BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("OPC") and for its *Application for Rehearing* of the Missouri Public Service Commission ("the Commission")'s June 17, 2020, *Report and Order* in the above styled case, states as follows:

Pursuant to RSMo. section 386.500, the OPC seeks rehearing of the Commission's *Report and Order* because the order is unlawful, unjust, and/or unreasonable for the reasons laid out herein.

The Commission erred in calculating the amount of the supposed net operating losses that it permitted MAWC to recover for in this case

The Commission's ultimate ruling in this case is premised on its determination that the Internal Revenue Service ("IRS") found that a utility company could have a net operating loss ("NOL") during an interim period. *Report and Order*, pg. 6 ¶ 16. This conclusion is both factually and legally unsound, but the OPC will look past that point for the sake of this first argument. Instead, the OPC is going to assume *arguendo* that the Commission's interpretation of the IRS's private letter ruling is correct and proceed on the basis that an NOL can exist for an interim period. The problem is that, even if one accepts this initial premise, the amount of the NOL that the Commission has determined existed has been calculated unlawfully, in that, the theory behind the calculation contradicts the plain language of the relevant U.S. federal statutes.

PUBLIC

For tax purposes (which is obviously the only purpose that matters when considering the interpretation of an IRS private letter ruling), the term net operating loss is defined in 26 USC § 172(c). That definition is as follows: "[f]or purposes of this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income." This definition is further clarified by the definition of "gross income" found in 26 USC § 61 which states that "Except as otherwise provided in this subtitle, gross income means **all income** from **whatever source derived** . . . ." (emphasis added). Putting these two definitions together and one can easily see that, by statutory definition, a net operating loss is the excess of the deductions allowed by chapter one of the Internal Revenue Code over **all** of a taxpayer's income from **whatever** source derived. 26 USC §§ 61, 172(c) (emphasis added). However, the Commission has unfortunately utilized a calculation of net operating loss that is contrary to the plain language of this statutory definition.

The Commission has adopted the Company's theory regarding the calculation of a net operating loss during the ISRS test period. That theory is as follows:

> MAWC's theory of its NOL is the accelerated depreciation expense of the new infrastructure subtracted from zero new revenues on that infrastructure, produces a loss on the new infrastructure up until the time the new ISRS rates are effective.

Report and Order, pg. 5 ¶ 11. What should be obvious, though, is that this theory is inconsistent with the plain language of 26 USC §§ 61, 172(c) as outlined above. Instead of calculating the net operating loss based on "gross income" as required under 26 USC § 172(c), MAWC (and now the Commission) has calculated a net operating loss based only on a select subset of its income – the income related exclusively to its ISRS – which the Company is claiming is $0. This is a fundamental and obvious flaw with the Commission's calculation that must be corrected.

Even if the Commission accepts that a net operating loss can exist for an interim period, it must still calculate that net operating loss correctly. In order to be consistent with the plain language of 26 USC §§ 61, 172(c) and ruling number nine of MAWC's private letter ruling, the Commission must therefore calculate the supposed NOL by offsetting the expense arising from "depreciation-related book/tax differences during the test period for the Surcharge Case" against MAWC's **gross income** that accrued during the test period for the Surcharge Case. So far, the Commission has only managed to properly calculate half of this equation (the accelerated depreciation half). The second half (MAWC's gross income) has been completely ignored by the Commission, which has instead adopted MAWC's clearly erroneous calculation that offsets the accelerated depreciation expense against $0 in income. As already stated, this is clearly legally wrong and must be corrected,

Before going any further, the OPC wishes to remind the Commission of an important point. This argument is premised on accepting the Commission's interpretation of the IRS private letter ruling's ruling number nine. A Court of Appeals could thus completely agree with the Commission's interpretation of the private letter ruling and still overturn this decision based on the argument the OPC is now putting forward. The error being alleged here is solely and completely a product of **the Commission's** misinterpretation of federal statutes, and does not require any challenge to the IRS's private letter ruling or the Commission's interpretation of the same.

There is absolutely nothing in ruling number nine that says that accelerated depreciation expense has to be offset against $0 in income and the ruling offers no indication of what the actual dollar amount of the supposed NOL in question should be. The same holds true for the rest of the rulings, which also offer no indication either that accelerated depreciation expense has to be offset

against $0 in income or otherwise calculate what the supposed NOL should be. Thus the calculation of the supposed NOL has been left exclusively in the hands of this Commission. That does not mean, however, that this Commission is free to ignore the readily apparent and exceptionally plain language of 26 USC §§ 61, 172(c). By doing so, the Commission – and not the IRS – has committed a reversible error.

As one last point, the OPC is going to address what may be a possible rejoinder to the preceding argument. Based on its response to other issues raised by the OPC, there is a chance that this Commission might feel that its calculation of MAWC's supposed net operating loss is statutorily compliant given RSMo. § 393.1000(6). Such a conclusion would be legally erroneous for three reasons.

First, RSMo. § 393.1000(6) defines the revenues to be collected **<u>through</u>** an ISRS. (the statute defines ISRS revenues as "revenues produced **<u>through</u>** an ISRS, exclusive of revenues from all other rates and charges." (emphasis added)). As such, the definition does not determine what revenues/income may be considered in **<u>setting</u>** ISRS rates, but rather, defines the revenues to be collected after the rates are set. Attempting to employ the definition of what revenues are collected **<u>through</u>** the ISRS to dictate what revenues may be considered in **<u>setting</u>** ISRS rates is an exercise in circular reasoning that quickly devolves into utter madness. Under that theory, every expense ever incurred by a utility during the test period of an ISRS case is automatically going to generate a net operating loss because all Missouri utility rates (including ISRS rates) are set prospectively. Moreover, the Court of Appeals have already heard this exact argument and rejected it on that very basis. *Mo. Am. Water Co. v. Mo. Pub. Serv. Comm'n*, No. WD83067, 2020 Mo. App. LEXIS 498 *16 – 17 (Mo. App. WD Apr. 21, 2020) ("We reiterate that 'direct rate recovery of investment by a utility can only occur ***after*** that investment is in service.'" (quoting *Missouri-*

American I, 591 S.W.3d at 477 (emphasis added) (citing *State ex rel. Union Elec. Co.*, 765 S.W.2d at 622)). There is no reason why the Commission should continue to cling to a theory that the Courts of this State have already rejected.

Second, there is the simple difference in terms being employed by the two sets of statutes. Again, the term net operating loss is defined by federal **statute**. 26 USC § 172(c). That statute plainly and unambiguously refers to "gross income," which is itself defined by federal statute. *Id.*; 26 USC § 61. The statutory definition of gross income includes revenues from **multiple different sources**. 26 USC § 61. Nothing in the definition of "ISRS Revenues" found in RSMo. § 393.1000(6) states that **only** ISRS revenues can be used to calculate a net operating loss during the ISRS test period in contradiction to the federal statutory definitions of gross income or net operating loss. Therefore, the only logical conclusion is that when determining what amount of an NOL, if any, existed during the ISRS surcharge period, it is necessary to consider **all revenue streams** contributing to MAWC's gross income during that time period, and not just ISRS revenues. This, the Commission has failed to do.

The third and final point applies only if the Commission chooses to ignore the first two, though it remains perhaps the strongest of the three. To put it bluntly, a determination by the Commission that the calculation of MAWC's supposed NOL could consider only those revenues generated by the ISRS itself due to RSMo. § 393.1000(6) (or any other state statute for that matter) would violate the United States Constitution. Article VI, clause 2 of the US Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const. art VI, §2. This clause, commonly known as the supremacy clause, clearly defines a very basic principle of U.S. constitutional law, which is that federal law (including both constitution and statute) supersedes the laws of any given state. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."). Let us now consider why this applies to the present case.

The OPC's argument on this point can be summed up rather succinctly as this: federal statute requires the supposed NOL to be calculated based on MAWC's "gross income" during the test period which would not be $0 because the Company was collecting money through base rates during that time. The only possible response that the OPC can perceive is the argument that RSMo. § 393.1000(6) restricts the calculation of the NOL for the ISRS period to only those revenues actually produced by the ISRS. That argument, however, would put 26 USC §§ 61, 172(c) and RSMo. § 393.1000(6) in conflict. Where federal and state statutes conflict, the supremacy clause dictates that federal statute wins out. U.S. Const. art VI, §2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). Thus, the OPC's argument regarding the necessity of basing the supposed NOL calculation on "gross income" per the federal statute will persist regardless of any interpretation of state law.

The laws of the State of Missouri are not permitted to retard, impede, burden, or in any manner control those laws passed by the federal government. The requirement that any supposed NOL be calculated based on MAWC's **complete gross income** during the ISRS period per the

plain language of 26 USC § 172(c) thus remains in effect and cannot simply be ignored by the Commission. However, the Commission has failed to abide by this plain language because it has not calculated the supposed net operating loss against gross income, but rather, against an "ISRS only" income of $0. In failing to adhere to the plain language of the federal statute that defines net operating loss, the Commission has committed an open and obvious reversible error. To cure this error, the Commission should order a rehearing as to the proper calculation of the supposed net operating loss MAWC incurred during these ISRS case test periods by comparing the ISRS related depreciation expense for each test period against the Company's gross income accrued during the same test period.

The Commission has erred in determining that the IRS found that a net operating loss can occur during an interim period and thus erred in finding there was a net operating loss at all

The OPC's initial argument sought to show the Commission how it had plainly erred even if one accepts the premise that the IRS found a net operating loss can occur during an interim period. While doing so, though, the OPC noted that the Commission's conclusion that the IRS found a net operating loss can occur during an interim period was factually and legally unsound. The discussion of this second point will address why.

The principle language found in ruling number nine that underlies the Commission's decision is the following:

> 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 depreciation-related book/tax differences during the test period for the Surcharge Case which would not have arisen had Taxpayer not reported depreciation-related book/tax differences during the test period for the surcharge case

PUBLIC

Report and Order, pg. 5 – 6 ¶ 15. Now obviously the Commission is reading the phrase "for the test period for depreciation-related book/tax differences during the test period for the Surcharge Case" as modifying the word "NOL." This must be the case, because it is the only way that the Commission could reach the conclusion that an NOL can exist exclusively for a test period based on this language. However, this is an incorrect reading of the IRS's ruling.

Instead of being read to modify the word NOL, the phrase "for the test period for depreciation-related book/tax differences during the test period for the Surcharge Case" should be read as modifying the word "portion." This means that what the IRS is saying is that 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 Company's **overall NOL** and that said **portion** is the **portion** that is (1) assignable to the test period and (2) arose because of depreciation-related book/tax differences during the test period for the Surcharge Case. Stated differently, the IRS was simply recognizing that, when a Company **actually has an NOL**, it is necessary to assign the **portion** of that NOL that arises directly as a result of the ISRS case to the ISRS case itself. This, it should be pointed out, is something that even the Western District acknowledged in its prior decisions regarding this issue. *Mo.-American Water Co. v. P.S.C. of Mo.*, 591 S.W.3d 465, 477 (Mo. App. WD 2019) ("Had there been evidence of an NOL, Section 393.1000 would have necessarily required inquiry into whether the NOL generated could be linked to eligible infrastructure system replacements."). And yet, despite the obvious nature of this reading, the Commission has now decided to simply ignore the existence of the word "portion" and instead interpret ruling number nine in a manner that contradicts all available factual evidence, legal analysis, and basic logic for no apparent reason.

As this Commission itself has previously determined, an NOL is a tax return item. WO-2019-0184, *Report and Order*, pg. 6 ¶ 14 ("An NOL is a tax return adjustment and not a regulatory item."). This has been confirmed by the Western District based on acknowledgments by MAWC itself. *Mo.-American Water Co. v. P.S.C. of Mo.*, 591 S.W.3d 465, 476 (Mo. App. WD 2019) ("MAWC does not dispute the Commission's finding that, 'An NOL is a tax return adjustment and not a regulatory item.'"). Moreover, the evidence shows that "NOLs are calculated on an overall basis" and "are not split out for accounting purposes by the various tax deductions that may contribute to an NOL situation." Tr. pg. 108 ln. 17 – pg. 109 ln. 18. The evidence further shows how NOLs are not broken down by specific projects in the tax reports that the company files with the IRS. *See* Ex. 200 pg. 2 ln. 29, pg. 276 ln. 29. All of this factual evidence confirms the very basic point that the Commission itself has seen fit to acknowledge for the past two ISRS cases: there are not asset specific NOLs. Yet the Commission has now decided to abandon that point based wholly and exclusively on an interpretation of a private letter ruling that, as the OPC has already established, ignores part of the ruling itself and for which there is zero factual support.

In addition to ignoring the raw factual evidence, the Commission's interpretation of ruling number nine is also legally problematic. As the OPC has now pointed out at length, any NOL calculated for tax purposes has to be based off of **gross income** according to statutory definitions. 26 USC § 172 (c). A company cannot have multiple competing measures of gross income given the plain langue definition of that term included in the Internal Revenue Code.[1] 26 USC § 61. Thus

[1] Gross income means **all** of a company's income. 26 USC § 61. A company cannot have two competing measurements of gross income because then at least one of those measurements would necessarily not include **all** of the company's income (specifically the larger number would be the gross income and the smaller number would be something less than gross income because it is less than **all** available sources of income).

there is no way for a company to legally claim that it both has and does not have an NOL within the same tax year. And yet, that is exactly what has happened in this case.

**____

____ ** Ex. 200 pg. 276 ln. 29. Despite this, the Commission has now allowed MAWC to offset part of its ISRS revenue based on a supposed NOL that occurred during the 2018 taxable year. The Commission has thus determined that the Company **____ ** actually had an NOL for its 2018 tax year based wholly and exclusively on the **<u>Commission's</u>** interpretation of what the IRS said in a private letter ruling. In effect, the Commission has decided to interpret the IRS's private letter ruling in a way that violates the Internal Revenue Code by allowing the company to calculate an NOL based on something other than gross income. **<u>The Commission should not interpret the IRS's private letter ruling in a way that violates the Internal Revenue Code</u>**.

As a final note, beyond ignoring factual evidence and legal analysis, the Commission's interpretation of the IRS's private letter ruling makes no sense. The OPC posed a simple question to the Commission Staff's witness who testified on this issue: "Is it your position that a company can both have a net operating loss and not have a net operating loss simultaneously?" Tr. pg. 120 lns. 19 – 22. The Staff witness's initial answer was the correct one: "no." Tr. pg. 120 ln. 23. It is inherently illogical to the point of being nonsensical to say that a company is both operating at a net loss and not operating at a net loss at the same time. But, again, that is what this Commission has somehow managed to find by choosing to interpret the IRS private letter ruling in the way that it did. That last point deserves special attention.

This needs to be made perfectly clear: the error that the OPC is alleging does not lie with ruling number nine; it is with the way that **<u>the Commission</u>** has interpreted ruling number nine. To elaborate, if we return to the question the OPC posed to Staff's witness we will see that, after giving his correct initial answer of "no," the same witness attempted to suggest that the IRS saw things differently. Tr. pg. 121 lns. 2 – 6. He is wrong. The problem is not that the IRS had a different view than the Commission's Staff when it came to an NOL; the problem is that Staff's witness did not properly understand what the IRS had actually said regarding the supposed NOL. In other words, the Commission's staff has misinterpreted the legal significance of the ruling number nine. This is understandable, though, as the Staff witness was not a lawyer and thus had not been trained to parse the legal significance of the terms and wording found in the ruling. The Commission's staff counsel, on the other hand, should have advised the Commission otherwise.

Should this case ultimately be appealed, then the Appellate Court is going to have to undertake a legal analysis of ruling number nine. Because this will be a legal analysis (and thus a question of law) the Commission will receive no deference. *Mo.-American Water Co. v. P.S.C. of Mo.*, 591 S.W.3d 465, 469 (Mo. App. WD 2019) ("We review questions of law *de novo*."). Instead the Court will most likely employ the commonly understood canons of statutory construction, which include such requirements as giving every word meaning and interpreting in a manner to avoid violating the law. *State ex rel. Mobile Home Estates v. PSC of Mo.*, 921 S.W.2d 5, 10-11 (Mo. App. WD. 1996) ("[W]e are necessarily guided by the principle that all provisions of a legislative act must be construed together and the provisions must be harmonized, if possible, and every clause given some meaning."); *State v. Meacham*, 470 S.W.3d 744, 746 (Mo. banc 2015) ("Statutes are presumed valid and will be construed in favor of constitutional validity."). Under those circumstances, only the OPC's interpretation of ruling number nine makes any sense.

PUBLIC

At the end of the day it all comes down to this. Instead of trying to interpret ruling number nine in a manner that was consistent with its own prior decisions, the evidence presented, or the plain language of the relevant statutes; the Commission has chosen to adopt an interpretation that contradicts all of those things and is based on no legal or factual support whatsoever. This is both a textbook definition of arbitrary and capricious decision making as well as being clearly unlawful. As such, this decision represents a reversible error which the OPC urges the Commission to correct.

<u>The Commission has permitted MAWC to engage in an unlawful and impermissible collateral attack on its own prior decisions as well as the decisions of the Western District Court of Appeals</u>

It is well established under Missouri law that "A judgment rendered by a court having jurisdiction of the parties and subject matter is not open to collateral attack in respect of its validity or conclusiveness of the matters adjudicated." *M.W. v. S.W.*, 539 S.W.3d 910, 919 (Mo. App. WD 2017) (citing *Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. WD 2012).

> "'Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.'" *In the Interest of K.R.T.*, 505 S.W.3d 864, 868 (Mo. App. W.D. 2016) (quoting *Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. W.D. 2012)). "Generally, a judgment must be challenged via direct appeal and not by a collateral attack." *Id.* If the judgment was rendered by a court that had both subject-matter jurisdiction and personal jurisdiction, then the judgment is not open to attack. *Id.*

E.R. v. T.B. (In re A.R.B.), 586 S.W.3d 846, 860 (Mo. App. WD 2019). The prohibition on collateral attacks is made specifically applicable to the decisions of the Commission by action of statute. Mo. Rev. Stat. § 386.550 *("*In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."). Despite all of this clear

PUBLIC

precedent, the Commission has, nevertheless, still permitted MAWC to engage in an impermissible collateral attack on two of the Commission's own prior decisions as well as the Opinions issued by the Western District Court of Appeals upholding the Commission's decisions. This is clearly an error.

The Commission's previous decisions clearly and unambiguously stated that there was no NOL during the 2018 ISRS period. WO-2018-0373, *Report and Order*, pg. 6 ¶ 20 ("MAWC did not generate any NOL in the 2018 ISRS Period."); WO-2019-0184, Report and Order, pg. 12. ("The Commission, for the reasons discussed herein, finds there is not sufficient evidence to show an NOL being generated in the ISRS Period."). Those decisions were then further unambiguously affirmed by the Courts on appeal. *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*, No. WD83067, 2020 Mo. App. LEXIS 498 *16 – 17 (Mo. App. WD Apr. 21, 2020). MAWC's argument in this case is a direct attack on those findings and is thus an open and obvious collateral attack on the Commission's decisions in cases WO-2018-0373 and WO-2019-0184. Such an attack is legally impermissible under all relevant case laws and statutes. Mo. Rev. Stat. § 386.550; *E.R. v. T.B. (In re A.R.B.)*, 586 S.W.3d 846, 860 (Mo. App. WD 2019); *M.W. v. S.W.*, 539 S.W.3d 910, 919 (Mo. App. WD 2017); *Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. WD 2012). This decision thus represents plain legal error and the Commission should reconsider its decision accordingly.

<u>The Commission has failed to properly account for CIAC and other revenues based on an erroneous legal position</u>

In addition to its first and most important argument that there simply was no net operating loss to permit an adjustment to be made, the OPC also raised additional arguments regarding how the Commission had failed to consider alternative sources of revenue in its calculations.

Specifically, the OPC argued that MAWC and the Commission had failed to consider contributions in aid of construction ("CIAC") and the revenues generated by the sale of water flowing through the ISRS related pipe prior to the ISRS rates being set. The Commission's current *Report and Order* seeks to dismiss these arguments with a hand wave. Yet, the Commission's position is clearly legally flawed.

Because the Commission's analysis of both points is contained in a single paragraph each, the OPC shall address them line by line. The first sentence of the paragraph concerning CIAC merely lays out the argument and thus need not be considered much. *Report and Order*, pg. 14. The second sentence states: "The testimony of MAWC and Staff show that CIAC is already being counted and that MAWC's tariff directs that CIAC is included in general rate cases." *Id*. This statement is demonstrably false and is premised on an unfortunate misunderstanding by the Commission. In particular, the Commission has misconstrued how CIAC is incorporated into ratemaking since the passage of the Tax Cuts and Jobs Act ("TCJA").

Prior to the TCJA, CIAC was only an offset (reduction) to rate base due to the fact that a contractor bore the expense of the assets in question and therefore was not a MAWC cost. This calculation is still conducted to this day. However, the passage of the TCJA changed the tax code to require CIAC to be considered as <u>taxable income</u> (*i.e.* a tax return item). Riley, *Rebuttal*, pg. 5 lns 7 – 8. Therefore, CIAC now plays two separate roles. The first role involves revenue requirement in the form of a reduction in rate base (like it always has) and represents what the Staff and Company witnesses were referring to. The second role, though, is to be recognized as taxable income, which is something that the Commission has erred in overlooking.

Recall that a net operating loss is defined by statute as the excess of deductions over gross income. 26 USC § 172(c). Because CIAC is now required to be considered as taxable income

under the tax code, it must now be included in the calculation of a net operating loss. Riley, *Rebuttal*, pg. 5 lns. 13 – 15. However, CIAC is clearly not being included as taxable income in the calculation of MAWC's supposed net operating loss because the net operating loss is being calculated based on an assumed income of $0. *Report and Order*, pg. 5 ¶ 11. So there is plainly an error occurring here.

The Commission's position on this point really underlies the absurdity of this whole case. To put it succinctly, the uncontroverted evidence shows that MAWC **____________________ ____ ** and further (2) had more ISRS related income than it had ISRS related expenses during the 2018 ISRS test period. Yet, despite these two facts, the Commission has somehow determined that the Company was operating at a net loss during the 2018 ISRS period. This is a truly ridiculous position.

The next two lines should be handled together because they form a single complete thought. They are as follows:

> Furthermore, the PLR Ruling 9 specifically states that the NOL deducted against the depreciation related ADIT must be an amount that is no less than the amount computed using the With-and-Without Method. This calculation does not provide for revenue offsets of any type.

Report and Order, pg, 14. There is absolutely no legal support for the conclusion that the With-and-Without Method does not provide for revenue offsets of any type anywhere in the record. In fact, the only relevant legal point to consider is the definition of net operating loss found in the Internal Revenue Code which states effectively the exact opposite. 26 USC § 172(c). The Commission's conclusion here apparently means that the With-and-Without Method allows a NOL to be calculated using only depreciation expenses without any consideration for any kind of income. In reality, the Internal Revenue Code defines a net operating loss as expenses taken

PUBLIC

against gross income. *Id*. The Commission's interpretation of the With-and-Without Method language found in the private letter ruling is therefore erroneous.

The last substantive line reads: "[t]he PLR applicable to MAWC's ISRS, does not consider NOL treatment in the same context that would be applied for traditional income tax calculation purposes." *Report and Order*, pgs. 14 – 15. Based on this line, it is clear that, instead of attempting to harmonize the IRS's private letter ruling with the existing statutory law, the Commission has determined that the IRS – operating with absolutely no legal authority to do so – has created an entirely new tax treatment for NOLs that applies solely and exclusively to MAWC. The Commission should not operate with the assumption that the IRS sought to create new law through the course of a private letter ruling. On the contrary, instead of assuming that the IRS re-wrote the Internal Revenue Code when it issued its PLR, the Commission should be seeking to read the PLR in a matter that is **consistent** with the statutory law. To do that, though, the Commission would need to truly look at the statutory law as well as the calculations being performed and realize that CIAC has to be included.

The second issue really only has one substantive sentence. After laying out the OPC's argument the Commissions states thus: "As MAWC and Staff point out, this revenue is earned under the prior rates and thus cannot be double counted as revenue." *Report and Order*, pg. 15. The OPC is not seeking to have revenues be "double counted." As the OPC has pointed out numerous times, a net operating loss is defined by statute as the excess of expenses over **gross income**. 26 USC § 172(c). A company can only ever possibly have **one** amount of gross income. It is impossible for a company to claim a "base rates" gross income and an "ISRS" gross income, for example, because the second you start dividing income out among sources it is by definition no longer "gross." *See* 26 USC § 61. As such, including the revenues being earned in base rates in

the calculation of MAWC's supposed NOL is not "double counting," but rather, is counting only once **all** the income that MAWC is earning at any given point in time **from whatever source derived** per the Internal Revenue Code. *Id*. The Commission's failure to do this is reversible error, and warrants a rehearing.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant a rehearing of the June 17, 2020, *Report and Order* issued in the above styled case pursuant to the authority of RSMo section 386.500.

Respectfully submitted,

By: /s/ John Clizer
John Clizer (#69043)
Senior Counsel
Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5324
Facsimile: (573) 751-5562
E-mail: john.clizer@ded.mo.gov

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-sixth day of June, 2020.

/s/ John Clizer

PUBLIC