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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

'86 SEP 29 P2:19

Before

Helen F. Hoyt
Administrative Judge

IN THE MATTER OF	
TOLEDO EDISON COMPANY, et al.	Docket No. 50-346-ML
(Davis-Besse Nuclear Power Station, Unit No. 1)	ASLBP No. 86-525-01-ML

REPLY BY STATE OF OHIO TO
FILINGS OF TOLEDO EDISON

A. Introduction - TECO Procedural Complaints

At the end of the hearing in this matter, the Presiding Officer directed the parties to file simultaneous Findings of Fact and Conclusions of Law. Tr. III 393. No provision was made for filing reply briefs.

Nevertheless, on September 18, 1986, the State received a reply to its proposed findings from Toledo Edison[1], which the company purported to file pursuant to 10 CFR 2.754. This regulation, however, does not authorize its filing. Subsection

1 Because lead counsel for the State was out of state until September 22, he did not see the reply until that day. Because no provision has been made for reply briefs, the State's other counsel were not watching his mail for such a brief and thus were also not aware of the brief until September 22.

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(a)(3) of 10 CFR 2.754 allows the filing of a reply by the party with the burden of proof where this party has filed its proposed findings first and has subsequently received opposing proposed findings from other parties. 10 CFR 2.754(a)(1) & (a)(2). In such a situation, it is only fair that the party with the burden of proof file a reply, since the opposing parties have had the benefit of replying to the first party's filing. However, the regulation does not contemplate the situation in the case at hand, in which simultaneous filings have been ordered. Furthermore, the company's reply brief was not filed within the time limits of 10 CFR 2.754(a)(3).

Toledo Edison's reply vigorously attacks counsel for the State of Ohio, contending that they have filed proposed findings which violate the Commission's procedural requirements and that their proposed findings are "inaccurate", "without citation", "misleadingly juxtapos[ed]", "particularly egregious", "misleading", "obfuscation", and "unsupported". The findings attacked by Toledo Edison (TECO) comport to procedural standards and indeed are accurate. Rather than accepting TECO's allegations at face value, the State urges the Presiding Officer to consider the information provided herein. In the alternative, the State moves that TECO's reply be striken.

As a preliminary matter, TECO seeks to have the Presiding Officer ignore the information contained in a number of State findings by arguing that the findings are based on exhibits to the State's motion to intervene. TECO Reply, p. 2. This

argument, however, ignores the Commission's order of February 20, 1986, which on page 5 states:

> The presiding officer's decision . . . should be made on the basis of the written submissions of the parties, any oral presentations by the parties, and other technical or factual information that is publicly available in the docket file.

The State referred to this order in its proposed findings (A-10) but TECO apparently missed it. The Presiding Officer in her order of March 10, 1986, stated that materials submitted by petitioners in support of their motions to intervene would form part of the Hearing File on which her decision would be based. Page 5, Para. IV. She also put petitioners on notice that she might rule on the merits based on the petitioners' initial written submissions, rather than holding a hearing. Page 5, Para. V. The Presiding Officer's order of May 29, 1986, requested evidence on twenty matters which were "not clearly enunciated in the documents related to the Commission's action in this matter", confirming her earlier statement in the March 10 order and complying with the Commission's order of February 20.

It should also be noted that most of the sentences contained in the paragraphs of proposed findings listed by TECO as relying on these intervention exhibits actually cite to transcript testimony instead of or in addition to the exhibits. Furthermore, TECO heavily relies on the Freeze and Cherry textbook throughout its proposed findings, which was not introduced into evidence or made part of the hearing record in

any way. Even TECO used exhibits from the State intervention motion as a basis for testimony. TECO Dir. Linneman 91. TECO's attempt to have the State's evidence excluded must be rejected.

The second procedural matter which should be addressed is TECO's assertion that many of the State's proposed findings cite to nothing in the record. TECO then supplies a list of proposed findings which it argues are unsupported. Judging from the wording of its allegation, TECO apparently would have the Presiding Officer believe that no statements in these paragraphs contain citations to evidence. This is not the case, as a casual glance at most of the paragraphs fingered by TECO will show. For example, proposed finding C-7 contains five cites to record evidence and one cite to a regulation.

TECO's objection to the State's findings apparently arises out of a difference in the writing styles of counsel for State and counsel for TECO. Whereas a paragraph in TECO's findings will often set forth several sentences without citation and then end with citations for the entire paragraph, the State supplied the citations directly after the fact supported by the cites, in mid-paragraph or mid-sentence. In this way, the Presiding Officer can easily tell which citation supports which factual statement, without searching through a list of cites to find the one relevant to a particular factual statement.

Where sentences or portions of sentences in the State's proposed findings do not explicitly cite the record, these

statements are merely common sense conclusions and inferences drawn from previous cites. Basing conclusions on evidentiary facts is the function of any trier of fact and is permissible here as well. TECO's proposed findings likewise drew conclusions from testimony, but placed them at the beginnings of paragraphs or in the entire section labelled "Conclusion".

Nitpicking objections such as those described above merely serve to divert attention from the merits of the case. The Commission should instead focus on whether TECO has met its burden of proving that its burial proposal will prevent harm to the environment. With this purpose in mind, the State will briefly address several arguments contained in TECO's proposed findings and reply brief. These arguments will be addressed issue by issue in the same order as discussed in the State's proposed findings.

B. Description of the Waste

TECO violently objects to the State's description of the hazardous constituents in the waste which will be disposed at the burial grounds, since it exposes as fallacious the company's assertion that the waste is harmless. TECO would have the Commission accept its argument that the waste is harmless because it is not classified as a hazardous waste. The State does not contend that the waste is legally classified as hazardous.[2] Being non-hazardous and being harmless are two completely different matters, however. In fact, the

federal government has devoted an entire statute to controlling harmful water pollutants, whether hazardous or non-hazardous (the majority being non-hazardous). Clean Water Act, 33 U.S.C. 1251 et seq. For example, oil is not a hazardous substance but is reknown for killing wildlife and harming the environment when spilled.

TECO would have the Commission hinge the safety of the invaluable resources in this area on the EP Toxicity analysis of a single sample. Tr. II 153. These EP results should not give TECO any comfort, for three reasons. First, a host of non-hazardous but harmful pollutants are not detected by EP Toxicity. See the very short list of pollutants tested by TECO's EP Toxicity procedure. TECO Dir. Table 17-1, p. 2.

Second, only certain hazardous wastes are detected by EP Toxicity. For example, three hazardous constituents found in the TECO waste were not tested by EP Toxicity. One of these hazardous constituents, chloroform, is present in the waste at 298 mg/kg. TECO Dir. Table 17-1, p. 3. Chloroform is not even detectable in normal Lake Erie water. TECO Dir. Table 17-1, p. 10.

Third, the EP Toxicity test does not account for a release of the waste itself into the environment. As TECO has pointed out, only the leachate, not the waste, is tested by EP

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2 The last phrase of the first sentence in State's proposed finding B-19 should have read "the hazardous constituents in the sludge are not subject to these regulations".

Toxicity. The EP Toxicity test does not account for this event. For example, even TECO's expert on resins admitted that he did not know what effect ingestion of resins would have on waterfowl. Hetherington Tr. II 126-7.

The high level of hazardous constituents contained in Table 17-1, reproduced in column 3 of the chart in State proposed finding B-17, were apparently detected by an analysis procedure other than EP Toxicity.[3] Nevertheless, these hazardous constituents are still contained in the waste and will be released into the environment if any waste is lost from the cells. Given the location of the cells in a 10 to 50 year floodplain, loss of the waste is not an unlikely scenario. For this reason, subsection (5) of 10 CFR 61.50(a), one of the NRC regulations which TECO acknowledges to be the culmination of

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3 In footnote 5 of its reply, TECO argues that the results expressed in mg/l on page 2 of Table 17-1 of its direct testimony were obtained from leachate rather than the settling basin water. While Table 17-1 states that these are EP Toxicity tests, however, it does not state that they were performed on leachate from the solids rather than on the liquid from the settling basin samples. Because EP Toxicity procedures require that a waste sample be separated into its liquid and solid phases, the State naturally assumed that the values on page 2 of the table were analyses of the liquid phase of the sample. See 40 CFR 261, App. II. See also the testimony of Mr. Bennett, TECO Dir. 97, which refers to Table 17-1 generally when discussing EP Toxicity results, seemingly and confusedly indicating that the entire table contained EP Toxicity results. Whether the results on this page were derived from the settling basin liquid or from the leachate does not matter, however. These results were not included in the chart upon which the State's proposed finding B-17 was based.

the Commission's study and development of licensing criteria for low level radioactive waste disposal sites[4], establishes an absolute prohibition against waste disposal in a 100 year floodplain regardless of the landfill technology used. This indicates an unacceptable risk of release into the environment posed by waste disposal sites in floodplains. Therefore, the content of the waste itself must be conscientiously examined, not just the leachate.

As established in the State's proposed finding B-17, the concentrations of hazardous constituents present in the waste exceed the concentrations permitted in groundwater around hazardous waste facilities by degrees of magnitude as high as 400. TECO Dir. Table 17-1; 40 CFR 264.94(a). If this waste is washed into the environment as a result of one or more of the many unfavorable natural characteristics of the burial site, these hazardous constituents in their highly concentrated form will also be washed into the environment. Since the concentrations of 40 CFR 264.94(a) were set at levels necessary to protect groundwater from chemical constituents known to have toxic, carcinogenic, mutagenic or teratogenic effects, the release of the same constituents in concentrations as great as 400 times higher would not have a neutral effect on the environment (e.g. organisms exposed to surface water into which the waste is washed). Given their high degree of

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4 TECO proposed finding 176.

concentration, the hazardous constituents could do substantial damage before diluting to acceptable levels.

TECO emphasizes again and again that its waste is not classified as hazardous and that 40 CFR 264.94(a) applies only to hazardous waste sites. This argument ignores the point made by the State's proposed findings. As stated by B-19, hazardous constituents released from hazardous waste should effect the environment in the same way that the very same hazardous constituents from non-hazardous waste affect it. TECO has not shown arsenic from a non-hazardous waste to be less harmful than arsenic from another waste that happens to be legally classified as hazardous.

Columns 3 and 4 of the chart in State's proposed finding B-17 illustrate the highly concentrated nature of the contaminants in the waste. Mr. Hetherington supported this finding by saying:

> One example of the insolubility of <u>these resins</u> is their use in municipal water treatment systems to treat drinking water. Specifications typically require that each cubic foot of resin treat at least one million gallons of water. [Emphasis added.] TECO Dir. 101.

Mr. Hetherington, in referring to "these resins", was referring to the resins used at TECO, which were the subject of his prior sentences. Mr. Hetherington did not differentiate between the resins used at municipal plants and those used at TECO. Unless the resins used in municipal systems were the same as those used at TECO, a description of the traits of these resins would

have no relevance to TECO's resins. It is thus apparent that a small amount of resins removes, and thus concentrates, the pollutants from a very large amount of water.

TECO also argues that the water treatment plant removes contaminants from the raw water before it reaches the secondary system. The citation used by TECO to support this argument does not confirm this argument. TECO Dir. Briden 11. TECO's statement that the water in the secondary system is not raw water may nonetheless be correct, although the testimony examined by counsel for the State while writing the proposed findings seemed to indicate otherwise. This issue need not be resolved by the Presiding Officer, however, since it does not affect the finding that contaminants from large amounts of lake water are concentrated in small amounts of waste. Under TECO's scenario, if a million gallons of water are used for every cubic foot of resins, the water treatment plant instead of the resins removes the contaminants from this million gallons before sending it to the secondary system. The contaminants still end up in the same place -- the waste proposed for burial at TECO. TECO's complaint that the State has engaged in "obfuscation" (Reply page 7) thus is merely an attempt to draw attention away from important matters by focusing on insignificant facts.

On page 8 of its reply, TECO attempts to refute the State's statement that the TECO waste sample was diluted and thus could contain concentrations of pollutants even higher than shown in

Table 17-1. However, in his testimony Mr. Briden did not just say the sample contained water, he said the sample contained "a lot of water" and that it was "very, very loose sludge". Briden Tr. 154.

In an apparent attempt to convince the Presiding Officer that the waste is harmless, TECO states that sludge produced by the Cities of Toledo and Oregon have less heavy metals. TECO Proposed Finding 142. However, Toledo and Oregon are not asking for permission to bury their waste 25 feet from a wetland in an area subject to frequent flooding.

Regardless of TECO's attempts to make its waste appear innocuous, the record contains ample evidence indicating that this is not so. While it is foolish to place any waste in an area with the characteristics of the proposed burial site, it is doubly reckless to place waste with these pollutants in such an area.

C. Location And Environs Of The Proposed Disposal Site

On page 3 of its reply, TECO provides examples of what it claims are inaccurate proposed State findings. TECO states that Mr. Jackson's testimony did not support the State's proposed finding that Navarre Marsh contained several tall, isolated trees for eagle nesting. A quotation will suffice to show that Mr. Jackson, in fact, said exactly that. In referring to the Peregrine Falcon's roosting habits, he said:

> It might rest on a tall tree, a craggy tree, of which there are only a few in Navarre Marsh per se. [Emphasis added].

Jackson Tr. III 197. It is hard to conceive of language that more clearly establishes that Navarre Marsh is home to several tall isolated trees. Mr. Jackson subsequently stated that tall, isolated trees are typical eagle nesting sites. Id. at 198. While the eagle presently does not nest in Navarre Marsh, testimony very clearly establishes that the marsh might be a future nesting site.[4] See State Proposed Findings C-14, C-16, C-17.

D. Description Of The Proposed Disposal Cells

No further discussion of this topic is necessary.

E. Flooding Of The Proposed Disposal Site

TECO admits that the proposed burial site is plagued by flooding but attempts to minimize the fact by saying lake levels have been abnormally high during the last fifteen years. TECO Proposed Finding 35. How a condition which has persisted for fifteen years can be termed "abnormal" is anyone's guess.

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4 TECO correctly points out that Common Terns do not nest in marshland. Including the Common Tern in the list of endangered birds that could nest in Navarre Marsh was an error on the part of lead counsel for the State. The King Rail, on the other hand, probably does nest in Navarre Marsh and/or the triangular marsh. Mr. Jackson's failure to see King Rails at Navarre Marsh is not at all unusual, since the rail is "very secretive" and hides in dense vegetation. Jackson Tr. III 195. As an off-the-record aside, lead counsel for State in ten years of birdwatching has been unable to find a King Rail, despite frequenting habitat known to harbor the bird.

To support its view that lake levels will decline, TECO cites a prediction by the Army Corps of lower lake levels for the next six months (six months from the hearing in January). This prediction is meaningless, given the undisputed and widely known fact that spring is the wettest season of the year, causing water levels to peak by mid-summer and to reach their low in mid-winter. Guy Tr. III 96-7.

In Proposed Finding 35, TECO states that "Mr. Guy, testified that a spectral analysis of lake levels by Cohn and Robinson suggests that high lake levels will not persist". Mr. Guy, however, stated that the analysis by Cohn and Robinson predicted that lake levels would only begin to drop by the mid 1990's. Guy Tr. III 96. Therefore, under this analysis, the burial site will be subject to frequent flooding for years before the lake levels even begin to go down. If lake levels have a fifty year cycle as TECO suggests, the disposal site will continue to go through high lake periods, since resins are non-degradable and the waste will remain there indefinitely. Wasilk Tr. II 167.[5]

Although TECO has designed its plant for the worst possible meteorological event, it has declined to ascribe the same importance to protecting invaluable area resources from its

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5 TECO seeks to rebut the prediction of high water in the 1990's by pointing to Mr. Guy's statement that the projected high point for the lake in the 1990's is slightly lower than current lake levels. This, however, may only indicate that current levels are higher than expected.

disposed waste. Since the waste will remain on site indefinitely, there is plenty of time during which extraordinary weather events could occur and damage the cells. Since destruction of the cells would occur well short of the probable maximum meteorological event, a release of waste is not that unlikely a scenario. Guy Tr. III 320-1.[6]

Although TECO seeks comfort in the dikes along Lake Erie, these dikes are not likely to adequately protect the disposal area from severe storms. Contrary to TECO's Proposed Finding 42, Mr. Guy's testimony did not establish that the dikes destroyed in the 1972 storm were primarily unarmored. He specifically stated that some of the breached dikes were armored and some of them were unarmored. Guy Tr. III 219. Then, in the same Proposed Finding 42, TECO mischaracterizes Mr. Guy's testimony one more time by saying he admitted that the burial site would be in still water during a flood. What Mr. Guy actually said was that most of the 23,000 acres of Ottawa County inundated in a flood would be in slack areas (not necessarily the burial site, which is closer to the lake and the river than the majority of flooded land) and that these

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6 In a footnote, TECO notes that hazardous waste facilities can be located in 100 year floodplains if designed and operated properly. Prop. Find. 36, fn. 9. A 100 year flood, of course, is not a 10 or 50 year flood. In addition, hazardous waste facilities are not necessarily landfills but can be tank farms and other above-ground storage facilities. Instructively, the Ohio solid waste regulations prohibit landfills in a floodplain unless a special waiver is given by Ohio EPA. OAC 3745-27-06(I).

areas would be primarily (but not all) in standing water. Guy Tr. III 183-5. Note that this testimony was speaking in generalities, and was not specifically addressing a storm in which the lake dikes failed.

Roughly 47 percent of the shore is unprotected from storms. Parts of the Lake Erie shore are not protected by dikes or even barrier beach. Guy. Tr. III 113. (In Proposed Finding E-15, the State wrote that 47 percent of the dikes were unarmored. This should have read that 47 percent of the lakefront is unprotected against storms. Where dikes are found along the lakefront, 30 to 40 percent of them are unarmored. Herdendorf Tr. I 221).

As TECO has stated (Proposed Finding 176), 10 CFR Part 61 reflects the Commission's efforts to study and develop licensing criteria for low level radioactive waste disposal sites. In fact, TECO in its Proposed Conclusions of Law 1 and 2 uses language from 10 CFR 61.23 to establish the standards for issuing the license. As such, 10 CFR 61.50(a)(5) results from the Commission's finding that waste disposal sites are not safe in 100 year floodplains. While 10 CFR 20.302 provides an opportunity for disposal less restrictive than those in 10 CFR Part 61, this section is not meant to authorize disposal in areas which may release waste into the environment through flooding just because the waste has lower levels of radioactivity.

F. Geologic Characteristics of the Proposed Disposal Site

Besides relying heavily on the testing of a non-geologist for geologic testimony, TECO insists on basing one of its proposed findings on the naked, unsupported statement by Mr. Swim that the burial area has "favorable geologic conditions". TECO Proposed Finding 180. Unlike Mr. Henderson, Mr. Swim did not even pretend to have credentials in geology. Swim Tr. I 169. Such an attempted proposed finding demonstrates TECO's desperation for geologic testimony.

Rather than demonstrating meaningful geologic study of the burial site, TECO repeatedly focused most of its attention on pointing out uncertainties in the State's knowledge about the site. TECO Proposed Finding 61 is a prime example. Rather than showing the geology to be appropriate for waste disposal, TECO spends most of its effort emphasizing that the State cannot be positive that the geology is inappropriate. However, TECO has the burden of proof on this issue, not the State. The State has no obligation to test the site. The State's testimony establishes that the best available information indicates poor geologic conditions at the burial site. Of course, there is a possibility that cobbles or sand lenses may not exist at the site. However, the probability is in favor of finding these permeable structures at the site. Pavey Tr. III 252-3. It should be noted that each till in that area of the state ordinarily contains sand and gravel lenses, pipes, and seams which carry water. Pavey Tr. III 117. Although the site

is likely to have more than one till, the existence of multiple tills is not essential for the presence of permeable structures. The State has been limited to describing the geology likely to be present at the burial site because TECO has provided no geologic information about the site. Pavey Tr. III 115-6. TECO, on the other hand, attempts to carry its burden of proof by presenting geotechnical engineering information, gathered by construction personnel who knew no geology, who were not even looking for geologically significant information, and who did not even testify. Hendron Tr. II 32-3, 42. To cap it all, TECO presented the information through the testimony of a witness who knows only geotechncial engineering and who was not even present when the informtion was obtained. Id.

In footnote 14 of its Proposed Findings, TECO selectively cites testimony of John Voytek to assert that TECO's laboratory permeability testing does not underestimate permeability (pg. 27). TECO states:

> He acknowledged that he had no proof that laboratory tests necessarily underestimate permeability.

What Mr. Voytek actually said is as follows:

> I have no proof that all laboratory testing is at least one order of magnitude difference, but it is my belief that that would be so, yes, just from the nature of sampling and how the samples are normally run. [Emphasis added].

Voytek Tr. III 307. Obviously, Mr. Voytek does not know about every soil sample ever tested by a lab for permeability, and thus has no proof that all laboratory testing has been inaccurate.However, his testimony establishes the likelihood that lab testing generally underestimates permeability.

TECO tries to bolster its faulty testing method by stating the tests were run on intact Shelby tube samples rather than mixed soil. Footnote 14, pg. 28. However, the Shelby Tube is merely an instrument to collect samples and is not used to test them for permeability. The method of sample collection in the field has no bearing on the method of permeability testing used on the sample in the lab. In fact, the samples ordinarily are mixed together in the lab as part of the testing procedure, not in the field. Voytek Tr. III 308. TECO never told us what lab procedures were used in its permeability testing, nor does any statement in the record suggest that lab testing is performed differently than it was in the 1970's.

G. The Hydrology Of The Proposed Disposal Site

TECO expends a great deal of effort discussing the differences between its and the State's definitions of an aquifer. Eg., TECO Proposed Finding 80. Despite semantic differences, however, one fact is clear: the near surface soils at the site are seasonably very wet. Hendron Tr. III 350; See State Proposed Finding G-3. Mr. Hendron tried to minimize the

wetness of the soil by saying it is only "partially saturated." TECO Dir. Hendron 44.

While TECO tried to denigrate the significance of the water in the upper soil layers by saying ponding shows impermeability (Proposed Findings, fn. 25), such is not the case. While the ponded water does not migrate immediately to the bedrock aquifer, it does reach the aquifer and can carry contaminants along. Voytek Tr. III 140-2. Subsection (5) of 10 C.F.R. 61.50(a) acknowledges the danger of siting landfills in areas of this nature by providing:

> The disposal site must be generally well drained and free of areas of flooding or frequent ponding. [Emphasis added.]

TECO's unconscientious attempt to put a landfill into an area such as this should be rebuffed.[7]

H. Conclusion

TECO has reminded the Commission time and time again of the Commission's promotion of on-site disposal of low level radioactive waste. E.g., TECO Proposed Findings 177-179.

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7 On page 4 of its reply, TECO tries to differentiate between observations of water levels in the borrow pits during dewatering and current observations. However, testimony established that fluctuation of water levels in such large ponds would not be noticeable by visual observation either during dewatering or in the absence of watering, unless the water levels were actually measured. Voytek Tr. III 159. TECO's efforts to differentiate the two situations must be rejected.

While the State appreciates the Commission's desire to save space in off-site low level radioactive waste sites, TECO's proposed burial site is not the proper place to establish a precedent for on-site disposal.

Although 10 C.F.R. Part 61 is not binding on disposal requests submitted pursuant to 10 C.F.R. 20.302, 10 C.F.R. 61.50 does contain common sense technical guidelines by which waste disposal sites can generally be judged. The provisions of 10 C.F.R. 20.302 themselves require the Commission to consider the topographical, geological, meteorological, and hydrological characteristics of a proposed site. Not only does TECO's proposed burial spot possess physical characteristics likely to cause failure of the disposal facility, but it also is located in the midst of irreplaceable resources which could be damaged if cell failure occurs. The State respectfully urges that TECO's proposed site is a highly inappropriate place to initiate the on-site burial of waste. In addition, the State urges that its natural resources not be exposed to such potential damage based solely on the woefully inadequate investigation performed by TECO.

Respectively submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that a true copy of the foregoing Reply by State of Ohio to Filings of Toledo Edison served by regular U.S. Mail, postage prepaid, this 26th day of September, 1986, on:

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