

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

LAZ PARKING LTD, LLC)
)
 Petitioner,)
)
and)
)
COMMONWEALTH EDISON COMPANY)
)
 Respondent.)
)
Complaint pursuant to Sections 9-250)
and 10-108 of the Illinois Public Utilities)
Act And Section 200.170 of the Rules of)
Practice Of the Illinois Commerce Commission)

Docket No. 12-0324

**REPLY BRIEF
OF
LAZ PARKING LTD, LLC**

LAZ incorporates by reference the material on the nature of this case and its procedural background in Sections I and II of its Initial Brief. Capitalized terms used in this Reply Brief without definition have the same meanings as in the Initial Brief.

I. Argument in Reply

A. Commission Regulation 410.200 Applies to This Case

ComEd claims that Commission Regulation 410.200 does not apply unless a meter test first shows an error. (ComEd Brief, pg. 13). Reading this provision as ComEd suggests means that before an electric utility can be sanctioned under Section 410.200 for failure to perform a meter test, it must have tested the meter. As ComEd reads Section 410.200, the sanction for ComEd's failure to test a meter does not apply if it has failed to test the meter. A more absurd reading of Section 410.200 can hardly be imagined.

The tests required by Part 410 are mandatory, not optional. Section 410.200, just like the other provisions of Commission Regulation 410, has no precondition to its application or effectiveness. Section 410.200(h) states:

h) Billing adjustments

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

83 Ill. Adm. Code Section 410.200(h)(1) (emphasis added).

There is nothing ambiguous or unclear about the language in this Commission Regulation, thus

making principles of statutory construction ComEd seeks to introduce inapplicable. The record is undisputed that ComEd failed to conduct the post-installation test or inspection of 141362866 required under Section 410.155. Therefore it has failed to meet all of the requirements of Part 410, and it may not adjust its bill to LAZ.

ComEd argues that even if a post-installation inspection or test were conducted, it would not have disclosed the error in this case. This argument falls with ComEd's admission in testimony at hearing that a post-installation inspection or test of 141362866 with the billing multiplier information would have revealed the error in that multiplier. (Tr. 3/15/2016 Hrg., 368:6-22).

ComEd next claims that if 141362866 or the related current transformers ("CTs") "had experienced error, ComEd would have removed the faulty equipment from service and notified the ComEd billing department of the percentage of error." (ComEd Brief, pg. 14). The record in this case renders this statement nonsensical. ComEd never explains how it would have learned that 141362866 or any associated CT had an error, especially when it failed to conduct any post-installation testing or inspection of that meter. ComEd doesn't even know how or why information on 141362866 eventually appeared in its bi-weekly meter discrepancy report. (Tr. 3/15/2016 Hrg., 368:8-14).

B. ComEd's Supposed Distinction Between Meter Error and Billing Error is Meaningless and Unsupported

ComEd goes to great lengths to distinguish meter error from billing error, and in doing so it misses the entire point of the post-installation testing required under Section 410.155: to ensure that the meter is accurately measuring the customer's energy usage. ComEd argues that this is a

billing multiplier issue, and that the billing multipliers are in CIMS. (ComEd Brief, pg. 4).

The testing and inspection regime of Part 410 of the Commission Regulations is based on a fundamental principle that ComEd is determined to miss. The meter is the point at which the utility and the customer meet, and the fundamental point of a meter is to ensure that the customer is accurately billed for the energy it uses. The importance of accurate metering – and, in turn, accurate billing – increases with the size of the customer if for no reason other than the increased dollar amounts involved. The Commission Regulations recognize this in Part 410 by requiring testing, including post-installation testing, of meters associated with instrument transformers such as 141362866.

As LAZ witness Bernhardt made abundantly clear, ensuring the accuracy of measurement of LAZ's energy usage required ensuring the quality of LAZ's entire metering installation and its proper coordination with ComEd's customer billing system. (Tr. 3/15/2016 Hrg., 290:4-15). The record in this case makes clear that these are tasks to which ComEd's present meter testing and inspection procedures are manifestly unequal. ComEd insists that all it needs to do is make sure the CTs are aligned correctly and that the power is flowing in the right direction. (Tr. 3/15/2016 Hrg. 377:1-378:15). But its witnesses never explain (and, of course, can't explain) how such a quick look-see could ever ensure that the metering installation was accurately recording the customer's energy usage.

A single fact overturns ComEd's elaborate position on the primacy of billing multipliers and their supposed separation from anything having to do with meters: ComEd itself has no idea where its billing multipliers go once a metering installation is completed, nor where they're stored. Sometimes they're in CIMS, but sometimes not. Sometimes they're in a field technician's

company-issued laptop computer. “For reasons unknown,” ComEd states, it used the wrong billing multiplier in CIMS for 141362866. (ComEd Brief, pg. 4).

But the reason is not only known, it’s plain on the face of the record in this case. ComEd failed to conduct the post-installation inspection required under Section 410.155.

ComEd’s claim that the Commission Regulations “narrowly and purposefully define meter error” as an erroneous variation in registration of more than two percent up or down is equally unfounded. The Commission Regulations do not define “meter error,” and if the Commission had wanted to limit the meaning of “meter error” to that two percent collar it could have done so by including another defined term in Section 410.10 of the Commission Regulations. But the Commission did not do that. Rather, the Commission Regulations state that if the test of a meter shows that it is outside the tolerances specified in Section 410.150, that is a meter error. But nothing in the Commission Regulations even remotely states that that is the only kind of meter error there is. ComEd’s definition of “meter error” would exclude other occurrences, which certainly may occur in a piece of equipment as highly engineered as an electricity meter. (LAZ Exh. 2.0:186-190).

Another mysterious unknown is why ComEd’s bi-weekly meter discrepancy report did not show any discrepancy relating to 141362866 from 2007 to 2010, nor is it known how that data arrived in the meter discrepancy report after a period of several years. ComEd’s billing system expert witness did not even understand what was meant by a central location where billing multipliers are recorded, nor did this witness even know what a billing multiplier was. (Tr., 3/15/2016 Hrg., 403:15-404:19). On the basis of such facts as these ComEd argues that the Commission should deem its post-installation meter inspection regime adequate under Part 410.

C. ComEd's Distinction Between a Meter Accuracy Test and a Meter Accuracy Inspection is Unsupported and Meritless.

ComEd's next defense of its failure to conduct any required post-installation testing is that Regulation 410.155 requires a post-installation "inspection," rather than a "test." ComEd provides no support for this distinction. This attempt at verbal acrobatics fails for several reasons.

First, the Commission Regulations do not define "inspection." ComEd defines the term itself, and, unsurprisingly, its definition is perfectly congruent with the steps ComEd sees fit to take, even if those steps utterly fail to ensure that a transformer-rated metering installation is accurately measuring customer energy usage.

Second, there is no meaningful distinction between a "test" of the meter and an "inspection" of the meter, especially when the purpose for which an "inspection" is performed is to ensure that the meter is "accurately measuring the customer's energy consumption." (Section 410.155). Merriam-Webster, for instance, defines an "inspection" as "a check or testing of an individual against established standards." See Exhibit A to this Reply Brief.

ComEd witness Rumsey, testifying as ComEd's expert on meters, argues against treating the meter and instrument transformers as an integrated system, but nonetheless admitted that he never performed a field test of a meter. (Tr. 3/15/2016 Hrg., 358:18-359:14).

The clear intention of the Commission Regulations, whether in the context of a "test" or an "inspection" of an instrument transformer meter, is to help ensure that larger customers are correctly billed and don't have to endure what ComEd's grossly inadequate procedures have inflicted on LAZ in this case.

D. ComEd is Responsible for the Quality of the Metering Installation

ComEd tries to carve the CTs away from the meter to avoid liability in this case. But like

its bogus distinction between a meter accuracy “test” and a meter accuracy “inspection,” it is something ComEd evidently concocted for this case. ComEd treats CTs and meters quite differently in its own tariffs.

ComEd expressly includes current transformers within the scope of metering equipment when it charges customers for removal of a meter. (ComEd Rate MSPS, Ill. C.C. No. 10, 4th Rev. Sheet No. 100). ComEd uses the term “metering installation” throughout its tariffs, including instrument transformer metering installations. (E.g., ComEd Rate MSPS, Ill. C.C. No. 10, Orig. Sheet No. 104). LAZ witness Bernhardt’s testimony regarding the importance of the entire metering installation to the determination of whether the customer’s usage is being accurately measured is, therefore, entirely consistent with ComEd’s own treatment of metering equipment in its own tariffs.

Correct customer billing depends on accurate metering, which in turn relies on an integrated system of components and calculations to bill properly.

E. ComEd Distorts LAZ witness Bernhardt’s Testimony

The entirety of ComEd’s argument from page 20 to the first paragraph of page 22 of its Brief is based on its confusion of a test with the customer meter in isolation with a test in which the portable standard and customer meter are connected in series.

ComEd distorts LAZ witness Bernhardt’s testimony by tactically omitting any reference to the other tests he described and recommended to ensure accurate metering and billing. Based on this distortion, ComEd then claims that the test LAZ witness Bernhardt recommends would make it impossible to do the light load, heavy load and power factor test. (ComEd Brief, pg. 20), and that his test would never discover the error at issue in this case.

To the contrary, LAZ witness Bernhardt's testimony made clear that "[t]here are multiple tests that need to be performed to ensure that a customer's metering installation is accurately measuring the energy." (Transcript, 3/15/2016 Hrg. 256:17-19). LAZ witness Bernhardt also stated that "[ComEd witness] Rumsey is limiting himself to just one type of test, where there are several that are necessary to ensure the proper installation and accuracy." (Tr. 3/15/2016, 259:1-4). ComEd can argue that LAZ witness Bernhardt's recommended testing procedure makes it impossible to perform the light load, heavy load and power factor tests (ComEd Brief, pg. 20) only by ignoring its own cross examination of LAZ witness Bernhardt regarding testing the customer's meter in series with the portable standard:

Q You don't have to read the -- you can just start with "as I stated."

A "As I stated earlier, the portable standard would be connected in series with the meter under test so that the same voltage, current, and phase angle would pass through both meters for the same testing period. To determine whether the meter under test is properly reporting customer usage, one would compare the usage indicated by the meter under test with the usage indicated by the portable standard."

Q Okay. Stop just for one second.

A Sure.

Q Well complete it in -- so far the two descriptions, the one that we just went over on page 10 at 213 and this one, sound the same, correct?

A Yes.

Q Okay. But then here you add in another sentence beginning "consequently"?

A Would you like me to read that?

Q Yes, please.

A "Consequently to obtain the usage indicated by the meter under test, one would need to take the relevant pulse data from that meter and factor it by all the applicable billing multipliers including the current transformer multiplier. Once again, had this been done by ComEd, the enormous difference between the two usage figures would have made ComEd's error immediately apparent."

(Tr., 3/15/2016 Hrg., 282:15-283:20). On further questioning by ComEd's counsel, LAZ witness Bernhardt confirmed that, depending on the type of test conducted, the billing multipliers would be applied to both the portable standard and the meter under test, or to neither. (Tr., 3/15/2016 Hrg., 284:11-22).

LAZ witness Bernhardt confirmed that the test of a customer's meter in isolation, which is the test method prescribed by ComEd witness Rumsey, would never determine whether that customer meter is accurately measuring the full load of a customer that uses CTs. (Tr. 3/15/2016 Hrg. 263:18-264:11). His testimony disclosed the major flaw in ComEd's meter inspection and testing regime.

F. ComEd's Refusal to Adequately Test Transformer-Rated Meters Post-Installation Under Section 410.155 Is Its Own Policy Choice

Section 410.155 requires the utility to conduct a post-installation inspection under load to determine if the meter is accurately measuring customer energy consumption."

ComEd argues that a decision in favor of LAZ would require it to "go above and beyond the testing and accuracy requirements in the Commission Regulations and conduct additional testing - as specified by LAZ - to ensure that mistakes never happen." With this argument ComEd once again resorts to its fallacious straw man trope: to challenge any ComEd procedure in even the slightest degree is to demand unattainable perfection.

Nothing that LAZ has suggested in this case represents any quest for perfection. There is no technological leap required to test the metering installation so that future LAZs are fewer and

farther between. (Tr. 3/15/2016 Hrg., 329:10-14). Contrary to ComEd’s straw man argument, LAZ witness Bernhardt made clear that the type of post-installation procedure he recommends can be completed in a matter of minutes, with equipment that is commonly available in the commercial market. (Tr. 3/15/2016 Hrg., 266:18-267:4). Other utilities do field meter testing, or else equipment such as that described in LAZ Exhibit 2.1 and 2.2 would not exist.

ComEd has made a policy choice as to what it considers to be the scope of a required “inspection,” despite ample testimony from LAZ witness Bernhardt on how that procedure falls far short of what is needed to ensure the accurate measurement of the customer’s energy consumption, all with equipment and procedures commonly available and widely used. Far from demanding that “no mistakes ever happen,” LAZ is simply showing that ComEd didn’t do the job that the Commission Regulations required it to do.

II. ComEd’s Rule 216 Arguments are Repetitive and Still in Error

A. ComEd Misrepresents to this Commission the Holdings of Illinois Cases It Cites

ComEd cites the cases of *Ellis v. American Family Mut. Insurance Co.*, 322 Ill. App. 3d 1006 (4th Dist. 2001) and *New Amsterdam Casualty Co. V. Waller*, 323 F.2d 20 (1963) in support of its assertion that “a judge may disregard an admission if it appears that the facts in the admission are untrue.” (ComEd Brief, pg. 28). Either ComEd is unable to read and construe a reported judicial decision or it is engaged in an effort to perpetrate a fraud on this tribunal.

Ellis concerned the death of a young man in an accident that occurred while he was driving his mother’s car. 322 Ill. App. 3d at 1008. The mother’s insurer denied coverage on grounds that the son was not an “insured person” within the meaning of the policy because the mother had stated in response to a Rule 216 request for admission that he owned his car at the

time of the accident. 322 Ill. App. 3d at 1009. During her discovery deposition, the mother contradicted her Rule 216 response when she stated that the son was driving her car because he did not have his own car at the time. 322 Ill. App. 3d at 1009-10. While her statement that her son didn't own a car at the relevant time was true, the court refused to allow that testimony to overturn the answer she gave in her response to the Rule 216 request for admission, and it affirmed the lower court's decision in favor of the insurer. 322 Ill. App. 3d at 1010. Thus, while ComEd cites *Ellis* in support of its position, the case actually supports LAZ's position.

New Amsterdam is equally as irrelevant to this case. *New Amsterdam* concerned a judgment creditor's attempt to attach a North Carolina home built in part with funds fraudulently transferred by the judgment debtor. 323 F.2d at 23. The transferee of the funds sought to bar the creditor's recovery because its lawyer had in an earlier filing advanced a theory of the case that made judgment in his client's favor insupportable. 323 F.2d at 24-25. The federal appellate court rejected the transferee's contention that the lawyer's statement was a judicial admission. 323 F.2d at 24-25. *New Amsterdam* is irrelevant not only because it concerns North Carolina law, but also because it has nothing to do with requests for admission under the Rule 36 of the Federal Rules of Civil Procedure, the federal analog of Rule 216.

B. ComEd Continues to Re-Litigate Its Rule 216 Judicial Admissions

Throughout this entire proceeding ComEd has engaged in an unremitting effort to violate the orders of the ALJ regarding its Rule 216 judicial admissions. (See, e.g., ComEd Brief, pg. 31). With each and every pleading it files, it includes, yet again, the same arguments about why Rule 216 does not apply in Commission proceedings. ComEd then has the audacity to complain about LAZ's motions to strike and related responses to its actions.

The real extent of ComEd's contumacious behavior towards the standing ALJ orders in this case cannot be fully appreciated without seeing how often and how repeatedly ComEd has engaged in it. Attached as Exhibit B to this Reply Brief is a timeline showing the pleadings and responses in which ComEd has continued to re-litigate its Rule 216 judicial admissions in virtually every piece of paper it files in this proceeding.

C. LAZ Has Not Waived Any Rule 216 Admissions

ComEd makes a last-ditch, frivolous argument that LAZ Parking has waived certain admissions because its witnesses discussed how ComEd bills were handled. (ComEd Brief, pg. 32). ComEd's assertion is almost too fatuous to merit a response, but suffice it to say that nothing in the testimony of any LAZ's witnesses presented any contention regarding any fact admitted by ComEd under Rule 216, and the exhibit to LAZ's complaint including a copy of ComEd's bill for \$36,625 does not place in question the grounds for that bill.

III. Conclusion

The law and the facts in this case are clear. ComEd failed to perform a post-installation inspection or test of 141362866, a transformer-rated meter, as required by Section 410.155. Section 410.200(h)(1) prohibits ComEd from adjusting LAZ's bill because by failing to conduct that inspection or test ComEd did not comply with all of the requirements of Part 410 of the Commission Regulations.

Similarly, ComEd's judicial admission that its \$36,625 bill to LAZ was for delivery services rendered prior to the recovery period permitted by Section 280.100 entitle LAZ to recovery of this amount. ComEd's own citation to *Ellis*, 322 Ill. App. 3d 1006, above, further supports this result.

The Commission should disregard the ComEd dust cloud on where billing multipliers “reside” and its artificial separation of “billing” error from “meter” error. The overall purpose of Part 410, and Section 410.155 in particular, is to ensure accurate customer billing for the energy that the customer uses. ComEd has failed to take the required steps to ensure this. The Commission should disregard ComEd’s arguments, allow common sense to reassert itself, and decide in favor of LAZ on the grounds prayed for in the Complaint.

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Respectfully submitted,

LAZ PARKING LTD, LLC



By: Paul G. Neilan

Its Attorney
Law Offices of Paul G. Neilan, P.C.
1954 First St. #390
Highland Park, IL 60035
847.266.0464 Tel
312.580.5483 Cell
312.674.7350 Fax
pgneilan@energy.law.pro

Attachments:

- Exhibit A – Merriam Webster, Definition of “inspection”
- Exhibit B – Timeline of ComEd’s Repeated Rule 216 Re-Litigation