MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE PETITION OF MISSOURI-AMERICAN WATER COMPANY FOR APPROVAL TO CHANGE AN INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGES;

MISSOURI-AMERICAN WATER COMPANY AND MISSOURI PUBLIC SERVICE COMMISSION

RESPONDENTS,

v.

OFFICE OF THE PUBLIC COUNSEL

APPELLANT.

DOCKET NUMBER WD83924

DATE: May 11, 2021

Appeal From:

Public Service Commission

Appellate Judges:

Division Three: Thomas H. Newton, Presiding Judge, Gary D. Witt, Judge and W. Douglas Thomson, Judge

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Attorneys:

Dean L. Cooper, Jefferson City, MO, for respondent Missouri-American Water Company.
Jennifer Heintz, Jefferson City, MO, for respondent Public Service Commission

John A. Clizer, Jefferson City, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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MISSOURI-AMERICAN WATER COMPANY AND MISSOURI PUBLIC SERVICE COMMISSION, RESPONDENTS,
v.
OFFICE OF THE PUBLIC COUNSEL, APPELLANT.

WD83924 Public Service Commission

Before Division Three Judges: Thomas H. Newton, Presiding Judge, Gary D. Witt, Judge, and W. Douglas Thomson, Judge

The Office of Public Counsel appeals the order of the Public Service Commission holding that Missouri-American Water Company could raise the rates through its Infrastructure System Replacement Surcharge. Public Counsel argues the Commission's Order is unlawful in that the Commission misinterpreted an advisory option issued by the Internal Revenue Service and misapplied governing statutes.

REVERSED AND REMANDED.

Division Three holds:

The Commission erred in entering its Order adopting Missouri-American's methodology of calculating a net operatingloss ("NOL"), using "the accelerated depreciation expense of the new infrastructure subtracted from zero new revenues on that infrastructure." The Order is unlawful in that Missouri-American's and the Commission's methodology is inconsistent with the Internal Revenue Code, which defines a net operating loss as 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. A NOL cannot be calculated by limiting the consideration of income derived from and expenses related to one isolated project within the larger company. Therefore, the Commission misinterpreted Ruling 9. The result of the Commission's Order is to allow Missouri-American to claim a fictitious or hypothetical NOL that may or may not actually materialize and build that loss into its ISRS rate. The proper construction of Ruling 9, when considering the relevant statutes and case law, is:

Under the circumstances described, in order to comply with the normalization method of accounting within the meaning of [26 U.S.C. § 168(i)(9)], the amount of depreciation-related ADIT reducing rate base used to determine the revenue requirement set in the [first ISRS case]

must be decreased to reflect **that** portion of the NOL**, which 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, attributable to** the test period for the [first ISRS case] which would not have arisen had [Missouri-American] not reported depreciation-related book/tax differences during the te[s]t period for the [first ISRS 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. (Words in bold added).

We reverse the Order, and instruct the Commission to approve temporary rate adjustments in accordance with section 386.520.2(2), RSMo, and consistent with this opinion.

Opinion by: Gary D. Witt, Judge May 11, 2021

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