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STATEMENT OF INTEREST

Amici St. Louis County Municipal League and the Missouri Municipal League represent cities throughout St. Louis County and the State of Missouri. The cities of Hazelwood, Bellefontaine Neighbors, Clayton, Des Peres, Webster Groves, Olivette and Ferguson are typical of all Missouri municipalities responsible for the public roads which traverse their jurisdictions. Collectively, the Amici are vitally interested in the control, construction, maintenance, and improvement of municipal roadways and are correspondingly interested in maximizing the uses of private properties served by those roads in the most effective and efficient manner possible. This case, as shown by the opinion of the Missouri Court of Appeals, Eastern District, could adversely affect the ability of cities state-wide to control their public roads and to effect appropriate and necessary public road improvements, and in turn promote quality land use.

Relevant Facts

In 1902 the St. Louis County Court granted a franchise to Missouri-American Water Company's predecessor in interest (and its successors and assigns) to lay and maintain water lines along "all the public highways as they now exist, or may hereafter be laid out, of the County of St. Louis." In 1956, the city of Bridgeton annexed a portion of unincorporated St. Louis County which included Taussig Road. At that time Missouri-American's predecessor had not yet installed any water lines in the annexed Taussig Road right-of-way. Thereafter, the water company installed lines along Taussig Road

without authority from the city of Bridgeton. The water company has maintained and utilized these facilities for several years.

In the late 1990s, TriSTAR Business Communities, LLC, sought Bridgeton's permission to improve the Route 370/Missouri Bottom Road interchange, a portion of which is located in the city. (Missouri Bottom Road becomes Taussig Road south of Route 370.) Bridgeton agreed, subject to TriSTAR providing funds to Bridgeton to improve, upgrade, replace, and realign different sections of Taussig Road. The improvements were long overdue and had been declared by the city as necessary for the safety of the traveling public and for facilitating commercial redevelopment. TriSTAR agreed to defray the city's expenses in making the improvements, and the city initiated the Taussig Road project by instructing Missouri-American Water Company to relocate its lines located in the Taussig Road right-of-way.

Missouri-American denied that it had any obligation to relocate the lines at its own expense and demanded a payment of more than $500,000.00. The city filed suit against Missouri-American, seeking, among other relief, an injunction directing the company to relocate the lies at its own expense or to remove the lines. Missouri-American moved for summary judgment. The water company argued it was exempt from the common law requirement that the utility pay for facility relocation because the anticipated street improvements were privately funded by, and were for the benefit of, TriSTAR. The trial court granted Missouri-American's motion, and the judgment was affirmed on appeal by the Eastern District. This court accepted transfer on the city's motion.

Amici Concerns

1. Control and Development of Local Infrastructure.

Both the trial court and the Eastern District found that Missouri-American was excepted from the common law obligation to relocate the Taussig Road lines at the water company's expense. In doing so both courts fixed on the notion that the financing for the street improvements came from a private developer, as a *quid pro quo* for the city's approval of the interchange work that ultimately would benefit the financier's nearby commercial real estate development. The courts below concluded that this private benefit, albeit attenuated, outweighed any public benefit resulting from the Taussig Road improvements, consequently the common law rule did not apply.

In casting aside the public benefits from improving Taussig Road the courts below ignored the reality that the improvement of streets, even in conjunction with the development of private property, promotes public welfare in profound ways. For those cities with limited funds, as most are, partnering with a developer to improve city streets may be the only feasible way to address a burgeoning population and the concomitant toll on public infrastructure. For all municipal governments, real estate development increases the value of land, raises the tax base, and enhances employment opportunities, often while eradicating blight or remediating impossible topographical conditions, and such development, infused by private funds, often includes new, rebuilt, or reconfigured streets. These kinds of infrastructure development can overwhelmingly benefit the public health, safety, and welfare.

By ignoring the obvious public benefits to be realized from the Taussig Road improvements, the courts below have contradicted this Court's decision in *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W.2d 29 (Mo. banc 1977),* and they have also misinterpreted and misapplied *Home Builder's Ass'n of Greater St. Louis v. St. Louis County Water Company, 784 S.W.2d 287 (Mo. App. 1989).* Both *Union Electric* and *Home Builders* adhere to the traditional common rule that utility companies are obligated to relocate their facilities within public streets when directed to do so by the local government to further a public purpose. By focusing on the private benefits to TriSTAR rather than the public purpose and benefits of the Taussig Road improvements, the lower courts have strayed significantly from, and have even gutted, *Union Electric* and *Home Builders*.

Amici also suggest that by ignoring the public nature of the Taussig Road improvements in favor of the attenuated benefits to TriSTAR, the courts below have "second guessed" the policy determinations of Bridgeton's legislative body, without any showing that the city's decisions were arbitrary or unreasonable. This approach violates a long line of Missouri case law acknowledging the judiciary's traditional deference to a government's policy decisions.

Amici accordingly urge the Court to reject the analysis of the Eastern District in favor of applying the common law rule as expressed in *Union Electric* and *Home Builders,* and with appropriate deference to the city of Bridgeton's policy declaration as to the nature of, and need for, the Taussig Road improvements.

2. Control of Local Roads.

Both the trial court and the Eastern District also determined that erroneously Missouri-American was authorized to locate and maintain its lines in the Taussig Road right-of-way. The trial court essentially ignored the issue, reaching without analysis the conclusion that the water company "is certainly not a trespasser." The Eastern District's opinion was hardly better. It reaches the conclusion that the St. Louis County's 1902 franchise prevails over the city's authority over its own roadways, even though the Taussig Road water lines were installed *after* the city's annexation of the area. Both courts' conclusions serve as precedent for any utility company receiving a county-wide franchise to ignore the authority of local governments over their own rights-of-way.

Amici suggest the decisions below again contradict existing Missouri law. While county governments may grant utility franchises over unincorporated public roads, if those roads are subsequently annexed, the municipality succeeds to the county's authority. If utilities were placed in the public roadways pre-annexation, then the annexing municipality "stands in the shoes" of the county for purposes of the franchise so granted. If a utility franchise was granted pre-annexation but no facilities were installed, the annexing municipality has full authority to permit or refuse the location of those facilities in the annexed rights-of-way. Amici urge the Court to correct the errors of the courts below.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO MISSOURI-AMERICAN BECAUSE MISSOURI LAW REQUIRES THE WATER COMPANY TO RELOCATE ITS FACILITIES IN THE PUBLIC RIGHTS-OF-WAY AT ITS OWN EXPENSE WHEN THE RELOCATION IS REQUIRED BY GOVERNMENTAL ACTION TO SERVE A PUBLIC PURPOSE.

This case calls into question the responsibility of Missouri-American to relocate its underground water lines to allow the city to improve Taussig Road. Under the common law rule, utilities must relocate their facilities at their own expense when required to do so by the government in furtherance of a public purpose. While the Eastern District acknowledged the common law rule in the case below, the court concluded that because the Taussig Road improvements were being financed by a private developer who would benefit from the project, Missouri-American should not have to bear the cost of the facilities relocation. Amici submit that the Eastern District opinion erroneously subverts the common law rule and would establish a precedent which would adversely affect a city's ability to construct appropriate and necessary public road improvements, and in turn diminish a city's power to promote quality land use.

More specifically, the opinion below (1) contradicts this Court's decision in *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W.2d 29 (Mo. banc 1977),* (2) misreads and misapplies the Eastern District's

own precedent in *Home Builders Association of Greater St. Louis v. St. Louis County Water Company*, *784 S.W.2d 287 (Mo. App. 1989)*, and (3) would serve only to frustrate local governments and the courts in its future application.

1. The *Union Electric* Case.

The Eastern District opinion contradicts the *Union Electric* case. In *Union Electric*, the utility challenged its obligation to relocate electric facilities, at its own cost, for a city-approved redevelopment project. The "fundamental common law" rule placed this burden on the utility, provided the relocation was required by the public necessity, convenience, or security and was intended for a governmental, rather than a proprietary, purpose. This Court found the city's redevelopment project to be a governmental act consistent with the city's declared public purpose and thus held the utility responsible for the costs:

> This relocation of facilities required of Union Electric was necessitated by an urban renewal project . . . . 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, *784 S.W.2d at 32-33.*

Union Electric argued that the redevelopment project was really for the benefit of a privately owned and operated hotel and that the proprietary connection relieved the utility of the relocation expense. This Court implicitly accepted as true the private benefit allegedly inuring to the would-be hotel operator,[1] but despite the private benefit, the Court refused to call into question the judgment of the city that the area in question was blighted and that its redevelopment served a needed public purpose. *Union Electric, 784 S.W.2d at 32-33.* Under *Union Electric*, the governmental action and the governmental purpose is determinative; any private benefit is not relevant if a public purpose is served.

The instant case is not significantly different than *Union Electric*. The city of Bridgeton, a governmental entity with the authority and responsibility to maintain its public roads, has ordered Missouri-American to relocate its facilities so that the city can reconstruct the road "in the public interest." The city has found Taussig Road to be narrow, congested, and in need of significant improvement to facilitate safe and efficient public travel and to foster business growth and activity, and the Eastern District acknowledged that "the purpose of the [Taussig Road improvements] is governmental, in that the improvements are necessary for the safety and benefit of the public." *City of Bridgeton v. Missouri-American Water Co., -- S.W.3d --, 2006 WL 770445 (Mo. App.).*

[1] The Supreme Court affirmed the dismissal of Union Electric's declaratory judgment petition for failure to state a claim. *Union Electric, 784 S.W.2d at 30.*

Under *Union Electric*, this finding is conclusive, and Missouri-American is obligated to relocate its facilities at its own expense.

Yet the Eastern District cast aside this admitted governmental action because the city's funding for the road improvements came from TriSTAR, the private developer of property in a neighboring municipality. In a determination that beggars logic, the court concluded that the developer was the primary beneficiary of the Taussig Road improvements and should pay for the utility relocation:

> Although the general public benefits from the improvements to Taussig Road, these benefits are incidental. The primary beneficiary of the work is TriSTAR, which would not have been permitted to pursue its project without agreeing to perform the improvements. Since TriSTAR presumably enjoys the economic opportunity that the development represents, it seems proper that it should also bear the attendant costs.

Id. But under *Union Electric*,[2] benefits inuring to private parties are not relevant if a public purpose is served by governmental action.[3]

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[2] And many other court precedents. See below.

[3] It is noteworthy that the Eastern District's analysis bears no resemblance to the "proprietary" examples noted by this Court in *Union Electric*, which involved non-governmental programs to be carried out by the city itself, such as a city's demand that a utility's street lights be removed so the city could install its own street lights, or a city

The Eastern District also suggests that the test is one of causality—that the Taussig Road improvements occurred only because the city exacted them from TriSTAR in exchange for the city's approval to improve a nearby interchange, which in turn benefited the developer's commercial project in an adjacent city:

> Not only did this exaction tie TriSTAR's project to the Taussig Road project in such a manner that realization of the former was contingent upon accomplishment of the latter, but it also invokes the necessity of a cost-benefit analysis. . . .

Id. But if the Eastern District's intent is to engraft a causation element onto the "governmental action and purpose test," i.e., that any public improvements exacted in exchange for the approval of a private development absolves utilities from their common law obligation to relocate facilities, then the court has erroneously interpreted and applied its own precedent in the *Home Builders* case.

2. The *Home Builders* Case.

In *Home Builders*, several private developers filed suit against the St. Louis County Water Company to determine which of the parties, the developers or the water company, should be liable for the costs of relocating water lines in conjunction with related street improvements. The street improvements had been required by local governments in which the developments were located. None of the governmental

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wanting utilities moved to accommodate a city market, *784 S.W.2d at 32-3*.

agencies were party to the suit; neither had they taken action to declare the street improvements necessary for the public health, safety, or welfare, nor had they ordered the water company to relocate the lines to serve any needed public improvement. *Home Builders, 784 S.W.2d at 288-289.* On those facts, the Eastern District found that

> 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.

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

While the *Home Builders* decision acknowledges a causal relationship between the private developers and the public improvements, *Home Builders* also recognizes that the relationship is one of cause *and effect*, noting that the road improvements in question "primarily accomplish private sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of the Developer's *(sic)* projects." *Home Builders, 784 S.W.2d at 292.* Said another way:

> Appellant Developers, by their private development decisions, have triggered the need for road improvements and thus for facility relocations. They are in a position, when making those development decisions, to factor the cost of utility relocations into their project plans.

Home Builders, 784 S.W.2d at 292-293.

In the instant case, the public need for the Taussig Road improvements was not created by TriSTAR's development. The need existed independently and had existed for

years. While TriSTAR's development created an opportunity for the city to address that need, it did not *cause* the need. The Eastern District misinterpreted and misapplied *Home Builders* to the extent it relied on a causal relationship between TriSTAR's private development and the Taussig Road improvements.

Indeed, in the case below the Eastern District failed to appreciate the very role of governmental action, the absence of which it had found critical in *Home Builders*. In that case the court correctly noted that while all public infrastructure improvements serve a public purpose, not all public improvements result from governmental action:

> Developers erroneously seek to equate governmental purpose with governmental action. The trial court, however, correctly recognized the distinction between them. It thus held that a utility within a public right-of-way must relocate its facilities at its own cost when the right-of-way improvement necessitating the relocation is made necessary by the actions of a governmental entity and those governmental actions accomplish a purely governmental purpose.

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

And in *Home Builders*, the absence of governmental action, or even a governmentally declared public purpose, was manifest. The localities had no real stake in the improvements at issue. While the improvements were definitely "public" in nature, the local governments had not declared the improvements necessary for the public good, they were not constructing the improvements themselves, and they did not order the

utility to relocate its facilities to serve the public interest. The local governments merely determined that if private parties wanted to develop private projects, certain related public improvements would be required. These facts led inevitably to the Eastern District's conclusion:

> No governmental act is presented in this case. Thus, neither the common law rule nor the Missouri statutes discussed earlier apply to the factual situation in this case.

Home Builders, *784 S.W.2d at 292.*

Unfortunately, in its opinion below the Eastern District abandoned the logic that it had so carefully crafted in *Home Builders*, i.e., the critical distinction between private action—commercial development decisions that trigger the need for related road improvements—and public action—government decisions to improve roads for the public good. Instead the court became distracted by the fact of the "exaction" and inartfully decided, by some calculus that is baffling, that because the developer was willing to submit to the exaction, TriSTAR thereby became the "primary beneficiary" of the Taussig Road improvements, thus relieving Missouri-American of its common law obligation.

This conclusion is simply not supported by *Union Electric* or *Home Builders*. Its effect will be to raise significant questions about a city's ability to partner with private developers for future public improvements and to mock the judiciary's traditional deference to the policy decisions made by local governments.

3. Application of the Opinion Below.

If the opinion below is allowed to stand, its future application would frustrate the ability of local governments to effect public infrastructure improvements through private redevelopment, and it would invade the traditional prerogative of local government to determine what constitutes a "public purpose."

The opinion below ignores the modern reality of public-private partnerships, which are used daily throughout Missouri to transform the public infrastructure landscape. Private redevelopers often petition local governments for tax increment financing or for status as a Chapter 353 redevelopment corporation.[4] Other Missouri statutes let private parties initiate the creation of a special district, which often involve the improvement of public facilities at private expense.[5] In each of these "public-private partnerships," private individuals and corporations reap private benefits, but the public realize benefits as well, including the construction or improvement of public infrastructure, the reutilization of deteriorating commercial properties, the creation of

[4] Sections 99.800 *et seq.*, and 353.010 *et seq.*, RSMo.

[5] See Sections 67.453 *et seq.*, RSMo. (neighborhood improvement districts), 67.1401 *et seq.*, RSMo. (community improvement districts), 238.200 *et seq.*, RSMo. (transportation development districts), and 71.790 *et seq.*, RSMo. (special business districts).

new employment opportunities, higher property values, and the promise of a increased tax revenues, which in turn allows for the delivery of enhanced public services.

These partnerships are often initiated by private parties, but they can exist only through local government action premised on the public benefits that will accompany the private activity. If the Eastern District's "private benefit" analysis applies, utility companies will never again have to pay for facilities relocation in a "public-private partnership" situation, as the public purposes and benefits inherent in their creation will necessarily give way to the private benefits realized.

As for the Eastern District's suggestion that courts use a "cost-benefit analysis" to assess the benefits to the public, this approach conflicts with the traditional analysis used by courts when considering a city's policy decisions. In *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36 (Mo. banc 1975)*, this Court was presented with a similar "public v. private" benefits challenge to Missouri's Planned Industrial Expansion statute The challenger argued that the public benefits derived from the clearance and redevelopment of blighted, insanitary properties were far outweighed by the tax exemptions and financing opportunities granted to the private developers. This Court disagreed:

> [R]elator is erroneously presenting the question of public purpose as one of degree. The law does not require us to determine whether the public or private citizens benefit 'more' by reason of the legislation. Rather, the rule is that if the primary purpose of the act is public, the fact that special

> benefits may accrue to some private persons does not deprive the government action of its public character, such benefits being incidental to the primary public purpose.

Atkinson, 517 S.W.2d at 45.

And the judiciary has routinely deferred to the governing body's assessment of what constitutes a public purpose. For example, in *State ex rel. Wagner v. St. Louis County Port Authority, 604 S.W.2d 592 (Mo. banc 1980)* this Court held the Missouri Port Authority Act constitutional, despite the fact that the law authorized the issuance of revenue bonds to aid private corporations. The Court rejected the claim that the Act violated the constitutional provision requiring that public funds be used only for public purposes:

> A review of these purposes is limited by the long-standing rule that determination of what constitutes a public purpose is primarily for the legislative department and will not be overturned unless found to be arbitrary and unreasonable. . . .

Wagner, 604 S.W.2d at 596-597.

The heavy burden placed on those who would challenge a city's policy decisions permeates Missouri case law. For example, in *JG St. Louis West Ltd. Liability Co. v. City of Des Peres, 41 S.W.3d 513 (Mo. App. 2001*) the plaintiffs challenged the legality of the city's decision to blight an area and approve a tax increment financing project. The Eastern District acknowledged: "Judicial review of a legislative determination is limited

to whether it was arbitrary or induced by fraud, collusion or bad faith or whether Board exceeded its powers." *JG St. Louis, 41 S.W.3d at 517.*

These cases apply equally to the case at bar. Rather than fixating on the private benefits to TriSTAR, the courts below should have focused on whether the primary object of the city's road improvements was to serve the public. If the purpose is to serve the public, then the utility pays for the facilities relocation. If the purpose is to serve the developer, then the developer pays. Most critically, the court is obliged to extend proper deference to the legislative declaration by the city. When the local government has determined that an improvement serves the public welfare, the utility must comply unless it is prepared to prove that the city's determination was arbitrary and unreasonable. *Wagner, 604 S.W.2d at 596-597; JG St. Louis, 41 S.W.3d at 517.*

In the instant case, the city's legislative determination is fully validated by the record. The Taussig Road improvements directly benefit the public. The record reflected, and the Eastern District admitted, that the developer did not benefit immediately from the road improvements, but rather benefited indirectly, as it enabled the developer to construct its commercial project. That benefit to the developer, no matter how significant to the developer, is incidental to the improvement of Taussig Road and the immediate health, safety, and welfare benefits to be realized by the community. The courts below erred in finding the contrary.

4. Conclusion

Amici's concerns in this case lie with the decision's potential effect as legal precedent. By ignoring *Union Electric*'s governmental action analysis, and thus casting aside the city's own judgment of its public needs and the means by which to meet them, the opinion makes it possible for utilities to avoid their common law relocation obligation if the public improvements are related in any way to private commercial activity. This result can only serve to force additional costs on private developers, who will be discouraged from partnering with cities on future developments, or on the cities themselves, who in turn face ever increasing challenges to deliver quality public amenities with limited financial means. The common law rule on utility relocations has served Missouri well; this case cannot be allowed to shift a utility's relocation obligation onto others to the public's detriment.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO MISSOURI-AMERICAN BECAUSE THE WATER COMPANY DID NOT HAVE A PERPETUAL FRANCHISE TO INSTALL FACILITIES IN TAUSSIG ROAD IN THAT THE CITY'S 1956 ANNEXATION OF THE AREA SUPERSEDED ANY RIGHTS GRANTED TO THE WATER COMPANY BY THE 1902 ST. LOUIS COUNTY FRANCHISE.

This case also concerns the right of Missouri-American to occupy Taussig Road through the placement of underground facilities. There was no dispute about the germane facts: that St. Louis County granted Missouri-American's predecessor a franchise over its roads in 1902, that the city of Bridgeton annexed the Taussig Road area in 1956, and that Missouri-American had not installed any facilities in Taussig Road prior to the city's annexation. Amici submit that the governing statutes and case law establish that the city's 1956 annexation of Taussig Road superseded the County's 1902 franchise and nullified any authority Missouri-American might have received from that franchise to make use of Taussig Road or any other city street.

In the case below, both the trial court and the Eastern District ignored the statutory authorizations granted respectively to county and municipal governments for the franchising of public utilities. At the time Missouri-American's county franchise was granted in 1902, utility companies were prohibited from installing facilities under or on "the public roads or highways of any county," without "first having obtained the assent of

the county . . . ." Laws 1901, p. 233[6] In 1902, utility companies were authorized to install facilities within and on the " streets, lanes, alleys and squares of any city, town or village," but only "with the consent of the municipal authorities thereof, and under such reasonable regulations as such authorities may prescribe." Sec. 1341, RSMo. 1899.[7]

These two statutes can only be construed as authorizing counties and cities to grant utility franchises under, over, and on roads and streets within their respective jurisdictions. Certainly the statutes cannot be interpreted as authorizing overlapping franchises, as one grant of authority could easily conflict with, or be negated by, either another grant of authority or by the outright denial of a franchise. Accordingly, in 1902 St. Louis County's governing body, then known as the St. Louis County Court,[8] was authorized by Missouri law to grant utility franchises only for those public rights-of-way located within St. Louis County and subject to St. Louis County jurisdiction. The St.

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[6] This statute continues, with immaterial amendments, as Section 229.100, RSMo. 2006, which continues to give the County's governing body the authority to permit use of the county's roads. The Eastern District's footnote about the Public Service Commission succeeding to the County's franchising authority is mistaken. *State ex rel. City of Sikeston v. PSC, 82 S.W.2d 105 (Mo. banc 1935).*

[7] This statute also continues, with immaterial amendments, as Section 393.010, RSMo. 2006.

[8] Now known as the St. Louis County Council. See Section 49.010 RSMo.

Louis County Court did not have authority to grant utility franchises over municipal rights-of-way.[9]

The divergent franchise authority granted to local governments by the Missouri legislature leads to the question of what happens when a county grants a utility franchise over county roads and a city subsequently annexes the franchised roads. This Court addressed the question in *Missouri Public Service Co. v. Platte-Clay Electric Cooperative, Inc.*, 407 S.W.2d 883 (Mo. 1966). In that case the electric cooperative had exercised its county franchise privileges by constructing utility lines in unincorporated county rights-of-way. The area was subsequently annexed by Kansas City, and the city then granted an overlapping franchise to its own provider. Kansas City's franchised provider filed suit against the cooperative for declaratory judgment. This Court held that the cooperative's existing lines and customer base were grandfathered, but the cooperative had no authority to build new facilities due to the annexation by Kansas City, which had authority to approve new installations:

> When the annexation became effective the county courts lost and the city acquired jurisdiction to grant franchises in the annexed areas.

[9] In this era, it was generally understood that a county's "roads" meant only the rights-of-way outside incorporated cities. The county had no authority over city streets and could not lawfully even spend bond issue funds to improve them, *State ex rel. St. Louis County v. Gordon, 188 S.W. 160, 165 Mo. banc 1916).*

Platte-Clay Electric Cooperative, *407 S.W.2d at 889.*[10]

The *Platte-Clay* decision mandates a finding that Missouri-American's 1902 franchise from St. Louis County, which had not been exercised by installing facilities in Taussig Road, was eclipsed by Bridgeton's 1956 annexation, and thereafter the water company was obliged to approach Bridgeton for permission to build new facilities in what was now the city's street. Inexplicably, the Eastern District misread *Platte-Clay* to arrive at the exact opposite conclusion, but in determining that Bridgeton's annexation did *not* affect Missouri-American's "right and power as a franchise to furnish services in the area" the Eastern District completely ignored the fact the utility company in *Platte-Clay* was held to be grandfathered only to the extent that it had installed facilities and *was already providing service* in the annexed area.

The case of *Dixie Electric Membership Corp. v. City of Baton Rouge*, *440 F.2d 819 (5th Cir. 1971)*, a case factually "on all fours" with the instant one, demonstrates the appropriate resolution of disputed franchise rights in the face of an annexation. In *Dixie*

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[10] See also *City of Westport v. Mulholland*, *60 S.W. 77 (Mo. banc 1900)*, in which a company, which had received a county franchise, had built a railroad line over a street that was subsequently annexed by the city. The railroad was charged with violating a city ordinance when it disrupted the street while maintaining the line. This Court held that the railroad company remained subject to the city's authority over its streets, the previous county franchise notwithstanding. *Mulholland*, *60 S.W. at 79.*

Electric an electric utility had been franchised by a local parish (i.e., county), and the city of Baton Rouge annexed part of the unincorporated parish. The city refused the utility's franchise application to expand its service within the annexed area, and the company sued, claiming violation of its rights arising from the parish franchise. The Fifth Circuit disagreed, noting that "those accepting Parish 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." *Dixie Electric*, *440 F.2d at 822*.

The *Platte-Clay* and *Dixie Electric* decisions are typical of how courts throughout the country have resolved the question of the effect of a city's annexation on a franchise previously granted in an unincorporated area. The issue is so fundamentally settled that it is addressed in McQuillin's treatise on municipal corporations:

> The annexation or detachment of territory must not impair vested rights . . . The utility provider is permitted to continue providing its services. However, the utility provider cannot extend or expand its use of the public streets or other public property without first obtaining the consent of the municipality.

2A McQuillin Mun. Corp. §7.46.40 (3rd ed.)(footnotes omitted). If a utility cannot extend its facilities in a newly annexed area without city authority, it follows that Missouri-American did not have any authority from the 1902 county franchise to install its facilities in Taussig Road after Bridgeton's annexation of the area.

Any decision rendered in the instant case must recognize the jurisdictional limitations inherently placed on utility franchises when annexations occur. It is plain that the Eastern District has confused the jurisdictional limitations of the franchise statutes with the geographic limitations of a given political entity, specifically St. Louis County. It misreads its own conclusion in the *Home Builder's* case by reiterating that the 1902 franchise constituted "a right to lay and maintain [facilities] across the public highways of St. Louis County," assuming that the applicable boundary is one of geography rather than jurisdiction. This error cannot be allowed to stand. Clearly, under Missouri's statutes and well-settled case law, Missouri-American's 1902 franchise rights extended only to *county* rights-of-way; the franchise would not and could not authorize the water company to install its facilities on highways and streets subsequently annexed by the city.[11]

Missouri-American, and the Eastern District, both rely on *Russell v. Sebastian, 233 U.S. 195 (1914)*, apparently for the proposition that Bridgeton's annexation could not operate to deprive the water company of its right to install facilities pursuant to the 1902 franchise. In *Dixie Electric* the Fifth Circuit considered *Russell* and correctly found it inapposite. In *Russell*, the utility had already received a constitutional state-wide

[11] Indeed, the *Home Builders* court understood this, as the opinion acknowledged that one of the projects at issue was affected by the terms of a city's franchise agreement with the water company, and noting pointedly that none of the developers were parties to the city or county franchise agreements, *id. at 287-8*.

franchise, was already doing business in the city, and had expended large sums in preparation for an anticipated expansion. The city attempted to deny the utility from expanding its service, and an amendment to the state constitution was passed to restrict the state-wide franchise previously granted. In these circumstances the United States Supreme Court refused to give retrospective effect to the after-the-fact attempt to unilaterally amend the utility's franchise. The ***Russell*** facts are not the facts of the instant case, and ***Russell*** does not address the expiration of unused franchise rights due to annexation. ***Dixie*** so held, and by implication, so did ***Platte-Clay***.[12]

Accordingly, when Bridgeton annexed Taussig Road in 1956, it ceased to be a county road, and whatever rights the water company may have previously had to install pipes and facilities in the road no longer existed, because the St. Louis County Council no longer had authority over the right of way.[13] The resolution of the instant dispute must be made in the context of Bridgeton's authority to control its right-of-ways as established

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[12] In any event, the Supreme Court has unambiguously declared that a required relocation of utility facilities to accommodate a public works project is not a taking of the utility's property rights under its franchise, *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 462 (1905).*

[13] While any facilities installed in the Taussig Road right-of-way before 1956 pursuant to the 1902 franchise would have been grandfathered, as held in ***Platte-Clay*** and explicated in McQuillin, there were no such facilities.

by Section 393.010 RSMo. By the express terms of the statute, Missouri-American needed the consent of Bridgeton to install pipes in its streets after Bridgeton's annexation of the area in 1956. If the company did not have this authority, any facilities it installed were removable at the city's instance. *Holland Realty and Power Co. v. City of St. Louis*, *282 Mo. 180, 221 S.W. 51 (1920).*

Whether the water company had or still has some rights under the 1951 city franchise was not decided below, but whatever rights the water company has or had in Taussig Road flowed solely from the city of Bridgeton. The trial court's grant of summary judgment on a contrary theory is unsustainable, since it is inconsistent with Missouri's governing statutes and the controlling decisions of this Court and many other courts.

CONCLUSION

The trial court erred in awarding summary judgment to Missouri-American, and in affirming the judgment the Missouri Court of Appeals misinterpreted and misapplied the law pertaining to the relocation of utility facilities for the public good and the effect of annexation on a utility's franchise rights. For the reasons stated, Amici respectfully urge the Court to reverse the trial court, remand the case, and issue an opinion correcting the errors below.

Respectfully Submitted,

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Curtis, Heinz, Garrett & O'Keefe, P.C
Paul Martin, #34428
Kevin M. O'Keefe, #23381
500 North Broadway, Suite 200
Clayton, MO 63105
(314) 725-8788 (v)
(314) 725-8789 (f)
pmartin@lawfirmemail.com

_____

James H. White, #21427
953 Alanson
St. Louis, Missouri 63105
(314) 995-9742 (v)
(314) 983-0768 (f)
jaswhite@earthlink.net

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for respondent that the word count for this brief is 6,164 per MS Office Word 2003 and that the diskette provided to the court and to the appellant has been scanned for viruses and is free of same.

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

_____

Paul E. Martin, #34428
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief and a diskette was mailed first class, postage prepaid, this 25th day of September, 2006 to:

Attorneys 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

Attorneys for Respondent Missouri-American Water Co.:

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

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