

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PENALTY ASSESSMENT AGAINST
VIRGIL R. FOX, President, American
Water Resources, Inc., in the amount of
\$3,700.00

DOCKET NO. UW-031596

STAFF RESPONSE TO
APPLICATION FOR
MITIGATION OF PENALTIES

1 On November 6, 2003, Virgil Fox, President of American Water Resources, Inc.
(AWR or Company), filed an application for mitigation (Application). Pursuant to
WAC 480-09-425, Commission Staff submits the following response. Commission Staff
respectfully requests that the application for mitigation be denied.

I. BACKGROUND

2 In Docket No. UW-010961, American Water Resources, Inc., (AWR) requested a
rate increase that included amounts for additional field and office staff personnel. The
Commission increased AWR's annual revenue requirement by 11.27% above its
previous revenue requirement. In doing so, the Commission required AWR to deposit
\$4.40 per month from each customer payment received into an account titled "Docket
010961 Account." *WUTC v. American Water Resources, Inc.*, Docket No. UW-010961,
Order Accepting Settlement Agreement (Dec. 18, 2001).

3 The Commission explicitly limited the purposes for which AWR could use the money required to be deposited into the Docket 010961 Account. *Id.* The Docket 010961 Account was to be used primarily for employee expenses associated with hiring additional employees, such as salary, transportation, benefits, and payroll taxes. The Commission ordered that the money required to be deposited into the Docket 010961 Account be used only to cover expenses for additional employees that exceed the average monthly amount spent during the test period. *Id.* at ¶ 19(c). AWR could also use the money to obtain vehicles for use by the two additional field employees AWR said it needed. *Id.* at ¶ 19(e).

4 Conditions on the use of the Docket 010961 Account money was appropriate because AWR had in the past requested rate increases that included amounts for additional personnel for field operations, but consistently failed to hire and maintain the additional positions. *See WUTC v. American Water Resources, Inc.*, Docket Nos. UW-980072, UW-980258, and UW-980265 (consolidated), Fifth Supplemental Order, Initial Order Rejecting Tariff Filing, Authorizing and Requiring Refiling at 28 (Nov. 24, 1998), *affirmed* Sixth Supplemental Order (Jan. 21, 1999); *WUTC v. American Water Resources, Inc.*, Docket No. UW-991392 (Nov. 1999) (matter settled); *WUTC v. American Water Resources, Inc.*, Docket No. UW-010961, Open Meeting Memorandum at 6 (July 25, 2001).

5 After the Commission entered its Order Accepting Settlement Agreement, AWR failed to deposit the required money into the Docket 010961 Account on several

occasions. AWR also improperly used money from the Docket 010961 Account in the amount of \$66,258.00. The failure to deposit and unauthorized use of funds resulted in the Commission imposing a penalty assessment against Virgil Fox in this docket. *Notice of Penalties Incurred and Due for Violations of Commission Order, Virgil R. Fox, President, American Water Resources, Inc., Docket No. UW-031596, Order No. 01; Penalty Amount: \$3,700.00 (Oct. 22, 2003) (Notice of Penalties).*

6 Mr. Fox now argues that the penalty assessment should be mitigated. Mr. Fox states that the money required to be deposited into the Docket 010961 Account was used for company purposes and that money was not available from other sources to pay company expenses.

II. ARGUMENT

7 Under RCW 80.04.405, the Commission is authorized to impose penalties against companies and company officers, agents, or employees for violations of Commission order. In this instance, the Commission imposed a penalty against Mr. Fox as an officer of AWR for violating the Order Accepting Settlement Agreement.

A. Mr. Fox Acted In Direct Violation of Commission Order.

8 AWR has a history of requesting rate increases that include amounts to hire future employees. AWR has a history of not hiring or maintaining the future employees after receiving funds to do so. To ensure that AWR would use money granted to it for additional employees in Docket No. UW-010961, the Commission imposed conditions on the Company. Those conditions included requiring the

Company to set aside certain funds and to use that money for certain purposes associated with hiring new employees.

9 Despite the conditions, AWR did precisely what it had done in the past: it failed to hire and maintain the additional employees it represented to the Commission it needed. Moreover, AWR executed a signed sales agreement to sell its largest water system less than one month after the Commission entered its order in Docket No. UW-010961, effectively eliminating the need for additional employees.¹

10 Because the Commission restricted the use of the money AWR was required to deposit into the Docket 010961 Account, Mr. Fox acted in direct violation of the Order Accepting Settlement Agreement when he allowed AWR to either fail to deposit money into the Account or use the money in an unauthorized manner. As a result, the penalty imposed in the Notice of Penalties is proper and should not be mitigated.

B. Proposals Brought to Staff by AWR Are Not Mitigating Factors.

11 Mr. Fox references two proposals AWR brought to Commission Staff regarding use of the Docket 010961 Account funds. Application at ¶ 4. Mr. Fox states that Staff “rejected” AWR’s proposals. *Id.* Staff does not possess the authority to reject requests to modify a Commission order, and Staff advised AWR of this. Although Staff cannot determine from Mr. Fox’s statements to what proposals he is referring, Staff does remember speaking with the Company regarding conditions imposed by the Order

¹ The sales agreement was executed on January 16, 2002. See *WUTC v. American Water Resources, Inc.*, Docket Nos. UW-031284 and UW-010961 (consolidated), Staff Response To AWR’s Petition to Allow Use of Funds, Attachment A at 13-14 (November 7, 2003); See *WUTC v. American Water Resources, Inc.*, Docket Nos. UW-031284 and UW-010961 (consolidated), Petition to Allow Use of Certain Funds at 1 (November 3, 2003).

Accepting Settlement Agreement. *See* Exhibit 1, Declaration of Gene Eckhardt. During conversations with the Company, Staff consistently told AWR that Staff is bound by the Commission's orders and does not have the authority to alter the requirements of any Commission order. *Id.*

12 Staff also consistently advised AWR that it should submit a request to the Commission asking the Commission to issue a new order if it wanted the conditions of the Docket 010961 Account changed. *Id.* The Company did attempt to seek a ruling from the Commission regarding the Docket 010961 Account. In November 2002, Julia Parker sent a letter on behalf of AWR requesting that the Commission modify the Order Accepting Settlement Agreement. *See* Exhibit 1, Declaration of Gene Eckhardt, Attachment A, Letter from Julia Parker. The Commission took no action on that request because AWR subsequently withdrew the request in January 2003. *See* Exhibit 1, Declaration of Gene Eckhardt, Attachment B, Letter from Rick Finnigan.

13 AWR's actions, approved by Mr. Fox, do not warrant mitigation of the penalties imposed by the Commission.

C. AWR Should Have Had Sufficient Funds to Cover its Expenses.

14 Mr. Fox argues that AWR used the money required to be deposited into the Docket 010961 Account for expenses not covered by other revenues. Application at ¶ 2. Although Mr. Fox's statement is too vague to determine to what expenses he is referring, he refers to the quarterly reports AWR was required to submit to the Commission. Application at ¶ 3. The quarterly reports did not indicate any major

problems with the Company's cash flow. In fact, the quarterly reports indicate to Staff that AWR's rates are too high at their current level.²

15 In addition, AWR has money available in other accounts earmarked for certain purposes. It appears that AWR is not using the money it has available to it. For example, AWR has a facilities charges account earmarked for capital improvements and repairs beneficial to AWR's customers. *See WUTC v. AWR, Inc.*, Docket Nos. UW-980072, UW-980258, UW-980265 (consolidated), Sixth Supplemental Order at 1 (Jan. 21, 1999). AWR states that one reason money was not deposited into the Docket 010961 Account is because an "emergency repair [was] made on one of the systems the company operates." Declaration of Julia Parker, ¶ 19. The emergency repair may have been an appropriate expense to be paid from the facilities charge account.

16 AWR also had a line of credit it could have accessed for certain expenses. The line of credit AWR possessed was recently renegotiated to consolidate the principle amount with another loan and will not be renewed. *See Exhibit 2, Declaration of Jim Ward, Attachment A, Response to Staff DR No. 5.* However, that line of credit was available to AWR when it made the choice to not fund the Docket 010961 Account in violation of Commission order.

17 The Commission found that the settlement agreement proposed by Staff and AWR in Docket No. UW-010961 provided AWR with the "opportunity to recover expenses that are appropriate for its operations and to earn a rate of return on its

² This is an issue to be determined in Docket Nos. UW-031284 and UW-010961 (consolidated). Staff's position will be that a rate reduction is appropriate.

investment that is appropriate for its business.”³ The Commission also found that the settlement agreement provided “adequate and appropriate protections to assure that the funds [required to be deposited into the Docket 010961 Account] are spent for the purposes intended.”⁴ If AWR found later that rates were not sufficient, the Company had an obligation to bring a rate request to the Commission for evaluation. AWR chose instead to improperly use money the Commission explicitly earmarked for specific purposes. Mr. Fox has not presented reasons sufficient to require mitigation of the penalties imposed by the Commission.

D. Julia Parker’s Statements Regarding Unauthorized Withdrawal Should be Disregarded.

18 Mr. Fox submitted a declaration from Julia Parker to support his application for mitigation. Ms. Parker discusses use of the Docket 010961 Account to meet AWR’s operating expenses in her declaration. Declaration of Julia Parker, ¶¶ 5-13. The Commission should disregard this discussion because it addresses penalties that were ultimately withdrawn from the penalty assessment. The original draft of the penalty assessment presented at the Commission’s Open Meeting on October 8, 2003, included penalties for use of funds from the Docket 010961 Account during June, July, August, and September 2002. Those penalties were excluded from the penalty assessment entered by the Commission at the October 22, 2003 Open Meeting, reducing the assessment to \$3,700.00. One penalty for unauthorized use of funds remained in the

³ Order Accepting Settlement Agreement at ¶ 12.

⁴ Order Accepting Settlement Agreement at ¶ 13.

penalty assessment because AWR used Docket 010961 Account funds to pay for tax liabilities not intended to be paid from that account.

III. CONCLUSION

19 Mr. Fox acted in direct violation of the Commission's Order Accepting Settlement Agreement. The Commission properly imposed a penalty assessment against Mr. Fox. No reason has been offered to warrant mitigation of the penalty. Therefore, the Commission should deny Mr. Fox's application for mitigation.

DATED this 9th day of December 2003.

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