

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	DOCKET NO. UW-031284 &
)	DOCKET NO. UW-010961
Complainant,)	(consolidated)
)	
v.)	ORDER NO. 06
)	
AMERICAN WATER RESOURCES,)	
INC.,)	ORDER DENYING PETITION TO
)	ALLOW USE OF CERTAIN FUNDS
Respondent.)	
.....)	

1 **Synopsis:** *the Commission denies American Water Resources, Inc.’s request to use funds from the “Docket Account” to defend itself in litigation relating to a complaint for trespass.*

I. MEMORANDUM

2 **Proceedings:** This is a complaint brought by the Commission against American Water Resources, Inc. (AWR). The complaint alleges that AWR failed to comply with the Order Approving Settlement Agreement in Docket No. UW-010961, including improper use of funds related to the “Docket 010961 Account” (Docket Account).

3 **Parties:** Richard A. Finnigan, attorney, Olympia, WA, represents American Water Resources, Inc. Lisa Watson, Assistant Attorney General, Olympia, WA, represents the staff of the Washington Utilities and Transportation Commission (Commission Staff).

4 **Petition to Allow the Use of Certain Funds (Petition):** On November 3, 2003, AWR filed a petition requesting that it be allowed to use funds, not to exceed \$20,000, from the Docket Account in order to defend against litigation relating to a trespass complaint and to pay a judgment or settlement amount, if any. Commission Staff recommends that the Petition be denied. AWR and Commission Staff agree to waive an initial order, and to present the matter directly to the Commission for final decision. *RCW 34.05.050.*

II. BACKGROUND

5 **Settlement Order, Docket No. UW-010961.** On December 18, 2001, the Commission entered an Order Approving Settlement Agreement (Order) in Docket No. UW-010961. In part, the Order required AWR to deposit \$4.40 per month from each customer payment received into a separate account named the "Docket 010961 Account" (Docket Account). The Commission limited the purposes for which AWR could use the money deposited into that account to additional employees and certain other employee-related expenses.

6 Shortly after the Order was entered, AWR sold a portion of its operating systems. Consequently, the projected level of employees contained in the Order was no longer required.

7 **Commission Complaint Against Rates, Docket No. UW-031284.** On August 13, 2003, the Commission, on its own motion, filed a complaint against AWR, alleging that AWR failed to comply with the Order in Docket No. UW-010961. The complaint asks that the Commission evaluate whether AWR's current rates and charges provide the Company with an excessive return, determine whether the Order in Docket No. UW-010961 should be amended to impose a refund obligation upon AWR, determine whether the set-aside obligation imposed in Docket No. UW-010961 should be canceled, and determine whether AWR should be required to make a new tariff filing reducing rates. The Commission consolidated Docket No. UW-010961 and Docket No. UW-031284.

8 **Partial Settlement Agreement, Docket Nos. UW-031284 and UW-010961.** On October 1, 2003, the Commission approved a proposed Partial Settlement (Partial Settlement) between Staff and AWR that discontinues the monthly set-aside amount of \$4.40 collected from customers, and credits each customer \$7.10 for funds collected and deposited in the Docket Account, and inappropriately used between August 13, 2003 and October 1, 2003. Issues that remain unresolved by the Partial Settlement include whether a further rate adjustment is required, and the treatment of money remaining in the Docket Account not subject to the credit obligation.

9 **Petition to Allow the Use of Certain Funds.** On November 3, 2003, AWR filed its Petition requesting permission to use funds from the Docket Account to defend against litigation. Our discussion of AWR's petition follows.

III. DISCUSSION AND DECISION

10 **AWR's Petition.** On August 30, 2002, Mark Davenport filed a complaint for trespass against AWR with the Superior Court. The complaint alleges that a portion of a water distribution main owned by AWR was constructed outside of the granted easement and is therefore trespassing on the property of Mr. Davenport and has caused Mr. Davenport damage. Mr. Davenport claims damages in the amount of \$50,000.00. According to AWR, the parties were involved in settlement discussions, and Mr. Davenport recently terminated those discussions. The matter is scheduled for trial on December 7 and 8, 2003.¹

11 AWR states that it finds itself in a position where it must try to defend itself against the claim brought by Mr. Davenport, but has no funds available to do so. AWR represents that there is approximately \$40,000.00 in the Docket Account after approximately \$10,000.00 is refunded to customers pursuant to the Partial

¹ AWR filed a Motion to Postpone the Trial Date until March 18 and 19, 2004. The Court heard the motion on November 7, 2003, and granted a postponement of the trial until February 2004.

Settlement approved by the Commission. AWR estimates that the matter can be tried with approximately \$10,000,00 in legal fees and expert witnesses' fees of \$2,000.00 to \$4,000.00.

12 AWR contends that it is in the best interests of its customers to expend monies out of the Docket Account to avoid having judgment rendered against the Company, and ultimately its customers, for trespass in the amount of \$50,000.00 or more.

13 **Commission Staff's Response.** Commission Staff requests that the Petition be denied. Staff argues that use of money from the Docket Account to defend against a lawsuit is inappropriate for the following reasons. First, the Docket Account was not intended to fund future litigation costs. Rather, it was intended to pay the costs of the additional employees. In addition, current rates are not designed to provide excess funds to prepay unknown expenses or investments.

14 Second, Staff argues that AWR should have discontinued collecting the \$4.40 per customer payment when the purpose for which the Commission allowed the collection became obsolete. Because collection continued, the money accumulated in the Docket Account. Staff notes that treatment of the money remaining in the Docket Account is an issue that will be resolved in this proceeding.

15 Third, Staff observes that AWR's request does not include an obligation to repay with interest consistent with the market rate for debt. Staff suggests that even allowing the company the use of the funds with an obligation to repay is not a viable option because the company seems unable to successfully fulfill such obligations. Staff refers to a recent Commission order where the Commission

- issued penalties against AWR's president for violations including failure to deposit funds as ordered and improperly using funds from the Docket Account.²
- 16 Staff further argues that defense of a major claim is not a recurring event. The Commission sets rates using prudent historical expense data adjusted to reflect known and measurable changes. Ratepayers do not pay for additional capital costs up front. Rather, costs are incorporated into rates after they have been incurred. Nonrecurring litigation costs are typically capitalized and amortized over an appropriate period of time.
- 17 Staff also questions AWR's claim that it has no funds available to defend against the trespass claim. Staff believes that AWR has available \$46,383.56 from a \$100,000.00 line of credit. *See* Attachment B to Staff Response, Declaration of Jim Ward, and Attachment C, Third Quarter Report, at p. 5, Item 224.7—FCB—Line of Credit #6470.
- 18 **Decision.** We agree with Commission Staff that use of the funds from the Docket Account to defend a lawsuit is inappropriate. The funds in the Docket Account were earmarked for specific purposes, not including future litigation costs. AWR's failure to deposit funds to the Docket Account and its improper use of funds from the Docket Account have resulted in the issuance of penalties against the company president. Moreover, issues related to the Docket Account form the basis for the Commission's complaint against rates in this proceeding. While the Commission, on occasion, has allowed a company's use of funds to meet an expense in advance of incurring the cost, we do not find it appropriate to grant the company's request in this case, given the history of this company and the problems associated with the Docket Account. Accordingly, AWR's petition to allow use of certain funds is denied.

² *Notice of Penalties Incurred and Due for Violations of Commission Order, Virgil Fox, President, American Water Resources, Inc., Docket No. UW-031596, Order No. 01, Penalty amount: \$3,700.00 (Oct. 22, 2003).*

DATED at Olympia, Washington, and effective this 21st day of November, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).