

whether ISRS plant additions **actually caused** a tax loss (i.e., net operating loss) to occur due to no revenues being collected by MAWC for the plant additions until the plant could be incorporated directly into ISRS rates. MAWC argued a tax loss occurred; Staff and OPC argued it did not.

Oligschlaeger, *Direct*, pg. 8 lns. 8 – 12 (emphasis added). This Commission twice determined that MAWC did not have an NOL. WO-2018-0373, *Report and Order*, pg. 6; WO-2019-0184, *Report and Order*, pg. 12. The Commission’s decision was then further affirmed by the Western District Court of Appeals, twice. *Mo.-American Water Co. v. P.S.C. of Mo.*, 591 S.W.3d 465, 477 (Mo. App. WD 2019); *Mo. Am. Water Co. v. Mo. Pub. Serv. Comm’n’n*, No. WD83067, 2020 Mo. App. LEXIS 498, at *22 (Mo. App. WD Apr. 21, 2020).

In 2019, MAWC entered into a *Stipulation and Agreement* with The Commission’s Staff (“Staff”) that sought to settle this issue by having MAWC request a private letter ruling (“PLR”) from the Federal Internal Revenue Service (“IRS”). Oligschlaeger, *Direct*, pg. 6 ln. 20 – pg. 7 ln. 16. MAWC subsequently sent the IRS a PLR request. Oligschlaeger, *Direct*, pg. 7 lns. 1 – 8. However, instead of asking the IRS to determine whether ISRS plant additions **actually caused** a tax loss (i.e., net operating loss) to occur, MAWC instead ** _____

_____ ** Wilde, *Direct Schedule JRW-1*, pg. 19. In other words, MAWC literally

** _____

_____ ** *Id.*

The Commission should plainly see how there is an immediate problem when the Company who has twice litigated the existence of an NOL and who has twice been

told (by two different authorities on each occasion) that no NOL exists turns around and tells the IRS **_____** *Id.* But there is an even bigger problem at play here, and it has to do with the **way** the IRS handles a PLR request. When the IRS receives a request for a PLR, it does not question the facts presented to it. Instead, as OPC witness John Riley explains, “[t]he IRS takes the facts presented by the taxpayer at face value and applies them to the situations that the taxpayer wishes to have the Service clarify.” Riley, *Direct*, pg. 3, lns 15-16. Therefore, **_____

** Wilde, *Direct Schedule JRW-1*, pg. 19. it simply accepted that fact in the course of the PLR and never made a determination as to whether MAWC’s ISRS plant additions **actually caused** an NOL to occur.

Because the IRS was never asked to determine if MAWC’s ISRS plant additions **actually caused** an NOL to occur, any determination of a normalization violation by the IRS becomes conditional on the actual existence of an NOL. In other words, the PLR is, as Mr. Riley described it, just “an expensive ‘what if’ proposition.” Riley, *Direct*, pg. 7, ln 23. Moreover, because **the Commission** has already determined that MAWC did not have an NOL in these prior ISRS cases, no normalization has occurred. Without an NOL, there is nothing that need be done to prevent a normalization violation under the plain language of the PLR itself. *See* Riley, *Direct*, pg. 6 ln 21 – pg. 7 ln. 2.

Despite the obvious and undisputable facts that the IRS was never asked to determine if MAWC’s ISRS plant additions **actually caused** an NOL to occur and

that the Commission has previously determined that an NOL did not occur, the OPC has nevertheless supplied even more evidence to show why MAWC cannot ascribe an NOL to its ISRS cases for two distinct reasons. The first concerns contributions in aid of construction (“CIAC”). Since the passage of the 2017 Tax Cuts and Jobs Act, CIAC is considered taxable income for utilities. Riley, *Rebuttal*, pg. 5 lns 7 – 8. This CIAC is accrued by the utilities long before ISRS rates are collected. Riley, *Rebuttal*, pg. 5 lns. 13 – 14. Further, these CIAC costs “can and should be matched to the accelerated depreciation that Company claims as the expense causing the NOL.” Riley, *Rebuttal*, pg. 5 lns. 14 – 15. Neither Staff nor the Company have performed this calculation, hence the problem.

The second major reason for why MAWC cannot claim that it has suffered an NOL related to its ISRS plant additions is because the Company is receiving revenues related to those pipes that it has not accounted for. As stated in the stipulation of facts, a net operating loss is “the excess of operating expenses over revenues,” with the IRS further clarifying the term to mean “the excess of the deductions allowed by [IRS regulations] over the gross income.” In the case of a water utility, that “gross income” comes from the sale of water to customers. The pipes installed in an ISRS are helping to produce that gross income, *i.e.* revenue, the second the pipes are placed into service, in that, they are transporting the water that is to be sold. Riley, *Rebuttal*, pg. 6 lns 16 – 22. To say that a company is “actively losing money” on pipes that are helping to transport the very goods that the Company is then selling for a profit is therefore simply wrong. Riley, *Rebuttal*, pg. 7 lns 1 – 12.

Whether you accept the argument that the company has failed to offset accelerated depreciation with CIAC, that the pipes in question are producing revenue for the company by transporting water for sale, or any other reasons previously raised in the past ISRS cases, the ultimate outcome remains the same: MAWC's ISRS plant additions have **not** caused an NOL to occur. And, as previously explained, in the absence of an NOL, the PLR given by the IRS means nothing. Without an NOL, there is no normalization violation, and hence, no need for an adjustment.

Because (1) the Commission previously determined that there was no NOL in the prior ISRS cases, (2) the PLR issued to MAWC never determined that the Commission was wrong, and (3) the evidence **still** shows that MAWC has incurred no NOL, there has not been a normalization violation in the prior three ISRS cases. Because there has not been a normalization violation in the past three ISRS cases, MAWC's incremental pre-tax revenue requirement in this matter does not need – and thus should not include – a total of \$35,328 associated with MAWC's proposal to address these alleged normalization violations.

Issue 2: Should MAWC's incremental pre-tax revenue requirement in this matter include recognition of deferred taxes associated with accelerated depreciation tax timing differences?

Yes. While the first issue dealt with a "cure" that MAWC claimed was necessary for the past three cases, this issue deals exclusively with the present case. In the present ISRS case, Staff made the following adjustment as explained in Mr. Oligschlaeger's testimony: "consistent with its understanding of the IRS' rulings in the recent PLR, Staff has removed any deduction for accelerated depreciation

associated with ISRS plant additions from its calculation of MAWC's ISRS revenue requirement in this case." Oligschlaeger, *Direct*, pg. 9, lns 4 – 7. Staff should not have done this. Riley, *Rebuttal*, pg. 6 lns 9 – 10. These removals were done to prevent a normalization violation. Oligschlaeger, *Direct*, pg. 9, lns 3 – 4. For all the reasons stated above for the prior issue, there was no normalization violation in these cases because MAWC has not suffered an NOL related to these ISRS projects. Again, no NOL means no normalization violation occurs and hence no adjustment is needed. MAWC's incremental pre-tax revenue requirement in this matter therefore should include recognition of deferred taxes associated with accelerated depreciation tax timing differences.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept these *Position Statements* and rule in the OPC's favor on all matter presented herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this twenty-ninth day of May, 2020.

/s/ John Clizer