

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Petition of Missouri-American)
Water Company for Approval to Establish an) **Case No. WO-2020-0190**
Infrastructure System Replacement Surcharge (ISRS))

STAFF’S POST-HEARING BRIEF

COMES NOW the Staff (“Staff”) of the Missouri Public Service Commission (“Commission”), by and through the undersigned counsel, and for its *Post-Hearing Brief*, states as follows:

Background

In recent ISRS petitions,¹ Missouri-American Water Company (“MAWC”) has claimed that an existence of a net operating loss² (“NOL”) amount on its books during the Infrastructure System Replacement Surcharge (“ISRS”) period precluded the Commission from recognizing certain income tax deductions (accelerated depreciation, repair allowance) otherwise available to MAWC in ISRS rates, due to the normalization restrictions applicable to regulated utilities in the Internal Revenue Code (“the Code”).³ MAWC argued that an amount of NOL must be used to offset rate base in ISRS proceedings due to its claim that a “tax loss” occurs within the ISRS period due to failure to collect ISRS revenues from customers concurrently with the addition to rate base of ISRS plant additions. Staff and the Office of the Public Counsel (“OPC”) disputed this claim, largely due to uncontroverted evidence that MAWC’s overall NOL carryforward

¹ See generally, Commission Case Nos. WO-2018-0373, WO-2019-0189, and WO-2019-0389.

² The term “net operating loss” is defined as “the excess of operating expenses over revenues.” The Internal Revenue Code states, “For purposes of this section, the term ‘net operating loss’ means the excess of the deductions allowed by this chapter over the gross income.” See Ex. 100, Stipulation of Facts, P. 2.

³ Ex. 303, Supplement to Direct Testimony of Ali Arabian, Schedule AA-sd1, P. 5.

("NOLC") amounts were estimated to decrease during the ISRS periods, thus showing no actual amount of NOL was generated by MAWC during the ISRS periods, or was being reflected on its books. MAWC responded to this argument by claiming that the alleged tax loss associated with ISRS plant additions reduced its ability to use prior NOL amounts to offset taxable income going forward, thus in MAWC's view implicating the IRS Code normalization requirements.⁴ In Case Nos. WO-2018-0373 and WO-2019-0184, the Commission agreed with Staff and OPC and reflected the full amount of the applicable accelerated depreciation and repair allowance deductions available to MAWC in setting ISRS rates. Following issuance of the Commission's Report and Order in Case No. WO-2018-0373, MAWC made a request for a Private Letter Ruling ("PLR") with the Internal Revenue Service ("IRS"), generally inquiring whether the Commission's treatment of NOLs in setting MAWC's ISRS rates constituted a violation of the normalization restrictions contained within the Code. The PLR request was filed with the IRS on June 6, 2019. While MAWC's PLR request was pending, MAWC and Staff entered into a stipulation and agreement in Case No. WO-2019-0389 that, in the event that the IRS would rule in MAWC's favor regarding the disputed NOL amounts in that and prior ISRS cases, called for the NOL amounts to be deferred through an Accounting Authority Order ("AAO") and recovered in subsequent MAWC rate proceedings. However, no deferral was to take place until any decision that might affirm MAWC's position was issued by the IRS.⁵ The IRS provided the requested PLR on December 3, 2019.⁶

⁴ Ex. 301C, Rebuttal Testimony of Mark L. Oligschlaeger, P. 2.

⁵ Ex. 303, Supplement to Arabian Direct, Schedule AA-sd1, P. 5.

⁶ Ex. 102C, Direct Testimony of John R. Wilde, P. 11.

Current ISRS Petition

MAWC filed its *Petition to Change its Infrastructure System Replacement Surcharge & Motion for Approval of Customer Notice* (“Petition”), and tariffs associated therewith, on March 2, 2020, in accordance with Commission Rule 20 CSR 4240-3.650. MAWC’s Petition requested an adjustment to its ISRS rates and charges for ISRS-eligible infrastructure system replacements and relocations made during the period of October 1, 2019, through March 31, 2020. MAWC’s Petition included a request to adjust its ISRS revenues to address an issue related to potential tax normalization violations addressed in MAWC’s prior three ISRS cases.⁷ On March 3, 2019, the Commission issued its *Order Directing Notice, Setting Intervention Deadline, Directing Filing, and Suspending Tariff*.

Staff filed its *Staff Recommendation* on May 1, 2020, that recommended the Commission issue an Order that: (1) rejects MAWC’s ISRS tariff sheet (YW-2020-0148), P.S.C MO No. 13 13th Revised Sheet No. RT 10 cancelling 12th Revised Sheet No. RT 10, filed on March 2, 2020; (2) approves the Staff’s recommended ISRS surcharge revenues in the incremental pre-tax revenue amount of \$9,725,687;⁸ and (3) relieves MAWC from filing an application for an AAO to record a regulatory asset to capture the rate differential to cure any normalization violations, as contemplated in the *Partial Stipulation and Agreement* approved in Case No. WO-2019-0389.

MAWC filed its *Response to Staff’s Recommendation* on May 11, 2020, indicating that it had no objection to Staff’s recommended increase in ISRS revenues. On the same

⁷ See Commission Case Nos. WO-2018-0373, WO-2019-0184, and WO-2019-0389.

⁸ This amount includes an adjustment of \$35,328 to cure potential normalization violations stemming from MAWC’s last three ISRS cases.

date, OPC filed its *Response to Staff Recommendation and Request for an Evidentiary Hearing*, specifically objecting to Staff's adjustment of approximately \$35,000 to be included in MAWC's ISRS revenues to cure past normalization violations related to NOLs. On May 12, 2020, the Commission issued its *Order Directing Joint Proposed Schedule*, directing the parties to submit a joint proposed procedural schedule no later than May 19, 2020. On May 18, 2020, the parties filed their *Joint Proposed Procedural Schedule*, and on May 21, 2020, the Commission issued its *Order Setting Procedural Schedule* adopting the parties' proposal, with modifications. An evidentiary hearing took place on June 3, 2020, during which the parties presented a total of six witnesses and entered thirteen exhibits into the record as evidence.

Introduction

Staff filed the parties' joint *List of Issues, List and Order of Witnesses, Order of Cross-Examination and Order of Opening* on May 28, 2020, which presented two issues to be decided by the Commission, set forth in the Argument section below.

Argument

Issue 1: Should MAWC's incremental pre-tax revenue requirement in this matter include a total of \$35,328 associated with MAWC's proposal to address alleged normalization violations related to eligible infrastructure system replacements included in MAWC's currently effective ISRS?

Yes. In recent ISRS cases, MAWC has raised the possibility that the Commission's actions regarding the purported existence of a NOL may not be in compliance with the IRS Code's normalization restrictions. In Case Nos. WO-2018-0373 and WO-2019-0184,

the Commission disagreed with MAWC's claims, and ordered the full amount of the applicable accelerated depreciation and repair allowance deductions available to MAWC to be reflected in ISRS rates.⁹ Following the issuance of the Commission's Report and Order in Case No. WO-2018-0373, MAWC took the step of seeking clarification from the IRS through the PLR process as to whether the normalization restrictions were, in fact, being violated.¹⁰ Prior to the submission of its request, Staff was provided drafts of the PLR request and provided feedback to MAWC, including detailed explanations and justifications for Staff's positions and those reflected in Commission orders regarding these matters.¹¹ Staff's comments were attached to MAWC's request sent to the IRS on June 6, 2019.¹² The IRS provided the requested PLR in December 2019.¹³ Staff reviewed the PLR, and, through its analysis, concludes that the IRS determined the Commission's actions, in reflecting a full deduction of applicable accelerated depreciation amounts *without* offset for an NOL amount in prior ISRS cases,¹⁴ constituted a violation of the Code's normalization restrictions.¹⁵ The potential consequences to a utility and its customers from a finding by the IRS of a normalization violation are serious;¹⁶ failure to cure a violation could result in a utility losing the ability to utilize accelerated depreciation,¹⁷ which could ultimately result in higher rates for rate payers.¹⁸ Therefore,

⁹ See Ex. 300, Direct Testimony of Mark L. Oligschlaeger, P. 6.

¹⁰ See *Id.*, at P. 7-8.

¹¹ Ex. 102C, Wilde Direct, Pp. 9-10.

¹² See *Id.*, Schedule JRW-1, Pp. 118-134.

¹³ Ex. 102C, Wilde Direct, P. 11; Ex. 300, Oligschlaeger Direct, P. 7.

¹⁴ Commission Case Nos. WO-2018-0373, WO-2019-0184, and WO-2019-0389.

¹⁵ However, the IRS also found that the Commission's treatment of reflecting a full deduction of applicable repair allowance amounts without offset by NOL amounts did not violate the normalization restrictions within the IRS Code. Ex. 300, Oligschlaeger Direct, P. 8.

¹⁶ Ex. 300, Oligschlaeger Direct, P. 4.

¹⁷ Ex. 102C, Wilde Direct, P. 5.

¹⁸ Ex. 100, Stipulation of Facts, P. 3.

in order to account for NOL amounts consistent with the IRS ruling, and the corresponding impact to accumulated deferred income taxes associated with the eligible infrastructure system replacements included in MAWC's current ISRS, Staff has included MAWC's proposed NOL adjustment of \$35,328 to the appropriate pre-tax revenues to be collected in this ISRS.¹⁹

As such, Staff recommends the Commission approve Staff's recommended ISRS surcharge revenues in the incremental pre-tax revenue amount of \$9,725,687,²⁰ and approve the following rates for each rate class:

<i>Rate A</i>	<i>\$0.96287</i>
<i>Rate B</i>	<i>\$0.01463</i>
<i>Rate J</i>	<i>\$0.01399²¹</i>

Interpretation of the Private Letter Ruling

This case hinges on the interpretation of the PLR requested by MAWC pertaining to the treatment of NOLs within the ISRS.²² As explained by Staff witness Mark L. Oligschlaeger,²³ who has over 38 years of experience in utility regulation and has testified before this Commission on more than eighty occasions,²⁴ it is Staff's position that within the PLR, the IRS indicates its concurrence with MAWC's prior arguments before the Commission that ISRS plant additions in fact did cause MAWC to suffer a tax loss that should be taken into account by the Commission in setting ISRS rates.

¹⁹ Ex. 300, Oligschlaeger Direct P. 9; Ex. 303, Supplement to Arabian Direct, Schedule AA-sd1, Pp. 6-7; Ex. 301C, Oligschlaeger Rebuttal, P. 8.

²⁰ Ex. 302, Direct Testimony of Ali Arabian, P. 2.

²¹ Ex. 304, Direct Testimony of Matthew J. Barnes, P. 2.

²² Tr. Vol. 1, P. 120.

²³ Ex. 300, Oligschlaeger Direct, P. 8.

²⁴ See *Id.* at P. 2 and Schedule MLO-d1.

OPC agrees with this interpretation in one light;²⁵ however, OPC's witness John S. Riley alleges that the IRS's findings are simply an acknowledgment that an NOL should be reflected in an ISRS, under the specific facts presented by MAWC, not an affirmation that an NOL actually existed during the ISRS timeframes in past cases.²⁶ He terms it as "[A]n expensive 'what if' proposition."²⁷ OPC's position is in effect, that MAWC misrepresented facts to the IRS, the IRS took those facts at face value, and thus, the Commission should ignore the PLR and reach its own conclusions as to the tax normalization issue. Staff disagrees.

Riley, in his direct testimony, states, "[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."²⁸ The language of the PLR itself, confirms Mr. Riley's contention, at least in part, stating:

This ruling is based upon information and representations submitted by Taxpayer and accompanied by penalty of perjury statements executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.²⁹

However, OPC's position ignores the fact that the "information and representations" submitted by MAWC not only included the "facts" section of its request, but also included the ** _____ — _____ —

²⁵ Tr. Vol 1, P. 32; Counsel for OPC, Mr. Clizer, stated in his opening statements that OPC agreed that the IRS concluded in the PLR, that if there was a net operating loss, there was a normalization violation.

²⁶ Ex. 201C, Direct Testimony of John S. Riley, P. 3.

²⁷ *Id.* at P. 7.

²⁸ *Id.* at P. 3.

²⁹ See Ex. 102C, Wilde Direct, Schedule JRW-2, Pp. 22.

³⁰ See Ex. 102C, Schedule JRW-1; Sections 393.1000 through 393.1006, RSMo.

³¹ See *Id.*; Commission Rule 20 CSR 4240-3.650.

³² See *Id.*

. ** As OPC's position is that the IRS took the facts asserted by MAWC as gospel, it is also, necessarily, that the IRS completely ignored the remainder of the information provided to the IRS within MAWC's request for a PLR.

As detailed in the rebuttal testimony of MAWC witness John R. Wilde, IRS Revenue Procedure 2019-1 required MAWC to indicate to the IRS, among other things, whether:

- (1) The regulatory authority responsible for establishing or approving the taxpayer's rates has reviewed the request and believes that the request is adequate and complete.³³

Mr. Wilde further testified to the following in his rebuttal testimony:

... Staff was provided with drafts of the PLR request, was allowed to comment and suggest edits to each draft of the request, and was allowed to comment on each of the requested rulings providing facts and analysis that Staff believed were relevant to the IRS. As I explained in my Direct Testimony at page 10, Staff did much more than simply review and edit the request document. It submitted an extensive and detailed description of the arguments and Commission perspective as to the specific rulings being requested. Before MAWC filed its final draft of the PLR request with the IRS, Staff acknowledged the following to MAWC: "Missouri Public Service Commission Staff considers the PLR request to be adequate and complete under the condition that the Staff's Comments are included within the document in full. Further, under the same condition, Staff does not object to filing of the PLR request with the Internal Revenue Service at this time." Staff's Comments were accordingly attached and submitted as Attachment J to the PLR request. (See Wilde Direct Testimony, Schedule JRW-1 at pages 118-134.)³⁴

Mr. Wilde is correct that Staff did much more than simply review and edit MAWC's request, and it is clear that OPC failed to take Staff's comments into account in analyzing

³³ Rev. Proc. 2019-1, Appendix G, Internal Revenue Bulletin No. 2019-01 at 100 (I.R.S. Jan 2, 2019).

³⁴ Ex. 103C, Rebuttal Testimony of John R. Wilde, P. 5.

IRS appears to have accepted certain factual assertions made by MAWC, there is no indication in the PLR that the IRS did not consider Staff's comments.³⁷

Further, while Mr. Riley is correct that MAWC did not specifically ask the IRS to rule on whether an NOL existed in the context of previous ISRS cases, Mr. Riley does not sufficiently capture the fundamental issue that was before the Commission in past MAWC ISRS cases.³⁸ In Case Nos. WO-2018-0373 and WO-2019-0184, the key questions facing the Commission were:

- (1) Was an NOL generated during the ISRS periods in those cases; and, if so,
- (2) Was any of that NOL amount attributable to ISRS plant additions made during that period?³⁹

Mr. Oligschlaeger testified that it is his expert opinion that the IRS ruled on these issues, and that it is clear that the IRS expressed agreement with MAWC's contentions that an NOL was generated during the ISRS periods at issue due to ISRS plant additions, and that the NOL amount applicable to ISRS plant additions should be determined using the so-called "with-and-without" method.⁴⁰

With that in mind, as stated earlier, Staff concludes that within the PLR, the IRS has determined that the Commission's actions in reflecting a full deduction of applicable accelerated depreciation amounts without offset for an NOL amount in ISRS in prior ISRS cases did constitute a violation of the IRS Code's normalization restrictions,⁴¹ and the language contained therein is adequate in demonstrating IRS support for MAWC's

³⁷ Tr. Vol 1, P. 124.

³⁸ Ex. 301C, Oligschlaeger Rebuttal, P. 4.

³⁹ Ex. 301C, Oligschlaeger Rebuttal, P. 4; *See Report and Order*, P. 8, issued on December 5, 2018, in Case No. WO-2018-0373, EFIS Item No. 39.; *See Report and Order*, P. 11, issued June 5, 2019, in Case No. WO-2019-0184, EFIS Item No. 51.

⁴⁰ Ex. 301C, Oligschlaeger Rebuttal, Pp. 4-5.

⁴¹ Ex. 300, Oligschlaeger Direct, Pp. 7-8.

contentions made in recent ISRS cases.⁴² In particular, as explained by Mr. Oligschlaeger in his rebuttal testimony, the language wherein the IRS grants MAWC's requested ruling no. 9 effectively affirms MAWC's prior position taken in ISRS cases that the accelerated depreciation income tax ("ADIT") deductions associated with ISRS plant additions must be offset by assumed tax loss/NOL amounts in order to comply with the IRS Code.⁴³ Within the PLR, in the section entitled "Facts," the following language appears:

In the course of the Surcharge case, Taxpayer and other participants in the proceeding analyzed the expenditures for which Taxpayer sought recovery via the surcharge and debated the proper regulatory treatment of Taxpayer's NOLC and tax loss incurred through the rate base determination date of the Surcharge case with respect to the costs incurred that are recoverable in the Surcharge case. The revenue requirement approved in the Commission's order issued on Date 1 was lower than the revenue requirement sought by Taxpayer and is entirely attributable to the differing ADIT calculations with respect to the NOLC and the resulting effects on rate base and allowed return. The approved revenue requirement in the surcharge case was based on a rate base computation that reflects the gross ADIT liabilities associated with depreciation-related and repair-related book/tax differences, **but did not reflect an ADIT asset for any portion of the Taxpayer's NOLC as of the date that rate base was determined (Date 9), including the tax loss resulting from the infrastructure expenditures addressed in the Surcharge Case.**⁴⁴ (Emphasis added.)

Later, on the same page of the PLR:

...As of the date of the rate base determination, **none of the surcharge revenues had been billed to customers, and, thus, as of this date a**

⁴² Ex. 301C, Oligschlaeger Rebuttal, P. 8.

⁴³ Ex. 301C, Oligschlaeger Rebuttal, Pp. 4-5; further, It is suggested in Mr. John R. Wilde's Direct Testimony (page 11) and rebuttal testimony (pages 12 – 13) that, if the Commission rejects MAWC's and Staff's position in this case regarding the applicability of Ruling 9 to this proceeding, the IRS' granting of Ruling 8 would have the same impact on the Commission's ratemaking for deferred tax expense in MAWC ISRS cases. However, for the reasons discussed in Mr. Oligschlaeger's Rebuttal Testimony, Ex. 301C at pages 8 - 12, Staff does not agree with MAWC's interpretation of Ruling 8 on this point.

⁴⁴ See Ex. 103C, Wilde Rebuttal, Schedule JRW-2, P. 7 of 23.

taxable loss of approximately \$e had been incurred in respect to the plant-related expenditures with rates set by the Surcharge Case.⁴⁵
(Emphasis added.)

Mr. Oligschlaeger explains that bolded language indicates the IRS chose to accept MAWC's claims that the inability of MAWC to capture customer revenues for ISRS plant additions prior to the ordering of new ISRS rates caused a tax loss for the utility. Understanding this point is necessary to interpret the IRS language adopting MAWC's requested Ruling 9.⁴⁶

MAWC's requested Ruling 9 is as follows:

Taxpayer requests that the Service also rule: in order to comply with the normalization method of accounting within the meaning of Section 168(i)(9), the amount of depreciation-related ADIT reducing rate base used to determine the revenue requirement set in the Surcharge Case must be decreased to reflect a portion of the NOL for the test period for the Surcharge Case that would not have arisen had Taxpayer not reported depreciation-related book/tax differences during the test period of the Surcharge case and such decrease in depreciation-related ADIT must be an amount that is no less than the amount computed using the With-and-Without method. (Schedule JRW-2, pages 10 – 11 of 23).

Within the PLR the IRS granted MAWC's request for Ruling 9 using the same language suggested by MAWC above.⁴⁷

Further underscoring the IRS' acceptance of requested Ruling 9, the PLR states the following in respect to requested Ruling 10, which had been posed by MAWC as an alternative to granting Ruling 9:

⁴⁵ *Id.*

⁴⁶ Ex. 301C, Oligschlaeger Rebuttal, P. 5.

⁴⁷ Ex. 102C, Wilde Direct, Schedule JRD-2, P. 21.

Ruling request 10 is moot because we grant ruling 9 in accordance with Taxpayer's analysis.⁴⁸

Existence of a Net Operation Loss

As stated supra, it is the opinion of Staff's expert in this matter, Mr. Oligschlaeger, that within the PLR, the IRS expressed agreement with MAWC's contentions that an NOL was generated during the ISRS periods at issue due to ISRS plant additions, and that the NOL amount applicable to ISRS plant additions should be determined using the "with-and-without" method.⁴⁹ Nonetheless, the OPC contends that MAWC cannot ascribe an NOL to ISRS for two distinct reasons.

The first concerns contributions in aid of construction ("CIAC"). In his rebuttal testimony, Mr. Riley correctly states that "[s]ince the passage of the 2017 TCJA [Tax Cuts and Jobs Act], CIAC is considered taxable income for utility companies."⁵⁰ Mr. Riley goes on to claim that CIAC, as an income tax generated event, can and should be matched to the accelerated depreciation that MAWC claims as the expense causing an NOL, and that MAWC failed to perform such a calculation.⁵¹ He claims that CIAC-related income greatly exceeds the accelerated depreciated expense for MAWC, and thus, MAWC is not currently suffering any type of NOL. However, Mr. Riley made errors in his calculations necessitating amendments to his Rebuttal Testimony.⁵² Mr. Riley's Amendment to his Rebuttal Testimony purports to also include the "CIAC and NOL figures for ISRS WO-2019-0184, ISRS WO-2019-0389, and WO-2020-0190," as his rebuttal only

⁴⁸ *Id.*

⁴⁹ Ex. 301C, Oligschlaeger Rebuttal, P. 4-5.

⁵⁰ Ex. 202C, Rebuttal Testimony of John S. Riley, P. 5.

⁵¹ *Id.*

⁵² See Ex. 203, Amendment to Rebuttal Testimony of John S. Riley.

included the CIAC schedule and NOL amounts for ISRS WO-2018-0373.⁵³ Therein, Mr. Riley states that he calculated these CIAC and NOL values utilizing data provided to OPC by MAWC.⁵⁴ Attached to Mr. Riley's Amendment to his Rebuttal Testimony, as Schedule JSR-AR-1, are certain pages from MAWC's ISRS Revenue Requirement Calculations workpapers.⁵⁵ At hearing, when subject to cross-examination by counsel for MAWC concerning these schedules, the following exchange occurred:

Q. Let's turn for a minute to your amendment to rebuttal testimony and the Schedule JSR-AR-1. Do you have that in front of you?

A. Yes, sir.

Q. And if you will turn to page 4 of 8 within 22 that schedule. Are you there?

A. Yes, sir.

Q. And that's a page that the top says Missouri-American ISRS #18 Deferred Taxes, correct?

A. That's correct.

Q. And do you see on line 30 that there's a line for Taxable Income-Contributions?

A. Yes, sir.

Q. Let's turn over to page 6 of 8 in that same schedule, and that is again titled Missouri-American and now ISRS #19 Deferred Taxes, correct?

A. Yes, sir.

Q. And on line 30 again there's a line Taxable Income-Contributions, correct?

A. That's correct, sir.

Q. And then again if we turn to page 8 of 8 in that same schedule, again have Missouri-American ISRS #20 Deferred Taxes, correct?

A. That's correct, sir.

Q. And again line 30 is Taxable Income - Contributions, correct?

A. That's what it says, yes.⁵⁶

⁵³ *Id.* at P. 1.

⁵⁴ *Id.* at P. 2.

⁵⁵ These same documents can be found attached to Ex. 101, Direct Testimony of Brian LaGrand, Schedule BWL-2.

⁵⁶ Tr. Vol. 1, Pp. 77-78.

It is clear from the selected MAWC workpapers attached to Mr. Riley's Amendment to his Rebuttal Testimony, and the exchange quoted above, that MAWC did in fact consider, to some extent, income tax related to contributed property in determining the deferred taxes for ISRS in the years 2018, 2019, and 2020; Mr. Riley, in calculating his recommended CIAC and NOL amounts, apparently failed to recognize that the very workpapers on which he relied on indicated as much. From this, it is evident that, at the very least, Mr. Riley's calculations are flawed, and should be disregarded by the Commission.

The second reason OPC claims the Commission cannot ascribe an NOL to ISRS is because MAWC is receiving revenues related to ISRS plant additions that it has not accounted for.⁵⁷ At hearing, Mr. Riley agreed that these revenues would be those stemming from MAWC's base rates.⁵⁸ Staff does not disagree with the conceptual point underlying OPC's contentions on this issue; in fact, Staff raised similar arguments in its comments attached to MAWC's PLR request.⁵⁹ However, based upon the language in the PLR, it seems the IRS recognizes that in this case, the Parent (on a consolidated basis), and the Taxpayer, which would be MAWC, (on a separate company basis), estimated that taxable income was earned in 2018 and thus NOLC was utilized.⁶⁰ Thus, it appears that the PLR contemplates the existence of ongoing revenues being received by MAWC. Therefore, in the particular circumstances of this proceeding, it is Staff's position that the IRS findings regarding net operating losses outlined in ruling number 9 of the PLR should be followed.

⁵⁷ Ex. 202C, Rebuttal Testimony of John S. Riley, Pp. 6-7.

⁵⁸ Tr. Vol. 1, P. 82.

⁵⁹ See Ex.102C, Wilde Direct, JRW-1, Pp. 118-134.

⁶⁰ *Id.*, Schedule JRW-2, P. 7.

It is Staff's position that the language of the PLR demonstrates IRS support for the applicable contentions made by MAWC in recent ISRS cases. However, as stated by Mr. Oligschlaeger at hearing in response to questions from the Bench, PLRs are directed only to the taxpayer who requested it.⁶¹ Pursuant to 26 U.S.C. § 6110(k)(3) of the Federal Code, PLRs may not be used or cited as precedent. Therefore, Staff interprets this PLR to be applicable only to MAWC's ISRS proceedings, and only as long as MAWC has an NOLC on its books.⁶²

Finally, while it was stipulated in Case No. WO-2019-0389 that disputed NOL amounts from prior ISRS cases should be deferred through an AAO in the event that the IRS found in MAWC's favor, Staff agrees that including these amounts now has several benefits, and thus, Staff does not object to the Company's proposal for collecting this amount in this proceeding in lieu of deferring the amounts through an AAO. Doing so allows MAWC to cure past normalization violations at its *next available opportunity*. Further, addressing the issue within the current ISRS ensures that MAWC will collect no more and no less than the identified amounts and allows recovery to be received from only those customers to which the ISRS applies. Finally, because the past NOL amount to be provided to MAWC due to the PLR is relatively immaterial, the rate impact to customers will be immaterial. Therefore, Staff recommends that the Commission include a total of \$35,328 in MAWC's incremental pre-tax revenue requirement in this matter in order to resolve any potential adverse consequences from violating the normalization requirements contained in the IRS Code,⁶³ and that MAWC be relieved from filing an

⁶¹ Tr. Vol. 1, P. 111.

⁶² *Id.*

⁶³ Exhibit 301C, Oligschlaeger Rebuttal, P. 8.

application for an AAO as contemplated in the *Partial Stipulation and Agreement* approved in Case No. WO-2019-0389.

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. Section 393.1000, RSMo, defines "Appropriate pretax revenues" as the revenues necessary to produce net operating income equal to:

- (a) The water corporation's weighted cost of capital multiplied by the net original cost of eligible infrastructure system replacements, **including recognition of accumulated deferred income taxes and accumulated depreciation associated with eligible infrastructure system replacements which are included in a currently effective ISRS**; and
- (b) Recover state, federal, and local income or excise taxes applicable to such income; and
- (c) Recover all other ISRS costs;

Therefore, the amount of the required return on rate base for ISRS plant additions is required to be netted against the amount of booked accumulated deferred income taxes ("ADIT") associated with the ISRS additions, to recognize that customers as well as the utility have invested capital related to the plant additions. However, in order to account for NOL amounts in MAWC ISRS cases consistent with the IRS ruling within the PLR, any associated ADIT for accelerated depreciation in this particular case must be offset by a corresponding NOL deferred tax asset.⁶⁴

⁶⁴ See Oligschlaeger Direct and Rebuttal Testimonies.

Conclusion

For the reasons set forth in this brief and Staff's Exhibits in this case, the Commission should issue an order:

1. Rejecting MAWC's ISRS tariff sheet (YW-2020-0148) filed on March 2, 2020;
2. Approving Staff's recommended ISRS surcharge revenues in this docket in the incremental pre-tax revenue amount of \$9,725,687 with a total current and cumulative ISRS surcharge of \$31,094,713; and
3. Relieving MAWC from filing an application for an AAO to record a regulatory asset to capture the rate differential to cure any normalization violations, as contemplated in the Partial Stipulation and Agreement approved in Case No. WO-2019-0389.

WHEREFORE, Staff respectfully submits this Post-Hearing Brief for the Commission's consideration.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 8th day of June, 2020, to all counsel of record.

/s/ Mark Johnson