

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 )	CASE NO.
CONTINUATION OF CERTAIN EXISTING DEMAND-SIDE )	2017-00441
MANAGEMENT AND ENERGY EFFICIENCY PROGRAMS )	

**ATTORNEY GENERAL’S REPLY BRIEF**

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (the “Attorney General”), and hereby submits his reply brief in the above-styled matter.

**ARGUMENT**

**I. The Companies Must Address The Stakeholder Process To Ensure It Is More Inclusive and Transparent**

To demonstrate compliance with KRS 278.285(1)(f), the factor which considers how much involvement the Attorney General and customer representatives had in the planning process for the proposal, the Companies state in their brief that the DSM Advisory Group met five times across 2016 and 2017, and its membership included a broad swath of customer representatives in addition to the Attorney General’s Office.<sup>1</sup> The Companies go on to describe some of the presentation topics put forward at those various meetings, before noting that there did not appear to be final unanimity on the proposal among these participants, although such was not required per statute.<sup>2</sup>

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<sup>1</sup> Initial Brief of Louisville Gas and Electric Company and Kentucky Utilities Company, *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, at 3 (June 26, 2018).

<sup>2</sup> *Id.* at 3–4.

The Companies do not state whether they took any of the participants' specific suggestions into account, and to what degree, they simply claim to have "extensively consulted with the Attorney General and customer advocates in formulating the 2019-2025 Program Plan, which supports its reasonableness under KRS 278.285(1)(f)."<sup>3</sup>

The Companies have previously stated that the collaboratives involving the Attorney General and customer group representatives are simply informational, essentially a one-directional forum through which the participants share their views with the Companies.<sup>4</sup> However, they also indicated that they consider DSM Advisory Group participants' views alongside all other customer input, which seemingly renders it all at the same level of importance.<sup>5</sup> The Attorney General believes that compliance with KRS 278.285(1)(f) requires that the Companies provide insight into how input from the DSM Advisory Group is considered in the development of their DSM/EE proposal, so that the Public Service Commission ("Commission") is able to adequately gauge and consider the level of involvement of the other participants as contemplated by the plain text of the statute. Moving forward, the Attorney General maintains that the Companies must invite full participation from the members of the DSM Advisory Group through the use of more constructive processes, and a clear delineation of the role the Advisory Group's discussions play in shaping the Companies' proposal before the Commission.

## **II. The Degree Of The Commission's Authority in Reviewing DSM/EE Programs**

The Companies' brief states that the plain text reading of KRS 278.285 "clearly limits the Commission's authority in this proceeding to reviewing for reasonableness the proposals made by

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<sup>3</sup> *Id.* at 4.

<sup>4</sup> *See* Attorney General's Initial Brief, Case No. 2017-00441, at 5 (June 26, 2018) (citing the Companies' Responses to the Attorney General's Supplemental Data Requests).

<sup>5</sup> *Id.*

the Companies.”<sup>6</sup> The Companies contend that the “the Commission may not require the Companies to extend, expand, or even offer DSM-EE programs.”<sup>7</sup> The Companies made the same argument in their brief supporting the DSM/EE application for 2015-2018, in Case No. 2014-00003.<sup>8</sup> In both instances the Companies go so far as to claim that since a bill was introduced in 2009, which did not become law, and which would have given the Commission the express authority to order any energy utility in its jurisdiction to file demand-side management plans, programs, and measures, the Commission lacks the ability to alter the Companies’ instant proposal. The Companies state “[t]he General Assembly’s refusal to enact this legislation is evidence of legislative intent to limit the Commission’s authority to review DSM plans, not require them.”<sup>9</sup> The Companies present a citation with a link to the draft bill, but provide no other support for their contention that the General Assembly intended to specifically limit the Commission’s authority in regards to DSM/EE proposals by not passing this bill, or even that the bill sponsors sought to give the Commission authority it did not already possess.

In the Commission’s Final Order in Case No. 2014-00003, the Commission ordered the Companies to conduct a study to examine the potential benefits of offering industrial DSM/EE programs, finding that sufficient justification existed which required the Companies to further investigate this issue.<sup>10</sup> The Commission went on to state that “[t]he Commission’s role is to

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<sup>6</sup> Initial Brief of Louisville Gas and Electric Company and Kentucky Utilities Company, Case No. 2017-00441, at 11 (June 26, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> Post-Hearing Brief of LG&E and KU, *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. 2014-00003, at 19–21 (September 30, 2014).

<sup>9</sup> Initial Brief of Louisville Gas and Electric Company and Kentucky Utilities Company, Case No. 2017-00441, at 10, footnote 36 (June 26, 2018).

<sup>10</sup> PSC Order, *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. 2014-00003, at 30 (November 14, 2014).

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.”<sup>11</sup> However, the Commission also earlier noted that KRS 278.285(1):

is permissive, not prescriptive. . . . Thus the Commission may exercise its discretion in considering and weighing the factors enumerated in KRS 278.285(1), as well as any other relevant factors. The statute also does not restrict the Commission’s consideration to the factors specified in the statute.<sup>12</sup>

The Attorney General is concerned that the Companies’ conception of the Commission’s role and authority under KRS 278.285 is even narrower than that which the text contemplates, and would remind the Companies of the Commission’s broad discretion in determining the reasonableness of any DSM/EE proposal under the plain reading of the statute. KRS 278.040 charges the Commission with the regulation of utilities and the enforcement of KRS chapter 278. Furthermore, the Commission must always ensure that its orders comply with KRS 278.030, which mandates that utilities may only demand, collect, and receive rates that are fair, just, and reasonable, and that utilities must furnish adequate, efficient, and reasonable service. The fair, just, and reasonable standard is the Commission’s lodestone for authority, especially if there are conflicting statutes.

Finally, in light of the Companies’ arguments regarding perceived limitations on the Commission’s ability to modify their proposals, the Companies’ claim that they gave full consideration to stakeholder concerns seems even more disingenuous. If the Companies continue to maintain that the Commission itself lacks the authority to add or change any of the programs in their proposal, then they certainly do not give any real weight to the suggestions or concerns of the customer representatives or the Attorney General. The Companies’ position belies their true feelings toward the stakeholder process; which is one of forced compliance with the statutorily

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<sup>11</sup> *Id.* at 30–31.

<sup>12</sup> *Id.* at 24.

mandated process, but where the outcome in no way reflects the collaboration intended by the legislature, by the very same plain text reading of KRS 278.285 the Companies support. If the Commission only has the authority to vote up or down on a utility's proposal as the Companies argue, then the stakeholder process becomes even more important to the overall scheme, and the Commission should place an emphasis on maximizing the effect of stakeholder input by requiring the Companies to further incorporate stakeholder concerns.

### **III. Granting An Industrial Opt-out to Walmart Would Effectively Sanction a Cost Shift to Other Customers**

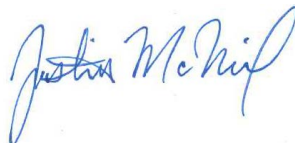
The Attorney General reiterates that regardless of the current or eventually accepted opt-out definition and application to commercial customers, if Walmart is allowed to opt out of the DSM/EE programs, it will create a cost shift for all remaining tariff customers. As a matter of policy, such an approval would mean the Commission is rewarding a commercial customer with superior capital to the detriment of the commercial customers who are unable to opt out.

### **CONCLUSION**

The DSM/EE plan proposed by the Companies, on the whole, is adequate. However, the Companies should properly recognize the inherent discretion the statutes grant the Commission in evaluating DSM/EE proposals, and in enforcing the entirety of chapter 278, and tailor their proposals accordingly. Further, the Companies must work to more fully embrace the stakeholder process, as the current *status quo* merely allows stakeholders a chance to voice their opinion without knowing how this might affect the final proposal. Finally, the Commission should remain mindful that allowing Walmart to opt out will necessarily create a cost shift, which will have real implications for the customers not afforded the same treatment.

Respectfully submitted,

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