

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

ORDER

On December 6, 2017, Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively the “Companies”) filed a joint application for the review, modification, and continuation of certain existing demand-side management and energy efficiency programs (hereinafter the “Application”).¹ As part of the Application, the Companies are seeking approval of demand side management and energy efficiency (“DSM-EE”) programs that would allow industrial customers to participate. If approved, industrial customers would be included in the Companies’ Demand-Side Management Cost Recovery Mechanism (“DSM Mechanism”) and would be eligible for all non-residential program offerings unless they meet the opt-out criteria and elect to opt out their eligible meters. The proposed DSM Mechanism includes an industrial opt-out provision that sets forth a definition of the term industrial customer.²

¹ Application, Case No. 2017-00441 (filed Dec. 6, 2017).

² *Id.* at ¶ 28.

On January 10, 2018, Wal-Mart Stores East, LP and Sam's East, Inc. (collectively "Walmart") filed a motion to intervene in this matter. Walmart asserted that it is a large commercial customer and that it purchases substantial amounts of electricity and related services from the Companies.³ Walmart indicated that it takes service under the Companies' Time-of-Day Primary, Time-of-Day Secondary, and Power Service rate schedules. Walmart stated that it has a special interest in this matter because the DSM-EE programs proposed by the Companies in the Application might negatively affect Walmart's ability to pursue its own DSM-EE initiatives in the Companies service territory, "particularly in light of the way that the Companies have defined eligibility for the industrial opt-out measure included in their DSM-EE Program Plan."⁴ Walmart also stated that it provided recommendations to address its concerns with the industrial opt-out measure as a participant in the Companies' DSM Advisory Group, but its concerns were not alleviated by the Companies' proposals in this case.⁵ Walmart indicated that its participation in this matter would assist the Commission in fully addressing and considering how the Companies define eligibility for the industrial opt out measure.⁶

On January 16, 2018, the Companies filed a response to Walmart's Motion to Intervene, arguing that Walmart failed to assert an interest in the proceeding that differs from those of the Companies' numerous other "non-industrial" customers.⁷

³ Motion to Intervene of Wal-Mart Store East, LP and Sam's East, Inc. (filed January 10, 2018).

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 2–3

⁷ Kentucky Utilities Company and Louisville Gas and Electric Company's Response to Motion to Intervene of Wal-Mart Stores East, LP and Sam's East, Inc. (filed January 16, 2018) at 2–3 (hereinafter "Companies' Response to Walmart's Motion to Intervene")

The Companies argued that Walmart's large presence and energy usage and its DSM-EE investments in Kentucky would not provide it a specialized interest justifying intervention in the matter.⁸ The Companies argued the Attorney General and Kentucky Industrial Utility Customers, Inc. ("KIUC"), who have intervened in this matter, will adequately protect Walmart's interest.⁹ The Companies also argued that Walmart has failed to demonstrate that it will present issues or develop facts that will assist the Commission without unduly complicating the proceeding.¹⁰ Rather, the Companies contended that Walmart's real interest in this matter is a desire to opt out of the Companies DSM-EE programs and charges, pursuant to KRS 278.285(3). The Companies argued that the statute does not apply to Walmart, given that Walmart acknowledges that it is a commercial entity and the opt-out provision of KRS 278.285(3) refers only to industrial customers.¹¹

On January 22, 2018, Walmart filed a reply in support of its Motion to Intervene in which it concedes that its interests in this matter relate to its eligibility to opt out of DSM-EE charges.¹² Walmart noted that it participated in the Companies' general rate cases

⁸ *Id.*

⁹ *Id.* at 1, 3–5.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 3–4.

¹² Reply of Wal-Mart Stores East, LP and Sam's East, Inc. to Kentucky Utilities Company and Louisville Gas and Electric Company's Response to Motion to Intervene (filed January 22, 2018) at 2–3 ("Walmart's Reply in Support of its Motion to Intervene").

filed in 2014, Case Nos. 2014-00371¹³ and 2014-00372,¹⁴ and in the Companies' DSM Advisory Group meetings to assert its interest in opting out of the DSM-EE charges.¹⁵ Walmart referenced testimony it filed in the general rate cases arguing that the Commission should reject the Companies use of North American Industry Classification System codes to define who may opt out of DSM-EE charges and direct the Companies to adopt standards that reflect actual energy usage and load characteristics.¹⁶ Walmart submitted that it should be permitted to intervene in this matter based on its interest in defining who may opt out of DSM-EE charges.¹⁷

DISCUSSION

The Attorney General is the only person with a statutory right to intervene in a case before the Commission.¹⁸ Intervention by all others is permissive and is within the sound discretion of the Commission. However, the Commission's discretion to grant or deny a motion for intervention has limits enumerated by statute and regulation.¹⁹ Specifically, "there is the statutory limitation under KRS 278.040(2) that the person seeking

¹³ Case No. 2014-00371, Application of Kentucky Utilities Company for an Adjustment of Electric Rates (Ky. PSC June 30, 2015).

¹⁴ Case No. 2014-00372, Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates (Ky. PSC June 30, 2015).

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 6.

¹⁸ Case No. 2017-00179, *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*, (Ky. PSC Aug. 3, 2017), Order at 1 ("Case No. 2017-00179, Order Granting Walmart's Intervention").

¹⁹ *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 at *3-4 (Ky. App. Feb. 2, 2007).

intervention must have an interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the [Commission]."²⁰ Then, there is the regulatory limitation set forth in 807 KAR 5:001, Section 4(11)(a),²¹ which states that the Commission:

shall grant a person leave to intervene if . . . he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.²²

Having reviewed the pleadings at issue, the Commission finds that Walmart has a special interest in the instant matter that is not otherwise adequately represented. The Companies' proposed industrial opt-out provision includes language defining who would be considered an industrial customer that may impact Walmart's future ability to opt out of participation in the Companies' DSM-EE offerings and the associated charges. The Commission understands that Walmart seeks to intervene to present evidence and argument that certain companies should be permitted to opt out of DSM-EE charges based on a standard other than the one purposed by the Companies and to advocate for an order from the Commission requiring the Companies to file a tariff allowing the same. The Commission does not believe that other parties to this matter, including the Attorney General and KIUC, will advocate for Walmart's position in this matter. Although the Attorney General is empowered to represent the interest of all utility customers, those customers at times have competing interests in designing rates or determining which

²⁰ *Id.* at *4

²¹ *Id.*

²² 807 KAR 5:001, Section 4(11)(a).

class of customer should bear a particular cost or portion thereof, which is the subject that forms the basis of Walmart's Motion to Intervene. Similarly, KIUC indicated it was representing the interest of a number of manufacturing and production companies, whose interest regarding the DSM-EE charges likely differ from those of Walmart.

Moreover, while the Commission is making no ruling at this time regarding whether Walmart or similar entities could meet the definition of "industrial customers" as that term is used in KRS 278.285(3), or could be permitted to opt out of DSM-EE charges, the Commission finds that it would be helpful to have those issues presented in this matter by an interested party. The Commission finds that Walmart is in a position to address these issues based on its involvement in previous matters with the Companies, such as the general rate cases filed in 2014 and the Companies' DSM Advisory Group meetings, in which questions regarding who may opt out of DSM-EE charges were raised.²³ Further, the Commission finds that Walmart will be able to participate without unduly complicating or disrupting the proceedings. Thus, the Commission finds that Walmart is entitled to intervene in this matter, pursuant to 807 KAR 5:001, Section 4(11)(a), because it is likely to present issues or to develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

The Commission acknowledges, as the Companies pointed out, that it did not allow Walmart to intervene in Case No. 2017-00097, which was an investigation of the

²³ In the final orders of their 2014 general rate cases, in which Walmart participated, LG&E and KU were directed to propose a definition of the term "industrial" as that term is used in KRS 278.285(3)" in their next DSM-EE application and were required to form DSM Advisory Groups, in part, to examine that definition. Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC June 30, 3015), Order at 9; Case No. 2014-00372, *Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates* (Ky. PSC June 30, 3015), Order at 9.

reasonableness of the demand-side management programs and rates of Kentucky Power Company (“Kentucky Power”).²⁴ However, Kentucky Power did not initiate that case by filing an application and tariff seeking to modify its DSM-EE programs, including eligibility for who may opt out of DSM charges. Rather, it was initiated by the Commission “from an Order issued by the Commission on its own motion to investigate the reasonableness of increased spending on DSM programs.”²⁵ More importantly, in the Kentucky Power case, Walmart did not directly raise the issue that is the primary basis for its intervention herein; nor did the Commission, which was investigating a significant rise in the cost of the DSM program, address the basis for intervention Walmart raised in this matter.²⁶ Thus, that decision is distinguishable from the decision herein.²⁷

The Commission cautions that allowing Walmart to intervene in this matter should not be read as a decision to allow Walmart to intervene in every DSM-EE case or every general rate case in which eligibility for opting out of DSM-EE charges is at issue. Rather, the Commission is granting Walmart’s motion based on the specific facts and

²⁴ See *Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company*, Case No. 2017-00097 (Ky. PSC Apr. 12, 2017), Order at 1-2.

²⁵ *Id.* at 2.

²⁶ In fact, a review of Walmart’s motion and motion for reconsider in that matter makes no mention of opting out of DSM-EE charges. Rather, Walmart based its Motion to Intervene in the Kentucky Power case on its generalized interest in keeping rates low, while, at most, vaguely referring to potential impacts on Walmart’s “responsibility for contributing to other customers’ participation” in DSM-EE programs without explanation. Case No. 2017-00097, *Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company* (filed Mar. 24, 2017), Motion to Intervene of Wal-Mart Stores East, LP and Sam’s East, Inc.; Case No. 2017-00097, *Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company* (filed Apr. 28, 2017), Motion of Wal-Mart Stores East, LP and Sam’s East, Inc. for Rehearing of the Order Denying Intervention.

²⁷ See also Case No. 2017-00179, Order Granting Walmart’s Intervention, *supra* at 1-2 (in which Wal-Mart was permitted to intervene in Kentucky Power’s general rate case several months after being denied intervention in the matter investigating DSM rates).

circumstances of this matter. The issues presented by Walmart have not been thoroughly addressed in a previous matter and Walmart, while potentially representative of a class of customer, is the only entity of its kind previously involved in the Advisory Group and other matters in which the relevant issues were addressed that is seeking to intervene herein. The Commission would note that this order should not be read as having any bearing on merits of the arguments of any parties or the applicability of KRS 278.285(3).

IT IS HEREBY ORDERED that:

1. The motion of Walmart to intervene is granted.
2. Walmart shall be entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.
3. Walmart shall comply with all provisions of the Commission's regulation, 807 KAR 5:001, Section 8, related to the service and electronic filing of documents.
4. Walmart shall adhere to the procedural schedule set forth in the Commission's January 4, 2018 Order and as amended by subsequent Orders.
5. Pursuant to 807 KAR 5:001, Section 8(9), within seven days of entry of this Order, Walmart shall file a written statement, with a copy to parties of record, that:
 - a. Affirms that it, or its agent, possesses the facilities to receive electronic transmissions;
 - b. Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding should be served.

By the Commission

ENTERED
FEB 14 2018
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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