

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

In the matter of Sho-Me Power Corporation's conversion
from a Chapter 351 corporation to a Chapter 394 rural
electric cooperative.

)
) Case No. EO-93-259
)
)

APPEARANCES

Patrick A. Baumhoer, Andereck, Evans, Milne, Peace & Baumhoer, 301 East McCarty Street, Post Office Box 1280, Jefferson City, Missouri 65102, for Sho-Me Power Corporation.

Paul H. Gardner, Husch & Eppenberger, Post Office Box 1251, Jefferson City, Missouri 65102, for the City of West Plains, Missouri.

Gary W. Duffy, Brydon, Swearingen & England, P.C., Post Office Box 456, Jefferson City, Missouri 65102, for the City of Cabool, Missouri.

Lewis R. Mills, Jr., Deputy Public Counsel, Office of Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of Public Counsel and the public.

Jeffrey A. Keevil, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

HEARING EXAMINERS: Janet L. Sievert, Edward C. Graham.

REPORT AND ORDER

PROCEDURAL HISTORY:

On March 8, 1993, Sho-Me Power Corporation (Sho-Me) filed its Application herein requesting that the Commission find that it has no jurisdiction over the decision by Sho-Me to convert to a rural electric cooperative subject to Chapter 394, R.S.Mo. 1986, or in the alternative, if the Commission finds that it has jurisdiction over Sho-Me's conversion to a rural electric cooperative, to grant its permission and approval and to further find that upon the conversion that the Commission no longer has jurisdiction over it except to the extent that the Commission has jurisdiction over rural electric cooperatives in general. On March 17, 1993 the Commission issued an Order And Notice establishing the

procedural schedule and setting a date for intervention by proper parties. Subsequent thereto, on April 16, 1993, two intervention applications were approved by the Commission, one by the City of Cabool, Missouri (Cabool), and one by the City of West Plains, Missouri (West Plains). On May 5, 1993, the Commission issued its Order modifying the procedural schedule, setting dates for the filing of testimony and setting dates for the prehearing conference and hearing. On May 25, 1993, Sho-Me filed its direct testimony. On June 21, 1993, Staff, Cabool and West Plains filed rebuttal testimony. On July 2, 1993, Sho-Me and Cabool filed surrebuttal and/or cross-surrebuttal testimony. On July 8, 1993, an evidentiary hearing was convened at the Commission's hearing room in Jefferson City, Missouri, with all parties present and participating, including the Office of Public Counsel. Subsequent to the hearing, the parties other than Office of Public Counsel submitted simultaneous initial briefs on August 13, 1993, and simultaneous reply briefs on August 23, 1993.

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.

BACKGROUND:

Sho-Me Power Corporation's principal office and place of business is located at 301 West Jackson Street, Marshfield, Missouri. Sho-Me is a public utility corporation engaged in the generation, transmission and sale of electric power in a service territory located generally in southeast and south-central Missouri. The large preponderance of the business engaged in by Sho-Me is the transmission of bulk electric power from the generating source to Sho-Me's service territory. Sho-Me's transmission network serves south-central Missouri

to the Arkansas border and is bounded on the north by Benton, Miller, Maries, Gasconade and Franklin Counties, on the east by Jefferson, Washington and Reynolds Counties, and on the west by Cedar and Dade Counties. Sho-Me owns the transmission lines in its service territory and the majority of the substations in its service territory. Since Sho-Me is only engaged in wholesale power transactions, not retail, it has only been granted transmission line certificates by the Commission. The Commission has granted no certificate of convenience and necessity to Sho-Me to serve any particular area. Even though Sho-Me is a general corporation under Chapter 351, R.S.Mo. 1986, it operates in a nonprofit manner on the cooperative business plan.

Sho-Me is owned by nine rural electric distribution cooperatives to which it sells power. It also sells power to seventeen municipalities and Fort Leonard Wood. These municipalities are served under an all-requirements firm contract to supply all necessary power. Sho-Me also provides transmission to the Missouri Joint Municipal Electric Utility Commission (MJMEUC), which in turn transfers the power to one of its members, West Plains. Fort Leonard Wood and the eighteen municipalities provide approximately 33 percent of the annual revenue flow for Sho-Me. The nine rural electric distribution cooperatives which own Sho-Me are cooperatives which supply electricity to their members/owners who are the ultimate consumers of electricity. Historically, these distribution cooperatives individually were too small to obtain sufficient generation and transmission resources to support the needs of their members. Therefore, the distribution cooperatives banded together to form larger cooperatives which were called generation and transmission cooperatives (G&Ts). The G&Ts could afford to build and develop transmission and generation plant of sufficient size to produce and deliver sufficient electricity to meet the end users' needs. There are six G&Ts operating in Missouri including Sho-Me. These six G&Ts have banded together to form a larger G&T, Associated Electric Cooperative, Inc. (AECI).

AECI is responsible for providing for the generation needs of all the rural electric cooperative members in Missouri. There is an interconnected transmission grid in the state of Missouri that is owned by the six G&Ts. There are also interconnection points between that transmission grid and power plants located in New Madrid, Missouri and Moberly, Missouri. There are also approximately 80 interconnection points between the transmission grid and approximately 12 other utility companies in a multistate area. Rural electric cooperatives in Missouri are currently serving the total electric needs of over 500,000 persons. AECI owns or controls in excess of 2,200 megawatts of coal-fired generating capacity. Missouri rural electric cooperatives have invested nearly \$3 billion in plant and related facilities in Missouri. Sho-Me, as other rural electric cooperatives, is funded through the federal Rural Electrification Act (REA). Sho-Me provides an average in excess of 25 percent of AECI's membership income. Sho-Me operates essentially the same as the rest of the G&Ts in Missouri, which are organized pursuant to Chapter 394. Sho-Me has signed the same coordination and long term all-requirements contract as have the other five G&Ts members of AECI.

Sho-Me operates as a nonprofit cooperative allocating its margins, i.e., profits, to its patrons as capital credits. Sho-Me has made patronage refunds to its patrons in the form of retirement of capital credits. Sho-Me sells power to its members and political subdivisions in the same way as the other five G&Ts members of AECI. Sho-Me is a borrower from REA. Sho-Me is a member of the Missouri Association of Rural Electric Cooperatives. There is no significant practical difference between how Sho-Me operates and how the other five G&T members of AECI operate. The only difference is that Sho-Me is presently organized under Chapter 351, and the other five G&Ts are organized under Chapter 394. Pursuant to Section 394.160, R.S.Mo. 1986, the Commission has

jurisdiction over cooperatives organized under Chapter 394 only to the extent of safety.

Sho-Me was originally incorporated as an agricultural cooperative in 1944. The Missouri Supreme Court in 1946 concluded that a cooperative composed of representatives of electric cooperatives was not an association of agriculturists and could not engage in the business of operating an electric utility service under a statute authorizing creation of cooperatives to conduct agriculture or mercantile businesses, and afforded Sho-Me one year to reorganize. *State on Inf. Huffman, Pros. Att., et al. v. Sho-Me Power Co-op.*, 191 S.W.2d 971 (Mo. banc 1946). Sho-Me at the time owned some non-rural cooperative operations, primarily non-rural retail electric services, and some non-electric operations such as an ice plant. In 1947, the Missouri Supreme Court approved Sho-Me's plan to reorganize as a general business corporation pursuant to Chapter 351. *State at Inf. of Huffman, et al. v. Sho-Me Power Co-operative*, 204 S.W.2d 276 (Mo. banc 1947). This organization placed Sho-Me under the regulation of the Commission. Since 1947, Sho-Me has divested itself of the operations and assets that originally caused it to organize pursuant to Chapter 351, as opposed to Chapter 394. Sho-Me has twice filed applications with the Commission requesting that the Commission relinquish its jurisdiction over Sho-Me. In *In Re Sho-Me Power Corporation*, 26 Mo. P.S.C. (N.S.) 571 (1984), Sho-Me asked for a relinquishment of Commission jurisdiction over wholesale rates, and in *In Re Sho-Me Power Corporation*, 28 Mo. P.S.C. (N.S.) 100 (1986), Sho-Me asked the Commission to relinquish its entire jurisdiction over Sho-Me. In both proceedings the Commission concluded that it should retain jurisdiction pursuant to Chapter 393, R.S.Mo. 1986, to regulate Sho-Me even though it operates functionally as a rural electric cooperative.

On March 10, 1992 Sho-Me filed Articles of Conversion with the State of Missouri Office of Secretary of State as specified in Section 394.070,

R.S.Mo. 1986, which accepted the same and issued a cooperative charter to Sho-Me to operate as a rural electric cooperative pursuant to Chapter 394. On March 25, 1992 the Commission established Case No. EO-92-229 to once again consider the matter of Sho-Me's regulation by the Commission pursuant to Chapter 393, and its organizational status under Chapter 351. On February 24, 1993, the Commission issued its Report And Order which ordered, *inter alia*: (1) that Sho-Me Power Corporation's attempted conversion from a public utility corporation pursuant to Chapter 393 to a rural electric cooperative pursuant to Chapter 394 is unlawful and void; and (2) that the Missouri Public Service Commission has continuing jurisdiction over Sho-Me Power Corporation. On March 8, 1993, Sho-Me filed its application in this case requesting that the Commission find that it has no jurisdiction over the decision by Sho-Me to convert to a rural electric cooperative subject to Chapter 394, or in the alternative, if the Commission finds that it has jurisdiction over Sho-Me's proposed conversion to a rural electric cooperative, to grant its permission and approval to the conversion by Sho-Me and further find that upon the said conversion by Sho-Me, the Commission no longer has jurisdiction over Sho-Me except to the extent that the Commission has jurisdiction over other rural electric cooperatives in accordance with Chapter 394.

COMMISSION'S JURISDICTION OVER CONVERSION:

Sho-Me once again wishes to argue that its Articles of Conversion that were approved by the Secretary of State's Office removed Sho-Me from the Commission's jurisdiction. The Commission has concluded otherwise, as indicated by its Order in Case No. EO-92-229, and will not restate its reasoning in that Order but will adopt and endorse its ruling in that case. The Commission unequivocally finds that it has jurisdiction over the issue of Sho-Me's proposed conversion to a Chapter 394 rural electric cooperative and that it must seek Commission

approval prior to any conversion, as it has done so in this case. The Commission has previously approved a conversion of a regulated electric utility to a rural electric cooperative as set out in the case described in the Conclusions of Law herein.

CONTROLLING CONVERSION STATUTE:

Having decided that the Commission has jurisdiction to approve or disapprove Sho-Me's proposed conversion to a Chapter 394 rural electric cooperative, the initial question concerns the proper statute that applies to such a conversion. There are two potential statutes that conceivably could apply. First, Section 393.250.1, R.S.Mo. 1986, relates to corporate reorganizations of regulated electric utility companies and provides in part:

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

Secondly, Section 393.190(1), R.S.Mo 1986, relates to corporate sales, etc. by regulated electric utility companies and provides in part:

"Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void."

Sho-Me disputes that Section 393.190(1) should apply to its proposed conversion herein. It states that there is nothing in the record before the Commission and certainly no substantial evidence substantiating that there has been any sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation of the whole or any part of the property owned by Sho-Me as a result of a conversion to a rural electric cooperative.

West Plains agrees with Sho-Me that Commission jurisdiction over the proposed conversion of Sho-Me to a rural electric cooperative must be exercised pursuant to Section 393.250.1.

Cabool and Staff have not stated a preference.

The Commission determines that Section 393.250.1 is the controlling statute that would operate to convert Sho-Me to a Chapter 394 electric cooperative. A transfer as contemplated by Section 393.190(1) contemplates two entities. The conversion from a Chapter 393 regulated electric company to a rural electric cooperative operating pursuant to Chapter 394 requires only one entity. Sho-Me would continue to exist after conversion but would be governed by a different set of rules. In a conversion as proposed herein, there is no transfer of property of any kind, only a reorganization of the corporation into a different statutory entity. While the effect may be drastic in that a conversion from a regulated electric company operating pursuant to Chapter 393 to a rural electric cooperative operating pursuant to Chapter 394 for all purposes ends Commission regulation except as to safety considerations, it nonetheless is a corporate reorganization as contemplated by Section 393.250.1 rather than a sale or type of transfer contemplated by Section 393.190(1).

STANDARD OF REVIEW THAT APPLIES TO STATUTORY CONVERSION:

The issue has arisen as to what the standard of review, if any, should be for the Commission to approve a conversion of a regulated electric company operating pursuant to Chapter 393 to a rural electric cooperative operating pursuant to Chapter 394. Section 393.250.1 is not explicit as to what standard of review, if any, the Commission should follow in supervising and controlling a conversion of a regulated electric company to a rural electric cooperative.

West Plains argues that in the absence of any criteria for the exercise of that authorization, the Commission's exercise of discretion is quite broad and

informed by the Commission's "principal interest ... to serve and protect ratepayers...." *State ex rel. Capital City Water v. PSC*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). Therefore, West Plains argues that the Commission has a broader mandate than ensuring "the continuation of adequate service to the public served by the utility," which is the stated purpose of Section 393.190 as set out in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980). According to that case the Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest. West Plains argues that the standard of review of the Commission in approving a conversion as requested by Sho-Me is that it be "in the public interest." It believes the requirement is informed primarily by the Commission's duty "to serve and protect ratepayers." West Plains believes the requirement to prove that the conversion is in the public interest is a burden of proof required of Sho-Me.

Sho-Me and Cabool both believe that the standard of review of the Commission pursuant to Section 393.250 is the same standard as set out in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra*. They both state that the Commission may not withhold its approval of the conversion of Sho-Me unless it can be shown that the conversion is detrimental to the public interest. Cabool believes this is a burden of proof required of Sho-Me while Sho-Me is uncertain as to who has the burden of proof. Sho-Me additionally argues that the standard of review that West Plains believes applies of "being in the public interest" is a duty that applies to rate cases but is a non sequitur as applied to matters internal to the utility, such as how the corporate structure of the utility is to be formulated and how its assets are to be manipulated. Sho-Me states that the Commission must approve the proposed conversion unless it can be shown that the change will adversely affect the continuation of adequate service to the

public served by Sho-Me. Sho-Me states that service to its members and to other customers will not be affected in any way by the proposed conversion.

In determining this issue, the Commission would further point out that Section 394.070.1, R.S.Mo. 1986, which states:

"Any corporation organized under the laws of this state for the purpose, among others, of supplying electric energy in rural areas may be converted into a cooperative and become subject to this chapter with the same effect as if originally organized under this chapter by complying with the following requirements:...",

does not specify any standard of review that the Commission could positively rely upon in approving a conversion of a regulated electric company to a rural electric cooperative. The Commission in retaining jurisdiction of the proposed conversion must follow some standard of review in deciding whether to authorize the conversion of a regulated electric utility to a rural electric cooperative. The Commission determines that the standard of review applied by the Court in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra*, should also apply to a conversion of a regulated electric company to a rural electric cooperative pursuant to Section 393.250. That standard of review is that the applicant for conversion must prove that the conversion would not be detrimental to the public interest. Under both statutes the Commission has the same primary interest, i.e., the continuation of adequate service to the public served by the utility be ensured. Both a sale, etc. of a regulated electric company and a conversion of a regulated electric company to a rural electric cooperative involve a structural change of the corporate organization of the utility. The internal structure of the utility may not necessarily be a matter of the public interest, but the public interest requires that after the internal corporate restructuring there continues to be safe and adequate service provided to the public served by the utility. The Commission can find no distinction between Section 393.250 and

Section 393.190 as to the standard of review to be applied by the Commission in its deliberations.

IS THE PROPOSED CONVERSION DETRIMENTAL TO THE PUBLIC INTEREST:

Is the conversion proposed by Sho-Me detrimental to the public interest? The preliminary question is, what result would constitute a detriment to the public? The Court in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra*, answered that question in construing Section 393.190 by saying: "The obvious purpose of the provision is to ensure the continuation of adequate service to the public served by the utility." As has previously been found herein, the "purpose" of Section 393.190 is the same as that of Section 393.250, which is the reorganization statute. A conversion to a rural electric cooperative as contemplated by Sho-Me is found herein to be the same as a reorganization. Therefore, the Commission herein must be assured that after the proposed conversion by Sho-Me to a rural electric cooperative, the same public served by Sho-Me must continue to have adequate service. If such assurance is not provided by Sho-Me, then it would be detrimental to the public for such a conversion to transpire. No party has suggested that the proposed conversion will in any way interfere with Sho-Me's ability to conduct its business. No party has suggested that any assets currently being used to provide electric service to the public will not continue to be used to provide that service. The Commission finds that approving the conversion proposed by Sho-Me to a rural electric cooperative will not be detrimental to the public interest in that Sho-Me would continue to provide the identical electric service to the public it serves immediately after the conversion was approved.

**IS THE PROPOSED CONVERSION CONTRARY TO THE PUBLIC INTEREST
AND THE LEGISLATIVE INTENT:**

The Commission does not find that it is necessary for Sho-Me to prove that the proposed conversion would be "in the public interest" as is argued by West Plains. However, the Commission cannot make declarations of law and must therefore consider the possibility of acting contrary to legislative intent. Therefore, the Commission will consider what it understands legislative intent to be and whether or not the public interest, in its opinion, is served by the proposed conversion of Sho-Me.

The General Assembly of Missouri has approved of the rural electric cooperative organization in the formulation of Chapter 394, and has designated the ways in which a regulated electric company can convert to a rural electric cooperative, Section 393.250 and Section 394.070. There is little doubt that Sho-Me is, in practice, a rural electric cooperative. In fact, it is the only practicing rural electric cooperative G&T in Missouri that is not presently organized pursuant to Chapter 394. The legislative intent appears clear that if a regulated electric company wishes to convert from a Chapter 393 company to a Chapter 394 rural electric cooperative, it will be approved unless the Commission finds the conversion to be detrimental to the public interest.

At this juncture the issue of public interest must be considered. A conversion from a regulated company operating pursuant to Chapter 393 to a rural electric cooperative operating pursuant to Chapter 394 has considerable regulatory consequences. Primarily, a conversion to a rural electric cooperative removes a company from regulation by the Commission. This is the very bone of contention of Cabool and West Plains. They both believe that the "deregulation" is not in the public interest. Together, Cabool and West Plains represent approximately 5,600 retail customers out of an approximate total of 156,000 retail customers served by Sho-Me's transmission. The approximate total

number of retail customers who have voting cooperative status in Sho-Me's system is 113,000.

Cabool's complaint is that it has no choice but to deal with Sho-Me for electric power and energy because there is no readily available competitive source of wholesale electric power. To build any alternative access transmission line would be prohibitively expensive, it claims. With that in mind Cabool signed a contract with Sho-Me which provides that for at least the next 20 years from the date of the contract, it will buy all of its power requirements from Sho-Me, which is committed to provide all power necessary. The price that Cabool will pay for that power is defined in the contract as the same price currently being paid by Sho-Me's cooperative owners/members. The rate to Cabool can only be changed if the rate is changed to all of Sho-Me's members.

A rural electric cooperative essentially operates as a not-for-profit corporation that is owned and managed by its members. Cabool's complaint is that it is not a "member" and that its citizens are not "members", and, therefore, Cabool or its citizens have no voice in the management of Sho-Me. Neither Cabool nor its citizens have ever been permitted to cast a vote for the election of any director of Sho-Me. For that matter, none of the other sixteen municipalities to which Sho-Me sells electricity nor their citizens are members of Sho-Me and entitled to vote in any management decisions. The same can be said for Fort Leonard Wood, which is a customer of Sho-Me.

West Plains' complaint is different from that of Cabool. West Plains purchases power from AECI, the City of Sikeston, and the Southwestern Power Administration. West Plains is a member of MJMEUC, which contracts with Sho-Me for delivery of the power through Sho-Me's transmission network. West Plains, however, pays the entire cost for delivery of its purchased power by Sho-Me except for the power it receives from Southwestern Power Administration. Sho-Me in effect operates as an intrastate wheeler for West Plains. West Plains also

must rely exclusively on the transmission network of Sho-Me in order to obtain delivery of purchased power from the City of Sikeston and AECI. The only transmission service within some thirty miles of West Plains is either owned or controlled by Sho-Me and its generating affiliate, AECI. In the absence of construction of new transmission facilities, West Plains has no meaningful alternative to the Sho-Me system for the transmission of electric power. West Plains complains: (1) that Sho-Me has included costs in its wheeling formula not caused by the transmission service provided to West Plains; (2) that Sho-Me has refused to discuss modification of its wheeling formula to exclude costs not caused by the transmission of power to West Plains; and (3) that Sho-Me and AECI have refused to allow West Plains to construct its own line to interconnect with an AECI substation just outside the West Plains city limits as an alternative to Sho-Me's excessive wheeling charges.

Both Cabool's and West Plains' complaints are concerned with their claims that Sho-Me is exercising monopoly powers and that, as a result, without Commission regulation there is no adequate forum for a resolution of conflicts. Sho-Me disputes any allegation of being a monopolist or acting illegally as such. The fact is that Cabool and West Plains are not by law subject to a monopoly situation. Neither is legally compelled to use Sho-Me as a transmission service. They are, however, by reason of financial constraints, somewhat captive customers of Sho-Me.

As to Cabool's complaint of no voice or vote in management, this complaint must fail because of the legislatively-dictated structure of rural electric cooperative membership. Section 394.020, R.S.Mo. 1986, defines (1) "member", (2) "person", and (3) "rural area". "Rural area" is defined as "any area of the United States not included within the boundaries of any city, town or village having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population

thereof." Therefore, a municipality not in excess of 1,500 population is, by reason of this provision of this section defining rural area, a "rural area", and at the same time a municipality in excess of 1,500 population is deemed by the legislature not to be a "rural area". Only residents supplied electric power by a rural electric cooperative living in a "rural area" are allowed membership and voting representation by the legislature. The Commission might sympathize, but the General Assembly makes the determination of the voice in management or voting representation of the citizens of Cabool.

As to West Plains' complaint of no proper forum to have its allegations of excessive wheeling charges by Sho-Me decided, this is not true. West Plains would prefer to have its complaint decided by the Commission. The legislature has not given the Commission the authority to decide wheeling rates between rural electric cooperatives and municipalities. Forums do exist, however, and it must be the legislature's intent that the courts of Missouri or the Federal Energy Regulatory Commission provide a proper arena for this conflict to be decided. In the case of *City of Fulton v. Central Elec. Pow'r*, 810 S.W.2d 349 (Mo. App. W.D. 1991), the Court affirmed a Circuit Court decision that had determined a reasonable rate for wheeling by a rural electric cooperative to a municipality. In that case, during the course of the negotiations Central offered to accept \$1.80/Kwm and Fulton offered to pay \$1.22/Kwm, but the parties were unable to agree. The Circuit Court set a rate of \$1.39/Kwm and that finding was affirmed by the appellate court. Thus, it is clear that the courts provide the rural electric cooperatives and their customers a forum for their disputes. As Sho-Me states in its brief: "This mechanism has been in place for the entire existence of electric cooperatives and the Legislature has not perceived the need to change or alter the laws affecting the way rural electric cooperatives operate."

The case of *City of Kirkwood v. Union Electric*, 671 F.2d 1173 (8th Cir. 1982), stands for the proposition that the courts and not the Commission are the proper forum for monopoly complaints. The City of Kirkwood felt it was being treated unfairly because of an improper use of monopoly power by Union Electric Company and filed suit. As has previously been shown, the courts are also the legislatively approved forum for solving wheeling complaints between rural electric cooperatives and municipalities. Also, the legislature has not found it necessary to provide a vote in management or membership voting status to citizens of municipalities over 1,500 population who contract for electric power supplies from rural electric cooperatives. Apparently the legislature believes that these municipalities' citizens' protection is not that they have representation on the board of directors but that they pay exactly the same rate as the people with that controlling voting right pursuant to federal or state laws that may apply prohibiting discrimination against the same classes of customers.

In addition to finding that the legislative intent allows for Sho-Me to, in essence, become unregulated by the Commission to the extent that all the rural electric cooperatives organized pursuant to Chapter 394 are unregulated, the Commission finds that the public interest is in fact served by the conversion of Sho-Me to a rural electric cooperative. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Sho-Me has pointed out advantages it perceives for rural electric cooperatives organized pursuant to Chapter 394 that do not exist for regulated electric companies. Sho-Me says that rural electric cooperatives, in addition to providing power to rural areas with reliability and at the lowest cost, are designed to improve the quality of life in rural areas. Sho-Me states that rural electric cooperatives are engaged in economic development and in providing other public services such

as television programming and other types of utility services in rural areas. It believes that the majority of its membership will not be allowed to receive these additional services as long as Sho-Me remains a regulated electric company pursuant to Section 393. Regardless of the truth of Sho-Me's claims, it operates through its membership and that membership represents approximately 72 percent of the total retail customers served by Sho-Me. Cabool and West Plains together represent approximately 4 percent of the total retail customers of Sho-Me. Balancing the public interest in sheer numbers would unquestionably lead to the conclusion that Sho-Me should be allowed to convert to a rural electric cooperative pursuant to Chapter 394.

OUTSTANDING PUBLIC SERVICE COMMISSION ASSESSMENTS FOR SHO-ME:

Sho-Me has not paid any portion of its Public Service Commission annual assessments for the fiscal year beginning July 1, 1992, which was \$102,438.08, or for the fiscal year beginning July 1, 1993, which is \$123,515.50. Staff's position is that if the Commission approves the conversion, that Sho-Me be required to pay the annual assessments that are delinquent. The Commission finds that Sho-Me has been a regulated electric utility pursuant to Chapter 393, R.S.Mo. 1986, up to the date of this order and as such is required to pay any Public Service Commission annual assessments that are delinquent. The fiscal year 1994 Public Service Commission annual assessment can be prorated for the fiscal year so that the amount due and owing for fiscal year 1994 is the quarterly amount of \$30,878.87. The effective date of this Report And Order also will be contingent upon receipt of the total unpaid Public Service Commission annual assessments as prorated from Sho-Me in the total amount of \$133,316.95.

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, R.S.Mo. 1986. *In the Matter of the Application of Intercounty Electric Cooperative Association for Approval of its Conversion into a Cooperative Subject to the Provisions of the Rural Electric Cooperative Act of 1939*, 27 Mo. P.S.C. 631 (1947); *In Re Sho-Me Power Corporation*, 26 Mo. P.S.C. (N.S.) 576 (1984); *In Re Sho-Me Power Corporation*, 28 Mo. P.S.C. (N.S.) 100 (1986); and *In Re Sho-Me Power Corporation*, Case No. EO-92-229.

A conversion from a Chapter 393 regulated electric company to a Chapter 394 rural electric cooperative is a corporate reorganization as contemplated by Section 393.250.1, R.S.Mo. 1986, which provides in part:

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

After a conversion from a Chapter 393 regulated electric company to a Chapter 394 rural electric cooperative is approved by the Commission, Articles of Conversion are filed with the Missouri Office of Secretary of State as specified in Section 394.070.

A conversion from a Chapter 393 regulated electric corporation to a Chapter 394 rural electric cooperative is specifically authorized by Section 394.070.1, R.S.Mo. 1986, which states in part:

"Any corporation organized under the laws of this state for the purpose, among others, of supplying electric energy in rural areas may be converted into a cooperative and become subject to this chapter with the same effect as if originally organized under this chapter by complying with the following requirements:..."

The Commission concludes that the standard of review it should apply in a conversion of a Chapter 393 regulated electric company to a Chapter 394 rural electric cooperative is that the conversion not be detrimental to the public interest. The Commission concludes that this is the burden of proof for the applicant and that the standard of review is the same standard that applies to a Section 393.190 sale, etc. of a regulated electric company as specified in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

The Commission concludes that the proposed conversion of Sho-Me to a rural electric cooperative would not be detrimental to the public interest because after the proposed conversion, Sho-Me would continue to provide safe and adequate service to the public it serves, *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra*.

The Commission concludes that while not a necessary conclusion of law, the conversion of Sho-Me from a Chapter 393 regulated electric company to a Chapter 394 rural electric cooperative would be in the public interest.

The Commission concludes that the General Assembly has considered and approved of municipalities and their citizens with populations in excess of fifteen hundred being customers of rural electric cooperatives organized under Chapter 394 but not having membership or voting privileges in the rural electric cooperatives.

The Commission concludes that the General Assembly has considered and intended for the courts to be the proper forum for a determination of conflicts between rural electric cooperatives organized under Chapter 394 and their municipal retail customers as to reasonable rates for wheeling electricity, *City of Fulton v. Central Elec. Pow'r*, 810 S.W.2d 349 (Mo. App. W.D. 1991).

The Commission concludes that the General Assembly has considered and intended for the courts to be the proper forum for a determination of conflicts

between rural electric cooperatives organized under Chapter 394 and their municipal retail customers as to monopoly complaints, *City of Kirkwood v. Union Electric*, 671 F.2d 1173 (8th Cir. 1982).

The Commission concludes that Sho-Me, as a matter of law, by being a regulated electric corporation is subject to Public Service Commission annual assessments for the fiscal year beginning July 1, 1992, and, as prorated to the effective date of this Report And Order, for the fiscal year beginning July 1, 1993, pursuant to Section 316.370, R.S.Mo. (Supp. 1992).

Based upon the findings of fact made in this case, the Commission concludes that Sho-Me's conversion from a regulated electric company operating pursuant to Chapter 393 to a rural electric cooperative operating pursuant to Chapter 394 should be approved since it is found not to be detrimental to the public interest. The Commission also finds the conversion to be in the public interest.

IT IS THEREFORE ORDERED:

1. That Sho-Me Power Corporation be hereby authorized to convert to a Chapter 394, R.S.Mo. 1986, rural electric cooperative pursuant to Section 393.250, R.S.Mo. 1986, from a Chapter 393, R.S.Mo. 1986, regulated electric company upon payment of the Public Service Commission annual assessments as set out herein in Ordered Paragraph No. 2 and No. 3.

2. That Sho-Me Power Corporation be hereby required to pay the Public Service Commission annual assessment for the fiscal year beginning July 1, 1992, of \$102,438.08 prior to the effective date of this Report And Order.

3. That Sho-Me Power Corporation be hereby required to pay the Public Service Commission prorated annual assessment for the fiscal year beginning July 1, 1993, being the quarterly amount of \$30,878.87, prior to the effective date of this Report And Order.

4. That this Report And Order shall become effective on the 1st day of October, 1993, if the total amounts ordered in Paragraph No. 2 and No. 3 herein are received and, if not received, the effective date of this Report And Order shall be suspended until further order of the Commission.

BY THE COMMISSION

A handwritten signature in cursive script that reads "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., and Perkins, C.,
concur;
McClure and Kincheloe, CC.,
concur, with separate opinions;
and certify compliance with the
provisions of Section 536.080,
R.S.Mo. 1986.
Crumpton, C., absent.

Dated at Jefferson City, Missouri,
on this 17th day of September, 1993.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Sho-Me Power	)	
Corporation's conversion from a Chapter	)	<u>Case No. EO-93-259</u>
351 corporation to a Chapter 394 rural	)	
electric cooperative.	)	

CONCURRING OPINION OF COMMISSIONER KENNETH MCCLURE

I wholeheartedly endorse the Commission's Report and Order in Case No. EO-93-259. The Commission's conclusion and reasoning are totally correct. However, it must be noted for the record that Sho-Me's desired result (i.e., conversion to a Chapter 394 rural electric cooperative) has been delayed by at least seven months and probably more by Sho-Me's stubborn insistence on doing things its own way and being unwilling to operate according to the statutorily-sanctioned means of reviewing and approving such a conversion. Sho-Me's unwillingness to participate in a meaningful fashion in Case No. EO-92-229 rendered the Commission unable to reach any conclusion other than Sho-Me's attempted conversion was unlawful and void. Sho-Me even went so far as to state in that case that it would not abide by any Commission directive. Clearly, the Commission cannot and will not tolerate such an attitude by a regulated utility. It was only when faced with the possibility of substantial fines and penalties that Sho-Me changed its approach.

In addition, Sho-Me's board of directors and members need to be aware that the actions of its management have needlessly cost the Company a great deal of money. As noted in the Report and Order, the unpaid assessment for FY93 is \$102,438.08. This, plus a prorated amount of the FY94 assessment of \$123,515.50, is now due and payable. Furthermore, several thousand dollars in legal and other rate case-related expenses have undoubtedly been incurred in the present case.

Most, if not all, of these expenses could have been avoided. Clearly, Sho-Me's failure to play by the rules was an imprudent management decision and one which has cost the board and its members money.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kenneth McClure".

Kenneth McClure
Commissioner

Dated this 17th day of September,
1993.

CONCURRING OPINION OF COMMISSIONER DUNCAN E. KINCHELOE
Application of Sho-Me Power Corporation
Case No. EO-93-259

I fully join in the Commission's determination to authorize Sho-Me Power's conversion to a rural electric cooperative based upon the company's successful showing that no detriment to the public interest will flow from that corporate reorganization. The Commission's further finding that the public interest is in fact served by the conversion is not a judgment that I have yet reached, but I believe the Commission's discussion of that finding has been correctly characterized as unnecessary to the result here.

On the other hand, however, I think certain factors the Commission weighed in its discussion of service to the public interest and legislative intent -- for example, factors such as cooperatives' statutory freedom from Public Service Commission rate regulation, their authority to sell to non-member municipalities, and the existence of other state and federal forums for regulation and adjudication -- were matters of essential consideration in determining whether this corporate reorganization would be detrimental to the public interest. I hope that the Report and Order's references to the dicta of *State ex rel. Fee Fee Trunk Sewer, Inc., v. Litz*, 596 S.W.2d 466 (Mo. App. 1980) regarding "continuation of adequate service" and the Order's limited discussion of "adequate service" do not lead any future applicant to underestimate the scope of the Commission's evaluation of alleged detriment to the public interest.

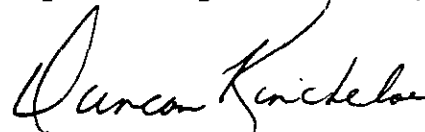
An illustration of some factors that may be evaluated in determining detriment to the public interest is found in the Commission's decision in *Re the joint application of Rocky Ridge Ranch Utilities Company and Rocky Ridge Property Owners Association*, Case No. WM-93-136 (Mo. P.S.C. Report and Order issued December 18, 1992). That case involved a sale of assets under §393.190.1 RSMo 1986 from a regulated water corporation to an association. Although the Association did not intend to provide water service for gain, the Commission, in approving the sale, explicitly retained jurisdiction over the Association because it would be serving customers who were not members of the association and for whom there was no evidence of alternative regulatory nor market protection.¹ In the present case, non-member customers are saved from similar jeopardy by long term contracts and other protections. Nevertheless, the Rocky Ridge cases illustrate that appropriate case-by-case analysis of detriment to the public interest may include consideration of a number of factors in addition to the continuation of service.

In summary, the concerns of Cabool and West Plains in this case simply do not pose valid threats to the public interest when judged in the context of all relevant factors, including particularly the provisions of the federal Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), which provide

¹Later the Commission relinquished jurisdiction after the bylaws of the Association were amended to allow any property owner who was a water customer to vote on matters pertaining to the water department of the Association. *Re the application of Rocky Ridge Ranch Property Owners Association*, Case No. WD-93-307 (Mo. P.S.C. Order issued July 7, 1993).

for the development of a competitive wholesale power market and grant to the Federal Energy Regulatory Commission authority to require wheeling by cooperatives and other utilities at federally regulated rates.

Respectfully submitted,

A handwritten signature in cursive script, reading "Duncan Kincheloe". The signature is written in dark ink and is positioned above the printed name and title.

Duncan E. Kincheloe
Commissioner

Dated at Jefferson City, Missouri,
on this 17th day of September, 1993.