

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Sho-Me Power Electric
Cooperative's conversion from a Chapter 351
corporation to a Chapter 394 Rural Electric
Cooperative.)

Case No. EO-92-229

APPEARANCES

Gary W. Duffy, Attorney at Law, Brydon, Swearengen & England, P.C., P.O. Box 456,
Jefferson City, Missouri 65102-0456, for the Cities of Cabool, Richland and
Winona, Missouri.

Lewis R. Mills, Jr., First Assistant Public Counsel, Office of the Public
Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the
Public Counsel and the Public.

Jeffrey A. Keevil, Senior Counsel, Missouri Public Service Commission, P.O. Box
360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public
Service Commission.

LIMITED APPEARANCE

Rodric A. Widger, Attorney at Law, Stockard, Andereck, Hauck, Sharp & Evans, P.O.
Box 1280, Jefferson City, Missouri 65102-1280, for Sho-Me Power Cooperative.

HEARING EXAMINER

Janet L. Sievert

REPORT AND ORDER

Procedural History

On March 13, 1992, Sho-Me Power Corporation (Sho-Me) filed a copy of the Articles of Conversion adopted by Sho-Me's Board of Directors, authorizing its conversion from a corporation to a rural electric cooperative, which Sho-Me filed with the Secretary of State of the State of Missouri (Secretary of State's Office). Additionally, Sho-Me filed the Certificate of Conversion issued on March 10, 1992 by the Secretary of State's Office converting Sho-Me from a corporation pursuant to Chapter 351, RSMo 1986, to a rural electric cooperative pursuant to Chapter 394, RSMo 1986. (Hereinafter all references to Missouri statutes refer to RSMo 1986 unless otherwise indicated.) In its filing, Sho-Me requested that Commission Case Nos. ER-91-298 and EO-92-60 be closed. In support of its request, Sho-Me stated that as it has been converted to a rural electric cooperative, it is no longer a public utility, and, therefore, the Commission no

longer has jurisdiction over its services, rates, financing, accounting or management.

The Commission, on March 25, 1992, issued an Order and Notice establishing an April 24, 1992 intervention date. On May 22, 1992, the Commission granted intervention to the municipalities of Cabool, Houston, Richland, St. Robert, Waynesville, Willow Springs, Winona, Ava, Lebanon and Salem. On June 15, 1992, a prehearing conference was held as scheduled. As a result of the prehearing conference, the Staff of the Missouri Public Service Commission (Staff) requested that the proceedings be stayed for a six (6) month period ending August 14, 1992, to allow the intervenors sufficient time to resolve their issues with Sho-Me. As all parties were unable to resolve their differences with Sho-Me, on September 1, 1992, the Commission established a procedural schedule. The hearing in this proceeding was held October 7, 1992. Briefs were filed by the Staff and the Office of the Public Counsel (Public Counsel) pursuant to the briefing schedule.

On January 25, 1993, Sho-Me and Staff filed a non-unanimous Stipulation in resolution of the issues in this case. On January 29, 1993, the City of Cabool (City) filed a response to the Stipulation requesting that the Commission reject the Stipulation. On February 8, 1993, Sho-Me filed a reply to the City's response. On February 9, 1993, the City filed a reply to Sho-Me's response.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

This docket was established as the result of Sho-Me filing a Certificate of Conversion issued by the Secretary of State's Office converting Sho-Me from a corporation pursuant to Chapter 351 to a rural electric cooperative pursuant to Chapter 394 and requesting that the Commission close all pending cases. Sho-Me asserts that it is no longer a public utility corporation, and, therefore, the Commission no longer has jurisdiction over its services, rates, financing, accounting or management.

The issue before the Commission is whether Sho-Me's conversion is valid, thus terminating the Commission's jurisdiction or whether its conversion is invalid and the Commission retains jurisdiction over Sho-Me. The underlying question is whether or not Sho-Me is required by Missouri law to seek Commission approval prior to converting from a public utility corporation to a rural electric cooperative.

Since incorporating as a general business corporation in 1946, Sho-Me has, in two separate cases prior to this proceeding, requested that the Commission relinquish jurisdiction over it. In both cases the Commission denied Sho-Me's request, finding it has a statutory duty to regulate public utility corporations. RE: Application of Sho-Me Power Corporation for an order finding that Sho-Me is no longer subject to Commission jurisdiction, 28 Mo. P.S.C. (N.S.) 100 (1986); RE: Sho-Me Power Corporation for a determination that the Commission no longer has jurisdiction over its wholesale power contracts, 26 Mo. P.S.C. (N.S.) 571 (1984). This proceeding is distinguished from the previous two proceedings in that Sho-Me was attempting to retain its corporate structure while having Commission jurisdiction terminated, whereas in this proceeding, Sho-Me is attempting to convert to a rural electric cooperative to terminate Commission jurisdiction. Throughout this proceeding Sho-Me has denied that it is requesting Commission authorization to convert from a corporation to a cooperative. Sho-Me asserts that its filing of the Certificate of Conversion was merely to inform the Commission that Sho-Me is no longer subject to Commission jurisdiction.

The Commission, in once again addressing its jurisdiction over Sho-Me, established this proceeding to provide Sho-Me the opportunity to submit evidence in support of its assertion that the Commission no longer retains jurisdiction. However, Sho-Me has, at every step of this proceeding, refused to participate. Sho-Me has made limited appearances before the Commission in this matter for the purpose of denying that the Commission has jurisdiction and, therefore, has no authority to order Sho-Me to participate in this proceeding in any manner. Sho-Me's refusal to participate has served only to frustrate the expeditious resolution of this case.

There is no dispute that prior to Sho-Me's receiving the Certificate of Conversion from the Secretary of State's Office, it fell under the jurisdiction of the Commission. The dispute arises from Sho-Me's misguided belief that a public utility corporation is not required by statute to seek, much less receive, Commission authorization prior to converting to a rural electric cooperative. The relevant statutes are Section 393.190 RSMo, 1986, which states:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so.

and Section 393.250(1) which states:

Reorganizations of gas corporations, electrical corporations, water corporations and sewer corporations shall be subject to the supervision and control of the commission, and no such reorganization shall be had without the authorization of the commission.

Since the inception of this proceeding, the Commission has been, and continues to be, of the opinion that it has continuing jurisdiction over Sho-Me and that its jurisdiction cannot be terminated by the simple act of filing Articles of Conversion with the Secretary of State's Office. The Commission is of the opinion that in order for any public utility corporation, including Sho-Me, to reorganize, the corporation, by statute, must first file an application with the Commission requesting authorization. The Commission is further of the opinion that only after the Commission has granted said authorization can a corporation take the necessary action to restructure its business.

The Commission finds that from the plain reading of the foregoing statutes a corporation under the jurisdiction of the Commission must seek Commission authorization prior to reorganizing its business structure. Sho-Me has failed to follow statutory procedure to reorganize its business structure. Sho-Me, by its own admission, has not filed such an application and asserts that the Commission has no authority to require such a filing. Therefore, Sho-Me's conversion from a public utility corporation to a rural electric cooperative is

invalid. Thus, the Commission finds that it has continuing jurisdiction over Sho-Me and the authority to require Sho-Me to fully participate in proceedings before the Commission. The Commission recognizes that the question of its continuing jurisdiction over Sho-Me is a legal issue and will address it further in the conclusions of law section of this Report and Order.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Sho-Me is a public utility subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393. Having found that the Commission retains jurisdiction over Sho-Me, the legal question will be addressed.

There is no dispute that the Commission had jurisdiction over Sho-Me prior to the Secretary of State issuing the Certificate of Conversion. The question before the Commission is whether statutory provisions require Commission approval prior to Sho-Me converting from a corporation pursuant to Chapter 351 to a rural electric cooperative pursuant to Chapter 394.

The relevant statutes for the Commission's deliberations are 393.190(1), 393.250(1) and 394. Section 393.190(1) set forth above requires Commission approval before a corporation under Commission jurisdiction sells, assigns, leases, transfers, mortgages or otherwise disposes or encumbers the whole or part of its franchise, works or system. Section 393.250(1) set forth above requires that an electric corporation such as Sho-Me receive Commission authorization prior to reorganizing. Chapter 394 sets forth the laws under which rural electric cooperatives may be formed and conduct business.

In addressing the validity of Sho-Me's conversion to a rural electric cooperative, the Commission is guided by the following rules of statutory construction: (1) words used in statutes are to be considered in their plain and ordinary meaning in order to ascertain the intent of lawmakers, Abrams v. Ohio Pacific Express, 819 S.W.2d 338, 340 (Mo. banc 1991); (2) in construing a statute, significance and effect should, if possible, be attributed to every word, every phrase, sentence and part thereof, Union Electric Company v. Public

Service Commission, 765 S.W.2d 626, 628 (Mo. App., W.D. 1988); and (3) statutes must be read in pari materia if possible, giving effect to each clause and provision, where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general. State of Missouri v. Dickherber, 576 S.W.2d 532, 536-37 (Mo. banc 1979).

Section 393.190 requires that an electric corporation first secure an authorizing order from the Commission before it sells, assigns, leases, transfers, mortgages or otherwise disposes of, or encumbers the whole or part of its franchise, works or system, necessary or useful in the performance of its duties to the public. Sho-Me's conversion violates this section of the statute as it failed to obtain an authorizing order prior to filing its Articles of Conversion with the Secretary of State's Office converting itself from a business corporation to a rural electric cooperative. Sho-Me's facilities were, and are, used in the provision of utility service to the public via its twenty-seven (27) wholesale customers. Therefore, in accordance with this statute, Sho-Me is required to obtain an authorizing order from the Commission prior to making changes to its facilities which are used in the performance of its duties to the public.

Unequivocally, Section 393.250 establishes that no reorganization shall be had without Commission approval. The Commission, in addressing this issue, recognizes that corporations can reorganize in methods other than converting to cooperative status, however, a conversion to a cooperative is clearly one form of reorganization. The terms "conversion" and "reorganization" have been found to be synonymous by the United States Court of Appeals, 8th Circuit. Consolidated Electric Cooperative v. Panhandle Eastern Pipeline Company, 189 F2d 777, 780-82 (8th Cir. 1951). Additionally, the Missouri Supreme Court often has held that a word's meaning should be derived from the dictionary. Abrams, 819 S.W.2d 338, 340 (Mo. en banc 1991). The American Heritage Dictionary, second college edition, defines reorganization as (1) the act or process of organizing

again or differently, (2) a thorough alteration of the structure of a business corporation. American Heritage Dictionary Second College Edition (1985). Clearly, the act of converting from a public utility corporation to a rural electric cooperative results in the alteration of Sho-Me's business structure and, at the very least, organizing differently, thereby requiring Commission authorization.

The Commission, having determined that by statute Sho-Me must seek Commission approval prior to converting to a rural electric cooperative must examine how Chapters 393 and 394 affect one another. There is no doubt that these chapters are separate and distinct, with Chapter 393 applying to utility corporations and Chapter 394 applying to rural electric cooperatives. However, rules of statutory construction require that the interpretation which will give both effect be adopted. The only means of accomplishing this is to require Sho-Me to first receive Commission approval to convert to a rural electric cooperative prior to the conversion taking place. The Commission finds inconceivable the contention that the legislature enacted Sections 393.190(1) and 393.250(1) requiring Commission approval prior to a corporation under Commission jurisdiction disposing of its property in any manner or reorganizing, but intended to allow a corporation to escape statutory requirements by merely changing the form of its business structure.

Based on the pleadings filed after the conclusion of the evidentiary hearing, the Commission is of the opinion that it has two courses of action: (1) reject the Stipulation, or (2) hold a hearing on the Stipulation. The filing of the Stipulation after the conclusion of the evidentiary hearing places the Commission in an unusual position. Normally, stipulations are presented to the Commission prior to the evidentiary hearing. This case is even more unusual as Sho-Me has limited its appearance in this proceeding to deny Commission jurisdiction. Due to its limited appearance, Sho-Me chose not to present evidence on the issues of Commission jurisdiction and whether it is in the public interest for Sho-Me to be granted authorization to convert to a rural electric cooperative. This places the Commission in the position of having no evidence

on the record to accept the Stipulation. Furthermore, in its reply filed February 8, 1993, Sho-Me asserted that unless the Commission finds that it has no jurisdiction over Sho-Me's conversion to a rural electric cooperative, or, in the alternative, finds that it has jurisdiction but will authorize the conversion, Sho-Me will not abide by any Commission order. Sho-Me even went so far as to state that if the Commission issued an order holding this case in abeyance until Sho-Me filed an application, Sho-Me would withdraw the Stipulation and again not abide by the Commission order. This, in fact, was one of the many options the Commission considered in an effort to expeditiously resolve this case. However, as Sho-Me has clearly stated it would not abide by this Commission directive, it is pointless for the Commission to further consider this or any other option to resolve this case. The Commission, therefore, finds that it should proceed upon the record it has before it. Based upon the record before it, the Commission must reject the Stipulation as there is no evidence upon the record with which to accept the Stipulation.

Furthermore, based upon the evidence and rules of statutory interpretation, the Commission concludes that Sho-Me's attempted conversion from a public utility corporation pursuant to Chapter 351 to a rural electric cooperative pursuant to Chapter 394 is unlawful and void and that the Commission has continuing jurisdiction over Sho-Me. *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981). Pursuant to the requirements of *State v. Carroll* that before the courts should be called upon to act, the Commission determines this matter to be within its jurisdiction and finds Sho-Me to be operating unlawfully. As Sho-Me has continually refused to fully participate in this proceeding and has indicated that it is not subject to the Commission's jurisdiction, the Commission is of the opinion that its Office of General Counsel should commence an action in a circuit court of this state in the name of the Commission to recover the maximum penalty or penalties pursuant to the provisions of Sections 386.570, 386.590 and 386.600, for Sho-Me's violation of Sections 393.190(1) and 393.250(1). The Commission concludes that Sho-Me's violation of Sections 393.130(1) and 393.250(1) began March 13, 1992 and the Office of the General Counsel should seek the maximum

penalties allowed pursuant to Sections 386.570, 386.590 and 386.600 beginning March 13, 1992.

Furthermore, the Commission is of the opinion that if Sho-Me truly desires to be released from the Commission's jurisdiction that it should file an application seeking Commission authorization to convert to a rural electric cooperative, as required by statute. The Commission can then expeditiously review the application and make a determination.

IT IS THEREFORE ORDERED:

1. That Sho-Me Power Corporation's attempted conversion from a public utility corporation pursuant to Chapter 393 to a rural electric corporation pursuant to Chapter 394 is unlawful and void.

2. That the Missouri Public Service Commission has continuing jurisdiction over Sho-Me Power Corporation.

3. That the Stipulation filed January 25, 1993 by Sho-Me Power Corporation and the Staff of the Missouri Public Service Commission be, and is, hereby rejected.

4. That the Office of the General Counsel be, and is, hereby directed to file an action in a circuit court in the State of Missouri to recover the maximum penalty or penalties pursuant to the provisions of Sections 386.570, 386.590 and 386.600, RSMo, for Sho-Me's violation of Sections 393.190(1) and 393.250(1), RSMo 1986, beginning March 13, 1992.

5. That this order shall become effective on March 9, 1993.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

McClure, Chm., Mueller, Perkins
and Kincheloe, CC., Concur.
Rauch, C., concurs in separate
opinion and certify compliance
with the provisions of
Section 536.080, RSMo 1986.

Dated at Jefferson City, Missouri,
on this 24th day of February, 1993.

Concurring Opinion of Commissioner David L. Rauch
Sho-Me Power Electric Corporation
Case No. EO-92-229

I concur in the Commission's Report and Order in the matter of Sho-Me Power Cooperative's conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative. In this decision the Commission concludes that Missouri Statutes clearly require that a corporation under the jurisdiction of the Commission must seek Commission approval before it reorganizes its business structure. I believe that this is the appropriate reading of the Statute. Had Sho-Me recognized and affirmed the Commission's jurisdiction and authority in this case it is likely that this long and contentious proceeding well could have been resolved much earlier. However, this was not to be the case.

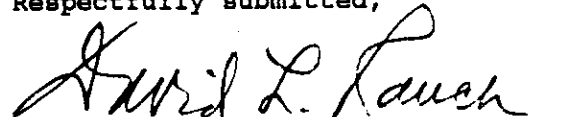
I regret that the Commission could not give more serious consideration to the non-unanimous Stipulation offered by Sho-Me and the Commission Staff. I appreciate the effort that was contributed to such a solution in this case by these two parties, even though it was an "eleventh hour" attempt to do so. This Stipulation did present a potential option for the Commission to consider.

However, as the Commission in its order correctly concludes and I seek merely to amplify, this Stipulation could not be seriously considered without adequate evidence on the record to support the Stipulation's assumptions and conclusions. The challenge to the Stipulation filed by the City of Cabool made this point even more clear and, in my opinion, rendered the Commission unable to conclude that it was in the public interest to allow Sho-Me to reorganize, and thus terminate Commission jurisdiction, without the evidence on the record to support such a finding.

Sho-Me's unwillingness to acknowledge the Commission's jurisdiction in this case is its justification for its limited participation in the proceeding and is the reason no evidence was placed upon the record to support its cause or to provide the necessary basis for consideration of the non-unanimous Stipulation. The Commission, it could be argued, could have indeed set this Stipulation for hearing and called on Sho-Me to then submit evidence to support its position; however, to do so likely would be an act of futility for to do so Sho-Me would have to more fully involve itself in this case and as a consequence acknowledge

the Commission's jurisdiction. As the Commission's order states, Sho-Me consistently throughout this case, and even in its latest filing in this case, has stated clearly its unwillingness to do this. Again, without the appropriate evidence available necessary for the Commission to consider the conclusions called for in the non-unanimous Stipulation, the Commission has no choice but reject the Stipulation and, like it or not, proceed upon the record it has before it.

Respectfully submitted,


David L. Rauch, Commissioner

Dated at Jefferson City, Missouri,
on this 24th day of February, 1993.