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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

MFS INTELENET, INC.;

SHARON L. NELSON, Chairman,
RICHARD HEMSTAD, Commissioner, and
WILLIAM P. GILLIS, Commissioner,
in their official capacities as Commissioners of
the Washington Utilities and Transportation
Commission; and

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Defendants.

NO. C97-0222WD

AMENDED COMPLAINT

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

U S WEST Communications, Inc. ("U S WEST") brings this Complaint for declaratory and injunctive relief under § 252(e)(6) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act"), 42 U.S.C. § 1983, the United States Constitution, and the Washington Constitution.

PARTIES

1. U S WEST is a public service corporation incorporated under the laws of the State of Colorado with its principal place of business in Denver. U S WEST maintains its

1
2 primary business office in the State of Washington at 1600 Seventh Avenue, Seattle,
3
4 Washington, 98181. U S WEST is authorized to provide telephone and other
5
6 communications services in Washington. Seventy-five percent of its Washington employees
7
8 work in King County, and over one-third of U S WEST's access lines in the state are located
9
10 in King County.

11
12 2. Defendant MFS Intelenet, Inc. ("MFS") is a company incorporated under the
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14 laws of the State of Delaware and is authorized to do business in Washington. MFS and
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16 U S WEST are the parties to the agreement at issue in this Complaint. MFS maintains its
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18 Washington business office and switch in Kirkland, Washington. MFS has constructed a fiber
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20 ring around Lake Washington.

21
22 3. Defendants Sharon L. Nelson, Richard Hemstad and William P. Gillis are, and
23
24 at all relevant times have been, Commissioners for the Washington Utilities and
25
26 Transportation Commission ("WUTC"). These defendants are sued in their official capacity
27
28 as commissioners who issued the order approving the agreement that is the subject of this
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30 Complaint. They are referred to throughout this Complaint as "the Commissioners."
31
32 Chairman Nelson is a resident of King County. All of the Commissioners are residents of the
33
34 Western District of Washington.

35
36 4. Defendant Washington Utilities and Transportation Commission ("WUTC") is
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38 the state commission in Washington which has regulatory jurisdiction with respect to
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2 intrastate operations of telecommunications carriers. The WUTC is a "State commission"
3
4 within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.¹
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6

7 JURISDICTION AND VENUE

8 5. This action arises under the Telecommunications Act of 1996 ("the Act"), 47
9 U.S.C. § 153, *et seq.*, 42 U.S.C. § 1983, and the United States and Washington Constitutions.
10 The Court has jurisdiction over U S WEST's claims that arise under the Act pursuant to 47
11 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The Court has jurisdiction over U S WEST's
12 claims under 42 U.S.C. § 1983 and the United States Constitution pursuant to 28 U.S.C.
13 §§ 1331 and 1343(a). This Court has jurisdiction over U S WEST's claims that arise under
14 the Washington Constitution pursuant to 28 U.S.C. § 1367.
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22 6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c)
23 because defendant MFS is subject to personal jurisdiction in this district, the individual
24 defendants reside in this district, and a substantial part of the events giving rise to U S
25 WEST's claims occurred in this district. The Seattle division of this district is the proper
26 forum for this action because the majority of the parties, witnesses and physical property at
27 issue are located in and around Seattle.
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45 ¹ WUTC has been joined as a party defendant pursuant to Fed. R. Civ. Proc. 19(a). See Order
46 on Motion of United States and FCC to Intervene and Commissioners' Motion to Dismiss entered in
47 this matter on July 24, 1997.

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FACTUAL ALLEGATIONS

A. U S WEST's Provision of Telephone Service In Washington and the Regulatory Framework Prior to the Telecommunications Act of 1996

7. U S WEST has provided local telephone and exchange access service in Washington for over 100 years. Today, U S WEST provides local telephone service and exchange access in 70 local exchanges in this state. For much of its history, U S WEST provided this service without competition in its service territories.

8. The WUTC regulates U S WEST's provision of local telephone service in Washington, including the rates U S WEST charges for services, its rates of return, and the structure and design of its rates. The WUTC also reviews U S WEST's levels of investment and its operating costs for reasonableness. Further, the WUTC purports to require U S WEST to serve every potential customer in its service areas, regardless of the cost of providing service, at rates fixed by the WUTC. To foster universal telephone service, or telephone service at a low price to all requesting customers, the WUTC requires U S WEST to charge local exchange customers a uniform rate, even if the cost of providing service to those customers varies dramatically.

9. In the past, the WUTC's regulation of U S WEST's rates has included an array of cross-subsidies. As a result, certain customers paid less than the cost of providing service to them, while other customers, for whom the WUTC decided the value of telecommunications service was higher, paid more than the cost of providing service to them. As long as U S WEST operated without competition in its service areas, this cross-subsidy allowed U S WEST to recover its costs and earn a reasonable return on its investment, even though some customers received service at a below-cost rate. Although the WUTC purports

1
2 to base U S WEST's current rates on its costs, the WUTC still requires U S WEST to provide
3
4 some services below cost.

5
6 10. Through the ratemaking process, the WUTC also regulates when and how U S
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8 WEST recovers the investments it makes in its facilities. In its role as the historic provider of
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10 local telephone service, U S WEST has invested billions of dollars in network facilities and
11
12 equipment in Washington. From 1990 to the present, U S WEST has invested more than \$2.3
13
14 billion to provide service in Washington. As a result, U S WEST has built and owns as its
15
16 private property a high-quality, ubiquitous telephone network capable of serving all potential
17
18 customers in its service territories.

19
20 **B. The Telecommunications Act of 1996**

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22 11. In February 1996, Congress enacted the Telecommunications Act of 1996,
23
24 Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 153, *et seq.*, which amends the
25
26 Telecommunications Act of 1934. The Act is a dramatic departure from prior approaches to
27
28 regulation of local telephone service. It is designed to foster competition in both local and
29
30 long distance telephone markets and, among other things, sets forth a comprehensive scheme
31
32 for removing barriers to entry into these markets.

33
34 12. One of Congress' goals under the local competition provisions of the Act , 47
35
36 U.S.C. §§ 251-261, was to promote the rapid development of facilities-based competition, or
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38 competition premised upon new entrants building their own local telephone networks. The
39
40 Act reflects Congress' judgment that encouraging facilities-based competition would spur
41
42 technological innovations, encourage investment in the booming telecommunications industry
43
44 and create jobs.

1 **1. Obligations Under the Act**

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3 13. Congress recognized that new entrants into the local telephone markets were
4 unlikely to be able to build their own facilities immediately upon entering the markets.
5 Accordingly, the Act provides two separate and distinct mechanisms for competitors to
6 provide telecommunications services. First, competitors can purchase individual, unbundled
7 network elements, such as an individual loop,² that they can combine with their own network
8 facilities to provide services to their customers. Second, competitors can purchase at
9 wholesale prices an incumbent local exchange carrier's assembled finished services, such as
10 residential or business telephone service, for resale. Through these methods, Congress
11 envisioned that new entrants could begin competing before their own competing networks
12 were in place.
13
14

15 14. To facilitate competition, Congress also established specific obligations for
16 three categories of telecommunications service providers. Section 251(a) contains the
17 minimum requirements with which all telecommunications carriers, the broadest category of
18 telecommunications service providers, must comply. Section 251(b) imposes additional
19 obligations on local exchange carriers ("LECs"), companies that provide local telephone
20 service and local exchange access for long distance telephone companies.
21
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23 15. Section 251(c) imposes further obligations on *incumbent* local exchange
24 carriers ("incumbent LECs"), those telephone companies that have served as the historic
25 provider of local telephone service and exchange access in a particular area. U S WEST is an
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45 ² "Loops" are the wires and other equipment that connect individual telephone customers to
46 U S WEST's central offices (or switches), its trunk lines (or high-capacity lines), call-related databases
47 and support systems.

1
2 incumbent LEC. In addition to obligations under § 251(a) and (b), under § 251(c) incumbent
3
4 LECs have the duty to:

- 5
6 (1) negotiate in good faith to reach agreements under § 252 of the Act;
7
8 (2) offer interconnection to competing providers at "any technically
9 feasible point" within their network. Interconnection must be at least
10 equal in quality to that provided by the LEC to itself, its subsidiaries,
11 affiliates or any other carrier, and must be provided on "rates, terms,
12 and conditions that are just, reasonable, and nondiscriminatory;"
13
14 (3) provide access to unbundled network elements at "any technically
15 feasible point" on "rates, terms, and conditions that are just, reasonable,
16 and nondiscriminatory." "Network elements," defined in § 153(29), are
17 facilities or equipment used in the provision of telecommunications
18 services, including features, functions and capabilities that are provided
19 by means of those facilities or equipment. "Unbundling" refers to
20 selling individual network elements, as opposed to aggregations of
21 network elements, for the exclusive use of the purchasing
22 telecommunications carrier;
23
24 (4) offer for resale at wholesale rates any telecommunications service
25 that the carrier provides at retail prices to customers who are not
26 telecommunications carriers;
27
28 (5) provide notice of changes in the information necessary for the
29 transmission and routing of services on the incumbent LEC's network;
30 and
31
32 (6) provide for collocation of the equipment necessary for
33 interconnection or access to unbundled elements on "rates, terms, and
34 conditions that are just, reasonable, and nondiscriminatory." Physical
35 collocation requires the incumbent LEC to turn over space within its
36 offices to its competitors so that the competitors can install and operate
37 their own equipment. Virtual collocation requires the incumbent LEC
38 to dedicate to its competitors the equipment they request and to permit
39 those competitors to interconnect with that equipment within the
40 incumbent LEC's offices.
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16. Although Congress created a host of new obligations for incumbent LECs, it also placed important limits on those obligations. In order to avoid an unconstitutional taking of incumbent LEC property, Congress mandated that incumbent LECs are entitled to recover the costs of providing interconnection, unbundled network elements, transportation and termination of traffic, resale and collocation, plus a reasonable profit.

17. Congress also determined that incumbent LECs are not required to unbundle every aspect of their business for the benefit of their competitors; rather, they must provide only those network elements that are necessary for competitors to provide local telephone service. Through these protections, Congress ensured that vigorous, facilities-based competition would grow under the Act.

2. Reaching Agreements Under the Act

18. To implement these new rights and obligations, § 252 of the Act sets forth a comprehensive framework for reaching agreements. As evidenced in §§ 251(c) and 252(a), Congress intended that agreements would be reached through private negotiation between the parties. If negotiations fail to resolve all outstanding issues under the Act, a party can seek mediation under § 252(a)(2). If mediation does not result in an agreement, a party may seek compulsory arbitration under § 252(b).

19. The Act delegates to state commissions responsibility for conducting arbitrations under § 252(b), subject to important limitations. Under § 252(e)(2)(B), for example, a commission can reject an agreement, or a portion of an agreement, reached through arbitration only if it finds that the agreement does not meet the requirements of § 251, including any FCC regulations then in effect under that section, or the standards in § 252(d).

1 **3. The Role of Federal Courts**

2
3 20. The Act gives federal district courts a key role in the process of establishing
4 interconnection agreements. As a backstop to the delegation of implementation responsibility
5 to state commissions, the Act provides for federal court review of agreements reached under
6 § 252. Section 252(e)(6) provides that in "any case in which a State commission makes a
7 determination under this section, any party aggrieved by such determination may bring an
8 action in an appropriate Federal district court to determine whether the agreement . . . meets
9 the requirements of the Act." Federal court review is a critical feature of Congress' federal-
10 state implementation scheme because it ensures that a federal body will protect the rights and
11 obligations established under federal law.
12
13

14 **C. The FCC's First Report and Order**

15 21. Section 251(d)(1) of the Act gives the Federal Communications Commission
16 (the "FCC") the authority to "establish regulations to implement the requirements" of the
17 Section regarding interconnection, unbundling, and resale.
18

19 22. On August 8, 1996, the FCC issued its 700-page First Report and Order in
20 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,
21 FCC Docket No. 96-98, 61 Fed. Reg. 45476 (Aug. 29, 1996) (hereafter "FCC Order"), that
22 dictated to state commissions rules for reviewing and arbitrating interconnection agreements
23 and prices incumbent LECs would receive for interconnection, unbundling and resale. The
24 FCC Order attempts to regulate virtually every aspect of local telecommunications
25 competition.
26

27 23. Critical provisions of the FCC Order relating to pricing methodology,
28 unbundling, access to network elements, and proxy prices, were stayed by the United States
29 Court of Appeals for the Eighth Circuit on September 27, 1996. Iowa Utilities Board et al. v.
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2 FCC, No. 96-3321, 1996 U.S. App. LEXIS 27953, 1996 WL 589204, 1996-2 Trade Cas.
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4 ¶ 71,598 (8th Cir. 1996). The petitioners there established that they enjoyed a substantial
5
6 chance of prevailing on the merits of their claim that the FCC Order violated the Act. The
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8 Supreme Court of the United States refused to vacate the stay *en banc* on November 12,
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10 1996. 117 S. Ct. 429. Oral argument was heard on permanently vacating the FCC Order on
11
12 January 17, 1997.

13
14 24. On July 18, 1997, the Eighth Circuit vacated certain provisions of the FCC
15
16 Order that had been the subject of the earlier stay. Iowa Utilities Board et al. v. FCC, 1997
17
18 U.S. App. LEXIS 18183 (8th Cir. July 18, 1997).

19
20 **D. The Arbitration Between U S WEST and MFS**

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22 25. On February 8, 1996, U S WEST received a request from MFS for
23
24 interconnection and related network elements under § 251.

25
26 26. Negotiations resolved most, but not all, outstanding issues between the parties,
27
28 and on June 24, 1996, MFS filed a petition with the WUTC for arbitration with U S WEST
29
30 pursuant to § 252(b).

31
32 27. On June 28, 1996, the Commissioners and the WUTC (hereinafter "the
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34 Commission Defendants") entered an Order on Arbitration Procedure, appointing an arbitrator
35
36 and establishing procedures for the arbitration. The arbitrator appointed by the Commission
37
38 Defendants adopted "final offer" or "baseball" arbitration, under which the arbitrator would
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40 select between the parties' last proposals as to each unresolved issue.

41
42 28. On July 19, 1996, U S WEST filed its response to the MFS petition, and
43
44 provided the arbitrator with detailed studies reflecting U S WEST's costs to establish rates for
45
46 interconnection, unbundling and resale.
47

1
2 29. An arbitration hearing was held on September 18 and 19, 1996. U S WEST
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4 presented three witnesses who sponsored over 350 pages of pre-filed testimony (plus
5
6 appendices and complete and documented cost studies) that established not only the costs of
7
8 providing facilities and services requested by MFS, but also addressed technical issues raised
9
10 by MFS's requests. By contrast, MFS failed to present any cost studies. Indeed, the MFS
11
12 witness who very briefly criticized U S WEST's cost studies admitted that he had devoted no
13
14 more than 6-8 hours to reviewing those studies, and that he had not reviewed them at all at
15
16 the time he filed his direct testimony.

17
18 30. On October 2 and 8, 1996, the parties filed final briefs and "final offers" on
19
20 each contested issue.

21
22 31. On October 23, 1996, the Commission Defendants stated in this and other
23
24 arbitration dockets under the Act that a separate, generic proceeding would be initiated to
25
26 review costing and pricing issues for interconnection, unbundled network elements, transport
27
28 and termination and resale. Accordingly, rates adopted in pending arbitrations, including the
29
30 arbitration at issue in this Complaint, are interim rates until the Commission Defendants
31
32 conduct a hearing on cost issues in the generic cost proceeding later this year. However, the
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34 agreement at issue in this Complaint and the generic cost proceeding do not contain any true-
35
36 up provision that requires MFS to reimburse U S WEST for any deficiency in the interim rates
37
38 or prices. Indeed, the Commission Defendants rejected U S WEST's request that the interim
39
40 rates and prices in the MFS agreement be subject to true-up. U S WEST reserves its rights to
41
42 join in this action such claims as may arise from the generic cost proceeding.

43
44 32. On November 8, 1996, the arbitrator issued his Arbitrator's Report and
45
46 Decision which required that the parties submit a contract in compliance with that decision.
47

1
2 On December 9, 1996, MFS requested approval of the arbitration order by the Commission
3 Defendants. On the same date, U S WEST filed a Request for Approval of Arbitrated
4 Agreement and a Request to Adopt, Modify, and Reject the Interconnection Agreement which
5
6 objected to the provisions complained of in this Complaint.
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10 33. The parties also filed on that date a signed agreement consistent with the
11 arbitrator's order. A copy of that agreement is attached as Exhibit 1 (the "Agreement").
12
13

14 34. On January 8, 1997, the Commission Defendants approved and adopted the
15 arbitration order and the signed agreement in their Order Approving Negotiated and
16 Arbitrated Interconnection Agreement, a copy of which is attached as Exhibit 2. The
17 Arbitrator's Report and Decision is attached to that order, at Appendix A.
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22 **E. The Provisions U S WEST Challenges**
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24 35. U S WEST challenges the following disputed provisions of the Agreement, for
25 the reasons set forth in the counts of this Complaint:
26
27

- 28 • Price of the Unbundled Loop (3-8);³
- 29
- 30 • Denial of Construction (8-10, 20-21) and Conditioning (11-12)
- 31 Charges;
- 32
- 33 • "Finished Service" Unbundling ("Sham Unbundling") (12-14);
- 34
- 35 • Wholesale Discount (14-15);
- 36
- 37 • Resale of Deregulated Services (18-19);
- 38
- 39 • Tandem Treatment for MFS Call Termination (23-25);
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45 ³ The numbers in the parentheses refer to the page numbers of the Arbitrator's Report and
46 Decision, Appendix A to Exhibit 1 hereto.
47

- Failure to Exempt Enhanced Service Provider (ESP) Call Termination (25-26);
- Interim Number Portability Switched Access Charges (27-28) and Cost Recovery (28-29); and
- Interconnection Architecture (31).

F. Harm to U S WEST

36. If U S WEST is forced to comply with the Agreement, it will suffer irreparable harm. U S WEST will lose millions of dollars providing facilities and services at below cost prices to MFS. Although the prices in the Agreement are interim, the Agreement contains no true-up provision requiring MFS to reimburse U S WEST for any deficiency in the current prices. Thus, even if the interim prices are corrected in the generic pricing proceeding, U S WEST will have lost substantial sums of money providing service to MFS below cost, while that proceeding moves forward with no definite date for completion.

37. The Agreement places U S WEST at a marked competitive disadvantage to MFS, contrary to the competitively-neutral intent of the Act. Further, the Agreement provides no incentive to MFS to invest in facilities in Washington and, indeed, discourages such investment by any company.

38. As a result of the requirements of the Agreement described in this Complaint, U S WEST is aggrieved within the meaning of Section 252(e)(6) and will suffer irreparable harm, including loss of its customer base, harm to its good will and reputation, loss of revenues, the inability to negotiate with other competitors on a fair and equal basis, and

1
2 damage to its substantial investment in its telecommunications network.⁴ The public interest
3
4 and competition in the market for local telephone service will also suffer.
5

6 **COUNT I: IMPOSITION OF BELOW-COST PRICING IN**
7 **VIOLATION OF PRICING PROVISIONS**
8 **(47 U.S.C. §§ 251(c)(2) and 252(d))**
9

10 39. The Agreement contains prices for unbundled network elements that fall far
11 short of allowing U S WEST to recover its costs. Further, it contains a significantly inflated
12 wholesale discount rate to be applied to U S WEST's sale of wholesale services that will
13 prevent U S WEST from recovering its costs. The Agreement deprives U S WEST of its
14 right to recover the costs of construction or conditioning costs incurred in providing
15 interconnection. The Agreement also inappropriately treats MFS' call termination as tandem
16 and imposes interconnection requirements compelling U S WEST to provide transport and
17 termination services without just and reasonable compensation.
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26 40. In each instance, the prices and rates at issue do not allow U S WEST to
27 recover the actual costs it incurred to build its Washington network and are directly contrary
28 to the statutory pricing mandates of the Act. Further, the pricing provisions are not supported
29 by the evidence presented and are unlawful.
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34 41. In addition, although the Commission Defendants labeled the rates "interim"
35 pending the outcome of the separate, generic cost proceeding, the Commission Defendants
36 rejected U S WEST's request that the interim rates should be subject to true-up.
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46 ⁴ U S WEST has suffered, or will suffer, irreparable harm as a result of the Agreement.
47 MFS has not yet interconnected with U S WEST and has not yet placed any orders. As such activity
approaches or occurs, U S WEST may seek injunctive relief in this action.

1 **A. Price of the Unbundled Loops**
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3 42. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
4 herein.
5

6
7 43. Pursuant to §§ 251(c)(2) and 252(d)(1), prices for interconnection and access
8 to unbundled network elements must be cost-based and non-discriminatory.
9

10
11 44. The price for unbundled network elements contained in the Agreement is not
12 based upon U S WEST's costs, and is below cost. MFS failed to present *any* evidence
13 supporting its proposed unbundled loop price. The price in the Agreement was not supported
14 by any evidence presented in the arbitration and is unlawful.
15

16
17 45. Accordingly, the price for unbundled network elements in the Agreement
18 violates §§ 251(c)(2) and 252(d)(1).
19

20 **B. Unrecovered Costs of Construction and Conditioning Charges**
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23 46. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
24 herein.
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26
27 47. Pursuant to §§ 251(c)(2) and 252(d), U S WEST is entitled to recover the
28 costs of providing interconnection and network elements to requesting carriers and may
29 recover a reasonable profit. In addition, the FCC Order permits incumbent LECs to recover
30 the costs of unbundling network elements, such as construction charges, from requesting
31 carriers. FCC Order at ¶ 200. These costs include the costs of modifying U S WEST's
32 network to allow for specific requests for interconnection and unbundling and the cost of
33 implementing individual agreements with LEC's, including MFS.
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36 48. The Agreement denies U S WEST the right to recover the costs of making
37 changes to its network facilities and services and in its operations to provide interconnection
38 and unbundled network elements. Such costs include construction costs for previously
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1
2 unplanned upgrades to U S WEST's network and conditioning of loops to ensure the
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4 necessary transmission standard for particular services.
5

6 49. Despite the statutory mandate in §§ 251(c)(2) and 252(d), the Agreement does
7
8 not allow U S WEST to recover the costs of providing interconnection and making changes to
9
10 its network facilities, services and operations or to receive advance payment for performing
11
12 these functions. The Agreement permits U S WEST to recover construction costs from MFS
13
14 only if it could recover them from a U S WEST end user pursuant to U S WEST's tariffs.
15

16 50. Accordingly, the Agreement violates §§ 251(c)(2) and 252(d).
17

18 **C. Wholesale Discount**
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20 51. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
21
22 herein.
23

24 52. Pursuant to § 252(d)(3), wholesale prices for services subject to resale must be
25
26 based on U S WEST's retail rates for services minus U S WEST's avoided costs.
27

28 53. Contrary to the terms of § 252(d)(3), the wholesale discount in the Agreement
29
30 is not based on the costs that U S WEST will in fact avoid by providing retail services at
31
32 wholesale rates. MFS failed to present *any* evidence supporting its proposed discount rate.
33

34 54. The wholesale discount imposed by the Agreement is excessive, prevents
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36 U S WEST from recovering the costs of providing services to its competitors, was not
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38 supported by any evidence presented in the arbitration, and is unlawful.
39

40 55. Accordingly, the wholesale discount rate in the Agreement violates
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42 § 252(d)(3).
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1 **D. Tandem Treatment for MFS Call Termination**
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3 56. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
4 herein.
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7 57. Transport and termination of traffic involves four elements: (1) tandem
8 switching (switching used to route traffic among U S WEST's central offices and to points-of-
9 presence of long distance carriers), (2) tandem transport (common transport of the call from
10 the tandem switch to the end office switch⁵), (3) direct trunk transport (dedicated transport
11 between end-office switches), and (4) end office switching, also known as call termination.
12
13 As set forth above, the Act requires state commissions to adopt prices for transport and
14 termination of traffic that are just and reasonable and that allow carriers to recover the costs
15 associated with providing transport and termination services. Section 252(d)(2)(A) provides
16 that compensation for these services must "provide for mutual and reciprocal recovery by each
17 carrier of costs associated with transport and termination on each carrier's network facilities of
18 calls that originate on the network facilities of the other carrier"
19
20

21 58. The Agreement provides "tandem rate treatment" for calls terminated on
22 MFS's own network by MFS switches. That is, MFS proposed to treat call termination on
23 U S WEST and MFS switches as though they had comparable switching functionality. Under
24 this proposal, a single, reciprocal per-minute rate for tandem termination is imposed both on
25 MFS and U S WEST. Despite the un rebutted evidence at the arbitration hearing that the
26 MFS switch cannot offer U S WEST switching functionality comparable to that offered to
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46 ⁵ The end office switch is the switch used to route calls from an interoffice trunk to a
47 customer's line.

1
2 MFS on U S WEST switches, the arbitrator adopted the MFS proposal for tandem treatment
3
4 for its switch and the Commission Defendants adopted this proposal.
5

6 59. Accordingly, the Agreement violates § 252(d)(2) by requiring U S WEST to
7
8 provide transport and termination services without just and reasonable compensation.
9

10 **E. Enhanced Services Traffic**

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12 60. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
13
14 herein.

15
16 61. U S WEST sought to exempt from reciprocal compensation provisions any
17
18 traffic originated or terminated by enhanced service providers, i.e., Internet traffic and voice
19
20 mail services. Internet traffic increasingly distorts traffic volumes because the average holding
21
22 times for this type of traffic range up to twenty minutes, compared to four minutes for non-
23
24 Internet traffic. Nevertheless, over U S WEST's objection, the Agreement requires reciprocal
25
26 compensation for enhanced services traffic. This will result in a failure by U S WEST to
27
28 cover its costs for transporting and terminating traffic to MFS.
29

30 62. The Agreement thus violates §§ 251(c) and (d).
31

32 **F. Interconnection Architecture**

33
34 63. U S WEST incorporates by reference paragraphs 1-41 as if fully set forth
35
36 herein.

37
38 64. Because, as a practical matter, calls for MFS will be transported within
39
40 U S WEST's network unless and until MFS builds its own facilities, U S WEST must absorb
41
42 any costs for call transport that are not covered by the prices set in the Agreement. The cost
43
44 of transporting a call is determined in part by the distance that the call must be transported.
45
46
47

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2 65. Because of this, U S WEST proposed that "points of interface" be established
3
4 for local traffic so that calls would be routed within the relatively short distances of local
5
6 calling areas. However, the Agreement adopted by the Commission Defendants imposes
7
8 MFS' proposal that the point of interconnection need not be located within the rate center area
9
10 or at the rate center point. Instead, MFS proposes that U S WEST deliver local traffic to
11
12 MFS *in Seattle* for all local calls within the LATA.⁶ For example, MFS proposes that a local
13
14 call between a U S WEST customer and an MFS customer in Olympia would have to be
15
16 delivered by U S WEST to MFS' switch in Seattle. This would require U S WEST to
17
18 transport that local call between two parties in Olympia nearly 65 miles to MFS' Seattle
19
20 switch, from which the call would be transported back to Olympia for completion. By
21
22 imposing such transport arrangements rather than allowing U S WEST to deliver the call to
23
24 MFS at a point of interface in Olympia, the Agreement imposes additional, unrecoverable
25
26 costs on U S WEST.

27
28 66. Accordingly, the interconnection architecture provision of the Agreement
29
30 violates § 252(d)(2) by requiring U S WEST to provide transport and termination services
31
32 without just and reasonable compensation.
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43 ⁶ A LATA is a Local Access and Transport Area. It is a geographic area established by the
44 consent decree divesting the Bell System into interLATA and intraLATA components, i.e., toll and
45 local companies. The Western Washington LATA encompasses all of Western Washington with the
46 exception of Southwest Washington. See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982),
47 aff'd sub. nom. Maryland v. United States, 460 U.S. 1001 (1983).

COUNT II: UNLAWFUL SHAM UNBUNDLING
(47 U.S.C. §§ 251(c), 252(d), 271(e)(1))

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67. U S WEST incorporates by reference paragraphs 1-38 as if fully set forth herein.

68. As discussed above, the Act allows competitors to provide services either through purchase of network elements that are used with the competitor's facilities or through purchase of finished services through resale. The Act draws an important division between "network elements" and "services" available for resale. The Act requires that the price for network elements be based on an incumbent LEC's *costs* (§ 252(d)(1)), whereas the price for services must be based on an incumbent LEC's *existing retail rates* (minus avoided costs) (§ 252(d)(3)). The Act contemplated that resale of service by new LECs such as MFS would be at a discount from retail, but that such LECs could purchase individual network elements on a cost basis ("unbundling").

69. The Agreement, however, permits MFS to purchase on an unbundled basis from USWC -- at hypothetical cost-based rates -- *all* of the network elements necessary to provide the completed service. That is, MFS is allowed to buy each unbundled element individually at cost, and then pretend to rebundle all of them into the original service, when in fact no unbundling takes place at all. MFS can require U S WEST to disaggregate its network elements, then "reaggregate" those same elements into a finished service and sell the reaggreated elements to MFS at their unbundled element rates. "Sham unbundling" is a fiction in that it does not involve any unbundling at all. Unlike true unbundling, where a competitor would purchase individual elements to use with their own facilities to provide services to their customers, "sham unbundling" requires no use of the competitor's facilities.

1
2 70. "Sham unbundling" violates the Act because it eviscerates the pricing
3
4 distinction Congress established between the purchase of network elements by facilities-based
5
6 competitors and the purchase of finished services by pure resellers. It further violates the Act
7
8 by undermining the restriction Congress placed on the joint marketing of long distance service
9
10 with local service provided through resale. To provide parity among telecommunications
11
12 carriers in the provision of "one stop shopping" for telecommunications services, in
13
14 § 271(e)(1) Congress prohibited large telecommunications carriers, such as MFS, from jointly
15
16 marketing long distance telephone service with local service provided through resale until a
17
18 Bell operating company (defined in § 153(4) and including U S WEST), is authorized to
19
20 provide long distance service in its home region under § 271 or until three years from the date
21
22 of the Act's enactment. By permitting "sham unbundling," the Agreement permits large
23
24 telecommunications carriers to avoid this express joint marketing restriction.
25

26 71. MFS has a strong economic incentive to take advantage of the "sham
27
28 unbundling" provision because of the significant price advantage MFS will enjoy through
29
30 sham unbundling. In some circumstances--where, for example, U S WEST's services are
31
32 priced above cost under WUTC-approved tariffs--the price for the network elements,
33
34 reaggregated to form a finished service, is lower than the wholesale rate for the identical
35
36 service sold in its finished state. Thus, "sham unbundling" permits MFS to engage in rate
37
38 arbitrage. The Act requires unbundling so that competing LECs will not have to purchase
39
40 more than they need from U S WEST, not so that they can further arbitrage U S WEST's
41
42 prices. During the arbitration proceedings, U S WEST presented substantial evidence that
43
44 sham unbundling would cause significant price arbitrage, would discourage the development
45
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47

1
2 of competing facilities, and would place U S WEST's competitors at a significant, and unfair,
3
4 advantage in the marketplace.
5

6 72. The "sham unbundling" provision in the Agreement would require U S WEST
7
8 to provide reaggregated unbundled elements far below cost, and violates §§ 251(c), 252(d)
9
10 and 271(e)(1).
11

12 **COUNT III: VIOLATION OF DELEGATED AUTHORITY**
13 **(47 U.S.C. § 252(b)(4) and (c))**
14

15 73. U S WEST incorporates by reference paragraphs 1-38 as if fully set forth
16
17 herein.
18

19 74. Section 251(c)(4)(A) requires incumbent LECs to offer for resale at wholesale
20
21 rates any "telecommunications service" that the carrier provides at retail to subscribers who
22
23 are not telecommunications carriers. Section 251(c)(4)(B) also provides that the incumbent
24
25 LEC shall not impose unreasonable or discriminatory conditions or limitations on the resale of
26
27 such telecommunications services. Nowhere does the Act require that an incumbent LEC
28
29 offer for resale deregulated or unregulated services. Services not regulated are by definition
30
31 not telecommunications services.
32

33 75. Despite this, the Agreement the Commission Defendants approved concludes
34
35 that *deregulated* services must be made available for resale under the Act. This would require
36
37 access to U S WEST's separate, unregulated businesses and the business of affiliates of U S
38
39 WEST. This requirement has no basis in the Act or state law, and the Commission
40
41 Defendants have no authority to impose this requirement.
42

43 76. By imposing resale of deregulated services on U S WEST without any
44
45 authority under the Act or state law, the Commission Defendants exceeded their authority
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47

1
2 under §§ 252(b)(4) and 252(c), and the Agreement's provisions regarding deregulated services
3
4 are unlawful.
5

6
7 **COUNT IV: UNLAWFUL TREATMENT OF COST RECOVERY**
8 **AND ACCESS REVENUES**
9 **FOR INTERIM NUMBER PORTABILITY**
10 **(47 U.S.C. §§ 251(b)(2) and 251(e)(2))**
11

12 77. U S WEST incorporates by reference paragraphs 1-38 as if fully set forth
13 herein.
14

15 78. Section § 251(b)(2) requires that an incumbent LEC shall "provide, to the
16 extent technically feasible, number portability in accordance with the requirements prescribed
17 by the [FCC]." The Act defines number portability as the "ability of users of
18 telecommunications services to retain, at the same location, existing telecommunications
19 numbers without impairment of quality, reliability, or convenience when switching from one
20 telecommunications carrier to another." 47 U.S.C. § 153(30). Section 251(e)(2) requires that
21 the cost of number portability "shall be borne by all telecommunications carriers on a
22 competitively neutral basis"
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31 79. The FCC interpreted § 251(b)(2) to require an incumbent LEC to provide
32 number portability using interim methods, pending development of a permanent number
33 portability system. U S WEST's interim method uses "store and forward" technology, in
34 which a call to an MFS customer will be dialed to the customer's old U S WEST number then
35 switched within U S WEST's network and forwarded to the new MFS number. Because *all*
36 calls to MFS customers will be routed through U S WEST's interim system, U S WEST must
37 absorb any costs it cannot recover from MFS or other telecommunications providers for
38 providing this number portability.
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1 **A. Cost Recovery**

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3 80. The Agreement requires that interim number portability costs be assigned
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5 between U S WEST and MFS based on the amount of active local numbers each has, rather
6
7 than on the numbers that will actually be ported. This assigns a disproportionate share of the
8
9 costs to U S WEST.

10
11 81. This mechanism prevents U S WEST from recovering a significant portion of
12
13 the costs of interim number portability, in violation of §§ 251(b)(2) and 251(e)(2).

14
15 **B. Switched Access Charges**

16
17 82. "Switched access charges" are fees paid by interexchange (long distance)
18
19 carriers (such as AT&T and MCI) to local exchange carriers for access to the LEC's network
20
21 to complete the call.

22
23 83. The Agreement requires that U S WEST share with MFS all four elements of
24
25 access charges (local transport, local switching, interconnection, and carrier common line
26
27 charge) paid by interexchange carriers to U S WEST for calls to numbers that are ported on
28
29 an interim basis to MFS customers. The Agreement fails to allow U S WEST to retain the
30
31 local switching and local transport charges it receives from interexchange carriers when it
32
33 forwards calls to MFS to provide interim number portability. This division of access charges
34
35 on ported numbers is inappropriate because, as described above, U S WEST still performs the
36
37 local switching and transport functions for these calls to MFS customers and incurs no less
38
39 cost for these calls.

40
41 84. Accordingly, sharing revenues for these services with MFS amounts to a
42
43 further unwarranted subsidy to MFS and is inconsistent with §§ 251(b)(2) and 251(e)(2).
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COUNT V: DENIAL OF DUE PROCESS
(U.S. Const. Amend. XIV)

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85. U S WEST incorporates by reference paragraphs 1-84 as if fully set forth herein.

86. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. Pursuant to the Fourteenth Amendment, U S WEST is entitled to due process in arbitrations under the Act.

87. The Commission Defendants improperly adopted or relied on the FCC Order and the rules promulgated therein, failed to take into account the overriding provisions of the Act, and acted arbitrarily.

88. The Commission Defendants did not have the authority to impose agreement provisions that were unsupported by record evidence. MFS failed to provide evidence supporting terms and conditions sufficient to support its proposals. MFS' proposals were adopted based simply on "final offer" arbitration procedures, and arbitrary rejection of U S WEST's voluminous evidence, rather than on any evidence supporting MFS' positions. Without evidentiary support, these provisions, as set forth above, should not have been considered and the Commission Defendants unlawfully adopted the Agreement with provisions that are inconsistent with the record evidence. The unilateral adoption by the arbitrator without sufficient notice of "final offer" or "baseball" arbitration is not authorized by the Act or state law and operated to deprive U S WEST of due process of law.

89. As a result, U S WEST will lose substantial revenues complying with unlawful contractual provisions imposed without authority. Thus, U S WEST has been deprived of its

1
2 property without due process of law in violation of the Fourteenth Amendment to the United
3
4 States Constitution.
5

6 **COUNT VII: UNCONSTITUTIONAL TAKING OF PROPERTY**
7 **(U.S. Const. Amend. V; Wash. Const. art. I, § 16)**
8

9 90. U S WEST incorporates by reference paragraphs 1-89 as if fully set forth
10
11 herein.
12

13 91. The Takings Clause of the Fifth Amendment to the United States Constitution
14
15 provides that private property shall not be taken for public use without just compensation.
16
17 The Takings Clause applies to states through the Fourteenth Amendment of the United States
18
19 Constitution.
20

21 92. Article I, Section 16 of the Washington Constitution provides broader
22
23 protection to property within the state of Washington than that provided by the federal
24
25 constitution, including that private property shall not be taken or damaged for private or
26
27 public use without just compensation.
28

29 93. If the Agreement is imposed on U S WEST, it will result in a taking of
30
31 U S WEST's property in violation of the Fifth and Fourteenth Amendments to the
32
33 Constitution and a taking or damaging of property in violation of Article I, Section 16 of the
34
35 Washington Constitution.
36

37 94. Specifically, the Agreement's imposition of below-cost prices on U S WEST
38
39 that do not fully compensate U S WEST for the costs it will incur, the requirement of sham
40
41 unbundling, the unlawful ordering of resale of unregulated services, the unlawful application
42
43 of compensation charges to enhanced services traffic, and the failure to assure recovery of
44
45 construction and conditioning all result in the taking or damaging of U S WEST's investment
46
47 in its network without just compensation.

1
2 95. This violates the Fifth and Fourteenth Amendments to the U.S. Constitution
3
4 and Article I, Section 16 of the Washington Constitution.
5

6
7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiff U S WEST seeks:
9

10 1. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, a judgment
11
12 declaring that those portions of the Agreement adopted by the Commission Defendants
13
14 between U S WEST and MFS, as heretofore identified in this Complaint, violate the
15
16 Telecommunications Act of 1996, specifically:
17

18 (a) the unbundled loop prices in the Agreement are not cost-based
19
20 in violation § 252(d)(1);
21

22 (b) the provisions of the Agreement which fail to assure
23
24 U S WEST's recovery of the costs of construction and implementation
25
26 necessary to allow access to its network violate § 251(c)(2);
27

28 (c) the wholesale discount at which U S WEST must provide
29
30 services for resale is not based upon the actual costs U S WEST avoids
31
32 by providing each retail service at wholesale rates, and therefore
33
34 violates § 252(d)(3);
35

36 (d) the tandem treatment of MFS call termination fails to provide
37
38 for mutual and reciprocal recovery and requires U S WEST to provide
39
40 transport and termination service without just and reasonable
41
42 compensation in violation of § 252(d)(2);
43

44 (e) the interconnection architecture provision of the Agreement
45
46 fails to provide for mutual and reciprocal recovery and requires
47
48 U S WEST to provide transport and termination services without just
49
50 and reasonable compensation in violation of § 252(d)(2);
51

52 (f) the provision of the Agreement that attempts to regulate
53
54 enhanced services traffic violates § 251(c) and (d), is inconsistent with
55
56 the Act, and is beyond the scope of the Commission Defendants'
57
58 authority to impose under the Act;

1 (g) the provision of the Agreement, permitting MFS to purchase all
2 of the network elements necessary to provide a completed service on
3 an unbundled basis violates §§ 251(c), 252(d) and 271(e)(1);
4

5
6 (h) the provision of the Agreement requiring U S WEST to resell
7 deregulated services violates §§ 251(c)(4), is inconsistent with the Act,
8 and is beyond the scope of the Commission Defendants' authority to
9 impose under the Act;
10

11 (i) the provision in the Agreement requiring that interim number
12 portability costs be assigned between U S WEST and MFS based on
13 the number of their active local numbers violates §§ 251(b)(2) and
14 251(e)(2);
15

16 (j) the provision of the Agreement requiring U S WEST to share
17 interstate switched access charges with MFS violates §§ 251(b)(2) and
18 251(e)(2); and therefore
19

20 (k) the Agreement between U S WEST and MFS that the
21 Commission Defendants approved is unlawful and without legal effect.
22

23
24
25 2. In the alternative, if the Agreement is upheld by this Court under the Act, U S
26 WEST seeks a judgment, pursuant to 28 U.S.C. § 2201-02 and 42 U.S.C. § 1983, declaring
27 that
28
29

30 (a) the arbitration proceedings and Commission Defendants' order
31 denied U S WEST due process in violation of the Fourteenth
32 Amendment to the United States Constitution; and
33

34 (b) the Agreement constitutes a taking of or damage to
35 U S WEST's property without just compensation in violation of the
36 Fifth and Fourteenth Amendments to the U.S. Constitution and Article
37 I, Section 16 of the Washington Constitution.
38

39 3. U S WEST also seeks a judgment declaring that unless and until it is fully
40 compensated for its costs of interconnecting, U S WEST is not required to interconnect with
41 MFS.
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2 4. U S WEST also seeks an injunctive relief prohibiting all defendants from taking
3
4 any action to place into effect or otherwise enforce the unlawful Agreement. U S WEST
5
6 reserves its right to seek preliminary injunctive relief pending a decision on the merits in this
7
8 proceeding.
9

10 5. U S WEST prays that the Court remand this case to the Commission
11
12 Defendants for further proceedings that adhere to the declarations requested above, and
13
14 provides U S WEST with full compensation as required by the Act and the federal and state
15
16 constitutions.
17

18 6. U S WEST also prays that the Court award it its costs and attorneys' fees
19
20 pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54(d), and such other relief as the Court
21
22 deems just and reasonable.
23

24 DATED: August 15, 1997
25

26 Respectfully submitted,
27

28 PERKINS COIE
29

30 By 
31

32 Sherilyn Peterson, WSBA #11713
33 Kirstin S. Dodge, WSBA #22039
34

35 --and--
36

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47