

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Report of Duke	)	
EnergyOhio, Inc. Concerning Its	)	
Advanced and Renewable Energy	)	Case No. 10-511-EL-ACP
Baseline and Benchmarks.	)	

In the Matter of the Request by Duke	)	
Energy Ohio Inc. for a One Time Waiver	)	Case No. 10-512-EL-WVR
of Rule 4901:1-40-04(D)(1).	)	

In the Matter of the Request for Force	)	
Majeure Determination by Duke Energy	)	Case No. 10-513-EL-ACP
Ohio Pursuant to Rule 4901:1-40-06.	)	

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**COMMENTS  
BY  
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COUNCIL AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Environmental Law and Policy Center, the Ohio Environmental Council and the Office of the Ohio Consumers' Counsel file these comments in response to Duke Energy Ohio's ("Duke's") filing of three cases in one document on April 15, 2010, which Duke entitled "Alternative Energy Portfolio Status Report." The decision in these cases is important because it will affect the extent to which Ohioans will receive intended benefits from the provisions in the new energy law encouraging renewable energy generally and solar energy specifically. Interested parties are permitted thirty days for filing comments on Duke's status report.<sup>1</sup>

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<sup>1</sup> Ohio Adm. Code 4901:1-40-05(B).

Duke asks the Public Utilities Commission of Ohio (“PUCO” or “Commission”) for multiple determinations in its three cases jointly filed. Duke’s joint presentation makes it difficult to associate its arguments with specific cases, and the undersigned therefore respond in kind to the consolidated manner in which Duke presented its arguments.

Duke first asks the Commission to revise and lower its originally calculated baseline. Then, Duke asks the Commission for one of two alternative forms of excuse from the solar energy resource (“SER”) benchmarks requiring certain amounts of solar power from sources within Ohio. As one alternative, Duke asks the Commission to accept 80 non-Ohio solar Renewable Energy Credits (“RECs”)<sup>2</sup> to fill its shortfall from the Ohio solar requirement.<sup>3</sup> As another alternative, Duke requests a force majeure determination (“Force Majeure Request”), R.C. 4928.64(C)(4) and Ohio Adm. Code 4901:1-40-06, for the 80 Ohio-sited SERs it did not procure in 2009. Duke thus is making its various arguments in these three cases to be excused from a portion of its 2009 SER benchmarks.<sup>4</sup>

## **II. APPLICABLE LAW**

Ohio law requires that solar energy resources account for at least 0.50% of the renewable energy generated in Ohio.<sup>5</sup> In addition, utilities must obtain at least half of

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<sup>2</sup> Under Ohio Adm. Code 4901:1-40-01(BB), a REC means the environmental attributes associated with one megawatt-hour (“MWh”) of electricity generated by a renewable energy resource, except for electricity generated by certain biomass facilities described in Ohio Adm. Code 4901:1-40-04(E).

<sup>3</sup> Duke Energy Ohio, Inc.’s Alternative Energy Portfolio Status Report (April 15, 2010) (“Report”) at 9-10.

<sup>4</sup> Id. at 10-11.

<sup>5</sup> R.C. 4928.64(B)(2).

that requirement from within Ohio.<sup>6</sup> The statute requires utilities to begin developing SERs in 2009 and to meet annual statutory benchmarks until reaching the 0.50% level by 2025. R.C. 4928.64(B)(2) includes a chart setting the annual requirements for solar generation. For 2009, the statute requires utilities to provide at least 0.004% of their renewable energy generation from solar resources.<sup>7</sup> Utilities may achieve the SER benchmarks by directly developing solar generation or through the open market purchase of solar RECs.<sup>8</sup>

If a utility cannot meet its SER benchmark, it

may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.<sup>9</sup>

In order to grant the force majeure application,

the Commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy

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<sup>6</sup> R.C. 4928.64(B)(3).

<sup>7</sup> R.C. 4928.64(B)(2).

<sup>8</sup> R.C. 4928.64(B).

<sup>9</sup> R.C. 4968.64(C)(4)(a); see also Ohio Adm. Code 4901:1-40-06.

or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.<sup>10</sup>

R.C. 4928.64(C)(4)(c) states that a force majeure waiver “shall not automatically reduce the obligation for the electric distribution utility’s ... compliance in subsequent years.”

Finally, if a utility does not meet its SER benchmark, and the PUCO does not grant a force majeure determination, the utility is subject to an “alternative compliance payment” (“ACP”). The 2009 ACP is \$450 per MWh of solar capacity not obtained.<sup>11</sup>

### **III. COMMENTS**

#### **A. The Commission Should Not Reduce Duke’s Originally Calculated Baseline.**

In its filing, Duke asks the Commission to revise and lower its originally calculated baseline. The original, calculated baseline was 20,713,297 MWh, equating to 51,784 MWh from all renewable sources, and 829 MWh from solar energy resources.<sup>12</sup> Duke asks to revise this baseline to 17,187,784 MWh, equating to 42,969 MWh from all renewable sources and 688 MWh from solar-specific sources.<sup>13</sup> Consequently, Duke is seeking to lower its benchmark by 8,815 total RECs and 141 fewer solar RECs.

Duke claims that four factors warrant this reduction:

- ▶ The impacts of customer choice, which resulted in significantly increased levels of switching in Duke Energy Ohio’s service territory during the year 2009;
- ▶ Solar generation facilities within the state of Ohio are very few in number, and the corresponding market for SRECs has yet to fully develop;

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<sup>10</sup> R.C. 4928.64(C)(4)(b).

<sup>11</sup> R.C. 4928.64(C)(2)(a).

<sup>12</sup> Report at 3.

<sup>13</sup> Id. at 6.

- ▶ Regulatory uncertainty that existed until the Commission finalized its rules regarding REC acquisition, registration, metering, and project location; and
- ▶ S.B. 221's failure to include specific mechanisms for utility cost recovery, impeding long term contracts and investments in renewable energy.<sup>14</sup>

R.C. 4928.64(B) requires that "[t]he baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years" unless reduced by the Commission. The years 2006-2008 were used to determine Duke's 2009 benchmark level. The shopping that occurred in 2009 has no effect on the 2009 benchmark, and therefore the request to adjust the 2009 benchmark should be denied. Instead, that change in sales should be reflected in the 2010 benchmark.

Further, as discussed elsewhere in these Comments, the Commission has rejected the lowering of the statutory benchmarks, in favor of adding the shortfall to the next year's benchmark. The Commission should reject Duke's proposal to lower its baseline, and thus reduce its benchmark.

**B. The Commission Should Not Accept Solar RECs From Outside Ohio To Meet Requirements In The Law For Generation Of Solar Energy Within Ohio.**

Duke asserts that it complied with its non-solar renewable energy benchmarks under its revised baseline.<sup>15</sup> Duke does not state that it would have complied with the non-solar benchmarks under the original baseline calculation.

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<sup>14</sup> Id. at 3-4.

<sup>15</sup> Id. at 7-8. It should be noted that on page 7 of its Report, Duke states it needed 42,282 non-solar RECs. On page 6, it states it needed and obtained 42,181 non-solar RECs. The difference is likely immaterial or a typographical error, but it is possible Duke is 101 non-solar RECs short of its revised baseline requirement.



In any event, Duke then claims that it obtained a maximum of 264 Ohio-sited solar RECs toward its 2009 compliance benchmark of 344 in-state solar RECs.<sup>16</sup> Consequently, Duke is seeking to apply 80 non-Ohio solar RECs to its Ohio requirement to comply with its benchmarks.<sup>17</sup> Alternatively, Duke requests the PUCO to make a force majeure determination to be excused from compliance with the balance of its solar REC requirements, 80 Ohio-sited solar RECs.<sup>18</sup> This section addresses Duke's request to apply the non-Ohio solar RECs to its Ohio benchmarks; Duke's request for a force majeure determination to be excused from compliance with the benchmarks will be addressed in a later section.

The Ohio General Assembly explicitly required that at least half of the required SERs should be obtained or developed within Ohio. In Duke's case, this equates to 344 MWh of solar energy developed within Ohio's borders. The good purpose of the law is to encourage and develop a renewable energy industry within Ohio, which would translate to economic development and job creation within the State.<sup>19</sup> No other utility sought to apply non-Ohio RECs to fulfill Ohio-sited requirements for Ohio solar energy, and the Commission should not grant Duke special consideration here. Also, Duke has not stated the 80 out-of-state solar RECs will expire if not used. If they do not expire, Duke is permitted to bank the unused RECs and apply them to its 2010 benchmarks.

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<sup>16</sup> Id. at 9-10.

<sup>17</sup> Id. If the Commission were to impose the ACP, Duke's payment would be \$36,000.

<sup>18</sup> Id. at 10-11.

<sup>19</sup> When signing the requirements into law, Governor Strickland stated the legislation would "serve as a catalyst to enhance energy industries in Ohio, bringing new jobs while protecting existing jobs" and that the state "will attract the jobs of the future through an advanced energy portfolio standard." Office of the Governor, Press Release (May 1, 2008) (available at <http://www.governor.ohio.gov/Default.aspx?tabid=622>).

Duke claims it will exactly meet its 2009 requirements through the use of the 80 out-of-state solar RECs. But Duke does not provide information concerning how many RECs it actually obtained in 2009, the source of those RECs, and whether such RECs are dependent on any renewable energy certification application pending before the Commission. Such figures and information should be included as part of Duke's review of its "compliance with the most recent applicable renewable- and solar-energy resource benchmark."<sup>20</sup> In order for the PUCO Staff to make a thorough evaluation of Duke's benchmark compliance, the PUCO Staff should have access to all of the information concerning Duke's accumulation of RECs in 2009.

Furthermore, if Duke does not need the non-Ohio solar RECs in 2010, it can sell those RECs to another utility that fell short of its solar requirements and that has not yet received a force majeure determination, such as Duke Energy Retail Sales, LLC or FirstEnergy Solutions.<sup>21</sup> Other utilities that received a force majeure determination, as explained below, have increased needs for solar RECs in 2010, providing an additional market to Duke.

The Commission should not grant Duke special consideration for its Ohio-sited solar RECs. The General Assembly's intent in enacting the legislation was to help develop a renewable energy industry in Ohio, and Duke's request ignores that intent. Moreover, Duke can use the non-Ohio RECs in the future or sell them to another utility. Duke should not receive special treatment from the Commission, and particularly should

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<sup>20</sup> Ohio Adm. Code 4901:1-40-05(A)(1).

<sup>21</sup> See *In the Matter of Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report and Request for Force Majeure Determination*, Case Nos. 10-508-EL-ACP and 10-509-EL-ACP (April 15, 2010); *In the Matter of the Application of FirstEnergy Solutions Corp. for Approval of Its Alternative Energy Annual Status Report and for an Amendment of its 2009 Solar Energy Resources Benchmark Pursuant to R.C. §4928.64(C)(4)(a)*, Case No. 10-467-EL-ACP (April 15, 2010).

not receive special treatment that would compromise the law's intent to benefit Ohioans. The Commission should deny Duke's request to apply 80 non-Ohio solar RECs to the Ohio-sited benchmark.

**C. The Commission Should Deny Duke's Force Majeure Request.**

Duke has filed a Force Majeure Request to seek to be excused from the statutory requirement for producing some solar energy from Ohio sources. To consider the Force Majeure Request, the PUCO must look to R.C. 4928.64(C)(4)(c) which requires the Commission to determine if the necessary solar resources "are not reasonably available" to meet the 2009 SER benchmark. In order for the Commission to waive the 2009 SER benchmark, Duke must prove that it "made a good faith effort to acquire sufficient ... solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts."<sup>22</sup>

Duke was aware of its 2009 SER requirements on or before July 31, 2008, when the statutory requirements went into effect. Duke listed its efforts to meet the 2009 SER requirement consisting of:

- Controlling demonstration projects it funded and entered into purchase contracts;
- Discussions concerning solar RECs with three different consulting agencies;
- Spending 200-300 hours compiling a proprietary database of Ohio solar installations; and

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<sup>22</sup> R.C. 4928.64(C)(4)(b).

- Attempts to purchase all available Ohio solar RECs through direct contacts, responses to requests for proposals (“RFPs”), and advertisements in trade publications.<sup>23</sup>

Notably, in the list of efforts to comply with the benchmarks, Duke does not claim that it attempted to build its own solar resources facility. Had it constructed such a facility, it is likely Duke could have generated the solar RECs it needed to comply with Ohio’s benchmark, or at least have had fewer solar RECs subject to a force majeure determination.

Duke did not ignore its SER obligations, and it did meet most of its obligations. But it did not expend the appropriate effort to ensure it met its 2009 benchmarks – including construction of its own solar facility. Duke’s Force Majeure Request should be denied.

In addition, if the Commission denies Duke’s proposed baseline reduction, then Duke should resubmit its Compliance Report. In the revised report, Duke should address the regulatory requirements under the actual baselines and provide the reasons for any shortfalls.

**D. In The Event The Commission Determines To Grant Duke’s Force Majeure Request, The Commission Should Require Duke To Fulfill Its Missed 2009 Solar Requirement In 2010.**

If the PUCO is inclined to grant Duke’s Force Majeure Request (which the undersigned oppose), the PUCO should follow its own precedent and invoke R.C. 4928.64(C)(4)(c) and require the Company to fulfill any waived portion of the 2009 SER benchmark in 2010. In this way, the PUCO will balance Duke’s efforts against its

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<sup>23</sup> Report at 10-13.

shortfall in seeking solar resources. This equates to increasing Duke's 2010 benchmark by the 80 Ohio-sited solar RECs it failed to obtain in 2009.

As Duke correctly states, the PUCO recently applied this provision when it granted the applications of American Electric Power ("AEP-Ohio"), Dayton Power & Light, the Cleveland Electric Illuminating Company, the Toledo Edison Company and the Ohio Edison Company for force majeure determinations, excusing these companies from a portion of their 2009 SER requirements.<sup>24</sup> However, in the first case to address a force majeure waiver, the PUCO stated that, "AEP-Ohio's request for a force majeure waiver of its 2009 SER benchmarks be granted and, *to the extent that the Companies did not comply with the 2009 SER benchmarks, the 2010 benchmarks be increased.*"<sup>25</sup> In subsequent applications for a force majeure determination, the PUCO similarly applied this result. In addition, Duke Energy Retail Sales recently requested this same treatment in its force majeure application filed on April 15, 2010.<sup>26</sup>

Duke explicitly asks that even if the Commission does not accept the 80 non-Ohio solar RECs to comply with the Ohio-sited requirements, the PUCO should waive the resulting shortfall.<sup>27</sup> We strongly oppose this request. As stated above, the PUCO should extend its prior rulings to this case. All of these applications are similar to Duke's, and it is appropriate to reach a similar result in this case. There is no statutory

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<sup>24</sup> See Entry, Case Nos. 09-987-EL-EEC and 09-988-EL-EEC (January 7, 2010) ("AEP-Ohio Entry"); Finding and Order, Case No. 09-1989-EL-ACP (March 17, 2010); Finding and Order, Case No. 09-1922-EL-ACP (March 10, 2010).

<sup>25</sup> AEP-Ohio Entry at 9 (emphasis added).

<sup>26</sup> *In the Matter of Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report and Request for Force Majeure Determination*, Case Nos. 10-508-EL-ACP and 10-509-EL-ACP, Duke Energy Retail Sales, LLC's Request for Force Majeure Determination Regarding Its Benchmark for Electricity Generated from Solar Energy Resources (April 15, 2010) at 7.

<sup>27</sup> Report at 11.

clause allowing a waiver upon “substantial compliance” as Duke requests.<sup>28</sup> The General Assembly intended Duke to obtain SERs in 2009, and the Commission should not relieve the company of its statutory SER obligations. Therefore, Duke’s Force Majeure Request should be granted only if Duke is ordered to fulfill in 2010 the solar RECs it failed to obtain in 2009.

**E. Duke Should Plan For A Proactive Strategy To Increase The Amount Of Solar Energy Generated In The State To Keep Pace With The Increasing Benchmarks.**

Duke’s renewable energy compliance strategy consists of seeking in-state solar RECs through market brokers.<sup>29</sup> As Duke discovered, this is not a sufficient strategy in a state where four major utilities are competing for solar RECs. While Duke describes its efforts to meet its future in-state solar REC benchmarks,<sup>30</sup> Duke could achieve more through an effort it noticeably omits. Duke can greatly increase the availability of in-state solar RECs by issuing regularly scheduled RFPs for the purchase of solar RECs using long-term contracts concordant with the financing terms of large-scale solar energy facilities.

The need for long-term contracts for solar RECs is tied to the nature of financing solar energy projects. One purpose of S.B. 221 was to develop *new* solar energy generating resources. To finance these new projects solar developers must monetize *both* the revenue from the sale of electricity and the resulting solar RECs upfront. That is,

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<sup>28</sup> Id.

<sup>29</sup> Id. at 12.

<sup>30</sup> Id. at 14.

solar developers must obtain signed, long-term contracts for both the electricity and the solar RECs before they can obtain financing from a bank and proceed to build the solar system. If Duke intends to seek only very short-term, “spot market” solar RECs, no developer will likely step forward and finance a new project based on such an RFP.

Duke is familiar with terms of procuring solar RECs through long-term contracts with independent power producers through its subsidiary in North Carolina. Duke Carolinas has entered into a 20-year contract with an independent power producer to construct a 16 MW solar power plant resulting from “a request for proposals, or RFP, that Duke Energy issued in April 2007.”<sup>31</sup> Duke should draw upon its successful experience in developing renewables in North Carolina.

**F. Duke Should Develop A Plan For Customer Sited Solar Resources Procured Through The Residential Renewable Credit Program For Meeting A Portion Of The Solar Benchmarks.**

As part of the Stipulation in its Electric Security Plan case, Duke committed to put in place by June 30, 2009 a workable residential Renewable Energy Credit Program designed to provide Duke with additional RECs while at the same time providing customers with revenues to offset the cost of installing solar panels.<sup>32</sup> Instead of complying with the simple requirements of the Stipulation, Duke has filed and refiled its residential REC plan which in each instance has included terms and conditions that act as barriers to these programs working.

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<sup>31</sup> “Duke Energy Announces Deal to Harness the Power of the Sun,” Duke Energy Press Release (May 21, 2008) (available at <http://www.duke-energy.com/news/releases/2008052101.asp>).

<sup>32</sup> *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Stipulation (October 27, 2008) at 37.

Additionally, Duke has not finalized an effective, useful residential REC program within the timeframe required by the Stipulation. If implemented in a timely manner, the residential REC program could have given Duke at least a portion of the 80 additional in-state solar RECs it needed.<sup>33</sup> Duke needs to implement a program that will guarantee all distribution residential customers 15 years of REC payments that the customers need in order to obtain financing for solar projects they might otherwise not be able to afford. Based on participation numbers and feedback from customer and rooftop solar installers, Duke should adjust the program to maximize customer participation.

One important purpose of S.B. 221, as stated under R.C. 4928.02(K), is to develop distributed generation energy sources “across customer classes,” in order to reap the local grid benefits and transmission and distribution savings from reduced strain and repair. These grid benefits are in addition to the economic and job creation benefits that are maximized from local installation of distributed solar rooftop projects. Implementing a comprehensive and effective residential REC program will help achieve this important goal of S.B. 221. Consequently, the Commission should order Duke should to finalize and release its residential REC program *poste haste* to help it achieve compliance with future benchmarks, including those in 2010.

**G. If The Commission Does Not Deny Duke’s Proposal To Reduce Its Baseline, The Commission Should Ensure That Competitive Retail Electric Service Providers Are Meeting The Increased Renewable Obligations That Would Result From Duke’s Reduced Baseline.**

The three-year rolling baseline allows the utility companies and Competitive

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<sup>33</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. For Approval of a Residential Solar Renewable Energy Credit Purchase Program Agreement and Tariff*, Case No. 09-834-EL-REN.



Retail Electric Service (“CRES”) providers to plan for meeting the annual renewable energy benchmarks. If the Commission approves Duke’s proposal to reduce its baseline, Duke’s renewable energy obligations would decrease (which is what Duke is seeking). But a reduced baseline, if approved, would mean that CRES providers would have increased renewable energy obligations. Therefore, any PUCO acceptance of Duke’s proposal to reduce its baseline would require PUCO action to ensure that the CRES providers are meeting their increased renewable obligations. In other words, the renewable requirements must be synchronized between Duke and the CRES providers that Duke claims have taken many of its customers.

Adding this responsibility to the CRES providers at this point does not allow CRES providers to properly plan to meet the appropriate benchmarks. These changes in shopping will be reflected in the rolling three-year averages used to determine each electric supplier’s annual benchmarks, which will allow each utility the proper amount of time for planning to meet increasing or decreasing benchmarks over time. This unexpected result of Duke’s eleventh-hour proposal is unfair to CRES providers and may be anti-competitive as described above.

#### **IV. CONCLUSION**

The Commission should deny Duke’s request to apply 80 out-of-state solar RECs to the legal requirement for Duke to “buy-Ohio” to comply with its benchmarks. In addition, the Commission should deny Duke’s Force Majeure Request and thereby not excuse Duke’s failure to meet the solar energy requirement for in-state sources. But any granting of Duke’s Force Majeure Request should include requiring Duke to make up for the 2009 Ohio solar REC requirements during 2010.

In describing its future plans to meet in-state solar RECs, Duke did not identify a proposal to offer long-term solar RECs purchase contracts that will assist customers or other solar REC providers to obtain financing for solar REC projects. This is the kind of commitment that Duke needs to make if it is to meet the increasing benchmarks established under S.B. 221. Additionally, Duke should provide a useful residential REC program to further develop the solar market in Ohio and to help itself (Duke) comply with its statutory requirements.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Comments was served on the persons listed below via regular mail service, this 17<sup>th</sup> day of May 2010.

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Summary: Comments Coments on Duke Energy Ohio, Inc.'s Alternative Energy Portfolio Status Report and Waiver Requests by Environmental Law and Policy Center, Ohio Environmental Counsel and the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Etter, Terry L. and Office of the Ohio Consumers' Counsel