IN THE SUPREME COURT
STATE OF MISSOURI

Supreme Court Case No. SC87744

CITY OF BRIDGETON,

Appellant,

v.

MISSOURI-AMERICAN WATER COMPANY,

Respondent.

Circuit Court for the County of St. Louis
Cir. Ct. No. 04-CC-2107
Hon. Robert S. Cohen

Missouri Court of Appeals, Eastern District
App. Ct. No. ED86292
Hon. Sherri B. Sullivan, Hon. Nanette A. Baker, Hon. Robert G. Dowd, Jr.

BRIEF OF AMICUS CURIAE MISSOURI PUBLIC SERVICE COMMISSION

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STATEMENT OF INTEREST

Amicus the Missouri Public Service Commission ("PSC") is an executive branch administrative agency created by statute and charged with the regulation of investor-owned public utilities in the State of Missouri in order to ensure to the public safe and adequate utility services at just and reasonable rates. Utility rates are not just and reasonable to the extent that they include subsidies exacted by municipalities in order to facilitate development undertaken primarily for purposes of private profit. This Court has instructed the PSC that a "just and reasonable" rate is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." *State ex rel. Washington University et al. v. Public Service Commission et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (*en banc*, 1925). As cash-strapped municipalities vie with one another in order to attract developers and to thereby realize the incidental tax revenue benefits that development confers, a salient danger to the greater public interest arises in the form of collusion between municipal officials and developers aimed at exporting some of the costs of development to utilities and, ultimately, the rate-paying public.

This Court has instructed the PSC that its primary duty is the protection of the public, *St. ex rel. Electric Co. v. Atkinson*, 275 Mo. 325, 337, 204 S.W. 897, 899 (*en banc*, 1918), and, to that end, the PSC's interest in this matter is to ensure that Missouri-American Water Company ("MAWC"), and ultimately its ratepayers, are not required to subsidize profit-seeking, private developers. For this reason, the PSC submits this brief as amicus curiae in support of MAWC.

The PSC sets just and reasonable rates by either the file-and-suspend method or the complaint method via a two-step process that takes into account all relevant factors. § 393.140, RSMo. The first step is the determination of the utility's "revenue requirement," that is, the annual amount of revenue that the ratepayers must generate to pay the costs of producing the utility service they receive while yielding a reasonable rate of return to the utility's investors on the value of the private property that has been devoted to the public service. *State ex rel. Capital City Water Co. v. Missouri Public Service Commission*, 850 S.W.2d 903, 916 n. 1 (Mo. App., W.D. 1993). The second step is a rate design intended to recover the revenue requirement in an equitable manner, that is, one that matches the revenue charged to each class of customers to the costs incurred in providing service to that class.

In determining the revenue requirement, the PSC is careful to exclude from the cost-of-service that will be charged to the ratepayers any expense that should be borne by the shareholders, such as lobbying expenses and public relations expenses. Because relocations are an ongoing and regular expense of the utility, rates include an allowance for such costs. Where utilities are inappropriately required to bear the costs of relocations required by private developments, there is a danger that the amount allowed in rates for such expenses will not be sufficient. The inevitable result in such a case will be the deferral by the utility of maintenance and customer service activities, resulting in a palpable degradation of the quality of service provided to the public. Ultimately, the utility will seek a larger allowance for such expenses in its next rate case, with the result that the rate-paying public will subsidize both private developers and municipalities. In

the present case, MAWC operates throughout St. Louis County and in Jefferson County, St. Charles, Mexico, Jefferson City, Joplin, St. Joseph, Platte County, and Brunswick. It is simply not equitable to require ratepayers elsewhere in St. Louis County to underwrite the costs of a development in Bridgeton; neither is it equitable to require those ratepayers to subsidize private developers.

The General Counsel of the PSC is authorized by § 386.071, RSMo, to "represent and appear for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission, and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved . . . ."; consequently, pursuant to Rule 84.05(f)(4), the consent of the parties to the filing of this amicus brief "need not be had."

FACTS

Amicus the PSC adopts the statement of facts set out in Appellant's Substitute Brief and Missouri-American's Statement of Facts filed with the Court of Appeals below.

ARGUMENT

I.

The Court below did not err in granting summary judgment in favor of MAWC and against the City of Bridgeton ("Bridgeton") because there was no genuine issue as to any material fact and MAWC was entitled to judgment as a matter of law in that this matter is indistinguishable from the situation considered by the Eastern District of the Missouri Court of Appeals in *Home Builders Association of Greater St. Louis v. St. Louis County Water Company* and that decision accurately applied the controlling law as announced by this Court in *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis.* (This point responds to Appellant's first Point Relied On.)

The standard for review of grants of summary judgment is the same as that governing the granting of the motion in the first place – summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation*, 854 S.W.2d 371, 376 (Mo. banc 1993); Rule 74.04(c)(6), Mo. R. Civ. Pro. The present case is indistinguishable from that resolved by the Missouri Court of Appeals, Eastern District, in *Home Builders Association of Greater St. Louis, et al. v. St. Louis County Water Company,* 784 S.W.2d 287 (Mo. App., E.D.1989) ("*Home Builders*"), and that resolution should control here because it is founded upon a sound analysis of public policy.

The record shows that, in exchange for permission to proceed with a development, Bridgeton required TRiSTAR, a developer, to make certain improvements to Taussig Road (A.297). These improvements, in turn, required that utility facilities belonging to MAWC be moved (A.332, 334). MAWC refused to do so unless reimbursed for the cost thereof (A.334). The improvements to Taussig Road were desirable to improve its safety, promote area development and minimize storm water run-off (A.288, 291, 334), but Bridgeton was not able to afford to make the improvements out of public funds (A.291). In the absence of the exaction from TRiSTAR, Taussig Road would not have been improved at this time (A.291).

In *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977) ("*Union Electric*"), this Court stated the common-law rule as follows:

> "The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity * * *, [or] public convenience [and] security require it, * * * at * * * [its] own expense. * * * [But] [the] general rule that the utility must bear the relocation costs has been held inapplicable where the relocation of its facilities has been necessitated by the municipality's exercise of a proprietary rather than a governmental function or purpose."

(*quoting* 12 *McQuillin, The Law Of Municipal Corporations* § 34:74a (3d ed.)). This Court implicitly approved the proprietary purpose exception stated in *McQuillin* and

noted in *Union Electric* -- and later embodied in *Home Builders* --because, in concluding that Union Electric Company was obliged to bear the cost of relocating its facilities, the Court emphasized the public nature of the project that made the relocation necessary:

> "This relocation of facilities required of Union Electric was necessitated by an urban renewal project: the DeSoto Carr Urban Renewal Project said by Union Electric's petition to include the Convention Plaza and a privately owned and operated hotel as a part of St. Louis' new downtown Convention Center to be developed under authority of the Land Clearance for Redevelopment Authority Law. The primary purpose of the project, the redevelopment or renewal of what is implicitly a blighted area of the city, has been declared legislatively to be a public purpose. The vacation of this block of the city thoroughfare and the requirement that Union Electric remove its facilities therefrom to make the thoroughfare available for use as a part of this project were acts of the City and the Authority in the exercise of a governmental rather than a proprietary function."

Union Electric, 555 S.W.2d at 33.

In *Home Builders, supra*, the Missouri Court of Appeals, Eastern District, concluded that the utility was not required to bear the cost of relocation where the projects in question were "exactions" extracted from developers by a municipality in exchange for permission to go forward with the development. *Home Builders,* 784 S.W.2d at 292. The Court reasoned that, because the developers were free to either

proceed with the development subject to the conditions imposed by the municipality or to abandon the development, the action requiring the relocation was that of the developer and not the municipality:

> "In the instant case, the actions of private developers constructing their projects, not the actions of a governmental entity, have caused the need for right-of-way improvements and have, in turn, necessitated water facility relocations. Absent these private actions, the road improvements and consequent facility relocations would not occur at this time or perhaps at any time. While the right-of-way improvements incidentally accomplish a public purpose, they primarily accomplish private sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of the Developer's projects."

Home Builders, 784 S.W.2d at 291.

The similarities between *Home Builders* and the present case are striking:

- As in the present case, the developers in *Home Builders* were each required to make improvements to nearby roadways as a condition of municipal approval of the proposed development. *Id.*, at 288, 289.
- As in the present case, the relocation of utility facilities was necessary in order to complete the roadway improvements. *Id.*, at 288, 289.
- As in the present case, the roadway improvements would not have been undertaken at this time except for the coincidental opportunity presented by the nearby development. *Id.*, at 289; A.291.

The Court below did not err in granting summary judgment to MAWC because the *Home Builders* decision is directly on point with respect to the present case. As in *Home Builders,* the primary beneficiary of the Taussig Road project is TRiSTAR, which would not have been permitted to go forward with its development had it not agreed to undertake the Taussig Road improvements. The *Home Builders* decision does not conflict with this Court's decision in *Union Electric, supra,* but simply applies that decision to a significantly different set of facts. Therefore, this Court should affirm the decision below. Overriding public policy concerns also favor affirming.

The PSC suggests that the *Union Electric* and *Home Builders* decisions strike exactly the right balance between the interests of local governmental entities on the one hand and the ratepayers on the other. Under the primary rule, set out and applied in *Union Electric, supra,* utilities are required to cooperate with public projects and to bear the cost thereof. Under the exception, described in *Union Electric, supra,* and applied in *Home Builders, supra,* utilities – and utility ratepayers -- are protected from exactions by local authorities that are, in reality, nothing more than subsidies for private, profit-seeking developments.

Bridgeton appears to take the position that utilities must always bear relocation costs associated with projects favored by local government. Should this Court adopt that view, the rate-paying public will become the piggy bank to which every cash-strapped hamlet will turn to finance its pet projects. The effect would be to equip local government with an indirect taxing authority truly breathtaking in its reach. In the present case, working families in other cities are being asked to underwrite road

improvements in Bridgeton. For these reasons, the PSC trusts that this Court will affirm the Court below.

II.

The Court below did not err in granting summary judgment in favor of MAWC and against Bridgeton because there was no genuine issue as to any material fact and MAWC was entitled to judgment as a matter of law in that Bridgeton failed to show that MAWC's facilities are unlawfully located on Bridgeton's property. (This point responds to Appellant's second Point Relied On.)

Bridgeton also asserts that the Court below erred in finding that MAWC lawfully occupies the public right-of-way at Taussig Road. This contention is a matter of great concern to the PSC because the use of public rights-of-way by utilities has been a settled matter in Missouri for many years. However, if Bridgeton succeeds in casting doubt upon the existing rules and procedures, the result will necessarily be greater expenses – perhaps significantly greater expenses – charged to ratepayers as utilities spend more money seeking greater certainty in connection with system extensions. For this reason, the PSC urges this Court to affirm the Court below.

In 1902, MAWC's predecessor-in-interest (hereafter "MAWC") obtained a perpetual franchise from the no-longer-existing County Court of St. Louis County, Missouri, to use the county roads, as then existing or later constructed, to provide public water service throughout the county. Although Bridgeton existed at that time, the Taussig Road area was not within its boundaries. Consequently, the County Court franchise of 1902 was effective in conferring authority upon MAWC with respect to the

Taussig Road area. Bridgeton annexed Taussig Road in 1956, during the twenty-year term of a franchise agreement between Bridgeton and MAWC. The franchise agreement was not renewed when it expired in 1971, but both parties behaved thereafter as though it was still in effect. All of MAWC's facilities along Taussig Road were placed after the 1956 annexation and some were placed after the 1971 expiration of the municipal franchise.

Bridgeton maintains that MAWC's county franchise, being unexercised, was extinguished by the 1956 annexation. MAWC, on the other hand, asserts that the 1902 county franchise created a property right in MAWC's predecessor that could not be extinguished by Bridgeton's annexation in 1956. The PSC suggests that the Court adopt the analysis presented by MAWC in Respondent's Brief.

The PSC further suggests that guidance on this point may be found in the Public Service Commission Law, enacted in 1913. Included in that law, although numbered differently at that time, was the following provision, now designated § 393.170:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the

permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Subsection 2 of § 393.170 requires the "permission and approval" of the Commission prior to the exercise of any right or privilege "under any franchise heretofore granted but not heretofore actually exercised . . . ." The intent of the legislature as expressed in a statute must be determined from the language used, giving the words their plain and ordinary meaning. *St. ex rel. Riordan v. Dierker,* 956 S.W.2d 258, 260 (Mo. banc 1997). The plain and ordinary meaning of a word is found in the dictionary. *Curry v. Ozarks Electric Corp.*, 39 S.W.3d 494, 496 (Mo. banc 2001). "Heretofore" means "previously"; and "heretofore granted" therefore refers to a franchise granted *before* the effective date of the Section 393.170.2. *American Heritage*

Dictionary, Second College Edition (1985), at 607. The franchise granted by the St. Louis County Court to MAWC's predecessor in 1902, to the extent not already exercised in 1913, was thus made subject to the PSC's authority to grant or withhold a certificate of public convenience and necessity.

The language of § 393.170.2 demonstrates, first, that franchises once granted do not expire merely because unexercised. By contrast, unexercised certificates of convenience and necessity *do* expire through non-use, but only because of the specific terms of § 393.170.3. The legislature is presumed to not engage in meaningless acts. *Kilbane v. Director of Department of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). Second, the language of § 393.170.2 demonstrates that, in its absence, the General Assembly believes that utilities can extend their systems at will into areas within the scope of an existing but-not-yet-exercised franchise. Consideration of § 393.170.2, therefore, suggests that the mere fact of Bridgeton's annexation of the Taussig Road area in 1956 did not affect the existing franchise held by MAWC's predecessor.

This conclusion is supported by the significant public interest considerations that pertain to this issue. Public utilities are capital-intensive enterprises largely because of the costs of constructing and maintaining the transmission and distribution systems necessary to bring the utility service to the customer's premises. Public drinking water utilities, like MAWC, are among the most capital-intensive of the utilities. Pursuant to traditional ratemaking principles, the public must pay the utility a return upon the value of its capital assets as well as return to the utility the original cost of those assets as they depreciate. Up to now, public utilities have used public rights-of-way free of charge, a

circumstance that ultimately inures to the benefit of the public in the form of the ratepayers. Should the Court's disposition of this case change existing practices, however, utilities will be required to spend money, whether in the form of capital investment or expenses, in order to obtain a necessary level of certainty with respect to their use of public rights-of-way. While it is not possible at this time to predict the precise form the impact of such a decision would take, it is at least certain that it would cost ratepayers more money.

CONCLUSION

By reason of all the foregoing, Amicus the Missouri Public Service Commission prays that this Court will affirm the decision of the Court below and grant such other and further relief as justice may require.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The hereby certify that the foregoing brief of Amicus Curiae Missouri Public Service Commission complies with the limitations contained in Supreme Court Rule 84.06(c) and that:

(1) The signature block above contains the information required by Rule 55.03;
(2) The brief complies with the limitations contained in Rule 84.06 (b);
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(4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format, and in compliance with Supreme Court Rule 84.06(g);
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_____
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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned hereby certifies that two copies of this brief, along with a three-and-one-half-inch disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were sent via U.S. Mail, postage prepaid, on **October 30, 2006,** to the counsel of record listed below, and that an electronic version was transmitted via e-mail to those counsel with e-mail addresses:

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