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
REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Complainant Material Sciences Corporation's ("MSC") response to the Motion to Dismiss filed by The Toledo Edison Company ("Toledo Edison" or the "Company") confirms that the Motion should be granted. Rather than restate all of the Company's arguments,[1] this Reply provides a response to MSC's key arguments, which illustrate why its Memorandum Contra (the "Memo Contra") is insufficient and MSC's claims must be dismissed in their entirety.

1. **The Company has no burden (or right) to allege facts in a motion to dismiss and, thus, the Motion is not "defective."**

MSC argues that the Company's Motion to Dismiss "should be dismissed" because the Company did not allege that "it served notice to curtail at Noon."[2] However, the Company, as the movant, does not have the opportunity to make allegations in a motion to dismiss. In

[1] The Company hereby incorporates by reference all of its arguments set forth in its Motion to Dismiss.

[2] Memo Contra, pp. 4-5.

considering a motion to dismiss, it is MSC's allegations that are at issue.[3] And, as set forth in the Company's Motion, those allegations – even if accepted as true – are insufficient because they are barred by res judicata and collateral estoppel as a result of MSC's agreement to the ESP II Stipulation and because they do not state reasonable grounds for a complaint.

2. MSC provides no defense for its claim in Count Three, which is based solely on its unhappiness with the impact of Commission-approved rates and is barred for multiple reasons.

In Count Three of the Complaint, MSC alleges that its calculation of its "increase in rates beginning June 2013 results in unjust, unreasonable, and unlawful rates and charges," and attributes those increases to charges under Rider NMB.[4] However, MSC admits in its Memo Contra that it "signed the ESP II Stipulation, continues to support the ESP II stipulation . . . and also those riders approved under that stipulation."[5] Rider NMB is one of those riders, as is Rider GEN.[6]

MSC's only attempt to avoid the impact of res judicata / collateral estoppel is to assert that the parties in the ESP II Stipulation did not litigate the specific increase in rates of which MSC complains.[7] But, MSC's argument misses the point. The parties did litigate the terms of Rider NMB and many other of the Company's rates.[8] MSC has not alleged (and cannot allege) that the Company charged it[9] anything other than the rates MSC litigated and agreed to (and

[3] *See In the Matter of the Complaint of Evelyn and John Keller*, Case No. 12-2177-EL-CSS, Entry (May 23, 2013), ¶ 13 (noting that, in considering a motion to dismiss, "all material allegations of the complaint must be accepted as true and construed in favor of the complaining party") *citing In the Matter of the Complaint of XO Ohio, Inc. v. City of Upper Arlington,* Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003).

[4] Complaint, p. 17.

[5] Memo Contra, p. 8.

[6] *See* Case No. 10-388-EL-SSO, Stipulation ("ESP II Stipulation"), filed Mar. 23, 2010.

[7] Memo Contra, p. 10.

[8] *See* ESP II Stipulation.

[9] References to MSC herein include MSC Walbridge Coatings, Inc., a subsidiary of MSC and the Company's customer.

were approved) in the ESP II Stipulation. Thus, MSC's support for Rider NMB and the ESP II Stipulation bars its claims here.[10]

Further, even if MSC had not supported the ESP II Stipulation, Count Three lacks reasonable grounds because 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.[11] MSC's attempts to distinguish Count Three from the clear precedent of *Seketa* and others are unavailing. Indeed, all that MSC does is confirm that it is indeed challenging a rate increase under approved rates (as would be barred by R.C. § 4905.26 and *Seketa*). MSC then seeks to muddy the waters by trying to link the rate increase to the Rider ELR issues.[12] Count Three stands on its own as a claim that MSC's rates (under Rider NMB) are too high.[13] Such a claim is totally irrelevant to the Rider ELR issues that form the basis for Counts One and Two. Thus, MSC cannot save Count Three by attempting to distract the Commission. Count Three represents the classic claim that lacks reasonable grounds and must be dismissed for multiple, independent reasons.

3. Similarly, MSC cannot support its claims in Count One or Two that are based on the calculation or size of the penalties called for in Commission-approved Rider ELR.

For the same reasons that Count Three fail – (1) MSC's support of the ESP II Stipulation, (2) res judicata/collateral estoppel, and (3) failure to assert reasonable grounds – MSC's claims

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[10] *See 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 (because OCC was a signatory to the stipulation, which approved the distribution rate freeze that allowed for adjustments based on storm damage expenses, OCC is barred from challenging the increase in rates resulting from such adjustments); *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).

[11] *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.

[12] Memo Contra, pp. 16-17.

[13] *See* Complaint, ¶¶ 40-50.

that the size or calculation of the Rider ELR penalties are unjust or unreasonable also fail. MSC asserts, for example, that the Rider ELR penalty provisions should be subject to "equitable considerations" and are "inequitable."[14] But the terms of Rider ELR, including the calculation and definition of the penalties that would apply upon failure to reduce load to Firm Load, were approved as part of the ESP II Stipulation. Thus, MSC agreed to those terms, as did the Commission. MSC does not provide any arguments (or law) in its Memo Contra to avoid the application of res judicata and collateral estoppel on this portion of its claims. Its unhappiness with the result is not enough to establish reasonable grounds for a complaint. MSC's arguments are instead focused on whether notice was sufficient (and, as discussed below, MSC's attempts to avoid its obligations under Rider ELR based on the notice are simply an attempted distraction from its admitted failure to reduce its load in accordance with the requirements of Rider ELR in connection with the September 11, 2013 Emergency Curtailment Event).

If MSC violated its obligations under Rider ELR, the penalty calculated by the Company must apply. MSC cannot challenge the terms of the penalty or its size because those terms are set forth clearly and unambiguously in Commission-approved tariffs to which MSC stipulated. Thus, MSC's claims in Count One and Two that claim that the size of the Rider ELR penalties is unjust or unreasonable must be dismissed.

4. MSC's claims about the notice provided under Rider ELR are insufficient based on its own allegations – and represent only a smokescreen for its failure to comply with its obligations under Rider ELR.

The bulk of MSC's Memo Contra is focused on further attempted distractions regarding the notice provisions of Rider ELR. Notably, MSC's Memo Contra does not dispute the fact that it supported Rider ELR as a part of the ESP II Stipulation, including the Rider's notice

[14] Memo Contra, pp. 1, 2.

provisions. The Memo Contra also does not (and cannot) dispute its admission that it received notice from the Company on September 11, 2013, that it attempted to reduce its load in response, and that MSC had still failed to achieve its Firm Load well after more than two hours after it received notice from the Company.[15] Thus, MSC is left to create distractions by putting a dollar value on the amount of excess power it used, by pointing to other rate increases (that cannot form the basis for a complaint), and by referencing "compelling mitigation circumstances."[16] These are smokescreens for the only relevant facts, which MSC has admitted in its Complaint:

- "MSC stipulated to receiving interruptible service for The MSC Walbridge Facility under the Economic Load Response Program ('Rider ELR') . . . ."[17]
- MSC received notice of an Emergency Curtailment Event at 12:05PM on September 11, 2013.[18]
- "[T]he incremental usage from [MSC's] fans caused the Facility's Measured Load to exceed its contract Firm Load" still between 3:00PM and 3:30PM on September 11, 2013.[19]

Taking these allegations as true, MSC's Counts One and Two clearly fail because, the application of the terms of the Commission-approved (and MSC-approved) Rider ELR – which MSC acknowledges are clear and unambiguous[20] – to those allegations confirms that there are no reasonable grounds for the claims. MSC is unhappy with the Company's proper and mandatory application of Rider ELR to its unfortunate circumstances. But, as a matter of law, this is an insufficient basis for its Complaint. Therefore, Count One and Two should be dismissed.

[15] *See, generally,* Memo Contra.

[16] *See, e.g.,* Memo Contra, pp. 3, 5, 10.

[17] Complaint, ¶ 11.

[18] Complaint, Ex. 4.

[19] Complaint, ¶ 22.

[20] *See, e.g.,* Memo Contra, p. 10.

As set forth herein and in the Company's Motion to Dismiss, Counts One, Two, and Three should be dismissed because they are barred by MSC's support of the ESP II Stipulation and res judicata / collateral estoppel, and because they fail to state reasonable grounds. The Complaint should be dismissed with prejudice in its entirety.

Respectfully submitted,

/s/ *Laura C. McBride*

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On behalf of The Toledo Edison Company

CERTIFICATE OF SERVICE

The PUCO's e-filing system will electronically serve notice of filing of this document on the party set forth below, and in addition, a copy of the foregoing *The Toledo Edison Company's Reply in Support of Its Motion to Dismiss* was served this 7th day of March, 2014, via electronic mail on:

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Summary: Reply in Support of The Toledo Edison Company's Motion to Dismiss electronically filed by Ms. Laura C. McBride on behalf of The Toledo Edison Company