

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Material)	
Sciences Corporation,)	Case No. 13-2145-EL-CSS
)	
Complainant,)	
)	
v.)	
)	
The Toledo Edison Company,)	
)	
Respondent.)	

THE TOLEDO EDISON COMPANY’S MOTION TO DISMISS

Pursuant to Rules 4901-1-12 and 4901-9-01(C), Ohio Administrative Code, The Toledo Edison Company (“Toledo Edison” or “Company”) hereby moves to dismiss Complainant Material Sciences Corporation’s (“Complainant”) Complaint. The Complaint should be dismissed for two independent reasons. First, Complainant was a signatory party to Commission-approved Stipulations that supported the tariffs about which it now complains. As a signatory party, Complainant agreed to support the reasonableness of the riders, terms and conditions contained in the Stipulations in any enforcement proceeding. It cannot renege on that agreement and is estopped from doing so. Second, even if the claims were not barred, Complainant provides no reasonable grounds for its claims, as required by R.C. § 4905.26. The Complaint includes three claims that do not reflect any violation of a statute, regulation, or tariff. Rather, the Complaint expresses only dissatisfaction with the Company’s application of its tariffs to the Complainant’s facility in the Company’s service territory. The Company properly applied the mandatory forfeiture and penalty provisions contained in the Commission-approved interruptible tariff when the facility failed to comply with its obligations to curtail load. And the

Company properly billed the facility in accordance with the Company's other Commission-approved generation and transmission riders. Complainant's dissatisfaction with the results of properly applying the Company's tariffs does not constitute reasonable grounds for its claims. Accordingly, and as further described in the attached Memorandum in Support, which is incorporated herein, the Commission should dismiss the Complaint in its entirety with prejudice.

Respectfully submitted,

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On behalf of The Toledo Edison Company

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**MEMORANDUM IN SUPPORT OF
THE TOLEDO EDISON COMPANY’S MOTION TO DISMISS**

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Pursuant to Rules 4901-1-12 and 4901-9-01(C), Ohio Administrative Code, The Toledo Edison Company (“Toledo Edison” or “Company”) hereby moves to dismiss Complainant Material Sciences Corporation’s (“Complainant”) Complaint. The Complaint should be dismissed for two separate reasons. First, Complainant’s claims are barred because Complainant was a signatory to the Stipulation that sought, and later received, Commission approval of certain riders, terms, and conditions contained in the Company’s tariffs. As a result, based on its Stipulation and the doctrines of res judicata and collateral estoppel, Complainant is barred from complaining that those same riders, terms and conditions are unreasonable.

Second, the Complaint should be dismissed because the tariff requirements of which Complainant now complains were approved by the Commission. The Commission approved the Economic Load Response Rider (“Rider ELR”), including the forfeiture and penalties that must be applied if a subject customer fails to comply with the requirements of Rider ELR. Complainant voluntarily chose to participate in and take service pursuant to the provisions of Rider ELR. It is those same Commission-approved provisions that were applied by the Company here and about which the Complainant now complains. The Commission also approved the Company’s generation and transmission service riders, including Rider GEN and Rider NMB and the formula for allocating costs through those riders. Indeed, the Complaint does not allege that the Company misapplied the tariffs or that the Company miscalculated the facility’s penalties or rates. The Complaint contains only conclusory allegations that the results of the tariffs are “unjust, unreasonable, and unlawful.” Such conclusions are insufficient. Pursuant to well-settled Commission authority, dissatisfaction with Commission-approved rates,

terms, and conditions cannot constitute reasonable grounds for a complaint.¹ Thus, for all of these reasons, the Commission should dismiss the Complaint with prejudice.

I. FACTUAL BACKGROUND

A. The Terms And Conditions Of The Company's Service Are Set Forth In Its Commission-Approved Tariffs, Including The Option For Interruptible Service.

The Company provides electric service to customers in its service territory pursuant to its Schedule of Rates and Services (the "Schedule"), as approved by the Commission.² The Company's current Schedule includes rates, terms, and conditions that were approved as a part of the Company's application for an electric security plan filed in Case No. 10-388-EL-SSO ("ESP II"). The foundation for the Company's ESP II was a Stipulation, including supplements thereto, signed by numerous interested parties, including Complainant.³ The ESP II Stipulation was approved by the Commission on August 25, 2010, and covers the period June 1, 2011 through May 31, 2014.⁴ In connection with the Stipulation, Complainant "agree[d] to and will support the reasonableness of the ESP and this Stipulation before the Commission . . . and in any . . . enforcement of the ESP and this Stipulation."⁵

The ESP II Stipulation, as subsequently approved by the Commission, included a number of riders, terms and conditions for electric service provided by the Company. For example, Complainant agreed to, and the Commission approved, as part of the ESP II Stipulation certain

¹ *Seketa v. The East Ohio Gas Co.*, Case No. 06-549-GA-CSS, Entry (Aug. 9, 2006), ¶ 4; *In the Matter of the Complaints of Young, et al. v. The Ohio American Water Co.*, Case Nos. 05-1170-WW-CSS *et al.* Entry (Nov. 1, 2006), ¶ 1.

² See R.C. §§ 4905.04, 4909.03, 4933.82; Schedule of Rates for Electric Service, PUCO No. 8.

³ See ESP II, Stipulation, filed Mar. 23, 2010; Supplemental Stipulation, filed May 13, 2010; Second Supplemental Stipulation, filed July 22, 2010.

⁴ See Compl. ¶ 6; ESP II, Opinion and Order, filed Aug. 25, 2010.

⁵ ESP II Stipulation, p. 35.

generation and transmission service riders, including Rider GEN and Rider NMB.⁶ Further, among the terms and conditions of the Company's Schedule – and among the terms and conditions stipulated to by Complainant in connection with ESP I⁷ and ESP II – is the option for interruptible service under Rider ELR.⁸ Pursuant to Rider ELR, and in conjunction with Rider EDR, certain eligible customers may receive credit amounts for agreeing to curtail their load during an Emergency Curtailment Event ("ECE") and agreeing to comply with the other requirements.⁹ The Facility is such an eligible customer and did in fact agree to comply with the requirements of Rider ELR in exchange for receiving the aforementioned credit amounts. The focus of Rider ELR is to provide an important demand-response function to support system reliability and the demand reduction pledged by Rider ELR customers assists the Company in meeting its statutory requirements to reduce peak demand on the system.¹⁰

Rider ELR provides, in pertinent part, that:

Upon no less than two hours advance notification provided by the Company, **a customer taking service under this rider must curtail all load above its Firm Load during an Emergency Curtailment Event** consistent with the Company's instructions. For purposes of this rider, an Emergency Curtailment Event shall be one in which the Company, a regional transmission organization and/or a transmission operator determines, in its respective sole discretion, that an emergency situation exists that may jeopardize the integrity of either the distribution or transmission system in the area. . . .

During the entire period of an Emergency Curtailment Event, the customer's actual measured load must remain at or below

⁶ ESP II Stipulation, filed Mar. 23, 2010, at §§ C.1, D.2, D.3, and Att. B.

⁷ Rider ELR was previously approved in connection with the Company's first electric security plan in Case No. 08-935-EL-SSO *et al.* ("ESP I") in March 2009. Compl. ¶ 7. The foundation for ESP I also was a Stipulation supported by numerous interested parties, including Complainant. *See* Compl. ¶ 7; ESP I Stipulation, filed Feb. 19, 2009, at § A.11(ii) and Att. B; Supplemental Stipulation, filed Feb. 26, 2009.

⁸ Schedule, Sheet 101; ESP II Stipulation, filed Mar. 23, 2010, at § D.2 and Att. B.

⁹ *Id.*

¹⁰ *See* ESP II Stipulation, § D.2; R.C. § 4928.66(A)(1)(b).

its Firm Load with such load being measured every clock half hour. A customer's actual measured load shall be determined using the greater of the customer's highest lagging kVA or highest kW during the Emergency Curtailment Event.

If at any time **during the Emergency Curtailment Event** a customer's actual measured load exceeds its contract Firm Load, **the Company may disconnect the customer** from the transmission system for the duration of the Emergency Curtailment Event, at the customer's expense. The Company shall not be liable for any direct or indirect costs, losses, expenses, or other damages, special or otherwise, including, without limitation, lost profits that arise from such disconnection.

If at any time during the Emergency Curtailment Event a customer's actual measured load exceeds 110% of its Firm Load, the customer shall be subject to all four (4) of the following: (i) forfeit its Program Credit for the month in which the Emergency Curtailment Event occurred; (ii) pay the ECE Charge set forth in the Rates section of this Rider; (iii) pay the sum of all Program Credits received by the customer under the Program during the immediately preceding twelve billing months which shall include credits from this Rider and the Economic Development Rider; and (iv) the Company's right, at its sole discretion, to remove the customer from the Program for a minimum of 12 months.¹¹

Thus, in order to ensure that the required load reduction occurs consistent with the requirements and obligations of Rider ELR, Rider ELR imposes mandatory penalties. Where a customer fails to comply with Rider ELR's requirements at any time during an ECE, the imposition of the forfeiture and penalties is mandatory ("the customer shall be subject to. . .").¹² While Rider ELR provides the Company with discretion to also disconnect the customer's service after the commencement of an ECE if the customer fails to comply ("the Company may disconnect the customer..."¹³), the forfeiture and penalties remain mandatory.

¹¹ Rider ELR (emphasis added).

¹² *Id.*

¹³ *Id.*

B. Complainant Failed To Adhere To The Requirements Of Rider ELR On September 11, 2013 And, Therefore, Is Subject To The Rider’s Forfeiture and Penalty Provisions.

Complainant operates a galvanizing, plating and coating plant known as the MSC Walbridge Coatings Facility at 30610 E. Broadway Street, Walbridge, Ohio (“Facility”).¹⁴ The Company provides the Facility with service in accordance with the Schedule.¹⁵ The Facility voluntarily elected, via execution of a contract addendum, to receive service under Rider ELR for the period in question.¹⁶

PJM Interconnection, LLC (“PJM”), the Company’s regional transmission organization, called for five ECEs in 2013, as provided for under Rider ELR: July 15, July 16, July 18, September 10, and September 11.¹⁷ The Facility complied with its obligations under Rider ELR and reduced its load as required by the Rider in connection with the ECEs called on July 15, July 16, July 18, and September 10.¹⁸ However, the Facility failed to comply with the ECE called on September 11, 2013.

On September 11, 2013, PJM called a mandatory, six-hour ECE beginning at 2:00 PM EDT.¹⁹ The Company notified the Facility of the ECE by email sent on September 11, 2013, at 12:05 PM EDT.²⁰ Consistent with Rider ELR, the Company started measuring the Facility’s compliance with Rider ELR commencing with the first full half-hour of service that began two hours after the Company’s notice, 2:05 PM EDT (*i.e.*, the half-hour ending 3:00 PM EDT). During the half hours ending 3:00 PM EDT and 3:30 PM EDT, the Facility’s measured load

¹⁴ Compl. ¶¶ 1-2.

¹⁵ See Compl. ¶ 4.

¹⁶ See Compl. ¶11; Answer ¶11.

¹⁷ Compl. ¶ 16.

¹⁸ Compl. ¶ 16.

¹⁹ Compl. ¶¶16-17.

²⁰ See Compl. Ex. 4.

exceeded its Firm Load, in contravention of Rider ELR's requirements.²¹ Complainant admits that the Facility failed to reduce its load as required under Rider ELR during the September 11, 2013 ECE.²²

On October 4, 2013, the Company sent the Facility a penalty letter advising that, because the Facility's measured load exceeded its contract Firm Load by more than 110% during the September 11, 2013 ECE, the penalties required under Rider ELR would be applied to the Facility's bill.²³ The total forfeiture and penalties required by Rider ELR are \$2,445,543.15 – which includes \$99,760 in forfeiture of the current month's Rider ELR program credit; \$162.15 for the Rider ELR Emergency Curtailment Event Charge; and \$2,345,621.00 in forfeiture of Rider ELR and EDR-b credits received by the Facility for the preceding 12 months.²⁴ Though not required to do so and as an accommodation to Complainant, the Company offered to recover those amounts from the Facility over the next twelve billing months without a carrying charge, rather than immediate payment of the full amount owed.²⁵ The Company did not disconnect the Facility's service during the ECE and did not seek to remove the Facility from the Program.

Complainant subsequently filed this Complaint asserting three causes of action. In Count One, Complainant alleges that the Company's application of the forfeiture and penalties required by Rider ELR were unjust and unreasonable because the Company provided insufficient notice of the ECE.²⁶ In Count Two, Complainant alleges that "circumstances" warrant mitigation of

²¹ Compl. ¶ 22.

²² Compl. ¶¶ 16, 22.

²³ See Ex. 3 to Compl.

²⁴ *Id.*

²⁵ See *id.*

²⁶ Compl. ¶¶ 25-33.

Rider ELR's forfeiture and penalties.²⁷ In Count Three, Complainant vaguely alleges that the rates charged by the Company to the Facility under Rider GEN and Rider NMB have resulted in unjust and unreasonable increases.²⁸ As set forth herein, these claims are insufficient and should be dismissed.

II. LAW & ARGUMENT

A. Complainant's Claims Are Barred As A Matter Of Law Because Complainant Agreed To The Relevant Tariffs In The Company's ESP II Proceeding.

Complainant was a signatory party to the Company's ESP II, which was litigated before the Commission and eventually approved by the Commission.²⁹ Nevertheless, Complainant's claims here that the tariffs that it supported as part of the ESP II Stipulation, and that the Commission approved, are now unreasonable or unlawful. Those claims are barred as a matter of law. Indeed, the Commission has previously precluded parties from taking positions inconsistent with those they agreed to in a stipulation. For example:

The OCC was a signatory party to both the ETP Stipulation and the RSP Stipulation. We approved the Stipulations With respect to the RSP Stipulation, which specified that adjustments to the distribution rate freeze should be made through the filing of an "ATA" application, OCC claimed that the RSP Stipulation, as a package, benefited ratepayers and the public interest. Moreover, OCC represented to the Commission that the RSP Stipulation did not violate any important regulatory principle. If OCC believed that the adjustments to the distribution rate freeze for recovery of storm damage expenses could be made only by an application for an increase in rates rather than through an application for tariff approval, OCC could have and should have raised that issue with

²⁷ Compl. ¶¶ 34-39.

²⁸ Compl. ¶¶ 40-50.

²⁹ See ESP II Stipulation.

the Commission at the time the RSP Stipulation was submitted to the Commission for approval.³⁰

Complainant should be similarly barred here.

In connection with the ESP II Stipulation, Complainant agreed that the Company's ESP II, containing the terms and conditions for Rider ELR, Rider GEN, and Rider NMB, were beneficial for customers, supported state policy, and were reasonable. Specifically, Complainant agreed that:

- “This Stipulation is supported by adequate data and information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable Signatory Parties in a cooperative process and undertaken by the Signatory Parties representing a wide range of interests to resolve the aforementioned issues.”³¹
- “The rates, together with other terms and conditions provided in the ESP, better assure customers of stabilized prices through the periods covered by the different aspects of the ESP and promote energy efficiency, economic development and provide support for low income customers.”³²
- “This ESP is more favorable in the aggregate to customers as compared to the expected results that would otherwise occur under an MRO alternative and represents a serious compromise of complex issues and involves substantial customer benefits that would not otherwise have been achievable.”³³
- “[E]ach Signatory Party agrees to and will support the reasonableness of the ESP and this Stipulation before the Commission, and to cause its counsel to do the same, and in any appeal from the Commission's adoption and/or enforcement of the ESP and this Stipulation.”³⁴

³⁰ *In the Matter of the Application of Dayton Power and Light Company for Approval of Tariff Changes Associated With a Request to Implement a Storm Cost Recovery Rider*, Case No. 05-1090-EL-ATA, Entry on Rehearing (Aug. 30, 2006), ¶ 7 (emphasis added).

³¹ ESP II Stipulation, p. 1.

³² ESP II Stipulation, p. 5.

³³ ESP II Stipulation, pp. 31-32.

³⁴ ESP II Stipulation, p. 35.

Thus, Complainant cannot come back now and raise complaints with the Commission regarding the riders, terms and conditions approved in ESP II when it failed to do so at the time the ESP II Stipulation was submitted to the Commission for approval.

The doctrines of res judicata and collateral estoppel also are applicable and bar Complainant's claims. The Ohio Supreme Court has held that the doctrines apply in administrative proceedings before the Commission and bar a party from attempting to reopen an issue that was "previously determined to be proper."³⁵ The reasonableness of the Company's interruptible, generation, and transmission riders was at issue and litigated in the Company's ESP II proceeding. Complainant and the Company were parties to that proceeding. In fact, in the course of that proceeding, Complainant explicitly agreed that Rider ELR, Rider GEN, and Rider NMB were reasonable.³⁶ As a result, Complainant cannot come back now and claim that the riders are anything but reasonable.

Complainant's claims regarding the propriety of the Company's interruptible Tariff and generation/transmission riders are barred as a matter of law and should be dismissed.

B. The Complaint Also Should Be Dismissed Because It Fails To State Reasonable Grounds, As Required By R.C. § 4905.26.

The mere act of filing a complaint does not automatically trigger a party's right to a hearing before the Commission. Rather, "[r]easonable grounds for the complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26 . . ."³⁷ Where the allegations, even

³⁵ *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10, 475 N.E.2d 782, 783-84 (1985) ("OCC is barred by the doctrines of res judicata and collateral estoppel from attempting to relitigate the issue of the EFC rate which was previously determined to be proper" in a previous action between the same parties).

³⁶ ESP II Stipulation, p. 35.

³⁷ *Ohio Util. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, syl. 2 (1979).

if true, do not provide reasonable grounds for a cognizable claim, the complaint must be dismissed.³⁸

The “reasonable grounds” prerequisite necessarily requires that the complaint contain sufficient allegations of facts that could support a finding of unjust, unreasonable, or unlawful charges. A complaint that does not allege specific incidents of violative conduct must be dismissed.³⁹ Additionally, a complaint that fails to allege a violation of any statute, Commission rule, or order fails to state reasonable grounds and should be dismissed.⁴⁰ The Commission routinely dismisses such cases.⁴¹

Here, Complainant claims that the Company’s application of the Rider ELR forfeiture and penalty provisions and other of the Company’s charges for electric service are unjust, unreasonable, and unlawful. Complainant does not, however, allege that the Company has violated any statute, tariff provision, or any rule, regulation, or order of the Commission. Instead, the Complaint reflects Complainant’s unhappiness with the Company’s otherwise proper application of its Schedule. Accordingly, the Complaint lacks reasonable grounds and should be dismissed in its entirety.

1. Counts One And Two Should Be Dismissed Because The Company Simply Applied The Terms Of Rider ELR To The Facility.

In Counts One and Two, Complainant alleges two nearly identical claims that the Facility should not be subject to the forfeiture and penalties called for in Rider ELR for non-compliance because the Company’s notice of the ECE was insufficient and/or because the penalties “require

³⁸ *Lucas County Comm’rs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347 (1997).

³⁹ See, e.g., *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.*, Case No. 98-1616-EL-CSS, Entry (May 19, 1999), ¶7; *In the Matter of Petition of J. Earl McCormick, et al. v. The Ohio Bell Tel. Co., et al.*, Case No. 90-1256-TP-PEX, Entry (Sept. 27, 1990), ¶3.

⁴⁰ *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.*, Case No. 98-1616-EL-CSS, Entry (May 19, 1999), ¶¶6-7.

⁴¹ *Id.* See also *Lentz v. The East Ohio Gas Co.*, Case No. 96-25-GA-CSS, Entry (Apr. 18, 1996), ¶ 7.

full mitigation” due to MSC’s purported (and unsuccessful) efforts to comply.⁴² However, the terms of Rider ELR are clear and unambiguous and the Company properly followed them – as the Complaint essentially acknowledges.

- a. *Pursuant to Rider ELR, the Facility was required to curtail its load two hours after the Company’s notification of the ECE.*

As set forth above, Rider ELR provides, in pertinent part, that: “[u]pon no less than two hours advance notification provided by the Company, a customer taking service under this rider must curtail all load above its Firm Load during an Emergency Curtailment Event consistent with the Company’s instructions.”⁴³ It is undisputed that the Company provided notice of the ECE to Complainant at 12:05 PM EDT on September 11, 2013.⁴⁴ Therefore, in accordance with Rider ELR, the Facility was not required to curtail its load until two hours after the Company’s notification – or by 2:05 PM EDT. Rider ELR does not require the Company to provide two hours advance notice of PJM’s ECE start time, as the Complaint suggests. Instead, Rider ELR requires Complainant to have curtailed its load to its “Firm Load” two hours after receiving the ECE notice from the Company. There is no dispute that Complainant failed to do so.

Because Rider ELR calls for measured load to be calculated in half-hour increments, the Company only began to measure the Facility’s compliance with Rider ELR as of the first full half-hour of service following the two-hour notification period ending at 2:05 PM EDT (*i.e.*, the half-hour starting at 2:30 PM EDT and ending 3:00 PM EDT), which was more than two hours after the Facility was notified of the ECE. This means that the Facility was under no obligation to curtail during the half-hour period from 2:00 PM EDT to 2:30 PM EDT – and that no penalties were applied to the Facility for not reducing to its Firm Load during that time period. The

⁴² Compl. ¶¶ 25-34 (Count One), 34-39 (Count Two).

⁴³ Rider ELR, p. 3.

⁴⁴ Compl. Ex. 4.

Facility's curtailment obligation period began at 2:30 PM EDT. Thus, the Facility was provided with "no less than two hours advance notification" of its obligation to curtail all load above its Firm Load. Nevertheless, the Facility failed to comply. More than two hours after receiving notification of the ECE – in the half hours ended 3:00 PM EDT and 3:30 PM EDT – the Facility's measured load exceeded its Firm Load by more than 110%. (It also bears noting that, even if the Company had provided notice of the ECE to Complainant five minutes earlier, at 12:00 PM EDT, the Facility would still have failed to comply with Rider ELR because the Facility's measured load was in excess of 110% of its Firm Load as of both 3:00 PM EDT and 3:30 PM EDT, i.e. the penalty and forfeiture amounts required under Rider ELR would be the same.)

Pursuant to Rider ELR, the Facility was obligated to curtail its load to its Firm Load within two hours of the Company's notice and the Facility admittedly failed to do so. The fact that the notice was provided at 12:05 PM EDT when PJM planned the ECE to begin at 2:00 PM EDT does not alleviate the Facility's obligation to comply in the half hours ending at 3:00 PM EDT and 3:30 PM EDT, which it failed to do.

- b. *Rider ELR provides a significant source of demand reduction that promotes system reliability and warrants the Commission-approved forfeiture and penalties.*

It is clear that Complainant's arguments must fail because, taken to their logical end, Complainant's position would lead to an irrational result. PJM's September 11, 2013 ECE began at 2:00 PM EDT; the Company sent notice of the ECE at 12:05 PM EDT; and the Facility did not sufficiently curtail its load until the half-hour ending 4:00 PM EDT. Based on the five minute difference between PJM's noticed start time of 2:00 PM EDT and two hours after the Company's notice, 2:05 PM EDT, Complainant takes the untenable position that it should be relieved of its obligation to curtail its load altogether. Such an illogical interpretation of Rider ELR's

provisions is not only inaccurate, but is also antithetical to the purpose of Rider ELR, which is to help ensure system reliability – particularly when an “emergency situation exists that may jeopardize the integrity of either the distribution or transmission system in the area.”⁴⁵

Indeed, Rider ELR’s significant penalties for noncompliance are supported by the important benefits provided to the system and to Rider ELR customers. As noted above, Rider ELR serves as an important peak demand reduction program that promotes system reliability. If interruptible load is not reduced during ECEs, the entire system may be more vulnerable and firm service customers may be forced to curtail in order to maintain system reliability. Therefore, it is critical that Rider ELR customers curtail their load in connection with an ECE, as they agreed and committed to do. The penalties serve as an important incentive for this compliance.

Moreover, Rider ELR customers enjoy significant credits (paid for by other customers) under Rider ELR in conjunction with Rider EDR.⁴⁶ If Rider ELR customers were allowed to receive these credits, but then could fail to comply with Rider ELR and still retain their credits, there would be no incentive to comply – and all other customers would be paying for an empty benefit. The forfeiture and penalties provided for by Rider ELR are an important mechanism to support the interruptible, peak demand reduction program and system integrity. Complainant’s interpretation of Rider ELR is nonsensical and inappropriate.

⁴⁵ See Rider ELR.

⁴⁶ Any amounts received by the Company from the Complainant in payment of the Rider ELR penalties and forfeitures are returned in full to the benefit of the same group of customers that pay for the credits to ELR customers. The Company does not retain any of the penalty or forfeiture amounts.

- c. *Rider ELR's forfeiture and penalties for noncompliance are not discretionary or subject to other "mitigation."*

In the Complaint, Complainant also alleges that a variety of "circumstances" "require full mitigation of the penalties" triggered by its noncompliance during the September 11, 2013 ECE.⁴⁷ However, such a position is wholly inconsistent with the plain language of Rider ELR. Rider ELR does not include any basis upon which to excuse or mitigate a customer's noncompliance with Rider ELR, other than the mitigation already included in the Rider itself.⁴⁸ It is of no moment under Rider ELR, for example, that the Facility's management "used tested shutdown procedures" and "believed in good faith the Measured Load would remain below contract Firm Load," as Complainant alleges.⁴⁹ Rider ELR does not provide exceptions or allowances for customers who follow their typical shutdown procedures or who maintain (subjective) good faith beliefs about their load reduction. The only measure of compliance is purely objective: whether the customer's measured load exceeded its contract Firm Load during the ECE, with such load being measured every clock half hour.⁵⁰ Here, the relevant facts are straightforward and uncontested. The Facility failed to comply with its requirement to curtail load and its actual measured load exceeded 110% of its Firm Load during the ECE.⁵¹ Thus, the Facility "shall be subject to all four (4)" of Rider ELR's penalties.⁵²

⁴⁷ Compl. ¶ 36.

⁴⁸ Rider ELR establishes a two-tier penalty structure. If a customer's actual measured load is greater than 100% of its Firm Load, but less than or equal to 110% of its Firm Load, at any point during the ECE, then the penalties are more limited: (1) forfeiture of Program Credits for the current month; and (2) payment of the ECE Charge. Rider ELR, p. 4. If, however, a customer's actual measured load is greater than 110% of its Firm Load – as MSC's actual measured load was during the September 11, 2013 ECE – then additional penalties are imposed: (1) forfeiture of Program Credits for the current month; (2) payment of the ECE Charge; plus (3) a penalty in the amount of the sum of all Program Credits received by the customer during the immediately preceding twelve billing months; and (4) the Company's right, at its sole discretion, to remove the customer from the Program for a minimum of 12 months. *Id.*

⁴⁹ *Id.*

⁵⁰ *See* Rider ELR.

⁵¹ *See* Compl. ¶ 22.

⁵² Rider ELR, p. 4 (emphasis added).

Complainant does not allege that the Company miscalculated the Rider ELR forfeiture and penalties. Rather, Complainant is unhappy with the Company's proper and required application of Rider ELR to its unfortunate circumstances and seeks to have the Company apply discretion not provided for by Rider ELR. For the foregoing reasons, the imposition of the Rider ELR forfeiture and penalties against the Facility for its noncompliance in connection with the September 11, 2013 ECE is reasonable, proper, and mandatory. There are no reasonable grounds for Counts One and Two of Complainant's Complaint and they should be dismissed.

2. Count Three Should Be Dismissed Because Complainant Fails To Allege That The Company Charged The Facility Anything Other Than Commission-Approved Rates.

It is well-settled that a complaint that asserts that a utility should not charge Commission-approved rates fails to set forth reasonable grounds as required by R.C. § 4905.26.⁵³ In *Seketa*, the Commission observed that:

[T]he complaint should be dismissed with prejudice. From the pleadings, it appears that [complainant] has been billed the tariff rates for the service he receives from [the utility]. In fact, [complainant] does not allege that [the utility] charged him the wrong rate; rather he argues that he should not be charged one of the components (the PIPP rider). As a result, [complainant] argues that the tariff rates are excessive, unjust and unreasonable.

* * *

There is no allegation that [the utility] charged [complainant] something other than the approved rate. . . . The Commission does not believe that the complaint sets forth reasonable grounds. We have similarly dismissed other complaints that allege that approved rates should not be charged. . . .⁵⁴

⁵³ *Seketa v. The East Ohio Gas Co.*, Case No. 06-549-GA-CSS, Entry (Aug. 9, 2006), ¶ 4; *In the Matter of the Complaints of Young, et al. v. The Ohio American Water Co.*, Case Nos. 05-1170-WW-CSS *et al.* Entry (Nov. 1, 2006), ¶ 1.

⁵⁴ *Seketa*, Entry (Aug. 9, 2006), ¶ 4 citing *Gannis v. The Cleveland Electric Illuminating Co.*, Case No. 94-154-EL-CSS, Entry (May 11, 1994) and *Hughes v. The Cleveland Electric Illuminating Co.*, Case No. 94-969-EL-CSS, Entry (Sept. 1, 1994).

Here, as in *Seketa*, the Complaint fails to allege that the Company charged the Facility the wrong rate. Instead, Complainant claims that the ESP II rate increases – which resulted from the rates, rate design and auction process stipulated to by Complainant and approved by the Commission – are “unjust, unreasonable, and unlawful.”⁵⁵ These allegations are simply conclusory. The Complaint includes several paragraphs of allegations regarding the Facility’s historical bills, the size of the increases experienced by the Facility under Rider GEN, Rider NMB, and others, and a purported comparison of the increases to those of other FirstEnergy Ohio utility customers.⁵⁶ But Complainant does not allege, and it cannot allege, that the Company miscalculated the Facility’s rates or somehow misapplied the Commission-authorized formulae under the various riders. Complainant has alleged no more than dissatisfaction with the Company’s Commission-approved rates. Therefore, Complainant has failed to state reasonable grounds and Count Three should be dismissed.

III. CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed with prejudice in its entirety.

Respectfully submitted,

/s/ Laura C. McBride

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⁵⁵ See Compl. ¶ 50.

⁵⁶ See Compl. ¶¶ 40-50.

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On behalf of The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *The Toledo Edison Company's Motion to Dismiss* and the *Memorandum in Support* thereof were served this 13th day of February, 2014, via electronic mail on:

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