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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221	Case No. 08-888-EL-ORD

REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

Pursuant to the Commission's Entry of August 20, 2008, Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their reply comments to the comments filed by parties regarding the proposed Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code.

As explained in the introduction to the Companies' initial comments, several of the proposed rules go beyond the requirements or criteria contained in Am. Sub. S.B. 221 ("S.B. 221"). The Commission is not empowered to act in conflict with statutes enacted by the legislature, and therefore, those proposed rules which are in conflict cannot be adopted. In the replies to the parties' comments listed below, the Companies have highlighted sections in which other parties have also noted proposed rules that are in conflict with statutes. Further, the Companies have responded to some parties' recommendations, which themselves are improper and, if enacted, would offend the Commission's jurisdiction.

As stated previously, the Companies appreciate the Staff's efforts in drafting these rules, as well as the opportunity given to parties to comment on the proposed rules and to offer reply comments. The Companies look forward to continuing to work with the Staff and other parties toward the creation of rules that effectively implement S.B. 221.

II. REPLY COMMENTS TO PARTIES' COMMENTS TO STAFF'S PROPOSED RULES

A. General Reply to Comments made by OCEA.

Before responding section-by-section to the comments filed on behalf of the Ohio Consumer and Environmental Advocates ("OCEA") and other parties, the Companies would generally observe that many of OCEA's comments share a common problem: They would impose onerous procedures on the Commission and the Companies without any showing that such procedures are necessary or provide any particular benefit. But more importantly, the proposed procedures would impose limitations and restrictions on the Companies and Commission that are neither authorized nor contemplated by S.B. 221, and in fact would hinder the Companies' efforts at complying with the law.

In particular, OCEA's numerous proposals for additional reporting requirements, including the following by way of example, have no statutory basis and would increase the burdens of implementing S.B. 221 with no demonstrable benefit:

— *Rule 4901:1-39-05*, proposed requirement of detailed DSM evaluations and summaries. (OCEA Cmts., pp. 15–16.)

— *Rule 4901:1-39-07*, proposed requirement of a report of "*all* actions taken in prior calendar year to comply with the approved benchmarks." (*Id.*, pp. 22–23.)

— *Rule 4901:1-40-04(E) and (F)*, recommendation that notice, a hearing, and third party input should be required before classifying new technologies as advanced or renewable energy resources. (*Id.*, pp. 48–50.)

— *Rule 4901:5-5-02*, recommendation of forecast reports that include detailed summaries of cost and benefits of proposed plans, including social and environmental costs. (*Id.*, p. 73.)

— *Rule 4901:5-5-4(C)(2)*, recommendation of analysis and investigation of benefits of geographically targeted DSM. (*Id.*, p. 74.)

— *Rule 4901:5-5-05*, proposal to require discussion of how resource plan complies with state policy in 4928.02. (*Id.*, pp. 77–79.)

With no identifiable benefit, OCEA's proposals would weigh down the entire process down from the outset, and thereby undermine the efforts of the Companies and others to comply with the statutory requirements in an efficient and timely manner. The Commission should reject these proposals and others like them that may well work counter to legislative intent.

B. Rule 4901:1-39-01 Definitions

1. General Reply Comments

The Companies agree with many of the interested parties that the definition of "Demand Response" should include economic interruption.

2. Reply to OCEA Comments

(a) The Collaborative Proposal

OCEA recommends the creation of a collaborative that would be "responsible for managing the energy efficiency and demand reduction programs of a utility." (OCEA Cmts., p. 5.) This change is reflected throughout a number of rules.

The Companies strongly disagree with the introduction of the concept of a "collaborative" as suggested by OCEA. The utility has the burden to meet the aggressive goals set for in S.B. 221. As a matter of law, S.B. 221 states that "*an electric distribution utility* shall implement energy efficiency programs." R.C. 4928.66 (emphasis added). Thus, the statute places the implementation of energy-efficiency programs in the hands of the EDU, and no one else. This makes sense, because it is the EDU, and no one else, that is potentially subject to penalties if it fails to meet statutory requirements. Adding a collaborative to the process, as suggested by OCEA, would conflict with the statute and only make it more difficult to meet the goals within the established timeframe.

(b) Distinction between "Program" and "Project"

The Companies agree with the Ohio Environmental Council's ("OEC") proposal to add new definitions for "program" and "project" to more clearly distinguish projects with individual customers and programs that affect a class of customers. (OEC Cmts., pp. 5-6.)

C. Rule 4901:1-39-03 Filing and Review of the Benchmark Report

1. Reply to Comments of OCEA

(a) Forfeitures

OCEA recommends that the Staff must recommend forfeitures for non-compliance with benchmarks under Rule 4901:1-39-03(C). (OCEA Cmts., p. 25.) OCEA's proposal, however, mismatches the rule and statute.

Under the statute, if *the Commission* finds that a benchmark has been missed and cannot be excused under R.C. 4928.66(A)(2)(b), it shall impose a forfeiture. This statute does not address Staff. The rule clearly defines Staff's role within this process, and states that Staff *may* recommend a forfeiture to the Commission. There is no basis to suggest that the Commission is bound to impose a forfeiture based solely on a Staff recommendation, as suggested by OCEA's rule change. OCEA's recommendation in this regard must be rejected.

D. Rule 4901:1-39-04 Benchmark Report Requirements

1. General Reply Comments

The Companies generally support any comments that would clarify and specify the requirements of the Benchmark Report, provided that such requirements are consistent with statute and not unnecessarily onerous.

2. Reply to Comments of AEP

The Companies agree with AEP's recommendation that the 5-year action plan and 10-year projection requirements are too burdensome and support the recommendation of modifying the timeframes to a 2-year action plan and a 5-year projection. (AEP Cmts., p. 6.)

3. Reply to Comments of DP&L

The Companies support DP&L's proposal that the baseline should be based on the years 2006 through 2008, and not on a rolling average. (DP&L Cmts., pp. 2-4.)

E. Rule 4901:1-39-05 Recovery Mechanism

1. Reply to Comments of OCEA

(a) Proposed DSM Allocations

OCEA proposes a new rule whereby "no less than 40 percent of DSM program savings should come from the Residential Class," of which half should be allocated to lower-income customers. (OCEA Cmts., pp. 15–16.) The Companies disagree with this recommendation. DSM programs should be focused on achieving the greatest cost-benefit value available, and the relative amount of DSM spending by class should be directly related to its cost effectiveness.

(b) Proposed Program Planning Process

OCEA proposes a new section which among other things states "that the Total Resource Cost Test as defined in the California Standard Practice Manual will be used to determine the cost-effectiveness of . . . DSM[] programs" and requires "that energy efficiency programs be made available to all customer classes." (OCEA Cmts., p. 15.) The Companies disagree with the addition of this new section.

First, the Companies do not believe that a requirement that each class of customers have programs made available to it is in the best interests of the citizens of the state of Ohio. Programs should be made available that are cost effective and truly gain energy efficiencies. A

utility should have the latitude to determine what programs will be most effective based on the profile of its customers. Again, the EDUs are held responsible by statute for the implementation of such programs, and adding restrictions and other limitations would upset the balance set by S.B. 221. Further, the contents of the plan are overly proscriptive and will not be acceptable for all segments of customers because they may reveal competitive information. Moreover, the Companies do not support using a TRC test to determine which projects to choose. Many projects provide benefits in addition to gains in energy efficiency and demand side management. This test does not count such benefits and is therefore insufficient to evaluate the economics of all projects.

F. Rule 4901:1-39-06 Commitment for Integration by Mercantile Customers

1. Reply to Comments of OCEA

(a) Proposed Planning Caps

OCEA proposes a new rule in which the evaluation budget shall be no more than 6% of total program costs in the first three years, then dropping to a maximum of 3%. (OCEA Cmts., p. 21.) The Companies object to this proposal on the grounds that there is neither a basis nor historical information to determine what the appropriate numbers should be for these types of programs in Ohio. This proposal appears arbitrary, and no reason to support such a new rule has been supplied.

(b) Third-Party Evaluator

OCEA recommends an independent third-party evaluator to audit DSM programs. (OCEA Cmts., p. 20.) There is no authorization in R.C. 4928.66 for an "evaluator" other than the Commission, and OCEA has not provided any support for the proposition that an additional evaluator will be anything but redundant to the evaluation provided by the Commission and Staff.

Further, if a collaborative process is adopted (and it should not be for reasons discussed above), third-party evaluation would be further redundant.

G. Suggested Rule 4901:1-39-09

1. Reply to Comments of the Ohio Environmental Council

(a) Mercantile savings

The Ohio Environmental Council suggests that mercantile customers' energy savings and demand reductions should meet or exceed the percentage reductions required under the statutory benchmarks to which the electric utility is subject. (OEC Cmts., pp. 18–22.) While the Companies agree that mercantile customers contributions should be commensurate with any benefits or incentives that they receive, they disagree that mercantile customers should be required to contribute by the same percentage reductions as the statutory benchmarks.

H. Rule 4901:1-40-1 Definitions

1. Reply to Comments of AEP

(a) Double-counting

The Companies support AEP's proposed revised definition of the term "double-counting" in subsection (M):

> "Double-counting" means utilizing ~~renewable energy,~~ renewable energy credits~~, or energy efficiency savings~~ to (1) satisfy multiple STATE regulatory requirements, (2) support multiple voluntary product offerings, (3) substantiate multiple marketing claims, or (4) some combination of these. (AEP Cmts., p. 12.)

This definition is supported by R.C. 4928.01(A)(34)(g), which explicitly states that "advanced energy resource" means "*any* efficiency improvement" (emphasis added), without any qualifications. There is no statutory prohibition against using a single resource to meet more than one requirement, and "double counting" cannot be defined in such a way that will create a requirement not included in the statutes. Further, satisfying requirements with fewer costs is

encouraged by S.B. 221, and therefore that behavior should be encouraged, not discouraged. AEP Ohio's proposed definition of "double counting" eliminates the double counting of renewable energy credits for purposes of complying with S.B. 221, which is acceptable and permissible.

Also, AEP Ohio's proposed definition should be adopted because if a Federal RPS were to be enacted, Ohio should not be disadvantaged by requiring its companies to comply with two separate RPS compliance obligations, federal and state. Further, Ohio customers should not bear the cost of separately complying with both obligations.

2. Reply to Comments of DP&L

Many parties filed comments on subsection (I) "Deliverable to this State." The Companies concur with the definition proposed by Dayton Power: "'Deliverable into this state' means that the electricity or Renewable Energy Certificate originates from a facility that is interconnected to electric distribution and transmission systems such that the electricity from such a facility could be transmitted to this State. Any electricity from a facility sited in Ohio, a contiguous State, or interconnected with an electric transmission company that is a member of the PJM Interconnection, LLC, or the Mid-West Independent Transmission System. Inc. shall be deemed to be 'Deliverable into this state.' For facilities sited elsewhere, a showing is required that a transmission path exists such that the power from such a facility could be delivered into this state, but it shall not be required that transmission agreements actually be executed."

This proposed revised language provides a reasonable definition that supports a number of potential suppliers to participate at the most economical cost to customers. Given the lack of alternative energy capacity currently installed in Ohio and the limited potential for some renewable resources, this definition allows utilities and electric services companies to utilize a wide range of existing facilities to meet the aggressive requirements of S.B. 221.

I. Rule 4901:1-40-3 Requirements

1. Reply to Comments of AEP

As stated in the Companies' comments, the Companies object to the requirement in subsection (C) that each electric utility and electric services company submit a long-term plan annually. There is no statutory basis for the proposed long-term planning requirement or its annual filing requirement.

However, if the Commission decides to adopt the proposed rule, the Companies support AEP's revised language. (AEP Cmts., pp.13-14.) Replacing the "fifteen-year planning horizon" with a "five-year planning horizon" would increase the value of the projections. Further, including a qualifying statement that the plans are non-binding and subject to change is necessary to protect companies that set high goals for achieving the benchmarks.

The Companies also agree with AEP's argument that the reporting of projected renewable energy credit inventories is confidential, and therefore subsection (C)(3) must be deleted. (*Id.*) The disclosure of this information could compromise the competitive position of a utility or electric services company.

2. Reply to Comments of OCEA

(a) Accounting for Line Losses

OCEA proposes a new subsection (B)(4) that would adjust the number of RECs needed for compliance upward to account for line losses. (OCEA Cmts., p. 43.) According to OCEA, this adjustment is needed to account for electricity transmission and distribution losses.

This underdeveloped comment should be rejected. In addition to citing no statutory or public-policy justification for making such adjustments, OCEA has not explained how such adjustments should be made, which makes it difficult to even respond to the proposal. Most importantly, R.C. 4928.64(B) provides that the basis is the amount of retail sales of a utility or

electric services company. Retail sales, by definition, do not include transmission and distribution losses. OCEA's proposal would create, not solve, an apples-to-oranges problem.

The Companies disagree with OCEA's proposed rule, and request that the proposed rules remain as written by the Commission Staff. The Companies recommend that retail sales remains the basis for determining the compliance obligations of each utility and electric services company.

J. Rule 4901:1-40-04 Qualified Resources

1. Reply to Comments of Norton Energy Storage

Norton Energy Storage LLC comments that the restrictions contained in proposed rule 4901:1-40-04(A)(8) would have "the unintended effect of denying the receipt of any renewable energy credits to a legislatively designated 'renewable energy resource.'" (Norton Cmts., pp. 2–6.)

The Companies support Norton Energy Storage's comments. Proposed rule 4901:1-40-04 contains limitations not found in R.C. 4928.64(A)(1)(c). The statute defines "[s]torage technology" as technology "that allows a mercantile customer more flexibility to modify its demand or load and usage." Staff, however, would recognize a storage facility only if it complied with a number of requirements of its own devise. Section (A)(8), therefore, should be deleted.

The value of a storage facility lies in its enabling of the development, construction, and implementation of renewable energy resources. Indeed, R.C. 4928.01(A)(35) expressly defines a "Renewable energy resource" as a "storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak." Storage facilities meet this criterion in a number of way, particularly with regard to wind power: Storage provides control for facilities that, without storage, would be an undependable source of energy (such as wind

power) that would only provide power to the grid when the wind was available to power the asset. Wind's value is enhanced by the ability to be delivered to the marketplace when needed and when it has more value to customers and producers. The benefits of storage would likely stimulate investment in wind power in this region (particularly as compared to regions without storage).

The Commission's rules may not vary from the clear language or intent of the statute, and the Companies' again stress that the statutory language should simply be repeated in the rules to ensure the intent of the Ohio legislature is implemented.

2. Reply to Comments of OCEA

(a) Existing Facilities as Advanced Resources

OCEA recommends that only incremental improvements to existing facilities should count as advanced energy resources under Rule 4901:1-40-04(B). (OCEA Cmts., pp. 43–45.)

The Companies disagree with OCEA's recommended rule change. OCEA recommends that modifications to existing facilities should only count towards benchmarks if "total annual carbon dioxide emissions" are "reduced." In other words, OCEA would discount relative gains in efficiency and output, no matter how large and even with no emissions increase, if there was not an absolute decrease in emissions. To begin with, OCEA does not explain this change in its discussion. Further, this recommendation is inconsistent with the goal of increasing efficiency and could disincentivize the implementation of projects that did not satisfy OCEA's arbitrary test. Likewise, OCEA recommends the adoption of a sub-section regarding the calculation of the facilities' baseline, but offers no explanation or justification for the calculation. For these reasons alone, the changes should be rejected.

Most importantly, however, OCEA's recommendation is inconsistent with S.B. 221. R.C. 4928.01(A)(34) provides that an advanced energy resource includes "[a]ny . . . modification . . .

that increases the generation output of an electric generating facility to the extent such efficiency is achieved *without additional carbon dioxide emissions* by that facility." Thus, the statute does not require reductions, simply improved output without increases. OCEA's comments should be rejected.

(b) Purchase Date of RECs

OCEA recommends that "the Commission should clarify that a REC is first 'purchased or acquired' upon the generation of the renewable energy, since this is when the REC is 'first acquired' by the owner of the generating system, or first purchased under a power purchase agreement. This begins the commencement of the five-year clock immediately and will allow market actors to easily calculate the expiration date of a REC." (OCEA Cmts., pp. 46–47.) The Companies disagree with OCEA's recommendation.

The statute already provides for the purchase date, and it is not the date of generation. R.C. 4928.65 provides that an EDU "may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition *from any entity*." Thus, the relevant date is the date the EDU gains possession of the REC, not the date the energy is generated. While it is possible that the date of generation will be the date the REC changes hands, it need not be. It is likely, therefore, that OCEA's recommendation will often lead to direct conflicts with the timeline established by the statute, which is reason to reject this proposal.

K. Rule 4901:1-40-06 Force Majeure

1. Reply to Comments of OCEA

(a) Force Majeure

OCEA recommends limiting the Commission's powers to waive a utility's compliance with the benchmarks on grounds of force majeure. It recommends that the standard should be

that "events outside the utility's control" rendered renewable energy resources "not reasonably available in the marketplace." (OCEA Cmts., pp. 50–52.) Again, OCEA needlessly and incorrectly seeks to modify the statutory tests.

R.C. 4928.64(C)(4)(b) provides the substantive standards governing the *force majeure* determination. The Commission must make a finding regarding the availability of renewable energy in the marketplace: It "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." *Id.* In addition to this market analysis, there is a single EDU-related question that Commission must consider: "whether the [EDU] has made a *good faith effort* to acquire sufficient renewable energy." *Id.*

The analysis is not, as OCEA suggests, whether events outside the utilities control rendered resources unavailable. It is whether the resources are available, and whether the company made a good faith effort. There is no basis to add or subtract from this statutory test; indeed, such modification is directly inconsistent with S.B. 221 and is beyond the authority of the Commission to implement.

L. Rule 4901:1-40-07 Cost Cap

1. Reply to Comments of AEP and Ohio Energy Group

The Companies concur with these comments stating that proposed subsection (F) cannot be adopted because the rule in this subsection extends beyond the Commission's statutory authority. (AEP Cmts., pp. 15-16, Ohio Energy Group Cmts., p. 2.) R.C. 4928.64(C)(3) states that a utility or electric services company need not comply with a benchmark under (B)(1) or (2) of the section "to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more." In proposed rule 4901:1-40-07(F), the Commission retains the right to

increase a compliance obligation in a future year by the amount of any under-compliance in a previous year that is attributed to the 3% cost cap provision. A proposed rule cannot extend beyond statutory authority, and as a result, subsection (F) should be deleted.

2. Reply to Comments of NUCOR Steel

The Companies disagree with NUCOR Steel's proposal that subsections (A) and (B) should be modified such that "any person," rather than an "electric utility or electric services company," should be permitted to request a determination of the Commission regarding the 3% cost cap. (NUCOR Steel Cmts., pp. 9-10.) This suggested change in terminology could result in an enormous amount of requests made to the Commission, which would affect the Commission's ability to process determination requests in a timely manner. Therefore, the Companies recommend that the Commission adopt the proposed rule as drafted.

3. Reply to Comments of OCEA, The American Wind Energy Association, Wind on the Wires, Ohio Advance Energy, and Environment Ohio, and LS Power Associates

(a) Competitive Bid Proposal

These parties recommend the addition of language to the proposed rule that requires a utility or electric service company to obtain renewable energy through a competitive bidding process. (*See, e.g.*, OCEA Cmts., pp. 56–57.) According to these parties' comments, this process will protect consumers from utilities overspending on renewable energy generation.

First, this proposed language extends beyond the statute and the authority granted to the Commission regarding the 3% cost cap. For this reason alone, the language cannot be adopted. Further, the proposed language does not provide any additional protection to the consumer. The cost cap itself was designed to protect consumers from any unreasonable cost of compliance. A well-developed market in which renewable energy credits are actively traded will ensure a competitive process. If the proposed bid-requirement were to be adopted, renewable energy

credits or renewable resources that a utility or electric service company has already obtained would be rendered worthless. Finally, this rule would make obtaining renewable energy credits on short notice nearly impossible for utilities or electric services companies, and would prohibit the development of an active trading market.

4. Reply to Comments of OCEA

(a) Mandatory Cost Cap Formula

OCEA proposes that the formula set forth in the rules should be mandatory. (OCEA Cmts., pp. 52–54.) The Companies disagree with this recommendation. S.B. 221 has ushered in a number of new requirements and goals. OCEA's proposals to eliminate flexibility and introduce rigidity into the processes at the outset make little sense without the benefit of experience and fuller understanding of how the processes will work.

M. Rule 4901:1-41-01 Definitions

1. Reply to Comments of AMP Ohio and Buckeye Power

The Companies continue to maintain the position expressed in their comments, which is the same position maintained by AMP Ohio and Buckeye Power, that the Commission lacks the jurisdiction to impose these proposed rules on the Companies. (AMP Cmts., p. 5.) The Companies own no operating generating facilities in Ohio. Therefore, the reporting requirements noted in the proposed rules would be imposed on the Companies' unregulated affiliates. Imposing these rules on an unregulated affiliate is not with the Commission's jurisdiction, exceeds the Commission's statutory authority, and is inconsistent with the express language in R.C. 4928.68.

2. Reply to Comments of OCEA.

(a) Definition of Electric Generating Facility

The Companies disagree with the proposed change to the definition of "electric generating facility" to mean an electric generating plant greater than one megawatt and associated facilities capable of producing electricity. (OCEA Cmts., p. 63.) This modification will result in many more facilities reporting, which otherwise may not have been required to do so.

(b) Definition of Greenhouse Gas

OCEA recommends "adding a sentence or phrase to recognize current and future science on greenhouse gases." (OCEA Cmts., p. 64.) According to OCEA, this could mean that greenhouse gas includes soot. The Companies disagree with this recommendation. As the current proposed rule is written, it targets greenhouse gas reporting and carbon control planning. There is no reason to include soot and other fine particulates in this rule. Rather, the Commission should continue to leave those issues to the other regulatory agencies and programs that are already responsible for them.

N. Rule 4901:1-41-02 Greenhouse Gas Reporting and Carbon Dioxide Control Planning

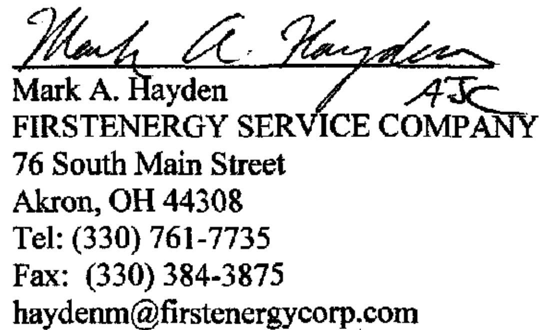
1. Reply to Comments of OCEA

The Companies oppose OCEA's suggested deletion of the term "economically feasible" from subsection (C). (OCEA Cmts., pp. 66–67.) For companies subjected to proposed rule 4901:1-41, imposing "best available control" technology as suggested by OCEA may not be economical, technically feasible, or prudent.

III. CONCLUSION

The Companies appreciate the opportunity to comment on Staff proposed rules and the comments to those rules. For the reasons stated above, the Companies respectfully request the Commission consider their comments and either maintain or modify the rules accordingly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was served upon the following this 26th day of September, 2008:[1]

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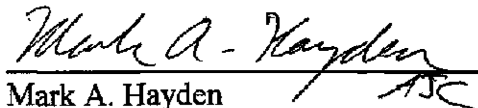

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