COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC JOINT APPLICATION OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND SITE COMPATIBILITY CERTIFICATES AND APPROVAL OF DEMAND SIDE MANAGEMENT PLAN AND APPROVAL OF FOSSIL FUEL-FIRED GENERATING UNIT RETIREMENTS	)	**CASE NO. 2022-00402**

REPLY BRIEF OF WALMART INC.

Walmart Inc. ("Walmart"), by counsel, respectfully submits this Reply Brief to the Kentucky Public Service Commission ("PSC" or "Commission"). Walmart stands by the recommendations set forth in its Initial Brief ("I.B.") and, therefore, does not reiterate those arguments herein. Instead, Walmart's Reply brief focuses on arguments from the I.B. of Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, "Companies"), the Kentucky Coal Association ("KCA"), the Kentucky Industrial Utility Customers' ("KIUC"), Sierra Club, and Joint Intervenors[1] concerning the proper meaning and scope of various requirements under Senate Bill 4 ("SB 4").

I. INTRODUCTION

With the passage of SB 4, one of the challenges before the Commission is determining which statutes apply to the Companies' various requests in this case. As the Companies correctly note, prior to the passage of SB 4, the decisions before the Commission were governed by KRS 278.020(1) (the statutory requirement for a CPCN) and KRS 278.030(2) (obligating the

[1] Joint Intervenors is comprised of Metropolitan Housing Coalition, Kentuckians for the Commonwealth, Kentucky Solar Energy Society, and Mountain Association

Companies to furnish adequate service at just and reasonable rates). SB 4 did not eliminate the Companies' obligation to comply with KRS 278.020 or 278.030. Instead, SB 4, with its own unique requirements, adds an additional layer of Commission review. Some of the Companies' proposals, like the proposal to retire certain fossil fuel electric generating units and to replace those units with new natural gas combined cycles ("NGCC"), need to be evaluated under each of these three statutes. By contrast, other resources like the proposed solar power purchase agreements ("PPAs") need only be considered under the pre-SB 4 requirements.[2] Because the law governing the scope of KRS 278.020 or 278.030 is long-standing and well-established, Walmart does not address those statutory requirements in this Brief. By contrast, as SB 4 is before the Commission as a matter of first impression, Walmart responds to arguments by the Companies, KCA, KIUC, Sierra Club, and Joint Intervenors concerning the scope and meaning of SB 4 to assist the Commission in interpreting and giving effect to SB 4 in this proceeding.

II. ARGUMENT

It is undisputed that SB 4 makes it more difficult for a utility to retire a fossil fuel-fired electric generating plant located in the Commonwealth of Kentucky. While the General Assembly clearly intended to make it harder to close such plants, they did not intend to make it impossible. Although SB 4's ultimate goal is unambiguous, there are numerous aspects of SB 4 that will require interpretation and the exercise of Commission discretion. Guided by rules of statutory interpretation and construction as well as the evidentiary record in this case, Walmart provides the following feedback on the proper interpretation of various sections of SB 4 vis-à-vis the Companies' requests in this case.

[2] *See* Rebuttal Testimony of Lonnie E. Bellar ("Bellar Rebuttal"), p. 11, line 19 to p. 12, line 3 (stating that solar PPAs are not intended to be "SB 4 replacement generating capacity," but are instead part of a "least cost portfolio").

A. "Replace" under Section 2(a) of SB 4 should not mean a 1:1 replacement of MWs.

Section 2(a) of SB 4 requires the Companies to put forward evidence that they "will replace the retired electric generating unit with new electric generating capacity" that meets the requirements of SB 4. Nothing in SB 4 either expressly states or implies that the replacement must be 1:1; *i.e.*, that if 500 MW of generation is retired then 500 MW must replace it. Walmart believes – consistent with the arguments of the Companies, Joint Intervenors, and Sierra Club[3] – that the replacement, even of a lesser amount of MW, is sufficient if it is: (i) dispatchable; (ii) maintains or improves reliability and resilience, as those terms are defined in Kentucky law; and (iii) maintains minimum reserve capacity. *See* SB 4, Section 2(a)(1)-(3). Any other interpretation would be absurd, harmful to ratepayers, and contrary to least cost principles.

B. "Electric generating capacity" under Section 2(a) of SB 4 should be interpreted as broader than an "electric generating unit."

Under Section 2(a), the Companies are obligated to "replace the retired electric generating unit with new electric generating capacity." KCA has alleged, albeit without support, that the Battery Energy Storage System ("BESS") proposed to be housed at the Brown Electric Generating Station does not provide "new electric generating capacity" within the meaning of SB 4. KCA I.B., pp. 8-9.[4] There is nothing in the record to support KCA's claim, nor is it consistent with the plain language of SB 4.

Critically, SB 4 does not require the replacement of a "retired generating unit" with a new "electric generating unit." Had it done so, the answer as to what replacement resources could be considered would be clear and unambiguous because the phrase "electric generating unit" is

[3] Companies' I.B., p. 31; Sierra Club I.B., p. 12; Joint Intervenors I.B., pp. 47-48.
[4] The Companies state that they do not object to treating Brown BESS as dispatchable but they "do not believe it is appropriate to treat storage resources as "generating capacity." *See* Companies' I.B., p. 32, n. 120.

defined in KRS 278.262(1). By contrast, the phrase "electric generating capacity" is not defined. The use of different phrases – generating unit versus generating capacity – necessarily implies that the General Assembly intended different meanings. To assume otherwise, ignores the legislature's purposeful use of different phrases in the law. *See Ky. Heritage Land Conservation Fund Bd. v. Louisville Gas & Elec. Co.*, 648 S.W.3d 76, 86 (Ky. Ct. App. 2022) (stating "[t]his Court cannot endorse an interpretation that simply ignores a portion of the statutory text"). Kentucky law is clear that courts are obligated to "presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Shawnee Telecom Res. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). In this case, defining "electric generating capacity" to have the same meaning as "electric generating unit" would not give all parts of SB 4 meaning.

Instead, the Commission should, consistent with KRS 446.080(4), give technical words such as the phrase "electric generating capacity" their technical meaning. *See* KRS 446.080(4). The U.S. Energy Information Administration ("EIA"), for example, notes that batteries provide energy capacity and serve as a generation resource when their discharge that capacity onto the grid.[5] Similarly, as the Joint Intervenors note in their I.B., "generating capacity" under Kentucky's net metering statute includes distributed energy resources. Joint Intervenors I.B., p. 46. Consistent with the EIA definition of "electric generating capacity" the Commission could find that Brown BESS satisfies the definition of "electric generating capacity" used in Section 2(a) of SB 4.[6]

[5] *See* https://www.eia.gov/todayinenergy/detail.php?id=34432 (dated Jan. 8, 2018) (last visited Sept. 29, 2023); *see also* https://www.eia.gov/energyexplained/electricity/energy-storage-for-electricity-generation.php (last visited Sept. 29, 2023) (describing energy storage systems, including batteries, as having "electric generating capacity").

[6] This conclusion was also supported by Joint Intervenor witness John D. Wilson. *See* Direct Testimony of John D. Wilson ("Joint Intervenors Wilson Direct"), p. 6, lines 4-21.

C. Electric Generating Capacity need not be dispatchable 100 percent of the time to be dispatchable under Section 2(a)(1) of SB 4.

Section 2(a)(1) requires that the electric generating unit be "dispatchable." Importantly, "dispatchable" is undefined, and the statutory language includes no descriptor. For example, there is no requirement that the replacement electric generating capacity "always" be dispatchable. Thus, the Commission is vested with the discretion to determine what "dispatchable" means within the context of SB 4, including whether a resource that is *ever* dispatchable satisfies this requirement of SB 4. In this case, the Companies contend that the proposed owned solar facilities should be deemed dispatchable within the meaning of SB 4. *See* Companies' I.B., p. 32. By contrast, KCA seems to limit the types of resources that could be deemed dispatchable to only "coal, gas, and nuclear." KCA I.B., p. 4.

From Walmart's perspective, it is not clear why a coal-fired unit (Brown 3) with an annual capacity factor of 29 percent[7] is any more "dispatchable" than a Companies' owned solar facility with a capacity factor of 24-25 percent,[8] which the Companies will be able to dispatch between its "economic minimum to maximum"[9] during periods of solar irradiance. Similarly, a coal plant on an outage is equally as non-dispatchable as a solar plant at night. Indeed, both a coal plant and a solar plant require "fuel" to operate, and both can experience supply issues, either loss of sun (solar plant) or transportation issues or coal pile freezing (coal), that impact that resource's ability to dispatch. The fact that the specific characteristics of these resources differ does not detract from the fact both resources are dispatchable under certain conditions. Adopting the definition recommended by Walmart would mean that both the NGCC units, Brown BESS, and the

[7] *See* KIUC I.B., p. 9 (*citing* Rebuttal Testimony of David S. Sinclair ("Sinclair Rebuttal"), p. 67).
[8] *See* Hearing Transcript ("Tr."), Aug. 24, 2023, 17:47:25-17:47:37 (discussing capacity factor in context of solar PPAs).
[9] *See Electronic Joint Application of Kentucky Utilities Company and Louisville Gas and Electric Company for Approval of Fossil Fuel-Fired Generating Unit Retirements*, Case No. 2023-00122 ("SB 4 Application Case"), Direct Testimony of Stuart A. Wilson ("SB 4 Wilson Direct") at Ex. SB4-1, p. 7.

Companies' owned solar would qualify as "dispatchable" resources replacing the at-issue units proposed for retirement for SB 4 purposes.[10]

D. The Commission should determine the meaning "maintain[] or improve[] the reliability… of the electric generating transmission grid."

Section 2(a)(2) of SB 4 requires that the replacement electric generating capacity must "maintain[] or improve[] the reliability… of the electric generating transmission grid."[11] In this case, the Commission will need to decide what it means to "maintain" reliability. On the one hand, the Commission could – as KCA argues – decide that "maintain" means at the exact same level as the Companies' current portfolio of resources. KCA I.B., p. 7. Alternatively, the Commission could define "maintain" reliability to mean sufficient to provide safe, reliable service as recommended by the Companies. Companies' I.B., p. 35. Walmart believes that the 3.57 loss of load expectation ("LOLE") metric identified by the Companies,[12] which is a 1-in-10 metric upon which most reserve margins are set (and systems are built),[13] should be the guidepost for determining whether a given portfolio sufficiently maintains reliability. To do otherwise would result in the system being overbuilt to the detriment of ratepayers.

According to KCA (based on their more stringent definition of maintain), the "reliability and resiliency" of the grid will actually decline under the Companies' proposed portfolio. KCA I.B., p. 7. If the Commission adopts Walmart's recommended definition for the phrase "maintains reliability," as supported by the Companies, then any of the various iterations of the Companies' proposals, including adopting all the Companies' requests and closing all seven of the fossil fuel-

[10] Walmart agrees with Joint Intervenors that certain types of demand side management ("DSM") could also be deemed to be dispatchable. *See* Joint Intervenors I.B., p. 49.
[11] While KCA argues that reliability and resilience will decline as compared to keeping the existing fossil fuel plants, a review of KCA's I.B., reveals that KCA does not separately address reliability from resilience. *See* KCA I.B., pp. 7-11.
[12] SB 4 Application Case, Direct Testimony of Lonnie A. Bellar ("SB 4 Bellar Direct"), p. 13, lines 2-5.
[13] *See* Direct Testimony of Andrew Levitt, p. 14, lines 163-168

fired electric generating units, result in LOLEs below 3.57, contradicting KCA's claims of declining reliability.[14]

By contrast, if the Commission determines that "maintains reliability" means the proposed portfolio of replacement resources must result in the same or better LOLE as compared to the fossil fuel-fired electric generating units proposed to be retired, then this lends credence to KIUC's arguments that all the fossil-fuel fired electric generating units except Ghent 2 should be retired. *See* KIUC I.B., pp. 11-16. The Companies' own analysis confirms that a portfolio that closes Mill Creek Units 1 and 2, Brown 3, Paddy's Run 12, and Haefling Units 1 and 2, adds two 621 MW NGCC units, one at Brown and the other at Mill Creek, and keeps open Ghent 2 is substantially more reliable than keeping all the fossil fuel-fired electric generating units open.[15] This is true even without considering the added reliability benefits of the owned solar, Brown BESS, the DSM portfolio, or the solar PPAs, all of which also contribute to improved reliability but may or may not be appropriate to consider under SB 4.

Alternatively, if the Commission agrees with Walmart that both Brown BESS and the owned solar should be deemed to be dispatchable electric generating capacity within the meaning of SB 4 (*see* arguments (A) and (B), *above*), then even under KCA's definition of "maintains or improves" reliability, a portfolio that closed all of the fossil fuel-fired electric generating units, added two, 641 MW NGCC units, one at Mill Creek and the other Brown, added Brown BESS and added the owned solar would be *more* reliable than no closing any of the fossil fuel-fired electric generating units.[16]

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[14] *See* SB 4 Wilson Direct ,Ex. SB4-1, p. 14, Table 5; Companies' Response to Commission Staff's Fourth Request for Information, Question No. 7(c).
[15] *See* Companies' Response to Commission Staff's Fourth Request for Information, Question No. 7(c) (noting that the "no retirements" portfolio "0" results in a LOLE of .74 whereas portfolio 3, "Ret MC1-2/BR3/PR12/HF1-2; Add MC5/BR 12," results in an LOLE of .28).
[16] *See id*. at portfolios 0 and 8.

E. Under Section 2(c) of SB 4, the Commission should determine what motivated the Companies to propose to retire the fossil fuel-fired electric generating units.

Under Section 2(c), SB 4 states that "the decision to retire the fossil fuel-fired generating unit [cannot be the result of any] financial incentives or benefits offered by any federal agency." KCA argues that this language "expresses that the Legislature believed that incentives for renewable generation being provided by the federal government sends the wrong price signals to the energy market and disadvantaging fossil fuel-fire generation…." KCA I.B., pp. 16-17. Walmart disputes KCA's contention, noting that SB 4 says nothing about whether incentives applicable to certain replacement resources can be considered, provided those incentives were not the motivating factor in the retirement decision.

Based on the language actually set forth in Section 2(c) of SB 4, Walmart believes the question before for the Commission implicates a "chicken or the egg" conundrum. Essentially, the Commission must determine what motivated the Companies' decision to retire the fossil fuel-fired generating plants.[17] If the decision to close the at-issue coal plants in this case was done *in order to* take advantage of existing federal incentives or benefits for certain replacement resources, such a decision would be contrary to, and prevented by, SB 4. By contrast, if the decision to retire was not made because of such incentives or benefits but was instead the result of other analysis (like U.S. Environmental Protection Agency ("EPA") costs of compliance), the mere fact that certain replacement resources would be able to take advantage of federal incentives or benefits should not run afoul of Section 2(c) of SB 4.

According to the Companies' evidence, the decision to retire *preceded* the replacement resource selection, stating they "had to decide how to best meet their customers' needs in a least-

[17] *See* Sierra Club I.B., p. 28.

cost fashion given the required retirements." Companies' I.B., p. 5 (emphasis added). The Companies stated that they established a "need," prompted by the required retirements, that they then sought to meet by modeling dozens of scenarios to provide a least cost solution and by issuing a "wide-ranging RFP to gather actually available supply-side resource options to consider." *Id*. at 5, 15. Furthermore, the Companies state expressly in their I.B. that they "are proposing to retire the units at issue due to environmental compliance costs and other significant capital costs." Companies' I.B., p. 42. This evidence suggests that the Companies' decisions were not motivated by, or the result of, federal incentives or benefits.

Interpreting Section 2(c) of SB 4 in the manner recommended by Walmart also harmonizes other provisions of SB 4. Kentucky case law requires courts to assume that the legislature "did not intend an absurd result" via SB 4. *See Shawnee Telecom Res. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). Under Section 2(b),[18] the Companies must show that there are no "net incremental costs to be recovered from ratepayers that could be avoided" by not retiring the fossil-fuel electric generating units. Unless the Companies are able to consider the financial incentives that, in fact, accrue for certain types of replacement resources, the Companies can never accurately calculate net incremental costs.[19]

KCA claims that the Companies' modeling runs afoul of SB 4 because it incorporates federal incentives and argues that the law requires "[t]he exclusion of the federal incentives from the PVRR analysis." *See* KCA I.B., p. 17. The Commission should reject KCA's suggestion that a utility must calculate costs to ratepayers in a manner that is divorced from reality. To do otherwise

[18] In Walmart's I.B., it addressed why KCA's proposal for a residential rate impact analysis was inconsistent with Subsection (3) of SB 4 and will not reiterate those argument here. Walmart I.B., pp. 12-14.

[19] *See* SB 4 Wilson Direct, Ex. SB4-1, p. 21 (stating that federal tax credits "must be included in any reasonable [present value revenue requirement] PVRR analysis to appropriately reflect the cost of such generation supply alternatives" and that "[i]t would be unreasonable and unfair to customers to have such benefits eliminated from consideration when evaluating generation units."

creates an absurd result. Provided the Commission agrees that the receipt of federal benefits and incentives was not the reason for retiring the fossil fuel-fired electric generating units, nothing should prohibit the Companies from incorporating those benefits in their PVRR analysis.

F. The Companies (and Commission) can always consider costs imposed by the federal government on fossil fuel-fired electric generating units to make retirement decisions.

An additional consideration under Section 2(c) of SB 4 is not prohibited: the costs and detriments of complying with federal mandates as well as the likelihood of future mandates that may have ongoing impacts on the Companies' ability to operate its existing coal-fired power plants. *See*, *e.g.,* Companies' I.B., p. 1 (noting "headwinds are strong against continuing to operate coal units beyond the early 2030s"). The Companies explained in great detail all of the EPA-related mandates negatively impacting the operation of its coal plants. *See* Companies I.B., pp. 11-12. Regardless of how the Commission interprets the meaning of the phrase "the result of any financial incentives or benefits offered by any federal agency," there is no interpretation of SB 4 that would prohibit the consideration of any negative costs or impacts.

G. Evidence of direct and indirect costs must be known and related to cost impacts on customers.

Under Section (3) of SB 4, the Companies are obligated to provide "evidence of all *known* direct and indirect costs of retiring electric generating units and demonstrate that cost savings will result to customers." SB 4 (emphasis added). Importantly, the "and" in the above-cited sentence is not preceded by a comma. If a comma was present, it would reflect that the obligation to provide "evidence of all known direct and indirect costs" is distinct from the obligation to "demonstrate that cost savings will result to customers." Here, the "and" is unaccompanied by a comma, reflecting two dependent inter-related clauses. As the Supreme Court of Kentucky has stated previously, "[w]here several things are referred to in the statute, they are presumed to be of the

same class when connected by a copulative conjunction unless a contrary intent is manifest." *Lewis v. Jackson Energy Co-Op. Corp*., 189 S.W. 3d 87, 92 (Ky. 2005). Here, no such contrary intent has been manifest.

Notwithstanding the lack of independent clauses, KCA argues that the Commission must consider indirect costs on third parties like the loss of tax base, supplier jobs, and local and State economic losses.[20] By contrast, the Companies argue that the phrase "known direct and indirect cost" pertains to customer costs as proposed by the Companies. *See* Companies' I.B., pp. 38-39. For the reasons stated above, Walmart believes the plain language of SB 4 supports the Companies' interpretation of this section of SB 4.

Assuming *arguendo*, that the Commission were to adopt the recommendation of KCA to more broadly construe the phrase "indirect costs" to include costs incurred by third parties, the Commission should only consider those costs, whether direct or indirect, that are "known." Hypothetical or unknown costs would not be within the scope of SB 4, which specifically limits any costs to those that are "known." Most of the other costs identified by KCA do not meet the "known" requirement of SB 4. As an example, KCA points out the loss of purported tax income associated with the closure of the coal plants. *See* KCA I.B., p. 19. In light of the fact the Companies plan to place new NGCC units at the same site as two of the coal plants planned for closure – Mill Creek and Brown – it is not clear that there will be a loss of tax income for those localities. At best, the closures *may* impact tax income, but there is no basis to believe that the Companies "know" within the meaning of SB 4 that tax income will be lost by the locality.

Similarly, KCA notes the likelihood of job losses should be factored in as an indirect cost. *See* KCA I.B., pp. 18-19. KCA argued that the Companies should have demonstrated that the

[20] KCA I.B., pp. 18-19.

"existing generation portfolio requires X number of workers and the proposed generation portfolio requires Y number of employees." *Id*. Even if this math were done precisely as KCA proposes, it would not be evidence of "known" job losses. The Companies indicated that they did not know how many jobs would be lost stating that factors like "workers retiring and attrition" would impact these numbers. *Id*. at 19. Furthermore, the Companies would also likely reassign employees to other positions within the Companies, thereby, not suffering a job loss. At this point in time, job losses are not "known" within the meaning of SB 4, and SB 4 does not contemplate hypothetical losses. The Commission should reject KCA's suggestions to include costs that are either unknown or unrelated to customer cost impacts.

III. CONCLUSION

For the reasons set forth herein and in its I.B., Walmart requests that the Commission take the following actions in response to the Companies' requests:

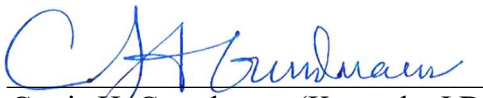
1. Authorize the Companies to retire Mill Creek Units 1 and 2, Brown Unit 3, Haefling Units 1 and 2, and Paddy's Run Unit 12;
2. Grant CPCNs to construct two NGCC units at Mill Creek and Brown, respectively;
3. Grant a CPCN for the Brown BESS, subject to the reporting metrics recommended by Walmart;
4. Grant CPCNs for the Companies' owned solar projects in Mercer and Marion Counties, subject to the Stipulation and Recommendation entered into by and between the Companies and Mercer County Fiscal Court;
5. Approve the Companies' Proposed DSM-EE Program Plan, but order the Companies to take steps to better engage C&I customers;

6. Signal support for the four solar PPAs but adopt a cost allocation methodology that recognizes fixed nature of the investment and the energy and capacity benefits of these resources, rejecting the Companies' proposal to recover these costs on a per MWh basis through the FAC; and

7. Order the Companies to continue to evaluate RTO/ISO membership, including as part of future IRP and CPCN filings with this Commission.

Respectfully submitted,

SPILMAN THOMAS & BATTLE, PLLC

By 

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Dated: October 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon parties and/or counsel of record in this proceeding by electronic mail (when available) or by first-class mail, unless otherwise noted, this 4th day of October, 2023, to the following:

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