BEFORE THE NEW MEXICO STATE CORPORATION COMMISSION

IN THE MATTER OF THE PETITION BY e·spire COMMUNICATIONS, INC., AND ACSI LOCAL SWITCHED SERVICES, INC. *d/b/a/* e·spire COMMUNICATIONS FOR ARBITRATION OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996 **DOCKET NO. 98-382-TC**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came before the New Mexico State Corporation Commission (the "Commission") upon the petition by e•spire Communications, Inc., and ACSI Local Switched Services d/b/a e•spire Communications (jointly, "e•spire") for arbitration of an amendment to the Interconnection Agreement between U S WEST Communications, Inc. ("U S WEST") and pursuant to Section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252, filed on July 13, 1998. The Commission, having conducted a hearing, having reviewed the record, testimony and exhibits, and being otherwise fully advised in the premises, enters the following Findings of Fact, Conclusions of Law and Order:

I. Findings of Fact

Statement of the Case and Procedural History.

1. This arbitration came before the Commission pursuant to the federal Telecommunications Act of 1996, Pub. L No. 104-104, 110 Stat. 56, codified at and amending the Communications Act of 1934, 47 U.S.C. § 251, et seq. (1966) (the "Act"). Signed into law on February 8, 1996, the Act provides for a pro-competitive national policy

designed to encourage private-sector deployment of advanced telecommunications services and information technologies for all Americans by opening telecommunications markets to competition.

2. The Act requires all states to allow competition in previously protected local exchange markets, but subject to specific rules of competition to be developed principally by state regulatory commissions in accord with the guidelines to be established by the Federal Communications Commission ("FCC").

3. U S WEST received e•spire's request for frame relay interconnection and resale from U S WEST on February 4, 1998.

4. Negotiations were unsuccessful and, pursuant to Section 252 of the Act, e•spire filed its Petition with the Commission on July 13, 1998.

5. Also, on July 13, 1998, e•spire filed a Motion for Protective Order.

6. On July 16, 1998, the Commission filed a Protective Order.

7. On July 24, 1998, the Commission entered a Notice of Hearing and Order, providing procedures to be followed in this arbitration.

8. On July 29, 1998, e•spire filed a Motion for Admission Pro Hac Vice for Charles H.N. Kallenbach, Brad E. Mutschelknaus and Edward A. Yorkgitis, Jr.

9. On August 4, 1998, the Commission entered an Order granting e•spire's Motion for Admission Pro Hac Vice for for Charles H.N. Kallenbach, Brad E. Mutschelknaus and Edward A. Yorkgitis, Jr.

10. On August 7, 1998, U S WEST filed its Response to e•spire's Petition.

11. On August 7, 1998, U S WEST filed a Motion for Admission Pro Hac Vice for Lynn Anton Stang.

12. On August 14, 1998, e•spire filed a Motion for Summary Decision and Modified Arbitration Schedule (Expedited Treatment Requested).

13. On August 18, 1998, the Commission filed an Order Setting Expedited Response Time and Staying Notice of Hearing and Procedural Order.

14. On August 21, 1998, U S WEST filed a Response to e•spire's Motion for Summary Decision and Modified Arbitration Schedule.

15. On August 27, 1998, e•spire filed a Reply to U S WEST's Response to Motion for Summary Decision and Modified Arbitration Schedule.

16. On September 22, 1998, e•spire filed a Request for Mediation, for Appointment of Hearing Officer as Mediator, and for Setting of Dates for Mediation Conference.

17. On September 29, 1998, U S WEST filed a Response to e•spire's Request for Mediation.

18. On October 2, 1998, e•spire filed a Withdrawal of Request for Mediation, for Appointment of Hearing Officer as Mediator and for Setting of Dates for Mediation Conference.

19. On October 2, 1998, e•spire filed a Response to Request for Dismissal and Suggestion that Section 252 of the Telecommunications Act of 1996 is not Applicable, along with a Motion Proposing Procedural Schedule, and its First Set of Data Requests.

20. On October 8, 1998, U S WEST filed a Motion for Admission Pro Hac Vice for Thomas M. Dethlefs.

21. Also, on October 8, 1998, U S WEST filed a Motion for Protective Order and Response to e•spire's Motion Proposing Procedural Schedule.

22. On October 13, 1998, U S WEST filed Objections to e•spire's First Set of Data Requests.

23. On October 14, 1998, e•spire filed a Response to U S WEST's Motion for Protective Order and Reply to Response to Motion Proposing Procedural Schedule.

24. On October 16, 1998, e•spire filed its Second Set of Data Requests to U S WEST Communications, Inc.

25. On October 20, 1998, the Commission filed a Notice of Hearing (Amended) and Procedural Order.

26. On October 23, 1998, e•spire filed its Direct Testimony of Charles Kallenbach, Pamela Cameron and Tony Mazraani.

27. Also, on October 23, 1998, U S WEST filed its Direct Testimony of Ruth Hellman, Mark D. Schmidt and Kathryn Malone. U S WEST also filed its Response to e.spire's First Data Requests.

28. On October 26, 1998, U S WEST filed its Response to e•spire's Second Data Requests.

29. Also, on October 26, 1998, e•spire filed the original verification of Charles Kallenbach, and its Third Set of Data Requests to U S WEST Communications, Inc.

30. On November 11, 1998, e•spire filed Nondisclosure Agreements for Patricia Salazar Ives and Carol Smith Rising.

31. Also, on November 5, 1998, U S WEST filed its Response to e•spire's Third Set of Data Requests.

32. On November 6, 1998, original affidavits of Maryann Klasinski were filed by U S WEST.

33. On November 9, 1998, U S WEST filed its First Set of Data Requests to e•spire Communications, Inc. and ACSI Local Switched Services, Inc. dba e•spire Communications.

34. Also, on November 9, 1998, e•spire filed a Motion for Extension of Time to File Rebuttal Testimony and to Propound Discovery, and a Nondisclosure Agreement by Pamela Cameron.

35. On November 12, 1998, U S WEST filed a Second Set of Data Requests to e•spire Communications, Inc. and ACSI Local Switched Services, Inc. dba e•spire Communications.

36. On November 12, 1998, e•spire filed a Motion to Compel Responses to Third Set of Data Requests, along with Rebuttal Testimony of Charles Kallenbach, Pamela Cameron and Tony Mazraani.

37. On November 12, 1998, U S WEST filed Rebuttal Testimony of Mark D. Schmidt, Kathryn Malone and Ruth A. Hellman.

38. On November 13, 1998, the Commission filed an Order on e•spire's Motion for Extension of Time to File Rebuttal Testimony and to Propound Discovery.

39. On November 13, 1998, U S WEST filed its Supplemental Response to e•spire's Third Set of Data Requests.

40. Also, on November 13, 1998, e•spire filed its Fourth Set of Data Requests to U S WEST Communications. Inc.

41. On November 16, 1998, the Commission filed an Order on the Motions for Admission Pro Hac Vice for Thomas M. Dethlefs and Lynn Anton Stang.

42. Also, on November 16, 1998 e•spire filed its Responses to U S WEST's First Set of Data Requests.

43. On November 17, 1998, e•spire filed Amended Responses to U S WEST's First Set of Data Requests.

44. Also, on November 17, 1998, U S WEST filed Supplemental Responses to e•spire's Third Set of Data Requests.

45. On November 18, 1998, e•spire filed the original verification of Tony Mazraani and Charles Kallenbach.

46. On November 19, 1998, e•spire filed a Withdrawal of its Motion to Compel Responses to Third Set of Data Requests.

47. On November 20, 1998, e•spire filed its Responses to U S WEST's Second Set of Data Requests.

48. Also, on November 20, 1998, U S WEST filed its Response to e•spire's Fourth Data Requests.

49. The arbitration hearing in this matter was held on November 23, 1998. The Commission served as the arbitrator for the proceedings in this docket.

50. On December 1, 1998, Supplemental Responses were filed by e•spire to U S WEST's First Set of Data Requests.

51. On December 3, 1998, U S WEST and e•spire filed a Joint Motion for Extension of Time to file Post Hearing Briefs.

52. Also, on December 3, 1998, an original verification of Pamela Cameron and Nondisclosure Agreements for Edward A. Yorkgitis, Jr. and Brad Mutschelknaus were filed by e•spire.

53. On December 7, 1998, the Commission filed an Order on the Joint Motion for Extension of Time.

54. On December 8, 1998, U S WEST filed its Post Hearing Brief along with its Issues Matrix.

55. Also, on December 8, 1998, e•spire filed its Post Hearing Brief along with Proposed Findings and Conclusions of Law and its Response to Bench Request and Issue Matrix.

56. On December 11, 1998, e•spire filed its Post Hearing Brief with Errata along with a Supplement to Response to Bench Request.

57. Section 252 of the Act defines the scope of this arbitration and of the Commission's responsibilities. Section 252(b)(4)(A) requires the Commission to limit its consideration to the issues set forth in the petition and in the response, if any. Moreover, under Section 252(c), in resolving open issues and imposing conditions upon the parties, the Commission must:

(1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

58. The parties have requested that the Commission resolve certain issues that are summarized on issues matrices filed by the parties.

59. In the findings below, the Commission has attempted to resolve all of the issues submitted by the parties.

Overview Of Frame Relay Network Connectivity And Rate Elements

60. Any user on a frame relay network (a Frame Relay Network ("FRN") is also referred to as a "cloud") is connected to a User-to-Network Interface ("UNI") on a frame relay switch via an access link. (U S WEST refers to this as a "FRAL", or Frame Relay Access Line). The FRAL is a two or four wire connection carrying data traffic at speeds up to 1.544 megabits per second. The FRAL may also be a DS3 connection. The physical connection at the customer locations is either an RJ-type jack or a digital cross connect at the DS1 or DS3 signal level.

61. When a frame relay customer seeks to communicate with another location on the same network, each of the two locations are given a Data Link Connection Identifier ("DLCI"), which is used as its address information identifier. The DLCI is used in the headers of each frame and identifies the address to which each frame is to be sent. Each set of DLCIs creates a "permanent virtual circuit," or "PVC," which allows for one-way communications between the two locations. For two-way communications, which is the most common form of frame relay service, two PVCs consisting of two pairs of DLCIs must be provisioned. The assignment of a DLCI is a one-time software programming activity which takes approximately 10 minutes.[1]

62. For example, if a particular frame relay end user desires the ability to have one-way communication with ten separate locations over the network, then ten PVCs would be established, each with its own pair of unique DLCIs identifying each of the ten end users as well as the user who initially requested interconnection. For the ability to utilize two-way communications, which is typical, the end user would require the provisioning of 20 PVCs and

20 pairs of DLCIs. (The same loop, or access link, and UNI could be used for each PVC connecting an end user location to other users on the frame relay network.) When a communication is sent, the frame relay switches read the DLCI of the destination within the header of each packet and routes the traffic over the frame relay network to the proper terminating switch, whereupon the communication is terminated to the end user. Most PVCs on FRNs are between different offices of the same corporate entity or between affiliates. However, it is possible for two distinct entities to establish a PVC connection with each other as well.

63. Two frame relay networks, or "clouds" may be connected together using a Network-to-Network Interface ("NNI"). The NNI is a frame relay port which is connected via a high speed access link to a corresponding NNI port on the frame relay switch of another frame relay network. As in the case of the UNI, an NNI can have multiple PVC connections flowing through the same NNI and access link.

64. The FRNs of U S WEST and e•spire are largely equivalent in terms of functionality, types of facilities deployed, and architecture. There is no technical barrier to interconnecting the two networks. Interconnection between the two networks would require a NNI port at each carrier's frame relay switch, with a NNI connection for the transport of data between the two NNI ports. The locations which would be connected by the PVCs would have to be specified by assigning each location a DLCI. Once the addresses are specified, the NNI ports provisioned, and a transport medium established between the two NNI ports, an end user on U S WEST's network would have a PVC with an end user on the e•spire FRN.[2]

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[1] For the timing of setting up a DLCI see the Direct Testimony of Tony Mazraani at p. 9, and *Before the Public Utilities Commission of the State of Colorado*, Decision No. C98-1057, at p. 6 par. 5.

[2] There would also need to be a PVC from the NNI to each end user's UNI, and an access line from each UNI to the customer location.

Rate Elements of Frame Relay Networks

65. Frame relay is generally priced using three rate elements; (1) Frame relay access links, i.e. the FRAL; (2) Frame Relay Ports, and; (3) Permanent Virtual Circuits, i.e. the PVCs.[3]

66. To gain access to U S West's frame relay network, or "cloud" as it is sometimes called, a customer must purchase a FRAL for each location to be connected to the network. In addition, a customer must pay for the use of the ports, switches and trunks that make up the network. (Malone Rebuttal, p. 5 lines 5 - 14). The charge for use of the cloud is assessed at switch ports known either as a UNI or a NNI. The charge that corresponds to the UNI port is a UNIT and the charge that corresponds to the NNI port is the NNIT. The UNIT is a combination of two elements, the PVC and a Port Connection and Switching ("PCS") component.[4] The NNIT covers the switched port, the cost of the switch, and some of the transport on U S West's network.[5] To get frame relay service, a customer must, at a minimum, purchase either two UNITs or a UNIT and an NNIT.[6]

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[3] USWC Witness Ruth Hellman Direct Testimony at p. 5.
[4] Before the New Mexico State Corporation Commission, *In the Matter of the Restructure of Frame Relay Service in the Advanced Communications Service Tariff of U S WEST Communications, Inc.*, Docket No. 94-359-TC, ¶12.
[5] However, it should be noted that just what this interoffice transport consists of is hard to say as U S WEST has also stated that; "[t]he rate for NNIT can be lower than the rate for UNIT because there are no averaged interoffice facilities mileage costs in the NNIT." Id. ¶15.
[6] USWC Brief at p. 8. and Vol. 1 of the Hearing Transcript, p. 43.

Discussion and Ruling on the Issues

Under What Interconnect Provisions of the Telecommunications Act of 1996 are the Parties Required to Interconnect their Frame Relay Networks?

67. U S WEST's position is that FRN interconnection is governed by the general duty of all telecommunications carriers to interconnect with other telecommunications carriers which is set forth according to §251(a) of the Act and not by the more specific and stringent requirements of §251(c)(2) of the Act.

68. U S WEST argues that §251(c)(2) "requires an ILEC to interconnect its facilities with those of a CLEC 'for the transmission and routing of telephone exchange service and exchange access.'" U S WEST Brief at p. 6. U S WEST maintains that most of the traffic carried on U S WEST's FRN is currently purchased out of FCC tariffs. Furthermore, U S WEST points out that e•spire has conceded that fifty percent of its own traffic is interLATA and that e•spire has made no showing that any of the traffic it carries on its own network is local traffic.

69. U S WEST goes on to suggest that e•spire's contention that it intends to use U S WEST's FRN to provide exchange access to its interexchange customers is an argument that has been rejected by the FCC in the voice context. U S WEST points out that the FCC has stated that a carrier may not obtain interconnection under §251(c)(2) solely for the purpose of originating interexchange traffic. U S WEST Brief at p. 7.

70. U S WEST also argues that §251(c) does not apply to frame relay service because these are essentially private services allowing FRN customers to establish private network connections with each other. U S WEST maintains that FRNs provide a private service

because end users on the network are only able to communicate with other end users on the network via PVCs. Since the establishment of these PVCs have to be agreed upon by both parties to the connection and, since a PVC connection between parties can only be used for communication between those parties for which the connection has been established, U S WEST asserts that frame relay service is best characterized as a private service.

71. In sum U S WEST maintains that it is not obligated to interconnect its frame relay network under §251(c)(2) for the following reasons: (1) FRN traffic is primarily toll traffic and it is not obligated to interconnect under §251(c)(2) for the provision of toll traffic; (2) e•spire intends to provide exchange access to its interexchange customers across U S WEST's FRN which also exempts U S WEST from interconnecting under §251(c)(2), and; (3) §251(c)(2) does not apply to its frame relay service because frame relay service is essentially a private line service.

72. In arguing that interconnection to frame relay networks is governed under the requirements of §251(c)(2) of the Act e•spire draws the Commission's attention to the FCC's *Section 706 Order*, FCC 98-188, released on August 7, 1998 which denied the petitions of U S WEST and several other ILECs for relief from §251(c) obligations applicable to packet switched services. In making its ruling e•spire suggests that the FCC specifically rejected arguments raised by U S WEST which are virtually identical to those which U S WEST has raised in this proceeding.

73. e•spire states that U S WEST's assertion that it would only provide interLATA frame relay services is a mischaracterization of e•spire's proposed frame relay service offering in New Mexico. e•spire argues that it is a CLEC with a frame relay switching facility of its own located in Albuquerque, NM. e•spire declares that this puts it in a position to compete with U S

WEST in the market for intraLATA frame relay services and to provide frame relay exchange access to itself and to other telecommunications carriers. e•spire Brief at p. 6. e•spire goes on to argue that, this being the case, it is entitled to interconnection under §251(c)(2) of the Act as it will be transmitting and routing telephone exchange services and exchange access services both on its FRN and on U S WEST's FRN.

74. e•spire points out the FCC's *Section 706 Order* concluded that advanced services such as packet switched networks and FRNs were telecommunications services and that the obligations of §251(c) of the Act apply to these services. Furthermore, e•spire mentions that the FCC rejected the U S WEST argument that "telephone exchange service" and "exchange" access refer only to local switched voice service, or close substitutes, and to the provision of such services. e•spire bolsters this argument by going on to point out that the FCC concluded that services provided over packet switched networks are comparable to voice switched services and so fall under the definition of "telephone exchange service." e•spire Brief at p. 11.

75. e•spire responds to U S WEST's private network argument by asserting that the FCC was fully aware of this line of reasoning when it denied the petitions of U S WEST and several other ILECs for relief from §251(c) obligations applicable to packet switched services in its *Section 706 Order*. In making its case, e•spire directs the Commission's attention to the following text from footnote 73 of the *Section 706 Order*:

> Subscribers typically set up what are termed "permanent virtual connections" in routing their traffic across a packet-switched network. Such a connection, which gives the end user an "always-on" connection over a preset physical path, is easier to provision than a "switched virtual circuit," in which the connection path is determined on a call-by-call basis. A "permanent virtual connection," however, is not so "permanent" as the term would suggest. Any subscriber located on a packet-switched network can request the establishment of a permanent virtual connection

79. The Commission's analysis of the FCC's language in its *Section 706 Order*, the context in which the FCC drew attention to its *Frame Relay Order*, and the logic and arguments put forth by e•spire have persuaded us that the provision of frame relay service is subject to the standards of Section 251(c)(2) of the Telecommunications Act of 1996. Accordingly, we order that the interconnection between the frame relay networks of U S WEST and e•spire be performed in accordance with the standards of Section 251(c)(2) of the Telecommunications Act of 1996.

Concerning the issue of intermingling of local and toll traffic on same trunk.

80. U S WEST suggests that e•spire's proposal that the Commission reject the private line model proposed by U S WEST and adopt a voice network type model for frame relay network service is flawed because e•spire does not carry its voice network analogy all the way through. For example, U S WEST points out that in the voice world interconnection between networks requires separate trunking for local and toll traffic. U S WEST elaborates on this point by mentioning that its current voice network interconnection agreement with e•spire does not permit e•spire to commingle local and toll traffic on the same interconnection trunk.

81. U S WEST did not propose any method by which the packet switched traffic which is carried by a frame relay network could be efficiently and cost-effectively separated.

Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Recon. Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Recon. Order), Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), recon. dismissed in part, Order, 11 FCC Rcd 12513 (1996); BOC Safeguards Order vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S.Ct. 1427 (1995) (referred to collectively as the Computer III proceeding).

> Consequently, we reject U S West's contention that those terms refer only to local circuit-switched voice telephone service or close substitutes, and the provision of access to such services.[11]

78. While this particular order did not explicitly refer to frame relay networks in its discussion of advanced services it is note worthy that, in ¶35, where the FCC points out "[T]hat it has repeatedly held that specific packet-switched services are 'basic services,' (footnote omitted)", the FCC makes reference to its *IDCMA Petition, Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995) (Frame Relay Order).* In other rulings the FCC has classified all services offered over a telecommunications network as either "basic" or "enhanced"[12] and has ruled that Congress intended the categories of "telecommunications" and "information service," established in the 1996 Act, to parallel these "basic" and "enhanced" categories.[13] Furthermore, in other proceedings the FCC has sought comment on whether the definitions of "telecommunications service" and "basic service" should be interpreted to extend to the same functions.[14]

> [The 1996 amendment] would not have been necessary had Congress intended to limit telephone exchange service to traditional voice telephony. The new definition was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition of telephone exchange service, was not made useless by the replacement of circuit switched technology with other means -- for example packet switches or computer intranets -- of communicating information within a local area.

[11] *Footnote # 72 in original order* See U S WEST Comments (CC Docket No. 98-78) at 15-17; see also U S WEST Reply Comments (CC Docket No. 98-26) at 19-20; *see also* NTIA July 17 Ex Parte at 7, n.22 ("neither [Section 251(c)] nor its legislative history suggests that its requirements apply only to an ILECs' circuit-switched facilities and services").

[12] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 419-20, 93, 96 (1980) (Computer II Final Decision), recon., 84 FCC 2d 50 (1980) (Reconsideration Order), further recon., 88 FCC 2d 512 (1981) (Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[13] Report to Congress on Universal Service, 21.

[14] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Recon. Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Recon. Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Recon.), Phase I Order and Phase I Recon. Order, vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I); Phase II, 2 FCC Rcd 3072 (1987) (Phase II

> connecting its own computers with those of any other subscriber. Indeed, it appears that customers can easily create and tear down different permanent virtual connections to different destinations on the network, giving them a degree of "switched" functionality.

According to e•spire the above text indicates that the FCC found that the need for end users to establish PVCs with other users on a network in order to communicate was not a sufficient reason to rule that relief from §251(c) obligations would be granted to the owners of packet switched networks.

76. The Commission notes that in its *Section 706 Order* the FCC concluded that:

> that the pro-competitive provisions of the [Telecommunications Act of 1996 amending the 1934 Act] apply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technology neutral and is designed to ensure competition in all telecommunications markets. We therefore conclude that incumbent LECs are subject to Section 251(c) in their provision of advanced services.[7]

77. In this order the FCC went on to rule that "We conclude that advanced services offered by incumbent LECs are either 'telephone exchange service' or 'exchange access.'"[8] Even more significantly the FCC went on to state, at ¶41, that;

> Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. Indeed, Congress in the 1996 Act expanded the scope of the "telephone exchange service" definition to include, for the first time, "comparable service" provided by a telecommunications carrier.[9] The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology.[10]

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[7] Section 706 Order, FCC98-188, released on August 7, 1998 ¶11

[8] Id. ¶40.

[9] *Footnote # 70 in original order* 47 U.S.C. § 153(47)(B). This amendment in turn has modified the scope of "exchange access," which the Act defines as "the offering of access to *telephone exchange services or facilities* for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (emphasis added).

[10] *Footnote # 71 in original order* See Comments of Senators Stevens and Burns, Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress) (filed Jan. 26, 1998), at 2, n.1:

82. U S WEST asserts that e•spire's proposal that it be allowed to commingle IntraLATA and InterLATA on the same interconnection trunk and that this traffic be separated into IntraLATA and InterLATA groupings based on a ratio of IntraLATA to InterLATA PVCs determined by using PVC endpoints is not an adequate substitution for requiring separate trunk groups. U S WEST states that the e•spire proposal is inadequate "because it presupposes that traffic across the network begins and ends where the PVC begins and ends." U S WEST Brief at p. 5.

83. U S WEST goes on to suggest that "[t]here are all sorts of ways to game this. A series of PVCs can be linked together such that interLATA traffic appears to be local traffic on U S West's network. Artificial points of presence, internet service providers and other devices can be used to create an apparent but illusory PVC endpoint." U S WEST Brief at p. 5.

84. e•spire maintains that commingling interLATA and intraLATA traffic on the same trunk is the most efficient, and cost effective, way to provide frame relay service. e•spire suggests that separate trunking is not necessary because it is very easy to determine which PVCs are interLATA and which are intraLATA based on the information contained in the DLCIs.

85. To determine how much of the traffic between frame relay switches is interLATA and how much is intraLATA, e•spire proposes that the parties simply take the total number of PVCs over the transport facilities between the switches divided into the number of intraLATA PVCs over that transport facility. This results in a factor that e•spire calls the Percent Local Circuit Use ("PLCU") factor. e•spire maintains that, since PVCs are dedicated and the traffic over the PVCs is not measured, using the PLCU is a more cost-effective approach for the allocation of frame relay traffic into intraLATA and interLATA groupings as opposed to U S WEST's separate trunking requirement.

86. It is this Commission's belief that the commingling of interLATA and intraLATA traffic on the interconnecting trunks between separate frame relay networks is justifiable in the interests promoting the provision of efficient and cost effective frame relay service to customers in New Mexico. We find that e•spire's PLCU methodology for the allocation of frame relay traffic into intraLATA and interLATA groupings is a reasonable and cost effective approach for dealing with the issue of separations and so order its adoption here.

87. U S WEST has asserted that such commingling is in violation of e•spire's existing interconnection agreement with U S WEST which governs the interconnection of local networks. We take note that this interconnection agreement is an agreement between e•spire and U S WEST with respect to switched voice interconnection. It is this Commission's opinion that by agreeing that intraLATA and interLATA traffic would be carried over separate trunks with respect to interconnection concerning its voice network, e•spire did not waive its right to argue that frame traffic should be commingled because of efficiencies and other factors.

88. It is also this Commission's opinion that the terms and conditions of the interconnection agreement reached between e•spire and U S WEST in regard to the interconnection of their respective voice networks, while, arguably, able to serve as a guide to the appropriate terms and conditions for an interconnection agreement involving frame relay networks, ought not be considered as binding requirements for the interconnection of frame relay networks.

89. U S WEST has also expressed concern that by allowing the commingling of intraLATA and interLATA traffic on the same trunk it would potentially enable e•spire to "game" the system by, for example, creating a series of PVCs linked together in such a manner that interLATA traffic appears to be local traffic on U S WEST's network.

90. In response to this, the Commission would note that e•spire has proposed "that the parties establish at the time a PVC is put in place whether the end points are within the same LATA or not." Rebuttal Testimony of Tony Mazraani at p. 11. In addition e•spire has proposed that it meet with U S WEST every six months to have a joint planning session to discuss its forecast for interconnection needs and growth over the next six months. Rebuttal Testimony of Tony Mazraani at p. 7.

91. The Commission further notes that under cross-examination e•spire witness Costa stated that, according to e•spire's classification system, if a customer labeled as an intraLATA, or metro customer, turns around and is transmitting interLATA traffic, then that customer's classification is changed such that they are designated as an interLATA, or national customer. Hearing Transcript Vol. I at p. 23-24. Mr. Costa went on to state that, while a customer may have both interLATA and intraLATA PVCs, once a metro customer establishes an interLATA PVC that customer is no longer a metro customer and is reclassified as a national customer.

92. It is this Commission's belief that the above provide ample safeguards against e•spire's "gaming" the system in a manner similar to that outlined by U S WEST in ¶83., above. This Commission expects that there will be timely notification by the parties of changes in customer status on those occasions when a customer moves from being an interLATA customer to being an intraLATA customer. Furthermore, it is this Commission's suggestion that the six month joint planning session would be useful time to review the frame relay customer account designations of the respective parties.

Are The Frame Relay Networks Of The Parties Public Or Private?

93. The issue of the private or public nature of frame relay networks has to do, primarily, with determining whether or not U S WEST's frame relay network in New Mexico was subject to the standards of Section 251(c).

94. U S WEST contends frame relay service is a private network service and is not subject to the provisions of Section 251(c) of the Act. e•spire argued that while the frame Relay services could be considered as private, the frame relay networks over which these services are offered should be considered public shared networks over which packet switched telecommunications services are made available to the public generally.

95. Since this Commission has already ruled, in ¶79., above, that U S WEST is obligated to interconnect its frame relay system subject to the standards of Section 251(c)(2), the issue of whether or not frame relay networks are private line networks or public networks no longer has any bearing on the determination of U S WEST's interconnection obligations under the Act.

96. However, U S WEST has also used their assertion that the frame relay network is a private line network to support their stance that "since neither bill and keep nor reciprocal compensation are applicable to interconnection of private lines, neither bill and keep nor reciprocal compensation should be applied to interconnection of frame relay networks." U S WEST Brief at p. 13.

97. The determination of the appropriateness of these measures for frame relay service is discussed more fully below. The Commission would just note here that this

appropriateness, or lack thereof, is founded on factors other than the public or private nature of frame relay networks.

The Appropriate Pricing Standard For Frame Relay Interconnection.

98. Given that the Commission has ruled that U S WEST is obligated to interconnect its frame relay network to e•spire's frame relay network under the standards of §251(c)(2) of the Act, it follows that the Commission will set rates and conditions that are in accordance with §252(d)(1) of the Act. That is, the pricing standards will be cost based, non-discriminatory, and may included a reasonable profit. Furthermore, these pricing standards will be based on the TELRIC principles pursuant to our findings in the Phase I order of our generic cost Docket, NMSCC Docket No. 96-310-TC.[15] This ruling is consistent with the pricing standards contained in §252(d)(1). We note that these pricing standards apply equally to interconnection and to the provision of unbundled network elements ("UNEs").

Comments Concerning Jurisdictional Issues

99. The next few issues are predominantly concerned with issues of compensation and pricing. This Commission has no jurisdictional authority to rule on matters concerning compensation and pricing of interLATA traffic and so we will not discuss any of the arguments pertaining to interLATA matters which have been presented by the parties in this docket.

100. In the Commission's recent order concerning the *Matter of Arbitration Between AT&T and U S WEST,* we ruled that for inter-exchange traffic access charges apply and that

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[15] See, for example ¶18, and ¶155 of that order.

AT&T abide by the currently applicable tariffs. We apply that ruling here as well. Accordingly we find that, for inter-exchange frame relay traffic, access charges apply and e•spire must abide by the currently applicable tariffs.

Appropriate Compensation for Interconnection

101. U S WEST asserts that the appropriate compensation scheme for interconnection is contained in its tariffs and catalogue and that, at most, §252(c)(2) permits this Commission "to price the facilities necessary for local interconnection (two switch ports and a trunk) and to determine who is to pay for those facilities." U S WEST Brief at p. 2. U S WEST maintains that the Act does not authorize or require this Commission to modify U S WEST's retail structure for frame relay service. U S WEST goes on to state that e•spire's proposal to eliminate the NNIT charge that is part of its retail frame relay offering and to establish new recurring and nonrecurring charges for PVC's is not authorized under the Act.

102. U S WEST declares that the Commission lacks the authority to change PVC charges because these are not part of interconnection. Rather, they are assessed to recover a portion of the cost of transport across U S WEST's frame relay network. U S WEST maintains that interconnection is accomplished when U S WEST's and e•spire's networks have been physically linked. U S WEST goes on to state that, since it is e•spire's view that the creation of a PVC is like making a phone call, establishing and maintaining a PVC is not necessary to accomplish interconnection. U S WEST Brief at p.10.

103. U S WEST also declares that e•spire's proposed elimination of the NNIT charges would mean that U S WEST could not bill for the NNI side of the transport across its network. This, U S WEST avers, would render it impossible for the company to recover its costs.

104. U S WEST also argues that its tariffed rates for frame relay services comply with the requirements of Section 252(d)(2), in that they are based on cost and include a reasonable profit. U S WEST Ex. 6, Exec. Sum., p. 1.

105. e•spire, in turn, contends that U S WEST's tariffed rates do not comply with the requirements of Section 252(d)(2). e•spire goes on to point out that these rates are based on 1996 cost studies which were not sponsored by U S WEST in this docket. What is more, e•spire remarks, when U S WEST produced its 1996 frame relay cost study to e•spire it stated that the results of the study were not reliable. For example, e•spire makes mention of the following statement from U S WEST which accompanied the cost study: "U S WEST does not consider this study to be reflective of current costs or reasonable cost assumptions." e•spire Brief at p. 24.

106. e•spire suggests that "[t]hese are admissions which e•spire submits are dispositive of this matter. Section 252(d)(1) requires that pricing for interconnection and unbundled network elements be 'based on the cost . . . of providing the interconnection or unbundled network element.' In Docket No. 96-310-TC, the Commission determined that the rates for Section 251(c)(2) (UNEs and hence interconnection) must be set to recover TELRIC costs and a reasonable allocation of forward-looking joint and common costs. U S WEST now admits that the cost study used to establish its proposed interconnection rates is: (1) not based on TELRIC costing principles; (2) outdated; (3) unreliable; (4) not reflective of today's costs; and (5) not based on reasonable cost assumptions." e.spire Brief at p.24.

107. e•spire proposes "that the costs for the transport facility between NNI ports should be shared evenly by the parties, to the extent that the facility is used to exchange local (intraLATA) frame relay traffic. For transport, those costs should be the same as the TELRIC-

based rates for direct trunked transport adopted in consolidated Docket Nos. 96- 310-TC and 97-334-TC. Where U S WEST provisions that facility, e•spire's cost should be 50% of TELRIC-based rates for dedicated transport, to the extent that facility is used for local frame relay traffic. Similarly, both U S WEST and e•spire should bear the burden of providing their own respective NNI ports, again at least to the extent the interconnection is used for local frame relay traffic." Direct Testimony of Charles Kallenbach at p. 18.

108. e•spire goes on to state that, since U S WEST has not provided adequate cost studies to support TELRIC-based frame relay interconnection rates, the Commission should adopt, as an interim measure, the e•spire proposed rates and rate structure until such time as U S WEST can set rates based on valid TELRIC studies. e•spire Brief at p. 31. This is the following, from e•spire Brief at p. 31:

- For interoffice transport e•spire suggests that the TELRIC based rates established for transport in the Commission's Phase 1 Order at ¶¶342, 246 be adopted.
- For the NNI monthly recurring and non-recurring charges, e•spire proposes using the UNE based rate for a DS1 or DS3 trunk port at a U S WEST switch. e•spire points out that this rate was also established in the Commission's Phase 1 Order.[16] e•spire notes that this charge will only apply for interLATA traffic. In the case of intraLATA traffic the parties will each provide their own NNI.
- e•spire proposes "that one-half of the 'additional' non-recurring charge for PVCs i.e.$7.75, be used as a surrogate for the establishment of DLCIs."
- For the transport and termination of mutually exchanged intraLATA traffic, e•spire proposes the use of a bill-and-keep arrangement.

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[16] e•spire has suggested the following alternatives to this rate: 1) the Commission could use the TSLRIC and SC results from the 1996 study as a surrogate. Only 90% of the SC should be used, per the SCC Decision in Docket No. 96-310-TC, and; 2) As an alternative interim surrogate for the NNI Port, e•spire would be willing to pay the TELRIC plus shared costs for the NNIT in U S West's 1996 cost study. While unsponsored, e•spire submits that this cost study is a better basis for a cost-based surrogate than U S West's tariff." e•spire Brief footnotes Nos. 45 and 35, respectively.

109. e•spire suggests that there is little basis for U S WEST's assertion that it could not recover its costs under e•spire's proposal. e•spire maintains that, since U S WEST sponsored no cost study, there is no evidence as to what its costs actually are and so there is no real way to test the validity of its assertion. e•spire Brief at p. 29. e•spire suggests that U S WEST's real concern is that it will be able to recover fewer revenues under e•spire's proposal than its own.

110. e•spire goes on to assert that "U S West's tariffed rates for both the UNIT and NNIT are set so far above their TSLRIC costs, including a reasonable profit, that only in very unusual circumstances - i.e., where an interconnection is established with three or fewer PVCs - will there be any danger of U S WEST not recovering its costs for the UNIT, NNIT, and the interconnection trunk through the UNIT charges to its end users." e•spire Brief at p. 27. e•spire went on to maintain that this was a very unlikely scenario for any extended period of time and that, furthermore, e•spire's witness, Mr. Costa, made clear that he would not put in an interconnection request unless he had assurances that there would be considerably more PVCs.

111. The Commission disagrees with U S WEST's assertions in regard to what it thinks the Act does and does not permit the Commission to do in regards to retail pricing and structure. In ¶79., above, we determined that U S WEST was obligated to interconnect under the terms and standards of §251(c)(2) of the Act. Having found this to be to be the case it follows logically that U S WEST may also be considered to have obligations under the terms and standards of §251(c) of the Act. Thus, in our opinion, U S WEST obligations regarding its frame relay service, can be construed to encompass not only the obligations imposed by §251(c)(2) but also those imposed by §251(c)(3), which concern unbundled access.

112. These considerations imply two conclusions: 1) That this Commission has the statutory authority to set rates and conditions that are in accordance with §252(d) of the Act, and; 2) That this Commission is not prohibited under the Act from defining additional UNEs, and the appropriate rates for said UNEs under §252(d), for those telecommunications services concerning which the FCC has itself made no determination.[17]

113. Given the Commission's statutory authority, as outlined above in ¶112., we conclude that there is nothing in the Act which dictates that unbundled network elements have to parrot a firm's retail price structure.

114. The Commission finds e•spire's logic and arguments compelling concerning U S WEST's tariffed rates and their inapplicability for setting UNE prices in compliance with §252(d)(2) of the Act. Accordingly, the Commission orders U S WEST to perform a new TELRIC study for frame relay services. This study will show separately the costs for the NNI port and the interoffice transport part of that port, the UNI port and the interoffice transport part of that port, and the PVC. With regard to the PVC costs, we further order U S WEST to separately show the costs for the establishment of a DLCI at each end of a PVC port. U S WEST is directed to provide this study within four months of the effective date of this order.

115. The Commission now turns its attention to the question of the appropriate surrogates to adopt as interim rates for intraLATA service until the time that U S WEST's new cost study is completed and reviewed. Our review of the material which has been presented to us suggest the following surrogates as an interim measure:

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[17] See, for example, our ruling in Docket 96-411-TC at ¶¶235-245 (March 20, 1997), where we determined that dark fiber could be a UNE although it has no retail equivalent.

- For transport between U S WEST's and e•spire's respective FRNs we will adopt the TELRIC base rates established for transport in our Phase 1 Order.
- In regards to the UNI, NNI, PVC, and associated transport costs across U S WEST's frame relay network, we note that e•spire's Supplemental Response to Bench Request stated that U S WEST's 1996 cost study breaks out the NNI and UNI port costs from the NNIT and UNIT costs and that there is a breakout for each level of UNIT and NNIT. Accordingly, we will adopt U S WEST's 1996 cost study as our interim measure for the cost of the UNI, the NNI, and the PVC, as well as for the associated transport costs across U S WEST's frame relay network. The interim rate will be set at the sum of the TSLRIC + shared costs.

Concerning The Matter of Bill-and-Keep.

116. Section 252(d)(2) of the Act states that the terms and conditions for transport and termination of traffic are just and reasonable if; (1) they provide for the mutual and reciprocal recovery of costs, and; (2) costs are determined on the basis of a reasonable approximation of the additional costs of terminating calls. The Act does not preclude arrangements that waive mutual recovery, such as bill-and-keep arrangements; i.e. each party completes the other party's traffic at no charge, but retains all of its own end user revenues (Section 252(d)(2)(B)).

117. U S WEST asserts that neither bill and keep nor reciprocal compensation are appropriate when FRNs are interconnected for the simple fact that the customer who requests the set up of a PVC on FRN pays for all of the facilities dedicated to the customer's use.

118. U S WEST goes on to ascertain that reciprocal compensation is not viable with FRNs because the measurement of frame relay traffic across networks is not economically feasible. U S WEST states that because of this factor bill-and-keep is clearly the more appropriate measure, given that the only other alternative is reciprocal compensation. U S WEST Brief at p. 11.

119. However, U S WEST suggests that e•spire's bill-and-keep proposal is fundamentally unfair to U S WEST customers because under e•spire's proposal U S WEST's NNIT and PVC charges will be reduced or eliminated. U S WEST points out that the elimination of the NNIT charge, as e•spire proposes, would require a customer on U S WEST's FRN to absorb the entire cost of transporting traffic generated from the e•spire network across U S WEST's network from the NNI port on U S WEST's side of the interconnection back to the U S WEST customer's UNI. U S WEST suggest that, given the greater geographic extent of its frame relay network, this would mean that customers on the U S WEST side of the network could be paying more than those customers on the e•spire side of the interconnection. Hearing Transcripts Vol. II, Ruth Hellman testimony, pps. 26-31.

120. e•spire argues that the reciprocal compensation provisions of Sections 251(b)(5) and 252 (d)(2) of the Act should apply to the transport and termination of local frame relay traffic carried over intraLATA PVCs. However, e•spire goes on to point out that both parties' "witnesses agreed that usage-based reciprocal compensation arrangements would be inappropriate and, in any event, difficult to implement in a frame relay application." e•spire Brief at p. 22.

121. Given that usage-based reciprocal compensation arrangements have been deemed inappropriate, e•spire suggests the adoption of a bill-and-keep arrangement for the transport and

termination of mutually exchanged intraLATA frame relay traffic. e•spire points out that "[t]he FCC has opined that use of such bill- and-keep arrangements is appropriate where there is no reason to assume that the traffic exchanged will be materially out-of-balance." e•spire Brief at p. 22.

122. e•spire goes on to assert that in the case of frame relay service "it is established that virtually all PVCs will be bi- directional and the flat-rated charges assessed by the parties for the end user portions of the frame relay PVCs are designed to compensate the parties for all traffic carried over them. Furthermore, Mr. Kallenbach's assertion that there is no reason to assume that traffic will be out-of-balance is uncontroverted." e•spire Brief at p. 22.

123. Concerning the issue of the geographic disparity between the two networks, e•spire maintains that there is no disparity as both e•spire and U S WEST have the "comparable ability to provide service to any end user location in the LATA through the use of loops and back haul transport facilities to the parties' respective switches." e•spire Brief at p. 23.

124. e•spire suggests that, should this Commission choose not to adopt bill and keep, then TELRIC would be an appropriate costing methodology and one which would be in conformity both with the Act and with the decisions of this Commission. Direct Testimony of Pamela Cameron at p. 9.

125. The Commission is not convinced that a bill and keep arrangement is appropriate given the disparities in the geographic extent of the two networks. We note that U S WEST witness Hellman has stated that PVCs are always two-way connections and U S WEST witness Schmidt has stated that "both subscribers to the frame relay service pay for their end of that service." Hearing Transcript Vol. I at p. 105, and Direct Testimony of Ruth Hellman at p. 4. A two-way PVC connection requires the provisioning of two PVCs, one running from the user at

one end of the connection and one running from the user at the other end of the connection. A further requirement is that both users must agree to pay for their end of the connection before connection can occur.

126. Given these conditions the Commission feels that the most appropriate compensation arrangement for the termination and exchange of local traffic, and for the interconnection of intraLATA traffic in general, would be for each party to recoup its costs by charging the end user on its respective network the total cost of the PVC connection to the other network. For example, in the case where an e•spire customer and a U S WEST customer desire to establish a two-way PVC connection with one another, the e•spire customer will pay all the recurring and nonrecurring costs of setting up their PVC connection to the U S WEST customer. Similarly the U S WEST customer will pay all the recurring and nonrecurring costs of setting up their PVC connection to the e•spire customer.

Frame relay service resale obligations under §251(c)(4) of the Act, what is subject to a resale discount?

127. One of the obligations U S WEST incurs under §251 of the Act is the obligation to resell those telecommunications services, such as frame relay services, which it provides to its retail customers. Both parties agree that a 12% discount is the appropriate resale discount for frame relay service. e•spire Brief at p. 31. The issue of contention between the parties is what are the appropriate elements to which the discount applies and which elements may be purchased for resale.

128. U S WEST points out that "[U]nder the Act, an incumbent local exchange carrier is obligated only 'to offer for resale at wholesale rates any telecommunications service that the

carrier provides at retail to subscribers who are not telecommunications carriers.'" U S WEST Brief at p.10.

129. U S WEST has stated that its standard retail frame service offering requires a non telco end user to purchase, at a minimum, either two UNITs or a UNIT and an NNIT.[18] In its Brief, at p. 8 U S WEST mentions that the purchase of a frame relay access link, or FRAL, is necessary to gain access to its frame relay network but does not include this purchase as part of its minimum requirement for obtaining frame relay service from Itself. U S WEST also states that the UNIT and NNIT charges must include all associated PVC charges. USWC Witness Hellman, Hearing Transcript V.II at p. 32. So, according to U S WEST's view of its resale obligations, e•spire *must* purchase at least a UNIT (and associated PVC charges) and an NNIT (and associated PVC charges) to qualify for the 12% resale discount. If it so desires, e•spire may also purchase a FRAL along with a UNIT and an NNIT and have the 12% resale discount apply to this entire package.

130. e•spire's resale proposal is that it will purchase a FRAL and UNIT from U S WEST at the 12% wholesale discount rate. Then U S WEST and e•spire will each absorb the cost of the NNI port at their respective switches. Furthermore, U S WEST and e•spire will share the cost of the transport between the two parties respective frame relay switches. If U S WEST provides the transport, e•spire will compensate U S WEST at 50% of the TELRIC-based rate for said transport. Under this scenarios e•spire will pay no NNIT charges.[19]

131. e•spire takes the position that "the FRAL, the UNIT, and the NNIT are all, in effect, retail telecommunications services unto themselves." e•spire Brief at p. 33, footnote 48.

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[18] USWC Brief at p. 8.

As such, e•spire maintains that "[j]ust as the combination of UNIT, NNIT, and private line up to the point of hand-off is a telecommunications service, so is the carriage of traffic to the points of interconnection under e•spire's IntraLATA" proposal. e•spire Brief at p. 33. e•spire goes on to note that U S WEST explained on several occasions that a standard model for frame relay service involving two carriers providing one PVC, was for each carrier to charge the end user(s) for one half of the PVC. e•spire Brief at p. 33, footnote 49.

132. The Commission believes that the arguments presented by U S WEST on this issue are persuasive, especially given the fact that e•spire witness Kallenbach noted under cross examination that he was not aware of any circumstance today in which a customer could get frame relay service from U S WEST without purchasing a both a UNIT and an NNIT. Hearing Transcript V.I at p. 48.

133. Accordingly, the Commission finds that, for resale purposes, e•spire must purchase, at a minimum, the UNIT, and the NNIT from U S WEST. Since, by U S WEST's definition, mentioned in ¶66., above, the UNIT and the NNIT already have PVC costs associated with them, e•spire is not obligated to pay any other PVC costs beyond what is associated with the UNIT and NNIT on U S WEST's network.

134. The Commission notes here, however, that even though both U S WEST and e•spire have agreed that a 12% discount rate is the appropriate discount rate for frame relay service this Commission has not yet ruled on what the applicable wholesale discount rate shall be. This is a matter that will be decided in phase II of the generic cost docket, NMSCC Docket No. 96-310-TC.

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[19] Exhibit G, Direct Testimony of Charles Kallenbach.

135. In fact, the Commission would like to further point out that when U S WEST witness Malone was asked the question; "If, in the generic cost docket, the Commission accepts U S WEST's proposal that the resale discount be de-averaged, what would be the appropriate discount rate?", she replied that she did not know what the appropriate rate should be. Hearing Transcript Vol. II p.93-94.

136. The Commission also takes note of the fact that Malone did say that "[u]nder the Amendment, the 12% rate is subject to true-up to the discount rate that the Commission ultimately sets for finished intrastate services." Direct Testimony of Kathryn Malone at p. 5.

CONCLUSIONS OF LAW

The Commission hereby enters the following conclusions of law:

1. U S WEST is a certified provider of public telecommunications service, as defined in NMSA 1978, § 63-9A-3 (Repl. Pamp. 1989), and is a telephone company, as defined in N.M. Const. art. XI, § 7.

2. U S WEST is an ILEC within the meaning of 47 U.S.C. § 252.

3. e•spire is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

4. The Commission has jurisdiction over U S WEST and e•spire and of the subject matter of this docket.

5. Notice of the arbitration in this docket was proper and legally sufficient.

6. The Commission's resolution of the issues herein is just, reasonable and non-discriminatory, consistent with the Act and other applicable law, and is in the public interest.

ORDER

IT IS, THEREFORE, ORDERED:

1. The Commission hereby adopts and incorporates as its Order the resolution of the issues contained in the foregoing Findings of Fact and Conclusions of Law.

2. U S WEST and e•spire shall prepare an interconnection agreement incorporating the terms of the Commission's foregoing resolutions, and shall file such agreement with the Commission within forty-five days of the date of this Order. In that filing, U S WEST and e.spire shall specifically identify each provision of the agreement agreed upon through negotiation or mediation, and each provision that was arbitrated.

3. U S WEST shall perform a new TELRIC study for frame relay services which shows separately the costs for the NNI port and the interoffice transport part of that port, the UNI port and the interoffice transport part of that port, and the PVC. With regard to the PVC costs, U S WEST shall separately show the costs for the establishment of a DLCI at each end of a PVC port. U S WEST is directed to provide this study within four months of the effective date of this order to the Commission.

DONE this ___ day of December, 1998.

JEROME D. BLOCK, Chairman

BILL POPE, Commissioner

ATTEST:

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Orlando Romero, Chief Clerk