litigant will enter into settlement negotiations fully armed with its own evidence. A reasonable litigant will make full and effective use of any pre-trial process afforded by the tribunal by bringing in the best evidence to support its position.

Here, however, Amcor did none of these things. At the start, and as the PO observes, Amcor made no attempt to preserve the Replaced Meter which only it argues was the key evidence in this proceeding. (PO at 8.) Yet, the PO correctly points out, Amcor never even inquired about the status of the meter or about ComEd's retention policy for meters. The PO further notes, and correctly so, that Amcor never requested ComEd to hold the meter or have a referee test performed, as was its right. (PO at 8.) And, as the PO rightfully considers, Amcor did not do any of these things before engaging in settlement negotiations or filing its informal complaint. (PO at 8.)

The Commission has great respect for its processes and that includes its informal complaint process. But, Amcor did not come prepared to fully engage in that process. If, Amcor's theory of the case was solely meter-driven, it should have walked into that informal complaint process with proof in hand. Without question, the Commission's Referee testing process under Rule 410.190 (d) gave Amcor ample opportunity to gather proof that would either support or negate its theory.

All of Amcor's omissions, *i.e.*, its failure to act with due diligence, is why it cannot legitimately claim surprise. *Shimanovsky v. General Motors Corporation*, 181 Ill.2d 112, 692 N.E.2d 286, 291-92 (1998). Likewise, Amcor cannot unfairly shift the blame to ComEd for its own unreasonable inactions.

Suggested language - to be inserted in the last paragraph on page 8, and in the 2nd sentence:

Although it was not given notice that the meter would be discarded by ComEd (and no rule requires such notice), it also never made any attempt to preserve the Replaced Meter which it has argued is the key evidence in this proceeding.

D. The PO correctly considered that ComEd, in keeping with the Commission's Rule, retained the meter test records and diagnostic results that Amcor could challenge.

(ComEd's reply to Amcor's argument that it was "prejudiced." BOE at 19).

The PO recognizes that - if Amcor actually had a right to perform additional testing on the meter - it may have been somewhat prejudiced because it could not test the meter once it was discarded. (PO at 9.) But, the PO also considers, and appropriately so, that the actual record of the the meter tests results survive. (*Id.*). This evidence, the PO reasons, was available to Amcor and could assist in the preparation of its case. (*Id.*)

Amcor complains that the PO speaks of a solution that multiple courts have rejected as a matter of law, *i.e.*, substituting one expert's description of a piece of evidence in the situation where another party's expert has no access to that same piece of evidence. (Amcor BOE at 19.) It then cites to a string of case law that involve private-party litigation over defective products. (*Id.*). But, the situation here is no way comparable.

ComEd is not some private party whose activities go unchecked. To the contrary, it is a public utility subject to the Commission's jurisdiction and all of its rules and regulations. *See* PO, Findings and Orderings Paragraphs (1) and (2). All aspects of metering are heavily regulated by the Commission. Given that ComEd is a regulated public utility, it was required, as the PO observes, to perform the meter test pursuant to the Commission's rules. (PO at 9.) Indeed, the PO rightfully confirms that meter test results proffered by public utilities carry a "significant indicia of credibility" because they are made and retained in accordance with the Commission's rules. (*Id.*). These statements in the PO are unassailable. They show why the case law, that Amcor urges upon the Commission, does not apply well to Commission proceedings.

Further, the PO correctly notes that the meter test was not performed in preparation for litigation. (PO at 9.) This is a fact of high importance, borne out by the record and adds still another layer of credibility to the preserved meter test record. So too, Mr. Rumsey, the technician who tested the meter, was not a private expert retained for purposes of litigation. Moreover, ComEd was more than willing to have Mr. Rumsey available to Amcor for cross-examination. *See* Reply in Support of Respondent's Motion to Strike (June 4, 2012). Finally, given that Amcor allegedly had some person or entity in mind to re-test the meter, this person or entity could have assisted Amcor in disputing the meter test results and the diagnostic (non-

manipulable) readings of record. Overall, the most telling fact in this situation is that the meter tests records showed the Replaced meter was registering usage “accurately.”

E. The PO correctly found that Amcor’s own lack of diligence created the situation it now complains of.

(ComEd’s reply to Amcor’s argument that it “was diligent.” BOE at 20.)

Amcor has essentially nothing to say about its diligence in this matter. Indeed there is nothing it can say.

If Amcor considered the meter relevant to its dispute with ComEd’s billing, and wanted to test the meter, it could have promptly asked for Referee testing as provided for under the Commission’s rules. 83 Ill. Adm. Code 410.190. It did not do so. Amcor also could have timely inquired of ComEd about the meter’s status and asked how long the meter would be held. It did not do so. Amcor also could have sent ComEd a preservation request letter to hold the meter for the unspecified testing it claims to have desired. It did not do so. All total, Amcor did nothing to help itself in the situation it now complains of.

What little Amcor does argue on the question of diligence, makes no sense. It takes the PO on Remand to task for suggesting that Amcor had a “duty” to conduct discovery during pre-litigation settlement discussions. (BOE at 20.) In making such an argument, Amcor obviously (and wrongfully) ignores all of the telling evidence that the PO considers. (PO at 9.) It further fails to recognize why its own inactions show an utter lack of due diligence in the instant situation.

Investigating and gathering evidence begins at the very moment a dispute arises. It does not wait for formal discovery. Here, the PO rightfully observes that Amcor was aware of the back-billing on December 8, 2009 when ComEd sent it a letter. (PO at 9.) Further, as the PO notes, Amcor was represented by counsel as early as February 2010. (PO at 9.) While Amcor itself believed that the meter was key evidence that it needed to dispute the ComEd's backbill, the PO observes Amcor failed to take any action regarding the meter from December 8, 2009 to the date that the meter was discarded on October 25, 2010. (PO at 9.)

The PO well understands that early dispute-alleviation processes require a party to come prepared and engage meaningfully. To do anything less is to waste resources. The PO correctly observes that this case involved settlement negotiations and an informal complaint, which it terms a "unique" (and ComEd would add "important") aspect of the Commission's administrative process. (PO at 9.) Indeed the PO is exactly right in stating (what Amcor fails to understand) that "it was in Amcor's best interest" to have inquired about the meter and timely pursued its desired re-testing of the meter in preparation for negotiations and the informal Complaint process. (PO at 9.)

F. The PO correctly concludes that there is no evidence that ComEd acted in bad faith.

(ComEd's reply to Amcor's argument that "there is evidence of ComEd's bad faith." BOE at 20.)

It is important to emphasize that the meter in question was found on testing to be "accurate" in registering usage and the meter test records showing the results of the testing were properly retained. As such, and with no request or demand to hold on to the meter, ComEd had no objective reason to believe that Amcor was interested in the meter. So, as the record shows and the PO considers, ComEd simply went about its normal practices and discarded the meter

after it had sat on a shelf for over a year, *i.e.*, 13 months. (PO at 10.) Despite these facts and circumstances and despite its own lack of diligence, Amcor claims that ComEd acted in bad faith solely because the meter discard date was, by chance, one day after the informal complaint closing date. (Amcor BOE at 20.) Its claim hinges on nothing more than coincidence.

The Commission knows, however, that an allegation of bad faith is a most serious thing. It is a charge that is not ever to be made or treated lightly. Such a claim must rest on substantial certainty and not idle speculation, imagination, or mere conjecture.

For this reason, the PO looks beyond mere “suspicion” and finds there to be no evidence to support a finding that ComEd acted in bad faith. And, the record shows that the PO on Remand is right.

- Nothing shows ComEd to have violated any Commission rule in not notifying Amcor before discarding the meter (because there is no rule).
- Nothing shows ComEd to have violated a Commission order (because there was no order in the premises).
- Nothing shows ComEd to have violated a “do not destroy” directive under Section 410.190(d) (because Amcor never availed itself of the right to Referee Meter Testing).
- Nothing shows ComEd to have violated a “preservation” demand from Amcor (because one was never sent).
- Nothing shows ComEd to have disposed of the meter in an unreasonable time (the meter sat on a shelf in the meter room for 13 months).

On the whole of the record, the PO reaches the only reasonable conclusion possible in these circumstances. It finds that:

there is no evidence to support a finding that ComEd acted in bad faith or more specifically that its actions show deliberate, contumacious or unwarranted disregard of the Commission’s authority.

(PO at 10.) Again, the PO is correct.

G. There Is No Sanction For The Innocent Discarding of the Meter.

(Reply to Amcor's assertion that "barring the testing evidence is the only possible sanction." BOE at 21.)

It is unclear to ComEd what argument Amcor is actually making here. (Amcor BOE at 21.) At the start, Amcor appears to take exception to the PO for noting that:

Illinois courts have held that an order of dismissal with prejudice or a sanction which results in a default judgment, which is what Amcor essentially seeks, is a draconian sanction that should only be invoked in those cases where the party's actions show "deliberate, contumacious or unwarranted disregard of the court's authority." [citing to *Shimanovsky* opinion and *Sanders v. Dow Chemical Co.*]

(PO at 10.)

Amcor does not directly challenge this proposition, because it is true. Both the courts and the Commission have an interest in resolving disputes on the actual merits. Indeed, when exercising its discretion to grant or deny a motion, the Commission is guided by the standards set out in Section 200.25 of its rules. Chief among the objectives stated in this Rule is the development of a full and complete record for decision. *See* Rule 200.25 (a). But, there is more to consider.

Owing to its statutory obligation of supervising utilities, the Commission demands to know exactly what ComEd did, or did not do, in relation to the underbilling that Amcor disputes. The relief Amcor asks for here, is contrary to the Commission's purposes and interferes with its fundamental duties. And, far more than just keeping the meter accuracy test results from the Commission, Amcor's Motion *in Limine* intends that it never see the record of the diagnostic examination that actually is, and always has been, central in this case.

Still, Amcor repeats its claim that evidence of bad faith exists and suggests the harshest of sanctions. But, as the PO rightfully finds, there is no evidence to warrant a sanction. (PO at 10.) Amcor has not read the PO in its entirety.

Once again, the PO is correct.

II. All Remaining Exceptions and Arguments in Amcor's Brief on Exceptions Have Nothing to Do With the PO and Improperly Attempt to Re-Do the Commission's Final Order.

The only matter at hand, is the Court's requirement of having the Commission address the substantive merits of Amcor's exceptions to the ALJ's Ruling on the Motion *in Limine*. (PO at 1). But, Amcor fails to understand what this means.

Amcor devotes a majority of its arguments and exceptions to what is essentially a re-working of the Final Order. (Exceptions at page 8 (3rd full paragraph under the heading "The Stipulation is the Entire Record in this Proceeding") and continuing through to page 14 (including Findings Nos. 7 and 8). This is improper, confusing, and illogical. Amcor appears to be operating on the proposition that:

the Commission is free to reverse its Order of April 2, 2014 and rule that, even if the Commission denies Amcor's Motion in Limine and permits evidence that the Replaced Meter under-billed, ComEd still cannot back-charge Amcor under the Commission's Regulations.

(BOE at 6) (Emphasis added).

Not only is this idea beyond the scope of the instant matter, such a premise simply makes no sense.

There are only two (2) possible outcomes here. And neither of these involve or allow the Commission to render a new decision based on a one-sided re-litigation of the merits of the complaint such as Amcor sets out in its exceptions.

The two (2) possible outcomes are that:

- A. If the Commission adopts the Proposed Order on Remand (as it should), then there is nothing more to be done. The proceeding is at an end.
- B. If the Commission were to reject the conclusions of the Proposed Order on Remand (and it should not), it will be return the matter to the ALJ and the parties will be heard on how to proceed further. Amcor's attempt to short-cut this process, and pre-determine an outcome of its own making, is grossly unfair and out-of-order with Commission process.

Amcor's exceptions do not fit in either of these scenarios and should be rejected outright.

III. Conclusion.

The Motion *in Limine* in this proceeding is unique. It is rare for a party to want to suppress, and keep from the Commission's eyes, meter test evidence that actually shows a meter to be accurate simply because it is unable to confirm, for itself, that the meter tested accurate.

To guide its assessment of the facts and circumstances in this situation, the PO applies the factors set out in the opinion of *Shimanovsky v. General Motors Corporation*, 181 Ill.2d 112 (1998). Its analysis under these factors is solid, supported by the record and draws reasonable inferences from the evidence. Nothing in Amcor's exceptions or its brief on exceptions suffices to undo either the analysis or the conclusions reached in the PO. Hence, all of Amcor's exceptions and arguments should be rejected.

For all the reasons set out above, ComEd respectfully asks the Commission to adopt (along with the additional language proposed here above) the conclusions in the PO as its own.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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