COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for Review, Modification, and Continuation of Existing, and Additional New, Demand-Side Management and Energy Efficiency Programs	)))))	**Case No. 2014-00003**

POST-HEARING BRIEF OF
WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, "Walmart"), submit this Post-Hearing Brief to the Kentucky Public Service Commission ("PSC" or "Commission") as follows:

I. INTRODUCTION

A. Statement of Case

In this case, Walmart would like the Commission to consider requiring Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, "Companies") to revise their current, narrow opt-out criteria so as to include large, energy intensive customers like Walmart, who invest significantly in their own Demand-Side Management and Energy Efficiency ("DSM/EE") programs and initiatives.

B. Walmart's DSM/EE Commitment

Walmart is a national retailer of goods and services throughout the United States, including approximately 100 retail units in Kentucky. Walmart's facilities include Walmart Supercenters, discount stores, Sam's clubs, and gas stations. Walmart directly provides over 28,000 jobs in Kentucky and contributes to Kentucky's economy through more than $1.5 billion dollars in annual purchases of goods and services from Kentucky-based suppliers, supporting 32,386 supplier jobs.[1] Walmart also is a large commercial customer of the Companies, with about 50 facilities purchasing more than 170 million kWh annually from the Companies, principally pursuant to service under the Time-of-Day Primary and Secondary rate schedules.[2]

Walmart has made multiple commitments to establish itself as a leader in DSM/EE efforts. In 2005, Walmart established the following goals:

1. To be supplied 100% by renewable energy;
2. To create zero waste; and,
3. To sell products that sustain people and the environment.

Additionally, in 2013, Walmart made two more commitments:

1. Scale renewable energy through driving the annual production or procurement of seven billion kWh of renewable energy across Walmart's global footprint by December 31, 2020 – an increase of over 600 percent compared to 2010; and,
2. Accelerate energy efficiency by reducing the kWh/sqft energy intensity required to power our buildings around the world by 20 percent versus 2010.[3]

In pursuing those commitments, Walmart has implemented a number of DSM/EE saving technologies, including:

- Daylight harvesting systems that monitor and adjust lighting intensity while automatically adjusting given the amount of light coming in from the skylights;
- White membrane roofs are placed on the roofs of facilities in certain parts of the country in order to lower cooling load;

[1] http://corporate.walmart.com/our-story/locations/united-states#/united-states/kentucky.
[2] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 3.
[3] Id.

- Heat reclamation from our refrigeration systems that is capable of meeting up to 70 percent of that stores hot water needs;
- Highly efficient HVAC systems;
- LED lighting; and,
- Active dehumidification that enables stores to operate at higher temperatures and use less electricity.[4]

In addition to the DSM/EE technologies listed above, all of the Walmart facilities across the United States, including those located in the Commonwealth, are centrally monitored to actively control the stores temperature, lighting, and refrigeration units. This "energy management system," in combination with advanced metering systems, also allows Walmart to efficiently implement demand response commands.[5] In short, Walmart is fully engaged and invested in DSM and EE.

C. Relevant Procedural History

On January 17, 2014, the Companies filed a Joint Application seeking approval of a proposed 2015-2018 Demand-Side Management and Energy Efficiency Program Plan ("DSM/EE Program Plan") and proposed tariffs.

On February 5, 2014, Walmart filed a Motion to Intervene, stating its initial concern that the Companies' proposed DSM/EE Program Plan could have an adverse financial impact on Walmart's current and future efforts to implement its own DSM/EE programs.

On April 14, 2014, Walmart filed the Direct Testimony and Exhibit of Kenneth E. Baker setting forth Walmart's proposal to revise the criteria for "opting-out" of DSM/EE programs. Per Mr. Baker's testimony, Walmart has proposed a benchmark opt-out level of 15 million kWh per

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[4] Id. at 4.
[5] Id.

year (aggregated consumption) for customers to be given the opportunity to opt-out of DSM/EE programs, as opposed to the Companies' current system, based arbitrarily on the North American Industry Classification System.[6]

On June 12, 2014, Walmart filed the Supplemental Direct Testimony of Kenneth E. Baker clarifying that Walmart currently has several accounts that participate in the Companies' DSM programs; however, it is still recommending that there be an opt-out for certain qualifying customers, so that such customers have available to them the opportunity to consider opting-out now and in the future.[7]

On September 3, 2014, Walmart appeared at the evidentiary hearing before the Commission. At the conclusion of the hearing, the Commission provided parties the opportunity to submit Post-Hearing Briefs, and Walmart hereby submits this brief in compliance with the Commission's directive.

D. Walmart's Recommendation

Walmart proposes that the Commission require the Companies to revise the qualifications for a non-residential customer to elect to "opt-out" of the Companies' DSM/EE programs to include large, energy intensive customers that are similarly situated to Walmart, not just industrial customers as the Companies have arbitrarily defined them for this purpose. Walmart recommends specifically that the Companies' set a benchmark level of 15 million kWh per year aggregated across all of a customer's accounts located within either LG&E's or KU's respective territories (not the Companies' combined territory). The option to elect to participate would not only provide Walmart (and other customers) with the flexibility to better manage its investments in its own DSM/EE efforts, but it would also fairly insure that Walmart is treated comparably to

[6] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 7.
[7] Supplemental Direct Testimony of Kenneth E. Baker (June 12, 2014).

those customers that currently are able to opt-out of the DSM/EE surcharge, particularly given that Walmart has comparable energy intensive usage and is committed to significant investment in its own DSM/EE measures.

II. ARGUMENT

A. Use of Select "NAICS" Codes Is An Unreasonably Narrow, Arbitrary Basis to Determine Opt-Out Eligibility And Is Unfair to Walmart and Similarly Situated Non-Residential Customers.

Currently, the Companies only allow non-residential customers who fall within sections 21, 22, 31, 32, and 33 of the North American Industry Classification System ("NAICS") the opportunity to elect to opt-out of its DSM/EE programs and not be assessed a charge pursuant to the Companies' programs.[8] The Companies' standard of using NAICS codes is unreasonably arbitrary, and it is unfair to non-residential customers who do not fall within these limited codes — it is a faulty means by which to decide customer eligibility for opting out of the Companies' DSM/EE programs.[9] As explained by Walmart's witness, "[u]se of a set of numbers that classify businesses into certain categories and then using those categories to decide what rights are or are not available to customers whom are similarly situated is arbitrary at best ...."[10]

The Companies' NAICS-code based standard is arbitrary and unfair in at least two specific respects. First, it is unfair to customers such as Walmart who consume equal or greater amounts of electricity than some, if not most, of the Companies "industrial" customers who fall within the listed codes.[11] Thus, using a simple set of numbers to decide if a business is an "industrial" for purposes of the opt-out is discriminatory to businesses like Walmart, who do not fall within the NAICS codes listed by the Companies (even though Walmart itself falls within other NAICS codes) but consume larger amounts of electricity than many customers who are classified as "industrial."

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[8] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 5; see Kentucky Utilities Company, P.S.C. No. 16, First Revision of Original Sheet No. 86, and Louisville Gas and Electric Company, P.S.C. No. 9, First Revision of Original Sheet No. 86.
[9] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 5-6.
[10] Id. at 5.
[11] Walmart collectively consumes 170 million kWh annually on the Companies' systems; Motion to Intervene, p. 1.

Further, despite the Companies' narrow application of NAICS codes to determine opt-out eligibility for "industrial customers," the Companies' tariff offerings generally do not distinguish between industrial and commercial customers. As noted by the Companies' witness Conroy, "the Companies don't have specific rate schedules for industrial and commercial customers with the exception of one set of rate schedules for LG&E ...."[12] In fact, Walmart takes service under Time-of-Day rate schedules from KU and related secondary services from LG&E that can apply equally to what the Companies would term industrial and commercial customers.[13] The rate schedules are identified for, and objectively apply to, customers based on load profile and usage. Fairness would dictate the same objectivity should apply to opt-out criteria (as opposed to a narrow application of NAICS codes).

Second, the Companies' current opt-out standard treats customers like Walmart differently than other similarly situated customers making DSM/EE investments. Presumably, current opt-out customers are making DSM/EE investments, even in the absence of a DSM/EE program.[14] It is established that Walmart is likewise making considerable DSM/EE investments outside of the scope of the Companies' programs, yet Walmart is not entitled to opt-out.[15] There is no viable rationale for such disparate treatment under the Companies' narrow opt-out standard.

The effect of not providing Walmart and similar non-residential customers the option to opt-out is that, if they pursue their own DSM/EE measures while still paying the Companies' program surcharge, then those customers are effectively paying twice for DSM/EE. As Companies' witness Hornung acknowledged in response to cross-examination, the system is

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[12] September 3, 2014 Video Recording of Hearing ("VRH") at approximately 08:13:57 – 08:14:08.
[13] See Direct Testimony of Kenneth E. Baker (April 14, 2014) at 3.
[14] See Sept. 3, 2014 VRH at approximately 00:08:36 – 00:09:13.
[15] See Direct Testimony of Kenneth E. Baker (April 14, 2014) at 3-4.

benefitting from commercial customers investing "on their own dime,"[16] even though such customers are still paying the DSM/EE surcharge. These network benefits include reduced overall energy cost that result from the reduced load and demand on the Companies' system, as well as increased system reliability. The Companies' other customers are able to benefit from Walmart's DSM/EE measures without having to fund such measures through their rates or additional recovery riders. Yet, Walmart is paying for both its own investment and the Companies' surcharge.[17]

B. The Commission Should Revise the Companies' Opt-Out Criteria.

Like all businesses, no matter how they are classified, Walmart understands its own business operations and is able to create the most effective way to implement DSM/EE measures for its own facilities. This gives Walmart the benefit of competing in the market-place for energy efficiency goods and services on a large scale. Also, while implementing its own DSM/EE measures, Walmart is carrying the risk of these investments, as opposed to other customers in the Companies' territories.[18] In that regard, the presumptive rationale for the opt-out applied to current opt-out customers is equally applicable to Walmart, thus the opt-out criteria should reflect that fact. By preventing these customers from opting-out, they may be dis-incentivized to make their own, more significant investments in DSM/EE. Allowing Walmart, and comparable customers, to opt-out under the more inclusive opt-out threshold proposed by Walmart insures that such customers are treated fairly and that they can continue unimpeded to invest their own funds in DSM/EE.

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[16] Sept. 3, 2014 VRH at approximately 06:38:14.
[17] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 6-7.
[18] Id.

Walmart recommends that the Commission set a benchmark level of 15 million kWh per year (aggregated consumption) to provide a broader array of non-residential customers with the option to opt-out of the Companies' DSM/EE programs.[19] The benchmark level of 15 million kWh per year aggregate would replace the Companies' current discriminatory NAICS codes qualification system. The 15 million kWh per year threshold would only apply to large customer accounts on either LG&E or KU, but not aggregated as between the Companies.

This threshold would be more reasonable and far less arbitrary than the Companies' current opt-out standard. In fact, this criteria is currently being used by Oklahoma Gas & Electric and Public Service Company of Oklahoma.[20] It would broaden the availability of the opt-out in a manner that would insure that customers with comparable loads would qualify, and it would advance independent DSM/EE investment by removing impediments to individual customers investing in their own DSM/EE initiatives.

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[19] Id. at 7.
[20] Id. at 7-8.

C. The Commission Has the Authority to Adopt Walmart's Recommendation

Kentucky's DSM statute, KRS 278.285, provides the Commission with the ability to determine the reasonableness of a company's proposed demand-side management plan.[21] The DSM statute also provides that the Commission "shall allow" "industrial customers" with "energy intensive processes" to pursue their own DSM/EE and effectively opt-out of the DSM/EE surcharge.[22] This statute does not, however, define "industrial customer" or "energy intensive processes," thus a fair and reasonable application of the concept should apply.[23]

The Companies', through witness Conroy, attempted to justify their narrow NAICS-based opt-out criteria by citing to the DSM statute and prior approval of their opt-out criteria.[24] The Companies also argue in rebuttal that their tariffs define industrial customers based on the type of production resulting from the energy use.[25]

As noted above, however, the DSM statute does not define "industrial customer" or "energy intensive usage," for that matter. Further, as described above, use of NAICS codes is arbitrarily narrow, and nothing would preclude the Commission from modifying the opt-out criteria as a function of reason and fairness.[26] In that regard, Walmart is of comparable size, consumption, and "energy intensive usage" as other "industrial customers"[27] on the Companies' system. Even the Companies' witness acknowledges that its rate schedules are not consistently designed to specifically distinguish between industrial and commercial customers.[28] Walmart

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[21] KRS 278.285(1).
[22] KRS 278.285(3).
[23] Per the Commission's "reasonableness" determination under the statute at KRS 278.285(1) and in insuring the Companies' DSM/EE plan will not result in any unreasonable prejudice or disadvantage at KRS 278.285(1)(e).
[24] Rebuttal Testimony of Robert M. Conroy (June 16, 2014) at 6.
[25] Id.; presumably because the DSM statute includes no definition, witness Conroy indirectly referenced KRS 56.440(6), a Kentucky "State Property and Building Commission" statute, and some generic documents regarding "industrial customers," but those definitions do not apply to the Commission.
[26] See supra Part II.A.
[27] Direct Testimony of Kenneth E. Baker (April 14, 2014) at 5.
[28] See supra Part II.A., p.7, and note 12.

takes service under Time-of-Day rate schedules that are utilized by all types of non-residential customers, large and small. Yet, as it stands, certain customers on these schedules can opt-out while others cannot simply based on a narrow list of NAICS codes, not load profile or usage thresholds; thus, customers that are similarly "energy intensive" are treated differently.

Walmart posits that such treatment is unfair and unjustly discriminatory. Revision of the opt-out criteria to remove arbitrary use of NAICS codes would correct the current disparity, and it would be consistent with the Commission's authority to remedy such treatment.[29] It would also be wholly within the Commission's authority under the DSM statute to insure that the Companies' plan is reasonable and does not result in any unreasonable prejudice or disadvantage.[30] In short, the Commission has the legal authority to revise and improve the Companies' opt-out criteria and insure that such criteria are fair and reasonable. Walmart's opt-out proposal in this case meets that objective.

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[29] See KRS 278.260(1).
[30] See KRS 278.285(1) and (1)(e).

III. CONCLUSION

Walmart believes that fairness requires the Commission to correct and revise the Companies' opt-out criteria to include large, energy intensive customers who invest in their own DSM/EE programs per Walmart's proposal to utilize a 15 million kWh collective annual usage opt-out threshold. In this way, customers similarly situated with respect to rate schedule application, energy intensive usage, and commitment to their own DSM/EE investment will be treated fairly. Further, this would insure that customers like Walmart are effectively not paying twice for DSM/EE when such customers are providing system benefits "on their own dime." This outcome would be consistent with the Commission's authority to insure that the Companies' DSM/EE plan is reasonable and fair.

WHEREFORE, Wal-Mart Stores East, LP and Sam's East, Inc., respectfully request that the Kentucky Public Service Commission modify the Louisville Gas and Electric Company and Kentucky Utilities Company DSM/EE Program Plan to reflect a 15 million kWh collective, annual consumption threshold to establish opt-out eligibility for non-residential customers.

Respectfully submitted,

SPILMAN THOMAS & BATTLE, PLLC

By______________________________

Don C. A. Parker (Kentucky I.d. No. 94113)
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd, East
Charleston, WV 25301
Phone: (304) 340-3896
Fax: (304) 340-3801
E-mail: dparker@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Phone: (717) 795-2740
Fax: (717) 795-2743
E-mail: dwilliamson@spilmanlaw.com

Counsel to Wal-Mart Stores East, LP and Sam's East, Inc.

Dated: September 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that Walmart's September 30, 2014, electronic filing is a true and accurate copy of Wal-Mart Stores East, LP, and Sam's East, Inc.'s ("Walmart's") Post-Hearing Brief to be filed in paper medium; and that on September 30, 2014, the electronic filing has been transmitted to the Commission, and that an original and one copy of the filing will be delivered to the Commission, that no participants have been excused from electronic filing at this time, and electronic mail notification of the electronic filing is provided to the following:

Dennis G. Howard II, Esq.
Lawrence W. Cook, Esq.
Angela M. Goad, Esq.
Heather Napier, Esq.
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204
Dennis.Howard@ag.ky.gov
Larry.Cook@ag.ky.gov
Angela.Goad@ag.ky.gov
Heather.Napier@ag.ky.gov

Allyson K. Sturgeon, Esq.
Senior Corporate Attorney
LG&E and KU Energy, LLC
220 West Main Street
Louisville, KY 40202
Allyson.Sturgeon@lge-ku.com
and
Kendrick R. Riggs, Esq.
W. Duncan Crosby, III, Esq.
Joseph T. Mandlehr, Esq.
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 4020
Kendrick.riggs@skofirm.com
Duncan.crosby@skofirm.com
Joseph.mandlehr@skofirm.com
Counsel for LG&E and KU Energy, LLC

Rick Lovekamp
Manager Reg. Affairs
LG&E and KU Energy, LLC
220 West Main Street
Louisville, KY 40202
Rick.Lovekamp@lge-ku.com

Edwin R. Staton
Vice President, State Regulation and Rates
LG&E and KU Energy, LLC
220 West Main Street
Louisville, KY 40202
Ed.Staton@lge-ku.com

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
Counsel to Kentucky Industrial Utility Customers, Inc.

Joe F. Childers, Esq.
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, KY 40507
childerslaw81@gmail.com
and
Jill Tauber
Earthjustice
1625 Massachusetts Avenue NW, Suite 702
Washington, DC 20036-2212
jtauber@earthjustice.org
and
Matthew Gerhart
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
mgerhart@earthjustice.org
and

Susan Laureign Williams, Esq.
Sierra Club
50 F Street, NW, 8^{th} Floor
Washington, DC 20001
laurie.williams@sierraclub.com
Counsel to Wallace McMullen and Sierra Club

Iris G. Skidmore, Esq.
Bates & Skidmore
Attorneys at Law
415 W. Main St., Suite 2
Frankfort, KY 40601
Batesandskidmore@gmail.com
Counsel for Community Action Council

Eileen Ordover, Esq.
Lisa Kilkelly, Esq.
Legal Aid Society, Inc.
416 W. Muhammad Ali Blvd., Suite 300
Louisville, KY 40202
EOrdover@laslou.org
LKilkelly@laslou.org
Counsel for Association of Community Ministries, Inc.

Don C. A. Parker (Kentucky I.d. No. 94113)
Derrick Price Williamson

Dated: September 30, 2014