

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY FOR APPROVAL OF TARIFF  
AMENDMENTS.

CASE NO. 22-1127-EL-ATA

IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC. FOR  
APPROVAL OF NEW OR AMENDED RATE  
SCHEDULES AND TARIFFS.

CASE NO. 22-1129-EL-ATA

IN THE MATTER OF THE APPLICATION OF  
THE DAYTON POWER AND LIGHT  
COMPANY D/B/A AES OHIO FOR A TARIFF  
REVISION TO IMPLEMENT MINIMUM  
STAYS FOR GOVERNMENT  
AGGREGATORS.

CASE NO. 22-1138-EL-ATA

IN THE MATTER OF THE APPLICATION OF  
OHIO POWER COMPANY FOR APPROVAL  
OF NEW OR AMENDED RATE SCHEDULES  
AND TARIFFS.

CASE NO. 22-1140-EL-ATA

### FINDING AND ORDER

Entered in the Journal on March 8, 2023

#### I. SUMMARY

{¶ 1} The Commission approves the applications of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Duke Energy Ohio, Inc., The Dayton Power and Light Company d/b/a AES Ohio, and Ohio Power Company d/b/a AEP Ohio to modify their respective supplier tariffs to address a “minimum stay” related to governmental aggregators prematurely returning customers to default service from an aggregation program, subject to the findings contained herein.

#### II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company (collectively, FirstEnergy), Duke Energy Ohio, Inc. (Duke), The

Dayton Power and Light Company d/b/a AES Ohio (AES Ohio), and Ohio Power Company d/b/a AEP Ohio (AEP Ohio) are public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} On September 7, 2022, in response to Northeast Ohio Public Energy Council's (NOPEC) decision to return 500,000 customers to standard service offer (SSO) service before the expiration of the governmental aggregation program term, the Commission issued an Entry, directing NOPEC to show cause why its certificate should not be suspended. Additionally, pursuant to R.C. 4909.18, the Commission directed the electric distribution utilities (EDU) in Ohio to work with Staff to develop proposed amendments to their respective supplier tariffs providing for a "minimum stay" to prevent governmental aggregators from prematurely returning customers to default service and then, within an unreasonably short time, reenrolling such customers in a new aggregation program. *In re Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator*, Case No. 00-2317-EL-GAG (*NOPEC Certification Case*), Entry (Sept. 7, 2022) at ¶ 14 and *In re the Motion of Northeast Ohio Public Energy Council for a Limited Waiver of Rule 4901:1-10-29(H) of the Ohio Admin. Code*, Case No. 22-806-EL-WVR, Entry (Sept. 7, 2022) at ¶ 14.

{¶ 4} On December 8, 2022, the above EDUs, in each of their respective dockets, filed applications requesting to modify their respective tariffs to provide for the above-mentioned "minimum stay." The EDUs proposed to amend the following current tariffs: FirstEnergy P.U.C.O. No. S-2, Sheet 1, 1<sup>st</sup> Revised Page 1 of 1, Section F; Duke P.U.C.O. Electric No. 19, Sheet No. 22-9 at Page 6 of 7, Section III(8); AEP Ohio P.U.C.O. No. 21, Original Sheet No. 103-22, Section 27; AES Ohio P.U.C.O. No. 17, Eleventh Revised Sheet, Page 16 of 36, Section 4. Additionally, in Case No. 22-1141-EL-AAM, AEP Ohio filed an application for authority to defer costs incurred to implement the proposed tariff provisions.

{¶ 5} By Entry issued December 15, 2022, the attorney examiner directed interested stakeholders to file comments concerning the application. Initial comments were due by January 6, 2023, and reply comments were due by January 17, 2023.

{¶ 6} On January 6, 2023, Northwest Ohio Aggregation Coalition (NOAC) filed a motion to intervene in Case No. 22-1127-EL-ATA. On January 6, 2023, in all of the above-captioned dockets, motions to intervene were filed by Calpine Retail Holdings, LLC (Calpine); Ohio Consumers' Counsel (OCC); NOPEC; and Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. (collectively, Constellation). No memoranda contra these motions to intervene were filed. The Commission finds that the above motions to intervene are reasonable and, therefore, should be granted.

{¶ 7} On January 6, 2023, Dynegy Marketing & Trade, LLC (Dynegy), Calpine, Interstate Gas Supply, Inc. (IGS), Vitol Inc. (Vitol), OCC, NOPEC, and Retail Energy Supply Association (RESA) filed their respective initial comments in the above-captioned cases. On the same date, NOAC filed initial comments only in Case No. 22-1127-EL-ATA.

{¶ 8} On January 17, 2023, Calpine, IGS, RESA, OCC, and AES Ohio filed their respective reply comments and Constellation its joint reply comments in the above-captioned cases. On the same date, Dynegy and NOPEC filed reply comments in Case Nos. 22-1127-EL-ATA and 22-1140-EL-ATA; AEP Ohio filed reply comments in Case Nos. 22-1140-EL-ATA and 22-1141-EL-AAM; and Duke filed reply comments in Case No. 22-1129-EL-ATA.

### III. DISCUSSION

#### A. *Applications and Proposed Tariff Amendments*

{¶ 9} In their applications requesting to modify their respective supplier tariffs, AEP Ohio, Duke, and AES Ohio submitted proposed tariff language that was nearly uniform. Each tariff required that, if more than 5,000 customers are returned to that EDU's SSO by a governmental aggregation program from an opt-out aggregation program before the end of the aggregation term, then the governmental aggregator may not offer an opt-out aggregation program for a minimum stay of at least 12 months following that return, with this stay extending to May 31 following the end of the minimum stay period or to a later date as may be ordered by the Commission. Each of their proposed tariffs also require a

governmental aggregator, no less than 10 days prior to returning a group of customers from the governmental aggregation program to the SSO prior to the scheduled expiration of the program, to file notice of such return in the governmental aggregator's certification docket with the Commission. The three EDUs require the notice to specify the reason for returning such customers to the SSO. Also, AEP Ohio and Duke require that the governmental aggregator provide notice to the EDU at the same time the governmental aggregator files notice of the return of customers in the certification docket. AES Ohio's proposed tariff language does not specifically require notice be given to AES Ohio.

{¶ 10} Included in AEP Ohio's application, it requests accounting authority to defer costs associated with the new tariff provisions and related matters, which it argues is consistent with R.C. 4905.13 and 4928.20. Also, AES Ohio requests, "out of an abundance of caution," a limited waiver of Ohio Adm.Code 4901:1-10-32, which is the Commission rule addressing cooperation with certified governmental aggregators, to the extent there is any conflict between that rule and the proposed tariff.

{¶ 11} FirstEnergy's proposed tariff is similar to the other EDUs' proposals; however, some notable differences exist. FirstEnergy's proposed tariff sets a minimum stay threshold of a return of more than 25,000 customers or 25 megawatts (MW) of a governmental aggregator's load, whichever is less, to the SSO by a governmental aggregator from an opt-out aggregation program before the end of the aggregation term. Further FirstEnergy's proposed tariff provides that "In advance of the return, the Governmental Aggregator shall provide notice to the Company of the name, service address, and account number of all customers who are being returned to the SSO, as well as 36 months of energy consumption data, or the maximum amount of such data that is available up to 36 months, for the returning customers, by customer class[.]" FirstEnergy also requires the governmental aggregator to file notice of the customer return in the aggregator's certification docket, though the language does not specifically require the notice to provide a reason for such return. The proposed tariff language also requires that, if the above customer return threshold is met, then the governmental aggregator may not offer an opt-

out aggregation program to the customers returned to the SSO for a minimum of 12 months. FirstEnergy's tariff allows for the governmental aggregator to reinitiate its opt-out program beginning June 1 following the completion of this minimum stay or at a date later ordered by the Commission. Finally, FirstEnergy also includes a provision clarifying that customers who were returned to the SSO by the governmental aggregator are not limited from shopping with a competitive retail electric service (CRES) provider during the stay.

**B. *Comments and Conclusions***

{¶ 12} In its comments, IGS argues that the Commission's ability to regulate an EDU's CRES lies solely through an SSO established pursuant to R.C. 4928.141-143. IGS asserts that the Commission's directive to the EDUs to modify their supplier tariff regarding the governmental aggregator issue described above amounts to amending an EDU's already-approved Electric Service Plan (ESP) in the middle of such ESP term, and IGS discourages the Commission from doing so. According to IGS, SSO suppliers willingly participate in the EDUs' auctions and choose to service the load fully knowing the uncertainty involved with serving such load. IGS avers that NOPEC's decision to return customers to the SSO was a present and inherent risk during the auction process, and any party bidding on the SSO should have effectively priced in such a risk. IGS believes that, in order to prevent anticompetitive effects, default service pricing should cover all retail risks and costs, including the risks of migration to and from default service and competitive service, which should not be limited by minimum stay periods or other artificial barriers in the market. (IGS Initial Comments at 4-5; IGS Reply Comments at 4-5.)

{¶ 13} In response to IGS's assertion that the Commission should not amend tariffs outside of an ESP, AEP Ohio argues that such a position has no legal basis. According to AEP Ohio, the EDUs update their tariff sheets on a regular basis either when rate changes occur or as directed by the Commission, as was the case here. Further, AEP Ohio argues that the above assertion from IGS along with IGS's argument that the Commission should not adopt a minimum stay tariff qualify as an untimely application for rehearing and as a

collateral attack on the Commission's September 7, 2022 Entry in Case No. 00-2317-EL-GAG directing EDUs to file minimum stay tariffs. (AEP Ohio Reply Comments at 1, 3-4.)

{¶ 14} Regarding IGS's argument that the Commission's directive to EDUs to modify their supplier tariffs regarding the governmental aggregator issue amounts to unlawfully amending an EDU's already-approved ESP outside of R.C. 4928.141-143, the Commission agrees with AEP Ohio that there is no legal basis to support IGS's position. The Commission should "respect its own precedents in its decisions to assure the predictability which is essential in administrative law." *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 at ¶ 16 (*quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)). This does not mean, however, that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. In this case, the Commission is responding to the unprecedented return of over 500,000 customers to SSO service prior to the scheduled termination of the aggregation program with a tariff change which will bring a measure of stability to the market. Moreover, as AEP Ohio highlights, EDUs update their tariff sheets regularly, and the Commission specifically directed the EDUs to file their applications amending their supplier tariffs in accordance with R.C. 4909.18. Therefore, we find no merit in IGS's argument. Furthermore, regarding IGS's assertion concerning artificial barriers in the market, part of our mission is to promote the state energy policy of fostering competition within the retail electric service choice market. Here, we do not believe our actions hinder competition in the choice market but rather are narrowly tailored to avoid repetition of an unprecedented premature, large-scale return of governmental aggregation program customers to the SSO that adversely affected the SSO wholesale auctions in Ohio.

{¶ 15} In its comments, Dynegy states that it supports the proposed tariffs though believes the Commission should ensure that the tariffs are aligned in their terms to prevent the application of different standards in different EDU service territories in Ohio (Dynegy Initial Comments at 1-2). RESA, Constellation, OCC, and NOAC echo this position, calling for consistency and uniformity between the tariffs. NOAC believes that such consistency will ease the burden on bidders and encourage competition, and RESA recommends that only the specific proposed tariff language be adopted by the Commission and not any of the extraneous information contained elsewhere in the applications. (RESA Initial Comments at 5-6; Constellation Jt. Reply Comments at 2-3; OCC Reply Comments at 4; NOAC Initial Comments at 3-4.) IGS opposes approval of the applications; however, if approved, IGS also requests that the tariffs be consistent across the EDU service territories (IGS Initial Comments at 5).

{¶ 16} In response to stakeholder comments asking for uniformity across the EDUs' tariffs, AEP Ohio notes that some consistency is reasonable, but uniformity is unnecessary, considering there may be circumstances where each EDU may need to insert provisions specific to their business regarding the impact of the return of governmental aggregation customers (AEP Ohio Reply Comments at 2-3).

{¶ 17} Several commenters weigh in on the governmental aggregation program return threshold that would trigger the minimum stay contained in the proposed tariffs. Dynegy and Constellation argue that FirstEnergy did not offer a rationale in its application and failed to file comments explaining why it proposes to set its minimum stay threshold at either a return of more than 25,000 customers or 25 MW of a governmental aggregator's load, whichever is less, instead of a proposal similar to the other EDUs who propose a threshold based off of a return of more than 5,000 customers to default service. Dynegy, Constellation, and RESA support revising FirstEnergy's tariff such that the minimum stay is triggered upon the return of more than 5,000 customers to default service. (Dynegy Initial Comments at 2; Constellation Jt. Reply Comments at 4; RESA Initial Comments at 5-6.) NOAC asserts that part of FirstEnergy's proposed minimum stay threshold, 25 MW of a

governmental aggregator's load being returned, is unclear. NOAC states that it assumes that this load refers to the sum of the Peak Load Contribution (PLC) calculated by FirstEnergy for each delivery year of the aggregation customers returned to the SSO; however, NOAC notes that PLC information is not included in governmental aggregation files provided by FirstEnergy to aggregation communities. To comply with this provision, NOAC asserts that the governmental aggregator would be required to cross-reference customer information with data from the eligibility files, which is unnecessarily complex and burdensome for a community aggregator. NOAC believes that any minimum stay threshold should be set at a specific number of customers. (NOAC Initial Comments at 4.) In its comments, OCC states that, outside of several of its own recommended additions to the tariffs, it supports the proposed tariffs and did not raise any issues with the different minimum stay thresholds between the tariffs (OCC Initial Comments at 4-5). None of the EDUs responded to comments related to the threshold issue.

{¶ 18} While the Commission does not believe complete uniformity is required among the proposed tariffs, we maintain that consistency among the proposed tariffs is important to ease the burden on those entities affected by such stays in the different EDU service territories in Ohio. Consequently, the findings herein result in minimum stay tariffs that are consistent with one another even though they may not be identical. The Commission believes the EDUs' minimum stay tariffs should be consistent with one another concerning the threshold at which a minimum stay will be implemented. To keep the threshold consistent across the EDU service territories and to avoid the burden identified by NOAC above, we direct that the threshold should be based only on a specific number of customers returned from the governmental aggregation program to the SSO and not based on the volume of load returned by the governmental aggregator, as FirstEnergy proposed in its tariff. Also, we note that no EDU provided reasoning as to why their specific customer return threshold was selected. We view the threshold proposed by AEP Ohio, Duke, and AES Ohio of a return of more than 5,000 customers to default service as being reasonable and material enough of a customer return to default service to implement the minimum



stay; therefore, we direct FirstEnergy to revise its proposed tariff such that the threshold equates to a return of “more than 5,000 customers” to the SSO.

{¶ 19} The Commission also believes that the length of the minimum stay period specified within the proposed tariffs should be consistent with one another. As proposed, once a governmental aggregator prematurely returns its customers to default service, each of the tariffs set a minimum stay period of 12 months plus any additional time necessary to reach the end of the applicable energy procurement delivery year, which is May 31, before the governmental aggregator can reenroll such customers. However, unless ordered otherwise in the future, the Commission finds that only a 12-month stay without any additional time suffices to accomplish our noted objective of implementing a minimum stay tariff to prevent governmental aggregators from prematurely returning customers to default service and then, within an unreasonably short time, reenrolling such customers in a new aggregation program. Therefore, we direct the EDUs to revise their proposed tariffs such that the minimum stay period for governmental aggregators be only 12 months upon the premature return of customers to default service, unless ordered otherwise by the Commission.

{¶ 20} Dynegy, Calpine, Constellation, OCC, and RESA support including a provision similar to the one proposed in FirstEnergy’s tariff explicitly stating that the proposed tariff amendment does not limit customers who were returned to the SSO by the governmental aggregator from shopping with a CRES provider during the stay (Dynegy Initial Comments at 3; Calpine Initial Comments at 3; Constellation Jt. Reply Comments at 3; OCC Initial Comments at 5-6; OCC Reply Comments at 4; RESA Initial Comments at 5). Although IGS opposes the applications, if approved, its supports including such an amendment as well (IGS Initial Comments at 5-6; IGS Reply Comments at 5-6). Duke notes that it does not believe its proposed tariff language limits customers who were returned to the SSO by a governmental aggregator from shopping with a CRES provider but agrees to include clarifying language (Duke Reply Comments at 3-4). In its reply comments, AES Ohio notes its support for including such a provision and offers its own proposed language

(AES Ohio Reply Comments at 3). AEP Ohio asserts that its proposed tariff does not prevent customers returned to the SSO from shopping with a CRES provider. AEP Ohio argues that the tariff merely prevents the governmental aggregator from taking returned customers back during the minimum stay period and that, as such, customers returned to the SSO as a result of this tariff will have the same opportunity to shop as do other customers. Therefore, AEP Ohio believes an amendment to the proposed tariff is unnecessary. (AEP Ohio Reply Comments at 4-5.)

{¶ 21} While the Commission is not convinced that the EDUs' proposed tariffs prevent or limit customers prematurely returned to the SSO by a governmental aggregator from shopping with a CRES provider during the stay period, nevertheless, we believe that adding a provision similar to that included in FirstEnergy's proposed tariff, explicitly stating that the proposed tariff amendments do not limit customers who were returned to the SSO by the governmental aggregator from shopping with a CRES provider during the stay, ensures clarity on the matter. Therefore, the Commission approves the newly proposed language offered by AES Ohio and Duke in their reply comments and directs AEP Ohio to amend its proposed tariff to include a provision similar to that provided in FirstEnergy's tariff.

{¶ 22} Calpine notes that the EDUs' filings do not define governmental aggregator and recommends that the term's definition should align with the definition listed in R.C. 4928.01(A)(13) (Calpine Initial Comments at 2). In their reply comments, Duke and AES Ohio agree to implement Calpine's recommendation (Duke Reply Comments at 5; AES Ohio Reply Comments at 2-3). AEP Ohio did not respond to this specific recommendation.

{¶ 23} The Commission agrees with Calpine's recommendation to align the term "governmental aggregator" used in the proposed tariffs with the definition listed in R.C. 4928.01(A)(13). Therefore, we approve the tariff amendments offered by AES Ohio and Duke in their reply comments that incorporate the definition and direct AEP Ohio and FirstEnergy to incorporate the definition in their tariffs as well.

{¶ 24} Dynegy recommends that the following provision should be added to all of the EDU's proposed tariffs: "This section does not apply to a [g]overnmental [a]ggregator who returns customers to SSO at the end of the aggregation term originally set forth in the aggregation opt-out notices provided to those customers" (Dynegy Initial Comments at 3; Calpine Reply Comments at 4). AES Ohio notes that, while it believes its proposed tariff addresses Dynegy's concern regarding the minimum stay provision not applying to governmental aggregators who return customers to the SSO at the end of the aggregation term, it appreciates the benefit of added clarity and then proposes similar language in its comments (AES Ohio Reply Comments at 3-4).

{¶ 25} While the Commission is not convinced that the proposed minimum stay tariffs would apply to governmental aggregators who return customers to the SSO at the end of the aggregation term, nevertheless, we agree that Dynegy's proposed provision would add clarity to the matter. Therefore, we approve AES Ohio's proposed language incorporating this provision and direct FirstEnergy, AEP Ohio, and Duke to amend their proposed tariffs to include a provision that is the same or similar to Dynegy's proposal.

{¶ 26} NOPEC requests that any proposed minimum stay provision the Commission approves must be applied prospectively instead of retroactively. NOPEC asks for specific language stating the above be included in the tariffs (NOPEC Initial Comments at 3-5; NOPEC Reply Comments at 1-2). OCC states that the Commission should clarify in its order approving the proposed tariffs that such tariffs are not effective until after the Commission's decision on the matter (OCC Initial Comments at 2-4; OCC Reply Comments at 3). AEP Ohio states that, although it believes such a clarification is unnecessary, nonetheless it clarifies that it intends for its tariffs to be applied prospectively and will only apply to new conduct that occurs after the adoption of the tariffs (AEP Ohio Reply Comments at 5).

{¶ 27} Although the Commission never intended for the minimum stay tariffs to apply retroactively, we clarify that application of these tariffs will be prospective in nature and will take effect after the final tariffs are filed with the Commission.

{¶ 28} In its comments, Dynegy also states that it supports the provision included in FirstEnergy's proposed tariff regarding the governmental aggregator transmitting information about customers returned to the SSO, along with up to 36 months of customer consumption data by customer class, to the EDU and SSO suppliers. Dynegy believes that this provision ensures that the EDU and its SSO load suppliers have the data necessary to understand the impact of any premature return of customers to the SSO. However, Dynegy recommends that the beginning phrase of this provision should be revised from "[i]n advance of the return \* \* \*" to "[t]en (10) days prior to the return \* \* \*" to align with the 10-day notice period in other EDU tariff proposals. Dynegy requests that the above revised provision be included in the other EDUs' tariffs as well. (Dynegy Initial Comments at 2-3). In their reply comments, AEP Ohio and AES Ohio agree to include such a provision and offer proposed language (AEP Ohio Reply Comments at 2-3; AES Ohio Reply Comments at 4). Duke did not respond to this specific recommendation. NOAC, on the other hand, argues that FirstEnergy's requirement for a governmental aggregator to include up to 36 months of customer's consumption data is burdensome since FirstEnergy has this data readily available to it; therefore, providing the customer's name, address, and customer number should be sufficient (NOAC Initial Comments at 4).

{¶ 29} The Commission agrees with Dynegy that the provision within FirstEnergy's proposed tariff regarding transmittal of specified customer information to the EDU and SSO supplier is appropriate. Part of the purpose of implementing these tariffs is to protect wholesale auctions which provide the generation for SSO service in all EDUs' service territories in Ohio by mitigating the risk and uncertainty posed by large-scale premature migration from governmental aggregation programs to default service. Despite NOAC's protests otherwise, such information, including the 36 months of consumption data, will help the EDU and SSO load suppliers better ascertain the impact of the customer return. Further, we agree with Dynegy's proposal to amend the beginning phrase of FirstEnergy's provision from "[i]n advance of the return \* \* \*" to "[t]en (10) days prior to the return \* \* \*" to align with the 10-day notice period in other EDU tariff proposals. Accordingly, we approve the proposed language offered by AES Ohio in its reply comments

incorporating this provision. We approve AEP Ohio's proposed language offered in its reply comments, though we direct AEP Ohio to include the revision changing the beginning phrase of that provision. Finally, we direct Duke to incorporate such a provision within its tariff and FirstEnergy to amend the beginning phrase of its provision in the manner above.

{¶ 30} NOAC believes that not all reasons for an aggregator returning its customers to the SSO should be treated the same and that, at a minimum, an exception should be included in the tariffs that accounts for an aggregator being forced to return customers because of a supplier default (NOAC Initial Comments at 3). If the proposed tariffs are not rejected outright, IGS offers a similar suggestion and believes there should be exceptions to the tariff in cases where the customers are not at fault, including but limited to circumstances such as a supplier terminating its contract with a customer or a supplier or governmental aggregator declaring bankruptcy (IGS Initial Comments at 6). OCC agrees with these sentiments, noting that customers should not have to bear the burden of a minimum stay requirement through no fault of their own, as it would deprive the customers of the choice to participate in a governmental aggregation program without justification (OCC Reply Comments at 4-5).

{¶ 31} At this time, the Commission believes including an exception to the minimum stay tariffs relating to supplier default is warranted. Therefore, we direct the EDUs to include a provision in their proposed minimum stay tariffs providing that an exception to the implementation of the tariff exists when a governmental aggregator is forced to return customers to default service due to supplier default, as that term is defined in the EDU and supplier's master service agreement.

{¶ 32} In its comments, RESA argues that, to avoid potential confusion, the Commission should refer to the proposed tariff changes as governmental aggregation certification requirements and not minimum stay requirements. According to RESA, historically, minimum stay provisions were restrictions that attached to individual customers that required them to either stay on or off default service for a specified period of time, and the Commission has found these stay provisions to be anticompetitive and

inconsistent with state policy. See *In re Application of Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., Entry on Rehearing (Jan. 30, 2013) at ¶ 45. RESA asserts that referring to these tariffs as minimum stay provisions could create regulatory confusion and open the door for more far-reaching anti-competitive proposals. (RESA Initial Comments at 4-5.)

{¶ 33} Duke states that it does not oppose RESA's request to reframe the tariff modifications as conditions on governmental aggregators instead of as a minimum stay. Duke acknowledges the potential confusion that may result from phrasing the tariffs as a "minimum stay" when interpreted by the general public and regulated community. To avoid confusion, Duke proposes to revise the phrase "minimum stay period" to instead reference "exclusionary period for governmental aggregation" or other phrasing approved by the Commission (Duke Reply Comments at 2-3).

{¶ 34} AES Ohio does not oppose RESA's recommendation to reframe the proposed tariff revision as a restriction on governmental aggregators rather than a "minimum stay." Accordingly, AES Ohio proposes to amend the following language to Section 4.11 of its proposed tariff: revise the heading "Minimum Stay Provisions for Governmental Aggregation Opt-Out Programs" to "Restrictions on Governmental Aggregation Opt-Out Programs"; revise the text "minimum stay of 12 months" to "minimum period of 12 months"; and, revise the text "minimum stay period" to "minimum period." (AES Ohio Reply Comments at 4-5).

{¶ 35} AEP Ohio asserts that RESA's request to reframe the issue of "minimum stay" is unnecessary since the proposed addition to Section 27 of AEP Ohio's Terms and Conditions of Service specifically references governmental aggregations, which should nullify any potential confusion (AEP Ohio Reply Comments at 2).

{¶ 36} While we appreciate RESA's concern regarding potential confusion related to phrasing these tariffs as minimum stays, we believe the proposed tariffs are clear in that

they only affect a governmental aggregator and not individual customers. Therefore, we do not believe such an amendment is necessary and reject the request.

{¶ 37} In its comments, NOAC argues that FirstEnergy's proposed tariff should be in the electric service tariffs and not the supplier tariff, considering the other EDUs' proposed tariffs are placed in their electric service tariffs (NOAC Initial Comments at 2-3).

{¶ 38} We reject NOAC's recommendation. The September 7, 2022 Entry specifically directed the EDUs to provide amendments addressing minimum stays in their "respective supplier tariffs." *NOPEC Certification Case*, Entry (Sept. 7, 2022) at ¶ 14. Nevertheless, we find no issue with the placement of any of the EDUs' proposed tariff amendments.

{¶ 39} If the Commission does not deny the applications, IGS recommends that the Commission allow a minimum stay period to be imposed where the utility can demonstrate that customers were given at least 14 days' notice that they would be returned to the SSO subject to a stated minimum stay period and that customers failed to choose another alternative. According to IGS, the notice should specify: (1) the date by which the customer must choose another CRES provider or alternative and that the customer will return to the SSO if the customer fails to make such a choice, and (2) the minimum stay period during which the customer will be ineligible to switch. (IGS Initial Comments at 5.) In response, Duke argues that IGS's suggestion above is not applicable or contemplated by the situation considered by the proposed tariff amendments, which seek only to limit governmental aggregators' abilities to form a new aggregation, not an individual's ability to shop (Duke Reply Comments at 4, fn. 6).

{¶ 40} The Commission agrees with Duke's response to IGS's suggestion. IGS's proposal, including the notice, seems to assume that the minimum stay tariff will prevent customers who are returned from the governmental aggregation program to the SSO from being able to shop for CRES providers during that stay; however, as already demonstrated above, the proposed tariffs do not prevent or limit these specific customers from shopping

for a CRES provider during the stay, and we have directed a clarifying provision explicitly stating so to be included in the tariffs. We believe IGS's proposal is unnecessary and, therefore, reject it.

{¶ 41} Vitol states that, while the proposed tariff amendments are in line with Vitol's opinion that the market would benefit from stricter switching rules and regulations, more needs to be done to address the SSO market instability introduced by the unprecedented migration to the SSO by customers in 2022. Vitol supports the tariff changes; however, it requests that the Commission consider the following modifications: (1) implement stricter switching rules, particularly for large commercial and industrial customers and municipal aggregators, to mitigate price increases in future auctions resulting from high migration risk premiums; (2) bifurcating the SSO auction product into separate customer classes for further auctions to limit cross-subsidization issues due to the higher migration/switching risk premium associated with customer classes that pose the highest migration risk; and, (3) directing Ohio's EDUs to implement the standby service charge provision in R.C. 4928.20(J) in their respective current and future ESP cases. (Vitol Initial Comments at 2, 21-24.) In its reply comments, NOPEC echoes concerns raised by Vitol (NOPEC Reply Comments at 2-3). Similarly, NOAC believes the Commission should consider a more comprehensive evaluation of the risk of large customers jumping back and forth from CRES to SSO supply throughout the year and arbitraging the price difference as such differences occur. Further, NOAC urges the Commission to take a more comprehensive approach to protecting and improving the SSO and to address broader issues than those raised in this proceeding. (NOAC Initial Comments at 5-6.)

{¶ 42} OCC recommends that the Commission explore Vitol's proposal of conducting the SSO auctions by class. OCC admits that, while this proposal was not part of the Commission's original Entry on minimum stay tariff language, it believes the Commission should open an investigation as to a possible restructuring of the SSO auctions in such a way. If the Commission chooses to explore Vitol's proposals in a separate proceeding, OCC recommends that the Commission should consider extending minimum



stay requirements to commercial and industrial consumers and should explore the merits of implementing governmental aggregator standby riders. (OCC Reply Comments at 5-9.)

{¶ 43} Calpine, IGS, Constellation, AEP Ohio, and RESA argue that Vitol's comments should be rejected since they are outside the scope of this proceeding (Calpine Reply Comments at 2-3; IGS Reply Comments at 6-7; Constellation Jt. Reply Comments at 4; AEP Ohio Reply Comments at 4-5; RESA Reply Comments at 3-6). AES Ohio states that it appreciates Vitol's comments regarding the SSO framework in Ohio, but it also believes the comments are outside the scope of this narrow proceeding (AES Ohio Reply Comments at 5). IGS and RESA further assert that Vitol's recommendations are anticompetitive and inconsistent with state energy policy and Commission precedent (IGS Reply Comments at 6-7; RESA Reply Comments at 3-6).

{¶ 44} The Commission appreciates the above stakeholders' concerns with the current structure of the SSO in Ohio as well as suggestions on how to improve SSO market instability in the face of large-scale migrations to the SSO, and we note that we continue to review ways to improve the auction processes. *In re the Procurement of Std. Serv. Offer Generation for Customers of FirstEnergy, AES Ohio, AEP Ohio, and Duke*, Case No. 16-776-EL-UNC, et al., Entries (Jan. 3, 2023; Jan. 30, 2023) (soliciting stakeholder comments on a proposal to modify the SSO auction processes). However, the proceeding before us is a narrow one—implementing a minimum stay tariff to prevent governmental aggregators from prematurely returning customers to default service and then, within an unreasonably short time, reenrolling such customers in a new aggregation program. As such, these comments are outside the scope of this proceeding, and, therefore, we reject them.

{¶ 45} In its comments, OCC provides several recommendations for tariff amendments. OCC asserts that governmental aggregators should be required to notify their respective EDUs of their intent to enroll governmental aggregation consumers by at least February 1 of each year. Further, OCC recommends that the governmental aggregator must supply their consumers for a minimum of one year, which will offer even more certainty to SSO bidders by giving them information as to how many opt-out governmental aggregation

consumers will not be served by the SSO. Also, OCC believes that consumers should be able to easily opt-out of having their personal information released to marketers and that tariff changes should also include language to allow consumers to opt-out of electric marketer solicitations. (OCC Initial Comments at 4-6.)

{¶ 46} IGS, Constellation, and RESA assert that OCC's request for electronic eligible list opt-outs should be rejected as being outside the scope of the proceeding (IGS Reply Comments at 7; Constellation Reply Comments at 4; RESA's Reply Comments at 7-8). Further, IGS argues that the Commission rules adequately address the issue of customers being informed of their right to opt-out of the eligible customer list (IGS Reply Comments at 7).

{¶ 47} Regarding OCC's recommendations to require governmental aggregators to notify their respective EDUs of their intent to enroll governmental aggregation consumers by at least February 1 of each year and to supply their customers for a minimum of one year, we find these recommendations unnecessary and reject them. At this time, we believe the less inhibitive approach of discouraging governmental aggregators from prematurely returning a large group of customers to default service by implementing a minimum stay tariff is the more appropriate course of action compared to requiring governmental aggregators to supply their customers for one year. Also, regarding OCC's proposal to allow customers to opt-out electronically from letting an EDU share their information with suppliers, we find this proposal outside the scope of this proceeding and irrelevant to the issue of governmental aggregators returning customers to the SSO and then reenrolling them into an aggregation program within an unreasonably short time. Additionally, the Commission has previously found that a customer's opt-out options set forth in Ohio Adm.Code 4901:1-10-24 are sufficient. *In re the Comm.'s Rev. of its Rules for Elec. Safety and Serv. Standards Contained in Chapter 4901:1-10 of the Ohio Adm. Code*, Case No. 17-1842-EL-ORD, Entry on Rehearing (Jan. 27, 2021) at ¶ 41.

{¶ 48} Regarding AEP Ohio's request for deferral authority, Calpine opposes the request. Calpine argues that this request runs counter to the September 7, 2022 Commission

Entry issued in Case No. 00-2317-EL-GAG and to Ohio Adm.Code 4901:1-10-29(H), requiring customers returning to the SSO under other circumstances not be liable for any costs associated with the return. Calpine notes that the other EDUs did not request such authority. If the Commission grants such authority, Calpine asserts that the Commission should clarify that any resulting exit fee should be imposed only on the governmental aggregator and not on individual customers. (Calpine Reply Comments at 2-3.) RESA also opposes AEP Ohio's request. RESA notes that the December 15, 2022 Entry soliciting comments did not include AEP Ohio's deferral authority AAM case in the caption. Further, RESA argues that AEP Ohio has not provided any estimate of the type of magnitude of costs it is seeking to defer and potentially recover in the future. Consequently, AEP Ohio's deferral authority is premature. RESA also notes that the changes AEP Ohio seeks to implement are designed to support the SSO, so it would be appropriate that any ultimate cost recovery be assigned to the SSO. (RESA Reply Comments at 6.)

{¶ 49} At this time, the Commission will defer ruling on AEP Ohio's request for deferral authority in this specific proceeding. We believe it is more appropriate for AEP Ohio to address such a request, if it so chooses, in its currently pending ESP application in Case No. 23-23-EL-SSO, et al.

{¶ 50} Also, the Commission finds that AES Ohio's request, "out of an abundance of caution," for a limited waiver of Ohio Adm.Code 4901:1-10-32 to the extent this Commission rule conflicts with the proposed tariff is unnecessary and, therefore, denies the request.

{¶ 51} Although not addressed in the comments, we note that, while FirstEnergy's proposed tariff requires the governmental aggregator to notify FirstEnergy prior to the premature return of customers to the SSO and to file a copy of that notice in the governmental aggregator's certification docket with the Commission, the tariff language does not require the governmental aggregator to specify a reason for the return. Therefore, we direct FirstEnergy to revise its proposed tariffs to require the governmental aggregator to specify a reason for the return of customers to the SSO in its notice.

{¶ 52} Pursuant to R.C. 4909.18, the Commission finds that the applications filed by the EDUs in the above-captioned cases are not for an increase in rates and that the applications are just and reasonable and, therefore, approved, subject to the findings and directives in this order. Consequently, the EDUs shall file final tariffs, subject to final review by the Commission. The amended tariffs will become effective for all services rendered on or after the effective date of the tariffs.

#### IV. ORDER

{¶ 53} It is, therefore,

{¶ 54} ORDERED, That NOAC's, Calpine's, OCC's, and Constellation's motions to intervene be granted in the above-captioned case dockets. It is, further,

{¶ 55} ORDERED, That the applications filed by FirstEnergy, Duke, AES Ohio, and AEP Ohio not for an increase in rates be granted, consistent with this Finding and Order. It is, further,

{¶ 56} ORDERED, That the EDUs are authorized to file in final form two complete copies of tariffs consistent with this Finding and Order and to cancel and withdraw its superseded tariffs upon the effective date of the final tariffs. One copy shall be filed with these case dockets, and one copy shall be filed in the EDU's respective TRF docket. The EDUs shall also update their tariffs previously filed with the Commission's docketing division. It is, further,

{¶ 57} ORDERED, That the effective date of the revised tariffs shall be a date not earlier than the date of this Finding and Order and the date upon which two complete copies of the final tariffs are filed with the Commission. It is, further,

{¶ 58} ORDERED, That AES Ohio's request for a limited waiver of Ohio Adm.Code 4901:1-10-32 be denied. It is, further,

{¶ 59} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

**COMMISSIONERS:**

*Approving:*

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJS/dr

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**in**

**Case No(s). 22-1127-EL-ATA, 22-1129-EL-ATA, 22-1138-EL-ATA, 22-1140-EL-ATA**

Summary: Finding & Order that the Commission approves the applications of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Duke Energy Ohio, Inc., The Dayton Power and Light Company d/b/a AES Ohio, and Ohio Power Company d/b/a AEP Ohio to modify their respective supplier tariffs to address a “minimum stay” related to governmental aggregators prematurely returning customers to default service from an aggregation program, subject to the findings contained herein electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio