

**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
INITIAL POST-HEARING BRIEF

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	4
A.	The Company Provides Service To MSC As Set Forth In Its Commission- Approved Tariffs, Including The Option For Interruptible Service.	4
B.	MSC Failed To Curtail Its Load In Accordance With The Requirements Of Rider ELR On September 11, 2013.	8
III.	LAW & ARGUMENT	11
A.	There Is No Evidence That MSC Was Charged Improper Rates.	11
1.	It Is Undisputed That The Rates Charged To MSC By Toledo Edison Were Approved By The Commission, And MSC’s Contrary Assertions Are Unsupported And Should Be Stricken.	11
a.	MSC’s assertion that its rate increases are unjust and unreasonable as reflected by a comparison of Summer 2013 to Winter 2012/2013 rates is unavailing.	14
b.	MSC’s assertion that its rates are somehow unjust or unreasonable because of an increase from a “historical baseline” lacks any substance.	15
c.	MSC’s assertion that the Company’s “practices affecting MSC’s rate increases in 2013 [that] appear to systematically eliminate the benefits of other decreases” is only a complaint about MSC’s bill.	16
d.	MSC’s suggestion that Rider NMB is misapplied to Toledo Edison GT customers because the allocation percentage is higher than other FirstEnergy Ohio Utilities is simply false.	16
2.	In Any Event, MSC Cannot Complain About The Rates That It Supported During The Company’s ESP II Proceeding.	17
B.	MSC Failed To Comply With Rider ELR And, Thus, The Companies Are Required to Apply the Tariff Penalties – As They Have Been Applied To All Other Customers That Similarly Failed To Comply.	19
1.	There Is No Dispute That MSC Failed To Sufficiently Curtail Its Load During An Emergency Event.	19

a.	Any suggestion by MSC that its processes were uniquely disrupted or otherwise unexpectedly delayed was not supported by its own witnesses’ testimony.	20
b.	Although it makes vague suggestions otherwise, there also is no evidence that MSC’s meter was inaccurate.	21
c.	MSC’s suggestion that it was “wrongly penalized” also fails.	21
2.	Again, MSC Cannot Challenge The Terms Of Rider ELR, Which It Supported In The Company’s ESP II Proceeding.	22
3.	MSC’s Allegations About The Timeliness And Clarity Of The Company’s Notice Are All Red Herrings.	22
a.	The timing of the ECE notice on September 11, 2013, had no impact on MSC’s response to the ECE or its ability to curtail to Firm Load.	23
b.	MSC’s proposed interpretation of the notice requirements under Rider ELR is illogical and antithetical to the purpose of Rider ELR.	25
c.	MSC’s assertion that the ECE notices are confusing does not support its attempts to avoid the Rider ELR penalties because there is absolutely no evidence that MSC was, in fact, confused or that any purported confusion impacted MSC’s ability to respond to the ECE.	27
4.	Rider ELR Does Not Provide For Any “Mitigation” Of The Penalties, Which Have Been Applied To Other Customers As Required By The Rider.	28
IV.	CONCLUSION	31

I. INTRODUCTION

The Complaint filed by Material Sciences Corporation (“MSC”¹) is unsupported and does not allow MSC to avoid the application of The Toledo Edison Company’s (“Toledo Edison” or the “Company”) Commission-approved rates and riders. On its face, the Complaint failed to state any cognizable claims against the Company as a matter of law and the limited evidence provided by MSC during the subsequent hearing process confirmed that the claims also lack factual support. Put simply, MSC has failed to meet its burden of proof in establishing that the Company’s rates and riders about which it complains are unjust or unreasonable.

MSC elected to take retail generation service with the Company and voluntarily participate in the Company’s interruptible service program – the Economic Load Response Program Rider (“Rider ELR”).² As a result of that choice, MSC agreed to curtail its load during emergency curtailment events (“ECEs”) in order to promote system reliability and, in exchange, received significant credits on its electric service, which are paid for by all other customers. MSC’s Complaint is driven by the undisputed fact that MSC failed to properly curtail its load during an ECE on September 11, 2013, and was thus subject to penalties imposed by Rider ELR. MSC is not alone in being subject to the Rider ELR penalties. Other FirstEnergy Ohio utility customers have failed to properly curtail during ECEs and were also subject to the same penalties. Rather than pay the penalties as all of the other non-complying customers have, however, MSC filed this Complaint, which relies on distractions in the form of irrelevant and unsupported allegations of unjust and unreasonable rate increases and “defective” notices of ECEs to try to avoid the penalties.

¹ Complainant Material Sciences Corporation and its subsidiary – and the relevant customer – MSC Walbridge Coatings, Inc. shall be referred to collectively herein as “MSC.”

² See P.U.C.O. No. 8, Sheet 101.

Indeed, each of MSC's three claims represents a request from MSC to the Commission to ignore the requirements of the Company's Commission-approved rates and riders. But the Companies are required by law to follow their approved tariffs pursuant to R.C. § 4905.32. Further, MSC is a Toledo Edison customer and therefore subject to the same rates and riders as all other similarly situated customers (other than the unique discount that the Commission already approved for MSC in the Companies' electric security plan ("ESP") proceeding). Moreover, **during the Company's second ESP ("ESP II") proceeding, MSC expressly supported every single rate and rider about which it now complains.**³ As a signatory party to the Company's ESP II Stipulation, which was subsequently approved by the Commission, MSC agreed to support the reasonableness of the riders, terms and conditions contained in the Stipulation. Such settlements are an important part of the proceedings before the Commission and MSC cannot renege on its agreement by directly challenging the same rates and riders that it supported in the ESP II Stipulation.⁴

More specifically, MSC complains that the Company's terms and conditions for Rider ELR are unjust and unreasonable. But, as discussed above, MSC expressly supported and the Commission approved the terms and conditions of Rider ELR, including the notice provisions and the mandatory penalties for non-compliance. The Company correctly applied those terms and conditions to MSC after MSC failed to properly curtail its load during the September 11, 2013 ECE and MSC cannot identify any violation or inaccuracy in the penalty amounts. Thus, the underlying substance of its claim is nothing more than MSC not wanting to repay all other customers for the credits it previously received due to its failure to abide by the tariff and its agreement to curtail in such situations.

³ See Case No. 10-388-EL-SSO.

⁴ The date of MSC's non-compliance with Rider ELR, September 11, 2013, occurred during the period that ESP II was in effect.

MSC also complains that the rates charged by the Company for MSC's electric service are unjust and unreasonable. But MSC also supported and the Commission also approved the rates that MSC complains about, including the Generation Service Rider ("Rider GEN")⁵ and the Non-Market-Based Services Rider ("Rider NMB")⁶ – as well as Rider ELR. The Company properly applied those rates to MSC and MSC cannot identify any violation or inaccuracy in its charges. Thus, the underlying substance of its claim is nothing more than MSC's desire to pay less for electricity.

The rest of MSC's Complaint and its testimony is a smokescreen. MSC attempts to hide the fact that it is simply trying to avoid paying the Company's Commission-approved rates and riders by pointing to collateral issues – issues that either MSC admits did not impact its ability to respond to the ECE or that MSC cannot support with any competent evidence. For example, MSC focuses most of its efforts on trying to argue that it should be absolved of the Rider ELR penalties because the Company's notice of the ECE was "late" and/or that the notice was "confusing." But multiple MSC witnesses consistently admitted that the notices had no impact whatsoever on MSC's response to the ECE. MSC did not delay or alter its curtailment procedures in any way. The reality is that: the Company provided notice of the ECE; MSC received the notice; MSC failed to properly curtail within two hours of its receipt of the notice; and the Company applied the appropriate penalties as required by the Rider ELR tariff. MSC also tries to argue that its rates have improperly increased. But MSC's only witness on this issue had no knowledge of the rates and relied on analyses that could not be verified by the Company and that did not identify any violations of the Company's tariffs. Accordingly, MSC's

⁵ P.U.C.O. No. 8, Sheet 114.

⁶ P.U.C.O. No. 8, Sheet 119.

only testimony regarding the propriety of the Company's Commission-approved rates also should be stricken.

Indeed, MSC's dissatisfaction with the results of the Company's proper application of its Commission-approved tariffs does not constitute reasonable grounds for its claims and does not warrant judgment in its favor. The Commission should deny all three of MSC's claims and require MSC to pay the mandatory penalties associated with its admitted failure to comply with Rider ELR.

II. STATEMENT OF FACTS

A. The Company Provides Service To MSC As Set Forth In Its Commission-Approved Tariffs, Including The Option For Interruptible Service.

The Company provides electric service to customers in its service territory, including MSC,⁷ pursuant to its Schedule of Rates and Services (the "Schedule"), as approved by the Commission.⁸ The Company's Schedule that was applicable at all times relevant to MSC's Complaint includes rates, terms, and conditions that were approved as a part of the Company's ESP II. In the ESP II proceeding, the Company, MSC, and numerous other interested parties asked the Commission to approve the agreements, rates, and riders proposed in the Stipulation and the supplements thereto.⁹ The ESP II Stipulation was approved by the Commission on August 25, 2010, and covered the period June 1, 2011 through May 31, 2014.¹⁰ In connection with the Stipulation, MSC "agree[d] to and will support the reasonableness of the ESP and this

⁷ Direct Testimony of Peter Blazunas on behalf of The Toledo Edison Company ("Blazunas Testimony"), p. 2 (the Company provides MSC with general transmission service in accordance with the Company's Schedule).

⁸ See R.C. §§ 4905.04, 4909.03, 4933.82; Schedule of Rates for Electric Service, P.U.C.O. No. 8.

⁹ See ESP II, Stipulation, filed Mar. 23, 2010; Supplemental Stipulation, filed May 13, 2010; Second Supplemental Stipulation, filed July 22, 2010.

¹⁰ See ESP II, Opinion and Order, filed Aug. 25, 2010.

Stipulation before the Commission . . . and in any . . . enforcement of the ESP and this Stipulation.”¹¹

The Commission-approved ESP II Stipulation included a number of riders, terms and conditions for electric service provided by the Company. For example, MSC agreed to, and the Commission approved, certain generation and transmission service riders, including Rider GEN and Rider NMB.¹² Further, among the terms and conditions of the Company’s Schedule – and among the terms and conditions stipulated to by MSC in connection with ESP I¹³ and ESP II – is the option for interruptible service under Rider ELR:¹⁴

Rider ELR includes a demand response program offered by Toledo Edison that allows for curtailments to be called by a regional transmission organization (“RTO”), a transmission operator, or Toledo Edison. The availability of curtailable load provides a resource for Toledo Edison, the RTO and/or the transmission operator to use when an emergency situation exists that may jeopardize the integrity of either the distribution system or the transmission system. The ability to call on these curtailable resources enhances the reliability of the electrical system during periods of system emergency In addition, Toledo Edison uses the demand response attributes from this Rider ELR program to help meet its statutory requirements for peak demand reductions, as mandated in Senate Bill 221.¹⁵

Rider ELR is a voluntary program. However, “[o]nce a customer chooses to participate in Rider ELR, they are subject to the mandatory terms and conditions of the Tariff, including the requirements for compliance and the penalties for non-compliance.”¹⁶ A customer’s decision to participate in Rider ELR is memorialized in a signed agreement between the customer and the

¹¹ ESP II Stipulation, p. 35.

¹² ESP II Stipulation, filed Mar. 23, 2010, at §§ C.1, D.2, D.3, and Att. B.

¹³ 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. The foundation for ESP I also was a Stipulation supported by numerous interested parties, including MSC. *See* ESP I Stipulation, filed Feb. 19, 2009, at § A.11(ii) and Att. B; Supplemental Stipulation, filed Feb. 26, 2009.

¹⁴ Schedule, Sheet 101; ESP II Stipulation, filed Mar. 23, 2010, at § D.2 and Att. B; Direct Testimony of Joanne Savage on behalf of The Toledo Edison Company (“Savage Testimony”), pp. 3-4.

¹⁵ Savage Testimony, p. 4; *see also* ESP II Stipulation, § D.2; R.C. § 4928.66(A)(1)(b).

¹⁶ Savage Testimony, p. 5; *see also* Rider ELR.

Company.¹⁷ MSC is a Rider ELR customer and has been so for the past five years, and has elected to participate in Rider ELR in connection with each of the Company's three ESP proceedings.¹⁸

Under Rider ELR, eligible customers may receive credits for their commitment to curtail their load during an ECE and complying with the other requirements.¹⁹ An ECE is called "where an emergency situation exists that may jeopardize the integrity of either the distribution or transmission system."²⁰ Thus, if a RTO (in the case of Toledo Edison, PJM Interconnection, LLC ("PJM")), a transmission operator (in the case of Toledo Edison, American Transmission Systems Incorporated ("ATSI")), or Toledo Edison itself determines that such an emergency exists, the Company may call an ECE under Rider ELR.

"Upon no less than two hours advance notification [of the ECE] provided by the Company," Rider ELR customers are required to reduce their load on the system down to a preset "Firm Load," which is chosen by each Rider ELR customer.²¹ Rider ELR customers' load "must remain at or below its Firm Load" during the entire period of an ECE²² in order to assist in maintaining the integrity of the system. If Rider ELR customers do not sufficiently curtail during an ECE in accordance with their commitments under the Rider, the Company may be required to take other action to ensure system reliability, which could include curtailing other firm service residential and business customers.²³

Participating customers receive \$10/KW per month per unit of Curtailable Load for agreeing to participate and for complying with the Rider ELR requirements: \$5/KW per month

¹⁷ Savage Testimony, p. 5; *see also* Ex. JMS-2.

¹⁸ Savage Testimony, p. 7, Ex. JMS-2.

¹⁹ *See* Rider ELR; Savage Testimony, p. 4.

²⁰ Savage Testimony, p. 8; Rider ELR, § D.

²¹ Savage Testimony, p. 9; Rider ELR, § D.

²² Rider ELR, § D.

²³ Savage Testimony, p. 14.

through a Rider EDR(b) credit; and \$5/KW per month Program Credit under Rider ELR.²⁴ The credits are paid for by other customers, including DSE1 charges under the Demand Side Management and Energy Efficiency Rider (“Rider DSE”) paid by all retail customers other than those participating on Rider ELR, and the EDR(e) charge under the Economic Development Rider (“Rider EDR”) paid by GS and GP rate schedule customers.²⁵ A Rider ELR customer receives the credits whether it is required to curtail in a given month or not.²⁶ In fact, MSC has received millions of dollars in credits, as of December 31, 2013, as a result of its agreement to participate in Rider ELR.²⁷ And, during the same four and a half years, MSC was only required to curtail its load seven times (two test events and five ECEs).²⁸

However, if a customer fails to curtail as required by Rider ELR, the customer is subject to penalties, including a requirement that the customer return certain amounts of the credits it previously received:

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.²⁹

The imposition of the forfeiture and penalties is mandatory. Rider ELR provides the Company with no discretion in this regard. Rider ELR does provide the Company with discretion to

²⁴ See Rider ELR; Rider EDR; Savage Testimony, p. 6.

²⁵ Savage Testimony, p. 7.

²⁶ Savage Testimony, p. 6.

²⁷ Savage Testimony, p. 8.

²⁸ Savage Testimony, p. 8 (1 test event in 2011, 1 test event in 2012, and 5 ECEs in 2013).

²⁹ Rider ELR, § D (emphasis added).

disconnect the customer's service after the commencement of an ECE if the customer fails to comply ("the Company may disconnect the customer..."). However, whether the Company uses its discretion to disconnect the customer's service or not, the customer is still subject to the mandatory monetary forfeiture and penalties ("the customer shall be subject to. . .").³⁰ Any and all amounts received via penalties under Rider ELR are returned to the customers who paid for the credits, via a reduction in the Rider DSE1 and Rider EDR(e) charges.³¹ The Company does not retain any of the penalty payments.

These penalties have been applied to other Rider ELR customers. The other FirstEnergy Ohio utilities offer the same Rider ELR program and customers of both Ohio Edison Company and The Cleveland Electric Illuminating Company have failed to comply with their obligations under Rider ELR in connection with ECEs in 2013.³² In each of these other instances, the Rider ELR customers were penalized as required by the Rider's penalty provisions and "have paid, or are in the process of paying, the penalties as assessed."³³

B. MSC Failed To Curtail Its Load In Accordance With The Requirements Of Rider ELR On September 11, 2013.

On September 11, 2013, PJM determined that an emergency situation existed that jeopardized the integrity of the transmission system in the Company's service territory and other areas.³⁴ PJM issued an email notice to the Company regarding the emergency situation at 12:00 PM.³⁵ In its notice, PJM declared a "zonal load management event" beginning at 2:00 PM and lasting for six hours.³⁶ In accordance with the Company's procedures, PJM's email was "sent to and received by the Regulated Generation Dispatch Department of FirstEnergy Service

³⁰ Rider ELR, § D (emphasis added); Savage Testimony, pp. 15-16.

³¹ Savage Testimony, p. 16.

³² Savage Testimony, p. 17.

³³ Savage Testimony, p. 17.

³⁴ Savage Testimony, p. 10, Exs. JMS-4 and JMS-5.

³⁵ Savage Testimony, Ex. JMS-4.

³⁶ Savage Testimony, Exs. JMS-4 and JMS-5.

Company.”³⁷ Company witness Savage explained the Company’s procedures upon receipt of PJM’s notice of an emergency situation:

The dispatcher on duty from the Regulated Generation Dispatch Department verifies the event by viewing the log on the PJM website. Once confirmed, the dispatcher proceeds to issue a notification of an ECE to all affected Rider ELR customers. The dispatcher initiates the notice simultaneously to all Rider ELR customers’ representatives – via phone (voice or text), fax, or email.³⁸

On September 11, 2013, after receipt of PJM’s notice of the emergency situation at 12:00 PM, the Regulated Generation Dispatch Department issued a notice of an ECE to all of the Company’s Rider ELR customers at approximately 12:05 PM – within five minutes after PJM’s notice.³⁹

MSC immediately received the Company’s notice of the ECE.⁴⁰ After receiving the notice, MSC initiated its procedures to shut down its production processes and curtail its load.⁴¹ Pursuant to Rider ELR, MSC had two hours from the time of the Company’s notice to MSC in which to curtail its load down to its contract Firm Load – or 2:05 PM.⁴² However, MSC failed to meet its obligation. MSC did not reach its Firm Load level until well over three hours after the Company’s notice of the ECE. More specifically, MSC’s actual measured load during the half-hour interval ending 3:00 PM exceeded 152% of its Firm Load and during the half-hour interval ending 3:30 PM, MSC’s actual measured load exceeded 144% of its Firm Load.⁴³ MSC witness Augsburger, the plant’s Engineering Manager and electrical expert, admitted that MSC’s highest

³⁷ Savage Testimony, pp. 10-11, 18; Ex. JMS-4.

³⁸ Savage Testimony, p. 11; *see also* Ex. JMS-5.

³⁹ Material Sciences Corporation’s Direct Testimony of Jim Augsburger (“Augsburger Testimony”), Ex. JA-1, p. 9; *see also* Savage Testimony, pp. 12-13, 18, Ex. JMS-6.

⁴⁰ Hearing Transcript (“Tr.”), pp. 22 (Siffer, plant manager), 31 (Ramsay, operations manager), 43 (Augsburger, engineering manager).

⁴¹ Tr., pp. 22-23 (Siffer), 31 (Ramsay).

⁴² Rider ELR, § D.

⁴³ Blazunas Testimony, pp. 15-16.

demand during the ECE was 3,041 kVa,⁴⁴ but MSC was required to reduce to and maintain a load of no more than its established Firm Load of 2,000 kVa/kW.⁴⁵

The Company subsequently notified MSC that, because MSC's actual measured load exceeded 110% of its Firm Load during the September 11, 2013 ECE, the penalties required under Rider ELR would be applied to MSC's bill.⁴⁶ The total 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 MSC in the preceding 12 months.⁴⁷

Rather than pay the penalties, MSC filed this Complaint asserting three causes of action. In Count One, MSC alleges that the Company's application of the penalties required by Rider ELR were unjust and unreasonable because the Company provided insufficient notice of the ECE.⁴⁸ In Count Two, MSC alleges that "circumstances" warrant mitigation of Rider ELR's forfeiture and penalties.⁴⁹ In Count Three, MSC vaguely alleges that the rates charged by the Company under Rider GEN and Rider NMB have resulted in unjust and unreasonable increases.⁵⁰ As set forth herein, these claims fail under the clear terms of the Commission-approved rates and riders, and the facts.

⁴⁴ Augsburger Testimony, p. 10.

⁴⁵ Savage Testimony, p. 9.

⁴⁶ See Ex. 3 to Compl.

⁴⁷ Rider ELR, § D; Blazunas Testimony, pp. 15-16, Ex. PRB-4; Material Sciences Corporation's Direct Testimony of John Siffer ("Siffer Testimony"), p. 14.

⁴⁸ Complaint, ¶¶ 25-33.

⁴⁹ Complaint, ¶¶ 34-39.

⁵⁰ Complaint, ¶¶ 40-50.

III. LAW & ARGUMENT

A. There Is No Evidence That MSC Was Charged Improper Rates.

1. It Is Undisputed That The Rates Charged To MSC By Toledo Edison Were Approved By The Commission, And MSC's Contrary Assertions Are Unsupported And Should Be Stricken.

In Count Three of its Complaint, MSC asserts that the amounts the Company billed MSC for electric service are unjust and unreasonable.⁵¹ The allegations underlying this claim, as set forth in the Complaint and MSC's testimony, are vague at best. MSC witness Siffer, the Plant Manager, testified only that: MSC has purportedly experienced an ~40% increase in rates between Winter 2012/2013 and Summer 2013 across Riders GEN, NMB, and DSE; MSC's rates exceed a "historic baseline" of \$0.05 per kWh; and the Company's Rider NMB is allegedly applied disproportionately to GT customers as compared to other FirstEnergy Ohio utilities.⁵² However, these arguments are distractions that are unsupported by any facts and that totally lack foundation and should be stricken.

According to MSC's own witnesses, only two individuals at the plant receive MSC's monthly bill from the Company: Mr. Siffer and Mr. Augsburger.⁵³ Neither performs any analysis of the bills. Mr. Siffer admitted that he only reviews the total dollar value of MSC's monthly bills and Mr. Augsburger simply files them upon receipt.⁵⁴ Mr. Siffer provided the only testimony on behalf of MSC regarding its purportedly unjust and unreasonable rates. However, Mr. Siffer admitted that:

- He is not an expert on rates or riders;⁵⁵
- He is not familiar with Rider GEN – including whether the Rider GEN rate varies by time of year or what costs are recovered through Rider GEN;⁵⁶

⁵¹ See Complaint, ¶¶ 40-50, pp. 19-20.

⁵² See Siffer Testimony.

⁵³ Tr., p. 42.

⁵⁴ Tr., pp. 12 (Siffer), 42 (Augsburger admitting that he does not review them in any detail).

⁵⁵ Tr., p. 12.

- He is not familiar with Rider NMB – including any specifics about the rider, which costs are recovered through Rider NMB, or whether the Commission has approved its rate design;⁵⁷ and,
- Although his testimony included two different values for the current Rider NMB rate, he did not know which one was correct.⁵⁸

Mr. Siffer's complete lack of knowledge regarding the Company's rates and riders renders the testimony he purportedly offered about the Company's charges wholly unsubstantiated and unreliable. Moreover, because his lack of knowledge precluded the Company from conducting any meaningful cross-examination of him regarding the basis for his testimony, the Company is prejudiced by the inclusion of his unsupported and conclusory testimony on these matters. Accordingly, as argued by the Company at hearing, Mr. Siffer's testimony at pages 14:19-16:16 should be stricken.⁵⁹

Even if Mr. Siffer's testimony is allowed to stand without any foundation, it utterly fails to support any challenge to the Company's rates as applied to MSC. At the most basic level, Mr. Siffer's testimony and its lack of foundation raise concern, particularly as to its accuracy. The Company's rate expert, witness Blazunas, explained that he attempted to confirm the overall rates provided by Mr. Siffer using information from the Company's billing system, but could not verify one way or another the accuracy of Mr. Siffer's numbers.⁶⁰ In addition, the average cent per kWh rate on which Mr. Siffer primarily relies is essentially irrelevant to a consideration of the Company's Commission-approved rates. MSC's overall cent per kWh rate is dependent on the applicable rates, but also MSC's usage characteristics. MSC's analysis does nothing to isolate the impact of its usage characteristics and, therefore, does not allow for any proper

⁵⁶ Tr., p. 12. Mr. Augsburg similarly admitted he was not familiar with Rider GEN. Tr., p. 42.

⁵⁷ Tr., p. 13. Mr. Augsburg again similarly admitted he was not familiar with Rider NMB. Tr., p. 42.

⁵⁸ Tr., p. 14; *see also* Siffer Testimony, p. 14 (\$2.249/kVa), 15 (\$2.1249/kVa).

⁵⁹ *See* Tr., pp. 27-28.

⁶⁰ Tr., p. 55 (testifying that in some instances the Company's numbers were higher than Mr. Siffer's and in others the Company's numbers were lower).

analysis of the underlying rates themselves.⁶¹ Importantly, Mr. Siffer admitted that he has **no information** to suggest that the Company is charging MSC the wrong rate and **no information** to suggest that the Company is treating MSC differently than any other similarly sized customer.⁶² In fact, **Mr. Siffer admitted that he assumes that the rates that the Company is currently charging MSC are the rates approved by the Commission.**⁶³ And, indeed they are.

It is undisputed that “[a]ll of the rates Toledo Edison charged to MSC were approved by the Commission”⁶⁴ It also cannot be disputed that the Company is legally required to charge only its approved rates and tariffs.⁶⁵ Company witness Blazunas explained each of the three riders about which MSC complains: Riders GEN, NMB, and DSE.⁶⁶ Notably, these riders are merely pass-through riders that allow the Company to collect dollars from customers and pass them along dollar for dollar to standard service offer (“SSO”) generation providers, PJM, and others for the provision of service, and all involve ongoing Commission review and approval.

- Rider GEN: The Company calculates Rider GEN rates “pursuant to a Commission-approved rate design” and the “costs that make up that rider are derived from the Commission-approved generation auctions and the results of capacity auctions conducted by PJM.”⁶⁷ Specifically, Rider GEN recovers the costs of SSO energy and capacity, which prices are set as a result of the FirstEnergy Ohio Utilities’ auction process.⁶⁸ Not only did the Commission approve the Rider GEN rate design in the Company’s ESP II proceeding, but the specific rates to be charged under Rider GEN are submitted to and approved by the Commission each year.⁶⁹ Company witness Blazunas confirmed – and it was

⁶¹ Tr., pp. 59-60.

⁶² Tr., pp. 19-20.

⁶³ Tr., p. 20.

⁶⁴ Blazunas Testimony, p. 4.

⁶⁵ R.C. § 4905.32.

⁶⁶ See Blazunas Testimony, pp. 4-12.

⁶⁷ Blazunas Testimony, pp. 5-6; Rider GEN.

⁶⁸ Blazunas Testimony, pp. 4-5.

⁶⁹ See Blazunas Testimony, p. 5.

undisputed by MSC – that MSC is treated the same as other similarly situated customers under Rider GEN.⁷⁰

- Rider NMB: The Company similarly calculates Rider NMB rates “[p]ursuant to the MSC-supported, Commission-approved ESP II Stipulation” to recover certain RTO and transmission costs.⁷¹ “The amount Toledo Edison pays to PJM is recovered from all customers through the non-bypassable Rider NMB pursuant to a Commission-approved rate design.”⁷² Rider NMB charges are updated and reconciled on an annual basis, and filed with and approved by the Commission.⁷³ Again, Company witness Blazunas confirmed – and it was undisputed by MSC – that MSC is treated the same as other similarly situated customers of the Company under Rider NMB.⁷⁴
- Rider DSE: MSC provided no testimony regarding Rider DSE other than to include it in Mr. Siffer’s tables of purported rate increases.⁷⁵ However, here too, Company witness Blazunas confirmed that Rider DSE is charged to customers in accordance with Commission approval, as a pass-through of Commission-approved costs of the Company’s energy efficiency and peak demand reduction programs.⁷⁶ The Company also files the specific charges with the Commission semi-annually and receives approval before the charges are implemented.⁷⁷

The undisputed, competent evidence establishes that the Company has charged MSC rates approved by the Commission. MSC provided no evidence otherwise and, upon review, its few allegations regarding unjust and unreasonable rate increases are revealed to be nothing more than a generalized complaint that MSC is paying more than it wants to pay for electric service.

a. MSC’s assertion that its rate increases are unjust and unreasonable as reflected by a comparison of Summer 2013 to Winter 2012/2013 rates⁷⁸ is unavailing.

As Company witness Blazunas explained, Rider GEN rates are designed and approved by the Commission to change by season.⁷⁹ “Hence, there is an inherent seasonal price change every

⁷⁰ Blazunas Testimony, p. 6.

⁷¹ Blazunas Testimony, pp. 8-9.

⁷² Blazunas Testimony, p. 8; Rider NMB.

⁷³ Blazunas Testimony, p. 8.

⁷⁴ Blazunas Testimony, p. 9.

⁷⁵ See Siffer Testimony, p. 14-15.

⁷⁶ Blazunas Testimony, pp. 10-12; Rider DSE.

⁷⁷ Blazunas Testimony, p. 11.

⁷⁸ See Siffer Testimony, pp. 14-15.

⁷⁹ Blazunas Testimony, p. 5.

year – the rates are higher in the summer period as compared to the winter period.”⁸⁰ Accordingly, a comparison of summer and winter rates is improper and meaningless. If any comparison is appropriate – and it is not, given that the rates were charged in accordance with Commission approval and also subject to the results of the competitive auctions – it could only be a comparison between rates in the same season across different years.⁸¹ Such a comparison, for example between Summer 2012 and Summer 2013, reflects a significantly lesser rate increase of approximately 5.5%, generally reflecting changes in the outcome of the Companies’ competitive auctions.⁸²

b. *MSC’s assertion that its rates are somehow unjust or unreasonable because of an increase from a “historical baseline” lacks any substance.*

Mr. Siffer admitted that his reference to the \$0.05 per kWh “historic baseline” was nothing more than the price MSC **wants** to pay for electricity – an internal target.⁸³ He further admitted that the Company has never provided MSC with any projections to suggest that MSC’s overall rate would be \$0.05 per kWh. As explained by Company witness Blazunas, “historical rates are not indicative of Commission-approved rates that may be in place at present or in the future.”⁸⁴ On redirect, all Mr. Siffer could offer was that the \$0.05 per kWh value impacts MSC’s profitability.⁸⁵ However, an individual customer’s desire for a certain level of profitability is not and cannot be a consideration in determining whether the Company’s Commission-approved rates, which must be applied equally to all similarly situated customers, are just and reasonable.

⁸⁰ Blazunas Testimony, p. 6.

⁸¹ Blazunas Testimony, p. 6.

⁸² Blazunas Testimony, pp. 6-8, Ex. PRB-1.

⁸³ Tr., p. 19.

⁸⁴ Blazunas Testimony, p. 3.

⁸⁵ Tr., p. 26.

- c. *MSC's assertion that the Company's "practices affecting MSC's rate increases in 2013 [that] appear to systematically eliminate the benefits of other decreases" is only a complaint about MSC's bill.*

In part of his testimony, Mr. Siffer suggested that the Company implemented some undefined "practices" to affect rate increases for MSC. However, he admitted on cross-examination that the referenced "practices" are simply the Company's bills.⁸⁷ MSC's testimony in that regard is nothing more than an assertion that its overall bill somehow eliminates the benefits of other purported rate decreases.⁸⁸ This convoluted assertion is wholly without merit and should be rejected.

- d. *MSC's suggestion that Rider NMB is misapplied to Toledo Edison GT customers because the allocation percentage is higher than other FirstEnergy Ohio Utilities is simply false.*

For each of the FirstEnergy Ohio utilities, Rider NMB charges are allocated to rate schedules in accordance with the same formula: the rate schedules' contribution to the relevant utilities' portion of the average ATSI coincident peak for the months of June through September of the prior year, divided by the forward-looking billing demand units.⁸⁹ "This rate design methodology is consistent across all of the Companies and the differences between Rider NMB Rate GT charges for Toledo Edison and the rest of the Companies were approved by the Commission and attributable to variable factors input into the approved (and consistent) rate design methodology."⁹⁰ Therefore, MSC's argument that the application of Rider NMB is unjust or unreasonable as applied to Toledo Edison GT customers lacks merit.

MSC's complaints about the rates it was charged under the Company's Commission-approved tariffs are curious in that MSC already receives a special discount that no other

⁸⁶ Siffer Testimony, p. 15.

⁸⁷ Tr., p. 18.

⁸⁸ Tr., p. 18.

⁸⁹ Blazunas Testimony, pp. 8, 10.

⁹⁰ Blazunas Testimony, p. 10.

Company customer receives. In connection with the Company's ESP III Stipulation, MSC was granted a \$2/kVa discount on its electric service.⁹¹ As detailed in Company witness Blazunas's testimony, this unique provision provides MSC with a significant discount on the rates that all other GT customers pay.⁹² Moreover, MSC's rates are primarily driven by its billing demand, which is completely within MSC's control.⁹³ "[T]o the extent that MSC did nothing else but decrease its billing demand, leaving everything else constant, it would have an immediate positive impact on its bill."⁹⁴ Whether changes to production processes make sense for MSC or not, the Company has no control over MSC's billing demand and is not in a position to selectively alter MSC's rates.⁹⁵ The Company is a public utility authorized to charge only those rates that are approved by the Commission.⁹⁶ The evidence establishes that the Company has charged MSC in accordance with Commission-approved rates. Accordingly, MSC's Count Three lacks merit and the Commission should find in favor of the Company.

2. In Any Event, MSC Cannot Complain About The Rates That It Supported During The Company's ESP II Proceeding.

MSC was a signatory party to the Company's ESP II, which was litigated before the Commission and subsequently approved by the Commission.⁹⁷ In the course of that proceeding and as reflected by the Stipulation, MSC explicitly agreed that the Company's riders, including Rider GEN and Rider NMB, are beneficial for customers, support state policy, **and are reasonable**.⁹⁸ For example, MSC agreed that:

- "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

⁹¹ Blazunas Testimony, pp. 14-15.

⁹² Blazunas Testimony, pp. 14-15.

⁹³ Blazunas Testimony, pp. 12-14.

⁹⁴ Tr., p. 60.

⁹⁵ Blazunas Testimony, p. 14.

⁹⁶ R.C. § 4905.32.

⁹⁷ See ESP II Stipulation; Blazunas Testimony, p. 7.

⁹⁸ ESP II Stipulation, p. 35.

aspects of the ESP and promote energy efficiency, economic development and provide support for low income customers.”⁹⁹

- “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.”¹⁰⁰
- “[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.”¹⁰¹

MSC’s support of the ESP II Stipulation and its agreements therein preclude MSC’s complaints about the Company’s rates here. MSC may not come back now and claim that the Company’s rates as established in ESP II are anything but reasonable. The Commission has previously precluded parties from taking positions inconsistent with those they agreed to in a stipulation – and should continue to do so in order to preserve the validity of the settlement process.¹⁰²

The doctrines of res judicata and collateral estoppel also bar MSC’s Count Three. The Supreme Court of Ohio 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.”¹⁰³ The Commission previously determined – and MSC agreed – that the Company’s rates and riders as proposed in the ESP II Stipulation were just and reasonable, and

⁹⁹ ESP II Stipulation, p. 5.

¹⁰⁰ ESP II Stipulation, pp. 31-32.

¹⁰¹ ESP II Stipulation, p. 35.

¹⁰² *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 (barring a signatory party from later challenging the recovery of expenses that was determined in a previous stipulation approved by the Commission).

¹⁰³ *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).

those matters were litigated in that proceeding. As a result, MSC – a party to the ESP II proceeding – cannot reopen the issues regarding the reasonableness of those rates and riders.

The legal bars to MSC’s Count Three established that it had no reasonable grounds for the Complaint. Indeed, 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. § 4905.26.¹⁰⁴ And the evidence and testimony provided during hearing only confirmed that. MSC has shown nothing more than dissatisfaction with the Company’s Commission-approved rates. Accordingly, Count Three should be dismissed with prejudice or, in the alternative, the Company should be granted judgment in its favor.

B. MSC Failed To Comply With Rider ELR And, Thus, The Companies Are Required to Apply the Tariff Penalties – As They Have Been Applied To All Other Customers That Similarly Failed To Comply.

1. There Is No Dispute That MSC Failed To Sufficiently Curtail Its Load During An Emergency Event.

MSC’s unhappiness with the Company’s Commission-approved rates and riders also underlies its Counts One and Two, which seek to avoid the application of the required penalties under Rider ELR. Only a few facts are relevant to a determination of whether MSC is subject to penalties under Rider ELR and those facts are essentially undisputed:

- At least three MSC representatives timely received notice of the ECE on September 11, 2013, after it was issued by the Company at approximately 12:05 PM.¹⁰⁵
- MSC promptly initiated its shutdown procedures after receipt of the notice.¹⁰⁶

¹⁰⁴ *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.

¹⁰⁵ Tr., pp. 22 (Siffer, plant manager), 31 (Ramsay, operations manager), 43 (Augsburger, engineering manager).

¹⁰⁶ Tr., pp. 22-23 (Siffer), 31 (Ramsay).

- During the ECE, MSC's actual measured load exceeded 110% of its Firm Load.¹⁰⁷ In fact, MSC's actual measured load did not drop to its Firm Load until well over three hours after Toledo Edison sent the ECE notice.¹⁰⁸
- The Company properly calculated the three mandatory penalties required by Rider ELR, which totaled \$2,445,543.15.¹⁰⁹

Thus, it is undisputed that MSC failed to sufficiently curtail to its Firm Load during the September 11, 2013 ECE and, in accordance with Rider ELR, MSC "shall be subject" to the penalty amounts identified in the Rider. None of MSC's attempts to excuse its deficient response to the ECE have merit.

a. Any suggestion by MSC that its processes were uniquely disrupted or otherwise unexpectedly delayed was not supported by its own witnesses' testimony.

MSC's testimony suggests that its failure to comply with its obligations under Rider ELR should be ignored because of a fluke occurrence at the plant during MSC's shutdown process. Sometime after September 11, 2013, MSC came to the conclusion that it was not able to curtail to its Firm Load within two hours after the notice of the ECE because fans that run an oven used in its production process had to be left on to control the heat.¹¹⁰ However, MSC acknowledged that it followed its standard shutdown procedures, which require the fans to be left on until the ovens are sufficiently cooled. MSC witness Ramsay further acknowledged that those procedures were not created or designed specifically for responding to an ECE, which requires curtailment to Firm Load within two hours.¹¹¹ MSC cannot avoid the impact of its failure to comply with Rider ELR by pointing to the use of its standard shutdown procedures. MSC also admitted that

¹⁰⁷ Blazunas Testimony, p. 15; Savage Testimony, p. 19; Augsburger Testimony, p. 11. More specifically, during the half-hour ending 3:00 PM, MSC's actual measured load exceeded 152% of its Firm Load. During the half-hour ending 3:30 PM, MSC's actual measured load exceeded 144% of its Firm Load. Blazunas Testimony, pp. 15-16. MSC witness Augsburger, the plant's engineering manager and electrical expert, admitted that MSC's highest demand during the ECE was 3,041 kVa. Augsburger Testimony, p. 10.

¹⁰⁸ Blazunas Testimony, pp. 15-16; Tr., p. 24.

¹⁰⁹ Rider ELR, § D; Blazunas Testimony, pp. 15-16, Ex. PRB-4; Siffer Testimony, p. 14.

¹¹⁰ Tr., p. 24; Siffer Testimony, pp. 4-5, 9.

¹¹¹ Tr., p. 33.

the failure of its internal energy tracking system about which it testifies did not delay the shutdown process at all.¹¹²

b. *Although it makes vague suggestions otherwise,¹¹³ there also is no evidence that MSC's meter was inaccurate.*

MSC witnesses admitted that MSC has no reason to believe that the Company's meters, which establish that MSC failed to curtail to Firm Load until well over three hours after the notice, are inaccurate.¹¹⁴ In fact, MSC subsequently confirmed that MSC's own measurements are the same as what the Company's meters have measured.¹¹⁵

c. *MSC's suggestion that it was "wrongly penalized" also fails.¹¹⁶*

Rider ELR clearly requires that, if a Rider ELR customer fails to curtail to and maintain its Firm Load throughout the ECE, the customer is required to:

- (1) forfeit its Rider ELR Program Credit for the month in which the ECE occurred;
- (2) pay the ECE Charge set forth in the Rates section of Rider ELR; and
- (3) pay the sum of all Program Credits received by MSC during the immediately preceding 12 billing months (including credits from Rider ELR and Rider EDR).

The penalties are mandatory; as set forth in Rider ELR, the non-complying customer "**shall be subject**" to these three penalties.¹¹⁷ As applied to MSC on September 11, 2013, those penalties total \$2,445,543.15.¹¹⁸ (The Company used the discretion provided by Rider ELR and did not

¹¹² Tr., p. 25.

¹¹³ See, e.g., Siffer Testimony, pp. 12-13.

¹¹⁴ Tr., pp. 24, 43. MSC's load is measured by an interval meter that is connected to an automated system that measures MSC's usage and demand, and verifies the results. Savage Testimony, p. 21. Mr. Siffer, the plant manager, is not aware of anyone at MSC identifying any issues associated with the meters in 2013 or since 2013. Tr., p. 43. Further, the Company did not receive any request from MSC in 2013 to test its meter. Savage Testimony, p. 21.

¹¹⁵ Tr., p. 44.

¹¹⁶ See Augsburger Testimony, pp. 10-11.

¹¹⁷ Rider, ELR, § D (emphasis added).

¹¹⁸ Blazunas Testimony, Ex. PRB-4.

remove MSC from the Rider ELR Program for a minimum of 12 months.¹¹⁹) MSC admitted that it exceeded 110% of its Firm Load during the ECE and that it has not identified any inaccuracies in the Company's calculation of the penalty amounts.¹²⁰ Therefore, MSC has no valid challenges to the Rider ELR penalties.

2. Again, MSC Cannot Challenge The Terms Of Rider ELR, Which It Supported In The Company's ESP II Proceeding.

As discussed in Section A.2, *supra*, MSC is barred as a matter of law from attempting to relitigate or challenge the terms and conditions of Rider ELR. Rider ELR, including its requirements for curtailment and associated penalties for non-compliance, was litigated, established, and approved via the Company's ESP II Stipulation that MSC signed onto and supported.¹²¹ MSC is barred by its own agreement to support the Company's ESP II, by Commission precedent, and by the doctrines of res judicata and collateral estoppel from coming back now to challenge the terms and conditions of Rider ELR.¹²² MSC's challenges to its obligations under Rider ELR and the Rider ELR penalties are barred as a matter of law and should be dismissed.

3. MSC's Allegations About The Timeliness And Clarity Of The Company's Notice Are All Red Herrings.

MSC argues that it cannot be penalized under Rider ELR because the notice of the ECE on September 11, 2013 was "late" in that it was issued less than two hours prior to the start of PJM's load management event. MSC asserts that because the ECE notice identified PJM's start

¹¹⁹ Rider ELR, § D ("If at any time during the [ECE] a customer's actual measured load exceeds 110% of its Firm Load, the customer shall be subject to . . . the Company's right, at its sole discretion, to remove the customer from the Program for a minimum of 12 months.") (emphasis added); Savage Testimony, p. 22.

¹²⁰ Augsburger Testimony, p. 11; Tr., p. 44.

¹²¹ See ESP II Stipulation.

¹²² *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; *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); see ESP II Stipulation, p. 35.

time as 2:00 PM, the Company's ECE notice, which was sent to MSC at 12:05 PM, was not proper because it was less than two hours prior to 2:00 PM. Thus, MSC argues, it was not required to respond at all to the ECE.¹²³ This is simply wrong; and the evidence shows that this is an after-the-fact attempt to avoid the penalties for non-compliance because: 1) MSC's own witnesses testified that the notice had no impact on MSC's response to the ECE; and 2) MSC never previously raised any issues with the ECE notices. Regardless, its assertions are inconsistent with the requirements of Rider ELR and the realities of a system emergency.

a. *The timing of the ECE notice on September 11, 2013, had no impact on MSC's response to the ECE or its ability to curtail to Firm Load.*

MSC's procedures in the event of an ECE begin with Mr. Siffer, the Plant Manager, who initiates a shutdown by instructing plant personnel to start the process.¹²⁴ Mr. Siffer admitted that he received the Company's notice of the ECE on September 11, 2013, at 12:05 PM – essentially instantaneously.¹²⁵ Mr. Siffer confirmed that he did not consider **not** curtailing after receipt of the notice.¹²⁶ In fact:

- MSC initiated the same shutdown procedures to curtail MSC's load as it would have under any other circumstances;¹²⁷
- Mr. Siffer did not delay the process at all because he thought the notice was "defective;"¹²⁸
- Mr. Siffer did not change anything about the shutdown process because he thought the notice was "defective;"¹²⁹

¹²³ See Siffer Testimony, pp. 11-12.

¹²⁴ Tr., p. 20.

¹²⁵ Tr., p. 22 (Mr. Siffer received the notice at 12:05pm, the time-stamp on the email); see Savage Testimony, Ex. JMS-6 (notice sent at 12:04pm).

¹²⁶ Tr., p. 22.

¹²⁷ Tr., pp. 22, 32.

¹²⁸ Tr., p. 23.

¹²⁹ Tr., pp. 22-23.

- He did not tell either Mr. Ramsay or Mr. Augsburger, the two other key plant personnel associated with the shutdown process, that MSC's curtailment was "voluntary;"¹³⁰ and
- He never discussed with anyone at Toledo Edison at any time his belief that the notices were defective.¹³¹

Mr. Augsburger, the plant's Engineering Manager, confirmed that he did not believe that MSC could have reacted any differently if the notice was received on September 11 at 12:00 PM, instead of 12:05 PM.¹³² Although Mr. Augsburger testified that the September 11, 2013 ECE notice was "late," he admitted on cross-examination that he had no concept of a "late" notice on September 11, 2013.¹³³ In fact, Mr. Augsburger only read Rider ELR after the September 11, 2013 ECE, and Mr. Ramsay, who implements the shutdown procedures after instructions from Mr. Siffer, has never read Rider ELR.¹³⁴ Therefore, the timing of the ECE notice could not have had, and did not have, any impact on MSC's response to the ECE.

Indeed, as Company witness Savage explained, even if the Company had provided notice at 12:00 PM, it "would not have changed the outcome at all because MSC's measured load exceeded its Firm Load from 2:30-3:00 p.m. . . . and from 3:00- 3:30 p.m. . . ."¹³⁵ MSC did not reach its Firm Load for **more than three hours** after notice of the ECE was issued.¹³⁶ Given the time it took MSC to reach its Firm Load, MSC would not have timely reached its Firm Load in compliance with Rider ELR whether the notice was sent at 12:00 PM or at 12:05 PM.

Regardless, Rider ELR provides that:

Upon no less than two hours advance notification provided by the Company, a customer taking service under this rider must

¹³⁰ Tr., pp. 23 (Siffer's admission), 31 (Ramsay's acknowledgment that Mr. Siffer did not tell him the ECE was voluntary), 45 (Augsburger's same acknowledgement).

¹³¹ Tr., p. 23.

¹³² Tr., p. 45.

¹³³ Augsburger Testimony, p. 4; Tr., p. 45.

¹³⁴ Tr., pp. 30, 44.

¹³⁵ Savage Testimony, p. 20.

¹³⁶ Savage Testimony, p. 20.

**curtail all load above its Firm Load during an Emergency
Curtailment Event¹³⁷**

MSC admits that the Company provided notice of the ECE to MSC at 12:05 PM on September 11, 2013.¹³⁸ Therefore, in accordance with Rider ELR, MSC was not required to curtail its load until two hours after the Company's notification – or by 2:05 PM. Rider ELR does not require the Company to provide two hours advance notice of PJM's start time; rather, Rider ELR required MSC to have curtailed its load to its "Firm Load" two hours after receiving the ECE notice from the Company. MSC failed to do so and its ability to comply was not affected by the timing of the ECE notice.

b. MSC's proposed interpretation of the notice requirements under Rider ELR is illogical and antithetical to the purpose of Rider ELR.

It would not have been possible for the Company to provide Rider ELR customers with notice two hours in advance of PJM's zonal load management event, as MSC suggests the Company was required to do.¹³⁹ PJM only notified the Company exactly two hours prior and so the Company could not have prepared a notice to Rider ELR customers two or more hours in advance of PJM's start time.¹⁴⁰ Indeed, as explained by Company witness Savage, "[f]or four of the [five] ECEs in 2013, the Company itself received notice from PJM less than two hours from the time identified by PJM for the start of the load management event."¹⁴¹ As she further explained, "[t]he notice from the Company simply starts the clock for Rider ELR customers to curtail to their Firm Load and provides the customer with additional information about the event, including, for example, if the ECE was triggered by PJM and PJM's start time."¹⁴² MSC failed

¹³⁷ Rider ELR (emphasis added).

¹³⁸ Tr., p. 22 (Mr. Siffer received the notice at 12:05pm, the time-stamp on the email).

¹³⁹ Savage Testimony, p. 13.

¹⁴⁰ Savage Testimony, pp. 10-12.

¹⁴¹ Savage Testimony, p. 13.

¹⁴² Savage Testimony, p. 18.

to curtail within two hours after the notice and, thus, the penalties must apply. MSC's other arguments lack merit and cannot change this outcome.

Rider ELR has historically provided a significant source of demand reduction that promotes system reliability and warrants the Commission-approved forfeiture and penalties. Indeed, the purpose of Rider ELR 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."¹⁴³ If interruptible load committed by Rider ELR customers 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.¹⁴⁴ Therefore, it is critical that Rider ELR customers curtail their load in connection with an ECE, as they agreed to do in exchange for the sizeable credits they receive.

However, MSC now asserts that it should be completely relieved of its obligations to curtail its load during such an emergency based on a five minute difference between the identified start time of PJM's event (2:00 PM) and two hours after the Company's notice of the ECE (2:05 PM) – even where the difference admittedly had no impact on MSC's response to the ECE and when the PJM start time is not a condition of Rider ELR. Such an argument flies in the face of the purpose of Rider ELR and the fact that neither the Company nor PJM have control over the timing of an emergency situation. That is exactly why Rider ELR provides that Rider ELR customers are required to curtail within two hours of notice from the Company ("upon no less than two hour notification by the Company").¹⁴⁵ If Rider ELR customers were allowed to receive the significant credits provided to them for agreeing to curtail load in the event of an

¹⁴³ See Rider ELR.

¹⁴⁴ Savage Testimony, p. 14.

¹⁴⁵ See Rider ELR, § D.

emergency, but then could avoid complying 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.

- c. *MSC's assertion that the ECE notices are confusing does not support its attempts to avoid the Rider ELR penalties because there is absolutely no evidence that MSC was, in fact, confused or that any purported confusion impacted MSC's ability to respond to the ECE.*

Mr. Augsburger was the only MSC witness to testify regarding purported “confusion” with the ECE notices, but Mr. Augsburger did not provide any evidence that any confusion with the September 11, 2013 notice impacted in any way MSC’s ability to curtail within two hours of that notice. Further, he admitted that he has no role in implementing MSC’s shutdown procedures and so his “confusion” could not (and did not) have any impact on MSC’s response to the notice.¹⁴⁶ MSC provided no evidence to suggest that its ability to comply with its Rider ELR obligations on September 11, 2013 (or any other date) was affected by the substance of the ECE notice.

In addition, each and every ECE notice clearly states that if a Rider ELR customer has any questions, the customer should contact its Customer Service Representative at the Company.¹⁴⁷ There is no evidence that MSC ever contacted its Customer Service Representative in 2013 to seek confirmation about the timing of the mandatory curtailments or to ask any questions about the substance of the notices. Mr. Siffer admitted that he never raised the issue with anyone at the Company¹⁴⁸ and MSC did not raise the issue of its purported confusion during its subsequent discussions with Company after the penalty letter was issued.¹⁴⁹

¹⁴⁶ See Ausburger Testimony, pp. 5-9; Tr., p. 44.

¹⁴⁷ See, e.g., Savage Testimony, Ex. JMS-6

¹⁴⁸ Tr., p. 23; Siffer Testimony, pp. 11-12.

¹⁴⁹ See Savage Testimony, p. 20 (“Mr. Siffer’s testimony is the first time the Company has heard MSC describe the ECEs as ‘voluntary.’”).

To the extent MSC tries to criticize the notices by pointing to changes in the language of the ECE notices issued in 2014 as compared to those issued in 2013, such an argument must also fail. First, the **2014** notices are irrelevant as to whether MSC met its obligations under Rider ELR on September 11, **2013**. Indeed, the 2014 notices and Mr. Augsburger's associated testimony about them should be stricken.¹⁵⁰ Regardless, the Company's subsequent efforts to revise and fine-tune its notices are not an appropriate consideration in this proceeding based on the Ohio Rules of Evidence and the underlying interest in promoting (rather than dissuading) any "remedial" efforts.¹⁵¹ The language of the ECE notices does not change the facts at issue here: MSC received notice of the ECE on September 11, 2013, and MSC immediately attempted, but failed, to comply. Accordingly, the Rider ELR penalties must apply.

4. Rider ELR Does Not Provide For Any "Mitigation" Of The Penalties, Which Have Been Applied To Other Customers As Required By The Rider.

MSC argues that the Rider ELR penalties should be mitigated as applied to MSC because MSC tried to comply with the September 11, 2013 ECE.¹⁵² However, the terms of Rider ELR are clear and unambiguous and, aside from the two-tier penalty structure contained within the Rider itself, do not include any basis upon which the Company would be permitted to excuse or mitigate a customer's noncompliance with Rider ELR.¹⁵³ The only fact that is relevant to the

¹⁵⁰ See Augsburger Testimony, pp. 7:17-9:16 and Ex. JA-1 at pp. 11-19.

¹⁵¹ See Tr., p. 101 ("[B]ased on [MSC's] complaint and their alleged confusion, we attempted to make the message clearer [in the 2014 notices]."); Ohio Rule of Evidence 407 ("When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to provide negligence or culpable conduct in connection with the event.").

¹⁵² See Complaint, ¶¶ 25-34 (Count One), 34-39 (Count Two); see, generally, Material Sciences Corporation's Direct Testimony of Jeff Ramsay ("Ramsay Testimony").

¹⁵³ 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

application of the penalties is whether the customer maintained its measured load below its Firm Load during the ECE.¹⁵⁴ “The [penalty] provisions of the Rider ELR tariff are mandatory. Toledo Edison has no discretion. It is incumbent upon the customer to contemplate the potential impact of a failure to comply with the terms and conditions of the rider at the time it elects to receive service under Rider ELR.”¹⁵⁵

Mr. Siffer admitted that MSC was aware of the Rider ELR penalties when it agreed to participate, but he does not know whether MSC considered the potential impact of those penalties.¹⁵⁶ The bulk of MSC witness Ramsay’s testimony regarding the negative impacts of the curtailments required for compliance under Rider ELR also is irrelevant. He admitted that MSC personnel were aware that there would be disruptions of MSC’s production process as a result of the shutdowns required in the event of an emergency under Rider ELR.¹⁵⁷ Further, MSC selected its Firm Load despite the fact that MSC cannot operate its main production processes while maintaining its Firm Load under Rider ELR.¹⁵⁸ MSC witness Siffer, the Plant Manager and highest-ranking employee at the plant, admitted that it was “reasonable” to say that the benefits to MSC from participating under Rider ELR are greater than the potential costs.¹⁵⁹ This cost-benefit analysis is affirmed by the fact that MSC elected to participate in Rider ELR three times, in connection with the Company’s three ESPs, which span over seven years.¹⁶⁰

MSC’s other arguments as to why the Rider ELR penalties it agreed to in the ESP II Stipulation are unjust and unreasonable should be rejected. First, MSC witness Siffer suggests

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.*

¹⁵⁴ See Rider ELR.

¹⁵⁵ Blazunas Testimony, p. 16.

¹⁵⁶ Tr., p. 10.

¹⁵⁷ Tr., pp. 34-35.

¹⁵⁸ Tr., p. 41.

¹⁵⁹ Tr., pp. 9-10.

¹⁶⁰ Blazunas Direct, p. 4.

that the Rider ELR penalties may serve as a deterrent to other customers' participation or their decisions to move to the Company's service territory. This argument is meaningless because no new customers are eligible for Rider ELR; the Rider specifically limits eligibility to those customers who have previously taken service from the Company under Rider ELR.¹⁶¹ Moreover, Mr. Siffer admitted that he does not recall having ever spoken with any other Toledo Edison customers about Rider ELR or any other manufacturer that is considering relocating to the Company's service territory or considering enrolling in Rider ELR.¹⁶² Second, to the extent MSC seeks to compare the penalties to those imposed by PJM in connection with PJM's demand response programs, such a comparison is improper and totally irrelevant as to whether the Commission-approved Rider ELR penalties are just and reasonable. PJM's program is separate and distinct from Rider ELR. Rider ELR, as supported by MSC in the ESP II Stipulation and approved by the Commission, has its own clear obligations and penalties. MSC is not now and never has been (and, while taking service under Rider ELR, cannot be) a participant in PJM's emergency and pre-emergency load response program.¹⁶³ Thus, any references to PJM's demand response programs and penalties should be disregarded and rejected.

Rider ELR customers also may receive extra time, beyond the two-hour requirement, before penalties apply. "Because Rider ELR calls for measured load to be calculated in half-hour increments, partial time periods at the beginning or the end of an event are not considered in determining whether a Rider ELR customer has complied with its obligations to curtail to Firm Load."¹⁶⁴ During the September 11, 2013 ECE, for example, customers' loads were not

¹⁶¹ Rider ELR, p. 1.

¹⁶² Tr., p. 11.

¹⁶³ Tr., p. 99.

¹⁶⁴ Savage Testimony, p. 10. "For example, if an ECE starts at 3:15 p.m., the first interval during which a Rider ELR customer's load is evaluated – and the first interval in which a Rider ELR customer may be penalized for non-compliance – is 3:30-4:00 p.m." *Id.*

evaluated until the half-hour ending 2:30-3:00 PM EDT.¹⁶⁵ Thus, Rider ELR customers would not have been penalized for non-compliance unless it took them more than approximately 2 hours and 25 minutes to reduce to Firm Load.

More fundamentally, however, the Company does not have the discretion to reduce or otherwise mitigate the Rider ELR penalties as applied to MSC because other non-complying Rider ELR customers have been required to pay the penalties during 2013. “This process is handled consistently and in a non-discriminatory fashion across the three Companies. Toledo Edison must assess the same penalties to MSC for its failure to curtail during the September 11, 2013 ECE that the other Companies have assessed to their customers for their failure to curtail during an ECE. The rates, terms, and conditions of Rider ELR are identical for all three Companies.”¹⁶⁶ The Company must administer its tariffs in a fair and consistent manner. Other customers failed to properly curtail to Firm Load during other ECEs in 2013 and they were all assessed the penalties called for under Rider ELR.¹⁶⁷ So must the penalties be assessed to MSC for its admitted failure to comply with its obligations in connection with the September 11, 2013 ECE. Counts One and Two of the Complaint should be denied. The Commission should order MSC to pay the required Rider ELR penalties and thereafter dismiss the Complaint with prejudice or, in the alternative, grant judgment in the Company’s favor.

IV. CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed with prejudice and/or The Toledo Edison Company should be granted judgment in its favor on all three counts in the Complaint.

¹⁶⁵ Savage Testimony, pp. 13, 14.

¹⁶⁶ Savage Testimony, p. 17.

¹⁶⁷ Tr., pp. 87-88 (Company witness Savage confirming that other customers of Ohio Edison Company and The Cleveland Electric Illuminating Company have been penalized after their failure to comply during other ECEs in 2013).

Respectfully submitted,

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