

**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) **CASE NO. 2017-00441**
FOR REVIEW, MODIFICATION, AND)
CONTINUATION OF CERTAIN EXISTING)
DEMAND-SIDE MANAGEMENT AND)
ENERGY EFFICIENCY PROGRAMS)

**INITIAL BRIEF OF
WAL-MART STORES EAST, LP AND SAM'S EAST, INC.**

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

I. INTRODUCTION

A. Statement of Case

On December 6, 2017, Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, "Companies") jointly filed with the Commission an Application pursuant to KRS 278.285 for approval of their 2019-2025 Demand-Side Management and Energy Efficiency ("DSM-EE") Program Plan ("Application"). As part of the Application, the Companies have made a proposal pursuant to KRS 278.285(3) to permit certain industrial customers to opt-out of the Companies' DSM-EE programs ("Opt-Out"). Walmart objects to the Opt-Out proposed by the Companies because the Companies failed to adequately explain why certain rate classes qualify as "energy intensive processes" as required by KRS 278.285(3), but other rate classes do not. Walmart also objects to the definition of "industrial"

proposed by the Companies as it unfairly discriminates against large non-residential customers by allowing only some customers in the applicable rate classes to take advantage of the Industrial Opt-Out while similarly-situated customers in the same rate class are prohibited from doing the same.

B. Relevant Procedural History

On January 10, 2018, Walmart filed a Motion to Intervene ("Walmart Intervention"), which was granted by Order of the Commission on February 14, 2018.

On March 21, 2018, Walmart submitted the Direct Testimony and Exhibits of Kenneth E. Baker, addressing the Opt-Out proposed by the Companies. Specifically, Mr. Baker noted Walmart's opposition to the Opt-Out as proposed by the Companies, arguing that the Companies' proposed qualification criteria arbitrarily excludes energy intensive customers who take service under the Companies' industrial rates. Mr. Baker's testimony also indicated that the Companies do not articulate sufficient reasons for selecting only some customers within some rate classes as qualifying for the Opt-Out while excluding others, and also recommended that the Opt-Out should be available to any customer who takes service under the Companies' industrial rate schedules. To the extent the Commission adopts the Opt-Out proposed by the Companies, Mr. Baker recommended that the Commission should give non-residential customers who are ineligible for the Opt-Out the option to self-direct their DSM/EE programs.

On April 24, 2018, the Companies filed Rebuttal Testimony. On April 26, 2018, as required by Commission Order, the Companies, Walmart, and the Attorney General filed letters requesting that the Commission not hold an evidentiary hearing, and instead decide the issues based on the record in this proceeding. The Metropolitan Housing Coalition ("MHC") filed a letter requesting an evidentiary hearing, or, in the alternative, asked the Commission to modify

the procedural schedule to allow an additional set of data requests to the Companies limited to their Rebuttal Testimony coupled with a briefing schedule. The Commission issued an Order on May 31, 2018, granting MHC's request for additional discovery and briefing. On June 7, 2018, Walmart and MHC each filed data requests to the Companies. On June 14, 2018, the Companies filed their responses to Walmart's and MHC's requests.

C. Walmart's Recommendation

Walmart recommends that the Commission should reject the Opt-Out criteria proposed by the Companies as it is insufficiently supported and because it results in discriminatory treatment of customers within similar rate classes. Rather than picking and choosing certain customers within a rate class, the Commission should make the Opt-Out available to any customers who takes service under an industrial rate schedule.

II. ARGUMENT

The Kentucky Legislature has authorized certain customers to opt-out of participation in utility-sponsored DSM/EE programs.¹ The scope of that opt-out is set forth in Kentucky Revised Statute 278.285(3) and states as follows:

The commission shall assign the cost of demand-side management programs only to the class or classes of customers which benefit from the programs. The commission shall allow individual industrial customers with energy intensive processes to implement 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. Such individual industrial customers shall not be assigned the cost of demand-side management programs.

Id. Neither the term "industrial" nor the phrase "energy intensive processes" are defined by the statute.

¹ KRS 278.285(3).

A. The Companies' Industrial Opt-Out Arbitrarily Excludes Certain Customers from Participation.

In this proceeding, the Companies seek approval of an opt-out pursuant to KRS 278.285(3). The Companies' propose to define "industrial" for purposes of the Opt-Out as:

[N]on-residential customers engaged in activities primarily using energy (electricity or gas) in a process or processes involving either the extraction of raw materials from the earth or a change of raw or unfinished materials into another form or product.²

The Companies do not attempt to define the phrase "energy intensive processes," but have instead proposed to include only certain rate schedules³ – Fluctuating Load Service (Rate FLS), Retail Transmission Service (Rate RTS), and Time-of-Day Primary Service (TODP) for electric service and rates⁴ – as eligible to participate in the Industrial Opt-Out, arguing they are *de facto* "energy intensive."⁵ Other than concluding that these rate schedules are "energy-intensive rates," the Companies offer no explanation for their inclusion of some rate schedules and the exclusion of others. To the extent the Companies believe these rate schedules, and only these rate schedules, reflect "energy intensive processes," the Companies should be required to put forth proof in support of such contention and should also be required to show why customers in other rate classes do not engage in "energy intensive processes."

The effect of adopting the Opt-Out as proposed by the Companies is that customers within rate classes will be treated differently from one another. For example, the Companies have indicated that there only 219 customers taking service under TODP who would be eligible

² Direct Testimony of Rick E. Lovekamp ("Lovekamp Direct"), p. 6, lines 2-7.

³ Direct Testimony of David Huff ("Huff Direct"), p. 26, lines 14-19.

⁴ The Companies have also included certain gas service rates for inclusion.

⁵ Lovekamp Direct at 6, 8-10.

for the Opt-Out using the criteria proposed by the Companies,⁶ but that there are at least 358 customers taking service under TODP.⁷ 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.⁸

Walmart recognizes the Commission's prior finding in Case No. 2014-00003 that "the industrial opt-out is available only for industrial customers, not commercial customers."⁹ The problem here is that a fair definition of "industrial" versus "commercial" is not readily available. The Kentucky Legislature did not define the meaning of "industrial" for purposes of 278.285(3), thought it clearly could have done so.¹⁰ Nor can the Commission or parties look to the rate schedules offered by the Companies as the Companies admittedly "do not have industrial rates for electric service," but instead distinguish based rates on "electrical demand rather than the purpose for which the customer uses the service."¹¹ Accepting the Opt-Out as proposed by the

⁶ Companies' Response to Walmart's Supplemental Data Requests Regarding Rebuttal Testimony dated June 7, 2018, at Question No. 4(a).

⁷ *Id.* at Response to Question 4(b).

⁸ KRS 278.030(1) (stating that utilities must charge "fair, just and reasonable rates"); *see also* KRS 278.170(1) (prohibiting a utility from giving "any unreasonable preference or advantage to any person or subject any person to unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service doing a like and contemporaneous service under the same or substantially the same conditions").

⁹ *See In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for Review, Modification, and Continuation of Existing, and Addition of New, Demand-Side Management and Energy-Efficiency Programs*; Case No. 2014-0003, Order at 26 (Nov. 14, 2014).

¹⁰ As the Companies' Rebuttal Testimony notes, there are several statutes where the Kentucky Legislature has distinguished between commercial and industrial. Rebuttal Testimony of Rick E. Lovekamp, p. 4, lines 4-19 ("Lovekamp Rebuttal"). These citations are noteworthy for two reasons. First, none of the cited statutes fall within Section 285 of the Kentucky Code. Second, these statutory citations only reinforce the notion that the Kentucky Legislature knows how to define these terms. The notable absence of an applicable definition for the meaning of "industrial" indicates that the Commission can exercise its authority to interpret that term on its own.

¹¹ Lovekamp Rebuttal, p. 3, lines 10-13.

Companies means that customers within the same rate class will be treated differently, which is simply unfair if not discriminatory.

In the absence of a definition from the Legislature or industrial-only rate schedules, the better and more fair course is for the Commission to determine that all customers served under energy intensive, traditionally "industrial," rate schedules are eligible for the Opt-Out. This ensures that all customers within the same rate class are treated similarly to one another, rather than picking winners and losers within these rate schedules. Walmart understands that the Legislature may have desired to restrict the opt-out but offered no definitions to do so, thus the Commission has broad regulatory authority to take steps over and above what the Legislature may or may not have explicitly stated in order to ensure that the rates charged by the Companies are just, reasonable, fair, and non-discriminatory.

B. In the Absence of a More Expansive Opt-Out, Non-Participating Customers Should be Entitled to Self-Direct.

In the event the Commission elects to approve the Industrial Opt-Out, the Commission should exercise its discretion and take steps to ensure that other customers who do not meet the Companies' definition of "industrial" are not left in a severely disadvantaged position vis-à-vis the other customers in their rate class. A self-direct option, as described by Mr. Baker in his Direct Testimony,¹² would give those non-"industrial" customers greater flexibility in effecting DSM/EE measures and would mitigate against the inherent unfairness of the Companies' proposed Opt-Out criteria.

¹² Direct Testimony of Kenneth E. Baker, p. 16, line 2 to p. 18, line 2.

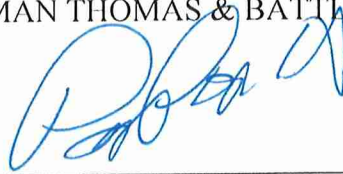
III. CONCLUSION

The Commission should carefully consider the parameters of the Opt-Out applicable to the Companies' customers. Accepting the Opt-Out as defined by the Companies makes arbitrary distinctions, both in terms of the rate classes that may take advantage of the Opt-Out and the customers within those rate classes who are eligible for it. The Companies separate customers by electrical demand and usage and not by the reasons for that usage. Therefore, electrical demand and usage should be the criteria for determining the applicability of the Opt-Out. As the Companies' proposed Opt-Out criteria does not result in just, reasonable, and non-discriminatory rates, the Commission should deny their request for approval of the Opt-Out as proposed, and require revisions that would produce a more fair result.

WHEREFORE, Wal-Mart Stores East, LP and Sam's East, Inc., respectfully request that the Kentucky Public Service Commission deny the Opt-Out proposed by Louisville Gas and Electric Company and Kentucky Utilities Company in their Application.

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

Barry A. Naum
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Phone: (717) 795-2740
Fax: (717) 795-2743
E-mail: bnaum@spilmanlaw.com

Carrie M. Harris (VA Bar No. 76817)
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
Phone: (336) 631-1051
Fax: (336) 725-4476
E-mail: charris@spilmanlaw.com

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

Dated: June 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that Walmart's June 26, 2018, electronic filing is a true and accurate copy of the Initial Brief of Wal-Mart Stores East, LP and Sam's East, Inc., to be filed in paper medium; and that on June 26, 2018, the electronic filing has been transmitted to the Commission, and that an original and six (6) copies 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:

Robert M. Conroy
Vice President – State Regulation and Rates
LG&E and KU Services Company
220 West Main Street
Louisville, KY 40202
robert.conroy@lge-ku.com

Allyson K. Sturgeon, Esq.
Sara V. Judd, Esq.
LG&E and KU Services Company
220 West Main Street
Louisville, KY 40202
Allyson.Sturgeon@lge-ku.com
sara.judd@lge-ku.com

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 40202-2828
kendrick.riggs@skofirm.com
duncan.crosby@skofirm.com
joseph.mandlehr@skofirm.com

Rebecca W. Goodman, Esq.
Kent A. Chandler, Esq.
Justin M. McNeil, Esq.
Lawrence W. Cook, Esq.
Office of the Attorney General
Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, KY 40601
Rebecca.Goodman@ky.gov
Kent.Chandler@ky.gov
Justin.mcneil@ky.gov
Larry.Cook@ky.gov

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
MKurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com

Tom FitzGerald, Esq.
Kentucky Resources Council, Inc.
P.O. Box 1070
Frankfort, KY 40602
FitzKRC@aol.com



Don C. A. Parker (Kentucky I.D. No. 94113)