

In the
Supreme Court of Missouri

Appeal No. SC87744

CITY OF BRIDGETON,

Plaintiff/Appellant,

v.

MISSOURI-AMERICAN WATER COMPANY,

Defendant/Respondent.

ON APPEAL FROM THE CIRCUIT COURT,
OF ST. LOUIS COUNTY,
HONORABLE ROBERT S. COHEN, CIRCUIT JUDGE,
CAUSE NO. 04CC-2107.

**APPELLANT CITY OF BRIDGETON'S
SUBSTITUTE REPLY BRIEF**

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-
lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Attorneys for Plaintiff/Appellant City of Bridgeton



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INTRODUCTION

Appellant City of Bridgeton’s Substitute Brief showed that the decision below should be reversed for at least three reasons:

1. The common-law rule that this Court applied in *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977), requires Respondent Missouri-American Water Company (“Missouri-American”) to pay the costs of relocating the facilities it has placed in the Taussig Road right-of-way because the Taussig Road project is a governmental act serving the public safety and necessity, and has been so determined by the elected officials responsible for making such determinations. (App. Br. 28-61.)¹

2. Missouri-American failed to establish an unqualified right to occupy Taussig Road because (1) the franchise granted by the St. Louis County Court in 1902 (the “County Franchise”) grants Missouri-American no current right to occupy a right-of-way in territory that Bridgeton annexed 50 years ago, and (2) even the County

¹ This brief uses the following additional abbreviations: “App. Br.” for Bridgeton’s Substitute Brief; “Resp. Br.” for Missouri-American’s Substitute Brief; “SWBT Br.” for the Brief of *Amici* Southwestern Bell Telephone, *et al.* (collectively, “SWBT”); “PSC Br.” for the Brief of *Amicus* Missouri Public Service Commission (“PSC”); “MIEC Br.” for the Brief of *Amici* Office of the Public Counsel and Missouri Industrial Energy Consumers (collectively, “MIEC”); and “A.____ (Reply)” for the appendix filed with this brief.

Franchise requires by its terms that the utility pay relocation costs whenever the relevant governmental unit determines in its sole discretion that such relocations are necessary. (App. Br. 62-79.)

3. With respect to facilities located on formerly private properties now owned by Bridgeton, Missouri-American either is contractually obligated to relocate them, or, in the case of other facilities, has no right to occupy the property. (App. Br. 79-83.)

In their briefs to this Court, Missouri-American² and its *amici* candidly admit that their real quarrel is with the common-law rule itself. In their view, it is always unfair to a utility that it should have to pay to move its facilities, whatever the reason. (PSC Br. 13.) Indeed, one of the *amici* goes so far as to assert that a governmental project constitutes a “taking” unless it is a “clear public necessity,” a standard not imposed by any court. (MIEC Br. 14.) Thus, the utilities seek to persuade this Court to absolve them from their common-law obligation to the greatest extent possible,

² Missouri-American begins its brief by charging Bridgeton with citing “material that was not part of the legal file” (Resp. Br. 13 n.1), but concedes in the next footnote that its accusation relates to one document: a PSC rate change request Missouri-American filed in 2006. (Resp. Br. 13 n.2). Rule 84.04(h) permits reliance on that document, which is properly subject to judicial notice. *See, e.g., Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 483 n.3 (Mo. Div. 2 1973).

even when the relocation is needed, as here, to accommodate a necessary, long-needed road improvement project undertaken by the government for public safety reasons.

In this case, Missouri-American and its *amici*, based on only two cases from other jurisdictions (and a third decision by Missouri’s intermediate appellate court), assert that “source of funding” provides the litmus test for determining whether a project is a “governmental act that serves the public necessity.” Thus, they assert that a project undertaken by a governmental body to improve an admittedly unsafe road should be treated as a private venture simply because most funding comes from a private source. That reasoning – Missouri-American’s “follow the money” approach (Resp. Br. 42) – may provide some rationale for utilities to avoid their fundamental obligations, but it is neither logical nor consistent with sound public policy or prevailing common law, including this Court’s decision in *Union Electric*.

Missouri-American does not – and could not – deny that the common-law rule requires that utilities pay for utility relocations for public projects; nor does it suggest that Bridgeton’s Taussig Road project will not improve the safety of a currently unsafe road. (Resp. Br. 16-20.) But Missouri-American’s “follow the money” rule seeks to avoid these inconvenient facts.

By focusing on funding, Missouri-American’s proffered rule leads to anomalous and unjust results. If an unsafe road existed in a rich community, the road could be improved with tax funds, and the utilities would have to move their facilities at their own expense. In that event, the utilities’ rate-payers – from rich and poor

communities alike – will pay for the utility relocations. If the same unsafe road existed in a poor community, which had to rely on private funding and creative financing to make the road safer, the utilities would escape their common-law obligation to pay to move their facilities. In this way, poorer communities end up paying for richer communities’ road improvements, while richer communities (and the utilities) avoid paying to help poorer communities make their roads safer. To focus on the source of funding, rather than on the judgments of elected officials that a government project serves a public necessity, is not just wrong, but backwards.

I. The common-law rule articulated by this Court in *Union Electric* requires that Missouri-American pay the relocation costs because the Taussig Road project is a governmental act that serves the public necessity, and the fact that Bridgeton used alternative means to finance the improvements is irrelevant to the application of the common-law rule.

A. Missouri-American’s “follow the money” rule is illogical because there is no logical reason to use the source of funding to determine whether a project is a governmental act serving the public necessity.

In *Union Electric*, this Court, consistent with the common law throughout the nation, held that a utility must relocate facilities placed in a public right-of-way when the relevant governmental authority determines that the relocation is required by “public necessity or public convenience and security.” 555 S.W.2d at 32. *Accord Riverside-Quindaro Bend Levee Dist. v. Missouri-American Water Co.*, 117 S.W.3d

140, 152 (Mo. App. W.D. 2003) (“Utilities must relocate their equipment in public rights-of-way at their own expense when the changes are required for a public purpose”); *Home Builders Ass’n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287, 289-90 (Mo. App. E.D. 1989) (quoting *Union Electric*, 555 S.W.2d at 32). As Bridgeton has shown, the principal concern of the common-law rule is to protect the public’s “paramount right” to use its rights-of-way to further the public necessity, convenience, and security. (App. Br. 33-36.) Any permission given to a utility to make use of a public right-of-way is necessarily subservient to that public interest, which means that any utility must accommodate the public interest by paying to move its facilities when required to do so. *See, e.g., City of Albuquerque v. N.M. Pub. Regulation Comm’n*, 79 P.3d 297, 301 (2003) (“Generally, as an incident of a utility’s use of municipal streets for its facilities, the utility must defer to the municipality’s discretion to alter, improve, or relocate its streets . . . In the absence of a valid ordinance or statute to the contrary, such removal of facilities must be accomplished at the expense of the utility.”)

The common-law rule also is consistent with Missouri statute, which provides that utilities are authorized to use the public streets only “with the consent of the municipal authorities thereof, under such reasonable regulations as such authorities may prescribe” RSMo § 393.010 (2000). Moreover, a utility’s use of the public streets may not “incommode the public [use].” *Id.*

Missouri-American does not dispute that *Union Electric* correctly states the common-law rule. Instead, Missouri-American argues that it should be relieved of its common-law duty solely because Bridgeton used an “exaction,” not taxes, to finance the project. (Resp. Br. 29-30.)³ The Court of Appeals found, and Missouri-American has failed to dispute, that (1) Taussig Road’s repair was long needed “[r]egardless of any new or future development within [the] area” (A.294);⁴ (2) TRiSTAR’s development did not exacerbate that pre-existing need;⁵ and (3) the actual physical improvements will provide no physical benefit to TRiSTAR’s project. (A.176.) Despite these facts, Missouri-American asserts that the common-law rule does not

³ MEIC suggests that because exactions are “voluntary,” they serve “primarily a private purpose.” (MEIC Br. 10.) This suggestion is wide of the mark. It is the governmental body that proposes the exaction (or fee or donation) as a condition for allowing some private action, and it clearly does so to accomplish a public purpose.

⁴ Missouri-American has never contested the need for the project. At best, it has demurred, arguing that need is irrelevant because the Court should just “follow the money.” (Resp. Br. 28-30, 41-44; A.160-61; L.F.162-63).

⁵ Bridgeton has *not* previously asserted that TRiSTAR’s development would cause increased traffic on Taussig Road. (Resp. Br. 48 n.6.) Bridgeton’s 1998 and 1999 traffic studies showed that TRiSTAR’s Park 370 development would contribute only a negligible amount of additional traffic. (A.293-94.)

apply because Bridgeton financed the project with exacted funds rather than general tax revenues.

Missouri-American confounds common sense by suggesting that a public project undertaken for a public purpose should be treated as a private project simply because of the manner in which the government has been able to fund it. In Missouri-American's view, if the purpose is to improve an unsafe road, the project will be deemed public only if it is financed by tax dollars. The same road project, needed to the same extent, will be deemed private if a cash-strapped municipality must look elsewhere for funding. Missouri-American and their *amici* provide no logical basis for focusing on the project's source of funding, rather than on its public necessity, to determine whether it is a proper public project. Nor *is* there any logical reason to believe that funding is relevant, let alone determinative. In truth, the only reason for the utilities' focus on this factor is its potential for avoiding costs which the common-law rule and the Missouri legislature rightly places on them.⁶

The funding-source exception ignores what the common-law rule treats as dispositive, namely, whether the project is a governmental act that serves public necessity. In *Union Electric*, this Court determined that the utilities must pay for relocation even though a private party – the hotel developer – would both benefit from

⁶ As Bridgeton has shown, the argument that the private party necessarily receives a greater benefit than the public is likewise unpersuasive, being based on a misconceived cost-benefit analysis. (App. Br. 60.)

the urban renewal project and pay for the privilege of occupying its piece of the project. 555 S.W.2d at 33. The source of funding for the project was irrelevant; what was relevant was the project's public purpose. Because the utilities are required to pay for relocation when a government project serves a public necessity, it is only logical that the same factor – whether the project serves a public necessity – should be the focus for determining whether the utilities may avoid their customary and long-standing obligations.

The New Jersey Supreme Court has expressly rejected the relevance of funding-source. In *Pine Belt Chevrolet v. Jersey Central Power & Light Co.*, 626 A.2d 434 (N.J. 1993), the New Jersey DOT conditioned the issuance of a highway access permit on a landowner's setting back the curb lines of its property and widening the adjacent public road. *Id.* at 435. The landowner was solely responsible for the project's construction and costs. *Id.* Relocation of utility lines was required, but the utility company refused to pay the costs. *Id.* The New Jersey Supreme Court held that "[b]ecause the relocation was in the public interest and not merely the parochial interest of the private-property owner, the utility company was liable for relocation costs." *Id.* at 438. The court properly found the source of funding to be irrelevant to the question before it, that is, whether the project served the public interest. *Id.* See, also, *Fellowship Bank v. Pub. Serv. Elec. & Gas Co.*, 385 A.2d 887 (N.J. Super. Ct. App. Div. 1978) (once county determines public interest requires road project, fact that

private party pays for project is irrelevant to utilities' obligation to pay relocation costs.)

B. Missouri-American's proposed exception to its relocation obligations based on the source of funding for a necessary public project is inconsistent with sound public policy.

By focusing on a project's funding source, rather than on its public necessity, Missouri-American invites the Court to recognize an exception to the common-law rule that would undermine the fairness and equity of the rule itself. The common-law rule – which allows municipalities to determine whether, when, and how necessary public projects should be undertaken – applies fairly and equally to all communities served by the utilities. If a community uses general tax revenues, or even creates a discrete, limited tax assessment district, to pay for straightening an unsafe public highway, it is clear that the utilities must pay for the necessary relocations. *See, e.g., City of Livermore v. Pacific Gas & Elec. Co.*, 51 Cal. App. 4th 1410 (Cal. Ct. App. 1997). However, under Missouri-American's proffered exception, utilities will not have to pay if an exaction is used to finance the very same and equally needed highway project. Thus, communities that have insufficient tax revenues to pay for necessary highway projects will also be deprived of the utility relocation costs that utilities will pay for the benefit of richer communities.

In effect, Missouri-American's rule forces ratepayers in poor communities to subsidize the road improvements of wealthy communities, while their own streets

remain unsafe. By contrast, the common-law rule focuses on public purpose and is neutral with respect to the economic status of the communities served by the utilities. This Court should not abandon a rule that has worked fairly and well throughout the state solely to protect the utilities from having to pay relocation expenses that they long ago committed to pay.

Missouri-American and its *amici* repeatedly seek to undercut Bridgeton's argument by noting that, in this particular case, because of the particular contract that TRiSTAR and Bridgeton entered into, TRiSTAR, rather than Bridgeton, will pay the relocation costs, if this Court relieves utilities of that obligation. It is not difficult to see why the parties foresaw the need to consider this contingency, or why TRiSTAR was willing to undertake this obligation. The parties were aware of *Home Builders* and anticipated that the utilities would seek to extend it beyond its facts, but they also anticipated that the utilities would fail. At the end of the day, the utilities would have to pay because the city was undertaking a governmental act serving the public necessity. If this Court should uphold the decision below, it would become clear that utilities can avoid their well-established obligation, and the economic realities will necessarily change. Far fewer projects will be financed by private parties if the costs of doing so are substantially increased. Once again, the effects will fall most heavily on the poorest communities, which will be unable to pay for those additional costs themselves. Unsafe roads will remain unsafe, and the utilities will have to pay for relocations only in the richest communities.

Missouri-American’s proposed exception should be rejected for the additional reason that it undermines the authority of elected officials to determine whether a particular project serves the public necessity. As Bridgeton has previously shown, Missouri law gives deference to legislative determinations of public purpose. (App. Br. 39-40, 54-57.) Missouri-American and its *amici* apparently contend that, because the legislative determination of public purpose happens to have been made pursuant to a specific constitutional provision in *Union Electric*, this Court should read that case as holding that only a constitutionally-recognized public purpose will satisfy the common-law rule. (Resp. Br. 37; SWBT Br. 20-21.) Missouri-American states that because “Bridgeton has pointed to no similar [*i.e.*, constitutional] source of deference” for its public necessity determination, Bridgeton’s determination does not satisfy the common-law rule articulated in *Union Electric*. (Resp. Br. 37.) While it is true that the public project in *Union Electric* happens to have been constitutionally sanctioned, nothing in this Court’s decision suggests that constitutional endorsement is required. Contrary to the argument of Missouri-American and its *amici*, there is no basis for elevating a mere fact of the case into a new legal standard for determining governmental projects’ necessity.

Finally, this Court should reject Missouri-American’s proposed exception because it inevitably will lead to more litigation, drawing the courts into political controversies regarding the allocation of tax dollars. As the utility *amici* candidly acknowledge, the utilities believe that the common-law rule should not apply if a

developer contributes *any* funds to *any* city project for *any* purpose, even if the privately-funded project is entirely separate from the city-funded project for which the city requires that the utilities pay relocation costs. (SWBT Br. 25.)⁷ Thus, if this Court were to recognize Missouri-American’s exception to the common-law rule, the utilities would then argue that every public project is somehow linked to private funding: If a developer provides money for one project, that will free up public money for a second project. Thus, the second project was “really” funded with private money. Plainly, the utilities seek to undermine the equitable application of the

⁷ SWBT further suggests that elected officials will collude with developers and use funds donated by developers for unrelated projects, thus freeing tax revenues for road improvements. (SWBT Br. 25.) SWBT insinuates that Bridgeton attempted to do just that by keeping “secret the fact that it had privately agreed with TRiSTAR to fund the project through an exaction.” (SWBT Br. 26.) That allegation is not true. In a letter to Mayor Bowers, Laclede Gas Company (one of the SWBT *amici*) states that a Bridgeton employee disclosed during a December 7, 1999 meeting attended by Laclede representatives “that Tristar [sic] was funding the road improvements to Taussig Road. Laclede understood, however, it would be handled like a road improvement project planned by the city.” (A.7 (Reply); Exhibit S.) That was six weeks after the agreement was signed. (A.299.) Clearly, there was no concealment of the agreement, just as there is no basis for assuming that elected officials act in an underhanded way.

common-law rule, not because their exception is fairer, but because they hope to avoid paying the type of costs they always have had to pay.

C. Missouri-American’s proposed exception to the common-law rule rests on only three cases, none of which provides any compelling reason for this Court to adopt the exception and thus relieve utilities of a common-law obligation that is an integral part of their right to occupy the public rights-of-way.

Missouri-American further suggests that its proffered exception is well-recognized and binding. (Resp. Br. 49.) However, Missouri-American cites only three cases to support this allegedly well-recognized and binding rule, none of which is actually binding authority here: the Missouri Court of Appeals’ decision in *Home Builders*, 748 S.W. 2d 287; a California intermediate appellate court’s decision in *Pacific Gas & Electric Co. v. Dame Construction Co.*, 191 Cal. App. 3d 233 (1987) (which *Home Builders* adopted); and the Maryland Court of Appeals’ decision in *Potomac Electric Power Co. v. Classic Community Corp.*, 856 A.2d 660 (Md. 2004). Not only are these cases not binding, but none of them persuasively demonstrates that this Court should recognize the utilities’ proffered exception. Indeed, it bears noting that the utilities’ “well-established” rule, which was first articulated almost 20 years ago in *Dame*, has been adopted by the highest court of only one state.

Missouri-American is also wrong when it asserts that these three cases establish an exception based solely on funding-source. In all three cases, in addition to private

funding, there was a showing that the present need for the roadway improvement was directly caused by the private project, and, in each case, the road work was done by a developer, not by the municipality. *See, e.g., Dame*, 191 Cal. App. 3d at 237 (developers required to finance and construct improvements necessitated by a large-scale private development). This was true even in *Potomac*, the case in which the Maryland court adopted the so-called “automatic rule.” *Potomac*, 856 A.2d at 668-69 (the common-law rule does not apply “where the relocation is triggered and made necessary by a private development”). Moreover, in *Home Builders*, private development not only created the need for the roadway improvement, but the non-public nature of the project was evidenced in several additional ways. Specifically, in *Home Builders*, unlike Bridgeton’s Taussig Road project, the road work was planned and completed by the developers; the government made no financial or other contribution; and the government was not a party to the ultimate dispute. (App. Br. 42-45.)⁸

⁸ Missouri-American’s assertion that “[f]or some of the *Home Builders*’ projects, the roads at issue needed upgrading before the developer and its project ever came along” is not supported by the relevant Stipulation of Facts. (Resp. Br. 44.) That stipulation states that some governments intended, in the normal course of operations, to fund road improvements in the future, not that the roadway projects were a present public necessity before the start of private development. (A.353-54.) Here, there was a

Contrary to Missouri-American’s suggestion the casual connection between the private project and the need for the roadway improvement in each of these cases was factual, and not simply a “legal” construct. Thus, *Dame* has been limited to its facts by the same California court in *Livermore*. 51 Cal. App. 4th at 1415 (limiting *Dame* to situations “where a private party seeks to make a utility pay for relocation”).⁹ In *Riverside*, the Western District of the Missouri Court of Appeals likewise limited *Home Builders* to its facts. 117 S.W.3d at 150. In each case, *Home Builders* and *Dame* were described as applying only to circumstances where a private development *caused* the need for a public project.¹⁰

preexisting need, as the Court of Appeals found, and Missouri-American has not disputed. (App. Br. 17; A.176; A.194.)

⁹ *Livermore* held that the common-law rule applies even when the city raises funds for road improvements using a special assessment. 51 Cal. App. 4th at 1417. Given that special assessments, business improvement districts (or tax increment financing districts), and exactions serve the same purpose of providing new sources of government funding, *Livermore*’s rationale for applying the common-law rule to special assessment financing applies with equal force here.

¹⁰ Another intermediate appellate court case, not cited by Missouri-American, also finds a limited exception to the common-law rule where a private development causes the need for road repairs. *See Sundquist Homes, Inc. v. Snohomish County Pub. Utility Dist. No. 1*, 965 P.2d 1148 (Wash. Ct. App. 1998).

Given Missouri-American’s interest in creating an exception broad enough to swallow the common-law rule, it is not surprising that Missouri-American takes *Home Builders* to hold that “the mere fact that exactions were accepted by the developers was enough to make the improvement a private, not governmental project, at bottom.” (Resp. Br. 42.)¹¹ That is incorrect. *Home Builders* was based on the court’s determination that the road improvement project was undertaken, not to satisfy a preexisting or independent need, but to satisfy a need created solely by increased traffic resulting from the private projects. In essence, the utilities ask this Court to adopt an “automatic rule,” whereby public projects financed by exactions are excepted from the common-law rule. (Resp. Br. 47.) There is no justification in law, logic, or public policy, for such a rule.

In sum, Missouri-American’s proposed exception is not supported by the three cases upon which Missouri-American relies. Nor do these cases represent sound public policy, to the extent they may be stretched to support Missouri-American’s position. Nor do they represent a consensus. Since *Dame* was decided in 1987, the courts have continued to require utilities to pay for relocations without reference to the source of the funds for public projects. *See, e.g., Pine Belt*, 626 A.2d 434 (allocating to the utility the cost of facility relocation made necessary by property owners’ road-widening projects “imposed by [the State] on plaintiffs’ [highway] access permits,”

¹¹ Missouri-American’s *amici* similarly misconstrue *Home Builders*. *See* SWBT Br. 22-26; PSC Br. 11-13; MIEC Br. 9-11.

because those projects “primarily benefited the public, not the plaintiffs”); *Livermore*, 51 Cal. App. 4th 1410 (a utility was required to pay to relocate its facilities for a municipal street-widening project that was financed entirely through assessments against private developers); *City of Albuquerque v. N.M. Pub. Regulation Comm’n*, 79 P.3d 297, 301 (N.M. 2003) (a municipality has the right to “require the utility to relocate its lines and facilities when necessary . . . in the interest of the public health and welfare”). Missouri-American’s cases lack either precedential authority or the power to persuade.

II. Missouri-American has exceeded the scope of its permission to occupy the Taussig Road right-of-way because Missouri-American’s occupancy rights are limited by the requirement that it relocate its facilities at its own expense when Bridgeton determines that relocation is necessary.

Missouri-American asserts that trespass is limited to “unlawful presence.” (Resp. Br. 61.) But trespass also includes “exceeding the scope of [a] consent or license.” *Smith v. Woodward*, 15 S.W.3d 768, 773 (Mo. App. S.D. 2000). Thus, summary judgment would have been proper only if Missouri-American had shown that there is no “genuine dispute” that (a) it has a “valid right” to keep its facilities in their current locations, and (b) it has not exceeded the limits of that right. Missouri-American’s argument fails for two reasons: *First*, Missouri-American exceeded the scope of its permission to occupy the right-of-way by refusing to pay to relocate its facilities to accommodate a road improvement project that serves the public necessity;

second, Missouri-American has failed to show that it has a current legal right to occupy Taussig Road, because (a) the County Franchise does not apply to Taussig Road, and (b) even if the County Franchise applied, its terms require Missouri-American to pay relocation costs.

- A. Missouri-American exceeded the scope of its permission to occupy the Taussig Road right-of-way when it refused to relocate its facilities at its own expense because that permission – whether it rests on a franchise or a common-law license – is, as a matter of law, subordinate to the public’s paramount interest in using the public right-of-way in furtherance of public health, convenience, and necessity.**

Missouri-American concedes that its facilities lie within a public right-of-way. Moreover, as a matter of law, a utility’s permission to occupy any public right-of-way, regardless of the source of permission, is subject to the police powers of the government authority having jurisdiction over the right-of-way. As this Court has held, any such occupant “is under the dominance of the police power delegated the city, which the city did not surrender and could not have surrendered had it attempted to do so.” *State ex rel. Chaney v. W. Mo. Power Co.*, 281 S.W. 709, 714 (Mo. Div. 1 1926); *accord State ex rel. St. Joseph Water Co. v. Eastin*, 192 S.W. 1006, 1008 (Mo. banc 1917) (franchises are “taken subject to regulation by the State in the exercise of its police power”); *Grand Trunk W. Ry. Co. v. City of South Bend*, 227 U.S. 544, 553

(1913) (“the police power remain[s] efficient and operative, [and] the municipality [has] ample authority to make regulations”).

The United States Supreme Court explained the basis for this rule in *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U.S. 453, 462 (1905), holding that “uncompensated obedience to a regulation enacted for the public safety under the police power of the state [is] not taking property without due compensation. . . . In complying with [the] requirement [that it move its facilities] at its own expense, none of the property of the [utility] has been taken, and the injury sustained is *damnum absque injuria*.” Thus, Missouri-American’s suggestion that being subject to the police power constitutes an unlawful taking (Resp. Br. 83) is contrary to the law.

Missouri-American’s license to occupy the Taussig Road right-of-way, however acquired, is subject to Bridgeton’s police power to regulate the right-of-way for the public safety, convenience, and necessity. The common-law rule requiring utilities to bear the expense of facility relocations necessary to accommodate the public necessity is but one expression of that fact. *New Orleans Gaslight*, 197 U.S. at 462; *Port of N.Y. Auth. v. Hackensack Water Co.*, 195 A.2d 1, 5 (N.J. 1963). Missouri-American therefore exceeded the scope of its permission to occupy the Taussig Road right-of-way when it refused to bear the expense of relocating its facilities to accommodate road improvements that Bridgeton determined were in the public necessity.

B. The County Franchise does not give Missouri-American a current right to occupy Bridgeton’s Taussig Road right-of-way and, in any event, the terms of the County Franchise require Missouri-American to pay for relocation of its facilities.

Missouri-American does not dispute that the County Franchise grants “authority and license” to “lay and maintain mains and pipes” *only* in rights-of-way that are “public highways . . . of the County of St. Louis.” (A.341 (emphasis added); Resp. Br. 62). Missouri-American also concedes that Taussig Road ceased to be a public highway of St. Louis County when it was annexed by Bridgeton in 1956. (A.49-50; L.F.51-52.) Nor does it dispute that none of its pipes had been laid in Taussig Road prior to annexation. (A.49; L.F.51.) Despite these facts, Missouri-American argues that Bridgeton’s annexation of Taussig Road does not allow Bridgeton to assert its police power over Missouri-American, even on terms consistent with the County Franchise. (*See, e.g.*, Resp. Br. 60, 66, 70.) Missouri-American’s position is contrary to the law.¹²

¹² PSC urges the Court to find that the County Franchise applies to Taussig Road. (PSC Br. 14.) PSC “suggests that guidance on this point may be found” in RSMo § 393.170, first codified in 1913. (PSC Br. 15.) Section 393.170 requires that utilities acquire PSC approval before exercising “any right or privilege . . . under any franchise heretofore granted but not heretofore actually exercised.” (PSC Br. 15.) PSC interprets the quoted language to mean that utilities must acquire its approval for any

The most relevant decision, which Missouri-American tries to avoid, is *Dixie Electric Membership Corp. v. City of Baton Rouge*, 440 F.2d 819 (5th Cir. 1971). In *Dixie*, the Fifth Circuit rejected a challenge similar to Missouri-American’s because “those accepting [county] franchises did so with knowledge of the right of municipalities to annex and thereafter to control the streets and other public thoroughfares within the annexed areas.” *Id.* at 822. The same is true here. Missouri-American’s predecessor knew that the County Court could not authorize occupation of municipal rights-of-way. It also knew that Bridgeton was empowered by statute to annex adjacent land. *State ex rel. Musser v. Birch*, 85 S.W. 361, 363-64 (Mo. Div. 1 1905) (quoting Section 1580, Rev. Stat. 1889, which allowed cities to annex adjacent land). Finally, it knew that Bridgeton, not St. Louis County, had to give consent to the utilities’ activities in the roads within Bridgeton’s jurisdiction. Indeed, the statute requiring utilities to obtain a municipality’s consent to lay pipes within the municipality’s jurisdiction has been in effect since 1859. 1859 Mo. Laws 46, § 7 (granting utilities the right to use public rights-of-way “with the consent of the

expansion of service into territory not already served, even if that expansion is authorized by a pre-1913 franchise. (PSC Br. 16-17.) But the record shows that Missouri-American has no certificate of convenience and necessity for Bridgeton. (A.109-12; L.F.111-14.) Missouri-American also lacks a franchise from Bridgeton. (A.84; L.F.86.)

municipal authorities thereof, and under such reasonable regulations as said authorities may prescribe”).

Like the franchise holders in *Dixie*, Missouri-American’s predecessor took the franchise “with knowledge of the right of municipalities to annex and thereafter to control the streets and other public thoroughfares within the annexed areas.” *Dixie*, 440 F.2d at 822. Its contract rights are not impaired because it was aware of the very conditions it now protests.¹³

There are no Missouri cases contrary to *Dixie*. Moreover, *Dixie* presents the correct view of the law because it recognizes that the authority of counties is

¹³ Missouri-American’s reliance on *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 966 (E.D. Mo. 2002), is misplaced because *XO* involves a franchise issued by Missouri and addresses only the powers of a city *vis-a-vis* the state. Moreover, the *XO* court actually held that Maryland Heights could regulate the placement and types of poles because the state-wide statutes granting the franchise reserved that power to the municipalities. Missouri-American also misinterprets *City of Hannibal v. Missouri & Kansas Telephone Co.*, 31 Mo. App. 23 (Mo. App. 1888). (Resp. Br. 81.) There the court held that a municipal order to relocate utilities was unenforceable because it was arbitrary and capricious. *City of Hannibal*, 31 Mo. App. at 33. *City of Hannibal* does not address the issue presented here – whether a contract issued by a county necessarily applies to property which once, but no longer is, county territory. That issue is addressed squarely, and in Bridgeton’s favor, by *Dixie*.

essentially provisional, particularly with respect to municipalities. *See* 440 F.2d at 822. Since municipalities were first empowered to annex unincorporated territory in the nineteenth century, cities have grown and the unincorporated areas of counties have shrunk. Once a street becomes part of a municipality, the city must be able to enforce its legal authority. There is no force to Missouri-American’s argument that *Dixie* is “factually distinguishable” based on differences between the powers of annexation under Louisiana and Missouri law. (Resp. Br. 73). The two laws are the same, and *Dixie* clearly provides the correct analysis.

Missouri-American’s present quarrel with the principle established in *Dixie* is undermined by its own actions. In 1951, Missouri-American not only sought and received a franchise from Bridgeton, but the franchise expressly extended to “any future extension of [Bridgeton’s] limits.” (A.244.) The inclusion of this language had no conceivable purpose other than to anticipate exactly what happened here: Bridgeton’s annexation of an unincorporated area of St. Louis County and Missouri-American’s post-annexation occupation of a right-of-way within that area. Given this language, it strains credulity for Missouri-American to say now that it obtained the 1951 franchise (and numerous others) solely to assuage nervous bondholders. If the bondholders were nervous, it was for good reason.¹⁴

¹⁴ Missouri-American’s emphasis on “perpetuality” is irrelevant because the County Franchise’s scope, not duration, is at issue here.

Missouri-American also rests its argument on other cases that are inapposite. For example, Missouri-American relies heavily on the United States Supreme Court's decision in *Russell v. Sebastian*, 233 U.S. 195 (1914). The agreement invoked in *Russell* was predicated on an 1884 amendment to the California Constitution that granted utilities the right to use public rights-of-way. *Russell*, 233 U.S. at 198. Twenty-seven years later, California amended its Constitution a second time and changed the earlier provision, adding language that allowed municipalities to establish their own conditions and regulations for utilities. *Id.* at 198-99. When Los Angeles invoked that power and attempted to impose regulations on a utility that had commenced operations under the earlier version, the Supreme Court held that Los Angeles's regulations impaired the original contract between the utility and California. *Id.* In other words, California could not authorize (or undertake itself) an impairment of its agreement with the utility. *Id.* at 204-205.

However, *Russell's* holding is inapplicable here. Bridgeton is not trying to change the terms of Missouri-American's "contract," but to enforce Missouri-American's agreement that its occupation of the public right-of-way is subject to the police power and to a municipality's right to annex portions of the franchised territory. Three other cases Missouri-American cites involve situations analogous to *Russell* and are similarly inapposite. *See, e.g., S. Bell Tel. & Tel. Co. v. City of Meridian*, 131 So.2d 666 (Miss. 1961) (state could not amend its franchise statute in derogation of

rights already granted); *Postal Tel.-Cable Co. v. R.R. Comm'n of Cal.*, 254 P. 258 (Cal. 1927) (same); *State v. Neb. Tel. Co.*, 103 N.W. 120 (Iowa 1905) (same).

Two other cases cited by Missouri-American actually support Bridgeton's position. In *City of Englewood v. Mountain States Telephone and Telegraph Co.*, 431 P.2d 40, 43 (Colo. banc 1967), and *Traverse City v. Consumers Power Co.*, 64 N.W.2d 894, 899 (Mich. 1954), the courts found that state-issued franchises that were more generous to utilities precluded municipalities from enforcing previously-issued municipal franchises, which were more restrictive of the utilities' rights. The principle of law expressed in *Englewood* and *Traverse City* is that a city is bound by the state's decision even when that decision upsets a previous allocation of rights and responsibilities between the city and a private party. In other words, a city may not complain that the state impaired the city's contract.

None of Missouri-American's other cases demonstrates it has the right to avoid its obligations to Bridgeton. In several cases Missouri-American cites, the utility already was providing service to customers at the time of annexation. *See, e.g., Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089 (Del. 1990) (city could not rescind a state-granted franchise where utility was already providing service); *Tri-County Elec. Ass'n Inc. v. City of Gillette*, 584 F.2d 995, 1004 (Wyo. 1978) (holding that, except for serving existing customers, utility's rights terminated at annexation); *Unity Light & Power Co. v. City of Burley*, 445 P.2d 720, 723 (Idaho 1968) (relying on state statute to hold that annexation does not authorize ouster of

utility “*once [utility] lawfully entered into an area to serve its members*” (emphasis added)); *City of Jackson v. Creston Hills, Inc.*, 172 So.2d 215, 218 (Miss. 1965) (the certificate of convenience from the Public Service Commission protected the utility’s existing service); *Jersey City H. & P. St. Ry. Co. v. Borough of Garfield*, 53 A. 11 (N.J. 1902) (completely new borough created within the existing township where utility already provided service). If Missouri-American had pre-existing service agreements with customers within Bridgeton’s annexed territory, Missouri-American could continue to serve them. *See, e.g., Mo. Pub. Serv. Comm’n v. Platte-Clay Elec. Coop.*, 407 S.W.2d 883 (Mo. Div. 1 1966); (App. Br. 69 n.13.) But the record shows that Missouri-American had no facilities or pre-existing customers in Taussig Road before annexation.

Similarly, the cases in which courts have enforced agreements between a utility and a municipality are inapposite because no such agreement existed between Missouri-American and Bridgeton. *See, e.g., Franklin Power & Light Co. v. Middle Tenn. Elec. Membership Corp.*, 434 S.W.2d 829, 834 (Tenn. 1968) (statute precluded utility from continuing to service areas annexed by a municipality); *Pa. Water Co. v. City of Pittsburgh*, 75 A. 945, 946 (Pa. 1910) (city expressly accepted and assumed all contracts of the annexed borough).

Missouri-American also argues that the County Franchise creates an “easement,” rather than a “license,” and that requiring it “to move or otherwise alter the location of pipes within an easement comprises an unconstitutional taking of

private property without compensation.” (Resp. Br. 83.) Both arguments are incorrect.

Requiring a utility to move facilities within an easement is only a taking if those facilities were placed within an easement on *private* property. *Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kan.*, 294 U.S. 613, 617-18 (1935) (a taking occurs if a utility were required to move pipes located in a private right-of-way not located in any previously existing highway); *Riverside*, 117 S.W.3d at 156 (the only compensable interest the utility had was in its private easement). As the United States Supreme Court noted in *Grand Trunk*, “the franchise, and not the particular location, being the essence of the contract,” the government can require a franchisee to move its facilities within the right-of-way. 227 U.S. at 553; *accord New Orleans Gaslight*, 197 U.S. at 462.

Missouri-American’s argument that the County Franchise is an easement is wrong for at least three reasons. *First*, in the *Home Builders* case, Missouri-American stipulated that its occupation of public rights-of-way “is by way of license and not by way of easement....” (A.345.) *Second*, Missouri-American confuses property interests in general with interests in real property that give rise to an easement. *See, e.g., Frost v. Corp. Comm’n of Okla.*, 278 U.S. 515, 520 (1929) (a permit to operate a cotton gin was a “franchise” and therefore a “property right”); *Russell*, 233 U.S. at 204 (a utility’s *contract* was “a property right, protected by the Federal Constitution”); *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 58-59 (Mo. App.

W.D. 2000) (a timeshare agreement was a property interest). *Third*, Missouri-American relies on dicta in *Chaney* that is contrary to well-established law to argue that the County Franchise creates an easement. In *Chaney*, this Court, in describing a city's broad authority to grant a power company a perpetual franchise, noted in passing that the utility's right was "an easement in the streets and as such an interest in the land." *Chaney*, 281 S.W. at 714. This statement is dicta with respect to *Chaney*'s holding – that a city has the authority (but not the obligation) to grant a power company a franchise in perpetuity. *Id.* (Even the holding in *Chaney* is no longer valid, of course, because municipal franchises are now limited to 20 years. RSMo § 78.630.)

In a more recent decision, *Planned Industrial Expansion Authority of the City of St. Louis v. Southwestern Bell Telephone Co. (P.I.E.)*, 612 S.W.2d 772 (Mo. banc 1981), this Court discussed in greater detail the type of interest granted in a public utility franchise. This Court stated that a license granted by a city pursuant to RSMo § 392.080 (1974) gave a telephone company "'permissive use' of a public street easement," not "a 'real property easement.'" *Id.* at 755. In language very similar to that of the 1901 statute pursuant to which the County Franchise was granted (*see* 1901 Mo. Laws 233, *Erection of Poles, Laying Pipes* § 1), Section 392.080 allows telephone companies, with municipal consent, to occupy public rights-of-way "in such a manner as not to incommode the public in the use of such roads." *Id.* at 774. Given the textual similarity of the two statutes, this Court's conclusion that § 392.080 granted only a

permissive use and not a “permanent and vested real property public easement,” *P.I.E.*, 612 S.W.2d at 776, applies with equal force to the 1901 statute.

The United States Supreme Court stated the universal understanding on this subject in *New Orleans Gaslight*, which held that “a general grant of authority to use the streets” gave the gas company “no exclusive right to the location of its pipes in the streets.” 197 U.S. at 462. In *Grand Trunk*, the Court likewise held that, notwithstanding the franchise that Indiana had granted to the railroad, the City of South Bend could “legislate” as to certain matters “regulating the use of the franchise, and preserving the concurrent rights of the public and the company.” *Grand Trunk*, 227 U.S. at 553. The Supreme Court further explained that the franchise (not the particular location) being the essence of the contract, the city could require the railroad to move its tracks to a different location within the right-of-way. *Id.*

A franchise clearly does not create an easement in real property. It creates only limited rights in the holder for a permissive use subject to the police power.

C. Even if the County Franchise applies to Taussig Road, Missouri-American is still exceeding its license because the Franchise requires Missouri-American to relocate its facilities at its own expense whenever the relevant governmental unit determines – in its sole discretion – that relocation is necessary.

Missouri-American does not dispute that the County Franchise expressly provides that “the determination by the County Court of the necessary repairs or

improvements along the public line or lines of said Company, its successors or assigns, shall be conclusive and binding on said Company, its successor and assigns.” (A.338.) Instead, Missouri-American argues that Bridgeton cannot enforce this provision because it “simply do[es] not apply to Missouri-American’s relationship with Bridgeton and instead pertain[s] only to the authority of the St. Louis County Court and not an outside third party like Bridgeton.” (Resp. Br. 85.) Missouri-American’s argument is illogical. If the obligations of the County Franchise passed to Bridgeton when it annexed the Taussig Road property in 1956, clearly the regulatory rights under the franchise also passed to Bridgeton. That is in the nature of an annexation, where complete and indivisible dominion over certain territory necessarily passes from one governmental body to another.

III. Missouri-American must pay the relocation costs for its facilities located within the Norfolk License and facilities located on formerly private property.

A. The Norfolk License.

Missouri-American argues that the Norfolk License, which was created by a document clearly titled “License for Underground Facilities,” is really an “easement.” (Resp. Br. 88-89.) That argument lacks merit for the reasons Bridgeton previously urged. (App. Br. 80-82.) For example, the fact that a license inures to the benefits of successors-in-interest and lacks an explicit termination clause does not render it an easement as a matter of law. *See Wilson v. Owen*, 261 S.W.2d 19, 25 (Mo. Div. 1

1953). But it also bears noting that the Norfolk License was negotiated by sophisticated corporations which frequently engaged in similar transactions and surely knew the difference between a license and an easement. Missouri-American might have been able to purchase an easement (the record is silent), but certainly it would have had to pay more for one. Its needs, presumably, were met by a license, and that is what it received.

Moreover, whether a “license” or an “easement,” the Norfolk License expressly requires Missouri-American to relocate its pipes “at its own cost and expense” whenever the land-owner deems the relocation “necessary to accommodate . . . future construction, improvements or changes.” (A.358.) The land-owner (specified as the Railroad) in this case clearly includes Bridgeton because the License “inure[s] to the benefit of [Norfolk’s] successors and assigns.” (A.360.) To support a more limited reading, however, Missouri-American actually italicizes the wrong language in the License. (Resp. Br. 91-92; A.358.) The whole provision (which requires relocation at the request of the land-owner in the event of “any changes whatever,” not simply for construction of “railroad tracks”) is directly contrary to Missouri-American’s reading.

B. The facilities outside any easement or license.

Contrary to Missouri-American’s assertion (Resp. Br. 93-95), Bridgeton demonstrated in the proceedings below that it owns Parcels 21 and 22 (on which the pipes in question are located) and that it therefore had “the right to order relocation of

the company's equipment" within them. (A.127-28; L.F.129-30.) Missouri-American's "waiver" argument has no merit.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

CITY OF BRIDGETON

By: _____

One of Its Attorneys

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Dated: November 4, 2006

CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Supreme Court Rule 84.06(c) that (1) this brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the brief contains 7,742 words (exclusive of the cover, certificates of service and compliance, signature blocks, and tables of contents and of authorities) as calculated by Microsoft Word 2002, the software used to prepare the brief.

The undersigned further certifies that a disk containing an electronic copy of the brief, in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

By: _____
Attorney for Appellant City of Bridgeton

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Dated: November 4, 2006

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned certifies that two copies of this brief and appendix, along with a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were served upon counsel for Respondent Missouri-American Water Company by delivery on November 4, 2006 to UPS for delivery on Monday, November 6, 2006, to the following address:

Carl J. Pesce #39727
Paul D. Lawrence #53202
THOMPSON COBURN, L.L.P.
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
cpesce@thompsoncoburn.com

An electronic copy of this brief and appendix was served on counsel for Respondent and for *amicus curiae* by electronic delivery on November 4, 2006 at the email addresses noted below:

Attorneys for *Amicus Curiae*
Office of the Public Counsel

Christina Baker #58303
Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230
(573) 751-5565
christina.baker@ded.mo.gov

Attorneys for *Amicus Curiae*
The Missouri Industrial Energy Consumers

Diana M. Vuylsteke #42419
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750
(314) 259-2543
dmvuylsteke@bryancave.com

Attorney for *Amicus Curiae*
The Metropolitan St. Louis Sewer District

Randy E. Hayman, #45435
2350 Market Street
St. Louis, Missouri 63103
(314) 768-6209
rhayman@stlmsd.com

Attorney for *Amicus Curiae*
Missouri Energy Development Association

Chuck Caisley, #50687
326 East Capitol Avenue
Jefferson City, Missouri 65101
(573) 634-8678
chuck@missourienergy.org

Attorney for *Amicus Curiae*
Southwestern Bell Telephone, L.P. d/b/a
AT&T Missouri

John F. Medler, Jr. #38533
One SBC Center, 35th Floor
St. Louis, Missouri 63101
(314) 235-2322
jm9992@att.com

Attorney for *Amicus Curiae*
Missouri Gas Energy, and The Empire
District Electric Company

James C. Swearngen #21510
P.O. Box 456
Jefferson City, Missouri 65102
(573) 635-7166
jswearngen@brydonlaw.com

Attorney for *Amicus Curiae*
The Missouri Public Service Commission

Kevin A. Thompson #36288
General Counsel
Missouri Public Service Commissions
P.O. Box 360
Jefferson City, Missouri 65102
(573) 751-6514
kevin.thompson@psc.mo.gov

Attorney for *Amicus Curiae*
Laclede Gas Company

David Abernathy #33785
720 Olive Street, Room 1402
St. Louis, Missouri 63101
(314) 342-0536
dabernathy@lacledegas.com

Attorney for *Amicus Curiae*
AmerenUE

Michael F. Barnes #24760
1901 Chouteau M/C 1310
St. Louis, Missouri 63103
(314) 554-2552
mbarnes@ameren.com

Attorney for *Amicus Curiae*
Atmos Energy Corp.

Douglas Walther #32266
5430 LBJ Freeway
Dallas, Texas 75265
(972) 855-3102
douglas.walther@atmosenergy.com

Attorney for *Amicus Curiae*
Aquila, Inc.

Brian J. Didier #56383
20 W. Ninth Street
Kansas City, Missouri 64105
(816) 467-3364
brian.didier@aquila.com

Attorney for *Amicus Curiae*
Kansas City Power and Light Company

Curtis Blanc #58052
1201 Walnut, 20th Floor
Kansas City, Missouri 64106
(816) 556-2785
curtis.blanc@kcpl.com

By: _____
Attorney for Appellant City of Bridgeton

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

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