

1 in carriage of traffic constitute an injury to competition in  
2 those areas and are detrimental and a danger to the public  
3 welfare. ELI's customers depend on reliable telecommunications  
4 services for their safety and to conduct their businesses.  
5 Because of USWC's willful acts, the public has been denied the  
6 benefits of competition, including lower rates, improved quality  
7 in equipment and services, and greater innovation and diversity  
8 of telecommunications services.

9 47. USWC acted with the purpose of excluding ELI from  
10 the relevant market and retaining its position of being the  
11 monopolist provider of local exchange telecommunications  
12 services.

13 48. USWC's actions constitute a violation of Section 2  
14 of the Sherman Act. USWC's actions have had an adverse impact on  
15 ELI and on the market for local exchange telecommunications  
16 services. ELI has been and will be damaged monetarily by being  
17 deprived of the opportunity to effectively compete in the market  
18 for delivery of local exchange telecommunications services.  
19 ELI's damages will be ascertained at trial, and ELI requests that  
20 the damages be trebled pursuant to the provisions of the Sherman  
21 Act. ELI is also entitled to a mandatory injunction, directing  
22 USWC to provide necessary interconnection points, facilities,  
23 equipment, and services to handle traffic from ELI and to cease  
24 discriminating in priority of traffic. ELI is also entitled to  
25 its reasonable attorney fees in prosecuting this action.

26



1           55. USWC's refusal to provide ELI with access to the  
2 essential facilities, and to do so on the same terms and  
3 conditions as USWC provisions its own services and the same terms  
4 and conditions required of other LECs (or as required under  
5 federal and state regulations), effectively constitutes a denial  
6 of the essential facilities to ELI.

7           56. USWC's control of the essential facilities carries  
8 with it the power to eliminate competition in the market for  
9 delivery of local switched telecommunications services. USWC's  
10 ability to eliminate competition is permanent or relatively  
11 permanent because of the inability of any enterprise practically  
12 to duplicate the essential facilities, i.e., USWC's ubiquitous  
13 network.

14           57. Consumers are harmed by USWC's refusal to provide  
15 access to the essential facilities because competition has been  
16 diminished or eliminated. As a direct result of elimination of  
17 competition, consumers face higher prices, fewer choices, and  
18 lower quality in local telecommunications services.

19           58. USWC's refusal to provide reasonable access to the  
20 essential facilities is motivated by the desire to further and  
21 extend USWC's monopoly over the provision of local  
22 telecommunications services.

23           59. It is feasible for USWC to provide equal,  
24 reasonable, and nondiscriminatory access to its essential  
25 facilities.

26



1 raising prices to consumers and lessening the availability and  
2 quality of telecommunications services in the relevant geographic  
3 and product markets.

4           66. There is a dangerous probability that USWC will  
5 retain monopoly power in the relevant product and geographic  
6 markets.

7           67. USWC's unlawful conduct is ongoing and threatens  
8 continuing loss and damage to ELI. Unless USWC is enjoined by  
9 this court, USWC's anticompetitive conduct will continue.

10           68. ELI has suffered damages in an amount to be  
11 determined at trial. ELI requests that its damages be trebled  
12 under the provisions of the Sherman Act and the Clayton Act.

13                           **FOURTH CLAIM FOR RELIEF**

14                   **SUPPLEMENTAL CLAIM FOR VIOLATION OF ANTIMONOPOLIZATION**  
15                   **PROVISIONS OF STATE LAW**

16           69. ELI incorporates by reference all the allegations  
17 in paragraphs 1 through 38 above.

18           70. This court has supplemental jurisdiction over  
19 ELI's state law claims under the doctrine of supplemental  
20 jurisdiction.

21           71. USWC's conduct as alleged constitutes a violation  
22 of the antimonopolization provisions of state law in Oregon,  
23 Washington, Utah, and Arizona.

24           72. If USWC is not enjoined from refusing to provide  
25 reasonable and nondiscriminatory access to its essential  
26 facilities, ELI will suffer irreparable injury and the market for





1           83. The acts of USWC that are complained about  
2 occurred in the conduct of trade or commerce that both directly  
3 and indirectly affected the people of the state of Washington.

4           84. USWC is a competitor of ELI in the market for  
5 local switched telecommunications services. As alleged  
6 heretofore, USWC has deceived or misled consumers about ELI's  
7 quality of service and ability to furnish service, thereby  
8 obtaining business for itself and injuring the business of ELI.  
9 USWC's deceptive acts or practices have the potential for  
10 repetition and are being repeated and carried on as a continuous  
11 course of conduct.

12           85. There is a causal link between the unfair or  
13 deceptive acts or practices of USWC and the injury to the  
14 business of ELI.

15           86. Unless enjoined, USWC's acts of unfair competition  
16 will continue, with the result that ELI will be unable to compete  
17 and the public will have fewer local telecommunications services  
18 available for use and the quality of services will not increase.  
19 Competitors of USWC will be injured in their business or  
20 property.

21           87. ELI has been damaged in an amount to be proved at  
22 trial. Pursuant to the provisions of RCW 19.86.090, ELI is  
23 entitled to recover its damages, to have its damages trebled, and  
24 to be awarded its attorney fees.

25

26



1 completion of regulatory proceedings in Utah. ELI therefore  
2 entered into short-term interim interconnection and compensation  
3 agreements with USWC for Utah and Oregon (now expired). The  
4 terms of the interim agreements were confidential, but the  
5 agreements are not inconsistent with the interconnection orders  
6 of the public utility commissions of Washington and Oregon. ELI  
7 has opted-in to an interconnection agreement in Washington. ELI  
8 has sought, without success, to negotiate the terms of permanent  
9 interconnection agreements with USWC for other states.

10           93. ELI has operational interconnection with USWC in  
11 Washington, Oregon, and Utah and is in the process of obtaining  
12 interconnection in Idaho and Arizona. ELI is currently providing  
13 switched local service in Seattle, Portland, Salt Lake City, and  
14 other adjoining areas.

15           94. During 1996, ELI received numerous complaints from  
16 customers in the areas in which it was interconnected with USWC,  
17 in which those customers reported severe call blockage.

18           95. ELI determined that the blockage has been  
19 occurring within the USWC network. USWC has consistently denied  
20 that it has an obligation to correct the blockage problems that  
21 ELI's customers are experiencing. USWC has refused to upgrade  
22 facilities, change prioritization, provide employees, or take  
23 other steps necessary to resolve the blockage problems. As a  
24 direct and proximate result, ELI's ability to acquire new  
25 customers is greatly inhibited and ELI has lost customers that  
26 had contracted to receive local switched telecommunications

1 services from ELI. ELI is continuously at risk of losing current  
2 customers due to poor service and failure to provide facilities,  
3 all of which has occurred within USWC's facilities or has been  
4 caused by USWC's refusal and failure to provide essential  
5 equipment and facilities. ELI has and will lose profits and  
6 suffer diminution in the value of its business.

7           96. USWC's refusal to provide essential facilities  
8 constitutes an immediate danger to the public welfare. Further,  
9 because USWC's inadequate facilities prevent effective  
10 competition from ELI, the public will be denied the benefits of  
11 competition, including lower rates, innovation and diversity of  
12 telecommunications services, and higher quality service, all  
13 contrary to public policy.

14           97. USWC is under express and implied duties of good  
15 faith in the performance of contracts between ELI and USWC, and  
16 USWC has violated its covenants of good faith and fair dealing in  
17 the particulars described in this complaint.

18           98. By virtue of USWC's monopoly position and control  
19 of essential or bottleneck facilities, and USWC's disregard of  
20 orders of state regulatory authorities, USWC has committed  
21 numerous acts of tortious violation of its covenants of good  
22 faith and fair dealing.

23           99. ELI is entitled to a mandatory injunction  
24 directing USWC to furnish necessary equipment, facilities, labor,  
25 and other goods and services necessary to allow interconnection  
26

1 by ELI with USWC's local exchange network on a fair and equitable  
2 basis and to receive damages to date of trial.

3 **EIGHTH CLAIM FOR RELIEF**

4 **PENALTY FOR VIOLATING STATUTE PROHIBITING BLOCKAGE**

5 100. ELI incorporates by this reference all the  
6 allegations in paragraphs 1 through 38 above.

7 101. Statutory law in Washington empowers the WUTC to  
8 order USWC to provide adequate and sufficient facilities  
9 (RCW 80.01.040). The WUTC may remedy undue preferences or  
10 advantages (RCW 80.01.170). The WUTC may order access on equal  
11 terms (RCW 80.01.186) and may order betterment (RCW 80.01.260).  
12 State law in Arizona contains similar provisions. State law in  
13 Utah expressly prohibits call blocking (Utah Code Ann.  
14 § 54-8b-2.2).

15 102. The WUTC has ordered USWC to invest the capital  
16 needed to provide equipment and facilities to handle traffic  
17 originating from ELI and other CLECs. The WUTC ordered USWC to  
18 provide "whatever facilities are necessary on its side of meet  
19 points to complete local calls that are delivered to it by  
20 originating local exchange companies." (WUTC Ninth Order at 19.)

21 103. USWC has failed and refused to provide adequate  
22 and sufficient equipment and facilities for interconnection with  
23 ELI.

24 104. The blockage experienced by ELI's customers in  
25 incoming or outgoing calls is the result of willful or  
26 intentional actions or inactions on USWC's part. ELI is entitled

1 to recover a penalty pursuant to RCW 80.36.220 for each blocked  
2 call resulting from USWC's inadequate and insufficient  
3 interconnection facilities.

4 **JURY DEMAND**

5 105. ELI demands trial by jury of all claims for  
6 monetary damages.

7 WHEREFORE, ELI prays for judgment against USWC as  
8 follows:

9 a. For ELI's actual damages as determined by a  
10 jury, to be thereafter trebled by the court in  
11 accordance with Sections 1 and 2 of the Sherman Act,  
12 Section 4 of the Clayton Act, and the provisions of the  
13 antimonopolization statutes of the states of Oregon,  
14 Washington, Idaho, Utah, and Arizona, and the Unfair  
15 Trade Practices Statute of Washington, RCW 19.86.020  
16 and RCW 19.86.090;

17 b. Under common law for damages and for punitive  
18 damages;

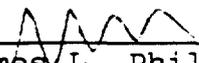
19 c. For preliminary and permanent injunctive  
20 relief enjoining USWC in the future from (i) violating  
21 federal and state statutes and regulations,  
22 (ii) violating interconnection agreements, and  
23 (iii) ignoring orders placed for interconnection  
24 points, facilities, services, and nondiscriminatory  
25 carriage of traffic;

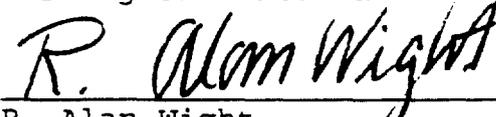
26 d. For interest as allowable by law;

- 1 e. For the costs of this lawsuit;  
2 f. For investigative costs and expert witness  
3 fees;  
4 g. For reasonable attorney fees; and  
5 h. For such other legal and equitable relief as  
6 is just and proper.

7 DATED this 30th day of June, 1997.

8 MILLER, NASH, WIENER, HAGER & CARLSEN LLP

9  
10   
11 James L. Phillips  
12 Washington State Bar No. 13186

13   
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23  
24  
25  
26



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	
	)	DOCKET NO. UT-970766
Complainant,	)	
	)	TENTH SUPPLEMENTAL ORDER
v.	)	
	)	COMMISSION DECISION AND ORDER REJECTING
U S WEST COMMUNICATIONS, INC.,	)	TARIFF REVISIONS;
	)	REQUIRING REILING
Respondent.	)	
..... )		

**BACKGROUND:** On August 29, 1997, U S WEST Communications, Inc. (USWC or Company) in Docket No. UT-970766 filed with the Commission certain tariff revisions designed to effect statewide a general rate increase of \$69.4 million<sup>1</sup> in its provision of intrastate telecommunications services. By order dated September 10, 1997, the Commission suspended the effective date of the tariff revisions pending investigation and hearing as to whether the proposed rates are fair, just, reasonable, and sufficient. The Commission held five hearings in November 1997, for members of the public to attend and express opinions about the proposal. The Commission also held hearing sessions on December 3 through 9, 1997, to hear the parties' evidence and cross-examination.

**APPEARANCES:** Lisa Anderl and Douglas N. Owens, attorneys, Seattle, represent the respondent, U S WEST Communications, Inc. Robert F. Manifold and Simon J. ffitch, Assistant Attorneys General, are Public Counsel. Gregory Trautman, Assistant Attorney General, Olympia, represent the Staff of the Washington Utilities and Transportation Commission (Commission Staff). Ronald L. Roseman, attorney, Seattle, represents the American Association of Retired Persons (AARP).<sup>2</sup> Art Butler, attorney, Seattle, represents Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER). Rogelio Pena, attorney,

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<sup>1</sup> The proposal began with discussions in April between the Company and Commission Staff. These discussions reduced the filing by about \$30 million. The Company then filed its request, with an estimated revenue effect of \$70.3 million. After agreeing to additional adjustments, the parties now agree that the effect of the filed rates is \$69.4 million. The term "filing" here also includes requested business-service increases for which the Company filed no tariff sheets because higher rates were in effect pursuant to judicial stay. The proposal is to increase those rates from lower levels authorized and directed in the Commission's order in Docket No. UT-950200, which have never taken effect because of judicial and Commission stays. The text of this order describes relationships between that proceeding and this one.

<sup>2</sup>AARP complied with the Commission's request that it work closely with Public Counsel. While it conducted its own case, it joined in many aspects with Public Counsel. For simplicity, we may refer to "Public Counsel" when we mean "Public Counsel and AARP jointly."

Denver, and Clyde MacIver, attorney, Seattle, represent MCI; Randy Gainer, attorney, Seattle, and Maria Arias-Chapleau, attorney, Denver, represent AT&T; Brooks Harlow, attorney, Seattle, represents Metronet. Carol Matchett and Richard Goldberg, attorneys, San Mateo, California, represent Sprint Communications Company. Richard A. Finnigan, attorney, Olympia, represents the Washington Independent Telephone Association (WITA). Washington Citizen Action was granted intervenor status, but did not appear at any hearing session and did not file a brief.

**COMMISSION:** The Commission rejects the Company's request for increased rates and charges, and directs it to file tariffs to effect an increase in rates of \$58.8 million according to instructions in this Order. The Commission also directs the Company to make improvements to its "customer service guarantee" program and institute a \$50 credit to customers for missed appointments or commitments.

The Company asks for three separate elements in its request for \$69.4 million in increased rates. It requests the implementation of the Commission's August, 1997 decision<sup>3</sup> to change depreciation rates (about \$36 million); it asked for implementation of previously-disallowed team and merit bonuses (about \$10.5 million); and contending that its financial performance had slipped so substantially in the short time since the prior order was entered that under principles established in that order, it is entitled to an additional \$23 million.

In this order we find that the Company is entitled to the \$36 million from previously approved depreciation schedule changes, and that will be authorized. We find that while there has been some improvement in customer service, it is not the substantial and significant improvement stated in the prior order as a condition of approval, so we deny the \$10.5 million request for funding of the team and merit (incentive) awards. The success and thoroughness of our analysis in the prior proceeding, and the changes occurring in the telecommunications sector of the economy, mean that the Company's earnings are sensitive to changes in revenues and expenses. It has demonstrated a change in the relationship between revenues and expenses and is entitled to an increase of approximately \$23 million for this element.<sup>4</sup>

The Washington State Supreme Court recently affirmed the Commission's 1996 order in Docket No. UT-950200, which will lead to the implementation of reductions in charges for some services, principally related to business and toll. We have directed that tariffs be filed in both cases for effect on February 1, 1998, for maximum coordination. The Courts have not yet formally returned the matter to the Commission and the Commission will take no action in that docket until it is clear that we have the jurisdiction to act.

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<sup>3</sup> Docket No. UT-951425.

<sup>4</sup> This is the amount that Commission Staff recommended. For a more complete perspective, we note that the Company's initial proposal to Commission Staff on this element was \$53.8 million.

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## I. INTRODUCTION

### A. Introduction

While significant both in its overall effect and in its impact on individual consumers and the Company, this proceeding is smaller in scope and less complex than the prior rate proceeding involving this Company.<sup>5</sup> It is brought about by the Company's desire to present a narrowly defined request for limited but speedy relief to which it would be entitled under the principles applied in that prior order.

Aware that the Commission's rules encourage negotiation and settlement, the Company approached Commission Staff in March 1997 with a proposal for a \$53.8 million rate increase on just one of the three elements on which it eventually filed.<sup>6</sup> Commission Staff notified several of the principal parties in UT-950200, including Public Counsel, that the discussions were beginning, but did not invite them to participate; the other parties did not participate in the discussions. Commission Staff performed a detailed investigation, reached the conclusion that the Company did in fact require \$23.7 million of its initial \$53.8 million request, proposed several adjustments to the Company's results of operation, and agreed to support the proposal if the request were reduced to that level. The Company filing was consistent with its agreements with Staff, and also included agreed elements seeking recovery for its team and merit program (\$10.5 million) and for depreciation schedule changes (\$36.1 million). The Commission suspended the filing and established a schedule consistent with a full and timely review, given the nature of the proceeding.<sup>7</sup>

The Commission continues to operate consistently with the requirements of constitution and law. We subscribe to the ratemaking principles we have often recited. We see no need to repeat them here, but cite to the discussion in Part 4 of our decision in the Fifteenth Supplemental Order in Docket No. UT-950200, set out at page 30 in that order.

We acknowledge the effective participation of all of the parties. We find it appropriate to identify the witnesses, both to acknowledge their participation and to serve as a reference in the future. The Company presented Teresa Jensen as its policy and service quality witness.<sup>8</sup> The Company also presented Phil Grate, Anthony Bowling, Wayne Culp, and Carl

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<sup>5</sup> For a description of the complexities, see the Fifteenth Supplemental Order in Docket No. UT-950200, at Page 6.

<sup>6</sup> The proposal was reduced to \$23.4 million during negotiations with Commission Staff. For comparative purposes, the Company's current total \$69 million filing would have been \$99 million without this reduction.

<sup>7</sup> The resulting proceeding has fallen short of some of the goals underlying the Commission's strong and consistent support of negotiation and settlement. We will consequently devote a portion of this order to a discussion of ways to improve the process.

<sup>8</sup> Several witnesses testified on more than one topic. We identify their principal area.

Inouye to rebut evidence offered by Public Counsel. Commission Staff presented Dr. Glenn Blackmon as its policy witness, Maurice Twitchell as its accounting witness, and Vicki Elliott as its witness on service quality. Public Counsel presented Michael L. Brosch as its accounting and policy witness, Dr. Margaret Raymond as its rate design witness, and Jay Emry, regarding the Washington Telephone Assistance Program. TRACER presented Dr. Thomas Zepp, addressing policy and rate design. AT&T presented Charles Ward, and MCI presented Mark Stacy; both addressed policy and rate design issues.

## **B. Public Concerns**

We acknowledge the participation of many members of the public at hearing sessions across the state and the presentation by Public Counsel of letters from additional members of the public. The public hearing sessions began our gathering of evidence in the case and set a tone for our inquiry. The information provided by members of the public is important to our inquiry and helps us to focus on the needs of the Company's captive customers.

The public hearing sessions occurred in Kent on November 17; Yakima and Spokane on November 18; Vancouver on November 19, and Port Angeles on November 20, 1997. Seventy-three individuals addressed the Commission at these meetings. The Commission also received over 900 letters, almost 500 additional electronic messages via the Internet, and one petition containing 226 signatures. All but 10 letters opposed the Company's proposal.

As with the public hearings during the 1995 rate case, a substantial number of citizens testified against the rate increase and expressed their frustration regarding the Company's handling of service and consumer issues. However, other participants spoke in favor of the rate increase and viewed it as necessary for ensuring that the Company has sufficient revenues and incentives to invest in the network and service quality. Some of the supporters of the rate increase conditioned their support on the Commission finding a way to ensure that the additional revenue stays invested in the state.

Seven citizens complained that they were not informed of the Company's customer service guarantee when their service installation was delayed. We discuss the service guarantee, below. The other common complaint regarding the Company's proposal was the effect that the proposed high percentage increase would have on low-income and fixed-income citizens. We address this topic in greater length, later in this order.

## II. POLICY ISSUES

### A. "Make-whole" Filing

Sometimes form eclipses substance. Here, the meaning of the term "make-whole" generated more conflict and disagreement than several of the accounting issues.

We need not define the term "make whole," because its meaning resolves no contested issue in the proceeding. What is important is that the final order in Docket No. UT-950200 was under appeal<sup>9</sup> and the Company stated that it chose not to contest any of the order's provisions.

In our order in Docket No. UT-950200, the Commission rejected the Company's attempt to relitigate issues that had been decided in another matter shortly before UT-950200 was heard. The Court found the Commission's decision proper.<sup>10</sup> Here, the Company chose not to seek rehearing of principles decided in the prior order under RCW 80.04.200.<sup>11</sup>

### B. Relationship with UT-950200

The Commission entered its order in Docket No. UT-950200 on April 11, 1996. That order decided a large number of significant issues and concluded, based on the 1994 information proper for the decision, that the Company was overearning by more than \$91 million per year. The Company appealed to the courts, contesting nearly every adverse element of the order. The courts and the Commission at various points stayed the requirement that the

Company file tariffs for services whose prices the Commission ordered reduced. Parties expressed concerns about tariffs that had been filed before the stay. The Commission declined to address areas subject to the stay, concerned that reversal could render its efforts useless.

The State Supreme Court has now affirmed the Commission order and parties to

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<sup>9</sup> The Washington State Supreme Court released its decision December 24, 1997, affirming the Commission decision in all regards. This order will discuss some ways in which these proceedings are interrelated.

<sup>10</sup> Original slip decision, Page 35.

<sup>11</sup> To some extent the filing did make requests for change, as in the area of team and merit awards, called "incentives" in this matter. The parties spent considerable time debating the proper means of "following" the principles of the order. For example, the order in UT-950200 implemented the *principle* that revenues and expenses should be matched to best reflect the relationship of the two during the period rates are expected to be in effect. That order found that revenues were rising much more rapidly than expenses, and *applied* that principle in light of the evidence of record by using revenue information from the last quarter of 1994 -- which happened to be the last month of the test period and the next two months after the test period. The Commission did not announce as a "principle" either that the last calendar quarter should always be used, or that the last month of the test period plus the next two months should always be used. The selection of the methodology to implement the principle that revenues and expenses should be matched is made on the basis of the evidence of record and the circumstances of the case.

that docket have reiterated their concerns regarding the resolution of that matter. Parts of it are unsettled, with a motion for clarification pending. We intend to coordinate the rate effect of the two proceedings to the extent feasible and consistent with the Commission's jurisdiction to act. The Commission would prefer that the application of the two dockets be coordinated to avoid a rate "see-saw" and to assure consistency between the two, and will work to achieve those goals.

### C. Procedural Issues -- Timing and Discovery

#### 1. Timing

Public Counsel, joined by AARP,<sup>12</sup> has lodged consistent and vigorous challenges to and complaints about the schedule. They contend that this is a major rate case, proposing a major shift of costs between customer classes, but it was accomplished in an unconventional manner. They argue that a case asking approximately \$70 million requires reasonable notice, a complete filing, detailed calculations, detailed testimony, explanations for adjustments, studying the current costs of capital, followed by adequate time for all parties to conduct discovery and resolve problems without denying needed information. They argue that direct and rebuttal testimony is required for all parties, and contend that this process was not allowed in this case. Public Counsel was afforded the right to file specific objections and state any remaining concerns at the conclusion of the case, but did not do so. Public Counsel has not identified any information that was felt needed but was not available.

The Company and Commission Staff respond that the time for preparation allotted by the Commission was appropriate for the scope and complexity of this proceeding. The Company also notes that the Commission did extend the initial schedule at Public Counsel's request and that Public Counsel had 10 weeks to prepare its case. Commission Staff points out that it notified Public Counsel of the Company proposal when Staff first began reviewing it. Staff provided continuing updates to Public Counsel and other parties. Parties were free to conduct their own examinations and to explore matters with the negotiating parties. Public Counsel did not request greater involvement in the Staff examination, did not request information from the Company until after the filing, and did not begin its own inquiry until the Company made a formal filing with the Commission in August 1997.

The Commission believes that while this case is substantial, and its results significant to both the public and the Company, it does not have the complexity or scope of its predecessor. Public Counsel acknowledges that the Company is entitled to \$36 million of the requested \$69 million, resulting from the prior agreed order in the depreciation proceeding. Of the remaining \$33 million, \$10 million is a repeat of an issue from the prior proceeding. The case does not match the \$240 million requested in the prior proceeding nor does it involve the number of issues presented in that matter.

Discussions and Commission Staff examinations of Company results of operation

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<sup>12</sup> While AARP joined in Public Counsel's objections, it did not complain about any particular problems and did not cite to any ways in which it was assertedly harmed by lack of time. Public Counsel did raise such matters, and we believe that in addressing Public Counsel's concerns we also address those of AARP.

began in April. Public Counsel had a number of opportunities both before and after the August filing to participate and to gather information.

In response to other specific concerns that Public Counsel raises, notice of the proceeding, both the informal notice in the spring and the formal notice after filing, provided reasonable and adequate notice to Public Counsel. The Company's filing was sufficient for the nature of its request and the setting in which it was made. While the schedule did not use the entire suspension period, we are not required to use the entire period. The schedule afforded all parties an adequate time to secure the information they needed to prosecute the case. All parties had adequate time to prepare testimony, and had the opportunity to respond to the evidence of others.

Public Counsel had all of the information requested before the conclusion of the hearing, did not cite any information failures that prejudiced his effectiveness as counsel, and did not ask for further proceedings to remedy any asserted problems. Alternative means of approaching the litigation -- including earlier participation, earlier sharing of information, and use of different discovery techniques -- offer ways to moderate or avoid the concerns that he addressed. The time allotted for this proceeding was sufficient for effective participation, and Public Counsel's performance was of the highest caliber. The schedule did allow for complete, reasonable and effective prosecution by the participants.

We respect Public Counsel as a critically needed representative of voices that the Commission wants and needs to hear, and a proven contributor to Commission proceedings and past decisions.<sup>13</sup> We are sensitive to the situation that Public Counsel faces, with all the responsibilities of major litigation to deal with and limited resources with which to accomplish the litigation. Despite the limitations, however, we believe that Public Counsel and all other parties had ample opportunity to prosecute this matter.

## 2. Discovery

WAC 480-09-480 provides for data requests as a means of discovery in certain Commission proceedings. The Commission invoked the rule in this docket. Public Counsel submitted more than five hundred data requests to the Company, many of which required clarification or contained multiple parts. Public Counsel chose to rely on written discovery as his primary -- nearly exclusive -- means of gaining information. In retrospect, this avenue brought with it some negative consequences.

As Commission Staff witness Twitchell noted, data request discovery can be less

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<sup>13</sup> Participants often contribute to the value and strength of decisions without "winning" their points. Even so, we note that in the UT-950200 decision Public Counsel was persuasive on many issues.

likely than other common means of acquiring information to produce swift information and understanding. Paper requests offer less opportunity for speedy clarification, speedy response, speedy resolution of differences, than other means. Although we recognize that Public Counsel is in a different situation from Commission Staff, we are concerned that Public Counsel required so many data requests, given the scope of the proceeding. This approach may have increased difficulties, as compared with alternatives.

Nor is the Company free of opportunities for improvement. The Company committed to a five-day response time, but clearly did not meet that commitment in many instances. We do not believe that it intentionally misstated its five-day goal. However, it should in a future case seek to consult with the Commission and opposing counsel to review schedules if it discovers it cannot consistently meet its commitment.

The Company's refusal to provide 1997 data -- clearly relevant to evaluating 1996 results under any reasonable regulatory theory -- may have contributed to working difficulties among the parties. The Company's own data requests to Public Counsel, requesting information about legal strategies, and its submission of questions that could be construed as containing challenges to Public Counsel's strategies or its practical or political base, may also have added to those difficulties.

In short, it is clear that the Commission should revisit discovery mechanisms in conjunction with its pending rulemaking on procedural issues.

#### **D. Investment in Washington State**

Many of the public witnesses expressed concern about the Company's level of investment in the State. The Company stated pointedly that it expects the Commission to grant its rate increases before it will increase its investment in the State. During the hearing it committed to make over \$30 million in investment, conditioned on whether the Commission makes the "right" decision in this proceeding.

The best response to this situation is presented in TRACER's comments. The intervenor supports the investment that the Company promised, but not the need to meet preconditions for the investment. TRACER states:

Presumably, USWC operates as would any rational business and will make the decision to invest in these services [those in the commitment conveyed by Ms. Jensen] if they can be provided on a profitable basis. Given the fact that the Commission has already approved use of ELG depreciation methodology, new depreciation lives (including shortened lives for digital transmission equipment), and the use of banded rates for all USWC services, there is no reason why any new investment required to offer these services could not be provided on a profitable basis. Particularly since