

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Modification of a Tariff |) | Case No. 19-1968-EL-ATA |
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**COMMENTS
OF
MATERIAL SCIENCES CORPORATION
REGARDING PROPOSED TARIFF REVISIONS FOR
THE ECONOMIC LOAD RESPONSE PROGRAM RIDER**

I. INTRODUCTION

Material Sciences Corporation (“MSC”) files these comments because the proposed tariff revisions filed on September 13, 2019 and October 31, 2019 do not comport with the decision in Case No. 13-2145-EL-CSS (the “Complaint Case”). The Public Utilities Commission of Ohio (the “Commission”) ordered The Toledo Edison Company (“Toledo Edison”) to propose revisions to its Economic Load Response Program Rider (“Rider ELR”) in its May 15, 2019 Opinion and Order in the Complaint Case. Toledo Edison proposed revisions on September 13,

2019, and at the same time included the same revisions for Rider ELR in the tariffs of The Cleveland Electric Illuminating Company and Ohio Edison Company (all three utilities collectively, “FirstEnergy”).¹ Subsequent to filing the tariff revisions in the 13-2145 case, the three utilities initiated an ATA application in Case No. 19-1968-EL-ATA on October 31, 2019.

The revisions in both proceedings, however, do not comply with the Opinion and Order in the Complaint Case for the following reasons:

- FirstEnergy’s proposed tariff change to Rider ELR would remove any discretion and impose a penalty of a combined forfeiture and clawback payment that will result in excessive and unreasonable penalties.
- FirstEnergy proposed tariff change to Rider ELR would impose a strict liability standard on customers.
- FirstEnergy proposes to eliminate the lower penalty tier of one month’s Rider ELR payments for noncompliance over 100% and less than or equal to 110% of load to be curtailed, although the Commission found nothing wrong with that lower penalty tier.
- FirstEnergy failed to include any revisions that reflect adjustment to its process and notice provisions so that the utilities (a) will provide sufficient notice time to the Rider ELR customers of PJM curtailments and (b) can confirm the customer received the notice and the customer is taking measures to comply.

Given FirstEnergy’s failure to follow the Commission’s directives and to save time and expense for all involved (including the Commission), the Commission should reject the proposed tariff language and order Toledo Edison and its utility affiliates to redraft the tariffs – and submit revised tariffs consistent with the Order and Opinion in the Complaint case.

¹ Toledo Edison is the only respondent in the Complaint proceeding and only it was required to file tariff revision in this matter. The Cleveland Electric Illuminating Company and Ohio Edison Company are not parties in the Complaint proceeding.

II. ARGUMENT

A. FirstEnergy proposes a combined forfeiture/payment that does not take into account the circumstances surrounding the customer's failure to comply with the curtailment.

FirstEnergy's penalty provisions in the current Rider ELR schedule for curtailment failures in excess of 110% of Firm Load include four different options that allow for discretion in their application.² The Commission has ruled that imposition of those penalties under the tariff must be done in a "reasonable, fair and consistent manner." Complaint Case, Opinion and Order at ¶ 39. During the hearing in the Complaint Case, Toledo Edison's witness acknowledged that the goal was to administer the tariffs in a fair and consistent manner. *Id.* The Commission held in that proceeding however, that Toledo Edison did not act reasonably or fairly when it imposed a \$2.4 million penalty in 2013 on MSC because the penalty was excessive and unreasonable. *Id.* at ¶ 41.

The Commission then found at ¶ 47 of its Opinion and Order that:

In considering each of the above factors and given the evidence of record in this case, we find that such penalty should be waived under the particular facts and circumstances in this case, and Toledo Edison is directed to rebill the Customer consistent with this Opinion and Order. Further, **Toledo Edison is directed to file, within 60 days of the issuance of this Opinion and Order, proposed changes to its ELR Tariff provision to provide penalty provisions that are in proportion to the customer's failure to comply with a mandatory curtailment without providing an incentive to use the provisions as a means to simply buy through the mandatory curtailment requirement.**

(Emphasis added.)

FirstEnergy's proposed tariff revisions, however, eliminate any discretion from the application of the penalty and are not in compliance with the Commission's directive.

² When a curtailment exceedance is greater than 110% of a customer's Firm Load, the current Rider ELR schedule subjects a customer to four possible penalties: forfeiture of that month's Program Credits; paying for the additional energy used through the ECE charge; a clawback of the last 12-months credits under the Program and Economic Development Rider; and removal from the Program for at least 12-months.

Specifically, under the new tariff language (third paragraph of page 5 of 6), a customer “**shall**” be liable for a combined total of:

- All ELR Program credits received under the rider during the current month;
- All ELR Program credits received during the 12 months before that were associated with the “uninterrupted demand”;
- All economic development rider interruptible credits during the current month;
- All economic development rider interruptible credits during the 12 months before that were associated with the “uninterrupted demand”; **and**
- The Emergency Curtailment Event Charge.

The specific redlined tariff language at issue is:

If at any time during the Emergency Curtailment Event a customer's actual measured load exceeds ~~110% of~~ its Firm Load, the customer shall (i) be required ~~subject to all four (4) of the following: (i) forfeit its all Program Credits received under this Rider and the Economic Development Rider Interruptible Credit Provision for during the current month in which the Emergency Curtailment Event occurred; and the preceding twelve months associated with the uninterrupted demand; and~~ (ii) pay the ECE Charge set forth in the Rates section of this Rider. The uninterrupted demand will be calculated as the difference between the maximum 30-minute actual measured load during the Emergency Curtailment Event and the Firm Load. ~~;(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) T~~ the Company's also has the right, at its sole discretion, to remove the customer from the Program for a minimum of 12 months.

As the redline indicates, FirstEnergy has drafted the language to remove any discretion, and the revisions will **not allow** FirstEnergy to take into consideration the magnitude of the penalty in proportion to the customer’s failure to comply with the curtailment. While a part of the penalty calculation is now based on the demand that was not curtailed over a maximum 30-minute differential period (the uninterruptible demand), that penalty calculation fails to consider the duration of the customer’s non-compliance.

For example, if a customer is running at maximum capacity and fails to curtail to its Firm Load in the first minute of a called curtailment, then it will be subject to all of the prescribed penalties including a clawback of the last 12-months Program Credits. This would result in a multi-million dollar penalty for a minor exceedance regardless of the reason for the exceedance. That was exactly the issue in the Complaint Case where Toledo Edison attempted to assess a \$2.4 million penalty on MSC that was found to be unreasonable and excessive.

The new language also ignores the factors that the Commission considered in the Complaint case:

- Whether the customer took reasonable measures to curtail its usage during the event (Opinion and Order at ¶ 40);
- The impact to the customer's noncompliance (Opinion and Order at ¶ 41); and
- The benefits that the ELR program provides to other customers and the chilling effect that an unreasonable assessment may have on participation by interruptible customers (Opinion and Order at ¶ 42).

FirstEnergy cannot ignore the Commission's directive (on a final and non-appealable order), especially as the evidence in the Complaint Case showed that circumstances can exist that warrant consideration of the magnitude of non-compliance in relation to the assessed penalty. Its tariff revisions should be rejected, and if not rejected outright the tariff language at issue should be revised to change the phrase "the customer shall" to the customer may" which will ensure that FirstEnergy has discretion to evaluate and apply penalties based on the surrounding circumstances.

B. FirstEnergy's new tariff language would impose strict liability on customers for the customer's failure to comply with a curtailment.

FirstEnergy's proposed revisions on page 5 of 6 of its proposed Rider ELR schedule (shown in the redline on the prior page) also impose strict liability on customers. Specifically,

FirstEnergy deleted the phrase “shall be subject” and replaced it with the **mandate** that the (“customer *shall (i) be required to forfeit * * * and (ii) pay*”) a penalty in all circumstances when a customer’s actual measured load exceeds its Firm Load during an emergency curtailment event.³ The effect of this language is to eliminate the optionality in the current tariffs and the ability to impose the tariff in a reasonable and fair manner under the circumstances. Customers under Rider ELR are instead left with a strict liability standard.

That is not what the Commission directed in its Opinion and Order. Nor did the Commission evaluate the current penalty language and find it in need of a strict liability concept. Instead and as noted above, the Commission considered the following factors in the Complaint case:

- Whether the customer took reasonable measures to curtail its usage during the event (Opinion and Order at ¶ 40);
- The impact to the customer’s noncompliance (Opinion and Order at ¶ 41); and
- The benefits that the ELR program provides to other customers and the chilling effect that an unreasonable assessment may have on participation by interruptible customers (Opinion and Order at ¶ 42).

The Commission then directed Toledo Edison to improve its Rider ELR tariff – not make it more onerous which in turn will have a chilling effect on program participation. FirstEnergy’s proposed tariff language to create a strict liability standard does not comply with the Commission’s factors, conclusions and its instruction in the Complaint Case. The language proposal should be rejected.

³ MSC notes that FirstEnergy also has changed the word “penalty” to “forfeiture” in the fifth paragraph on page 5 of 6 of the redlined tariff sheets to avoid future claims that it is assessing a penalty. The Commission, however, clearly found that the Rider ELR contains “penalty provisions” and this minor change should also be rejected. The consequences for non-compliance with Rider ELR are “penalties” and not “forfeitures.”

C. FirstEnergy proposes to eliminate the lower penalty tier without sufficient demonstration.

Currently, a customer is only subject to a forfeiture of that month's Program Credit if the customer's actual measured load is greater than 100% and less than or equal to 110% of its Firm Load during the Emergency Curtailment Event. Surprisingly, FirstEnergy proposes to eliminate this penalty tier at page 5 of 6 of the Rider ELR schedule, and, as noted above, mandate a collective forfeiture/payment for any measured load above the Firm Load amount to be curtailed. The Commission did not direct that FirstEnergy delete the initial penalty tier and doing so is contrary to the Commission's directive to propose revisions "*in proportion to the customer's failure to comply.*" Opinion and Order at ¶ 47. FirstEnergy does not demonstrate otherwise, and this change to the proposed tariff changes should be rejected. If not rejected, a customer will be subject to not only a full loss of that month's Program Credit but all other penalties including Program removal and a 12-month Program Credit clawback for a minor exceedance that is in the 100 to 110 percent range. FirstEnergy should not be allowed to make this first-tier penalty more onerous than exists today.

D. FirstEnergy omitted tariff revisions required by the Commission.

The Commission concluded in its Order that Toledo Edison needed to make certain adjustments to its Rider ELR schedule. In particular, the Commission concluded:

We believe an emergency curtailment announced by PJM should begin and end with PJM's announced times, despite any delay resulting from Toledo Edison's processes in notifying interruptible customers. Toledo Edison's Rider ELR process and notice provisions should, therefore, be revised to **adjust the minimum notice requirement** to allow Toledo Edison with sufficient time to provide its Rider ELR customers with notice of PJM curtailments.

* * *

[I]t is incumbent upon the Utility to establish processes to **ensure that a customer has received notice** of all PJM curtailment emergencies as soon as possible, and to **confirm that the customer has received** such notices **and is taking measures** to comply.

Opinion and Order at ¶¶ 44 and 46 (emphasis added). FirstEnergy has failed to propose tariff revisions that would satisfy these Commission requirements. Instead, the language in the proposed and current tariff (as approved in Case No. 14-2037-EL-ATA) would still:

- Require the ELR customer to curtail actual measured load prior to the start time of the Emergency Curtailment Event set forth in the PJM notification to the company (Sheet 101, page 4). However, no minimal amount of time for the advanced notice to be given to the ELR customers is included, although required by the Commission.
- Require the ELR customers to have and maintain the capability to receive company notices (Sheet 101, page 6). However, the language does not require the utility to confirm receipt of the notice of a PJM curtailment, or confirm the customer is taking action, although required by the Commission as set forth above.

FirstEnergy's tariff proposal falls short in both of these respects and must be corrected.

III. Conclusion

FirstEnergy's September 13, 2019 and October 31, 2019 tariff revisions conflict with the Commission's directives in the Opinion and Order. The Commission ordered Toledo Edison to make certain changes to its Rider ELR schedule, but FirstEnergy has instead made changes that are not consistent with the Commission's directives. Rather than spend time parsing through the tariff language, MSC recommends that the Commission reject FirstEnergy's proposed tariff

changes in full, and direct FirstEnergy to submit new proposed tariff changes that comply with the Commission's Opinion and Order.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 11th day of December 2019 upon all persons/entities listed below:

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Summary: Comments electronically filed by Mrs. Gretchen L. Petrucci on behalf of Material Sciences Corporation