



IN THE \_\_\_\_\_ JUDICIAL CIRCUIT, \_\_\_\_\_ COUNTY, MISSOURI

Judge or Division: Missouri Public Service Commission	Mo. P.S.C. Case Number: WO-2018-0373		<div style="font-size: 2em; font-weight: bold; margin-bottom: 10px;">FILED</div> <div style="font-size: 1.2em; margin-bottom: 10px;">FEB 01 2019</div> <div style="font-size: 0.8em;">Missouri Public Service Commission 12/09/19 MA</div>
Plaintiff/Petitioner: Missouri-American Water Company	Appellate Number:	<input type="checkbox"/> Filing as an Indigent	
	Date of Judgment/Decree/Order: (ATTACH A COPY) December 5, 2018	Court Reporter:	
vs.	Date Post Trial Motion Filed: December 14, 2018	<input type="checkbox"/> Sound Recording Equipment	
Defendant/Respondent: Missouri Public Service Commission	Date Ruled Upon: January 3, 2019	The Record on Appeal will consist of: ____ Legal File only or <input checked="" type="checkbox"/> Legal File and Transcript	
			(Date File Stamp)

### Notice of Appeal to Missouri Court of Appeals - Civil

District:  Western     Eastern     Southern

Notice is given that <u>Missouri-American Water Company</u> appeals from the judgment/decree/order entered in this action on <u>December 5, 2018</u>	
Appellant's Name (If multiple, list all or attach additional pages)	Respondent's Name (If multiple, list all or attach additional pages)
Missouri-American Water Company	Missouri Public Service Commission
Address 727 Craig Road St. Louis, MO 63141	Address 200 Madison Street PO Box 360 Jefferson City, Mo. 65102
Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages)	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages)
L. Russell Mitten #27881 Timothy W. Luft #40506 Dean L. Cooper #36592	Shelley Bruggemann, Mo. Bar No. 52173
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Telephone (573) 635-7166	Telephone (573) 751-7393
Brief Description of Case (May be completed on a separate page)  Application of Missouri-American Water Company ("MAWC") to Change its Infrastructure System Replacement Surcharge ("ISRS")	
Issues Expected To Be Raised On Appeal (May be completed on a separate page. Appellant is not bound by this list.)  The Public Service Commission's erroneous determination that certain costs incurred by MAWC were not eligible for recovery through its ISRS mechanism on the basis that sufficient evidence was not presented to demonstrate that a net operating loss ("NOL") was incurred in 2018. Such a determination was erroneous because: the undisputed evidence on the record showed that the authorized ISRS should have included an ADIT asset created by the NOL from the ISRS investments that were the subject of MAWC's Application; the effect of the order is inconsistent with a normalized method of accounting because the impact of ignoring the Deferred Tax Asset provides customers with the benefit of the tax deduction now, through a lower ISRS rate, even though MAWC is unable to benefit from those tax deductions at this time; and non-recognition of the NOL associated with the ISRS investments creates a peril for MAWC and its customers concerning its income tax accounting, in that it likely will cause a deviation from the normalization requirements of the IRS Code.	
Signature of Attorney or Appellant	Date
	2-1-2019

**Certificate of Service on Persons other than Registered Users of the Missouri eFiling System**

I certify that on Feb. 1 ~~January~~, 2019 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

Missouri Public Service Commission \_\_\_\_\_

Marc Poston, Acting Division Director -- Office of the Public Counsel \_\_\_\_\_

\_\_\_\_\_  
Appellant or Attorney for Appellant

**Directions to Clerk**

Transmit a copy of the notice of appeal and all attached documents to the clerk of the Court of Appeals and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

**Memorandum of the Clerk**

I have this day served a copy of this notice by  regular mail  registered mail  certified mail  facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I have transmitted a copy of the notice of appeal to the clerk of the Court of Appeals, Western District.

Docket fee in the amount of \$70.00 was received by this clerk on 2/1/19 (date) which will be disbursed as required by statute.

No docket fee was received because:

a docket fee is not required by law under \_\_\_\_\_ (cite specific statute or other authority).

a motion to prosecute the appeal in forma pauperis was received on \_\_\_\_\_ (date) and was granted on \_\_\_\_\_ (date).

2/1/19  
Date

Melissa Anderson  
Clerk

**Additional Parties and Attorneys**

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Court of Appeals (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

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<b>City, State, Zip Code</b>	<b>City, State, Zip Code</b>
	<b>E-mail Address</b>
	<b>Telephone</b>
<b>Party Name</b>	<b>Attorney Name</b>
<b>Address</b>	<b>Address</b>
<b>City, State, Zip Code</b>	<b>City, State, Zip Code</b>
	<b>E-mail Address</b>
	<b>Telephone</b>

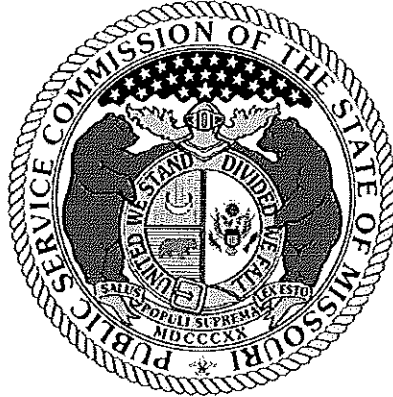


## **RSMo. §386.510 STATEMENT OF THE ISSUES**

Missouri-American Water Company (“MAWC”) challenges the lawfulness and reasonableness of the Missouri Public Service Commission’s Report and Order issued December 5, 2018, effective December 15, 2018, in Case No. WO-2018-0373, in that the Commission erroneously determined that certain costs incurred by MAWC were not eligible for recovery through its Infrastructure System Replacement Surcharge (“ISRS”) mechanism on the basis that sufficient evidence was not presented to demonstrate that a net operating loss (“NOL”) was incurred in 2018.

Such a determination by the Commission was erroneous because: the undisputed evidence on the record showed that the authorized ISRS should have included an ADIT asset created by the NOL from the ISRS investments that were the subject of MAWC’s Application; the effect of the order is inconsistent with a normalized method of accounting because the impact of ignoring the Deferred Tax Asset provides customers with the benefit of the tax deduction now, through a lower ISRS rate, even though MAWC is unable to benefit from those tax deductions at this time; and non-recognition of the NOL associated with the ISRS investments creates a peril for MAWC and its customers concerning its income tax accounting, in that it likely will cause a deviation from the normalization requirements of the IRS Code.

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



In the Matter of Petition of Missouri-American  
Water Company for Approval to Establish an  
Infrastructure System Replacement Surcharge  
(ISRS).

)  
) **File No. WO-2018-0373**  
) **Tariff No. YW-2019-0018**  
)

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**REPORT AND ORDER**

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**Issue Date:** December 5, 2018

**Effective Date:** December 15, 2018

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

In the Matter of Petition of Missouri-American Water Company for Approval to Establish an Infrastructure System Replacement Surcharge (ISRS). )  
 ) **File No. WO-2018-0373**  
 ) **Tariff No. YW-2019-0018**  
 )

**APPEARANCES**

**Missouri-American Water Company:**

**Dean L. Cooper**, Brydon, Swearingen & England, PO Box 456, Jefferson City, Missouri 65102.

**Staff of the Missouri Public Service Commission:**

**Mark Johnson**, Deputy Counsel, and **Ron Irving**, Legal Counsel, PO Box 360, 200 Madison Street, Jefferson City, Missouri 65102.

**Office of the Public Counsel:**

**Lera Shemwell**, Senior Public Counsel, and **John Clizer**, Associate Public Counsel, PO Box 2230, 200 Madison St., Ste. 650, Jefferson City, Missouri, 65102-2230.

**Regulatory Law Judge:** Charles Hatcher

**REPORT AND ORDER**

**I. Procedural History**

On August 20, 2018, Missouri-American Water Company ("MAWC") filed an application and petition with the Missouri Public Service Commission ("Commission") to establish an Infrastructure System Replacement Surcharge ("ISRS").

MAWC requests to establish an ISRS rate to recover costs incurred in connection with infrastructure system replacements made during the period January 1, 2018, through September 30, 2018. The Commission issued notice of the application and provided an opportunity for interested persons to intervene. The Empire District Electric Company filed a *Motion to Intervene*, which it subsequently withdrew. No other parties sought to intervene. The Commission suspended the filed tariffs until December 18, 2018.

On October 19, the Staff of the Commission ("Staff") filed its Recommendation and Memorandum proposing a number of corrections and adjustments to MAWC's calculations. Staff recommended that the Commission reject the original tariff sheet and approve an ISRS rate for MAWC based on Staff's determination of the appropriate amount of ISRS revenues.

On October 29, MAWC filed a motion objecting to Staff's recommendations. Also on October 29, the Office of the Public Counsel ("OPC" or "Public Counsel") filed its response in support of the Staff Recommendation. The Commission held an evidentiary hearing on November 20. In total, the Commission admitted the testimony of six witnesses and 10 exhibits into evidence and took notice of a select prior Commission decision. Post-hearing briefs were filed on November 27, and the case was deemed submitted for the Commission's decision on that date.<sup>1</sup>

## **II. Findings of Fact**

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed

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<sup>1</sup> "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. MAWC is an investor-owned water utility providing retail water service to large portions of Missouri, and specific to this case, most of St. Louis County.<sup>2</sup>

2. MAWC is a “water corporation” and a “public utility”, as defined in Sections 386.020(59) and (43), and 393.1000(7), RSMo 2016.<sup>3</sup>

3. OPC “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”<sup>4</sup> The Public Counsel participated in this matter.

4. Staff is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.<sup>5</sup>

5. On August 20, 2018, MAWC filed a petition (“Petition”) for its St. Louis County service territory, requesting an ISRS to recover eligible costs incurred for infrastructure system replacements made during the period January 1, 2018, through July 30, 2018, initially filed with pro forma ISRS costs for August 1 through September 30 (“2018 ISRS Period”).<sup>6</sup>

6. The ISRS request exceeds one million dollars, but is not in excess of ten percent of the base revenue levels approved by the Commission in the last MAWC rate case.<sup>7</sup>

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<sup>2</sup> MAWC’s Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice, p. 2.

<sup>3</sup> *Id.*

<sup>4</sup> Section 386.710(2), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

<sup>5</sup> MAWC’s Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice; Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

<sup>6</sup> Staff Recommendation, Appendix A, p. 1.

<sup>7</sup> Section 393.1003.1, RSMo 2016; Staff Recommendation, Appendix A, p. 2.



7. This is MAWC's first ISRS filing since their most recent general rate case, File Number WR-2017-0285, *Report and Order* issued May 2, 2018, and *Order Approving Tariffs* issued May 15, 2018.<sup>8</sup> As part of that general rate case, MAWC's existing ISRS was reset to zero.<sup>9</sup>

8. Water corporations are permitted to recover certain infrastructure system replacement costs outside of a formal rate case through a surcharge on its customers' bills.<sup>10</sup> In conjunction with its Petition, MAWC filed a tariff sheet that would generate a total revenue requirement for MAWC's ISRS.<sup>11</sup> MAWC's proposed ISRS revenue requirement was later updated by MAWC to \$7,264,876.<sup>12</sup>

9. MAWC attached supporting documentation to its Petition for completed plant additions. This included documentation identifying the type of addition, utility account, work order description, addition amount, depreciation rate, accumulated depreciation, and depreciation expense.<sup>13</sup> The company also provided estimates of capital expenditures for projects completed through September 2018, which were subsequently replaced with updated actual cost information and provided to Staff.<sup>14</sup>

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<sup>8</sup> Report and Order, *In the Matter of Missouri-American Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas, WR-2017-0285*, issued May 2, 2018; Order Approving Tariffs, *In the Matter of Missouri-American Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas, WR-2017-0285, et al.*, issued May 15, 2018.

<sup>9</sup> Section 393.1006.6, RSMo 2016.

<sup>10</sup> Sections 393.1000 to 393.1006, RSMo 2016.

<sup>11</sup> MAWC's Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice, Appendix B.<sup>12</sup> Staff Recommendation, Appendix A, p 3; Staff's Post-Hearing Brief, p. 4.

<sup>12</sup> Staff Recommendation, Appendix A, p 3; Staff's Post-Hearing Brief, p. 4.

<sup>13</sup> MAWC's Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice, Appendices D, E, and F.

<sup>14</sup> Staff Recommendation, Appendix A, p. 2; Direct Testimony of Brian W. LaGrand, p. 5.

10. MAWC's updated filing removed such items as: repairs to customer owned appliances and equipment; duplicate charges; installation of new service lines; and customer owned lead service line replacement costs.<sup>15</sup>

11. MAWC's supporting documents included an amount for Accumulated Deferred Income Taxes (ADIT).<sup>16</sup> MAWC also included a proposed calculation for a Deferred Tax Asset relating to an assumed net operating loss ("NOL") for 2018 in the amount of \$9,577,697.<sup>17</sup>

12. An NOL results when a utility does not have enough taxable income to utilize all of the tax deductions to which it would otherwise be entitled. The amount of unused deductions is the NOL.<sup>18</sup> An NOL is a tax return adjustment and not a regulatory item.<sup>19</sup>

13. On October 19, Staff submitted its *Staff Recommendation*. Staff's recommended revenue requirement is \$6,377,959.<sup>20</sup>

14. Staff and MAWC are in agreement with the *Staff Recommendation* except on one issue, specifically whether there is an NOL, and, if so, what impact it may have on the ISRS.<sup>21</sup>

15. Staff recommended removing approximately \$9.3 million in Deferred Tax Asset<sup>22</sup> from MAWC's ISRS calculations because it was not an NOL resulting from the

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<sup>15</sup> Staff Recommendation, Appendix A, p. 4.

<sup>16</sup> MAWC's Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice, Appendix C.

<sup>17</sup> MAWC's Petition to Establish an Infrastructure System Replacement Surcharge & Motion For Approval of Customer Notice, Appendix C. See also Direct Testimony of Lisa Ferguson at p. 3.

<sup>18</sup> Ex. 3, Oligschlaeger Direct, p. 5.

<sup>19</sup> Hearing Transcript, p. 78 (John Riley); Direct Testimony of John S. Riley, p. 2.

<sup>20</sup> Staff's Post-Hearing Brief, p. 4.

<sup>21</sup> MAWC's Response to Staff's Recommendation, p.1-2. Staff's Post-Hearing Brief, p. 2 and footnote 2 (noting that \$9,272 removed by Staff should remain included).

<sup>22</sup> The \$9.3 million figure is derived from the Net Operating Loss/Taxable Income of \$36.7 million as shown on Schedule BWL-1, p. 2 of the Direct Testimony of Brian W. LaGrand.

2018 ISRS Period.<sup>23</sup> This removal results in an \$866,917 reduction in recoverable ISRS costs.<sup>24</sup>

16. Only costs directly associated with qualifying ISRS plant that became in-service during the nine months of the 2018 ISRS Period should be reflected in ISRS rates.<sup>25</sup>

17. MAWC has an NOL carryover from prior years.<sup>26</sup>

18. No net amount of net operating loss has actually been generated for income tax purposes by MAWC on an aggregate basis since January 1, 2018, the beginning of the 2018 ISRS Period.<sup>27</sup>

19. The Internal Revenue Service ("IRS") Private Letter Rulings cited by MAWC to support its position<sup>28</sup> address time periods in which the utility in question was generating NOL amounts.<sup>29</sup>

20. MAWC did not generate any NOL in the 2018 ISRS Period.<sup>30</sup>

21. MAWC projects that it will be able to reflect all of its net accelerated depreciation benefits associated with ISRS plant additions on its books during the next two years without the need to record any new offsetting NOL amount.<sup>31</sup>

22. MAWC's NOL as of December 31, 2017, are currently reflected in MAWC's base rates as a result of MAWC's last general rate case, File Number WR-2017-0285, *Report and Order* issued May 2, 2018, and *Order Approving Tariffs* issued May 15, 2018.<sup>32</sup>

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<sup>23</sup> Staff Recommendation, Appendix A, p. 4.

<sup>24</sup> Staff's Post-Hearing Brief, p. 4.

<sup>25</sup> Direct Testimony of Mark L. Oligschlaeger, p. 6; Direct Testimony of Lisa M. Ferguson, p. 6

<sup>26</sup> Hearing Transcript, p. 48 (Brian LaGrand); Direct Testimony of John R. Wilde, p. 12; Direct Testimony of Lisa M. Ferguson, p. 5.

<sup>27</sup> Hearing Transcript, p. 90 (Mark Oligschlaeger); Direct Testimony of Lisa M. Ferguson, p. 6; Direct Testimony of John S. Riley, p. 3.

<sup>28</sup> Direct Testimony of John R. Wilde, Schedule JRW-2 through JRW-6, ; Private Letter Ruling are issued by the IRS to the taxpayer who requested it.

<sup>29</sup> Hearing Transcript, p. 90 (Mark Oligschlaeger).

<sup>30</sup> Hearing Transcript, p. 40 (John Riley); Direct Testimony of John Riley, p. 3; Direct Testimony of Lisa M. Ferguson, p. 7.

<sup>31</sup> Direct Testimony of Mark L. Oligschlaeger, p. 7; Direct Testimony of Lisa M. Ferguson, p. 5-6; Direct Testimony of John R. Wilde, p. 13.

23. A taxpayer cannot utilize an NOL carryforward amount from a prior tax year without first exhausting all of the deductions available to it for the current tax year.<sup>33</sup>

### III. Conclusions of Law

MAWC is a “water corporation” and “public utility” as those terms are defined by Section 386.020, RSMo 2016.<sup>34</sup> MAWC is subject to the Commission’s jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 393, RSMo. The Commission has the authority under Sections 393.1000 through 393.1006, RSMo, to consider and approve ISRS requests such as the one proposed in the Petition. Since MAWC brought the Petition, it bears the burden of proof.<sup>35</sup> The burden of proof is the preponderance of the evidence standard.<sup>36</sup> In order to meet this standard, MAWC must convince the Commission it is “more likely than not” that its allegations are true.<sup>37</sup>

Section 393.1006.2(4) provides that where the Commission finds that a petition complies with the statutory requirements, the Commission “shall enter an order authorizing the water corporation to impose an ISRS that is sufficient to recover “appropriate pretax revenues.” Section 393.1000(1) defines “appropriate pretax revenues” to include “recognition of accumulated deferred income taxes and accumulated depreciation associated with eligible infrastructure system replacements which are included in a currently effective ISRS.”

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<sup>32</sup> Hearing Transcript, p. 87 (Mark Oligschlaeger); Direct Testimony of Lisa M. Ferguson, p. 5 and 7.

<sup>33</sup> Hearing Transcript, p. 68-69 (John Wilde).

<sup>34</sup> Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri 2016.

<sup>35</sup> “The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue”. *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938); see also Section 393.150.2.

<sup>36</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

<sup>37</sup> *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

#### **IV. Decision**

The issue presented in this case is whether MAWC should be allowed to reduce its ADIT to reflect an NOL. To address this issue, we must answer two questions: 1) is MAWC generating an NOL in the applicable 2018 ISRS recovery period; and 2) if it is generating an NOL, is that NOL associated with the replacements included in the proposed ISRS.

##### **Is there an NOL for MAWC in 2018?**

MAWC has not provided evidence to support that it will in fact have an NOL in 2018. On the contrary, the evidence indicates MAWC is generating more revenue for 2018 than it is generating expenses that qualify for deductions. Thus, MAWC is expected to utilize prior NOL carryovers to offset its taxable income in 2018 and 2019, but will not generate a new NOL. Since the IRS Private Letter Rulings only address periods where an NOL is generated, there is no legal support for MAWC's position that an exclusion of an NOL would violate normalization requirements of the IRS Code.<sup>38</sup>

Because MAWC is expected to have taxable income in 2018, it is reasonable to conclude that MAWC is not generating an NOL during the 2018 ISRS Period at issue, either. And in fact, there was no evidence of an NOL being generated during the 2018 ISRS Period. In short, although the ISRS statute requires recognition of ADIT, which might include reflection of an NOL, we cannot allow MAWC to reduce its ADIT balance to reflect an NOL that does not exist.

##### **If there is an NOL, is it associated with the replacements included in the currently effective ISRS?**

Since there is not an NOL in the 2018 ISRS Period, the question of whether an NOL is associated with the proposed ISRS is moot.

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<sup>38</sup> Hearing Transcript, p. 87, 89, 90, and 92. (Mark Oligschlaeger).

Based on Staff's adjustments to exclude the ineligible costs, the corrected ISRS calculation will result in MAWC collecting ISRS revenues in the amount of \$6,377,959. The Commission also concludes that the appropriate rate design is that which was testified to by Matthew J. Barnes and to which there were no objections.

MAWC has complied with the requirements of the applicable ISRS statutes to authorize its use of an ISRS, however, for the reasons previously stated, the recovery should not include NOL. The Commission concludes that MAWC shall be permitted to establish an ISRS to recover ISRS surcharges for these cases in the amount of \$6,377,959. Since the revenues and rates authorized in this order differ from those contained in the tariffs the company first submitted, the Commission will reject those tariffs. The Commission will allow MAWC an opportunity to submit new tariffs consistent with this order.

Section 393.1015.2(3), RSMo, requires the Commission to issue an order to become effective not later than 120 days after the petition is filed. That deadline is December 18, 2018, so the Commission will make this order effective on December 15, 2018.

**THE COMMISSION ORDERS THAT:**

1. Missouri-American Water Company is authorized to establish an Infrastructure System Replacement Surcharge ("ISRS") sufficient to recover ISRS revenues in the amount of \$6,377,959. Missouri-American Water Company is authorized to file an ISRS rate for each customer class as described in the body of this order.
2. The tariff sheet filed by Missouri-American Water Company on August 20, 2018, and assigned Tariff Tracking No. YW-2019-0018, is rejected.
3. Missouri-American Water Company is authorized to file new tariffs to recover



the revenue authorized in this Report and Order.

4. This order shall become effective on December 15, 2018.



**BY THE COMMISSION**

*Morris L. Woodruff*

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and  
Coleman, CC., concur.

Hatcher, Regulatory Law Judge



### Application for Rehearing

3. The Order of the Missouri Public Service Commission is unlawful, unreasonable, unjust, arbitrary and an abuse of discretion for one or more or all of the reasons hereinafter set forth. For the reasons stated in the following paragraphs, the decision of the Commission should be reheard and the Order in this case should be amended or superseded to address and correct the matters of error raised by the Company.

4. In MAWC's Infrastructure System Replacement Surcharge Application, the Company included an ADIT<sup>1</sup> Asset created by the Net Operating Loss ("NOL") from the ISRS investments that were the subject of its Application consistent with the ISRS statute.<sup>2</sup> While the Commission concedes that the ISRS statute "requires recognition of ADIT, which might include reflection of an NOL,"<sup>3</sup> it concluded that the Company had not presented evidence sufficient to support that it will have a NOL in 2018, rejected the tariff sheet filed by MAWC on August 20, 2018<sup>4</sup>, and authorized it to file new tariffs omitting an ADIT Asset created by an NOL.<sup>5</sup> In support of its decision, the Commission states, among other things, that MAWC "will not generate a new NOL" to offset its taxable income in 2018 and 2019.<sup>6</sup>

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<sup>1</sup> Accumulated Deferred Income Tax.

<sup>2</sup> Section 393.1000(1)(a), RSMo, defines "Appropriate Pretax Revenues" as:

[T]he 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 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. (emphasis added)

<sup>3</sup> Order at p. 8.

<sup>4</sup> Tariff Tracking No. YW-2019-0018.

<sup>5</sup> Order at pp. 8-9.

<sup>6</sup> Order at p. 8.

5. The Commission's Order disregards evidence in the record showing that the MAWC Deferred Income Tax Asset balance over the period of December 2017, through September 2018 increased between May 2018, and June 2018 (not decreased as alleged by Staff), and that a NOL actually was incurred during the period of the ISRS plant at issue. Company witnesses LaGrand and Wilde testified that the Company included depreciation and interest expense that occurred during the ISRS period, accelerated depreciation, and the repairs deduction and that these large deductions, taken against no revenue, create a large NOL.<sup>7</sup> Consequently, the Commission's finding that there was "no evidence" of an NOL being generated during the 2018 ISRS period<sup>8</sup> is without basis because there is ample evidence in the record showing a NOL from the ISRS investments that were the subject of its Application.

6. The practical effect of the Order (i.e., to eliminate the recognition of the ADIT Asset which is comprised of the NOL) is inconsistent with a normalized method of accounting because the impact of ignoring the Deferred Tax Asset provides customers with the benefit of the tax deduction now, through a lower ISRS rate, even though the Company is unable to benefit from those tax deductions at this time.

7. The non-recognition of the NOL associated with these ISRS investments creates a peril for the Company and its customers concerning its income tax accounting. It likely will cause a deviation from the normalization requirements of the IRS Code. Specifically a finding by the IRS that MAWC has violated the tax normalization rules, or the terms of its Consent Agreement<sup>9</sup>, could cause the loss of significant tax benefits that currently are enjoyed by its

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<sup>7</sup> Exh. 1, LaGrand Dir., Sched. BWL-1, p. 2 of 7; Exh. 2, Wilde Dir., p. 12; Tr. 70, Wilde.

<sup>8</sup> Order at pp. 6, 8.

<sup>9</sup> The record shows that in 2010, the Company entered into a consent agreement with the IRS which authorized the Company's requested Change in Accounting Method to allow the utilization of the repairs deduction/method. One of the requirements of that consent agreement is

customers, such as the ability of the company to claim accelerated depreciation deductions and tax repair deductions which serve to keep rates lower than otherwise would be the case because these tax features serve to reduce rate base. The Commission's disregard of a private letter ruling (PLR 201548017) stating unambiguously that "an NOLC must be taken into account for normalization purposes" is premised on its erroneous factual determination that there is no NOL being generated.<sup>10</sup>

#### **Motion to Defer Ruling on this Application for Rehearing**

8. There is no requirement that the Commission rule on this Application for Rehearing by a date certain. Given the seriousness of the matters summarized in paragraph 5, *supra.*, MAWC requests that the Commission take this Application for Rehearing under advisement and *not* issue a ruling thereon until such time as the Company can request, obtain and proffer a private letter ruling from the IRS on whether application of the findings by the Commission for the period in question would cause a violation of tax normalization rules. As noted in MAWC's prehearing brief, the "inadvertent error" safe harbor exception relied upon by Staff witness Ferguson<sup>11</sup> does not, in the Company's view, save the Company from the adverse consequences that may flow should the IRS determine that the Company's practices in furtherance of the Order are inconsistent with tax normalization requirements or obligations.

9. The possible adverse consequences flowing from the Order are of such a magnitude, and have such a potential adverse consequence on cost of service for ratemaking

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that MAWC use a normalized method of accounting, even though a tax repairs deduction is not otherwise specifically subject to that the tax normalization rules.

<sup>10</sup> Order at. p. 8.

<sup>11</sup> Rev. Proc. 2017-47.

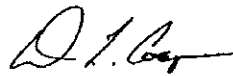
purposes, that sound policy supports a delay in finality in order to obtain more clarity on the income tax consequences that may result.

**Conclusion**

MAWC requests that the Commission defer ruling on this Application for Rehearing until such time as the Company can request, obtain and proffer a private letter ruling from the IRS concerning whether application of the findings by the Commission for the period in question would cause a violation of tax normalization rules.

Thereafter, for the reasons stated herein, MAWC respectfully requests that the Commission grant the Company's Application for Rehearing for the reasons aforesaid, and upon rehearing, issue a superseding or correction order directing that ISRS tariffs be filed sufficient to recover ISRS revenues in the amount of \$7,264,876 by including the Deferred Tax Asset in the ISRS calculations and making such other findings as are consistent with the matters set forth above.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI-AMERICAN  
WATER COMPANY

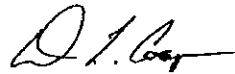


**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been transmitted by electronic mail to the following on this 14<sup>th</sup> day of December, 2018:

Mark Johnson  
Office of the General Counsel  
[staffcounsel@psc.mo.gov](mailto:staffcounsel@psc.mo.gov)  
[mark.johnson@psc.mo.gov](mailto:mark.johnson@psc.mo.gov)

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[lera.shemwell@ded.mo.gov](mailto:lera.shemwell@ded.mo.gov)



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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 3<sup>rd</sup> day of  
January, 2019.

In the Matter of Petition of Missouri-American  
Water Company for Approval to Establish an  
Infrastructure System Replacement Surcharge  
(ISRS).

)  
)  
)  
)

File No. WO-2018-0373  
Tariff No. YW-2019-0018

**ORDER DENYING APPLICATION FOR REHEARING**

Issue Date: January 3, 2019

Effective Date: January 3, 2019

On December 5, 2018, the Missouri Public Service Commission issued a *Report and Order* effective December 15, 2018, regarding Missouri-American Water Company's application to establish an infrastructure system replacement surcharge. Missouri-American Water Company filed a timely application for rehearing.

Section 386.500.1, RSMo 2016, states that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, the application for rehearing does not demonstrate sufficient reason to rehear the matter, or stay a ruling on said application. The Commission will deny the application for rehearing and the motion to defer ruling.

**THE COMMISSION ORDERS THAT:**

1. Missouri-American Water Company's *Application for Rehearing And Motion To Defer Ruling* is denied.

2. This order shall be effective when issued.
3. This file shall close on January 4, 2019.

**BY THE COMMISSION**

*Morris L. Woodruff*

Morris L. Woodruff  
Secretary



Silvey, Chm., Kenney, Hall,  
Rupp, and Coleman, CC., concur.

Hatcher, Regulatory Law Judge

**Missouri American Water  
 WO-2018-0373  
 Reconciliation**

	Annualized Revenue Requirement	Tariffed Rates (per 100 gallons)		
		Rate A	Rate B	Rate J
Missouri American Water Position	\$7,264,876	\$0.02252	\$0.00020	\$0.00019
Value of Deferred Tax / NOL Issue	(\$886,917)	(\$0.00275)	(\$0.00002)	(\$0.00002)
<b>Staff Position / Commission Order</b>	<b>\$6,377,959</b>	<b>\$0.01977</b>	<b>\$0.00018</b>	<b>\$0.00017</b>

**Notes:**

1. Revenue requirements agree to Schedule LMF-d2 in the Direct Testimony of Staff witness Lisa Ferguson
2. Staff Position / Commission Order tariffed rates agree to MAWC's 10th Revised Sheet No. RT 10, effective December 15, 2018