

FOURTH DIVISION
July 21, 2016

No. 1-15-2985

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The order of the Illinois Commerce Commission, that the motion *in limine* filed by the utility customer to bar evidence of results of tests by the utility on an electric meter the utility discarded without notice to the customer after a dispute had arisen as to utility bills purportedly caused by an error in programming the electric meter, is reversed. The utility had a duty under general rules of discovery to preserve the electric meter and the discarding of the meter so severely prejudiced the customer that barring evidence of the utility’s testing on the meter is an appropriate sanction for the utility’s spoliation of evidence. The cause is remanded for further proceedings.

¶ 2 This case returns to this court following our order on appeal from a final order of 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), and MidAmerican supplies Amcor's manufacturing facility with electricity. The proceedings stem from a letter ComEd wrote to Amcor in December 2009 informing Amcor that ComEd had tested an electric meter it had then recently replaced at Amcor's facility through which ComEd discovered Amcor was under billed for electricity because of a problem with that meter. As a result, ComEd back billed Amcor for unbilled electric service between December 2007 and April 2009.

¶ 3 Amcor filed an informal complaint with the Commission, which it was required to do before filing a formal complaint. The Commission informed the parties it was unable to resolve the informal complaint to the parties' satisfaction. The following day, ComEd disposed of the meter that allegedly caused Amcor to be under billed.

¶ 4 Just over two months later, on January 12, 2010, Amcor filed a formal complaint challenging ComEd's charges for allegedly unbilled delivery services to Amcor's manufacturing facility. Subsequently, Amcor filed a motion *in limine* to bar ComEd from admitting evidence of the results of its test on the electric meter mentioned in the December 2009 letter on the grounds that ComEd destroyed the most critical evidence, the meter. Amcor contested the fact it actually received unbilled electric service. An Administrative Law Judge (ALJ) denied Amcor's motion *in limine*, and later the ALJ submitted a proposed order to the Commission, along with a bench memorandum. The Commission subsequently issued an order in favor of ComEd on Amcor's complaint.

¶ 5 This court found the Commission’s order failed to adequately address the merits of the motion *in limine* and reversed for the Commission to rule on the merits of the motion. On remand, the Commission found that the ALJ properly denied the motion *in limine* and took no further action on the order denying Amcor’s complaint against ComEd.

¶ 6 For the following reasons, we reverse the Commission’s order on remand finding the ALJ properly denied Amcor’s motion *in limine*, grant the motion, and remand for further proceedings.

¶ 7 **BACKGROUND**

¶ 8 We will begin with a review of the pertinent facts and circumstances that led to our prior opinion in this case. In the original proceedings the parties proceeded by a “Stipulation of Facts” 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 electric 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 it removed the meter in April 2009. Amcor did not begin operating the new equipment until after the new meter was installed.

¶ 9 On December 8, 2009, ComEd wrote to Amcor informing it that the replaced meter had under billed Amcor for electricity delivered to Amcor. The letter explained that after the replaced meter was removed and replaced Amcor’s usage increased dramatically. 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. 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 electric service between December 2007 and April 2009.¹ Amcor did not stipulate that the contents of the letter were accurate. Specifically, Amcor did not stipulate that there was unbilled electricity service.

¶ 10 The parties stipulated to certain aspects of the replaced meter's operation. The meter consists of a "meter engine" which "calculates the energy *** running through the meter." A "microcontroller" sends a "billing pulse" to an internal billing memory. The "optiport" is an external port from which readings can be taken. A "virtual disk" should complete one revolution for every 1.2 watt-hours of electricity that flows through the meter. In the absence of a "scaling factor" the microcontroller would send 24 billing pulses or "counts" to the meter's internal memory for every revolution of the virtual disk that "turns" as electricity flows through the meter (or 1 billing pulse for every .05 watt-hour flowing through the meter (.05 watt hours X 24 = 1.2 watt hours)). The number of billing pulses the microcontroller sends for every revolution of the virtual disk is referred to as the counts per revolution (CPR).

¶ 11 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 or counts the microcontroller sends per revolution of the virtual disk. The scaling factor does not impact the amount of power reflected by a single 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 sent to the

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).

internal billing memory 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 (24 billing pulses per revolution \div scaling factor 6 = 4 counts (billing pulses) per revolution). Stated differently, a meter with a scaling factor of 6 has a CPR of 4; a scaling factor of 2 results in a CPR of 12.

¶ 12 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.

¶ 13 Customers' bills are based on information gathered from the billing memory in the meter and the CPR applicable to a customer's meter type. ComEd's billing software includes a database of different meter types and their corresponding CPR. The replaced meter was supposed to have a CPR of 12. A meter reader puts a probe on the optiport to download the number of billing pulses (counts) that have been sent to the billing memory during the billing period. ComEd calculates electricity usage based on the number of billing pulses in the meter's billing memory. Based on knowing the CPR, the number of counts stored in the billing memory gives ComEd the number of revolutions, and since one revolution represents 1.2 watt-hours of electricity, ComEd can calculate how many watt-hours of electricity were delivered to the customer. 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 Amcor actually received (because the meter only sent a third ($12 \div 4$) 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 misprogrammed and that ComEd only billed Amcor for one-third of the electricity it actually received.

¶ 14 The "Undisputed Testimony"² section of the "Stipulation of Facts" includes 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 based on ComEd's having discarded the replaced meter before Amcor could conduct its own tests. 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 Facts." The postremoval 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.

¶ 15 The Commission denied Amcor's complaint against ComEd and issued an 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 postorder stay pending rehearing and denied its application for rehearing and reconsideration. Amcor appealed.

¶ 16 This court remanded for further proceedings on Amcor's motion *in limine*. On remand, the parties stood on their prior pleadings. The Commission entered an order finding that the ALJ properly denied Amcor's motion *in limine* ("Order on Remand"). One Commissioner dissented, finding that the

² Amcor admitted it did not have any evidence to dispute the facts contained in this section.

record “supports the outcome whereby the Commission grants the Motion *in limine* in part and strikes ComEd’s test from the record along with any other evidence drawn from the meter test.” The Commission took no further action on the 2014 order.

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 Amcor appeals the Commission’s “Order on Remand” effectively denying Amcor’s motion *in limine* and allowing results from ComEd’s testing of the replaced meter into evidence. Amcor also appeals the 2014 order denying Amcor’s formal complaint challenging ComEd’s back bill for allegedly unbilled electricity delivered to Amcor.

“The scope of review of a Commission order is set out in section 10-201 of the Public Utilities Act. [Citation.] Under this provision, Commission orders are deemed *prima facie* reasonable and the burden is on the party appealing the order to overcome that presumption. *** As the parties challenging the Commission’s order, petitioners must affirmatively demonstrate that the conclusion opposite to that adopted by the Commission is clearly evident. [Citation.]” *People ex rel. Madigan v. Illinois Commerce Comm’n*, 2015 IL App (1st) 140275, ¶ 22.

“We review an administrative agency’s decision regarding the admission of evidence for an abuse of discretion.” *Danigeles v. Illinois Department of Financial & Professional Regulation*, 2015 IL App (1st) 142622, ¶ 82. “An abuse of discretion is found when a decision is reached without employing conscientious judgment or when the decision is clearly against logic” ((internal quotation marks omitted) *Gruwell v. Illinois Department of Financial & Professional Regulation*, 406 Ill. App. 3d 283, 295 (2010)), or where “it is arbitrary or capricious, or unless no reasonable person would agree with the

[agency's] position" ((internal quotation marks omitted) *Sonntag v. Stewart*, 2015 IL App (2d) 140445, ¶ 22).

¶ 20

I. Motion *In Limine*

¶ 21 Amcor's motion *in limine* argues that ComEd's disposal of the replaced meter deprived Amcor of 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 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)). "An evidentiary ruling, even if incorrect, will not be reversed unless there is demonstrable prejudice to the complaining party. [Citation.]" (Internal quotation marks omitted.) *Id.* See also *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, ¶ 52.

¶ 22

A. The Commission's "Order on Remand"

¶ 23 A majority of the Commission found that the motion *in limine* was properly denied because Amcor failed to establish that granting the motion as a discovery sanction is warranted in this proceeding.³ The majority of Commissioners questioned whether Amcor had a right to test the meter because "not all discovery procedures that are common place in civil litigation are applicable to cases

³ The Commission's order notes that the Commission "considered the ALJ's ruling on the Motion *in Limine* *** as reflected in the third ordering paragraph of the Final Order." The third ordering paragraph of the Final Order reads: "the findings of fact and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and findings of law." This boilerplate language also appears in the third ordering paragraph of the order on remand. As we noted when we reversed the Commission's 2014 order, "[t]he only conclusion supported by the Commission's order is that the Commission adopted the ALJ's [erroneous] finding that Amcor forfeited review of the order on the motion *in limine*."

brought before the Commission” and “there is [no] provision in the Commission’s rules that provides for this type of testing.” Nonetheless, the majority assumed *arguendo* Amcor had a right to test the meter, but was unconvinced the motion *in limine* should be granted as a sanction. The majority concluded Amcor’s argument “ComEd knew or should have known that future litigation was at least likely, if not obviously imminent, after the informal Complaint was closed” was unpersuasive. The majority was not persuaded because “a fair amount” of informal complaints against ComEd are closed “without progressing to a formal Complaint” and because ComEd’s failure to “take action to collect Amcor’s outstanding balance after the informal Complaint was closed could be attributed to many things, including simply oversight.” (Amcor maintains ComEd did not act to collect the bill because it knew litigation was imminent.)

¶ 24 The majority went on to apply the six factors identified in *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998), to determine what sanction, if any, should be imposed for a party’s breach of the duty “to take reasonable measures to preserve the integrity of relevant and material evidence.” *Shimanovsky*, 181 Ill. 2d at 121. The majority of the Commission found that “most of the factors weigh in ComEd’s favor.” The six factors are:

“(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party’s objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence.” *Id.* at 124.

¶ 25 The majority found the evidence did not support Amcor’s claim of unfair surprise because Amcor knew the basis of ComEd’s back bill was an alleged programming error in the replaced meter, yet Amcor took no action to inquire about the meter itself or to ask about ComEd’s retention policy for

meters, or to have the meter held or tested under procedures outlined in the Commission's rules (a "referee test"), before engaging in settlement negotiations and filing the informal complaint. The majority found this showed a lack of diligence in seeking discovery by Amcor. Amcor asserted in a reply brief that it did not need to test the meter during settlement negotiations because it had a basis to defeat ComEd's claim that was completely independent of the results of any meter test (that ComEd failed to comply with preinstallation and postinstallation meter testing requirements under the Commission's rules). The majority found that argument "weakened considerably" Amcor's claim it suffered severe prejudice from being deprived of the ability to test the meter. The majority later wrote, as to Amcor's diligence, that "it would appear that it was in Amcor's best interest to inquire about the meter and perform the additional testing it deemed necessary in preparation for the negotiations and informal Complaint process."

¶ 26 The majority agreed that Amcor "suffered some degree of prejudice because it could not test the meter once it was discarded" but reasoned that "the record of [ComEd's] meter test results could have assisted Amcor in developing its case." The majority noted that ComEd did not perform the test in preparation for litigation and it was required to perform the test pursuant to the Commission's rules. This, the majority reasoned, gave ComEd's meter test results "significant indicia of credibility." The majority therefore relied heavily on the fact that ComEd's meter test results were available to Amcor and that "Amcor had another completely independent argument that it could pursue in its attempt to prevail" to conclude that sanctioning ComEd was not warranted in this case.

¶ 27 Finally, the majority found that there was no evidence to support finding ComEd acted in bad faith, or that its actions showed deliberate, contumacious, or unwarranted disregard of the Commission's authority. See *Id.* at 123 ("a sanction which results in a default judgment is a drastic sanction to be

invoked only in those cases where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority").

¶ 28 One Commissioner dissented, finding that the record supports finding ComEd "was under a duty to preserve the replaced meter, that spoliation of the evidence had occurred, that ComEd's evidence based on tests of the meter should be stricken as a discovery sanction, and the matter remanded for further proceedings." The dissent found that ComEd had a reasonable expectation of possible litigation when Amcor and ComEd engaged in settlement negotiations after ComEd initially issued a back bill in December 2009, or at least after Amcor filed its informal complaint on October 1, 2010. The dissenting Commissioner noted that a customer *must* file an informal complaint before the customer is allowed to file a formal complaint initiating litigation. The dissenting Commissioner found that "[a]t the very least, with the informal complaint, the utility has a reasonable expectation of possible litigation." That is, the rules requiring an informal complaint "provide notice to the utilities that the customer is unsatisfied, has a dispute, and wants to pursue the available options to resolve the dispute before the Commission." The dissent concluded that when "the majority's opinion is understood in the context of the Commission's complaint procedures, the majority effectively holds that no duty to preserve attaches until a formal complaint is filed."

¶ 29 The majority found that the conclusion of the informal complaint procedure did not give ComEd notice of the possibility of litigation because many informal complaints against it conclude without proceeding to formal litigation. To hold the informal complaint does not give the utilities notice of possible litigation, according to the dissent, would give both the utility and customers an opportunity to permissibly destroy evidence. The dissenting Commissioner wrote: "it is for this reason that a pre-suit duty to preserve was established by the *Shimanovsky* Court."

¶ 30 The dissenting Commissioner, having found that a duty to preserve the evidence did attach, went on to apply the *Shimanovsky* factors to determine what sanction, if any, to apply, and concluded that “the manifest weight of the evidence is in favor of the Complainant.” The dissent found that Amcor was surprised by the discarding of the meter because it had been involved in settlement negotiations and made clear it disputed the back bill from the moment ComEd issued it, and had taken the first step toward formal litigation by filing the informal complaint, but ComEd never gave notice the meter would be discarded throughout that entire process. The dissent found the Commission’s rules provided that Amcor “was entitled not only to the referee testing, but had the right to third party testing of the meter in question if it so chose.” Thus, Amcor was prejudiced because ComEd’s spoliation of the meter “forecloses Amcor’s ability to dispute ComEd’s claims about the meter, and whether it accurately measured usage.” The dissent found “the fact that Amcor had other theories available is irrelevant.”

¶ 31 The dissenting Commissioner also found Amcor acted diligently. The dissent noted that Amcor “indicated its intent to examine the meter in the earliest stages of the formal litigation.” The dissenting Commissioner contrasted the fact Amcor had not requested a referee test during proceedings before the formal proceeding began with the fact Amcor “did inquire about the meter in the course of discovery one month after it filed its complaint.”

¶ 32 The dissent agreed there was no evidence to support a finding ComEd acted in bad faith, or that its actions showed deliberate, contumacious, or unwarranted disregard of the Commission’s authority. The dissenting Commissioner found that “although bad faith or deliberate disregard for authority is not apparent in the record, negligence is.” The dissent found ComEd was negligent in discarding the meter because the meter was discarded after ComEd had a reasonable expectation of litigation, and ComEd held the meter one month longer than their alleged retention policy required and discarded the meter immediately after the informal complaint was closed despite the fact “ComEd had been engaged in

settlement discussions through most of that year, and the informal complaint process had concluded *without a resolution.*” (Emphasis in original.) The dissent found that “ComEd’s negligence, when considered with the other five [*Shimanovsky*] factors *** that weigh in favor of Amcor’s argument, necessitates a sanction.”

¶ 33

B. Duty to Preserve

¶ 34

1. Amcor’s Right to Test the Meter

¶ 35 Initially we hold that, despite the expression of doubt by the majority of the Commission, Amcor had a right to third-party testing of the replaced meter independent of the referee testing proscribed by the Commission’s rules. The majority of the Commission wrote that “there is *** no provision in the Commission’s rules that provides for this type of testing.” However, the Commission’s rules on prehearing procedure and discovery state that “any party may utilize written interrogatories to other parties, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].” 83 Ill. Adm. Code 200.360(d) (2000). Moreover, the Commission’s hearing rules state that “[i]n contested cases⁴ *** the rules of evidence and privilege 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)). In civil actions in the circuit court, either party has the right to “seek production of evidence for testing whenever the condition of such item is relevant.” *Shimanovsky*, 181 Ill. 2d at 122 (citing Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)). Rule 214 states that “[a]ny party may by

⁴ “With respect to proceedings under the Public Utilities Act, however, complaint cases initiated pursuant to any section of that Act, investigative proceedings and ratemaking cases shall be considered ‘contested cases.’ [Citation.]” 83 Ill. Adm. Code 200.40 (2000) (citing 220 ILCS 5/10-101 (West 2012)).

written request direct any other party to produce for *** testing or sampling specified *** objects or tangible things.” Ill. S. Ct. R. 214(a) (eff. Jan. 1, 1996). There is no dispute the condition of the replaced meter is not only relevant, it is the dispositive evidence in these proceedings.

¶ 36 Further, there is no evidence that referee testing would have been an effective means for Amcor to dispute ComEd’s back bill. The Commission’s rules state that upon written application by any customer, the entity providing metering service shall test the customer’s meter within 30 days after receiving notice of the written request. 83 Ill. Admin. Code 410.190(d)(1). That rule goes on to state that if the meter is found to over-register by more than 2%, the entity shall reimburse the customer the amount paid to the Commission for the test and the entity shall make any necessary metering data adjustment. 83 Ill. Admin. Code 410.190(d)(4). Thus, the referee test only tests meter registration. It does not test whether the meter has been programmed with the correct scaling factor, which was the cause of the error in this case. The Commission’s 2014 order stated that: “When tested for accuracy, the test equipment verifies that one test pulse is sent to the meter’s optiport for every 1.2 watt-hours of energy flowing through the meter.” This is the same testing ComEd conducted preinstallation that Amcor complains was inadequate because it failed to reveal the misprogrammed scaling factor. The fact a referee test under the Commission’s rules was available to Amcor cannot be used to argue that Amcor did not have a right to independent testing of the meter under civil discovery rules. “The purpose of pretrial discovery is to aid the party in preparation and presentation of his case or defense.” *Smith v. Department of Registration & Education of State of Illinois*, 170 Ill. App. 3d 40, 45 (1988). Referee testing would not have aided Amcor to defend ComEd’s claim that a misprogrammed scaling factor caused Amcor to be under billed for electric service Amcor received. We find that the discovery rules of the circuit court gave Amcor the right to independently test the replaced meter.

¶ 37 The Commission argues that Amcor’s intent to seek testing of the replaced meter is not evident from its complaint, and Amcor failed to demand its own testing of the replaced meter until Amcor filed its motion *in limine*. The Commission argues this distinguishes this proceeding from the cases on which Amcor relies, the majority of which involved written discovery requests. In *Shimanovsky*, the plaintiffs suffered injuries in July 1985 due to an automobile crash, the plaintiffs tested an allegedly defective part of the automobile in September 1985, revealing a need for additional tests, and the plaintiffs conducted the additional destructive testing in October 1985. *Id.* at 115-16. The plaintiffs filed their complaint in June 1986, and the defendant filed a discovery request that did not include production of the automobile or any of its components in July 1986. Although the defendant’s expert first viewed the automobile and its component parts while they were in the plaintiffs’ possession in September 1989, the defendants did not seek production of the actual component at issue until December 1991, when it moved to compel the plaintiffs’ expert to produce the components at his deposition. *Id.* at 116-17. The defendant’s failure to request production of the automobile earlier in the litigation did not impact the *Shimanovsky* court’s finding that the trial court had not abused its discretion in finding that the plaintiffs’ act of performing destructive testing on the evidence at issue was an unreasonable noncompliance with discovery rules giving the trial court authority to impose a sanction. *Id.* at 122-23. Therefore, we reject the Commission’s argument that Amcor did not have a right to test the replaced meter because its desire to do so is not evident in its complaint against ComEd, or because it failed to request production of the replaced meter sooner—a topic we will discuss in more detail below.

¶ 38 2. ComEd’s Duty to Preserve the Meter

¶ 39 We now turn to the question of whether ComEd had a duty to preserve the replaced meter for purposes of potential testing by Amcor in this case. We hold that it did indeed have such a duty. See *Id.* at 121-22. In *Shimanovsky*, our supreme court found that the destruction of relevant evidence, “prior to

the filing of a lawsuit and, thus, before any protective order can be entered by the court” is sanctionable as “unreasonable noncompliance” with the court’s discovery rules requiring the production of relevant evidence under Illinois Supreme Court Rule 214 (eff. July 1, 2014). Our supreme court held that “a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court’s concern that, were it unable to sanction a party for the presuit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint.” *Id.* at 121. A potential litigant is not permitted to alter or destroy relevant evidence if doing so will unreasonably impair the opposing litigant’s presentation of his case to the trier of fact. See *Id.* at 122 (quoting *Sarver v. Barrett Ace Hardware, Inc.*, 63 Ill. 2d 454, 461 (1976)). “In determining unreasonable noncompliance, a court may focus on the importance of the information a party is seeking to have produced.” *American Family Insurance Company v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 627 (1992).

¶ 40 In this appeal, ComEd argues it did not have a duty to preserve the replaced meter because it did not know nor should it have known that future litigation was likely. ComEd argues Amcor failed to meet its burden of proof on this issue. Amcor argued that ComEd’s failure to pursue the back bill against Amcor when the informal complaint process ended was due to ComEd’s knowledge that litigation was imminent. ComEd responds “there is no logical connection between ComEd’s action or inaction on Amcor’s final bill and its knowledge about Amcor’s potential future litigation plans.” The Commission’s brief to this court similarly argues that it correctly determined that Amcor failed to carry its burden to prove that it was clearly evident the ComEd should have known that future litigation was likely. The Commission also notes it accepted ComEd’s argument that ComEd’s failure to pursue the back bill after the informal complaint was closed without being resolved could be attributable to something other than knowledge that litigation was imminent. ComEd also argues that the cases Amcor

relies on involved plaintiffs, but “a defendant does not share a plaintiff’s knowledge about the likelihood of a future lawsuit *** and thus does not share the same obligations to preserve potential evidence.”

¶ 41 We reject ComEd’s argument that a defendant does not share the same obligation as a plaintiff to preserve potential evidence. Our supreme court in *Shimanovsky* specifically stated that a “potential litigant” owes a duty to preserve relevant and material evidence. *Shimanovsky*, 181 Ill. 2d at 121. The *Shimanovsky* court did not draw any distinction between plaintiffs or defendants. The duty is imposed on a potential litigant in possession or control of relevant or material evidence. See *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 218 (2003) (“the duty remains as long as the defendant should reasonably foresee that further evidence material to a potential civil action could be derived from the physical evidence in the defendant’s possession”)⁵; *Jones v. O’Brien Tire & Battery Service Center, Inc.*, 322 Ill. App. 3d 418, 423 (2001) (“All that was required in *Boyd* to give rise to a duty to preserve evidence was that Travelers had possession of the heater and that it knew or should have known that the heater was evidence relevant to future litigation.”).

¶ 42 We find ComEd’s argument that there is no connection between its failure to pursue its back bill and its knowledge of a potential lawsuit unpersuasive in resolving the duty question. “[A] duty of due care to preserve evidence exists if a reasonable person in the defendant’s position should have foreseen

⁵ *Andersen* did not involve a motion for sanctions under Rule 219, but a third-party complaint for negligent loss of evidence that allegedly impaired the third-party complainant’s ability to defend itself. *Andersen*, 341 Ill. App. 3d at 213. The *Andersen* court applied the “elements needed for a spoliation of evidence claim” set forth in *Boyd*, 166 Ill. 2d 188 (1995). Although sanctions under Rule 219 and a complaint for spoliation of evidence are distinct remedies (see *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387, 393 (2005)), this court has applied the *Boyd* principles in cases involving discovery sanctions. See *Kambylis*, 338 Ill. App. 3d at 793; See also *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 63 (Kilbride, J., dissenting) (“In cases involving both sanctions for discovery violations and negligence actions for the spoliation of evidence, the common underlying rationale is this court’s concern that *** a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. [Citations.]” (Internal quotation marks and emphases omitted.)).

that the evidence was material to a potential civil action.” (Internal quotation marks omitted.) *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 793 (2003) (citing *Boyd v. Travelers Insurance Company*, 166 Ill. 2d 188, 195 (1995)). “A duty extends to particular evidence if a reasonable person should have foreseen that the evidence was material to a potential civil action.” *Burlington Northern & Santa Fe Railway Company v. ABC-NACO*, 389 Ill. App. 3d 691, 711 (2009) (citing *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004)).

¶ 43 In *Jones*, the spoliation defendant argued that the *Boyd* court relied on facts within the knowledge of the party (Travelers) that lost the evidence at issue and that those facts “supported the existence of special circumstances giving rise to a duty to preserve evidence.” *Jones*, 322 Ill. App. 3d at 422. The spoliation defendant in *Jones* argued that it had no duty to preserve the evidence at issue in that case absent a “special relationship” between the parties or pending litigation between the parties. The *Jones* court rejected that argument, noting that “our supreme court did not discuss the basis for Travelers’ knowledge that the heater would be material to any potential civil litigation, nor did it base its holding thereon.” *Id.* The court also held that “the existence of pending litigation would certainly help prove that a defendant should have foreseen that the evidence in question was material, but again, it is not required to establish the existence of the duty to preserve evidence. *Id.* at 423. A duty to preserve evidence arises if a reasonable person in the position of the possessor of the evidence should have foreseen that the evidence in question was material to a potential civil action.” *Id.* at 422-23. The particular facts of the case inform the inquiry into whether a reasonable person should have known of the potential for a civil action, but no specific facts or circumstances are necessary before a court may find that a reasonable person should have foreseen a civil action. *Id.* at 423 (“Ultimately, the plaintiff must prove that the defendant should have foreseen that the evidence in question was material to a potential civil action and *** the existence of a ‘special relationship’ between the plaintiff and the

defendant would help establish that foreseeability, but the existence of a ‘special relationship’ is not necessary to give rise to a duty to preserve evidence.”).

¶ 44 We do not need to rely on any alleged inaction on the back bill to find that ComEd had a duty to preserve the replaced meter after the informal complaint process ended without settling the parties’ dispute. Whether or not ComEd’s failure to pursue the back bill is indicative of its knowledge or belief that future litigation was imminent, we cannot say that a reasonable person in ComEd’s position would not have foreseen the potential for civil litigation in which the replaced meter would be material evidence. The attachments to the “Stipulation of Facts” reveal that ComEd wrote to Amcor’s operations director on December 8, 2009 to inform Amcor of the back bill. The exhibits contain printouts of email communications, and those emails reference other conversations. Then, by February 2, 2010, Amcor’s attorneys contacted ComEd disputing whether ComEd had shown that the electric service for which it issued the back bill was actually provided and requesting ComEd rescind the back bill. The February 2, 2010 letter states, in part, that “ComEd has failed to provide any evidence that this meter gave inaccurate readings. Apart from ComEd’s own self-serving assertion in the 12/8/09 Letter, ComEd provides no evidence to substantiate its claim.” The next attachment to the “Stipulation of Facts” is a February 17, 2010 email from an attorney responding to Amcor’s February 2 letter explaining the basis of the back bill. In August 2010, ComEd rejected Amcor’s “most recent” settlement offer. On September 23, 2010, ComEd issued Amcor a “Final Notice Prior to Disconnection.” On October 1, 2010, Amcor filed an informal complaint against ComEd with the Commission. On October 24, 2010, the Commission advised the parties it was unable to resolve Amcor’s informal complaint to the satisfaction of the parties. ComEd discarded the meter on October 25, 2010.

¶ 45 From the foregoing ComEd reasonably should have foreseen the potential for formal action by Amcor, and that the replaced meter was evidence that was material to that litigation. Amcor consistently

disputed the bill from the inception of the back bill. The parties were unable to negotiate a settlement through counsel, and the Commission was unable to resolve the matter to the parties' mutual satisfaction. No reasonable person would believe that Amcor, after pursuing its rights and its position that ComEd improperly back billed for delivered service, as vigorously as it did, would not pursue the formal complaint process. We find that the Commission's rules on its complaint process support this conclusion.

¶ 46 As the dissenting Commissioner pointed out, under the Commission's rules, upon the filing of the informal complaint, a customer "has demonstrated the intent to avail herself of the Commission's dispute resolution process." See 83 Ill. Adm. Code 280.230(h) (2014). Section 280.230(h)(1) states that except in circumstances not at issue here, "any customer with a dispute arising under the jurisdiction of this Part shall first use the informal complaint process before proceeding with a formal complaint." 83 Ill. Adm. Code 280.230(h)(1) (2014). We agree that where a customer invokes the complaint procedure and the informal complaint process is unable to settle the dispute, the utility has a duty to take reasonable steps to preserve evidence material to the dispute in its possession or control because it should reasonably foresee future litigation.

¶ 47 First, the rules on the complaint process state the intent of the rules:

"This Section provides utilities and customers with a process through the Commission's Consumer Services Division that allows the parties to settle a dispute without litigation; *or* to appeal an ongoing conflict that cannot be resolved informally to the Commission's formal complaint process." 83 Ill. Adm. Code 280.230(a) (2014).

Second, section 280.230(h)(2) goes on to state: "If the customer expresses non-acceptance of the response to the informal complaint, and further dialogue cannot secure an agreement, the Consumer Services Division shall advise the complainant of the right to escalate the informal complaint to the

Commission's formal complaint process." 83 Ill. Adm. Code 280.230(h)(2) (2014). The Commission's rules provide a mechanism to inform ComEd when an informal complainant requests escalation to a formal complaint. 83 Ill. Adm. Code 280.230(h)(4) (2014).

¶ 48 The stated intent of the rules supports the conclusion that invoking the informal complaint process gives notice to the utility of potential future litigation. If the informal complaint process fails to settle the dispute, the intent of the rules is that dispute will be resolved through the Commissions' formal complaint process. 83 Ill. Adm. Code 280.230(a) (2014). This concept is embedded within the rules, such that the Consumer Services Division is required to advise the complainant of their right to proceed to the formal complaint process. 83 Ill. Adm. Code 280.230(h)(2) (2014). The Commission continues to rely on its assertion that many informal complaints filed against public utilities are closed without progressing to a formal complaint, and argues the fact Amcor's informal complaint was closed without being resolved does not necessarily mean that a formal complaint would follow. We find the Commission's argument unpersuasive. Whether or not a majority of customers pursue their rights is irrelevant. Where the parties were unable to settle the dispute without litigation, the Commission's rules specifically contemplate a formal complaint. Therefore, we cannot say that ComEd should not have reasonably foreseen that Amcor would file a formal complaint, where the filing of such a complaint is within the express contemplation of the rules.

¶ 49 The decisions of this court do not require a potential litigant to *know* that litigation is imminent. Rather, all that is required is that a reasonable person in the possessor's position would have foreseen a potential civil action and the materiality of the item possessed. *Kambylis*, 338 Ill. App. 3d at 793. While the Commission claims that many informal complaints end and proceed no further, the informal complaint is a procedural prerequisite to a formal complaint and the entire complaint process, including the filing of a formal complaint, contemplates that unsettled disputes will proceed to the formal

complaint process. Regardless of the number of informal complaints it receives and how far those complaints proceed through the complaint process, where Amcor vigorously pursued its rights from the moment ComEd issued the back bill and the informal complaint ended without resolution, ComEd reasonably should have known that future litigation was likely. “Once the possibility of litigation becomes foreseeable to a potential party, the party is thereby made aware that, pursuant to the discovery rules, it is subject to a duty to preserve relevant and material evidence.” *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 22.

¶ 50

C. Appropriate Sanction

¶ 51 Having found ComEd breached its duty to preserve the replaced meter, we must address the question of what sanction is appropriate. See *Shimanovsky*, 181 Ill. 2d at 123. “[E]ven where evidence is destroyed, altered, or lost, a [party] is not automatically entitled to a specific sanction.” *Adams*, 358 Ill. App. 3d at 395. “A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits. [Citations.]” *Shimanovsky*, 181 Ill. 2d at 123. “A just order is one that is commensurate with the seriousness of the violation ***.” *Adams*, 358 Ill. App. 3d at 395. “When imposing sanctions, the court’s purpose is *** not to punish the dilatory party. [Citations.] *** [A] sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party’s actions show a deliberate, contumacious or unwarranted disregard of the court’s authority.” *Shimanovsky*, 181 Ill. 2d at 123.

“The factors a trial court is to use in determining what sanction, if any, to apply are: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party’s objection to the

testimony or evidence; and (6) the good faith of the party offering the testimony or evidence.” *Id.* at 124.

“The reversal of a trial court’s imposition of a particular sanction is only justified when the record establishes a clear abuse of discretion. [Citation.]” *Adams*, 358 Ill. App. 3d at 396.

¶ 52

1. Surprise to the Adverse Party

¶ 53 ComEd argues the majority of Commissioners correctly determined that Amcor has no legitimate claim it was surprised by the loss of the replaced meter because Amcor took no steps to preserve the replaced meter. The Commission similarly argues that Amcor cannot claim unfair surprise upon learning that ComEd disposed of the replaced meter because Amcor never inquired about the meter, holding the meter, or ComEd’s retention practices. The Commission’s brief also states that Amcor slept on its right to have a meter test, in reference to referee testing under the Commission’s rules. The Commission argues that Amcor failed to show the opposite conclusion to the Commission’s finding is clearly evident. We disagree and find ComEd and the Commission’s arguments misplaced. In *Shimanovsky*, the court did not discuss the defendant’s efforts to secure the evidence at issue; the court focused on the defendant’s knowledge of the fact that destructive testing on the evidence had occurred. *Shimanovsky*, 191 Ill. 2d at 124-25.

¶ 54 The *Shimanovsky* court rejected the defendant’s argument that “it was not clear that destructive testing of the evidence had occurred until *** [the] defendant had deposed [the] plaintiffs’ expert witness.” *Id.* at 124. The court pointed to facts showing that the defendant knew destructive testing had occurred: (i) a motion to compel stating that the plaintiffs had engaged in destructive testing, (ii) the defendant received a copy of the plaintiffs’ expert’s report documenting the testing “early in the case” that depicted the degree of the destructive testing, and (iii) the defendant’s expert has previously inspected the automobile at issue and all of its components. *Id.* Based on those facts the court

concluded that the “defendant was aware of the testing and condition of the [evidence.]” *Id.* at 125. See also *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 37 (2003) (finding the defendant was not surprised by testimony at trial of witnesses allegedly not disclosed as opinion witnesses where the plaintiff sent a supplemental Rule 213 disclosure, opinion witnesses were named in general interrogatories, the defendant received notice of witnesses’ depositions and participated in at least one, and the defendant named the witnesses in his own Rule 213 interrogatory answers).

¶ 55 In this case, there is no evidence that Amcor knew ComEd would discard the replaced meter one day after the informal complaint process closed or at all. Although we do not make a finding of bad faith on the part of ComEd, we do find the claim ComEd disposed of the meter under a one-year retention policy immaterial because ComEd actually held the replaced meter for 13 months and only discarded it the day after the informal complaint process concluded.

¶ 56 Further, we disagree with the Commission and find that Amcor is nothing like the defendant in *Shimanovsky*. See *Id.* at 125 (finding lack of diligence in seeking discovery). The *Shimanovsky* plaintiffs’ destructive testing of the evidence was necessary to enable the plaintiffs to file their complaint (*id.* at 126), and the defendants were aware of the testing “early in the case” (*id.* at 124). On the contrary, in this case the meter was not destroyed as a consequence of destructive testing because destructive testing was not required. Despite the fact Amcor may have been able to request production of the meter during the informal complaint process, Amcor did not fail to secure the replaced meter during formal litigation of this matter, and it can be excused from requesting the meter for testing while it pursued an alternative theory of relief (ComEd’s alleged failure to properly test the meter pre- and postinstallation) in informal proceedings, where Amcor had no warning or reason to believe the meter would be discarded before formal proceedings even began.

¶ 57 The majority Commission’s finding is against logic and the opposite conclusion—that Amcor was surprised when it learned ComEd had discarded the meter—is clearly evident where the parties were actively engaged in settling a dispute based on the condition of the meter being misprogrammed and where Amcor was in the middle of the process to settle disputes set forth in the Commission’s rules when ComEd disposed of the replaced meter. That process specifically provides that the parties must engage in an informal complaint process which will proceed to a formal complaint process if the matter is not settled to the parties’ satisfaction. From Amcor’s perspective, it was in the middle of that process when it learned the entire basis for the conflict had been discarded. We think it clearly evident this would surprise Amcor.

¶ 58 2. The Prejudicial Effect of the Evidence

¶ 59 We also find that the majority of the Commission abused its discretion in holding that Amcor did not suffer severe prejudice from ComEd discarding the replaced meter. The Commission based its holding on concluding that Amcor could rely on ComEd’s testing of the replaced meter, stating that “the record of [ComEd’s] meter test results could have assisted Amcor in developing its case.” We find the Commission abused its discretion because its rationale is contrary to the discovery rules applicable in this case and is inconsistent with our supreme court’s holding in *Shimanovsky*. First, Amcor had a right to production of the replaced meter for its own testing (Ill. Sup. Ct. R. 214 (eff. Jan. 1, 1996)), and ComEd had an affirmative duty to preserve the replaced meter for purposes of producing it in discovery (*Shimanovsky*, 181 Ill. 2d at 122). That a public utility is required to follow the Commission’s procedures when inspecting an electric meter does not necessarily mean that the inspection in this case was conducted properly or that the report of that inspection is accurate. Moreover, Amcor’s inspection of the meter might have revealed an alternative cause for the alleged under counting other than an incorrectly programmed scaling factor.

¶ 60 Second, unlike the defendants in *Shimanovsky*, there is no question about the degree of prejudice Amcor suffered from ComEd’s discarding the replaced meter. See *Shimanovsky*, 181 Ill. 2d at 126. In *Shimanovsky*, the plaintiffs “did not destroy or dispose of the entire allegedly defective product.” *Id.* at 128. “Although certain additional tests of the power-steering mechanism, which defendant claims are now impossible to perform, may have provided defendant with further evidence to support its defense, the power-steering components still exist in such a condition that defendant’s experts were able to form their opinions that the mechanism contained no defect.” *Id.* In this case, ComEd did dispose of the entire meter, and Amcor is left with nothing with which to establish its claim that the replaced meter was not improperly programmed without relying on ComEd’s expert’s conclusions. “As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy *** evidence and then substitute his or her own description of it.” *American Family Insurance Company*, 223 Ill. App. 3d at 627-28. See also *Kambylis*, 338 Ill. App. 3d at 798 (“the physical evidence destroyed with the vehicle would have been ‘far more probative’ in determining the cause of the fire than the photographs and wire”).

¶ 61 3. The Nature of the Evidence

¶ 62 There is no dispute the meter is the most important piece of evidence in these proceedings, and ComEd’s test results are highly prejudicial to Amcor in the absence of any ability to develop any counter-evidence. The test results are potentially dispositive of ComEd’s claim as to how Amcor was allegedly under billed. Compare *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶ 220 (holding “the nature of [disputed] testimony and its prejudicial effect are small”). Because of ComEd’s conduct, Amcor is unable to test the dispositive piece of evidence. The nature of the evidence was such that it could have been preserved for Amcor’s testing. ComEd has offered no legitimate reason to discard of the meter while still involved in a dispute with Amcor, or for failing to inform Amcor prior to

discarding the meter. See generally *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 487 (2010) (holding the nature of the evidence supplied “no reason it should not have been disclosed earlier”). The severity of the prejudice to Amcor from being unable to investigate a defense, and (having found a duty to preserve) the fact ComEd discarded the meter without warning, knowing it to be dispositive evidence in the proceedings, warrants a strong sanction against ComEd. See generally *Palmer v. Minor*, 211 Ill. App. 3d 1083, 1087 (1991) (“We acknowledge that barring a witness from testifying is a drastic sanction, and should be exercised sparingly. That is particularly true when the witness barred is a party’s only witness. Nevertheless, we find that under the circumstances before us, the trial judge exercised an appropriate sanction.”).

¶ 63 4. The Diligence of the Adverse Party in Seeking Discovery

¶ 64 The Commission found that the record does not support Amcor’s assertion that it diligently sought discovery of the meter, noting that Amcor failed to take any action regarding the meter from December 8, 2009 (the date of the letter informing Amcor of the back bill), and the date it was discarded, October 25, 2010. The Commission speculated that it was in Amcor’s best interest to “inquire about the meter and perform the additional testing it deemed necessary in preparation for the negotiations and informal Complaint process.” The dissenting Commissioner pointed out that “Amcor indicated its intent to examine the meter in the earliest stages of the *formal litigation*, while disputing the back-bill—and effectively ComEd’s test results—throughout.” (Emphasis added.) We believe the Commission’s finding of a lack of diligence in seeking discovery of the meter constitutes an abuse of discretion because it fails to take into consideration the reasonable foreseeability of formal proceedings. As the dissenting Commissioner pointed out, Amcor did express a desire and intent to conduct its own examination of the meter in the “earliest stages of the formal litigation” at which time it was surprised to learn the meter had been discarded. Under the circumstances, in which we believe it was reasonable to

foresee future litigation should the parties' dispute not be resolved in the informal complaint process, we find it is unreasonable to hold that Amcor did not act diligently to obtain discovery of the replaced meter when it did so in the beginning of formal litigation, just over one month after filing the complaint.

¶ 65 5. The Timeliness of the Objection to the Evidence

¶ 66 The majority of the Commission found that Amcor timely objected to ComEd submitting evidence of its tests on the replaced meter, and we agree.

¶ 67 6. The Good Faith of the Party Offering the Evidence

¶ 68 Finally, we find that the factor requiring the court to examine the good faith of the party offering the testimony weighs in favor of Amcor. Although part of the "Undisputed Testimony" (testimony which Amcor admits it has no evidence to refute) is that the ComEd employee who disposed of the replaced meter was not told there was an ongoing dispute related to the replaced meter, that testimony simply reinforces the fact ComEd took no steps to preserve the replaced meter. For reasons we have already discussed, ComEd reasonably should have foreseen future litigation over the back bill for unbilled electricity service. When it is considered that ComEd's claim is the replaced meter failed to record the proper number of billing pulses for the electricity delivered to Amcor, the relevance of the replaced meter to litigation of the dispute over the back bill is self-evident. Thus, while there may not be evidence of ComEd's bad faith, there is certainly a lack of evidence of its good faith.

¶ 69 However, just because we have agreed there is a lack of evidence of bad faith does not mean that the sanction Amcor seeks—debarment of ComEd's evidence concerning the replaced meter—is not appropriate. In *Kambylis*, the court held that "[f]ailure to preserve evidence will support sanctions, including debarment of evidence." *Kambylis*, 338 Ill. App. 3d at 793. In that case, the evidence at issue was an automobile that had been towed to an impound lot. The plaintiff received notice the automobile would be destroyed if not claimed, but the plaintiff did nothing to preserve the vehicle. The court found

that “the destruction of the evidence cannot be attributed to the commission of an innocent mistake resulting in the [vehicle’s] destruction.” *Id.* at 794-95. The court held that the plaintiff could not “stand by idly while evidence crucial to the resolution of a case is destroyed, especially where, as here, [the] plaintiff knew where the evidence was and had the authority to prevent its destruction and where the destruction of the evidence greatly prejudiced the defendant such that it prohibited it from effectively defending against [the] plaintiff’s claims.” *Id.* at 795. The court also rejected the plaintiff’s claim that “the trial court erred in barring evidence of the vehicle as a discovery sanction because [the] plaintiff took no affirmative action to destroy the vehicle ***.” *Id.* The court held it saw “no caveat in the preservation rule for plaintiffs who knew or should have known that the evidence should have been preserved, neglected to preserve it, but did not happen to personally destroy it.” *Id.* at 795-96.

¶ 70 This case is highly analogous to *Kambylis*, which instructs our decision. We have already explained why ComEd knew or should have known that the replaced meter should have been preserved—because it reasonably should have foreseen future litigation and the replaced meter was the key evidence. Accepting ComEd’s assertions as true, it “stood idly by” while its retention policy caused the replaced meter to be discarded. Even if ComEd did not affirmatively discard the replaced meter to thwart the litigation (*i.e.*, even if ComEd did not “personally” discard the replaced meter), under the facts of this case, just as in *Kambylis*, debarment of evidence is an appropriate sanction. In *Kambylis*, the court held: “[W]e cannot say that [the] plaintiff made a ‘diligent’ attempt to preserve the [vehicle] or that the [vehicle] was destroyed through no fault of [the] plaintiff. On the contrary, [the] plaintiff was notified by letter that the [evidence] faced destruction and made no effort to preserve the vehicle, even though the vehicle was in the nearby vicinity and [the] plaintiff possessed the authority to preserve it.” *Id.* at 796. ComEd knew the replaced meter faced being discarded and made no effort to preserve it “even though [it] knew, or should have known, that [Amcor] would want to inspect the [meter] and that

experts on *** [Amcor's] behalf would need to inspect the [meter]." *Id.* at 798. The *Kambylis* court affirmed the trial court's judgment barring evidence concerning the vehicle. *Id.* at 799.

¶ 71 Under the reasoning set forth in *Kambylis* for affirming the trial court, we believe the majority of the Commission abused its discretion in denying Amcor's motion to debar ComEd's evidence concerning the replaced meter. We think that no reasonable person would agree that ComEd should not have taken steps to preserve the meter regardless if it did not take affirmative action to specifically discard the meter before formal litigation began. We find such conduct, particularly given the importance of the evidence, is subject to the sanction of debarment.

¶ 72 The Commission should have granted Amcor's motion *in limine* to bar ComEd's evidence of its testing on the replaced meter. "Only a sanction barring evidence, direct or circumstantial, concerning the [disputed evidence] will place the two parties on equal footing." *Lawrence v. Harley-Davidson Motor Company*, No. 99 C 2609, 1999 WL 637172, at *3 (N.D. Ill. Aug. 12, 1999) (citing *American Family Insurance Company*, 223 Ill. App. 3d at 628). Accordingly, the Commission's order on the motion *in limine* is reversed, and the cause is remanded for further proceedings consistent with this order.

¶ 73 CONCLUSION

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

¶ 75 Reversed and remanded.