

not "interim."²⁵ The Board did not suggest that any of the non-interim rates in the MFS Agreement would be affected by the *Generic Rate Order*.

The Board then discusses at some length why the new, generic rates should supersede the *arbitrated* rates established in BA's agreement with AT&T. While the Board had previously stated that "[t]he generic proceeding will not supersede *arbitrated* terms and conditions," in the *Generic Rate Order* the Board "reverse[d]" that earlier conclusion. *Generic Rate Order* at 221 (emphasis added). The Board's discussion explains the difficulties in establishing *arbitrated* rates consistent with Section 252(d) within the nine-month deadline established by the Act. *See Generic Rate Order* at 222-39. After reviewing the record, the Board again states that the issue before it was to determine "whether to substitute the generic rates set forth herein *for the AT&T/BA-NJ arbitration rates.*" *Generic Rate Order* at 239 (emphasis added).

The Board's discussion then shows that its underlying concern both in issuing the *Generic Rate Order* and in applying it to previously arbitrated agreements was to ensure that *arbitrators* facing the complex task of applying the cost standards of Section 252(d) of the Act would not reach inconsistent results. As the Board stated:

As noted earlier, the Board had already advised the parties ... that "the information developed in this proceeding may well be relevant in assisting the Board to avoid disparate or inconsistent decisions with respect to the issues in [the] *arbitrations.*" [citation omitted] Unfortunately, the decisions of the *arbitrators* in the AT&T and MCI *arbitrations* presented the inconsistent outcomes which the Board sought to avoid. ...

In addition, the results of AT&T's *arbitration* was not consistent with the other *arbitrated* interconnection agreements which, as discussed above, also looked toward the generic proceeding for permanent rates. Finally, the

²⁵ *See* MFS Agreement, Attachment A, at Section 3.a under "MFS Service" (what BA pays to MFS) and Section 13.a. under "BA Service" (what MFS pays to BA).

AT&T *arbitration* decision was inconsistent with the interconnection agreements of the following carriers which were negotiated with BA-NJ and approved by the Board, all of which provide for the setting of interim rates until such time as the Board adopts permanent rates: [listing agreements not including the MFS Agreement].

Generic Rate Order at 245-46 (emphasis added).

For the reasons just described, it is absolutely clear that the Board did not intend the rates established in the *Generic Rate Order* to supersede the final *negotiated* call termination rates in the MFS Agreement. The purpose of the *Generic Rate Order* was to ensure that all CLECs that chose to *arbitrate* the rates they would pay BA ended up with rates that complied with the Board's understanding of how the cost standard of Section 252(d) applies to BA. Tr. 180. The *Generic Rate Order* had nothing to do with voluntarily negotiated rates — such as those in the MFS Agreement — that were neither designated as "interim" nor that purported to meet the Section 252(d) cost standard.²⁶

²⁶ The fact that Section 252(d) sets out a specific cost standard to be applied to BA's specific costs explains why the FCC, in its *Local Interconnection Order*, provided for an opportunity for incumbent LECs to seek to be relieved of Section 252(i) obligations over time. See Tr. 50-54 (colloquy between Mr. Lewis and Mr. Savage regarding the significance of the FCC's statements regarding Section 252(i) in the *Local Competition Order*. See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1317. In cases where Section 252(d) applies, rates will be set based on the ILEC's costs. If those costs change over time, it is only logical that the ILEC be permitted to show that its costs have changed. This is analogous to the procedure noted above, pursuant to which BA is free to argue to the Board that interconnection terms and conditions that have previously been found to meet the *non-cost-based* standard of Section 252(e)(2)(A) no longer meet that standard. But changes in an ILEC's costs — or a more precise determination of those costs — are simply irrelevant to rates established by negotiation and approved under Section 252(e)(2)(A). The *Generic Rate Order*, therefore, is irrelevant to this case.