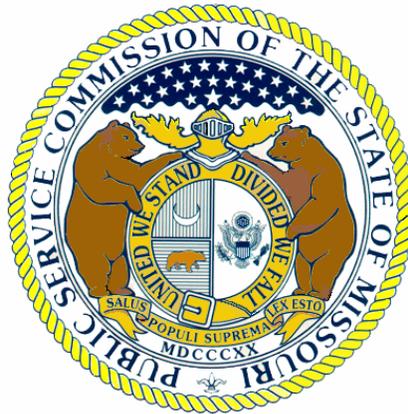


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the Consideration of Adoption )  
of the PURPA Section 111(d)(12) Fuel Sources )  
Standard as Required by Section 1251 of the )  
Energy Policy Act of 2005. )

**Case No. EO-2006-0494**

In the Matter of the Consideration of Adoption )  
of the PURPA Section 111(d)(13) Fossil Fuel )  
Generation Efficiency Standard as Required by )  
Section 1251 of the Energy Policy Act of 2005. )

**Case No. EO-2006-0495**

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**REPORT AND ORDER**

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**Issue Date: July 12, 2007**

**Effective Date: July 22, 2007**

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

In the Matter of the Consideration of Adoption )  
of the PURPA Section 111(d)(12) Fuel Sources ) **Case No. EO-2006-0494**  
Standard as Required by Section 1251 of the )  
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In the Matter of the Consideration of Adoption )  
of the PURPA Section 111(d)(13) Fossil Fuel ) **Case No. EO-2006-0495**  
Generation Efficiency Standard as Required by )  
Section 1251 of the Energy Policy Act of 2005. )

**APPEARANCES**

**James M. Fischer**, Attorney at Law, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Kansas City Power & Light Company.

**Diana C. Carter**, Attorney at Law, Brydon, Swearingen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for The Empire District Electric Company and Aquila, Inc.

**Thomas M. Byrne**, Attorney at Law, Ameren Corporation, 1901 Chouteau Avenue, St. Louis, Missouri 63101, for Union Electric Company, doing business as AmerenUE.

**Shelley A. Woods**, Assistant Attorney General, Office of the Attorney General, 221 West High Street, Jefferson City, Missouri 65102, for the Missouri Department of Natural Resources.

**Lewis R. Mills, Jr.**, Legal Counsel, Office of the Public Counsel, Governor Office Building, Post Office Box 2230, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

**Steven Dottheim**, Chief Deputy General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:** Harold Stearley, Judge.

## **REPORT AND ORDER**

**Syllabus:** This Report and Order delineates the final disposition of two workshop cases involving new Public Utility Regulatory Policy Act (“PURPA”) standards propagated by the federal government in the Energy Policy Act of 2005 (“EPAAct”).

### **Procedural History**

On June 22, 2006, the Staff of the Missouri Public Service Commission filed motions requesting that the Commission establish cases, provide notice, set intervention deadlines and schedule a prehearing conference for the purpose of determining whether to adopt the Fuel Sources Standard and the Fossil Fuel Generation Efficiency Standard, both established in Section 1251 of EPAAct. The Commission granted Staff’s motions on June 23, 2006. A deadline was set for intervention and numerous entities intervened.

A prehearing was held in these matters on August 4, 2006, and a technical conference followed on September 22, 2006. On September 29, 2006, the Staff filed “Suggestions Regarding Future Proceedings.” The parties were given until October 13, 2006, to respond to Staff’s suggestions. Numerous parties responded. Many suggested that the cases could be dismissed asserting the Commission had already taken sufficient action to comply with the new federal standards.

On October 16, 2006, the Commission directed its Staff to file a motion for a final order of rulemaking requesting that the Commission open a single rulemaking case to determine if any of the Commission’s prior actions applied to these standards and to proceed with rulemaking if so required. The parties responded and on December 22, 2006, the Staff retracted its motion to open a rulemaking docket and instead requested the Commission make a threshold determination as to whether prior Commission or legislative

action applied to these standards.

A provision in EPCRA directs state commissions not to take any action regarding the new standards if that commission, or that state's legislature, had taken any prior action to consider or implement a comparable standard. A decision by the Commission that prior state action satisfied EPCRA's consideration/implementation requirement would terminate these proceedings, while an opposite decision would require the Commission to decide if rulemaking or other action was required to adopt the standards.

On December 26, 2006, the Commission set a date for the parties to specifically address the threshold question on the applicability of the prior state action exemption to the adoption of the Fuel Sources Standard and the Fossil Fuel Generation Efficiency Standard. The parties were given until February 9, 2007, to file these additional responses and fully articulate their positions on this threshold issue.

On February 16, 2007, after reviewing all of the parties' responses, the Commission set these matters for an On-the-Record Presentation to take testimony from counsel and subject matter experts representing all of the interested parties. The Commission held its On-the-Record Presentation on April 27, 2007 and took testimony on whether the prior state action exemption applied to these PURPA standards. These two matters were not formally consolidated; however, because the Commission heard arguments on these matters simultaneously, it is issuing the decision in these matters in one Report and Order.

### **Findings of Fact**

With the exception of delineating the exact language of the standards in question and the parties' positions regarding those standards, both factual recitations, the Missouri Public Service Commission's determination as to whether the prior state action exemption

applies to these standards is purely a determination of law. Consequently, no additional findings of fact, beyond what the Commission has outlined below, are required.

### **The PURPA Standards**

The new standards enacted with EPAct that the Commission is considering in this Report and Order are:

#### **The Fuel Sources Standard - PURPA Section 111(d)(12):**

Each electric utility shall develop a plan to minimize dependence on one fuel source and to ensure that the electric energy it sells to consumers is generated using a diverse range of fuels and technologies, including renewable technologies.

#### **The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13)**

Each electric utility shall develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation.

### **Prior State Action Exemption Standard**

The original language from PURPA Section 111, when enacted in 1978 provided a procedure for state commissions to follow when considering and making determinations on whether to adopt the federal standards. That procedure is applicable to the newly enacted PURPA sections, unless the defined prior state action exemption (defined in detail later in this order) is applicable. The procedure for consideration and determination of the new PURPA standards is as follows:

#### **PURPA SECTION 111(16 U.S.C. § 2621) Consideration and determination respecting certain ratemaking standards**

##### **(a) Consideration and determination**

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and

make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. **Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.**

**(b) Procedural requirements for consideration and determination**

(1) The consideration referred to in subsection (a) of this section shall be made after public notice and hearing. The determination referred to in subsection (a) of this section shall be—

(A) in writing,

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public.

(2) Except as otherwise provided in paragraph (1), in the second sentence of section 2622 (a) of this title, and in sections 2631 and 2632 of this title, the procedures for the consideration and determination referred to in subsection (a) of this section shall be those established by the State regulatory authority or the nonregulated electric utility.

**(c) Implementation**

(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility **may, to the extent consistent with otherwise applicable State law—**

(A) **implement** any such standard determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, or

(B) **decline to implement** any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) of this section which is determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, such authority or nonregulated electric utility

shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

(3) If a State regulatory authority implements a standard established by subsection (d)(7) or (8) of this section, such authority shall—

(A) consider the impact that implementation of such standard would have on small businesses engaged in the design, sale, supply, installation or servicing of energy conservation, energy efficiency or other demand side management measures, and

(B) implement such standard so as to assure that utility actions would not provide such utilities with unfair competitive advantages over such small businesses.

It is important to note that PURPA Section 111 only requires the Commission to consider the new standards.<sup>1</sup> Implementation is discretionary, and complete exemption from subsections (b) and (c) above exists if a state legislature or commission has taken prior action to consider or implement a comparable standard. The applicable exemption language for PURPA standards 111(d)(12) and (13) is set forth in PURPA Sections 112 (d), corresponding to Sections 16 U.S.C. §2622(d), which provides, as summarized below:

**Prior State Actions –**

Subsections (b) Procedural requirements for consideration and determination, and (c) Implementation:

**shall not apply** to the standard established by paragraphs (11) through (13) of section 111(d) [16 U.S.C. Section 2621(d)(11)-(13)] of this title;

in the case of any electric utility in a State if, before the enactment of these subsections [Enacted August 8, 2005] --

(1) the State has implemented for such utility the standard concerned (or a comparable standard);

(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the

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<sup>1</sup> PURPA Section 111(a), (b), and (c) (16 U.S.C. § 2621(a), (b), and (c)).

standard concerned (or a comparable standard) for such utility; or

(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.

### **Comparability Standard**

The Commission must decide if it, or the Missouri legislature considered, voted upon or implemented a comparable standard to determine if the prior state action exemption applies. PURPA Section 124 offers guidance for determining if a “comparable” standard has been considered that would constitute prior state action and exempt or prohibit the Commission from taking any further action in relation to the newly adopted standards. That section provides:

#### **PURPA SECTION 124 (16 U.S.C. § 2634) Prior and pending proceedings**

For purposes of subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated electric utilities before November 9, 1978, and actions taken before such date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions **substantially conform** to such requirements. For purposes of subchapters I and II of this chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631 (c) of this title. In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13). In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14). In the case of each standard established by paragraph (15) of section 111(d), the reference contained in this subsection to the date of enactment of the Act shall be deemed to be a reference to the date of enactment of paragraph (15).

Substantial is defined as relating to, or having substance; material; true or real; not imaginary; not illusive.<sup>2</sup> Consequently, for a comparable consideration to have occurred, the Commission, or the State Legislature, must have considered a law or regulation sufficiently similar in substance to the new PURPA regulations as to trigger the prior state action exemption.

### **The Parties' Positions**

The parties have essentially divided asserting two opposing positions or legal arguments in these matters. Those positions are summarized as follows:

#### **The Fuel Sources Standard - PURPA Section 111(d)(12):**

Staff, The Empire District Electric Company, Union Electric Company, d/b/a AmerenUE, Aquila, Inc., Kansas City Power and Light Company (collectively "Staff and the Utilities") all believe this case can be closed based upon prior state actions. These parties argue that the Electric Utility Resource Planning Chapter of the Commission's Rules, 4 CSR 240-22, i.e. the Integrated Resource Planning (IRP) Rules, set out minimum standards for each electric utility's resource planning process.<sup>3</sup> The IRP rules require that utilities analyze the risks associated with various uncertainties and select a strategy that provides the appropriate balance between minimization of expected utility costs and other

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<sup>2</sup> Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990, p. 1428; The American Heritage College dictionary, 3<sup>rd</sup> Edition, Houghton Mifflin Company, 1993, p. 1354.

<sup>3</sup> See Testimony of Daniel I. Beck, Commission's Supervisor of Engineering Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Richard Voytas, Ameren's Manager of Corporate Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Randy L. Hughes, KCPL's Manager of Resource Planning, Transcript pp. 13-25, pp. 48-82. See also comments of Attorneys: Steve Dottheim, Attorney for the Commission's Staff; Tom Byrne, Attorney for AmerenUE; James M. Fischer, Attorney for KCP&L; Diana C. Carter, Attorney for Aquila, Inc and Empire, Transcript pp. 13-25, pp. 48-82. See also 4 CSR 240-22.010 - .080, in particular .040 in its entirety and .070(9), (10), and specifically (10)(B) – as they interrelate to .060 and .010(2).

considerations.<sup>4</sup> The risk analysis and strategy selection process address fuel diversity and considers the benefits of renewables, especially related to future environmental regulation.<sup>5</sup> Staff and the Utilities observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan.<sup>6</sup> Staff and the Utilities believe that promulgation and adoption of the Commission's IRP Rules constitute prior state action and that no further action is required by the Commission with regard to this standard.<sup>7</sup>

DNR, Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks, Burroughs Audubon Society and Heartland Renewable Energy Society (collectively "Concerned Citizens") all believe the Commission should engage in rulemaking to comply with this standard.<sup>8</sup> These parties claim that Section 1251 of EPAct explicitly requires that the "diverse range of fuels and technologies" included in the utility's fuel sources plan "must include renewable technologies" and that the Commission's Electric Utility Resource Planning Rules only require the utility to consider renewable technologies in its planning analysis, but do not require the utility's preferred resource plan

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Additionally company tariffs, implementing any portion of a utility's IRPs, that are reviewed and approved by the Commission, also constitute prior state action and negate the need for further action by the Commission in this matter. Tariffs, once reviewed and approved by the Commission, have the same force and effect as state statutes. *A.C. Jacobs and Company v. Union Electric Company*, 17 S.W.3d 579, 581 (Mo. App. 2000); *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8<sup>th</sup> Circuit 1932); *Urdike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8<sup>th</sup> Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

<sup>8</sup> It should be noted that Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks, Burroughs Audubon Society and Heartland Renewable Energy Society did not make an appearance at the On-the-Record Proceeding. These parties did, however, present their legal arguments to the Commission in their pleadings throughout the pendency of these matters. Their arguments essentially mirrored DNR's arguments and DNR was represented by counsel at the On-the-Record Proceeding.

to include renewable technologies.<sup>9</sup>

**The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13):**

Staff and the Utilities believe this case can be closed based upon prior state actions. These parties argue that the Electric Utility Resource Planning Chapter of the Commission's Rules, 4 CSR 240-22, i.e. the IRP rules, require a minimum of a 20-year planning horizon, which results in a more thorough analysis than described in PURPA Section 111(d)(13).<sup>10</sup> The IRP rules specifically require "life extension and refurbishment at existing generation plants; enhancement of the emission controls at existing or new generation plants;" and "efficiency improvements which will reduce the utility's own use of energy."<sup>11</sup> In addition, the IRP rules require analysis of new generation (including fossil fuel plants) in order to meet resource needs and to determine the manner in which this new generation affects the utility's overall fossil fuel generation efficiency.<sup>12</sup> The IRP rules also address fuel choices and environmental regulations through the risk analysis portion of the rules.<sup>13</sup> Staff and the Utilities again observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan, and again, believe that promulgation and adoption of the Commission's IRP Rules

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<sup>9</sup> See Testimony of John Noller, Energy Policy Analyst/Planner, Missouri Energy Center for DNR. Transcript pp. 13-25, pp. 48-82. See also comments of Attorney: Shelley A. Woods, Attorney for DNR; Transcript pp. 13-25, pp. 48-82.

<sup>10</sup> See Testimony of Daniel I. Beck, PSC's Supervisor of Engineering Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Richard Voytas, Ameren's Manager of Corporate Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Randy L. Hughes, KCPL's Manager of Resource Planning. Transcript pp. 77-82, and 95-105. See also comments of Attorneys: Steve Dottheim, Attorney for the Commission's Staff; James M. Fischer, Attorney for KCP&L; Diana C. Carter, Attorney for Aquila, Inc and Empire, Transcript pp. 77-82, and 95-105. See also 4 CSR 240-22.010 - .080, in particular .060 in its entirety and specifically .040(4)-(8) and .060(4); and CSR 240-22.070(9) and (10) generally and (10)(B) – as they interrelate to .060 and .010(2) – implementation is actually required.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

constitute prior state action and that no further action is required by the Commission with regard to this standard.<sup>14</sup>

The Concerned Citizens believe the Commission should engage in rulemaking to comply with this standard. These parties claim that while Missouri's resource planning rule, 4 CSR 240-22-040(1), requires regulated utilities to analyze opportunities for fossil fuel generation efficiency during the course of their resource planning process, it does not require that the preferred resource plan or resource acquisition strategy adopted by the utility include activities to increase the efficiency of the utility's fossil fuel generating resources or that the plan be implemented.<sup>15</sup>

### **Conclusions of Law**

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

#### **The Fuel Sources Standard - PURPA Section 111(d)(12):**

The Commission's IRP rules, set out minimum standards for each electric utility's resource planning process. The IRP rules require that utilities analyze the risks associated with various uncertainties and select a strategy that provides the appropriate balance between minimization of expected utility costs and other considerations. The risk analysis and strategy selection process addresses fuel diversity and considers the benefits of renewable technologies, including hydro, wind, solar, biomass and others, especially

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Additionally company tariffs, implementing any portion of a utility's IRPs, that are reviewed and approved by the Commission, also constitute prior state action and negate the need for further action by the Commission in this matter. See Footnote Number 7.

<sup>15</sup> See Testimony of John Noller, Energy Policy Analyst/Planner, Missouri Energy Center for DNR. Transcript pp. 77-82, and 95-105. See also the pleadings of DNR, Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks and Heartland Renewable Energy Society throughout the

related to future environmental regulation. Staff and the Utilities correctly observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan.<sup>16</sup> The Commission's promulgation and adoption of the IRP rules satisfy the prior state action exemption and no further Commission action is required to implement this federal standard.<sup>17</sup>

### **The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13):**

The Commission's IRP Rules require a minimum 20-year planning horizon, which results in a more thorough analysis than described in PURPA Section 111(d)(13). The IRP rules specifically require "life extension and refurbishment at existing generation plants; enhancement of the emission controls at existing or new generation plants;" and "efficiency improvements which will reduce the utility's own use of energy." In addition, the IRP rules require analysis of new generation (including fossil fuel plants) in order to meet resource needs and to determine the manner in which this new generation affects the utility's overall fossil fuel generation efficiency. The IRP rules also address fuel choices and environmental regulations through the risk analysis portion of the rules. The IRP rules also require risk analysis, strategy selection and an implementation plan for the preferred resource plan.<sup>18</sup> Consequently, the Commission's promulgation and adoption of the IRP rules satisfy the prior state action exemption, and no further Commission action is required

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pendency of these matters.

<sup>16</sup> See 4 CSR 240-22.010 - .080, in particular .040 in its entirety and .070(9), (10), and specifically (10)(B) – as they interrelate to .060 and .010(2).

<sup>17</sup> Additionally, company tariffs that implement IRPs in any way, which are reviewed and approved by the Commission, constitute prior state action by the Commission and negate the need for further action by the Commission in this matter. See Footnote Number 7.

<sup>18</sup> See 4 CSR 240-22.010 - .080, in particular .060 in its entirety and specifically .040(4)-(8) and .060(4); and CSR 240-22.070(9) and (10) generally and (10)(B) – as they interrelate to .060 and .010(2) – implementation is actually required. See also footnote Number 17.

to implement this federal standard.

### **Decision**

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

The Commission will close Case Nos. EO-2006-0494 and EO-2006-0495, finding that the prior state action exemption applies and that no further action is required by the Commission with relation to these two matters.

#### **IT IS ORDERED THAT:**

1. Case Number EO-2006-0494, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(12) Fuel Sources Standard as Required by Section 1251 of the Energy Policy Act of 2005, is closed.
2. Case Number EO-2006-0495, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(13) Fossil Fuel Generation Efficiency Standard as Required by Section 1251 of the Energy Policy Act of 2005, is closed.

3. This order shall become effective on July 22, 2007.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray and Appling, CC., concur;  
Gaw and Clayton, CC., dissent;  
and certify compliance with the provisions  
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 12th day of July 2007.