

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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) AN ORDER APPROVING ACCOUNTING)
PRACTICES TO ESTABLISH REGULATORY)
ASSETS AND LIABILITIES; AND (5) AN)
ORDER GRANTING ALL OTHER REQUIRED)
APPROVALS AND RELIEF)

CASE NO. 2017-00179

**RESPONSE OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.,
TO THE KENTUCKY INDUSTRIAL UTILITY CUSTOMERS,
INC.'S MOTION TO COMPEL**

COMES NOW Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, "Walmart"), a party to this proceeding, and, by counsel, files this Response to the Motion to Compel filed by Kentucky Industrial Utility Customers, Inc. ("KIUC"), seeking an Order to require Walmart to provide full and complete responses to KIUC's First Set of Data Requests. Walmart respectfully requests that the Kentucky Public Service Commission ("PSC" or "Commission") deny KIUC's Motion to Compel. In support thereof, Walmart states as follows:

RELEVANT PROCEDURAL HISTORY

1. On June 12, 2017, Walmart filed a Motion to Intervene in this proceeding.
2. On July 12, 2017, the Commission issued an Order establishing a Hearing on July 24, 2017, to receive testimony in support of interventions filed by numerous parties, including

Walmart ("Intervention Hearing"). At that point in the proceeding, the Commission had only granted the interventions of the Office of the Attorney General ("OAG") (a party with a statutory right to intervene) and KIUC, who filed a Motion to Intervene on May 11, 2017, that was granted by Commission Order on May 17, 2017.

3. On July 21, 2017, though not required by the Commission to do so, but in an effort to assist the Commission with its deliberation and determination of Walmart's Motion to Intervene, Walmart elected to file the written testimony of Gregory Tillman in support of Walmart's request to participate in this case as an active party.

4. On July 24, 2017, the Commission conducted the above-referenced Intervention Hearing, which the Commission explained was "a new exercise" conducted for the limited purpose of receiving testimony in support of various Motions to Intervene and identifying "who the intervenors would be and they could explain what their interests were." Transcript ("Tr.") (July 24, 2017) at 10:04:40 and 10:07:20.

5. On August 3, 2017, the Commission issued an Order granting Walmart's intervention in this proceeding. KIUC did not subsequently file a Motion for Rehearing of the Commission's Order granting Walmart's intervention.

6. On August 14, 2017, KIUC filed its First Set of Data Requests with the Commission and served the same to Walmart.

7. On August 28, 2017, Walmart filed and served its Objections to KIUC's First Set of Data Requests pursuant to the Commission's Rules of Practice and Procedure. 807 K.A.R. 5:0001, § 4.12(d)(5).

8. On August 29, 2017, KIUC filed its Motion to Compel Walmart's responses to its First Set of Data Requests, though without making any effort to first resolve Walmart's Objections,

as clearly required by the Commission's Rules of Practice and Procedure. 807 K.A.R 5:0001, § 4(12)(e)(3) ("A party shall compel compliance with the party's request for information by motion to the commission, which shall include: . . . The efforts taken to resolve any disagreement over the production of the requested information.")

RESPONSE TO MOTION TO COMPEL

A. Through its Data Requests and Motion to Compel, KIUC is Improperly Attempting to Re-litigate Questions Already Resolved by the Commission.

By its Data Requests to Walmart and through its Motion to Compel, KIUC is attempting to re-litigate matters that the Commission has already fully resolved in the context of the July 24 Intervention Hearing. KIUC should not be permitted to do so.

On July 21, 2017, Walmart voluntarily filed written testimony supporting its Motion to Intervene in an attempt to assist the Commission with evaluating Walmart's interest in this proceeding and its request to intervene as a full party. As part of that testimony, Walmart's witness, Mr. Greg Tillman, cited information publically available on Walmart's corporate website to indicate the general employment and economic impact that Walmart contributes to the Commonwealth of Kentucky. Walmart provided these figures to explain its presence as a corporate citizen of Kentucky, solely to support its interest in participating in this proceeding. At the Intervention Hearing, Kentucky Power Company ("KPCo"), OAG, and KIUC, as the only active parties in the case, were afforded the opportunity to cross-examine witnesses presented by the prospective parties moving to intervene, including Walmart. KIUC took advantage of that opportunity (which Walmart did not likewise have in relation to KIUC's intervention) and asked extensive questions challenging Walmart's use of these employment and economic impact figures on the basis that Mr. Tillman did not personally review the Dun & Bradstreet report used by the Walmart corporation to establish the publically-available information on "Kentucky-based

suppliers" actually used by Mr. Tillman. See generally Tr. (July 24, 2017) at 12:34:57 to 12:44:15. When Mr. Tillman acknowledged that he did not review the Dun & Bradstreet report, KIUC moved that the Commission strike the portion of Mr. Tillman's testimony referring to "Kentucky-based suppliers." Id. at 12:42:27. The Commission declined to grant that motion, instead noting that "the Commissioners can consider it for what it's worth, if anything." Id. at 12:42:27 to 12:42:49.

Whether it relied on those assertions or not, the Commission apparently found that Walmart established a threshold interest sufficient to justify its participation in this case, as is evidenced by the Order issued on August 3, 2017, granting Walmart's intervention.

Now, however, through the use of its First Set of Data Requests to Walmart and its Motion to Compel, KIUC seeks to obtain information underlying the employment and economic impact figures Walmart used solely in the context of Walmart's request to participate in this case, a question that has been procedurally resolved and decided by the Commission and now has no bearing on this case. As such, KIUC's expedition for this information appears to be an attempt to undermine the evidence presented at the Intervention Hearing employed by the Commission in reaching its decision to grant Walmart's participation in this case. If KIUC disagreed with the Commission's decision to permit Walmart to intervene in this case, it could have filed a Motion for Rehearing. KIUC did not do so. Having failed to do so, KIUC has no recourse to challenge Walmart's testimony in support of its Motion to Intervene, and any attempt to now effectively seek rehearing of the Commission's Order granting Walmart's intervention is out of time, and should be procedurally barred.

B. KIUC's Data Requests and Motion to Compel Seek to Obtain Information that is Irrelevant to the Subject Matter of this Proceeding and Outside of the Reasonable Scope of Discovery in this Case.

Ignoring the obvious connection of Walmart's employment and economic impact figures to the singular question of Walmart's initial Motion to Intervene, KIUC now implies that the information is somehow connected to the ongoing subject matter of this proceeding; however, the only nexus that KIUC alleges between its Data Requests and the subject matter of this case is the alleged possibility that Walmart "may subsequently use the economic impact figures contained in [Mr. Tillman's] Testimony as a policy basis upon which to argue for a favorable revenue allocation or for other purposes." KIUC Motion to Compel, p. 3 (emphasis added). This allegation is entirely unsupported. But more importantly, this assertion claims that KIUC has a need for information that is not currently relevant to the subject matter of this proceeding and in fact may never be relevant in this case.

Even if KIUC had supported this allegation, and even if the employment and economic impact figures used by Walmart at the Intervention Hearing might have some bearing on this case going forward, it would only be in the context of Direct Testimony supporting Walmart's case-in-chief. That testimony has not been filed. As explained in greater detail herein, Walmart has no intention of citing, using, or otherwise relying on the prior testimony supporting its Motion to Intervene at any point in this proceeding going forward, but even if Walmart did intend to do so, KIUC would have the opportunity available to all parties under the Commission's established procedural schedule to issue discovery to the parties based on their Direct Testimony in this case. For KIUC to demand this information when it has absolutely no present bearing on the case is outside of the proper scope of discovery. Therefore, KIUC's demand for information is premature, at best.

In reality, however, the information sought by KIUC simply has no relevant connection whatsoever to the subject matter of this proceeding.

KIUC correctly cites the standard of what constitutes the relevant scope of discovery, specifically: "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." KIUC Motion to Compel, p. 2 (citing Kentucky Rule of Civil Procedure 26.02(1)). KIUC's application of this rule in this context is, however, specious and contradicted by fact.

As evidenced by the caption of this proceeding, the express subject matter of this case is KPCo's application 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) an Order approving accounting practices to establish regulatory assets and liabilities; and (5) an Order granting all other required approvals and relief." Walmart is not the Applicant in this case and its employment and economic impact figures are not included in any of these issues or rationally connected to any proposal presented by KPCo in its Application.

In KIUC's own words, the only way that such information could conceivably be an issue in this proceeding, and the only basis provided by KIUC for its continued expedition for this information, is the potential that Walmart "may subsequently use the economic impact figures . . . as a policy basis upon which to argue for a favorable revenue allocation or for other purposes." Id. at 3. Walmart attests that it will not be raising its employment or economic figures as part of any claim related to the subject matter of this case, whether pertaining to "favorable revenue allocation" or "any other purpose." It bears repeating that Walmart offered this information solely for the purpose of identifying its corporate presence and interests in Kentucky in support of its Motion to

Intervene and to assist the Commission's assessment of Walmart's party status at the Intervention Hearing. These are questions that are now clearly moot given the August 3 Order granting Walmart's intervention.

As for the possibility that this information might be used by Walmart as a possible defense in this proceeding, KIUC did not indicate in its Motion to Compel that it intends to make Walmart's economic impact figures a matter of litigation, and in fact indicated that any use of such information would be based only on Walmart's initiative. Therefore, it appears that KIUC has no intention of affirmatively using any of the information it seeks from Walmart as part of any claim in its case-in-chief unless Walmart does first (which, again, Walmart will not do). Thus, relying on KIUC's assertions in its Motion to Compel, Walmart certainly does not intend or foresee a need to raise these matters as part of any defense in this case. There is no reasonable basis to believe that Walmart's employment and economic impact figures will ever be part of the subject matter of this proceeding.

Furthermore, KIUC's requests for information from Walmart also frankly exceed the reasonable scope of any subject matter that might have already been raised in this case. As explained above, this discovery dispute undeniably revolves around specific and detailed data underlying publically-available information Walmart used at the July 24 Intervention Hearing solely to support its Motion to Intervene. On questioning from KIUC, Walmart's witness Mr. Tillman confirmed that the publically-available information was derived from a Dun & Bradstreet report prepared by Walmart, but also confirmed that he did not rely upon this report in preparing his testimony. See Tr. (July 24, 2017) at 12:39:21 to 12:39:53.

As evidenced through KIUC's cross-examination at the Intervention Hearing, the publically-available Walmart corporate website functionally served as the only workpapers used

by Mr. Tillman in preparing his testimony in relation to statements of Walmart's employment and economic impact figures. This information constitutes workpapers that KIUC already had in its possession, as demonstrated by KIUC's counsel offering of these workpapers into the record as KIUC's cross Exhibit No. 1. Id. at 12:37:08.

KIUC, however, first at the Intervention Hearing and now through its Data Requests and Motion to Compel, seeks information that far exceeds the materials actually relied upon by Mr. Tillman in the preparation of his testimony supporting Walmart's intervention – specifically, the express number of full- and part-time employees; the names, products provided, and money spent by Walmart in relation to all of its Kentucky-based suppliers; and an analysis underlying the jobs that Walmart supports in the Commonwealth. See generally KIUC's First Set of Data Requests to Walmart. Even if Mr. Tillman's testimony at that stage of the proceeding is still relevant (which, as explained above, Walmart asserts it is not), KIUC cannot now require Walmart to produce information that Mr. Tillman admittedly did not rely on even at that stage of the proceeding. Such demands are entirely outside of the scope of Mr. Tillman's testimony in support of Walmart's intervention.

C. Even if the Information Sought by KIUC is Relevant to the Subject Matter of this Proceeding, KIUC's Motion to Compel is Unnecessary, Furthers the Harassing Nature of the Objectionable Data Requests, and Wastes the Valuable Time and Resources of the Commission and the Parties.

Of important note, KIUC's Motion to Compel argues that if KIUC is deprived of the opportunity to examine the data underlying Walmart's employment and economic impact figures presented at the Intervention Hearing, then Walmart "should be barred from citing that Testimony in the post-August 3, 2017 state of this proceeding." KIUC Motion to Compel at 8. Accepting this argument on its face, and unless KIUC intends to continue to make Walmart's economic contribution figures a subject matter in this proceeding, Walmart again attests that it has absolutely

no intention of citing Mr. Tillman's testimony in support of Walmart's intervention, or the employment and economic contribution figures contained therein, at any point or for any purpose in this proceeding going forward. Walmart's Motion to Intervene was granted by Commission Order on August 3, 2017. Walmart's testimony supporting its Motion to Intervene is now moot for the purposes of this case, and Walmart will not make any more arguments or references to statements in that testimony related to its employment and economic impact in Kentucky.

If KIUC's request that Walmart be barred from citing this testimony's reference to employment and economic impact figures going forward is indeed genuine, and given Walmart's assurance that it does not intend to do so, then this should end the present dispute over the requested information. Walmart intends to be bound by any such Commission Order on this point; however, given KIUC's presumably good faith request in this regard, as well as KIUC's assurance to not unduly prejudice any party,¹ then Walmart also respectfully asks that KIUC likewise be barred from intentionally and unilaterally segregating Walmart's employment and economic impact figures as an issue in this case that would then force Walmart to raise a related defense.

Ultimately, it is unfortunate that KIUC elected to involve the Commission in this dispute, as Walmart would have provided KIUC the assurance that it would not use the cited employment and economic impact figures going forward had KIUC simply reached out to Walmart before filing its Motion to Compel. As it is, KIUC's failure to reach out to Walmart on this matter before filing its Motion to Compel violates the Commission's Rules of Practice and Procedure, which require a party seeking to compel information from another party to state "the efforts taken to resolve any disagreement over the production of the requested information." 807 K.A.R 5:0001, § 4(12)(e)(3). KIUC's Motion to Compel does not contain any such explanation because KIUC took no such

¹ KIUC Motion to Intervene, p. 2.

efforts, and instead elected to file its Motion to Compel one day after receiving Walmart's Objections. The Motion to Compel therefore unnecessarily involves the Commission in a frivolous dispute that could have been resolved without its involvement, had KIUC fulfilled its obligation under the Commission's Rules. The Motion should be denied on these grounds alone.

Beyond this, however, KIUC's Motion to Compel also serves to further the inherent harassing nature of the Data Requests and the undue burden that these requests would place, and indeed already have placed, on Walmart. As KIUC acknowledges,² in order to satisfy the demand for information, Walmart would have to dedicate internal employees not engaged in any way with Walmart's utility regulatory work, as well as Walmart's expert witness already engaged in this case, in order to access and compile obviously voluminous materials. See generally Objections to KIUC's First Set of Data Requests to Walmart. Regardless of KIUC's belief that this would be readily available data, it is not.

For example, KIUC has asked Walmart to provide the names of all of its 848 Kentucky suppliers, the products purchased from these supplies, and all spending associated with these suppliers. See KIUC First Set of Data Requests to Walmart, Question 1-2. This information may or may not be contained in one single location, but it would certainly require Walmart to make individual inquiries into each of its 848 suppliers (many, if not most, of whom likely do not provide products or services to Walmart's KPCo-specific customer locations) in order to determine if the release of such information is prohibited by a Non-Disclosure Agreement or some other mechanism, and then attempt to obtain a release from each of these suppliers so that KIUC can receive information that it apparently does not intend to use in this case. The fact that KIUC is

² KIUC Motion to Compel, p. 3.

willing to give Walmart until October 27, 2017,³ does not in any way lessen the undue burden in time and expense that Walmart would have to incur, over and above the costs of examining and litigating the legitimate issues in this case, in order to satisfy the request for this information. The fact that this information is entirely irrelevant to the subject matter of this proceeding or any cause or defense that Walmart might reasonably make in this case only exacerbates that burden.

Furthermore, and critically, the fact that Walmart is still being required to defend, at significant time and cost, the basis for its intervention in this case (which was granted by Commission Order), is, on its face, evidence that the Data Requests made by KIUC are both harassing and unduly burdensome. KIUC has unreasonably made this proceeding – at least for Walmart, and now for the Commission – a matter of Walmart's employment data and economic impact for the entire Commonwealth of Kentucky instead of the important proposals presented by KPCo, and has already caused Walmart to divert important organizational and legal time and resources away from its assessment and evaluation of KPCo's Application (the actual subject matter of this case) in order to continue already extensive litigation, not to mention conforming to standards not similarly applied to KIUC, on issues raised solely in the context of Walmart's request to simply participate in this proceeding.

Given the lack of procedural sufficiency of KIUC's Motion to Compel, as well as the absence of any meaningful nexus to the relevant subject matter of this proceeding, Walmart can find no purpose for KIUC's Motion but to waste the parties' and the Commission's valuable time and resources. This continues to be frustrating and perplexing to Walmart, and Walmart respectfully asks that the Commission Order KIUC to cease this unreasonable and unduly prejudicial conduct.

³ KIUC Motion to Compel, p. 4.

D. KIUC's Motion to Compel Does not Resolve the Fact that Much of the Data Requested from Walmart is Confidential and Competitively Sensitive Information that Could Harm Walmart and its Supplier Partners.

Despite KIUC's Motion to Compel, Walmart maintains its Objections as they pertain to the Confidential and Competitively Sensitive nature of much of the information that KIUC seeks. Walmart closely protects the details of its employment figures in Kentucky and across the United States, including the number of its part-time and full-time employees, as well as all detailed information related to its suppliers and the economics of those contractual arrangements. The public revelation of this detailed information, particularly to Walmart's competitors, could be used by those competitors (as well as the competitors of Walmart's suppliers) to damage Walmart and its many supplier partners.⁴ As explained above, Walmart also believes that many of its contractual arrangements with suppliers are likely protected by Non-Disclosure Agreements or other mechanisms.

As for KIUC's suggestion that Walmart could negotiate a separate confidentiality agreement with KIUC,⁵ Walmart does not see how such an agreement would be possible. Walmart is aware that KIUC's counsel in this case represents a major Walmart competitor before the regulatory jurisdictions of other states. This major competitor also does business in Kentucky and often appears in cases before this Commission. Given this relationship, under no circumstances could Walmart provide to KIUC's counsel Confidential and Competitively Sensitive information related to Walmart's employment and economic impact figures. To the extent that the Commission may Order such Confidential and Competitively Sensitive information to be made available in this

⁴ KIUC complains that Walmart did not raise an objection based on the Confidential nature of this information at the July 24 Intervention Hearing. *Id.* at 4. The Confidential and Competitively Sensitive nature of KIUC's Data Requests were not identified by Walmart until Walmart had received and evaluated KIUC's Data Requests.

⁵ KIUC Motion to Compel, p. 4.

proceeding, and without waiving its objections regarding relevance and harassment/undue burden, Walmart believes that the only appropriate way to accommodate this request would be for the information to be made available to the Commission's Staff and the OAG *in camera* at Walmart's offices in Bentonville, Arkansas, in accordance with separate confidentiality agreements. To the extent necessary and requested, such arrangements could also be made for other non-KIUC parties pursuant to appropriate confidentiality agreements.

E. KIUC's Reliance on Statements Made by Walmart's Witness at the Intervention Hearing is Without Merit, as These Statements have No Controlling Effect on the Process of This Case.

As justification for its Data Requests, KIUC's Motion to Compel relies on a statement made by Mr. Tillman at the July 24 Intervention Hearing that KIUC "could ask" for the requested information. Motion to Compel, pp. 2, 3 (citing Tr. (July 24, 2017) at 1:05:10). This statement, however, made in response to re-direct examination from Walmart counsel, clearly did not indicate that such information would categorically be provided and did not bind Walmart to any such claim, nor did the Commission make such provision of future information by Walmart a condition of its participation in this proceeding. As evidenced by Walmart's objection at the Intervention Hearing, Walmart also believed that KIUC's pursuit of such information was irrelevant at the time. See Tr. (July 24, 2017) at 12:41:09. Walmart's refusal to subsequently provide this information upon receipt of KIUC's Data Requests is permissible, and was in keeping with the standards pertaining to objectionable discovery at any stage of any proceeding.

Specifically, upon receipt of KIUC's Data Requests, Walmart determined that the information sought by KIUC was objectionable on the basis of the irrelevant and Confidential and Competitively Sensitive nature of the material sought by KIUC, as well as the harassing and burdensome nature of the requests. Accordingly, Walmart appropriately and formally objected to

these Data Requests, as it was entitled to do under the Commission's Rules of Practice and Procedure,⁶ and as it (and any other party) is entitled to do with all objectionable discovery requests in any proceeding before the Commission, irrespective of any statement made at the Intervention Hearing – which, again, was a new procedural measure implemented for the first time by the Commission, previously unknown to the participants, for the discrete purpose of receiving from prospective parties testimony in support of their interests in participating in this case. Walmart submitted to that process, which included extensive interrogation by KIUC. That discrete process has unequivocally concluded. KIUC's reliance on a general statement made at the Intervention Hearing about the discovery process available to KIUC (and all parties) is insufficient to justify the relinquishment by Walmart of the specific information sought by KIUC that, as explained in detail above, is patently objectionable.⁷

⁶ 807 K.A.R 5:001

⁷ Furthermore, the fact, cited by KIUC on page 3 of its Motion to Compel, that Mr. Tillman stated at the Intervention Hearing that he would examine the Dun & Bradstreet report that provided the source of the data referenced in his testimony "if somebody asked [him] to go verify the accuracy of the data" was in no way a commitment by Mr. Tillman or Walmart to provide such information to anyone that asked for it. Rather, this statement was an indication of what Mr. Tillman would hypothetically do in his position as Walmart's Senior Manager, Energy Regulatory Analysis. As it stands, KIUC has not even asked for the Dun & Bradstreet report itself, but now seeks extensive data underlying the Dun & Bradstreet report, which as explained, is far beyond any information actually relied on by Mr. Tillman in preparing his testimony for the Intervention Hearing.

WHEREFORE, Wal-Mart Stores East, LP and Sam's East, Inc., respectfully requests that the Commission:

- (1) Deny the Motion to Compel filed by the Kentucky Industrial Utility Customers, Inc.;
- (2) Order the Kentucky Industrial Utility Customers to cease from its harassing and prejudicial attempt to gain from Walmart information pertaining to Walmart's employment and economic impact figures; and,
- (3) Order the Kentucky Industrial Utility Customers to abstain from raising issues of Walmart's employment and economic impact figures as part of any affirmative claim in this proceeding, to the same extent that the Commission may accept and enforce Walmart's commitment to refrain from doing the same.

Respectfully submitted,

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Dated: September 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that Walmart's September 5, 2017, electronic filing is a true and accurate copy of Response of Wal-Mart Stores East, LP and Sam's East, Inc., to the Kentucky Industrial Utility Customers, Inc.'s Motion to Compel to be filed in paper medium; and that on September 5, 2017, 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 served upon the following via Electronic Mail:

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