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

BRIEF OF *AMICI CURIAE* SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a AT&T MISSOURI, THE METROPOLITAN ST. LOUIS SEWER DISTRICT, MISSOURI GAS ENERGY, ATMOS ENERGY CORP., AMERENUE, KANSAS CITY POWER & LIGHT COMPANY, AQUILA, INC., THE EMPIRE DISTRICT ELECTRIC COMPANY, LACLEDE GAS COMPANY AND MEDA

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Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri"), The Metropolitan St. Louis Sewer District ("MSD"), Laclede Gas Company ("Laclede"), The Empire District Electric Company ("Empire"), Kansas City Power & Light Company ("KCPL"), Missouri Gas Energy ("MGE"), Union Electric Company d/b/a AmerenUE ("Ameren"), Atmos Energy Corp. ("Atmos") and Aquila, Inc. ("Aquila") (unless a distinction is necessary, hereinafter, the *amici curiae* are collectively referred to as the "Utilities"), and the Missouri Energy Development Association ("MEDA") hereby submit their Brief as *amici curiae* in support of Defendant/ Respondent Missouri-American Water Company (the "Water Company").

INTEREST OF THE UTILITIES AS *AMICI CURIAE*

The question posed by this appeal is whether public utility providers and, ultimately, their ratepayers, should be forced to subsidize the construction projects of private developers. In this case, a private developer struck a deal with a city that the developer would pay for improvements to a city road if the city assisted it in casting over $500,000 in utility relocation costs onto the shoulders of the water company and its ratepayers. The water company and its ratepayers gained nothing from this builder's private development, yet they are being asked to pay for it. The *amici curiae* here, representing telephone, electric, gas, and sewer utility companies, believe that such a scheme is an inappropriate effort to gouge Missouri utilities and their ratepayers in order to increase the profits of private construction companies. This Court should prevent such a misguided attempt to transfer burdens of private developers onto utilities and their ratepayers.

The Utilities are all companies that provide utility services that are a necessity to modern day living to residential and business consumers throughout most of the State of Missouri. AT&T Missouri provides telecommunications services, MSD provides sewer services, KCPL, Empire, Ameren, Atmos, Aquila, MGE and Laclede provide energy services in the form of natural gas and/or electricity. MEDA is an association which exists for the purpose of advocating utility interests and concerns in the State of Missouri. The Utilities (or their predecessors) have each been in business for more than 100 years and have committed themselves to providing consistent, reliable service to their customers. To provide that service, the Utilities have spent billions of dollars designing, constructing, and maintaining massive underground and aerial networks of facilities connecting customers together, and to the service the Utilities each provide. Several of the Utilities, like the Water Company, have facilities in the affected public right-of-way of Taussig Road, which are threatened by this litigation.

It is impossible for the Utilities to provide their services to customers without placing facilities on, under or above the municipal, county or state rights of way. The Utilities' services provide a public benefit and as such their use of the public right-of-way cannot be denied, and public entities are limited in the ability to require relocation once facilities are in place. *RSMo* §227.240; *Franke v. Southwestern Bell Telephone*, 479 S.W.2d 472, 477 (Mo. 1972); *State Highway Commission v. Union Electric Co. of Mo.* 142 S.W.2d 1099, 1101-1102 (Mo. Ct. App. 1940). Because of the need for these networks and the concomitant need of their customers to receive seamless service, the Utilities must give some level of trust in the governmental entity in question that they

will be able to keep their facilities in place, barring a true public need that may temporarily eclipse the public's need for the utility services in question. Each time one of the Utilities is required to relocate facilities in its network, it costs money, typically tens of thousands of dollars, if not more.

Moving utility facilities involves more than just a construction crew digging a hole and moving an MSD sewer pipe from one location to another, for example. Instead, it involves engineering expertise in designing and planning the connections as well as ensuring the new location will provide the necessary service to the customer. It involves prudent and careful construction and excavation work in relocating the facilities to ensure that the customers have as little interruption in their service as possible and to ensure the safety of the work crews performing the work. In many cases, it involves significant out of pocket expenditures for new pipes, conduits, cables, and other facilities. In the case of AT&T Missouri, for example, cable splicing technicians often sit in damp pits and manholes for hours and, many times, days on end, splicing together the hundreds and often thousands of individual pairs of wires needed to complete relocation. New manholes often need to be cast and inserted. Trenches are excavated with backhoe machines and conduits are installed. Technicians climb poles to transfer cables which are aerially attached to utility poles. In the case of Gas utilities, technicians fuse together sections of plastic pipes with heat fusing machines. They test the surrounding area for gas leaks with special detection equipment. They install gas valves and pressurize pipes to the correct pressure. In the case of electric utilities in Missouri, for example, the electric company must determine how and where to locate facilities, what size and type

of facilities are appropriate, how and when to remove the existing facilities without disrupting service to existing customers while transferring service to the newly constructed facilities. This work is dangerous, time-consuming and costly. At the very least, new poles must be set, new overhead conductors and facilities installed and old facilities removed. In the case of underground facilities, this involves the digging of new trenches, the installation of conduits, cables, transformer pads, transformers, pedestals and services. It is difficult work that takes many hours, often in inclement conditions. MSD crews insert sewer pipes and drainage culverts. Their crews pour concrete for new sewers. They hire crews to bore under roads with large pipe-pushing and boring machines. This is hard, time-consuming, gritty, expensive work.

Those relocation costs are ultimately borne by the customers of the Utilities whether it be through a direct pass-through, an increase in rates as a result of the increase in expenses, or the shifting of funds from new facilities or the maintenance and upgrades of existing facilities to the relocation efforts.

If the decision of the Circuit Court is reversed, it will impact the ability of the Utilities to provide necessary services to their customers at reasonable rates. If the Court rules in favor of Bridgeton and TRiSTAR (the private developer), it will send a message to any developer that it can transfer part of its private development costs onto the backs of utilities and their ratepayers by cutting a deal with a city which is anxious to have the new private development come to town. The issues presented in this case involve more than just the City of Bridgeton and the Water Company. Indeed, this case presents an issue that strikes at the heart of all utility industries and municipalities in the State of

Missouri. In conformity with the Missouri Court of Appeals' decision in *Home Builders Association of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. App. E.D. 1989), the Circuit Court's decision correctly protects utility companies and their customers from the greed of private developers and the subterfuge of municipalities. If this Court reverses the decision of the Circuit Court, it may bring into question the application of *Home Builders*, which the Utilities have come to rely upon in their dealings with municipalities and developers. The Utilities, therefore, have a significant interest in the outcome of this case.

Counsel for the City of Bridgeton and Missouri-American Water have consented to the filing of this Amicus Brief.

POINT RELIED ON

I.

The Circuit Court Correctly Entered Summary Judgment In Favor Of The Water Company Because Without the TRiSTAR Private Development and Associated Taussig Road Improvements Imposed by Exaction, the Taussig Road Utility Relocation Would Not Have Occurred At This Time In That the Private Developer "Caused," and Benefited from the Taussig Road Utility Relocation and Must Pay for the Associated Costs

Home Builders Association of Greater St. Louis v. St. Louis County Water Co., 784 S.W.2d 287 (Mo. App. E.D. 1989)

Pacific Gas & Elec. Co. v. Damé Constr. Co., Inc., 191 Cal. App.3d 233, 236 Cal Rptr. 351 (1987)

Potomac Elec. Power Co. v. Classic Community Corp., 856 A.2d 660, 669 (Md. 2004)

State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972)

ARGUMENT

I.

The Circuit Court Correctly Entered Summary Judgment In Favor Of The Water Company Because Without the Tri-Star Private Development and Associated Taussig Road Improvements Imposed by Exaction, the Taussig Road Utility Relocation Would Not Have Occurred At This Time In That the Private Developer "Caused," and Benefited from the Taussig Road Utility Relocation and Must Pay for the Associated Costs.

A. Public Utility Ratepayers Should Not Be Required to Finance Private Construction Projects

1. The Rule Sought by the City of Bridgeton is Inherently Unfair

If the Water Company and its ratepayers were going to build a new production facility in St. Louis County, no one would ever suggest that TRiSTAR be required to pay $500,000 of the Water Company's construction costs. But that is precisely what is occurring here -TRiSTAR is attempting to have the water company and its ratepayers shoulder over a half-million dollars in costs for its own private development project - a development that does not benefit the water company's ratepayers in any way. TRiSTAR was the originator of these utility relocation costs. TRiSTAR proposed the Office Park 370 and interchange improvements. If the TRiSTAR Office Park 370 and interchange were never proposed or built, the Taussig Road project admittedly never would have occurred at this time. Yet, without the Taussig Road project, TRiSTAR would not have

gotten approval for the development in the first place. It was truly the sole source and benefactor of these utility relocation costs. Because TRiSTAR caused the costs, and gained from their creation, it should pay for them. That is only common sense.

None of the Utilities are asking this Court to reverse the general common law rule that a utility must relocate its facilities from road right-of-way where the city requests the move for a public purpose. But where the relocations costs are caused by a private developer, the utility should not bear the cost.

To do otherwise will cause draconian results. One need only look to the various stadium, arena, and shopping mall projects in the St. Louis and Kansas City areas to see the extraordinary efforts which cities will employ to see new development (and new tax revenue) come to their cities. For this reason, cities are often very willing to give tax incentives to developers to put large new projects in their towns. The projects are continual efforts to create public improvements without requiring an increase in out-of-pocket taxpayer dollars. If the Court rules in favor of Bridgeton and TRiSTAR here, cities will all the more attempt to lure private developers by shifting costs from the developers onto the utilities and their ratepayers. Utilities will be forced to pay relocation costs on projects which would never have occurred but for the private development. It is the utility ratepayers who will ultimately pay the enormous price for such a rule.

2. The Home Builders Case Correctly Applied Common Law Rule.

The *Home Builders Association of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. App. E.D. 1989), correctly applied the common law rule to the facts nearly identical to those in the case at issue. In *Home Builders,* five developers sought to construct new private developments adjacent to a public road. Delmar Gardens Enterprises sought to build a skilled care facility for the elderly; Keller Plaza Ltd. sought to build a shopping center; Kingsway Homes, Inc. sought to erect condominiums; RGB Construction Company and Suntide, Inc. sought to construct subdivisions of single-family dwellings. In each case, the governmental authority required the private developer, as an exaction, to pay for road improvements. Those road improvements would require the relocation of water company facilities. The water company refused to relocate the facilities until it was reimbursed for the relocation costs by the private developers, relying on the rule set forth in *Pacific Gas & Elec. Co. v. Damé Constr. Co., Inc.*, 191 Cal. App.3d 233, 236 Cal Rptr. 351 (1987), that where a governmental authority requires a private developer, as an exaction for its private development, to pay for road improvements, the developer must ultimately pay for the utility relocation costs necessitated by the road improvements.

The Missouri Court of Appeals in *Home Builders* correctly held that because the private development "…***caused the need for right-of-way improvements***…" they "…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." *Home Builders* at 291(emphasis added). Therefore, the Court held, "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." *Id*. The Court there correctly applied the "governmental act" and "governmental purpose" test of, *Union Electric v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977), and held that neither prong was met. *Id*. The *Home Builders* court determined that the existence of the exaction provided a legal nexus justifying imposition of all of the costs of the development on the developer. *Id*.

The *Home Builders* case is on all fours with the case at bar. This Court should affirm the rule as applied in *Home Builders* and not allow the private developer to shift its costs, voluntarily accepted through an exaction by the governmental authority, onto the utility.

3. This Court Should be Concerned with Protecting Utility Ratepayers

The *Home Builders* rule makes sense because a contrary rule would place unfair burdens on utilities and their ratepayers. Where, as here, the dispute is whether the private developer or the utility companies will incur the costs to relocate the facilities, the court in *Home Builders* focused on protecting the ratepayers of the utility companies from the costs created by private developers. As the *Damé Construction* court found, those ratepayers "are comparable to taxpayers," and when the fight is between the ratepayers and the private developers, it is the ratepayers who the courts must protect. *Damé Constr.*, *supra*, 191 Cal. App. 3d at 237; *see also Home Builders*, *supra*, 784 S.W.2d at 292 (recognizing soundness of the holding in *Damé Construction*).

Indeed, in recently adopting the holding in *Home Builders*, the Maryland Court of Appeals focused on protecting the ratepayers from the private developers: "We find no legal basis, and certainly no equitable one, for requiring a utility's rate-paying customers to bear a cost triggered and made necessary by a private developer's project and thus, in effect, to subsidize the cost of the development." *Potomac Elec. Power Co. v. Classic Community Corp.*, 856 A.2d 660, 669 (Md. 2004). As *Damé Construction*, *Home Builders*, and *Potomac Electric Power* all recognize, the way to protect those ratepayers — the customers of the utility companies — is by requiring the private developers to bear the cost of utility relocations.

It is even more significant that most of the impacted ratepayers will not even live in the City of Bridgeton. The rates paid by the utility customers are typically not set on a municipality level; instead, they are generally established in a much broader base; i.e., in the case of the water company, the cost of service is shared by all ratepayers in St. Louis County, Missouri. Thus, if a utility company is required to pay for the cost to relocate facilities due to private development in Bridgeton, ratepayers in Arnold, Missouri or Chesterfield, Missouri will be subsidizing the costs for a private development in the City of Bridgeton. The residents of the City of Bridgeton may gain some benefit from TRiSTAR's new office park, while ratepayers of the utility living elsewhere will only be burdened and forced to subsidize private development for which they may not derive any benefit.

4. Private Developers Can Anticipate Utility Relocation Costs

As between the private developer and the utility company, it makes sense that the developer should have to pay for the relocation of utility facilities, because developers, who are most familiar with their own projects, are in the best position to plan for and anticipate utility relocation costs. TRiSTAR knew that the City was requiring it to finance and perform the road improvements to Taussig Road and that TRiSTAR was ultimately responsible for financing the utility relocations. TRiSTAR could plan in advance for that cost or could negotiate with the City. The Water Company and any other affected utilities had no input or notice in respect to the negotiations between TRiSTAR and the City of Bridgeton and should not be forced to bear the burdens of a contract to which they are not a party.

As the Court correctly explained in *Home Builders*:

> [The developers] are in a position, when making those development decisions, to factor the cost of utility relocations into their project plans. They can accept those costs, if feasible, and proceed to complete their projects. Or, they can decline to undertake a project if the relocation costs are beyond their present resources. Developers thus have a better opportunity than the Water Company to anticipate and to plan for the costs of relocation associated with their proposed projects. The Water Company, if forced to bear the costs whenever a developer's project requires facility relocations, has no similar opportunity to anticipate, much less to plan, the allocation of its resources to meet these costs.

Home Builders 784 S.W.2d at 293.

The *Damé Construction* court employed a similar rationale:

> Finally, we are convinced it is economically and otherwise fair that [the developer] bear these costs because it had reason to anticipate it would have to do so. Paragraph 8 of the subdivision agreement between [the developer and the county] provides that [the developer] "shall pay when due, all costs of the work, including inspections thereof and relocation existing utilities required thereby." . . . *In sum, a fair reading of the subdivision agreement at least should have put [the developer] on notice as to its potential liability for the utility relocation costs; at that point it could have determined the economic feasibility of going forward with its plans in light of this additional expense. On the other hand, [the utility] had no part in the negotiation of the subdivision agreement and had no opportunity to prevent the movement of its utility poles.*

Damé Constr. Co. 191 Cal. App.3d at 241-242 (court's emphasis omitted) (emphasis added); *see also Potomac Electric Power Co.* 856, A.2d at 666. ("By its own act, undertaken solely for its own economic benefit, [the developer] caused the poles to be situate[d] on land dedicated to public use and thereby made the removal of those poles from that land necessary.")

It is significant that if the City of Bridgeton loses this lawsuit against the Water Company, it is not the City or its taxpayers that will have to bear the cost of the utility relocations. Instead, it is undisputed that the private developer, TRiSTAR, will have to

pay those costs under its agreement with the City. Thus, the policy behind the cases that hold that a utility company must pay to relocate its facilities when a truly governmental public project is being performed (i.e., the desire to avoid having taxpayers from shoulder the burden), simply is not implicated here. *See, e.g., Damé Constr., supra,* 191 Cal. App. 3d at 237. Consequently, the interests of the utility's ratepayers are not at odds with those of the taxpayers of the City of Bridgeton. As TRiSTAR's contract with the City of Bridgeton specifically states: "TRiSTAR shall be obligated to pay for the following costs associated with the Project: . . . (5) All cost of utility relocation not paid by the utility involved."

B. The Water Company's Position is Entirely Consistent with the Case of *Union Electric v. Land Clearance*

Bridgeton spends most of its brief discussing *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977) where this Court set forth the general rule that utilities must pay for relocations from road right-of-way where the city requests the utility move for a public purpose relating to the safety or improvement of the road.

In *Union Electric,* the Land Clearance for Redevelopment Authority, a governmental entity founded pursuant to the Land Clearance for Redevelopment Authority Law, RSMo §§ 99.300 to 99.660, told Ameren's predecessor, Union Electric Company, it needed to move its lines to make way for a convention center project the Authority was building. *Union Electric* 555 S.W.2d at 31. Bridgeton focuses on the argument made by Union Electric in that case, which was rejected by this Court, that the

urban renewal project would incidentally include a privately owned hotel, and therefore the City was exercising a proprietary, rather than governmental function. The Court rejected the utility's position, concluding that the project was for a governmental purpose because under the Missouri Constitution and RSMo Chapter 99 governmental authorities have the ability to declare a redevelopment project as being for a governmental purpose, with such purpose being the reclamation of a blighted and unsafe section of the city. *Id*. at 33. Of interest is the fact that this Court had previously found RSMO Chapter 99 redevelopment projects to be for a governmental purpose via two cases cited in *Union Electric*. *Id.*

It should also be noted that the facts of *Union Electric* are different than the facts in this case. The *Union Electric* project was not the result of an exaction on a private developer seeking approval for its private development project. Additionally, exaction projects like the Taussig Road improvements have not received the special judicial recognition of being for a governmental purpose like RSMo Chapter 99 redevelopment projects and governmental authorities have no authorization to declare such exactions as being for a governmental purpose as they do for RSMO Chapter 99 redevelopment projects. Finally, there is no evidence that in *Union Electric*, the developer of the private hotel advised the city that the developer wanted to build a hotel, and then the city advised the hotel builder that the hotel would be approved only if the hotel developer also paid for a convention center and related improvements, which, in turn, would necessitate utility relocation.

The case at bar is consistent with *Union Electric* because the "primary purpose" of the project *which necessitated the utility relocation costs* - the TRiSTAR office park project—was private and not public. Bridgeton is muddying matters here by suggesting that the "project" is the Taussig Road improvement project, as if that job existed in a vacuum without any involvement of the TRiSTAR office park development. If the Court keeps its eye on the correct "project"—*the one causing or necessitating the utility relocation costs*—it becomes clear that the Water Company's position is entirely consistent with *Union Electric*.

C. The City's Exaction, and Acceptance Thereof, is the Causal Nexus Which Makes the Road Improvements Proprietary in Nature

Bridgeton suggests that *Home Builders* should not apply because the road improvement that TRiSTAR unquestionably is financing is not related to the development in question or there is some question of fact as to the relationship of the road improvement to the development. That is simply not an issue before the Court. The two projects are causally linked – and the City and TRiSTAR made them as such. In imposing that exaction on TRiSTAR and in TRiSTAR accepting the exaction in their October 20, 1999 contract, both the City and TRiSTAR implicitly agreed that the exaction was reasonably related to the development that TRiSTAR wanted to construct. That implicit agreement is all the Court needs to apply *Home Builders*.

Indeed, if the road improvements were not reasonably related to the development, then TRiSTAR would have had the right under Missouri law to contest the exaction. *See State* ex rel. *Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972) (there must be a

"reasonable relationship" between the development proposed by the builder and the exaction of the governmental authority; where proposed subdivision of 16 homes near Mason and Conway Road would not create necessary volume of traffic to require a major renovation of Mason Road, exaction by St. Louis County for major improvements to Mason Road was not reasonably related to development and was void). TRiSTAR is a sophisticated business entity. If TRiSTAR truly believed that its Office Park 370 and its interchange at Taussig Road, like the subdivision in *Noland*, would not create significant volumes of traffic on Taussig Road, it could have chosen to bring a *Noland* challenge to the exaction. Having chosen not to make a *Noland* challenge, and by voluntarily accepting the governmental exaction, the developer cannot now assent that the exaction and Taussig development have no causal link.

Any argument by the City that TRiSTAR would not engage in contesting the exaction because of the expense and delay of litigation is disingenuous, at best. It is unlikely that it would agree to such a high cost simply to avoid some litigation, particularly here, where it is undisputed that TRiSTAR is financing this litigation ostensibly brought by the City of Bridgeton against the Water Company. If delay or cost were an issue in the first instance, it certainly still exists in this current litigation. Indeed, it is axiomatic that a private developer will look out for its own interests and if it truly felt that it would ultimately prevail in a *Noland* suit, then it would have pursued that route. Here, it is undisputed that TRiSTAR did not, conceding the relationship between the road improvements on Taussig Road and its development.

Further exacerbating the egregiousness of Bridgeton's position is the fact that the utilities have no opportunity or ability to make a *Noland* challenge of the exaction's propriety. Once the developer agrees to the exaction, it should not be able to pass the consequent costs onto an innocent utility and its ratepayers but rather, it should be charged with financing the deal it has made. Without such a rule, the City and developer can subject the utility and its ratepayers to the whims of any arrangement upon which the City and developer may agree. Once accepted, the exaction is the nexus which makes any required improvements and all of the consequent costs proprietary and the responsibility of the private developer.

The standard under *Home Builders* is, and should be, that if the road improvement allows the private developer to build its development, then the private developer and not the utility companies should bear the cost of relocating the effected facilities. TRiSTAR's acceptance of the exaction allowed its development to proceed and created good will for TRiSTAR with the City, thereby creating a benefit for TRiSTAR. This is consistent with *Home Builders* where the Court of Appeals recognized that if such an exaction "does generate action, it is action by the owners of the property in question who choose to accept and to meet the conditions imposed in order to realize their desired use of the property." *Home Builders*, 784 S.W.2d at 291; See also *Damé Construction* 191 Cal.App.3d at 240 and *Potomac Electric* 856 A.2d at 669

Indeed, it is only because TRiSTAR accepted the City's exaction of improving Taussig Road that the road improvement work is being performed now, making this case fall squarely within *Home Builders*. *Id*. ("Absent these private actions, the road

improvements and consequent utility relocations would not occur at this time or perhaps at any time.")

When, as here, it is undisputed that the private developer agreed to the road improvement exaction as a condition to obtaining the necessary municipal permission, the Court's inquiry should go no further. Any suggestion by the City that the focus on whether there is a relationship between the development and the road improvements in question should be rejected. The case before the Court teaches that municipalities and private developers will be creative in trying to avoid the holding in *Home Builders*. If the Court were to adopt the position of the City of Bridgeton — even if it ultimately affirms the Circuit and Appellate Court's decision — it will be a simple matter for the next municipality and the next private developer to snub this Court and its rulings. All they would have to do is have the developer in question pay for a municipal project in another part of the city, while the city uses the funds it saves with the developer performing that unrelated work to make road improvements near the new private development. Surely, this Court's decisions have more strength than to be subject to such easy circumvention.

Indeed, in adopting the holding in *Home Builders*, the Maryland Court of Appeals recognized described the need for an "automatic rule" in order to avoid factual manipulation or circumvention. *Potomac Elec. Power Co. v. Classic Community Corp.*, 856 A.2d 660, 669 (Md. 2004). There the Court stated that instead of subjecting the courts to "the prospect of extensive litigation and endless discovery over who, among any number of potential parties may be the principal beneficiary of particular road improvements," the rule shall be that utility relocations made necessary by a private

development shall be paid by the developer. *Id*. In other words, once a developer accepts the exaction, the analysis shall end.

Potomac Electric Power also teaches that the City of Bridgeton's position that *Damé Construction* and *Home Builders* are out of date is utterly untrue. Indeed, the case that Bridgeton relies on most significantly for that proposition, *City of Livermore v. Pacific Gas & Electric Co*., 51 Cal. App. 4th 1410 (1997), is completely unrelated and irrelevant to the issues currently before this Court. *City of Livermore* involved special assessment districts targeted at numerous property owners, making it more akin to a tax than an exaction. *Id*. at 1417 (holding that the funds for the road improvements were "generated for governmental purposes by the exercise of the city's legislative authority to tax"). *City of Livermore* does not – as the City of Bridgeton wrongly states – overrule *Damé Construction*. Instead, because it involved a tax, the *Damé Construction* analysis simply did "not apply." *Id*. at 1415.

D. **This Court Should Not Sanction the Efforts by the City to Avoid Home Builders**

The City of Bridgeton here attempted to circumvent the *Home Builders* ruling by announcing to the public its plans to improve Taussig Road, but keeping secret the fact that it had privately agreed with TRiSTAR to fund the project through an exaction on private development. Had the Water Company not dug a little deeper, it may never have learned of the City's tactics. This Court should not sanction such strategies.

The Missouri Supreme Court addressed a similar issue in *State* ex rel. *City of Jefferson v. Smith*, 348 Mo. 554, 154 S.W.2d 101 (Mo. banc 1941), a case that the City of

Bridgeton relies upon in its brief. In that case, Jefferson City sought to construct a state office building, using municipal tax funds. *See id.* at 559-60, 154 S.W.2d at 103-04. In its referendum to its voting public seeking authority to issue bonds to pay for the construction of the building, Jefferson City claimed that the construction was for a municipal office building. *Id.* at 559, 154 S.W.2d at 103. Jefferson City claimed that the building would be primarily for municipal offices, but would also provide space for a state agency. *Id.* at 560, 154 S.W.2d at 104. After finding that the building would never have been built but for the needs of the state agency and therefore finding that Jefferson City had no power to use municipal funds to finance the construction of what was nothing more than a state office building, the Missouri Supreme Court chastised the city for its obvious manipulation:

> *[T]he subterfuge is an admission* that the construction of an office building for the Commission would not be for a municipal public purpose. Furthermore, the provision in the above mentioned ordinance for city offices in the building *also is a subterfuge.* In furtherance *of the effort to evade the Constitution*, a few city offices might have been located in the building. Even so, the primary purpose of the indebtedness was the construction of a building for the Commission. If so, the proposed indebtedness would be in violation of the above mentioned provision of the Constitution.

Id. (emphasis added).

CONCLUSION

For the foregoing reasons, *Amici Curiae* Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, The Metropolitan St. Louis Sewer District, Atmos Energy Corp., Aquila, Inc., Union Electric Company d/b/a AmerenUE, Missouri Gas Energy, The Empire District Electric Company, Kansas City Power & Light Company, Laclede Gas Company and MEDA respectfully urge that the Court affirm the Judgment of the Circuit Court in favor of Defendant/Respondent Missouri-American Water Company

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in reliance upon the word count of my word-processing system, that the foregoing brief contains 6,695 words.

One three-and-a-half-inch diskette containing the full text brief, prepared using Microsoft Word 2003, has been provided to the clerk and to each party represented by counsel. The diskettes have been scanned for viruses and are virus-free.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Brief of *Amici Curiae* Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, The Metropolitan St. Louis Sewer District, Atmos Energy Corp., Aquila, Inc., Union Electric Company d/b/a AmerenUE, Missouri Gas Energy, The Empire District Electric Company, Kansas City Power & Light Company, Laclede Gas Company and MEDA and a three-and-a-half-inch diskette containing a copy of the Brief in Microsoft Word 2003 format were sent via U.S. Mail, postage prepaid, this the 27th day of October, 2006, to the following counsel of record:

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