ADMINISTRATIVE LAW JUDGE RULING

On May 2, 2012, LAZ Parking LTD, LLC ("LAZ") filed a formal five-count complaint against Commonwealth Edison Company ("ComEd") challenging the Respondent's back-billing for delivery service. LAZ alleges that ComEd's charges for unbilled delivery services from June 2008 through July 2010 are barred by the Standards of Service Regulations for Electric Utilities of the Illinois Administrative Code. 83 Ill. Adm. Code 410. Counts I, III, and IV were later voluntarily dismissed by the Complainant. LAZ's Count II complains that it was improperly back billed for service to ComEd's meter No. 141362866 ("meter") in an LAZ parking garage, after the meter failed to accurately record LAZ electricity usage. Count V of the Complaint alleges that a back-bill charge of $36,625.07 for an unspecified period was untimely under Section 280.100 of the Illinois Commerce Commission's (the "Commission" or "ICC") rules.

LAZ operates parking garages in the City of Chicago. The garage location with the meter in question is 25 North Michigan Avenue. The ComEd account number for this service location is 2931008045 (the "Account").

Respondent ComEd is an Illinois corporation with a place of business at 440 S. LaSalle Street, Chicago, IL 60605. ComEd is a public utility under Section 3-105 of the Illinois Public Utilities Act (the "Act") and is regulated by the Commission pursuant to the Act.

On June 30, 2015, ComEd filed a Motion for Summary Judgment. On September 25, 2015 LAZ filed its response to ComEd's Motion for Summary Judgment. On October 19, ComEd filed its Reply to the LAZ Response to ComEd's Motion. The Motion for Summary Judgment is addressed in this ruling.

I. Factual Background

Prior to the Account's July 2008 meter reading date, LAZ took service from Pepco Energy Services, Inc. ("Pepco"). No single billing option was in effect under the Pepco supply arrangement, and accordingly the Account was billed by Pepco for supply service and separately by ComEd for delivery services.

Beginning in June 2008, LAZ entered into a Retail Electricity Supply Agreement (the "RESA") with MidAmerican Energy Company ("MidAm"), with service to commence with the Account's July 2008 meter read date. Pursuant to the RESA, LAZ elected single billing under ComEd's Rider SBO, accordingly MidAm included ComEd's delivery services charges in its bills to LAZ.

On July 12, 2010, MidAm re-billed LAZ $861,756.06 for alleged unbilled supply and delivery services said to have been incurred from the Account's August 2008 billing period through its May 2010 billing period. On July 20, 2010, MidAm sent to LAZ a re-bill breakout. Based on a review of MidAm's re-bill breakout, the amount of additional ComEd delivery services charges alleged to have been incurred was $223,312.78.

In September 2010, LAZ received a disconnect notice from ComEd. The disconnect notice claimed that LAZ owed ComEd $36,625.07 but contained no explanation of what the charge was for. On October 4, 2010, LAZ made a payment of $36,625.07 to ComEd to avoid ComEd's threatened disconnection.

LAZ asserted in Count V of its Complaint, on information and belief, that ComEd's charge of $36,625.07 represented delivery services charges for the Account's June and July 2008 billing periods. The Complaint asserted that these charges were time barred under 83 Ill. Adm. Code 280.100 ("Section 280.100") because the claim was made more than two years after the service was allegedly provided. The total amount directly or indirectly paid by LAZ to ComEd for alleged unbilled or late billed delivery services charges is $259,937.85.

Correspondence from ComEd to LAZ, dated October 28, 2010, stated that:

> Our records indicate you have been billed for electricity recorded on meter 141362866 located at 25 N Michigan, Chicago, with an incorrect meter constant that resulted in you being billed for less electricity than you actually used. We have identified the reason for this situation and it has been corrected.

The Complaint states that ComEd is not entitled to collect for the alleged unbilled delivery services because ComEd failed to conduct both an initial test and a post-installation inspection of this meter pursuant to 83 Ill. Adm. Code Sections 410.160 and 410.155 ("Section 410.160" and "Section 410.155"). According to the complaint, either an initial test or a post installation inspection of the meter, both of which are required by Commission regulations, would have shown that the meter was not accurately measuring energy consumption. 83 Ill. Adm. Code Section 410.200(h)(1) ("Section 410.200(h)(1))." Section 410.200(h)(1) bars billing adjustments for under registering metering service if all testing and accuracy requirements are not met. The Complaint alleges ComEd's collection of unbilled or late billed service charges, after failing to comply with required Commission testing requirements, should be time barred.

The meter in question in this case was furnished, installed, owned, operated, and maintained by ComEd. Although LAZ took electricity supply service from MidAm and/or Pepco during the period in question, ComEd was the electric utility that provided metering service on the Account.

The parties agree that this meter was connected to one or more current transformers ("CT" or "transformer"). Current does not pass directly through the meter, instead current passes through the current transformers in order to measure electricity usage. Accordingly, the meter was an instrument transformer metering installation, rather than a self-contained metering installation, as described in ComEd's tariffs at Ill. C. C. No. 10, Orig. Sheet No. 190.

When a meter being installed is connected to a CT, the installing technician is required to enter the CT type and size from the meter/CT location into ComEd's Customer Information Management System ("CIMS). This data entry automatically generates the meter constant or multiplier which is applied to generate the correct measure of usage. ComEd Ex. A., par. 6.

ComEd has provided evidence by affidavit that the meter was tested by its manufacturer on October 25, 2007. *Id*. The meter tested within allowable limits. The meter was installed at Complainant's premises on December 14, 2007. There is no indication in ComEd's affidavits that the CT, an associated device that also requires testing under the regulations, was similarly tested. ComEd's records indicate that the CT information for this meter installation was not properly recorded in the CIMS system at the time of installation, or at any other time after installation prior to May, 2010. *Id.* at par. 8. The failure to incorporate the proper CT values in the CIMS system resulted in an incorrect under registration of usage for more than two years. *Id*.

There is also no indication in ComEd's affidavits that the meter or the associated transformer was tested or inspected within 90 days after installation to determine if it was accurately measuring energy consumption as required by Section 410.155. Therefore, from the date of its installation, this instrument transformer metering installation was not properly recording usage, or its usage was not properly registering through the CIMs system because the required CT information was not incorporated into the billing system.

II. Summary Judgment Motion

A. ComEd Position

ComEd asserts that this dispute is governed by the provisions of Section 280.100 because, according to ComEd, it involves an "incorrect meter constant" contained in ComEd's billing software and is not due to an inaccuracy in the meter. ComEd argues the problem is "nothing more than a billing error" controlled by Section 280.100

During the relevant period, under the heading *Unbilled Service,* Section 280.100 provided in part that a utility may render a bill for services or commodities provided to a non-residential customer only if such bill is presented within two years from the date the services or commodities were supplied.

ComEd affidavits from present and former ComEd employees assert that the billing error:

1) was caused by the use of a default meter constant in ComEd's billing systems that revealed itself through a 2010 meter constant discrepancy report generated for the ComEd billing department. This anomaly was noted in the report due to the absence of the correct meter constant value. This number

should have been derived from the CT data input from the meter location at the time of the meter installation;

2) was corrected in May 2010 after a technician's on-site visit to the meter location (triggered by the error report) to determine and incorporate into CIMS the necessary information about the size/type of the CT needed to set the meter constant. The billing correction began on May 18, 2010 for the period from June 3, 2008 through May 5, 2010:

3) was due to the December 14, 2007 failure to input the proper CT values at the time of the meter installation to establish the "meter constant" in ComEd's billing system. This resulted in a default value meter constant of 1 instead of 600, causing an under-billing of LAZ for its usage until the improper meter constant was discovered and corrected.

After the meter constant was corrected, ComEd generated corrected back billing information for the LAZ account, in a manner asserted to be compliant with the two year limitation of Section 280.100.

ComEd argues that its affidavits establish that this discrepancy was solely a billing issue because the billing constant is part of ComEd's billing software. It contends that the meter itself had nothing to do with the more than two year under billing error. Therefore, according to ComEd it is entitled to Summary Judgment pursuant to Section 280.100.

B. LAZ Position

LAZ argues that the under billing was due to a failure to properly test the meter before and after installation. LAZ has provided its own affidavit from Richard B. Bernhardt, a professional engineer, supporting this position. Mr. Bernhardt states in Complainant's Exhibit A that:

. . .

> 29. . . . in the case where installer (sic) chooses to calculate total energy and power values using an external software, the meter multiplier (meter constant) would be introduced into the bill calculation software (CIMS).
>
> 30. The meter multiplier, whether programmed into the meter or into bill calculation software, is as much a part of the meter installation quality control as any of its other tests and confirmation of components. The assertions to the contrary made by Mr. T. Rumsey in his affidavit on behalf of ComEd are completely wrong.

> 31. . . The assertions made by Mr. T. Rumsey in his affidavit on behalf of ComEd that "neither meter testing not any type of post installation meter inspection would reveal the incorrectness of the meter constant for 1413628766 are completely wrong".

Thus, LAZ contends that the meter, or more properly, the "instrument transformer metering installation" was not properly pretested, or properly installed, or properly programmed into ComEd's billing system. ComEd subsequently failed to perform post installation "under load" inspection required by Section 410.155 which would have revealed the error.

LAZ contends that because ComEd failed to make the required pre and post installation tests or inspections, it is barred from collecting the under billed amount by Section 410.200(h)(1) which prohibits back billing for under registration when required tests for metering accuracy have not been performed. Therefore, Summary Judgment should be denied.

III. Standard of Review

Summary Judgment may be granted only if the pleadings, depositions, and admissions on file, together with 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. Summary judgment is proper only where the evidence, when construed most strongly against the moving party, and most liberally in favor of non-movant establishes clearly and without doubt the right to summary judgment. *Fisher v. Crippen,* 144 Ill. App. 3d 239, 242 (5th Dist. 1986); *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980).

Although summary judgment is encouraged as an aid to expeditious disposal of a lawsuit, it is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *Founders Ins. Co. v. Munoz,* 389 Ill. App. 3d 744, 749, 905 N.E.2d 902 (1st Dist. 2009), affirmed in part, reversed in part on other grounds, 237 Ill.2d 424 (2010). Even if the facts are undisputed, if reasonable persons could draw different inferences from those facts, summary judgment is inappropriate. *Wood v. National Liability and Fire Ins. Co*., 324 Ill. App. 3d 583, 755 N.E.2d 1044, 1047 (2nd Dist. 2001).

In ruling on ComEd's Motion for Summary Judgment, the Commission is to determine only whether a genuine issue of material fact exists, not to try questions of fact. *Waugh v. Morgan Stanley and Co., Inc*., 966 N.E.2d 540, 549 (1st Dist. 2012), appeal denied, 979 N.E.2d 890 (2012). The non-movant need not prove its case at summary judgment stage, but need only present a factual basis that would arguably entitle it to judgment under applicable law. *Conrad v. Christ Community Hospital*, 77 Ill. App. 3d 337, 395 N.E.2d 1158, 1161 (1st Dist. 1979); *Martin v. 1727 Corp*.,120 Ill. App. 3d 733, 458 N.E.2d 990, 993 (1st Dist.1983).

IV. Analysis and Conclusion

It is agreed that ComEd has been providing delivery services on this account since the meter installation on December 14, 2007. On or about June 2008, LAZ entered into a RESA with MidAm in which MidAm included ComEd's delivery service charges in its bills to LAZ.

In July 2010, MidAm sent LAZ a rebill detailing an additional $223,312.78 for delivery service charges from ComEd for the period from the August 2008 bill through its May 2010 bill. In September 2010, LAZ was sent a disconnect notice from ComEd due to an additional $36,625.07 for delivery services for an unspecified period. The total paid to ComEd directly or indirectly for these alleged previously unbilled delivery services is $259,937.85.

According to ComEd correspondence dated October 28, 2010, these additional charges arose because:

> . . . [Y]ou have been billed for electricity recorded on meter 141362866 located at 25 N. Michigan, Chicago, IL with an incorrect meter constant that resulted in you being billed for less electricity than you actually used.

It is uncontested that there was an incorrect meter constant associated with this account from December 2007 until May 2010. The meter constant is a multiplier of the meter reading that is established for the account when the ComEd meter installer inputs information about the CT component of this instrument transformer metering installation into the ComEd billing system software or CIMS. The CT, when properly programmed, communicates with ComEd's CIMS system producing the correct meter constant to generate a bill accurately measuring electric consumption using software at a billing facility. The proper delivery service charges on the account are computed by multiplying the meter reading by the meter constant specific to that type of CT.

Because the CT information was not supplied to the CIMS, ComEd's billing of the account used a default meter constant value to generate meter/CT information provided to MidAm and to LAZ during the period in question. ComEd insists that because the meter constant is part of its billing software that this question is solely a billing issue. Therefore, only the two year limitation on back bills in Section 280.100 applies, rather than billing rules related to meter testing requirements contained in 83 Ill Adm. Code Part 410.

The December 2007 installation error was not corrected until May 2010, when the meter and its attached CT were tested or inspected at the meter location, after ComEd employee Spitz noticed that the LAZ account appeared on a meter constant discrepancy report. The report indicated the meter constant was "1" when it should have been "600". This error resulted in much lower usage readings than were appropriate. Significantly, correcting this discrepancy required that the meter and its CT be inspected at the meter

location. Then the correct CT information was programmed into the billing system from the meter location site. The meter/CT installation subsequently produced correct measurements and bills. The incorrect programming of the meter/CT information was the cause of the under billing that occurred in this case. ComEd. Ex A, par. 8.

Part 410 provides the standards of service for electric utilities and alternative retail electric suppliers. Section 410.10 defines Metering Services as:

> . . . the performance of functions related to the provision, installation, testing, maintenance, repair and reading of electric meters used for billing of retail customers and maintaining meter usage data as well as the maintenance and management of meter information and meter data with respect to those meters.

83 Ill. Adm. Code 410.10.
Clearly, ComEd was providing metering services to this account.

Section 410.155, Installation Inspections, provides:

> 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. At a new or re-wired metering location, where the installation includes potential transformers, the inspection shall be performed by someone other than the original installer.

83. Ill. Adm. Code 410.155 (emphasis added).

Section 410.160, Initial Tests, provides, in part:

> Initial tests are tests made before installation, regardless of whether the meter and associated devices have previously been in service. Each meter and associated device (unless included 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.

83 Ill. Adm. Code 410.160 (emphasis added).

The manufacturer pretested the meter. There is no indication in the record that ComEd conducted a pre-installation test of the meter or the CT. Nor, apparently, did it

conduct an inspection of the meter and the CT within 90 days thereafter. Despite ComEd's assertions to the contrary, if proper tests had been performed, it seems very likely that the erroneous meter constant could have been corrected prior to the billing period at issue in this case.

The bills generated from this instrument transformer metering installation produced inaccurate bills for more than two years because the transformer was improperly programmed into the billing system. The evidence indicates that ComEd violated Section 410.155 and possibly Section 410.160 by not testing the meter and the associated CT to determine if they were "accurately measuring customer energy consumption."

A pre-installation test of one part of a multiple component system that does not determine the overall accuracy of the system is useless. The testing performed in this case was not compliant with the pre and post installation testing requirements of Sections 410.155 and 410.160.

Section 410.200 (h)(1) provides in part that 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, as in this case, all testing and accuracy requirements of this part have not been met. 83 Ill. Adm. Code 410.200(h)(1).

As asserted by LAZ witness Bernhardt, a revenue meter may be tested for accuracy under load at the customer location with a type of test meter called a portable standard.

ComEd's witness statement that neither meter testing prior to installation nor a post-installation meter inspection would have revealed the problem with the meter constant does not address the fact that the regulations require the testing and inspection. Moreover, the tests are designed to determine the accuracy of the entire meter/transformer installation, not just the meter. Had the transformer component of this installation been properly tested after the installation, it seems unlikely that more than two years of billing errors would have occurred. Not testing the installation as a whole was non-compliance. Mr. Bernhardt's statement contradicts ComEd's Exhibit A affidavit assertion that testing would not have revealed the error. That conflict in the evidence and ComEd's lack of compliance with testing requirements present material issues of fact bearing on the outcome of this case.

The Complainant has established that there are material issues of fact regarding whether this billing error was caused by ComEd's failure to perform meter/transformer pre-installation testing and a post-installation inspection as required by Part 410. The proper resolution of this case involves consideration of Part 410 metering regulations as well as Section 280.100. Respondent's Motion for Summary Judgment is denied.

Terrance A. Hilliard
Illinois Commerce Commission

Administrative Law Judge