

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Ameren Missouri's Application for)
Authorization to Suspend Payment of Solar Rebates)

File No. ET-2014-0350
Tariff No. YE-2014-0494

**AMEREN MISSOURI'S RESPONSE TO RENEW MISSOURI'S
APPLICATION FOR REHEARING**

COMES NOW Union Electric Company d/b/a Ameren Missouri (Ameren Missouri or the Company) and pursuant to 4 CSR 240-2.080(13), hereby responds to Renew Missouri's *Application for Rehearing*, as follows:

1. On August 20, 2014, the Missouri Public Service Commission (Commission) issued its *Order Regarding Tariff (Order)* approving a tariff change to allow Ameren Missouri to suspend payment of solar rebates after it has paid the previously agreed upon amount of solar rebates - \$91.9 million. The *Order* implements the Commission-approved Stipulation and Agreement and the tariffs filed in compliance therewith in File No. ET-2014-0085.¹

2. On August 29, 2014, Earth Island Institute d/b/a Renew Missouri (Renew Missouri) filed its *Application for Rehearing (Application)*. The *Application* alleges two grounds. First, that the Commission did not make a finding that Ameren Missouri has reached or would reach its 1% Retail Rate Impact (RRI) and second, that the Commission failed to act on the tariff within 60 days of it being filed by Ameren Missouri, thereby making the *Order* ineffective.

1% RRI Determination

3. Renew Missouri sets forth the argument that the Commission's *Order* did not make the required determination that Ameren Missouri has reached or would reach its 1% RRI

¹ *Order Approving Stipulation and Agreement* (Nov. 13, 2013); *Order Approving Tariff and Granting Variance* (Dec. 12, 2013); and *Order Revising Variance and Approving Tariff* (February 5, 2014).

limitation. Ameren Missouri agrees that the *Order* did not make the finding and also agrees the Commission should make that finding in order to fulfill the requirements of Section 393.1030.3, RSMo (Cum. Supp. 2013).

4. Attachment 1HC to Ameren Missouri's Application in this case was the Company's calculation of the 1% RRI. The calculation was made in accordance with the Non-Uniform Stipulation and Agreement approved by the Commission in File No. ET-2014-0085 (0085 Stipulation) and showed that Ameren Missouri would reach its 1% RRI and that rebate payments should be suspended.

5. On June 23, 2014, the Staff of the Commission (Staff) filed a *Staff Recommendation to Approve Suspension of Solar Rebate Payments and Tariff Sheet YE-2014-0494* (Staff Recommendation). In that recommendation, Staff states that it reviewed Attachment 1HC to Ameren Missouri's Application, that it conforms to the terms of the 0085 Stipulation and that the Commission should confirm Ameren Missouri's calculation of the 1% RRI.

6. Given the specific language of Section 393.1030.3 (quoted in *italics* in ¶ 1 of Renew Missouri's *Application*), Ameren Missouri believes (as Staff had also recommended) that it is necessary for the Commission to issue a revised order to include a Commission determination that will reach its 1% RRI limitation. The reason for this is because the statute indicates that if the Commission makes that determination then it shall approve the tariff suspending the rebates.²

60 Day Time Period

² The Commission made the requisite determination in a similar case involving KCPL Greater Missouri Operations Company's application for approval to suspend rebates implementing a similar Stipulation and Agreement. *See Order Approving Tariff*, Case No. ET-2014-0277 (Eff. June 8, 2014) ("Upon review of the pleadings, the Commission finds that the maximum average retail rate increase will be reached").

7. Renew Missouri next alleges that because the Commission did not rule upon Ameren Missouri's suspension filing within 60 days of the date it was filed, the Commission lost the authority to approve a tariff authorizing suspension of solar rebate payments, even once the Company has paid out the \$91.9 million.

8. Renew Missouri wrongly assumes that the statute at issue (Section 393.1030.3) imposes an obligation on the Commission to act within 60 days; that is, that it is “mandatory” rather than “directory.”³ Renew Missouri's point could only be true if the provision in question is mandatory rather than directory. The law is contrary.

9. A statute is merely directory and not mandatory where it specifies a time within which an official act is to be performed, but merely with a view to the proper, orderly, and prompt conduct of the business and where it *does not provide what results follow a failure to comply with its terms*. *State v. Wynn*, 666 S.W.2d 862, 864-65 (Mo. App. E.D. 1984)(emphasis added). While the statute evidences a legislative intent for the Commission to act promptly, it contains no consequences or results if the Commission does not actually act within 60 days. Moreover, if a public officer is to perform an official act within a statutorily-specified time period, and that act affects the rights and duties of others, the statute is also to be construed as merely directory, so as to prevent the omission or failure by public officials to timely act from prejudicing the rights or interests of those having no direct or immediate control over such officials. *State ex inf. Gentry v. Lamar*, 291 S.W. 457, 458 (Mo. banc 1927)(county superintendent’s failure to call an election within a specified time period did not invalidate the election held later. “It would be strange if a statute specifying an early day at which an act must be done with a view to its speedy execution, should be [so] construed that the act could not be

³ The relevant portion of §393.1030 states, "The commission shall rule on the suspension filing within sixty days of the date it is filed."

done at all after the day when the necessity for its performance is as great, if not greater, afterwards than before.” (internal citations omitted)).

10. In this case, the Company, per statute, is *entitled* to stop paying rebates (under prescribed circumstances), if it files an application with the Commission to suspend its rebate tariff 60 days or more in advance of ceasing such payments. If the statute were mandatory and thus deprived the Commission of the power to approve the suspension merely because the 60 days have passed, this would directly prejudice Ameren Missouri’s interests.

11. Contrary to Renew Missouri’s arguments, the principles in *Lamar* and *Wynn* indicate that the Commission in no way lost jurisdiction or authority to rule on the application to revise the Company’s tariff merely because the 60-day time period to rule has run, as do the other cases cited below, all of which make clear that when a statute provides a deadline by which the agency is to act, but does not provide a sanction for failure to act within that deadline, the statute is merely directory. “Where the legislature fails to include a sanction for failure to do that which “shall” be done, courts have said that “shall” is directory, not mandatory.” *Farmers & Merchants Bank & Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 33 (Mo. 1995)(statute providing that the Director of Revenue “shall” respond to claims for tax refunds within 120 days did not contain any statutory penalty for the failure to do so, and therefore was directory not mandatory, and the Director’s failure to do so did not estop her from denying a refund after that time—at most, the time limit in the statute established a time period after which an action for mandamus would lie to compel a decision by the Director).

Where a statutory provision is directory, the public official is not deprived of jurisdiction by his failure to act until after the statutory deadline has passed. *Fragger v. Director of Revenue*, 7 S.W.3d 555, 557 (Mo. App. E.D 1999)(Director of Revenue’s failure to issue a final decision

within 90 days after a hearing on the suspension of a driver's license and registration, as required by statute, "the Director of Revenue shall reach a final decision including findings of fact and conclusions of law within ninety days," did not deprive Director of Jurisdiction to enter a judgment after the deadline passed, because the applicable statute specified no result that would follow from the Director's failure to issue a decision within that time period). Similarly, see *State ex rel. MHTC v. Muegge*, 843 S.W.2d 192 (Mo. App. E.D. 1992)(in a condemnation action, trial court's failure to determine defendants' respective percentage interests in commissioner's award, despite a statute providing, "within thirty days after the filing of such motion, the trial court *shall* determine the percentage of the award...", did not deprive the court of jurisdiction to make such determination several months later. The statute was directory, not mandatory, since it contained no provision stating the result if a trial court failed to timely act). Likewise, subsection 3 provides no sanction or otherwise adverse result for the Commission if it fails to act within 60 days.

12. Not only does §393.1030.3 *not* prohibit the Commission from ruling on Ameren Missouri's Application after the 60-day period has expired, it actually *anticipates* that the Commission may not rule until after that period, causing the utility to pay out more than it should. In that case, it affords the utility some relief, "[although] the electric utility shall continue to process and pay rebates until a final commission ruling, if [t]he continued payment causes the electric utility to pay rebates that cause it to exceed the maximum average retail rate increase, the expenditures shall be considered prudently incurred costs as contemplated by subdivision (4) of subsection 2 of this section and shall be recoverable as such by the electric utility...[.]” Because the subsection expressly contemplates a “late” ruling by the Commission, it makes no sense to conclude that the Commission cannot rule on an application after the 60-day

period has expired.

Further, the object of the statute, and the consequences that would result from construing a provision as mandatory or as directory must be taken into account. *State ex rel. Hay v. Flynn*, 147 S.W.2d 210 (St.L. Ct. App. 1941)(object of voter registration statute was to provide check against fraudulent voting, such that statute requiring that registration “shall be closed” a certain number of days before election was mandatory, not discretionary). Here, the purpose of subsection 3 is to *entitle* the utility to suspend solar rebate payments to avoid exceeding the maximum average retail rate increase. If the provision that the Commission “shall rule” within 60 days is mandatory, such that the Commission is deprived of jurisdiction to rule on an application to suspend a tariff whenever it fails to rule within the 60-day period, then the purpose of the subsection would be thwarted whenever the Commission failed to act within the time period do so, rendering the entitlement meaningless.

13. Finally, Ameren Missouri notes that the reason the Commission did not act within the 60-day time frame is because the Cole County Circuit Court had issued a *Preliminary Order in Prohibition (Preliminary Order)*, which by its terms restrained the Commission from acting upon pending solar rebate cases (14AC-CC00316). That *Preliminary Order* was vacated at hearing on August 15, 2014. Even if the statutory language were mandatory, the 60 day requirement would be suspended during the pendency of the *Preliminary Order*. After removing the time during which the Commission was prohibited from acting, the Commission did issue the *Order* well within 60 days.

WHEREFORE, Ameren Missouri asks the Missouri Public Service Commission to issue an order determining that the maximum average retail rate increase will be reached and otherwise denying Renew Missouri's *Application for Rehearing*.

Respectfully Submitted,

/s/ Wendy K. Tatro

Wendy K. Tatro, #60261
Director & Assistant General Counsel
1901 Chouteau Avenue, MC 1310
P.O. Box 66149
St. Louis, MO 63166-6149
(314) 554-3484 (phone)
(314) 554-4014 (facsimile)
amerenmoservice@ameren.com

James B. Lowery, #40503
SMITH LEWIS, LLP
P.O. Box 318
Columbia, MO 65205
(573) 443-3141 (phone)
(573) 442-6686 (facsimile)
lowery@smithlewis.com

**ATTORNEYS FOR UNION ELECTRIC
COMPANY d/b/a AMEREN MISSOURI**

Dated: September 8, 2014

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served this 8th day of September, 2014, electronically or by First Class Mail, postage prepaid, upon all of the parties hereto according to the Service List for this case.

/s/ James B. Lowery _____