

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of the Electronic Application of Kentucky Power :
Company for (1) A General Adjustment of Its Rates for Electric :
Service; (2) An Order Approving Its 2017 Environmental :
Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) : **Case No 2017-00179**
An Order Approving Accounting Practices to Establish Regulatory :
Assets and Liabilities; and (5) An Order Granting All Other :
Required Approvals and Relief. :

**MOTION TO COMPEL DISCOVERY RESPONSES
OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

Kentucky Industrial Utility Customers, Inc. (“KIUC”) hereby moves the Kentucky Public Service Commission (“Commission”) to enter an order requiring Wal-Mart Stores East, LP and Sam’s East, Inc. (“Wal-Mart”) to respond to Questions 1-1 through 1-3 of KIUC’s August 14, 2017 First Set of Data Requests no later than October 27, 2017. A Memorandum in Support of KIUC’s Motion follows.

MEMORANDUM IN SUPPORT

KIUC’s August 14, 2017 data requests in this proceeding relate to the Testimony in Support of Intervention of Gregory W. Tillman (“Testimony”) filed by Wal-Mart on July 21, 2017. In that Testimony, Wal-Mart makes several claims regarding its economic impact on Kentucky. Specifically, Wal-Mart claims that it employs “*nearly 30,000 associates*” in the Commonwealth and that it uses “*848 Kentucky-based suppliers, supporting an additional 35,000 jobs.*”¹

¹ Testimony at 3.

KIUC's data requests simply ask for more detail surrounding those claims – detail that Wal-Mart previously indicated could be provided should KIUC ask.² KIUC Question 1-1 asks how many of the “*nearly 30,000 associates*” alleged to be employed by Wal-Mart were full-time employees and how many were part-time employees. KIUC Question 1-2 asks Wal-Mart to list the names of, products purchased from, and spending associated with its “*848 Kentucky-based suppliers.*” Finally, KIUC Question 1-3 requests the analysis underlying Wal-Mart's assertion that it supports an “*additional 35,000*” jobs in the Commonwealth.

KIUC attempted to derive much of this information at the hearing held in this case on July 24, 2017, but Wal-Mart's witness was unable to provide answers at that time.³ The witness confirmed that the economic impact information cited in his Testimony was derived from a Wal-Mart website and based upon a third-party study conducted by Dun & Bradstreet.⁴ But the witness had not independently reviewed the Dun & Bradstreet study nor could he provide more specific information with respect to the figures listed on Wal-Mart's website.⁵ Wal-Mart's witness did indicate, however, that such information could be provided later should KIUC ask.⁶ Accordingly, KIUC followed-up on its hearing inquiries by submitting written data requests to Wal-Mart on August 14, 2017.

Despite its representation at the hearing that more detailed information surrounding its economic impact figures could be provided at KIUC's request in a later stage in this proceeding,⁷ Wal-Mart now objects to providing all of the requested information on two grounds – relevance and harassment/undue burden – based upon the Commission's August 3, 2017 decision to grant Wal-Mart's intervention in this proceeding. Wal-Mart also objects to answering KIUC Questions 1-1 and 1-2 on the basis of confidentiality.

The information that KIUC seeks is still relevant to this proceeding. Kentucky Rule of Civil Procedure 26.02(1), regarding the scope of discovery, provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...” Wal-Mart's

² Tr. (July 24, 2017) at 1:05:10.

³ Tr. (July 24, 2017) starting at 12:35:00.

⁴ KIUC Cross-Examination Ex. 1; Tr. (July 24, 2017) at 12:37:51.

⁵ Tr. (July 24, 2017) at 12:38:36.

⁶ Id. at 1:05:10.

⁷ Id. at 1:05:10.

Testimony is now squarely within the record in this case. Although that Testimony may have initially been used merely as a basis for justifying Wal-Mart's intervention in this proceeding, Wal-Mart may subsequently use the economic impact figures contained in the Testimony as a policy basis upon which to argue for a favorable revenue allocation or for other purposes. Parties should therefore be given adequate opportunity to probe the veracity of the economic impact figures that Wal-Mart's voluntarily chose to include in its Testimony. Otherwise, Wal-Mart should be barred from citing that Testimony in the post-August 3, 2017 stage of this proceeding.

KIUC-1 is also not intended to harass or unduly burden Wal-Mart. Again, the issue of whether the Kentucky economic impact figures included in Wal-Mart's Testimony of record are accurate is not moot at this point since Wal-Mart could still cite those figures - which are now part of the evidentiary record - in the later stages of the proceeding. Further, Wal-Mart presumably has access to the Dun & Bradstreet study used as the basis for the cited Kentucky economic impact figures. Indeed, Dun & Bradstreet likely already compiled the detail that KIUC seeks in order to produce the figures cited in Wal-Mart's Testimony. Alternatively, internal Wal-Mart employees may have ready access to the requested information. Indeed, at the July 24, 2017 hearing under questioning from his own lawyer, Wal-Mart's witness explained how he could compile more detailed information surrounding the economic impact figures in his Testimony if KIUC asked for such information in the later stages of the case:

Q: If somebody were to ask you to go do a more detailed investigation as to the reliability of the data, could you do that?

A: I could.

Q: And specifically, what would you do if somebody asked you to go verify the accuracy of the data?

A: Well, I think I would go to Dun & Bradstreet first and see where they came up with their information and then I would... follow that to the key. But internally, in Wal-Mart, we have...people that track and monitor and provide this information just like...how do we know how much community giving we do in a particular state? That has to be tracked at the store level, basically, because that's who's doing most of the community giving across our nation.

Q: So if KIUC actually wanted to know these answers, they could ask you later in this case, couldn't they?

*A: They could.*⁸

⁸ Tr. (July 24, 2017) at 1:05:10 (emphasis added).

Yet Wal-Mart now seeks to foreclose KIUC from the very opportunity for discovery that it declared was the appropriate procedure at the intervention hearing in this proceeding.

KIUC would not object to Wal-Mart producing the requested information by as late as October 27, 2017. According to the Commission's current procedural schedule for this case, October 27, 2017 is the deadline for intervenor responses to requests for information. Allowing Wal-Mart the additional time to compile the requested information would reduce any perceived burden on Wal-Mart while still allowing KIUC to obtain the information it seeks.

Finally, with respect to Wal-Mart's objection to KIUC Questions 1-1 and 1-2 on the basis of confidentiality, Wal-Mart did not raise that objection when similar questions were asked at the July 24, 2017 hearing. Regardless, KIUC would be amenable to negotiating and entering into a separate confidentiality agreement with Wal-Mart in order to acquire the requested information.

WHEREFORE, for the foregoing reasons, KIUC respectfully moves that the Commission issue an order directing Wal-Mart to provide complete responses to KIUC Questions 1-1 through 1-3 no later than October 27, 2017.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: mkurtz@BKLawfirm.com

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.com

**COUNSEL FOR KENTUCKY INDUSTRIAL
UTILITY CUSTOMERS, INC.**

August 29, 2017