

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

LAZ Parking LTD, LLC)	
)	
-vs-)	
)	
Commonwealth Edison Company)	Docket No. 12-0324
)	
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.)	

REPLY BRIEF ON EXCEPTIONS
OF COMMONWEALTH EDISON COMPANY

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	LAZ’S EXCEPTION #1 PROVES THAT THIS CASE IS GOVERNED BY SECTION 280.100, NOT 410.200, AND IS OTHERWISE MERITLESS	2
A.	LAZ Asks the Commission to Apply the Limitation Period for Billing Errors, not Meter Errors, Thereby Admitting this is a Billing Error, not a Meter Error	2
B.	The “Admissions” at Issue Only State the Undisputed Fact that the Disconnection Notice Claimed \$36,625.07 for Delivery Service Charges	2
C.	The History of the “Admissions” in this Case	4
D.	LAZ’s “Law of the Case Argument” is Misplaced.....	7
E.	LAZ’s Claim that the PO Eviscerates Supreme Court Rule 201(j) is not Well-Founded.....	7
III.	LAZ’S EXCEPTION #2 MISCHARACTERIZES THE RECENT APPELLATE DECISION IN <i>AMCOR FLEXIBLES, INC. V. ILLINOIS COMMERCE COMM’N AND COMMONWEALTH EDISON CO.</i> , 2016 IL APP (1ST) 152985-U.....	8
IV.	ERRATA TO EXCEPTIONS.....	9
V.	CONCLUSION.....	11

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Commonwealth Edison Company (“ComEd”), by its counsel, in accordance with the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”) and the scheduling order of the Administrative Law Judge (“ALJ”), submits this Reply Brief on Exceptions (“RBOE”) to the ALJ’s Proposed Order (“Proposed Order” or “PO”).

I. INTRODUCTION

LAZ Parking Ltd., LLC’s (“LAZ”) BOE takes three exceptions to the PO. None of those exceptions are necessary or appropriate, and the first two are directly contrary to the facts of this case and the governing law.¹ Moreover, all of these exceptions illustrate the incorrect nature of LAZ’s other positions in this case – the positions that the PO incorrectly decided in LAZ’s favor.

¹ Whether or not the Commission accepts or rejects LAZ’s Exception #3 is immaterial and therefore is not further addressed in this RBOE. What is important is that the Commission recognize that different words have different meanings. In its BOE, LAZ treats inspection and testing as if they are one and the same, perpetuating the PO’s errors in this regard. See LAZ BOE at 1. This issue has been fully briefed and ComEd incorporates its prior arguments by reference herein. See ComEd Init. Br. at 17-19; ComEd Reply Br. at 9-11; ComEd Draft Position Statements at 20-23; ComEd BOE at 7-12. In summary, ComEd maintains that the plain language of the regulations requires a post-installation *inspection*, not a *test*. 83 Ill. Admin. Code § 410.155 (“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).

II. LAZ’S EXCEPTION #1 PROVES THAT THIS CASE IS GOVERNED BY SECTION 280.100, NOT 410.200, AND IS OTHERWISE MERITLESS

A. LAZ Asks the Commission to Apply the Limitation Period for Billing Errors, not Meter Errors, Thereby Admitting this is a Billing Error, not a Meter Error

As explained in ComEd’s Initial Brief, this case is governed by section 280.100, not section 410.200. ComEd Init. Br. at 7-13. In advancing its Exception #1, LAZ essentially admits this. LAZ argues that ComEd should refund an additional \$36,625.07 because ComEd is barred from recovering that amount pursuant to the limitation period governing adjustments for billing errors: section 280.100(b)(2). LAZ BOE at 7 (inadvertently referencing 280.100(a)(2) as cited in PO at 46); 83 Ill. Admin. Code § 280.100(b)(2). LAZ does not seek to apply the limitation period governing adjustments for meter errors: section 410.200(f). 83 Ill. Admin. Code § 410.200(f).

Either this case is a meter error governed by section 410.200 and the longer limitation period set forth in subsection (f) therein: the in service date of the meter or the date the customer first occupied the premises – or this case is a billing error governed by section 280.100 and the shorter limitation period set forth in subsection (b)(2) therein: two years. 83 Ill. Admin. Code § 410.200(f); 83 Ill. Admin. Code § 280.100(b)(2). LAZ cannot have it both ways. And in arguing for application of the limitation period in section 280.100(b)(2), LAZ essentially admits that this case is a billing error governed by section 280.100, not a meter error governed by section 410.200. The Commission cannot cherry pick, as LAZ urges, and conclude that this is a meter error governed by section 410.200 subject to the limitation period for billing errors in section 280.100.

B. The “Admissions” at Issue Only State the Undisputed Fact that the Disconnection Notice Claimed \$36,625.07 for Delivery Service Charges

With respect to the \$36,625.07 at issue in LAZ’s Exception #1, LAZ claims that ComEd should not be permitted to contradict the Supreme Court Rule 216 admissions (“Admissions”) that LAZ obtained in this case. LAZ claims that ComEd specifically admitted that the \$36,625.07 in

charges in the September 20, 2010 Disconnection Notice (“Disconnection Notice”) “represent delivery services charges for periods prior to LAZ’s June 2008 billing period,” and ComEd must therefore refund that amount due to the billing error limitation period discussed above. LAZ BOE at 4.

It is unclear what “Admission” LAZ relies on in support of this position. LAZ does not provide a citation to a specific “Admission,” and a review of the “Admissions” shows that none of them actually support this position. Notice of ALJ Ruling (Feb. 13, 2014) at 4-5. Although the PO cites to “Admission” No. 6 in its discussion of the Disconnection Notice, that admission does not even mention the Disconnection notice or the \$36,625.07. In any event, LAZ deletes the PO’s reference to “Admission” No. 6 in its Exceptions. And even if the Commission accepted all of the “Admissions” – and the Commission should not do that – nothing in the totality of those “Admissions” proves that the \$36,625.07 in the Disconnection Notice was related to charges for delivery service provided prior to June 2008 or any unbilled service due to any error.

The only “Admissions” even remotely related to the \$36,625.07 in charges in the Disconnection Notice are “Admission” Nos. 1 and 3. These “Admissions” state:

1. The amount claimed by Commonwealth Edison Company in the Disconnection Notice is \$36,625.07.
* * *
3. Commonwealth Edison’s claim of \$36,625.07 represented ComEd’s alleged delivery services charges.

These “Admissions” do not contain a date range or reference unbilled service or an error. They certainly do not support LAZ’s unabashedly false statement that the charges in the Disconnection Notice “represent delivery services charges for periods prior to LAZ’s June 2008 billing period.” LAZ BOE at 4.

As the PO correctly recognized, the record contains ample evidence to the contrary. PO at 46. The record clearly shows that the \$36,625.07 at issue in the Disconnection Notice related to delivery service provided by ComEd to LAZ in a later time frame: between May 5, 2010 and September 1, 2010. Jamison Dir., ComEd Ex. 4.0, 5:103-106; ComEd Ex. 4.05. LAZ was billed for this delivery service between July 9, 2010 and September 1, 2010, within two years after the delivery service was provided. Jamison Dir., ComEd Ex. 4.0, 5:107-110. None of the charges related in any way to the constant error or the unbilled service provided prior to May 2010.

Quite simply, after ComEd resolved the incorrect constant in CIMS, LAZ failed to pay its bills for the next four months. After ComEd issued the Disconnection Notice, ComEd and LAZ communicated about the delivery service charges and late fees. DiPaolo and Vieth Dir., LAZ Ex. 1.0, 7:140-143. None of this has anything to do with the ComEd error at issue in this case or the “Admissions.” The Commission should reject LAZ Exception #1.

C. The History of the “Admissions” in this Case

Even if there was an “Admission” that somehow supported LAZ’s Exception #1 – and there is not – that admission would be invalid. ComEd has repeatedly explained that its objections and responses to LAZ’s requests to admit were adequate pursuant Supreme Court Rule 216 and that the previous ALJ erred in granting LAZ’s motion to deem those requests admitted. ComEd Response to LAZ Motion in Limine (March 10, 2016) at 10-15; ComEd Init. Br. at 24-32; ComEd Reply Br. at 13-14. ComEd will not reiterate those arguments here and instead incorporates its prior briefing cited herein by reference, and urges the Commission to review that briefing if necessary.

In its Exceptions language, LAZ incorrectly attempts to distinguish a few of the cases ComEd cited in that prior briefing. LAZ goes into great detail concerning the facts of *Ellis v. Am. Family Mut. Ins. Co.*, 322 Ill. App. 3d 1006, 1010 (4th Dist. 2001) and *New Amsterdam Cas. Co.*

v. Waller, 323 F.2d 20, 24 (4th Cir. 1963). In doing so, LAZ ignores the clear language in those decisions stating that a judge may disregard an admission – even a judicial admission – if it appears that facts in the admission are untrue. *Ellis v. Am. Family Mut. Ins. Co.*, 322 Ill. App. 3d 1006, 1010 (4th Dist. 2001); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963).

LAZ also claims that *People v. Mindham* “destroys the Proposed Order’s reliance on *Strasbaugh*.” LAZ BOE at 13. This is incorrect. *Mindham* actually states that requests to admit are intended to be used “to expedite litigation, to obviate the difficulty and expense in procuring evidence, and to compel an admission by the adverse party of evidence which is generally of incontrovertible character. ... use of the procedure to request the admission of controverted facts should be avoided” *People v. Mindham*, 253 Ill. App. 3d 792, 797-98 (2d Dist. 1993). And here, LAZ’s requests to admit were particularly egregious because ComEd has provided evidence that those requests to admit were factually incorrect *and* that LAZ knew that at the time it issued the requests. *See* ComEd Response to LAZ Motion in Limine (March 10, 2016) at 3-15. *See also* Respondent’s Response to LAZ Parking’s First Set of Requests to Admit (Oct. 31, 2012), attached as Exhibit B to LAZ Motion in Limine (March 4, 2016) (providing reference to previously produced discovery responses showing total amount of rebilling was \$225,484.52, not \$259,937.85 as stated in the request). This was not a situation where it could “not be known until the opposing party responds whether a given fact will be controverted.” *Mindham* at 798.

Yet in its BOE, LAZ paints itself as the victim of unfair discovery practice and procedure. LAZ implies that it issued its requests to admit only as a reaction to ComEd’s alleged failure to provide adequate discovery responses. LAZ BOE 14-15. LAZ attached three exhibits purporting to prove the “duplicious and hypocritical” nature of ComEd’s argument that LAZ’s requests for admission undermine the integrity of the Commission’s fact finding process. *See* LAZ BOE at 13-

15; Exs. B, C, and D to LAZ BOE. These exhibits show the opposite: LAZ's use of requests for admission in this instance – not ComEd's discovery responses or testimonial evidence – is actually what is improper.

A review of LAZ's Exhibits B, C, and D – the exhibits that purportedly outline LAZ's "good faith" in issuing discovery related to the Disconnection Notice and the \$36,605.07 – shows that none of the discovery issues raised in those letters related to either the Disconnection Notice or the \$36,605.07. *See* LAZ IB at 14-15, Ex. B-D. Indeed, most of the issues in those letters related to questions regarding meter testing that were rooted in LAZ's misunderstanding of ComEd's meter testing policies and procedures. In short: LAZ either did not understand or did not like the answers that ComEd provided regarding various issues. In retaliation, LAZ issued half-baked requests to admit on related *and* unrelated issues. Those requests to admit then snowballed into a colossal waste of judicial resources.

To top it off, LAZ itself then placed several of the "Admissions" in contention, thereby waiving its use of those "Admissions." *Compare* DiPaolo and Vieth Dir., LAZ Ex. 1.0, 6:104-8:151 and LAZ Exs. 1.2 through 1.5 (discussing billing dates, charges, and amounts, as well as Disconnection Notice and alleged lack of communication regarding billing error) *with* Notice of ALJ Ruling (Feb. 13, 2014) Admission Nos. 1, 2, 3, 5 and 6 (addressing same subjects). Where a party presents evidence concerning admissions, it waives those admissions. *Moy v. Ng*, 341 Ill. App. 3d 984, 991 (1st Dist. 2003) (cited by LAZ).

LAZ then criticizes ComEd for continuing to litigate this issue. LAZ BOE at 9. But this should come as no surprise: ComEd's objections and responses to LAZ's requests for admission were not improper and should not have been discarded by the ALJ. The result is that LAZ obtained "Admissions" that were patently false. LAZ is undoubtedly aware of this and has even waived

some of the “Admissions,” yet it continues to advocate for use of the “Admissions” *and* insists on wasting the Commission’s and the parties’ time and resources further litigating this issue. Certainly someone is “repeating its falsehoods often and loudly enough to ensure that someone, sooner or later, will believe them.” LAZ BOE at 9. But that someone is not ComEd.

D. LAZ’s “Law of the Case Argument” is Misplaced

LAZ briefly argues that the PO violates the law-of-the-case doctrine. LAZ BOE at 9-10. LAZ appears to take the position that once an ALJ has rendered a ruling on an issue, that issue is foreclosed from further argument. LAZ BOE at 7. Under LAZ’s broad theory of law-of-the-case doctrine, the very notion of BOEs violates that doctrine. As the cases that LAZ cites make perfectly clear, however, this doctrine only applies if there is an “unreversed ... final and appealable order.” *McDonalds Corp. v. Vittorio-Ricci Chicago, Inc.*, 125 Ill. App. 3d 1083, 1087 (1st Dist. 1984). *See also McHugh v. Kottke Assocs., LLC*, 2015 IL App (1st) 142750-U, ¶ 37 (“It is well recognized that ‘[a] decision on appeal becomes the law of the case on remand to the trial court and on a subsequent appeal on those issues which were raised and decided on the initial appeal.’”). The time has not yet come for the parties in this litigation to appeal the issues presented here and the law-of-the-case doctrine is inapplicable. Moreover, in this case the ALJ invited ComEd to provide additional evidence regarding the “Admissions” and LAZ agreed to that protocol. Tr. at 200:1-201:5 (Nov. 13, 2015). LAZ’s position is frivolous at best.

E. LAZ’s Claim that the PO Eviscerates Supreme Court Rule 201(j) is not Well-Founded

LAZ also briefly argues that the PO’s application of Supreme Court Rule 201(j) is incorrect and eviscerates Rule 216. LAZ BOE at 10-11. Suffice it to say that the cases LAZ cites in no way support LAZ’s incorrect position. Those cases do not even remotely deal with the interplay, if any, between Rules 201 and 216. *See generally People v. Singleton*, 103 Ill. 2d 339 (1984); *Rose*

v. City of Chicago, 317 Ill. App. 1 (1st Dist. 1942); *Hubney v. Chairse*, 305 Ill. App. 3d 1038 (2nd Dist. 1999). Moreover, this argument is particularly ironic given that LAZ’s position in this case essentially eviscerates billing errors pursuant to section 280.100 – almost everything is now a meter error, regardless of whether the meter actually over- or under-registered in excess of 2%. ComEd BOE at 3, 8.

III. LAZ’S EXCEPTION #2 MISCHARACTERIZES THE RECENT APPELLATE DECISION IN *AMCOR FLEXIBLES, INC. V. ILLINOIS COMMERCE COMM’N AND COMMONWEALTH EDISON CO.*, 2016 IL APP (1ST) 152985-U

As ComEd stated in its Brief on Exceptions (“BOE”), although Amcor has twice appealed the Commission’s decision in *Amcor Flexibles, Inc. v. Commonwealth Edison Co.*, ICC Docket No. 11-0033, Final Order (April 2, 2014) (“*Amcor Order*”), the appellate court has never disturbed the Commission’s substantive legal conclusions regarding Part 280 and Part 410 in that case. Both appellate decisions dealt solely with evidentiary issues. *See Amcor Flexibles, Inc. v. Illinois Commerce Comm’n and Commonwealth Edison Co.*, 2015 IL App (1st) 141964-U (“*Amcor I*”); *Amcor Flexibles, Inc. v. Illinois Commerce Comm’n and Commonwealth Edison Co.*, 2016 IL App (1st) 152985-U (“*Amcor II*”).

Amcor II recently reversed the Commission’s finding regarding the admission of evidence of a long diagnostic meter test. *See generally Amcor II*, 2016 IL App (1st) 152985-U. But *Amcor II* did not touch the Commission’s analysis of the interplay between section 280.100 and section 410.200 and its analyses and conclusions that: (1) section 280.100 applies in cases of billing error; (2) section 410.200 (and the testing and inspection prerequisites contained therein) applies only in cases of meter error; (3) meter error is over- or under- registration in excess of 2% as set forth in sections 410.10 and 410.150; and (4) “since Amcor has failed to prove that Section 410.200(h)(1) is applicable to the facts in this case,” section 410.200’s prerequisites are irrelevant, and it is “unnecessary to consider Amcor’s allegations that ComEd did not conduct a post-installation test

or that its pre-installation testing was inadequate.” *Ancor* Order at 23. LAZ mischaracterizes *Ancor II* as reversing these findings. It does nothing of the sort. The Commission’s findings on the merits can and will stand on the remaining evidence in the record. The Commission need only clarify which party has the burden of proof and excise the portions of the *Ancor* order referencing the long diagnostic test that has now been excluded.

Moreover, LAZ admits that this case is similar to *Ancor*, and that there is no factual basis for distinguishing *Ancor* as the PO attempts to do. LAZ BOE at 15. The Commission should treat these like situations similarly. Indeed:

It is incumbent upon the Commission to explain and given [*sic*] reasons for its departure from an established past practice, i.e., why it is treating a like situation differently. See Abbott Laboratories v. Illinois Commerce Commission, 682 N.E.2d 340 (1st Dist. 1997) (stating that where the Commission departs from its usual rules of decision to reach a different, unexplained result in a single case, it deprives a party of equal treatment).

In Re City of Naperville, ICC Docket No. 03-0779, Final Order (September 9, 2004) at 16. As ComEd stated in its BOE, the Commission should apply its sound legal analysis and conclusion in *Ancor* with equal force to this proceeding. ComEd BOE at 2-6. The Commission should reject LAZ’s Exception #2.

IV. ERRATA TO EXCEPTIONS

In preparing this RBOE, ComEd realized that it inadvertently did not correct certain typographical errors or language in the PO related to the Exceptions previously raised in its BOE. ComEd hereby alerts the Commission to the following additional corrections, none of which raise new arguments:

- Strikethrough “and CTs” in the second line on page 4 of the PO.
- Strikethrough “to” in the fourth line of the third full paragraph on page 5 of the PO.

- Substitute “var” for “vary” in the fourth and sixth line of the first paragraph of page 24 of the PO.
- Substitute “installation” for “measuring unit” in the second line of the first full paragraph on page 43 of the PO (applicable only if the Commission rejects ComEd’s Exhibit A Exceptions deleting this paragraph in its entirety).
- Substitute “billing” for “registering” in the third line of the paragraph above heading C on page 46 of the PO.
- Substitute “280.100(b)(2)” for “280.100(a)(2)” above heading C on page 46 of the PO.
- Strikethrough “due to under Registration” in heading C on page 46 of the PO.

