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MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. WO-2020-0190

REBUTTAL TESTIMONY

OF

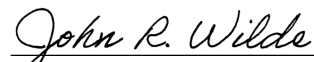
JOHN R. WILDE

ON BEHALF OF

MISSOURI-AMERICAN WATER COMPANY

AFFIDAVIT

I, John R. Wilde, under penalty of perjury, and pursuant to Section 509.030, RSMo, state that I am Vice President, Tax Strategy and Compliance, for American Water Works Service Company, Inc., that the accompanying testimony and schedules have been prepared by me or under my direction and supervision; that if inquiries were made as to the facts in said testimony and schedules, I would respond as therein set forth; and that the aforesaid testimony and schedules are true and correct to the best of my knowledge and belief.



John R. Wilde

May 27, 2020
Dated

**REBUTTAL TESTIMONY
JOHN R. WILDE
MISSOURI-AMERICAN WATER COMPANY
CASE NO. WO-2020-0190**

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REBUTTAL TESTIMONY

JOHN R. WILDE

1 **I. INTRODUCTION**

2 **Q. Please state your name and business address.**

3 A. My name is John R. Wilde, and my business address is One Water Street, Camden, NJ,
4 08102.

5 **Q. Are you the same John R. Wilde who previously submitted direct testimony in this**
6 **proceeding on behalf of Missouri-American Water Company (“MAWC” or**
7 **“Company”)?**

8 A. Yes.

9 **Q. What is the purpose of your rebuttal testimony in this case?**

10 A. The purpose of my testimony is to rebut the Direct Testimony of Office of the Public
11 Counsel (“OPC”) witness John Riley, opposing the inclusion of the \$35,328 adjustment
12 to correct tax normalization issues associated with the Infrastructure System
13 Replacement Surcharge (“ISRS”), which was included by both the Company and Staff.

14 **II. RESPONSE TO DIRECT TESTIMONY**

15 **Q. OPC witness Riley alleges that private letter ruling (“PLR”) No. 202010002 does**
16 **not support the position of the Company and of Staff that the \$35,328 adjustment**
17 **is necessary to bring prior ISRS rate setting into compliance with the tax**
18 **normalization restrictions. Do you agree?**

19 A. No, in Ruling 1 of the PLR the Internal Revenue Service (“IRS”) identifies ISRS plant

1 as utility property subject to the tax normalization restrictions, and in Ruling 2 the IRS
2 identifies the ISRS as a proceeding in which Accumulated Deferred Income Taxes
3 (“ADIT”) must be addressed pursuant to the tax normalization restrictions. Ruling 9
4 (and, in the alternative, Ruling 8) individually identifies the specific violation of the
5 tax normalization requirements that MAWC believes the \$35,328 is intended to cure,
6 and the facts, circumstance, and analysis on which that determination was made.

7 **Q. Does Staff agree with MAWC that the \$35,328 adjustment should be included to**
8 **bring prior ISRS rate setting into compliance with the tax normalization**
9 **restrictions?**

10 A. Yes. Staff’s position is that PLR 202010002, particularly Ruling 9, supports the need
11 to make the \$35,328 adjustment to bring prior ISRS rate setting into compliance with
12 the tax normalization restrictions, consistent with MAWC’s position. (See
13 Oligschlaeger Dir., pp. 8-9.)

14 **Q. OPC witness Riley suggests (Riley Dir., p. 2) that a Net Operating Loss (“NOL”)**
15 **should never be taken into account in ratemaking, because of his belief that it is a**
16 **tax return adjustment. He explains that rates are set prospectively, implying that**
17 **eventually the utility will have sufficient income to utilize the NOL. Is this position**
18 **consistent with the tax normalization rules?**

19 A. No. Ruling 9 of PLR No. 202010002 is clear that an NOL or Net Operating Loss
20 Carryover (“NOLC”) does need to be accounted for in ratemaking to avoid a violation
21 of the tax normalization rules. Numerous other PLRs cited by the Company in its PLR
22 request reach a similar conclusion. Ruling 8 is clear that inclusion of ADIT balances

1 pursuant to the tax normalization restrictions must be based on items of tax income and
2 expense realized as of the ISRS rate base determination date, not items of income and
3 expense to be realized on a prospective basis.

4 **Q. Mr. Riley states (Riley Dir., p. 6, line 16-18) “MAWC asked the IRS to answer**
5 **twelve specific questions. None of those questions included ‘was there an NOL**
6 **during interim period?’ so the IRS didn’t confirm an NOL.” Did the IRS confirm**
7 **a NOL?**

8 A. Yes, Ruling 9 cites the aggregate set of facts and circumstances on which its
9 determination was made (“Under the circumstances described”); identifies the NOL as
10 “the portion of the NOL for the test period for the Surcharge Case which would not
11 have arisen had Taxpayer not reported depreciation-related book/tax differences during
12 the text period for the Surcharge”; and provides the method on which the NOL should
13 be based (“must be an amount that is no less than the amount computed using the With-
14 and-Without Method”). On page 3 of his direct testimony, Mr. Oligschlaeger agrees
15 with my conclusion and correctly explains the IRS confirmation that a tax loss does
16 exist and is inherent in several statements made by the IRS. In doing so, Mr.
17 Oligschlaeger identifies those statements by the IRS that support his conclusion.

18 **Q. OPC witness Riley alleges the Company was allowed to unilaterally frame the**
19 **facts and questions to the IRS as it chose when it requested a PLR (Riley Dir., p.**
20 **5). Is that an accurate assessment of the PLR request that was provided to the**
21 **IRS?**

22 A. No. As noted in my Direct Testimony, IRS Revenue Procedure 2019-1 provides that a

1 taxpayer requesting a PLR involving a question of whether a rate order will meet with
2 IRS normalizing requirements must indicate, among other things, whether “(1) the
3 regulatory authority responsible for establishing or approving the taxpayer's rates has
4 reviewed the request and believes that the request is adequate and complete.”¹ As a
5 part of the request, the Company affirmatively represented that it had permitted the
6 Commission to review the request and that the Commission had indicated that it
7 believed that the request was adequate and complete. I know from my personal
8 involvement in preparing the request that these representations are accurate and
9 complete, and that the Commission, as represented by Staff, had a great deal to say
10 about the contents of the PLR request.

11 **Q. On page 3 (line 11-13) of his direct testimony, OPC witness Riley states that “Staff**
12 **may have been privy to the wording of the request prior to its delivery” Was**
13 **Staff merely “privy to the wording” of the request?**

14 A. No, as quoted above, Revenue Procedure 2019-1 requires much more than that. To
15 ensure MAWC would be able to make the required representation, Staff was provided
16 with drafts of the PLR request, was allowed to comment and suggest edits to each draft
17 of the request, and was allowed to comment on each of the requested rulings providing
18 facts and analysis that Staff believed were relevant to the IRS. As I explained in my
19 Direct Testimony at page 10, Staff did much more than simply review and edit the
20 request document. It submitted an extensive and detailed description of the arguments
21 and Commission perspective as to the specific rulings being requested. Before MAWC

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

1 filed its final draft of the PLR request with the IRS, Staff acknowledged the following
2 to MAWC: “Missouri Public Service Commission Staff considers the PLR request to
3 be adequate and complete under the condition that the Staff’s Comments are included
4 within the document in full. Further, under the same condition, Staff does not object
5 to filing of the PLR request with the Internal Revenue Service at this time.” Staff’s
6 Comments were accordingly attached and submitted as Attachment J to the PLR
7 request. (See Wilde Direct Testimony, Schedule JRW-1 at pages 118-134.)

8 **Q. Were any of the facts that Mr. Riley implies were withheld from the IRS by the**
9 **Company excluded from the PLR request filing?**

10 A. No, all of the relevant facts were contained in the body of the PLR request, which Staff
11 indicated was “adequate and complete”, and/or were included in one of the attachments
12 to the PLR request.

13 **Q. What is a taxable loss or tax loss?**

14 A. A tax loss results when tax deductions during the relevant period exceed taxable income
15 recognized during the same period. A tax loss can be measured and refer to a specific
16 transaction, subset set of transactions such as an ISRS, or all transactions executed
17 during that same period.

18 **Q. What is a net operating loss (“NOL”)?**

19 A. A NOL results when tax deductions during the relevant period exceed taxable income
20 recognized during the same period. The distinction between tax loss and net operation
21 loss depends on the transactions you choose to net operating results for. For example,
22 ISRS plant transactions during a relevant period could result in a tax loss, but when

1 combined with other transactions during the same relevant period could produce a net
2 operating gain or loss depending on the relevant fact and circumstances at the time.

3 **Q. What is a net operating loss carryover (“NOLC”) and how does it differ from a**
4 **NOL?**

5 A. A NOLC is the balance of NOL tax deductions available to a taxpayer at the end of a
6 given period that exceed the amount of taxable income recognized that would allow
7 those tax deductions to be utilized. The NOLC balance is carried forward to be claimed
8 when the taxpayer is out of a NOL position, having sufficient income to use all of its
9 available deductions.

10 **Q. OPC witness Riley alleges that the Commission found that no NOL existed during**
11 **the ISRS period in question (Riley Dir., p. 5), and implies the Commission’s**
12 **finding of fact should be binding both on MAWC in what facts were presented to**
13 **the IRS, and on the IRS in the determination of its rulings with respect to the tax**
14 **normalization restrictions. Do you agree?**

15 A. No. First, as Mr. Oligschlaeger indicates (Oligschlaeger Dr., pp. 3-4), it is the IRS that
16 is the regulator responsible for insuring the taxpayer is in compliance with the tax
17 normalization requirements or not, so I do not agree that the Company should be
18 precluded from providing information to the IRS simply because it stands in contrast
19 to a Commissions ruling that relates to the application of the tax normalization rules.
20 Second, I disagree with Mr. Riley’s apparent belief that the Commission’s ruling that
21 MAWC did not generate an NOL should be broadly interpreted as to imply no tax
22 losses, NOLs, or NOLCs were present during the ISRS period. Mr. Riley repeatedly

1 asserts that any factual representation that a taxable loss attributable to ISRS plant “is
2 literally the exact opposite of what the Commission found in both of MAWC’s prior
3 ISRS cases.” (E.g., Riley Direct at p.4.) However, the Commission’s finding that
4 MAWC did not generate an NOL on a companywide basis, even if correct from an IRS
5 perspective, does not mean that the Company did not generate an incremental tax loss
6 or NOL due to the fact that ISRS plant deductions exceeded ISRS plant income during
7 the relevant ISRS period. In any event, the Company provided the IRS with a complete
8 set of facts, citing and providing a copy of the Report and Order in File No. WO-2018-
9 0373, and the IRS was entitled to choose which facts and circumstances were relevant
10 to making its ruling on the application of the tax normalization restriction.

11 **Q. Was MAWC expecting to be in a NOLC position during each ISRS period?**

12 A. Yes. For 2017 and 2018 this was the result at the end of the respective calendar year-
13 end as computed for purposes of filing the respective tax return, and for 2019 this was
14 the result computed for purposes of recording year end results for financial accounting
15 purposes.

16 **Q. During each relevant ISRS period, were the tax deductions available to MAWC
17 related to the ISRS plant greater than the revenue MAWC received related to the
18 same ISRS plant?**

19 A. Yes. As of the date the rate base was determined for the establishment of the ISRS and
20 each ISRS change, none of the new surcharge revenues would have been yet billed to
21 customers and, thus, as of such date, tax deductions claimed exceeded ISRS revenues
22 collected. For example, in WO-2018-0373 tax deductions related to ISRS plant exceed

1 ISRS income recognized during the same relevant period, indicating a taxable loss of
2 approximately \$36.9 million resulted from investing in ISRS plant during the ISRS
3 period.

4 **Q. During each of the relevant periods, on a total Company basis, did MAWC's tax**
5 **deductions exceed MAWC's recognized taxable income?**

6 A. Yes, contrary to the Commission's findings, in each of the relevant periods the
7 Company would have had deductions including NOL deductions available to it in
8 excess of income recognized for tax purposes during that same period. That is
9 supported by the ongoing presence of a NOL tax deductions having to be carried
10 forward.

11 **Q. Did the IRS exclude the presence of the excess NOL deductions (NOLC) in the**
12 **facts considered in Ruling 9?**

13 A. No, the fact that MAWC was in a NOLC position during the relevant period was cited
14 by the IRS in reaching its conclusion in Ruling 9, as was the fact that tax deductions
15 related to ISRS property exceeded income related to ISRS property during the relevant
16 period. In Ruling 9, the IRS also confirmed that the with and without test is the method
17 that should be used to determine the amount of the NOL or NOLC that exists by virtue
18 of having claimed those accelerated tax depreciation deductions.

19 **Q. As a result of reviewing the finding of the IRS as outlined in the PLR, has Staff**
20 **modified its position with respect how the IRS would determine if an NOL or loss**
21 **existed that needed to be incorporated into the ISRS in order to avoid a**
22 **normalization violation?**

1 A. Yes. Mr. Oligschlaeger states: “Within the PLR, there are several statements made by
 2 the IRS that indicate its concurrence with MAWC’s prior arguments before the
 3 Commission that ISRS plant additions in fact did cause MAWC to suffer a tax loss that
 4 should be taken into account by the Commission in setting ISRS rates.” (Oligschlaeger
 5 Dir., p. 8)

6 Q. ** _____
 7 _____
 8 _____ **

9 A. ** _____
 10 _____
 11 _____
 12 _____ **

13 Q. **OPC witness Riley agrees with a question indicating that the IRS “answered the**
 14 **questions posed without questioning the facts that frame those questions.” (Riley**
 15 **Dir., p. 7, line 11-13). Do you agree with this characterization?**

16 A. No. Mr. Riley seems to suggest that MAWC framed the facts and questions in the PLR
 17 request to achieve a desired outcome, and the IRS somehow “rubber-stamped” the
 18 request, in spite of its review of Staff’s comments. That is not the case.

19 Q. ** _____ **

20 A. ** _____
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15 **Q. Mr. Riley alleges the IRS was asked by the Company to assume an NOL existed**
16 **based on MAWC simply representing that an NOL existed. Did the Company ask**
17 **the IRS to make such an assumption?**

18 A. No, Mr. Riley offers that conclusion citing only part of the record contained in the PLR
19 and PLR request without acknowledging that, as discussed above, the IRS had a
20 complete set of facts and circumstances to draw on to complete its analysis relating to
21 the appropriate adjustments to the ISRS that should be made pursuant to the tax
22 normalization rules.

1

2 **Q. Did Mr. Oligschlaeger or Mr. Riley Ruling address the significance of Ruling 8,**
3 **with respect to the \$35,328 adjustment?**

4 A. No.

5 **Q. Would you address the significance of Ruling 8 of the PLR?**

6 A. Yes. Ruling 8 requested guidance on whether it would be appropriate to include a
7 deferred tax liability (“DTL”) in the rate base component of ISRS calculation before
8 the related deferred tax expense was included in rates collected from customers.
9 Pursuant to Ruling 9, adding in the NOLC DTA effectively eliminates the accelerated
10 depreciation DTL in this case. This makes Ruling 8 seem less important in this specific
11 case. However, Ruling 8 would also, under the specific facts of the ISRS proceeding,
12 require elimination of the DTL in the first year of an ISRS and this may be without
13 regard to having a NOLC. Ruling 8 of the PLR is not necessarily dependent on the
14 presence of a NOLC, as the IRS does not indicate that it conditioned Ruling 8 on this
15 fact. During the test year, Ruling 9 would have the Company add a NOLC DTA to the
16 rate base component of the ISRS calculation; the NOLC DTA would be the portion
17 related to having claimed accelerated tax depreciation on ISRS property. Ruling 8
18 would have the Company remove a portion of the Book to Tax Depreciation DTL from
19 the rate base component of the ISRS calculation, related to having claimed accelerated
20 tax depreciation on ISRS property. Both have a similar effect on the ISRS as proposed
21 in this case to correct the inconsistency that occurred in prior Commission orders.

22 **Q. If the Commission finds that Ruling 9 is sufficient to support the inclusion of the**

1 **proposed \$35,328 adjustment, is it necessary for the Commission to address or**
2 **rely on Ruling 8?**

3 A. It is not.

4 **Q. When would the IRS expect MAWC to make the adjustment to correct rates to**
5 **reflect its ruling?**

6 A. As stated at page 6 of my Direct Testimony, the IRS has consistently held in prior
7 rulings and guidance that upon recognizing its failure to comply with the normalization
8 rules, the taxpayer needs to change the inconsistent practice or procedure to a consistent
9 practice or procedure *at the next available opportunity* in a manner that totally reverses
10 the effect of the inconsistent practice or procedure, provided the taxpayer's regulator
11 adopts or approves the change.²

12 **Q. Does this conclude your rebuttal testimony?**

13 A. Yes, it does.

² See, e.g., Safe Harbor for Inadvertent Normalization Violations, I.R.S. Rev. Proc. 2017-47, Section 3.01(3), 2017 WL 4099476 (Sept. 18, 2017).