FOURTH DIVISION
January 29, 2015

1-14-1964

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMCOR FLEXIBLES, INC.,	)	Petition for Review of the
	)	Order of the Illinois
Petitioner-Appellant,	)	Commerce Commission
	)	
v.	)	No. 110033
	)	
THE ILLINOIS COMMERCE COMMISSION	)	
and COMMONWEALTH EDISON COMPANY,	)	
	)	
Respondents-Appellees.	)	

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Commerce Commission erroneously failed to consider the merits of the customer's motion *in limine* to bar the results of the utility's testing of an allegedly defective electric meter because the meter was discarded by the utility before the customer could conduct its own tests; as a result the appellate court was unable to review the propriety of admitting that evidence in the proceedings. The case is remanded for a hearing on the merits of the customer's motion and such further proceedings as necessary.

¶ 2 This is a direct appeal of a final order by the Illinois Commerce Commission (Commission) pursuant to section 10-201 of the Public Utilities Act (Act) (220 ILCS 5/10-201(a) (West 2012)). Petitioner, Amcor Flexibles, Inc. (Amcor) is a corporation with a manufacturing facility in Mundelein, Illinois. Respondent, Commonwealth Edison Company (ComEd), delivers electricity to Mid-American Energy Company (MidAmerican). MidAmerican supplies Amcor's manufacturing facility with electricity. In December 2009 ComEd wrote to Amcor informing it that ComEd tested an electrical meter it recently replaced at Amcor's facility and discovered Amcor was under-billed for electricity. As a result, ComEd back-billed Amcor for unbilled electrical service between December 2007 and April 2009. On October 1, 2010, Amcor filed an informal complaint with the Commission. On October 24, 2010, the Commission informed the parties it was unable to resolve the informal complaint to the parties' satisfaction. ComEd disposed of the meter that allegedly caused Amcor to be under-billed on October 25, 2010.

¶ 3 Amcor filed a formal complaint on January 11, 2011, challenging ComEd's charges for allegedly unbilled delivery services to Amcor's manufacturing facility. Amcor filed a motion *in limine* to bar ComEd from admitting evidence of the results of its test on the electrical meter; tests which allegedly revealed the delivery of unbilled electrical service. Amcor contested the fact it actually received unbilled electrical service. The Administrative Law Judge (ALJ) denied Amcor's motion *in limine*. Amcor filed exceptions to the ALJ's ruling but the Commission failed to address the merits of the motion *in limine* based on erroneous advice from the ALJ.

¶ 4 We reverse for the Commission to rule on the merits of the motion *in limine*.

¶ 5 BACKGROUND

¶ 6 The parties proceeded by a stipulation of facts before the Commission and agreed that the stipulation constitutes the entire record of these proceedings. In 2008, Amcor contacted ComEd regarding a need to upgrade its electricity service because of the addition of new equipment to its manufacturing plant which would increase Amcor's electrical load. Amcor and ComEd completed the upgrades and in conjunction therewith in April 2009 ComEd replaced an electrical meter, meter number 140384879 (the replaced meter) at the manufacturing facility. The replaced meter had been installed in August 2005. ComEd performed a preinstallation test of that meter in July 2005 but did not perform any additional testing before removing the meter in April 2009. Amcor did not begin operating the new equipment until after the new meter was installed.

¶ 7 In December 2009 ComEd wrote to Amcor informing it that the replaced meter had under-billed Amcor for electricity delivered to Amcor. The letter explains that after ComEd replaced the meter Amcor's usage increased dramatically. Subsequently ComEd replaced meters at Amcor's facility two more times in an attempt to verify the authenticity of the increase. ComEd's letter states that the replaced meter was "faulty." ComEd determined that after the replaced meter was installed in July 2005 Amcor experienced an apparent dramatic reduction in usage. ComEd explained that the replaced meter was programmed with incorrect scaling factors, creating an incorrect counts per revolution. The letter states that "the meter did not register all of the usage flowing and under-billed Amcor's account." The December 8, 2009 letter states that ComEd had exercised its rights under section 280.100 of title 83 of the Illinois Administrative Code (Code) (83 Ill. Adm. Code 280.100 (2004)) and

back-billed Amcor for unbilled electrical service between December 2007 and April 2009.[1] Amcor does not stipulate that the contents of the letter are accurate. Specifically, Amcor did not stipulate that there was unbilled electricity service.

¶ 8 The parties stipulated to certain aspects of the replaced meter's operation. To understand Amcor's arguments in this appeal it will suffice to say that the meter consists of a "meter engine" which "calculates the energy *** running through the meter," a "microcontroller," which sends a "billing pulse" to the internal billing memory, and an "optiport," which is an external port from which readings can be taken. In the absence of a "scaling factor" the microcontroller would send 24 billing pulses for every revolution of a virtual disk that "turns" as electricity flows through the meter. The virtual disk completes one revolution for every 1.2 watt-hours of electricity. The number of billing pulses the microcontroller sends for every revolution of the virtual disk is referred to as the counts per revolution (CPR). Thus, with no scaling factor the standard CPR is 24. ComEd's meters are programmed with a scaling factor that changes the number of billing pulses the microcontroller sends per revolution of the virtual disk. The scaling factor does not impact the amount of power reflected in a revolution of the virtual disk. In effect, the scaling factor is simply a number by which the standard 24 billing pulses per revolution is divided to reduce the number of billing pulses per revolution of the virtual disk. Thus, a scaling factor of 6 means that the microcontroller will send 4 billing pulses to the billing memory per revolution

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[1] Although the replaced meter was installed in 2005 and purportedly under-billed the entire time, section 280.100 of the Code states 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." 83 Ill. Adm. Code 280.100 (2004).

(24 ÷ 6 = 4). Stated differently, a meter with a scaling factor of 6 has a CPR of 4. A meter with a scaling factor of 2 has a CPR of 12.

¶ 9 In addition to the billing pulses, the number of which changes based on the scaling factor, the meter also generates a test pulse. The scaling factor does not affect the test pulse. Regardless of the scaling factor, one test pulse should be generated for every revolution of the virtual disk. In other words, one test pulse should be generated for every 1.2 watt-hours of electricity flowing through the meter. ComEd tested the replaced meter before installing it in 2005 but it only tested the test pulse. That is, ComEd confirmed that the meter sent a test pulse for every 1.2 watt-hours of electricity flowing through the meter. ComEd did not confirm that the meter was programmed with the correct scaling factor or that the information downloaded by the meter reader was accurate.

¶ 10 Customers' bills are based on information gathered from the billing memory in the meter and the CPR applicable to a customer's meter type. A meter reader puts a probe on the optiport to download the number of pulses that have been sent to the billing memory during the billing period. ComEd's billing software includes a database of different meter types and their corresponding CPR. ComEd calculates electricity usage based on the number of pulses, or counts, in the meter's billing memory (which, based on knowing the CPR gives ComEd the number of revolutions, and one revolution represents 1.2 watt-hours of electricity). The replaced meter was supposed to have a CPR of 12. ComEd asserts the replaced meter was erroneously programmed with a CPR of 4. Therefore, ComEd contends, it only billed Amcor for a third of the electricity it actually used (because the meter only sent a third (12 ÷ 4) of the billing pulses ComEd thought it was sending per revolution--or 1.2 watt-hour).

Amcor disputes ComEd's contention the replaced meter was programmed with the wrong scaling factor and that ComEd only billed Amcor for one-third of the electricity it actually used.

¶ 11 The stipulation of facts includes undisputed testimony from Thomas Rumsey, a ComEd employee who tested the replaced meter after it was removed from Amcor's facility. Amcor filed a motion *in limine* to exclude portions of the undisputed testimony, but the parties agreed that any testimony not excluded would be admitted into evidence in the record as if it had been part of the stipulation of fact. The post-removal testing confirmed that one test pulse was sent to the optiport for every 1.2 watt-hours of electricity flowing through the replaced meter. Mr. Rumsey also conducted a "long diagnostic" which revealed that the replaced meter was programmed with a scaling factor of 6 (resulting in a CPR of 4) rather than the correct scaling factor of 2 (resulting in a CPR of 12). Mr. Rumsey kept the replaced meter for 13 months and on October 25, 2010, the replaced meter was discarded and cannot be found. Mr. Rumsey was not told to retain the replaced meter and was not informed of an ongoing dispute related to the replaced meter.

¶ 12 The Commission issued its order containing its analysis and conclusions on April 2, 2014. On May 2, 2014, Amcor filed an application for rehearing and reconsideration of the Commission's order. On May 20, 2014, the Commission denied Amcor's motion for a post-order stay pending rehearing and denied its application for rehearing and reconsideration. This appeal followed.

¶ 13 ANALYSIS

¶ 14 1. Jurisdiction of the Appellate Court

¶ 15 Amcor attempted to initiate this appeal by filing a notice of appeal with the Commission pursuant to section 20-201 of the Act (220 ILCS 5/10-201(b) (West 2012)). Amcor then filed that notice of appeal in this court pursuant to the statute. Despite the plain language of section 10-201(b), Amcor followed the wrong procedure, because the court has held that the procedure in the statute for perfecting direct appeal to this court is in direct contravention of Illinois Supreme Court Rule 335 (eff. Feb. 1, 1994), and to that extent, it is unconstitutional. *Consumers Gas Co. v. Illinois Commerce Comm'n*, 144 Ill. App. 3d 229, 236 (1986). Under Rule 335, to perfect direct appeal to this court Amcor was required to file a petition for review directly in the appellate court specifying the parties seeking review and designating the respondent and the order or part of the order to be reviewed. Ill. Sup. Ct. R. 335(a). The petition for review must name the agency and all other parties of record as respondents. Ill. Sup. Ct. R. 335(a). The rule also prescribes the form for the petition for review. Amcor's notice of appeal specifies that it was seeking review, specifies the orders to be reviewed (including the ALJ's ruling on the motion *in limine*), and names the Commission and ComEd as respondents. In other words, the notice of appeal initially filed by Amcor contains all the information required to be contained in a petition for review, except the document was mis-titled.

¶ 16 When Amcor learned of its mistake, it filed a motion in this court asking that we deem the notice of appeal petitioner filed in this case to be a petition for review. Alternatively, Amcor's motion asked for leave to amend the notice of appeal to conform to the form of petitions for review under Rule 335. Amcor's final alternative request was for an extension of time to file a petition for review *instanter*. We ordered Amcor's motion taken with the case

on appeal. In deciding this motion, we note that in proceedings before the Commission, the rules of evidence and privilege applied in civil cases in the circuit courts must be followed. 83 Ill. Adm. Code 200.610(b) (citing 5 ILCS 100/10-40 (West 2012) (Illinois Administrative Procedure Act)). Therefore, this court's rulings in matters before the circuit court addressing similar arguments shall be persuasive.

¶ 17 Rule 335 incorporates, insofar as is appropriate, Supreme Court Rules 301 through 373 (except Rule 326). Rule 303 states, in part, as follows: "On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the filing fee, *** the reviewing court may grant leave to appeal ***." Ill. Sup. Ct. R. 303(d) (eff. Jun. 4, 2008). Thus, this court has authority to grant a petitioner leave to file a late petition for review. *Getty Synthetic Fuels, Inc. v. Pollution Control Board*, 104 Ill. App. 3d 285, 288-89 (1982). We find that petitioner has shown a reasonable excuse for failure to file a petition for review on time, therefore petitioner's motion for leave to file a late petition for review *instanter*, and to file its docketing statement *instanter* is granted. See *LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 865-66 (2000) (granting timely motion for extension of time to file notice of appeal where tardiness was due to a docketing error on the part of counsel) (citing *Bank of Herrin v. Peoples Bank*, 105 Ill. 2d 305 (1985) (same)).

¶ 18 Respondent ComEd cites *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 387-88 (2008), in support of its argument this court does not have jurisdiction because petitioner failed to file a petition for review pursuant to Rule 335. Respondent's authority is inapposite. The issue in *People ex rel. Madigan*, 231 Ill. 2d at 386, was which district of the

appellate court should receive the case on remand. The parties had each filed a petition for review, but one party filed in the Fourth District and the other party filed in the First District. *People ex rel. Madigan*, 231 Ill. 2d at 376. Our supreme court did hold that "for the appellate court to acquire jurisdiction, the petition for review must be timely filed." *People ex rel. Madigan*, 231 Ill. 2d at 388. The court did not address whether or not to grant leave to file a late petition for review under the circumstances presented here.

¶ 19 Respondent also argues that recent decisions of this court have required strict compliance with procedural requirements relating to administrative appeals, which requires this case be dismissed. Respondent cites first, *Cook County Sheriff's Enforcement Association v. County of Cook*, 323 Ill. App. 3d 853, 854 (2001), in which this court denied leave to file an amended petition for review where the petitioner had failed to name a party of record in its initial petition for review. The court considered the "good-faith-effort exception, a judicially created exception used to avoid dismissal when a petitioner fails to name a necessary party in its petition for review." *Cook County Sheriff's Enforcement Ass'n*, 323 Ill. App. 3d at 856.

¶ 20 This court held the good-faith-effort exception did not apply in that case because the legislature had specifically amended the statute conferring special statutory jurisdiction to "limit when the appellate court may grant leave to amend a petition for review, thereby precluding the application of the good-faith-effort exception" to the failure to name a necessary party. *Cook County Sheriff's Enforcement Ass'n*, 323 Ill. App. 3d at 858 (citing 735 ILCS 5/3-113(b) (West 1998)). The court reached a similar result in the other case respondent cites, *Vogue Tyre and Rubber Co. v. Office of the State Fire Marshal of the State of Illinois*, 354 Ill. App. 3d 20, 27 (2004) ("Strict adherence to the procedures of the Review Law and the supreme

court rules is required and section 3-113(b) does not provide an exception that allows a petitioner to amend its petition for review to name the agency as respondent.").

¶ 21 *Cook County Sheriff's Enforcement Ass'n* and *Vogue Tyre and Rubber Co.* are inapposite. Each case relied on a statutory limitation on when the court may grant leave to amend a petition for review to name necessary parties. Moreover, both *Cook County Sheriff's Enforcement Ass'n* and *Vogue Tyre and Rubber Co.* were decided prior to the legislature's August 14, 2008 amendment to section 3-113 of the Administrative Review Law striking that portion of the statute which the *Cook County Sheriff's Enforcement Ass'n* court found precluded the application of the good-faith-effort exception to the joinder requirement in section 3-113. *Cook County Sheriff's Enforcement Ass'n*, 323 Ill. App. 3d at 858; 735 ILCS 5/3-113 (West Supp. 2009). See also *Vogue Tyre and Rubber Co.*, 354 Ill. App. 3d at 27 ("The 'good-faith effort' exception*** was applied by the court before the legislature amended section 3-113(b) of the Review Law to specifically delineate when a petitioner is allowed to amend its petition for review."). Although the joinder requirement in section 3-113 is not at issue in this case, the basis of the decision in the cases on which respondent relies has been repudiated by the legislature, demonstrating the lack of persuasiveness in respondent's authorities.

¶ 22 Further, in this case, respondent has pointed to no applicable provision limiting the court's authority to grant leave to amend pursuant to Rule 303 to conform a filing to the form required by Rule 335. Regardless, we are not allowing petitioner to amend the notice of appeal nor are we giving the notice of appeal petitioner filed in this court a liberal construction to find compliance with Rule 335. Therefore, respondent's reliance on *ESG*

Watts, Inc. v. Pollution Control Board, 191 Ill. 2d 26 (2000), is similarly misplaced. In *ESG Watts, Inc.*, our supreme court held that "liberal construction of petitions for review would be inappropriate because in the exercise of special statutory jurisdiction the party seeking review must strictly comply with the statute conferring jurisdiction on the court. Thus, if application of Rule 303 would mandate such a result, Rule 303 would not be applicable." (Emphasis omitted.) *ESG Watts, Inc.*, 191 Ill. 2d at 31.

¶ 23 We find that applying Rule 303 to grant petitioner leave to file a late petition for review does not violate the rule of strict construction of petitions for administrative review. The sole issue in *ESG Watts, Inc.* was the effect of the petitioner's failure to name a necessary party in its petition for review. *ESG Watts, Inc.*, 191 Ill. 2d at 29. The court did not address leave to file a late petition for review and respondent has not pointed to a statutory provision specifically prohibiting this court from granting leave to file a late petition for review under the circumstances of this case.

¶ 24 A petitioner must show a reasonable excuse for failure to file a petition for review on time. Ill. Sup. Ct. R. 303(d) (eff. Jun. 4, 2008). Respondent argues that petitioner's assertions of its good faith offer it no relief. We disagree. Respondent cites *Environmental Control Systems, Inc. v. Pollution Control Board*, 258 Ill. App. 3d 435, 439-40 (1994), wherein the court held that to avoid the clear language of Rule 335, parties seeking review must show a good faith effort to comply with the rules or face dismissal of their cases." *Environmental Control Systems, Inc.*, 258 Ill. App. 3d at 439-40. The court cited our supreme court's findings in a case involving amendment of a petition for review in the circuit court after expiration of the 35-day period for filing the petition for review and serving summonses upon all defendants.

Environmental Control Systems, Inc., 258 Ill. App. 3d at 438 (citing *Lockett v. Chicago Police Board*, 133 Ill. 2d 349 (1990)). In addressing the mandatory requirement to serve summonses on all defendants within 35 days, the *Lockett* court found that "in order to show good faith sufficient to avoid dismissal, the litigants must prove that failure to issue the required summons was 'due to some circumstance beyond their control,' such as problems at the clerk's office which could not be controlled by the litigant." *Environmental Control Systems, Inc.*, 258 Ill. App. 3d at 439 (quoting *Lockett*, 133 Ill. 2d at 355). That specific finding quoted in *Environmental Control Systems, Inc.* and relied upon by respondent here--concerning circumstances beyond the litigant's control as necessary to demonstrate good faith--was in regard to a mandatory requirement of the Administrative Review law, not a jurisdictional requirement. The court specifically found that "the filing of the petition for review, as required by Supreme Court Rule 335, is jurisdictional at the appellate court level." *Environmental Control Systems, Inc.*, 258 Ill. App. 3d at 439.

¶ 25 The *Environmental Control Systems, Inc.* court did find that the petitioner in that case had not demonstrated good faith (*id.* at 440) but its reasoning points to a different result in this case. The petitioner in *Environmental Control Systems, Inc.* had failed to name a necessary party, and the court found that the petitioner did not seek to add the party for more than eight months after a respondent moved to dismiss the petition for review for failing to name a necessary party and after the court entered an order for the petitioner to show cause why the appeal should not be dismissed for lack of jurisdiction. *Environmental Control Systems, Inc.*, 258 Ill. App. 3d at 440. In this case, petitioner filed a motion for leave to file a late petition for

review within three days of learning it had erroneously filed a notice of appeal rather than a petition for review.

¶ 26 We find that Amcor's reliance on section 10-201 of the Public Utilities Act, followed by its speedy effort to rectify its error, presents a reasonable excuse for failing to file its petition for review on time. Accordingly, the motion to file a late petition for review *instanter* is granted. We now turn to the merits of the appeal.

¶ 27 2. Motion *in Limine*

¶ 28 Amcor's motion *in limine* states that the motion relates to Amcor's dispute as to whether the replaced meter actually under-reported electricity usage or whether the increase in electricity usage was due to another cause--including but not limited to the operation of its new equipment after the replaced meter was replaced. The motion *in limine* argues that ComEd's disposal of the meter deprived Amcor an opportunity to test the meter in violation of ComEd's duty to preserve evidence in the face of likely litigation involving the replaced meter and that Amcor was prejudiced thereby. Amcor requested ComEd be sanctioned by prohibiting it from introducing evidence that the meter under-reported electricity usage including the testimony relating to ComEd's alleged testing of the replaced meter. The ALJ denied Amcor's motion *in limine*.

¶ 29 Amcor filed exceptions to the ALJ's proposed order including the ALJ's ruling denying the motion *in limine* with the Commission. The ALJ submitted a bench memorandum to the Commission along with the ALJ's proposed order. The ALJ recommended the Commission deny Amcor's request to reverse the ruling on Amcor's motion *in limine*. The bench memorandum states, in pertinent part, as follows:

> "Section 200.520(a) of the Commission's Rules of Practice provides that a party may seek interlocutory review of an ALJ's ruling by filing a Petition for Interlocutory Review which must be filed within 21 days after the date of the ruling unless good cause is shown or an extension of the deadline is granted by the ALJ or the Commission. Thus, this request [(to reverse the ALJ's order on the motion *in limine*)] should have been filed as a Petition for Interlocutory Review and it should have been filed in August 2012. Moreover, Amcor never filed a request to extend the deadline for filing a Petition for Interlocutory Review and it has not provided an explanation to show good cause for not complying with the Commission's rules."

¶ 30 The Commission's order only addresses the motion *in limine* in a footnote. That footnote states that Amcor moved to prohibit ComEd from entering the testimony into evidence because ComEd threw the meter away thereby preventing Amcor from testing it. The footnote further states that the ALJ denied Amcor's motion, so the allegations in the disputed portion of the stipulation--specifically the testimony of the results of the postremoval testing--are considered part of the agreed record. In the closing paragraphs of its order, the Commission ordered that "any petitions, objections, or motions made in the proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusion contained herein."

¶ 31 On appeal, Amcor argues that the Commission erred in holding that it forfeited its objection to the ALJ's denial of its motion *in limine* when it did not take an interlocutory appeal from the ruling. We agree Amcor did not forfeit review of the ALJ's ruling. Section 200.520(a) of the Commission's Rules of Practice, cited by the ALJ as adequate grounds to refuse review of the ruling on the motion *in limine*, reads as follows:

> "Any ruling by a Hearing Examiner, including rulings of the Chief Hearing Examiner under Sections 200.510 and 200.870, may be reviewed by the Commission, but failure to seek immediate review shall not operate as a waiver of any objection to such ruling." 83 Ill. Adm. Code 200.520(a) (2011).

¶ 32 On appeal the Commission concedes that Amcor correctly points out that its failure to seek interlocutory review of the ALJ's denial of Amcor's motion *in limine* does not bar Amcor from seeking review of that order by the Commission. Respondents now argue that the Commission did in fact review the ALJ's order denying the motion *in limine* and affirmatively denied Amcor's request for relief. Respondents point to the closing paragraphs in the Commission's order which state that all other objections or motions are hereby disposed of in a manner consistent with the conclusion contained in the order. Amcor argues the Commission's order does not support the conclusion the Commission actually did consider its motion *in limine* rather than simply adopting the ALJ's recommendation that Amcor forfeit review of the ruling. Regardless, Amcor argues, even if the generic language at the end of the Commission's order could be considered a ruling on the motion *in limine*, the

Commission abused its discretion by failing to provide any explanation for its ruling that this court could review.

¶ 33 Again, the rules of practice before the Commission state that in contested cases the rules of evidence applied in civil cases in the circuit courts of the State of Illinois shall be followed. 83 Ill. Adm. Code 200.610(b) (citing 5 ILCS 100/10-40 (West 2012)). This court has held that an administrative agency's decision regarding the conduct of its hearing and the admission of evidence is governed by an abuse of discretion standard and is subject to reversal only if there is demonstrable prejudice to the complaining party. *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, ¶ 52.

> "An abuse of discretion is found when a decision is reached without employing conscientious judgment or when the decision is clearly against logic. [Citation.]" (Internal quotation marks omitted.) *Gruwell v. Illinois Department of Financial & Professional Regulation*, 406 Ill. App. 3d 283, 295 (2010).

¶ 34 The Commission did not employ conscientious judgment to find that the ALJ properly denied Amcor's motion *in limine*. The record does not support the conclusion that the Commission accepted Amcor's request to review the ALJ's ruling on its motion *in limine* and subsequently denied Amcor relief.

¶ 35 In the "Commission Analysis and Conclusions" section of the order, the Commission states that the "primary issue in dispute is whether Section 410.200(h)(1) applies to the facts in this proceeding." The Commission, asserting that it had interpreted the language of that

section "in context rather than in isolation," determined that Amcor failed to prove that section 410.200(h)(1) applies. Section 410.200(h)(1) reads, in pertinent part, as follows:

> "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 410.200(h)(1) (2004).

¶ 36 Section 410.200(h)(1) would apply if ComEd sought to back-bill Amcor due to under registration of Amcor's electrical use caused by a "meter error." Amcor's complaint alleged, in part, that ComEd was actually seeking to recover for an under registration due to a meter error and that section 410.200(h)(1) prohibits such action because ComEd failed to properly test the meter.

¶ 37 The Commission rejected Amcor's argument that section 410.200 applies because the alleged under-billing resulted from meter error as that term is used in Section 410.200. The Commission found that section applies to billing adjustments caused by meter error but "meter error has a specific meaning as it relates to Section 410.200." The Commission specifically found that "the text of the regulations does not support Amcor's argument that

meter error is used consistent with its common meaning." Rather, meter error triggering section 410.200(h)(1) in this context means "the presence of a variance from the meter accuracy requirements set forth in Section 410.150 that exceeds the accuracy limits set forth in Section 410.150(b)." Those limits are determined based on tests of the amount of energy flowing through the meter as measured by test pulses sent to the optiport. The Commission's order describes the testing process and how meter error is calculated. If this testing reveals an average error greater than 2% then billing adjustments can be made "provided there is no violation of Section 410.200(h)(1)."

¶ 38 The Commission found that no evidence in the record supports Amcor's argument that the fact ComEd programmed the meter with the wrong scaling factor caused the meter to under-register usage. The Commission wrote: "The scaling factor determines how many pulses are sent to the billing memory for billing purposes but the registration of usage by the meter is not affected." After explaining how usage is reported based on the scaling factor programmed into the meter, or if there is no scaling factor, the Commission found that in any of the scenarios (different scaling factors or no scaling factor) it described, "the usage the meter measures is the same." The Commission concluded the billing adjustment was not made for under-registration, but because ComEd assigned the wrong value to the number of billing pulses the meter reader read from the meter's billing memory. That is, ComEd's billing software assigned the wrong value (*i.e.*, the number of revolutions the billing pulses represented) to each billing pulse because the software calculated each pulse's value based on a CPR of 12 but the meter actually recorded usage using a CPR of 4. The Commission stated: "The billing software misinterpreted how it should bill the usage recorded on the meter,

which is why the billing of Amcor's usage was wrong by two-thirds and it was only billed for one-third of the power that it actually used."

¶ 39 The Commission found that ComEd properly back-billed Amcor under Section 280.100 of the Commission's rules "because this matter concerns a billing error, not a meter error as the term is used in Section 410.200." Because section 410.200(h)(1) did not apply, the Commission found it "unnecessary to consider Amcor's allegations that ComEd did not conduct a post-installation inspection test or that its pre-installation testing was inadequate." The Commission ordered that Amcor is required to pay the back-bill pursuant to Section 280.100.

¶ 40 However, Amcor's complaint also alleged that ComEd failed to satisfy the requirement of section 280.100 to show that the allegedly unbilled service was in fact provided. Amcor's complaint alleges that ComEd has failed to provide any evidence regarding the allegedly faulty meter and has provided nothing more than a calculation of what its unbilled service charges would be if ComEd's allegations were true. Section 280.100 of the Code states that this section "provides for the billing and payment of previously unbilled service caused by errors in measuring or calculating a customer's bills." 83 Ill. Adm. Code 280.100 (1992). The only evidence in the parties' stipulation of facts that ComEd did deliver electricity to Amcor that was unbilled, and that the cause was an error in calculating Amcor's bill, is the testimony that postremoval testing revealed that the scaling factor in the replaced meter was incorrect. ComEd's December 8 letter offers an explanation for the under-billing, but the stipulation states that the parties stipulate that the communication occurred, not that

the statements made in the communication are correct. Further, the stipulation states that Amcor disputes the contention ComEd erroneously programmed the replaced meter.

¶ 41 The Commission's order makes it clear that the Commission accepted that the replaced meter was misprogrammed with a scaling factor of 6, causing the billing software to misinterpret how it should bill the usage recorded on the meter, "which is why the billing of Amcor's usage was wrong by two-thirds." The Commission found that "it is clear from the record that an adjustment to Amcor's billing was not made for under-registration but rather because ComEd did not bill Amcor for all of its usage due to a mismatch between the billing software and the information provided by the meter reader." The Commission noted that section 280.100 applies when something other than meter inaccuracy causes a misbilling or under-billing.

¶ 42 As for evidentiary rulings, the Commission only found that Amcor had not met its burden of proof because it failed to prove by a preponderance of the evidence that section 410.200(h)(1) applies. The Commission did not discuss the evidence that ComEd misprogrammed the replaced meter, which is the subject of the motion *in limine*, but simply concluded that ComEd properly back-billed Amcor under section 280.100 because of the misprogramming. The only conclusion supported by the Commission's order is that the Commission adopted the ALJ's finding that Amcor forfeited review of the order on the motion *in limine*. We are mindful that the Commission is not required to "make particular findings as to each evidentiary fact or claim." *Abbott Laboratories, Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 716 (1997). However, the Commission did not make any evidentiary rulings with regard to evidence that Amcor received unbilled service caused by an

error in calculating its bills. The Commission did not rule as to what evidence was required to support ComEd's claim that Amcor received unbilled service due to an error in calculating its bill or expressly state what evidence supported that claim in this case. The Commission did not discuss whether a sanction against ComEd for discarding the replaced meter was appropriate or not, or whether Amcor was prejudiced by the loss of the replaced meter given that ComEd was seeking relief under section 280.100.

¶ 43 The ALJ's recommendation that petitioner's claimed error was forfeit was erroneous, as the Commission has admitted to this court. Amcor suffered prejudice in the proceedings before the Commission because the ruling on the motion *in limine* would determine whether Amcor's allegations in its formal complaint are true and if ComEd is in fact entitled to relief under section 280.100. See generally *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010) ("a party is not entitled to reversal based upon the trial court's evidentiary rulings unless the error substantially prejudiced the aggrieved party and affected the outcome of the case."). Moreover, we find that the Commission's order does not set forth the facts which form the basis for its order such that informed review is not hindered. *Abbott Laboratories, Inc.*, 289 Ill. App. 3d at 716.

¶ 44 Amcor asks this court to grant the motion *in limine* as an alternative to remand. We decline. The Commission is required to make and render findings concerning the subject matter inquired into and enter its order based thereon. *Abbott Laboratories Inc.*, 289 Ill. App. 3d at 716 (quoting 220 ILCS 5/10-110 (West 1994)). The Commission erroneously failed to address the merits of Amcor's motion *in limine*. Resolution of the motion may require the Commission to construe both its substantive and procedural rules. In this situation, the

appropriate remedy is to remand for the Commission to properly rule on Amcor's motion *in limine*. *Illini Environmental, Inc. v. Environmental Protection Agency*, 2014 IL App (5th) 130244, ¶ 50 ("Courts must give substantial deference to the agency's reasonable interpretation of its own regulations and associated rules."). In light of this holding, Amcor's remaining arguments on appeal are premature. The Commission's order is reversed and the cause remanded for further proceedings in which the Commission is to address the substantive merits of Amcor's exceptions to the ALJ's ruling on the motion *in limine*.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the decision of the Illinois Commerce Commission is reversed and the matter is remanded for further proceedings consistent with this order.

¶ 47 Reversed and remanded with instructions.