

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**ELECTRONIC JOINT APPLICATION OF)
LOUISVILLE GAS AND ELECTRIC COMPANY)
AND KENTUCKY UTILITIES COMPANY FOR)
REVIEW, MODIFICATION, AND)
CONTINUATION OF CERTAIN EXISTING)
DEMAND-SIDE MANAGEMENT AND ENERGY)
EFFICIENCY PROGRAMS)**

CASE NO. 2017-00441

REPLY BRIEF
OF LOUISVILLE GAS AND ELECTRIC COMPANY
AND KENTUCKY UTILITIES COMPANY

Filed: July 9, 2018

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INTRODUCTION

Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively “Companies”) respectfully submit that none of the briefs filed by intervenors in this proceeding should affect the Kentucky Public Service Commission’s (“Commission”) approval of the Companies’ application. The Companies’ proposed 2019-2025 Demand-Side Management and Energy Efficiency (“DSM-EE”) Program Plan remains reasonable in view of all the items KRS 278.285(1) asks the Commission to consider, and the briefs filed have not given any reason to have a different view.

The brief by Metropolitan Hosing Coalition (“MHC”) asks the Commission to consider non-energy benefits, which the Commission is statutorily prohibited from doing. It further asks the Commission to terminate the Advanced Metering Systems (“AMS”) Customer Offering, yet the offering is performing well according to the terms on which the Commission approved the offering less than four years ago. MHC presents the Companies and the Commission with the specter of a federal disparate-impact claim under the Fair Housing Act, which potential claim the Companies show to be specious. Finally, MHC’s brief asks the Commission to require the Companies to perform two studies, but the proposed studies would serve no purpose other than to burden customers with additional costs.

The brief by the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“AG”) first accuses the Companies of inconsistency in their approach to avoided capacity cost in this proceeding versus their AMS full-deployment proceeding (Case No. 2018-00005), which the Companies show to be incorrect. It then attacks the DSM Advisory Group process as inadequate, notwithstanding nearly 20 years of Commission precedent holding that process to be consistent with KRS 278.285 and the AG’s own support of moving to the current DSM Advisory Group process.

Finally, the brief filed by Wal-Mart Stores East, LP and Sam's East, Inc. (collectively "Walmart") merely restates all the arguments it has previously presented, which the Companies comprehensively rebutted in rebuttal testimony and in the Companies' Initial Brief. The sole exception is a single new argument asserting that the Companies' industrial opt-out proposal would be unjustly discriminatory, yet the Companies show that the asserted infirmity—which actually is no infirmity at all—afflicts Walmart's opt-out proposal even more acutely.

Therefore, the Companies respectfully ask again that the Commission approve the proposed 2019-2025 DSM-EE Program Plan to be effective with services rendered on and after January 1, 2019.

ARGUMENT

I. The Commission Should Decline MHC's Invitation to Exceed Its Statutory Jurisdiction by Requiring Utilities to Include Non-Energy Benefits in DSM-EE Cost-Benefit Tests.

MHC devotes the largest single part of its brief to advocating a position the Commission is statutorily barred from taking, namely requiring the Companies (and presumably all utilities) to include non-energy benefits in the DSM-EE cost-benefit tests they conduct.¹ That the Commission is barred from considering non-energy benefits, and therefore from requiring utilities to include them in DSM-EE cost-benefit tests, is not a close or uncertain issue. Indeed, in response to an MHC data request, the Companies provided multiple pages of citations and quotes from the Commission and the Kentucky Court of Appeals showing that externalities such as non-energy benefits are beyond the Commission's jurisdiction; MHC did not address any of those authorities in its brief.² To give but one Commission quote from that long list authorities:

¹ MHC Brief at 8-19.

² Companies' Response to MHC 3-2.

The Commission understands and appreciates Mr. Young's interest as an environmentalist in seeking to reduce pollution, but the Commission has no jurisdiction over the quality of the air he breathes, the "significant health problem" associated with mercury pollution from coal-fired power plants, or "the carbon dioxide released [which] contributes to global warming." As discussed above, the Commission's jurisdiction is limited to the "rates" and "service" of utilities.³

That Commission holding, along with all the others cited in the Companies' response to MHC and in the Companies' Initial Brief, all reflect that the Commission is a creature of statute, and may therefore exercise authority only within the boundaries of its statutorily granted jurisdiction, namely the rates and service of utilities.⁴ Indeed, as the Kentucky Supreme Court stated concerning the Commission:

The legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference. In fixing rates, the commission must give effect to all factors which are prescribed by the legislative body, but may not act on a matter which the legislature has not established.⁵

By definition, non-energy benefits do not affect utility rates or service; if they did, they would be energy-related benefits, and the Companies would have accounted for them. But because non-energy benefits do not affect the Companies' rates or service, the Commission may not account for them or require the Companies to do so.⁶ The Companies therefore correctly excluded them from their cost-benefit analyses in this proceeding, and the Commission should refuse to require including them in future DSM-EE cost-benefit analyses.

³ Case No. 2008-00349, Order at 4 (Dec. 4, 2008).

⁴ See, e.g., *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates, a Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge*, Case No. 2012-00222, Order at 4 (Oct. 17, 2012) (quoting *Enviro Power, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at 3 (Ky. App. 2007) (not to be published) (“[R]ates’ or ‘service’ ... are the only two subjects under the jurisdiction of the PSC.”)); *South Central Bell Telephone Company v. Utility Regulatory Commission*, 637 S.W.2d 649 at 653 (Ky. 1982). See also Companies' Response to MHC 3-2.

⁵ *South Central Bell Telephone Company v. Utility Regulatory Commission*, 637 S.W.2d 649 at 653 (Ky. 1982).

⁶ Hinko at 12-13; MHC Initial Brief at 8-19.

Notably, the Companies' position regarding non-energy benefits is consistent with their view that the Commission and utilities are not constrained to consider only the four California Standard Practice Manual tests the Commission has long required utilities to use.⁷ The Companies have proposed in this proceeding that the Commission consider other means of evaluating DSM-EE cost-effectiveness, such as how the Companies determine what is an economical reserve margin,⁸ and have encouraged the Commission to view cost-effectiveness as one statutory criterion among the others listed for Commission consideration in KRS 278.285(1).⁹ But that is not the same as advocating that the Commission should consider costs or benefits that would not and could not affect utility rates or service under existing or reasonably foreseeable regulatory requirements; rather, the Companies have proposed other means of evaluating Commission-jurisdictional costs and benefits, and have asked the Commission to consider other criteria set forth in KRS 278.285(1) when evaluating the reasonableness of a utility's DSM-EE proposals. In other words, the Companies have asked the Commission to consider jurisdictional matters; MHC is asking the Commission to consider extra-jurisdictional matters, and the Commission must refuse that request.

MHC argues the Companies are "selective and arbitrary" in holding this position, but that is incorrect.¹⁰ Even a cursory review of the quotes from the Companies' witnesses that MHC has collected in its brief shows one thing: the Companies have consistently asserted that the Commission should take notice of potential environmental compliance costs, i.e., costs the Companies might have to incur and recover from their customers, but the Companies have not

⁷ *In the Matter of the Joint Application of the Members of the Louisville Gas and Electric Company Demand-Side Management Collaborative for the Review, Modification, and Continuation of the Collaborative, DSM Programs, and Cost Recovery Mechanism*, Case No. 1997-00083, Order at 20 (Apr. 27, 1998).

⁸ See Huff at 17-20.

⁹ Companies' Initial Brief at 2, 5-6.

¹⁰ MHC Initial Brief at 13.

asserted the Commission should take into account in a cost-benefit analysis any environmental externalities such as morbidity and mortality.¹¹ In other words, it is one thing to say that a Commission-jurisdictional benefit of a solar array could be potential environmental compliance cost avoidance—which the Companies have said—but it is quite another to say that a Commission-jurisdictional benefit of a DSM-EE program is that it might affect asthma attacks, which is a position the Companies have never taken, though MHC has.¹² Therefore, the Companies have been consistent in their position on this issue before the Commission, and that position reflects the Commission’s jurisdictional limits as articulated by the Commission itself and by Kentucky’s courts.

In addition, MHC’s assertion that the Companies have undercounted greenhouse-gas (“GHG”) emission compliance costs in their cost-benefit analyses in this proceeding relative to how the Companies have accounted for them in other proceedings, e.g., the CPCN proceeding concerning the Brown Solar array, ignores important facts.¹³ The Companies filed their CPCN application to construct the Brown Solar array and a natural gas combined cycle unit at the Green River Generating Station in January 2014.¹⁴ At that time, federal GHG regulations regarding new or modified stationary sources (including power plants) were in effect and relatively new,¹⁵ and the U.S. Environmental Protection Agency was working on its then-soon-to-be-proposed Clean Power Plan, which it first proposed in June 2014.¹⁶ Thus, significant and potentially costly GHG-compliance regulations were live and relevant considerations in 2014. But significant changes have occurred since then. The current presidential administration has

¹¹ *Id.* at 13-18.

¹² *See* Hinko at 13-15.

¹³ MHC Initial Brief at 13-19.

¹⁴ Case No. 2014-00002, Application (Jan. 17, 2014).

¹⁵ *See* <https://www.epa.gov/nsr/clean-air-act-permitting-greenhouse-gases>.

¹⁶ *See* <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-clean-power-plan.html>.

withdrawn from the Paris Climate Agreement,¹⁷ proposed to repeal the Clean Power Plan,¹⁸ and asked the federal Secretary of Energy to provide recommendations to prevent the closure of coal-fired power plants.¹⁹ Therefore, it is reasonable to assume GHG compliance costs are not likely to arise from federal regulation in the near term.

Moreover, the near term is what is at issue in this proceeding—the proposed DSM-EE Program Plan covers only 2019-2025—not the much longer-term perspective the Companies and the Commission must take when considering whether to build long-lived generating assets. The history of the Clean Power Plan (“CPP”) bears this out. The EPA first proposed the CPP in June 2014, and issued its final rule in August 2015.²⁰ Under the 2015 final rule, emissions reductions would not have begun until 2022.²¹ In other words, from the time the EPA first proposed the CPP to the date on which GHG reductions were required to begin was more than seven and a half years. The entire proposed DSM-EE Program Plan covers only seven years. Therefore, it is reasonable and consistent with their positions in other cases for the Companies to assume no GHG compliance costs in this proceeding.

The Companies have also demonstrated that they are willing to revise DSM-EE program plans to account for changed circumstances. For example, the Companies filed in January 2014 to revise their 2011-2018 Program Plan to terminate some programs, revise others, and add certain new programs.²² More recently, the Companies proposed in their annual program filing for 2018 to terminate several programs and revise others due to significantly reduced avoided

¹⁷ See <https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM>.

¹⁸ See <https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan>.

¹⁹ See <https://www.npr.org/2018/06/01/616245180/president-trump-orders-help-for-coal-and-nuclear-plants>.

²⁰ See <https://fas.org/sgp/crs/misc/R44145.pdf>.

²¹ See *id.*

²² Case No. 2014-00003, Application (Jan. 17, 2014).

costs.²³ Therefore, even if the state or federal regulatory landscape changes during the proposed 2019-2025 DSM-EE Program Plan period, the Companies will certainly evaluate whether and when to make such a filing.

II. The Commission Should Rule Definitively that Staying within Its Jurisdictional Bounds Does Not Violate Federal Fair Housing Law.

MHC has repeatedly asserted that not accounting for non-energy benefits in DSM-EE cost-benefit analyses could violate the federal Fair Housing Act.²⁴ The Commission should address and reject this claim for at least two reasons.

First, the federal Fair Housing Act concerns housing, not utility service. Indeed, the sole authority to which MHC cites, *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al.*, concerns two provisions of the Fair Housing Act that are facially inapplicable to the provision of utility service:

Section 804(a) provides that it shall be unlawful:

"To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. §3604(a).

Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

"It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of

²³ See, e.g., Lawson Direct at 11-12.

²⁴ See, e.g., MHC Initial Brief at 19; Hinko at 14.

such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." §3605(a).²⁵

Moreover, the Court in that case was not addressing utility service, but rather “where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs.”²⁶ Therefore, it is stretching the law to apply the FHA to DSM-EE cost-benefit analyses.

Second, even if the Commission gave any credence to MHC’s assertion on this issue, it is not obvious that including non-energy benefits in DSM-EE cost-benefit analyses would create the outcome MHC presumably desires, namely having more DSM-EE funds deployed in MHC’s preferred geographies. Including such benefits would tend to make more DSM-EE programs economical, though it is impossible to know which ones because MHC has not stated precisely which non-energy benefits it believes should be included. When more DSM-EE programs did satisfy the existing cost-benefit criteria under the previous DSM-EE program plan, MHC was not satisfied with how funds ultimately were used across LG&E’s service territory, which was a direct result not of how LG&E desired program resources to be used, but rather by customer choice and participation.²⁷ As the Companies have shown in this proceeding, the likely sources of DSM-EE funds and distribution of DSM-EE resources under the Companies’ proposed DSM-EE Program Plan, which significantly reduces DSM-EE programming and spending overall but

²⁵ *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al.*, 576 U.S.____ (2015). *Texas Department of Housing* was a 5-4 decision, and the four-justice minority strongly disagreed with the Court’s holding. For example, Justice Alito, writing for the four dissenters, stated, “The Fair Housing Act does not create disparate-impact liability, nor do this Court’s precedents. And today’s decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. ... Because Congress did not authorize any of this, I respectfully dissent.” Notably, of the four dissenting justices, three remain on the Court; Justice Scalia has since died and been replaced with Justice Gorsuch, who appears to have much the same judicial philosophy as Justice Scalia. Among the five-justice majority, Justice Kennedy has recently announced his retirement from the Court, and it appears a new justice will be appointed and confirmed before the end of 2018. It is therefore possible that the viability of disparate-impact analysis as applied under the FHA may soon be in jeopardy.

²⁶ *Id.*

²⁷ See Case No. 2014-00003, Hinko Direct Testimony at 5-10.

makes the low-income WeCare program the largest residential program by far, would seem to be in line with what MHC has stated it desires, though that outcome will be driven by customer choice, not LG&E's direction.²⁸ Therefore, it would seem likely that following MHC's direction to include non-energy benefits in DSM-EE cost-benefit calculations, which would likely cause an expansion of program offerings and spending for programs other than WeCare, would have the likely impact of exacerbating the very concern MHC voices.

In sum, MHC's position that not acceding to its non-energy-benefit demands will have FHA consequences is untenable as a matter of law and fact. The Companies respectfully ask the Commission to address and reject MHC's repeated attempts to encourage the Commission to act beyond its statutory authority.

III. The Commission Should Reject MHC's Request to Require a Study of the Impact of the Proposed DSM-EE Program Plan on Low- and Fixed-Income Customers, which Would Serve Only to Increase DSM-EE Costs to Customers.

The Commission should reject MHC's request that the Commission direct the Companies to conduct a study of the impact of the proposed DSM-EE Program Plan on low- and fixed-income customers.²⁹ The request is confusing precisely because the proposed DSM-EE Program Plan for residential customers is heavily weighted toward the WeCare program, which serves only low-income customers; it comprises well more than half of all proposed residential DSM-EE expenditures in every plan year.³⁰ Moreover, the Companies have proposed revisions to WeCare to make it accessible to even more low-income customers, namely raising the maximum-income requirement to 200% of the federal poverty level and including master-

²⁸ Lawson Direct at

²⁹ MHC Initial Brief at 22-26.

³⁰ *See, e.g.*, Lawson Direct at 20.

metered multi-family buildings in the program.³¹ Conducting a study of the kind MHC proposes would be costly, time-consuming, and presumably fruitless in view of the structure of the proposed DSM-EE Program Plan. The Companies would recover the cost of the study from all residential customers through the DSM mechanism, including all low- and fixed-income customers, which would increase charges to them with no plausible benefit. Therefore, the Companies ask the Commission to reject MHC's request.

IV. The Commission Should Deny MHC's Request to Terminate the AMS Customer Offering, which the Companies Offered to All Customers, Is Used by a Number of Customers Living in Zip Codes MHC Has Identified as Low-Income, and Is Performing Well as Approved by the Commission.

The Commission should deny MHC's request to terminate the AMS Customer Offering.³² To do so would be consistent with the Commission's denial of MHC's identical request made in its post-hearing brief in Case No. 2014-00003.³³ In rejecting MHC's identical arguments in Case No. 2014-00003, the Commission took the position the Companies have advocated in this case, namely that KRS 278.285(1) requires the Commission to evaluate the reasonableness of proposed DSM-EE program plans, and that KRS 278.285(1)(h) does indeed provide special consideration for advanced metering programs:

The majority believes that the Companies' AMS proposal is a good way to test this type of program on a limited scale as a pilot through a DSM program. The majority is not persuaded by certain arguments of the various intervenors opposing the AMS program. *The majority is persuaded by the Companies' argument that KRS 278.285(1)(h) provides special consideration for such offerings independent of cost-benefit considerations.* The majority notes that KRS 278.285(1) sets out the factors that the Commission may

³¹ Lawson Direct at 25.

³² MHC Initial Brief at 26-29.

³³ Case No. 2014-00003, MHC Post-Hearing Brief at 11-17 (Sept. 30, 2014).

consider in determining the reasonableness of DSM/EE programs.
The statute is permissive, not prescriptive.³⁴

As the Companies have previously noted, the AMS Customer Service Offering continues to be a success on the terms under which the Commission approved the offering—over MHC’s objections—as part of the Companies’ 2015-2018 DSM-EE Program Plan.³⁵ The offering was proposed to be limited to 10,000 customers participating on a voluntary basis; as of March 31, 2018, nearly 8,100 customers were enrolled in the offering.³⁶ The Companies asserted in 2014 that though they did not perform cost-benefit tests on the offering, they anticipated that customers would indeed benefit from the offering; participants have indeed demonstrated increased awareness of their energy usage and have reported implementing energy efficiency behaviors and efforts as a result of that awareness, including upgrading to LED bulbs and adjusting their thermostat settings as a result of participation.³⁷ Moreover, a third-party analysis of the AMS Customer Offering confirms that certain customers are indeed using the data available through AMS as a motivation to engage in energy efficiency and are achieving savings.³⁸ In addition, the Companies asserted in 2014 that, though participation would be limited to 10,000 customers, the opportunity to participate would be available to all customers; notably, about 1/5 of the residential AMS meters deployed to date in Jefferson County have been installed in zip codes with higher concentrations of low-income customers as identified by MHC, apparently confirming that customers of all income levels desire to participate in the offering and find it useful.³⁹ In short, the AMS Customer Offering is performing well on exactly the terms

³⁴ Case No. 2014-00003, Order at 24 (Nov. 14, 2014) (emphasis added).

³⁵ Case No. 2014-00003, Order at 31 (Nov. 14, 2014).

³⁶ Case No. 2018-00005, Companies’ Response to AG 1-9 (Apr. 13, 2018).

³⁷ Huff at 21.

³⁸ *See, e.g.*, Case No. 2018-00005, Malloy Direct at Exh. JPM-1 Appx. A-10 (Jan. 10, 2018).

³⁹ Lawson Rebuttal at 12.

approved by the Commission in Case No. 2014-00003 over MHC's identical objections. Therefore, the offering should be continued as proposed in this proceeding.

In addition, a potential benefit not only of the AMS Customer Offering but also of the full deployment of AMS the Companies have proposed in Case No. 2018-00005 is that the granular interval data AMS provides might aid the Companies' WeCare vendors to choose and implement the most effective energy-saving measures for low-income customers. Therefore, to discontinue the offering might potentially harm any low-income customers who are participating in the AMS Customer Offering and later seek services through WeCare.

Finally, it is important to note that terminating the AMS Customer Offering for any reason other than incorporating it as part of a full AMS deployment would result in customers continuing to pay for the AMS resources prudently deployed in accordance with the Commission's prior program approval, but without participants continuing to receive any benefit from the investment. In particular, if the offering terminates, the MyMeter customer portal will cease to function, preventing customers with AMS meters from obtaining data that might help them control and manage their energy usage. The Companies therefore believe it is appropriate and consistent with the offering's approval by the Commission in late 2014 to continue the program at a maintenance level until the Commission approves full AMS deployment, after which time the program will continue under the DSM mechanism until it is included in base rates in a subsequent rate case.

V. Contrary to the Attorney General's Claims, the Companies Have Been Entirely Consistent Regarding Avoided Capacity Costs in this Case and in Case No. 2018-00005.

Contrary to what the AG asserts, the Companies are not arguing one position regarding avoided capacity costs in this proceeding while taking another position in Case No. 2018-

00005.⁴⁰ The Companies have not claimed in Case No. 2018-00005 that avoided capacity cost will be a benefit of full AMS deployment, but rather that it is possible that avoided capacity cost *could be* a benefit of full AMS deployment if circumstances changed:

[T]hough the Companies' reserve margin appears to be adequate based on currently foreseeable conditions and circumstances, and the Companies did not include any avoided-capacity-related savings in their AMS Business Case, it is possible circumstances could change to allow such a benefit to eventuate. If it did, it would add net benefits to a project the Companies have already demonstrated will have net benefits.⁴¹

It is important to note that the study period at issue in that proceeding is 2018-2040, which is considerably longer than the period at issue in this proceeding, namely 2019-2025. The longer timeframe at issue in Case No. 2018-00005 makes it possible that changes could occur to create an avoided-capacity-cost benefit in a way that is highly unlikely with regard to the proposed DSM-EE Program Plan, i.e., the likelihood of meaningfully increased load or decreased generating capacity increases as the future timeframe considered increases. In short, contrary to the AG's assertions, the Companies' positions on this issue in this case and in Case No. 2018-00005 are indeed consistent.

VI. Contrary to the AG's Claims, the Stakeholder Process regarding the Proposed DSM-EE Program Plan Has Been Adequate and Sufficient under KRS 278.285(1)(f).

The Commission has repeatedly approved the Companies' DSM-EE Program Plans across nearly 20 years that involved exactly the same stakeholder process, i.e., the Companies' DSM Advisory Group, in which the Companies and a number of other stakeholders participated prior the Companies' filing their application in this proceeding.⁴² The AG's apparent position

⁴⁰ AG Initial Brief at 3-4.

⁴¹ Case No. 2018-00005, Malloy Rebuttal at 7.

⁴² See, e.g., Case No. 2000-00459, Order at 4 (May 11, 2001); Case No. 2014-00003, Order (Nov. 14, 2014).

that the Companies must provide a stakeholder process in which the participants all have a vote is contrary to the position previously held by the AG. More importantly, the AG's position is contrary to the Commission's precedent that has governed this issue for nearly 20 years.

Prior to the DSM Advisory Group that first convened concerning the Companies' DSM Program Plan application filed in 2000, LG&E engaged with a DSM Collaborative in which each member had a vote and unanimity was required to make decisions.⁴³ Notably, it was the AG who, in the context of the Companies' 2000 DSM application, agreed with the Companies that the former DSM Collaborative process should end "even if the requirement of a unanimous member vote on decisions is modified or eliminated":⁴⁴

MHNA and POWER and APCD both advocate continuation of the LG&E DSM Collaborative rather than having its members serve on a DSM Advisory Group. The AG, citing the problems the collaborative has experienced during its existence, favors the Companies' proposal [to end the DSM Collaborative and create the DSM Advisory Group].⁴⁵

Therefore, the AG's apparent change in this position in this case is a break with the position the AG has held for nearly 20 years.

More importantly, the Commission's final order in that case clearly stated the opposite of the position the AG now takes. Regarding the amount of stakeholder collaboration KRS 278.285 requires, the Commission stated:

KRS 278.285, under which the Companies' application was filed, does not require that a utility's DSM programs be developed through a collaborative process. Rather, the Commission must only consider the extent to which customer representatives were involved in the development of such programs and their support for the programs. Whether DSM programs are developed through

⁴³ Case No. 2000-00459, Order at 4 (May 11, 2001).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 8. *See also id.* at 4-5.

a collaborative process or with input from an advisory group is an issue to be resolved by the Companies and the interested parties.⁴⁶

Thus, the Commission's position on this issue has been clear and well established since at least 2001, and the Commission should reject the AG's criticisms in this regard as being contrary to long-established law.

The entities that had representatives attend the meetings did indeed help to shape the DSM-EE Program Plan.⁴⁷ For example, the Companies increased the maximum-income threshold for WeCare and added availability of the program to master-metered residential buildings based on input from low-income advocates participating in the group.⁴⁸ Therefore, the participants in the DSM Advisory group do provide input and insight that aids the Companies to create DSM-EE proposals the Companies' believe are reasonable and worthy of Commission approval.

Additionally, as the Commission noted as recently as its final order in the Companies' most recent DSM-EE Program Plan application in 2014, the Commission may consider and approve only those programs proposed by an applying utility.⁴⁹

In sum, the Companies respectfully submit the DSM Advisory Group process concerning this application was consistent with all relevant precedents and more than sufficient to merit the Commission's determination of reasonableness with respect to KRS 278.285(1)(f).

VII. Walmart's Industrial Opt-Out and Self-Direct Positions Remain Implausible and Contrary to KRS 278.285, and Must Be Rejected as Such.

Walmart's Initial Brief provides only one new argument to support its untenable position that large retail store operations such as those Walmart owns and operates should be eligible to

⁴⁶ *Id.* at 8.

⁴⁷ *See* Lawson Direct Exh. GSL-1 at 67-68, 86-87, 107-108, 130-132, and 159-161 (sign-in sheets for DSM Advisory Group meetings in 2016-2017).

⁴⁸ *See* Lawson Direct Exh. GSL-1 at 17 and 182.

⁴⁹ Case No. 2014-00003, Order at 30-31 (Nov. 14, 2014).

opt out of DSM-EE programs and charges under the industrial opt-out of KRS 278.285(3). Because the Companies have already addressed all of the rest of Walmart’s positions at length in rebuttal testimony and the Companies’ Initial Brief, the Companies will address only the new argument here at length.⁵⁰

The sole new argument Walmart presents in a single paragraph of its brief is that, because the Companies define “industrial” without reference to rate schedule but define “energy-intensive” by referring to rate schedules, it is possible that the industrial customers within a given rate class might be able to opt out, but the remaining non-industrial customers in that rate class would not.⁵¹ Walmart believes this is a serious infirmity, at least with respect to customers taking service under Rate TODP: “Assuming all 219 eligible customers elected to take advantage of the Opt-Out, that would leave 139 customers — a minority of the customers in that rate class — to bear the total costs of the Companies’ sponsored DSM/EE programs for this rate class. Such a result is inherently unfair and violates core regulatory principles advancing fair, just, reasonable, and non-discriminatory rates.”⁵²

But this supposed infirmity afflicts Walmart’s opt-out proposal more than it does the Companies’. Walmart’s opt-out proposal would “grandfather” all existing opt-out customers.⁵³ There are no such customers, but presumably Walmart intends that all customers not currently paying DSM-EE charges would continue not to pay them under Walmart’s opt-out regime. The difficulty for Walmart is that the 219 Rate TODP customers that *could* be eligible to opt out under the Companies’ opt-out proposal *would* be opted out under Walmart’s grandfathering proposal. Indeed, Walmart’s proposal exacerbates the problem because Walmart defines

⁵⁰ See Lovekamp Rebuttal; Companies’ Initial Brief at 10-15.

⁵¹ Walmart Initial Brief at 4-5.

⁵² *Id.* at 5.

⁵³ Baker at 12.

“industrial” by rate class—including Rate TODP—but then defines “energy-intensive” also by rate class and as having a minimum load factor of 60%.⁵⁴ This means some proportion of the remaining 139 Rate TODP customers about which Walmart is concerned will be able to opt out under Walmart’s plan, leaving an even smaller number of Rate TODP customers to pay DSM-EE charges. In short, Walmart’s opt-out proposal worsens the very problem Walmart invented.

But the problem Walmart articulates actually is not a problem at all; nothing in KRS Chapter 278 prohibits a utility from complying with KRS 278.285(3). Indeed, KRS 278.030(3) states that every utility may use “suitable and reasonable classifications of its service, patrons and rates,” which may take into account “the nature of the use, the quality used, the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.” With regard to opting out of a utility’s DSM-EE programs and charges, KRS 278.285(3) provides the criteria to be used to determine which customers may opt out, namely “industrial customers with energy intensive processes ... [which have] implement[ed] cost-effective energy efficiency measures in lieu of measures approved as part of the utility's demand-side management programs if the alternative measures by these customers are not subsidized by other customer classes.” Due to the limited and unique nature of the statutorily prescribed industrial opt-out, it is neither legally problematic nor surprising that the criteria for opting out do not mirror the criteria for customers’ eligibility for taking ordinary electric service under a particular rate schedule. Therefore, the issue Walmart raises is not a problem for either the Companies’ opt-out proposal or Walmart’s.

But Walmart’s patchwork opt-out proposal is infirm for numerous reasons the Companies have previously stated: a definition of “industrial” that has no relationship to any recognized

⁵⁴ *Id.*

definition of the term; a definition of “energy-intensive” that subsumes its definition of industrial, but then adds an arbitrary load-factor requirement; a grandfathering proposal that grandfathers nobody; a separate one-criterion opt-out test based on peak load without regard for any other consideration; all this in an attempt to have the industrial opt-out KRS 278.285(3) apply to obviously non-industrial customers, including large retail stores. The Commission should reject Walmart’s opt-out proposal as wholly inconsistent with the plain meaning and clear intent of KRS 278.285(3).

Finally, as the Companies have previously argued, the Commission must also decline Walmart’s request for a self-direct program.⁵⁵ KRS 278.285(1) clearly limits the Commission’s authority in this proceeding to reviewing for reasonableness the proposals made by the Companies: “The commission may determine the reasonableness of demand-side management plans proposed by any utility under its jurisdiction.” The Commission unambiguously recognized this limitation on its authority in its final order in Case No. 2014-00003: “The Commission's role is to review and approve (or reject) a particular program proffered for approval to the Commission. Therefore, we are not suggesting or ordering that any specific DSM/EE program for industrial customers be implemented.”⁵⁶

CONCLUSION

The Companies’ Proposed DSM-EE Program Plan provides a portfolio of DSM-EE programs that is reasonable under the terms of KRS 278.285(1). None of the briefs filed by MHC, the AG, and Walmart has shown anything to the contrary. If anything, the rebuttals to the arguments they presented provide further support for the Companies’ application as filed.

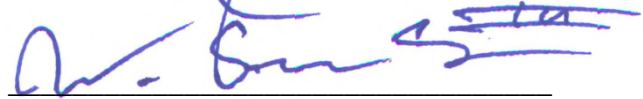
⁵⁵ Baker at 16-18; Walmart Brief at 6.

⁵⁶ Case No. 2014-00003, Order at 30-31 (Nov. 14, 2014).

Therefore, the Companies respectfully ask the Commission to approve the proposed 2019-2025 DSM-EE Program Plan to be effective with service rendered on and after January 1, 2019.

Dated: July 9, 2018

Respectfully submitted,



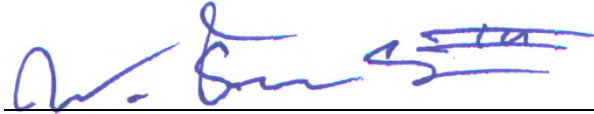
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CERTIFICATE OF COMPLIANCE

This is to certify that Louisville Gas and Electric Company and Kentucky Utilities Company's July 9, 2018 electronic filing of their Reply Brief is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on July 9, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and six copies in paper medium of the Reply Brief are being mailed by first class U.S. Mail, postage prepaid, to the Commission on July 9, 2018.

A handwritten signature in blue ink, appearing to read "D. G. ...", is written above a horizontal line.

*Counsel for Louisville Gas and Electric Company
and Kentucky Utilities Company*