VI. WHY GENERIC RATES SHOULD SUPERSEDE ARBITRATED RATES

We now address the applicability of the Board's generic rates, terms and conditions approved herein. By the very terms of the numerous approved or pending interconnection agreements, each of which incorporated interim provisions (rates and/or terms and/or conditions) pending this decision, the generic provisions (rates, and/or terms and/or conditions) approved by this action will govern. By this action the Board addresses all interconnection agreements that were interim in nature. The only arbitrator decision that included non-interim rates was the AT&T/BA-NJ arbitration[19] (hereinafter AT&T arbitration). The arbitrator in the AT&T proceeding elected to include permanent rates. However, this award was not acted on by the parties and remained open at the time of our deliberations in this matter. AT&T argued the arbitrator's lower rates should control the agreement to be entered into with BA-NJ . and in effect, AT&T argued that the arbitrator's ruling should supersede the Board's generic decision. AT&T's foundation for its position is a Board Order issued June 20, 1996, wherein the Board stated that it would take a two-step approach using negotiated agreements or arbitrations "to determine the appropriate rates, terms, and conditions ... The generic terms and conditions shall be offered as guidelines ... The generic proceeding will not supersede arbitrated terms and conditions." (Generic Order p. 2 issued June 20, 1996 at Docket No. TX95120631). As discussed more fully below, the Board quickly moved away from this position and, in fact, will herein reverse its June 20, 1996 position in light of the facts of this case and the changes in resulting policy since then.

19At the time of the Board's consideration of this matter at its July 17, 1997 agenda meeting, no interconnection agreement between AT&T and BA-NJ had been submitted to the Board. For a discussion of submissions made subsequent to the Board's July 17, 1997 ruling which is memorialized herein, see Order, I/M/O Interconnection Filing of AT&T Communications of New Jersey, Inc. and I/M/O Interconnection Filing of Bell Atlantic-New Jersey, Inc., Docket Nos. TO96070519 and TO96070523 (September 18, 1997). As discussed in the Board's September 18, 1997 Order, the separate submissions made subsequent to the July 17, 1997 agenda meeting by AT&T and BA-NJ did not comply with the requirements that a fully executed agreement must be submitted utilizing the Board approved generic rates, terms and conditions pursuant to the Board's July 17, 1997 ruling, which was reaffirmed by the Board at its September 9, 1997 agenda meeting. Accordingly, the Board notified AT&T and BA-NJ that the submissions would not be considered. Thereafter, an interconnection agreement executed by both AT&T and BA-NJ and embodying interim rates pending the Board's Order establishing generic rates was filed with the Board (with reservations of the right to challenge the Board's rulings), and was approved at our October 8, 1997 agenda meeting.

The Board's June 20, 1996 Order was issued in light of the Act's rather strict timelines. The Board interpreted the Act as requiring it to resolve all interconnection issues within nine months froom an initiated request (47 U.S.C. §252(b)(4)(C)). From that determination, the two-step approach appeared appropriate and was adopted, as were the Board's arbitration guidelines (Docket No. TX96070540, issued August 15, 1996). However, as time moved forward and the Act's intent became clearer, other options were found to provide adequate opportunities to review interconnection rates, terms, and provisions. In point of fact, the Board in its August 7, 1996, Pre-Hearing Order in this docket stated 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 those arbitrations." (Prehearing Order p. 3)

Just as the Board was refining its procedures for meeting the Act's requirements, the FCC was attempting to do the same. Pursuant to the Act, the FCC on August 8, 1996, issued its guidelines (I/M/O the Implementation of the Local Competition Provisions in the Teleocmmunications Act of 1996, cc Docket No. 96-98, FCC 96-325). These guidelines set out a new costing model approach that the FCC found met the Act's forward-looking cost requirement. Within three months, these FCC guidelines were challenged in court by the states and on October 15, 1996, the Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing rules, creating enormous uncertainty. More to the point, in New Jersey, the FCC Order required BA-NJ to abandon one cost methodology and adopt a new methodology. Up until this point, BA-NJ was working on a TSLRIC model which used total service long range incremental cost. The new FCC methodology required total element long run incremental cost (TELRIC), a significant change in cost approach.

Thus, by October, the Board had before it, new FCC guidelines, a stay of those guidelines, confusion as to the type of costing study that best met the Act's requirements, some arbitrations underway, and a request to dely the generic proceeding because of the FCC guidelines and rules.

The arbitrations that were underway, were following the Board's stated guidelines. These guidelines generally set an outside date of 60 days for the arbitrator to conduct all proceedings and render a decision. (Arbitration Order Appendix A p. 4) For the AT&T arbitration, the timeframes allowed 9 days for hearings held in October, cumulating 3600 pages of transcript, with time only for initial briefs to be filed in October by both AT&T and BA-NJ. A decision was rendered by the arbitrator on November 8, 1996; all-in-all a very tight timeframe. As a consequence, the arbitrator based his decision on a limited record, with but one cost model available for review. BA-NJ did not present a costing model from which to determine just and reasonable rates.

In attempting to meet the AT&T arbitration timelines, BA-NJ was not able to recast its TSLRIC model into a TELRIC model. The arbitration hearings were held in October and from August until October BA-NJ was attempting to develop its cost model. As a consequence, the arbitrator had but the one model before him to set interconnection rates for AT&T. That model was AT&T's Hatfield model. On top of that complication, the Hatfield model presented to the arbitrator was Hatfield version 2.2.2, as addressed herein, this version has been replaced by numerous updates with the latest being version 5.0. The significant of the model updates can be found in the FCC's universal service order. (In the matter of the Federal-State Joint Board on Universal Service Report and Order. FCC Order CC Docket No. 96-45 May 8, 1997)) In that Order, the FCC had before it Hatfield 3.1, but found that despite efforts to improve the model, it did not provide "dependable cost information." ID at ¶244 From this FCC analysis two things become evident. The first being that the Hatfield model version 2.2.2 required improvements to correct errors. The second is that despite the attempts at correcting engineering problems within the model, the FCC concluded that it could not use the Hatfield model "as a means to calculate the forward-looking economic cost of the network." (Id. at ¶245)

As will be discussed further herein, this Board will find that the inability to finalize any model is at the heart of this proceeding. The FCC and the Federal-State Joint Board, after reviewing numerous versions of three different models (the Hatfield model, one presented by Sprint called BCM and updated to BCPM, and one by the Advocate called TECM) over a number of years, with input from states, utilities, public advocates, its own staff as well as other interested parties could not use the Hatfield model before it as a means to calculate forward-looking costs according to the Act. The Board could likewise not find that an alder version totally met our needs. Nevertheless, the Board acted to introduce competition into the State by weighting the model results presented to us to minimize the engineering problems discussed in the record. The only other option would have been to delay the start of competition until a perfect model was developed. Yet, AT&T would have us find that its older Hatfield model, one in which even it found required updating, reviewed by one arbitrator and subject simply to an initial brief by BA-NJ should be standard for the setting of interconnection rates in the State.

Through the generic proceeding, the Board had an opportunity to explore the merits of four different costing models (Hatfield, BCM2, TECM and a BA-NJ model) as well as hold 20 days of hearings, examine 45 witnesses (resulting in about 5000 transcript pages) and analyze both initial and reply briefs from 15 different parties (however, not all parties briefed each cost model issue).

Finally, we note that AT&T was made fully aware of the Board's thinking as to generic rates versus arbitrated rates. By Secretary letter of January 16, 1997, all parties of interest were asked to comment on the applicability of the generic rates. Throughout this entire proceeding the aim of the Board is to set just and reasonable interconnection and unbundled network element rates based on the most complete, up to date information available to it. As part of this process we developed guidelines, and issued orders, we may not have been perfect in our assessment of the complexity of the issues, but we did constantly seek to develop the information needed to make such an assessment. Our initial determination as to the applicability of the arbitration rates not being superseded by the generic in retrospect and with the knowledge we have today was not as accurate as we would have liked. We have corrected that assessment with input from all interested parties. Our goal is a simple one, to set just and reasonable rates based on as complete a record as possible, we find this decision does that and, therefore, it compels us to herein state in fact the generic rates are controlling and must supersede arbitrated rates.

To place this discussion in its proper context, we first consider the duties imposed upon the Board by Congress in the Telecommunications Act of 1996 with regard to the opening of the local exchange marketplace to competition. The Telecommunications Act of 1996, signed into law on February 8, 1996, sets forth a national policy framework to establish a competitive and deregulated telecommunications environment. The Act imposes on incumbent local exchange carriers the duty to negotiate in good faith the terms and conditions of agreements to fulfill their obligations under the Act, including, but not limited to, their duties to provide interconnection, unbundled access, resale, collocation of facilities, number portability, dialing parity, access to rights of way and reciprocal compensation. 47 U.S.C. §251.

Carriers requesting interconnection (also known as "competitive local exchange carriers," and referred to herein as "CLECs") are also required to negotiate in good faith. Ibid. Binding agreements may be negotiated by the ILEC and CLEC, and entered into without regard to the standards set forth in subsections 251(b) and (c). 47 U.S.C. §252(a)(1). Any party negotiating an agreement may, at any point in the negotiations, request the participation of the state commission in the negotiation to mediate any differences which arise during the course of the negotiation. 47 U.S.C. §252(a)(2).

During the period from the 135th to the 160th day after the date on which an ILEC receives a request for interconnection, either party to a negotiation may petition the state commission to arbitrate any open issues. 47 U.S.C. §252(b)(1). An agreement arrived at by compulsory arbitration, as well as an agreement arrived at by negotiation or mediation, is to be submitted to the state commission, which may approve the agreement or reject it with written findings as to any deficiencies. 47 U.S.C. §252(e).

The Act requires the party petitioning for arbitration to provide with its petition all relevant documentation concerning the issues unresolved during negotiations, the positions of each party with respect to the unresolved issues, and any other issue discussed and resolved by the parties, and to simultaneously serve the same documents upon the other party to the arbitration. 47 U.S.C. §252(b)(2). The non-petitioning party may then respond to the petition and provide additional information as it wishes within 25 days of the filing of the petition with the State commission. 47 U.S.C. §252(b)(3).

Under the Act, the arbitration is to be limited to a consideration of the issues set forth in the petition and any response thereto, and the State commission may require either party to the arbitration to provide such additional information as may be necessary to reach a decision on the unresolved issues. Each issue set forth in the petition for arbitration and response thereto must be resolved by imposing appropriate conditions as required to implement 47 U.S.C. §252(c) not later than nine months after the date on which the ILEC received the request for interconnection. 47 U.S.C. §252(b)(4). An arbitrated resolution and imposition of conditions must meet the requirements of 47 U.S.C. §251, establish any rates for interconnection, services or network elements according to the pricing standards set forth in

47 U.S.C. §252(d), and provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. §252(c).

All agreements, whether arrived at through negotiation, mediation, arbitration or a combination thereof, are subject to approval or rejection by the state commission, which must determine to approve or reject an agreement arrived at by negotiation within 90 days and an agreement arrived at by arbitration within 30 days, otherwise the agreement is deemed approved. 47 U.S.C. §252(e). A state commission may reject an agreement (or any portion thereof) arrived at by negotiation if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or, that the implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. §252(e)(2)(A). A state commission may reject an agreement (or any portion thereof) arrived at by arbitration if it finds that the agreement does not meet the requirements of 47 U.S.C. §251, which, among other things pertain to interconnection, unbundled access, and resale, including regulations prescribed by the Federal Communications Commission pursuant thereto, or the pricing standards set forth in 47 U.S.C. §252(d). Subject to requirements regarding the removal of barriers to entry set forth in 47 U.S.C. §253, a state commission, in its review of an agreement, is not prohibited from establishing or enforcing other requirements of state law, including requiring compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. §252(e)(3). The Act also provides that if a state commission fails to act to carry out its responsibility in any proceeding or other matter under 47 U.S.C. §252, the FCC shall issue an order preempting the state commission's jurisdiction and shall assume the responsibility of the state commission. 47 U.S.C. §252(e)(5).

As noted earlier, following receipt of comments pursuant to its Notice of Investigation (see 28 N.J.R. 247(b) (January 16, 1996)) in the Local Competition docket, and the passage of the Telecommunications Act of 1996, and in order to fulfill its obligations under the Act, the Board determined that a two-step process was appropriate to begin the transition to a competitive local exchange marketplace. The first step was to utilize the negotiations and arbitrations to determine the appropriate rates, terms and conditions of interconnection for carriers requesting interconnection with an ILEC. Decision and Order, Local Competition (June 20, 1996), at 2. This process was required by the Act to be concluded in accordance with the time frames set forth therein. The second step was to conduct a generic proceeding to "determine the core issues of cost of a local exchange carrier's basic telephone service; the appropriate rates, terms and conditions of interconnection and wholesale resale rates applicable for all services." Ibid. The Board further stated that the setting of generic terms and conditions would allow the Board to "determine the appropriate general terms and conditions for a competitive local exchange marketplace." Ibid. Thus, as early as June 20, 1996, the Board articulated its desire to manage the creation of a competitive local exchange marketplace through the setting of generic rates, terms and condition, although as the Board looked at the local exchange landscape in June 1996, it anticipated that "the generally available terms and conditions that result from the generic proceeding will not supersede arbitrated terms and conditions." Ibid.

Thereafter, in considering and rejecting at its July 31, 1996 agenda meeting a recommendation by some parties to this proceeding that the Board adopt a schedule which would have delayed consideration of the interconnection and wholesale rate issues, the Board further emphasized the importance of its generic proceeding:

> [t]he generic proceeding will provide the Board with essential information for the Board to develop general terms and conditions of interconnection for parties not yet requesting arbitration. In particular, 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 those arbitrations.
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> [Prehearing Order, Local Competition (August 7, 1996), at 3.]

At the time the Board issued the Local Competition Prehearing Order, no fewer than four competitive LECs had already requested arbitration with BA-NJ, the ILEC which served more than 95% of the State's local exchange telecommunications customers. In this context, the Board clearly expressed its concern that different arbitrators, looking essentially at the same facts, may arrive at inconsistent decisions, and that the generic proceeding could be of assistance in ensuring consistency in the setting of rates, terms and conditions for interconnection with BA-NJ between and among the competitive LECs seeking such interconnection.

The Board next considered and adopted procedures to implement Section 252 of the Act at its public agenda meeting of July 17, 1996 and its special meeting of August 8, 1996. In its August 15, 1996 Order, the Board adopted procedures for the conduct of arbitrations and the Board's review of interconnection agreements, whether arrived at through negotiation or arbitration. Order, I/M/O the Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, the Arbitration Order).

In the Arbitration Order, the Board rejected direct participation by the Advocate in the arbitration process, reasoning that, not only did the Board's Section 252 procedures enable the Advocate to provide comments to the Board prior to a Board decision on any negotiated or arbitrated interconnection agreement, but also that the then existing schedule of the Local Competition proceeding, in which hearings were scheduled to begin September 9, 1996 and conclude October 11, 1996, was such that the Board would have the benefit of the input of the Advocate and all participants in the Local Competition proceeding on the issues of interconnection and wholesale rates before the Board rendered decisions on agreements resulting from then pending arbitrations. Arbitration Order at 16. Thus, as it considered and adopted procedures to implement the Act, the Board clearly envisioned the generic proceeding as a valuable source of input by the Advocate and others which would inform its deliberations on interconnection and rate issues in its review of agreements resulting from negotiations and arbitrations.[20]

Specifically with regard to arbitrations, the Board rejected proposals to consolidate arbitrations, deciding instead to maintain the arbitration process as essentially a two party process. The Board explained that "[c]onsidering the very tight time frames within which the Act requires the Board to fulfill its responsibilities under 47 U.S.C. §252, the Board is very concerned that consolidation may cause delay." Arbitration Order at 19. Accordingly, the Board adopted procedures which limited the arbitration process to the negotiating parties.[21] The procedures required the arbitrator to conduct all proceedings

20On an emergent application by the Advocate, the Board's August 15, 1996 Order was affirmed by the Appellate Division by Order entered August 23, 1996. A petition for certification thereafter was denied by the Supreme Court of New Jersey by Order entered September 9, 1996. Div. of the Ratepayer Advocate v. N.J. Board of Public Utilities, 146 N.J. 498 (1996).

21In limiting the arbitration process to the parties to the negotiations and the Advocate, the Board was mindful of the FCC's own arbitration procedures which limited arbitrations to the negotiating parties because such a limitation would allow for a more efficient process and minimize delay. FCC Order ¶1295.

and render a decision within a maximum time of approximately 60 days, unless extended for adequate justification, and required that parties to arbitrations incorporate the arbitration award into an interconnection agreement and submit that agreement to the Board within five days after issuance of the arbitration award. Arbitration Order, Appendix A at 4, 8. Thereafter, prior to the Board's consideration of the agreement and its determination whether to approve or reject the agreement (see 47 U.S.C. §252(e)), the Advocate would have fifteen days to file comments on the agreement with the Board, and the parties to the arbitration would then have five days to file replies to the Advocate's comments with the Board. Arbitration Order, Appendix A at 9.

These tight timeframes were adopted by the Board in deference to the Act's requirement for state action within nine months after the date on which the LEC received a request for negotiations, and the requirement for state action upon an arbitrated interconnection agreement within thirty days after submission of the agreement by the parties. 47 U.S.C. §252(b)(4); 47 U.S.C. §252(e)(4). In establishing these time frames, the Board also was mindful that the Act provides that should a state commission fail to act to carry out its responsibility under Section 252, the state commission is faced with the threat of an FCC order of preemption pursuant to which the FCC removes jurisdiction of the proceeding from the state. 47 U.S.C. §252(e)(5); FCC Order at ¶1285. In such an event, the state's ability to enforce state law requirements would be removed, and no authority to incorporate state policies into the arbitration process would exist. Thus, the Board structured an arbitration process which was expeditious so as to ensure compliance with federal deadlines, yet provided the information necessary to allow the Advocate to meaningfully comment during the Board's review of any interconnection agreement. In sum, in light of stringent federal time frames, and faced with the potentially dire consequence of preemption by the FCC, the Board adopted procedures, fulfillment of which it considered fundamental in order that arbitrations conducted pursuant to the Act would be successfully completed and timely reviewed by the Board.

With this background in mind, we next review the arbitrations between BA-NJ and prospective local exchange competitors that have actually come to the Board, as well as the conduct of the generic proceeding. The first requests for negotiation of interconnection agreements were received by BA-NJ on February 8, 1996, the day the Act was signed into law by the President. These requests for negotiation were from MFS Intelenet of New Jersey, Inc. (MFS) and Teleport Communications Group Inc. (TCG).

By letter dated July 16, 1996, TCG submitted a petition for arbitration to the Board (Docket No. TO96070525). The TCG arbitration decision was issued on October 16, 1996. However, rather than immediately filing an interconnection agreement with the Board as required by our Arbitration Order, TCG and BA-NJ instead chose to continue their discussions in order to reach a fully negotiated agreement. By joint application dated February 27, 1997, TCG and BA-NJ submitted a negotiated interconnection agreement dated as of February 3, 1997 which was subsequently approved by the Board. See Order Approving Interconnection Agreement, I/M/O the Petition of Teleport Communications New York for Arbitration to Establish an Interconnection Agreement with Bell Atlantic-New Jersey, Inc. and I/M/O the Joint Application of Bell Atlantic-New Jersey, Inc. And TC Systems, Inc. For Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996, Docket Nos. TO96070525 and TO97030122 (June 11, 1997) (TCG Order). Significantly, the approved interconnection agreement provided that BA-NJ shall charge non-recurring and monthly recurring rates for unbundled local loops and other network elements as set forth in the agreement as interim rates until such time as the Board adopted permanent rates. TCG Order at 3.

On July 17, 1996, BA-NJ and MFS jointly filed a petition for arbitration (Docket No. TO96070527). At the same time, BA-NJ filed a petition with the Board for approval of a negotiated interconnection agreement with MFS. The MFS arbitration decision was issued on October 12, 1996 and filed with the Board on October 16, 1996. On October 23, 1996, a revised exhibit to the negotiated interconnection agreement was filed with the Board to reflect the arbitrator's decision on issues before him, and the fully executed agreement was approved by the Board on November 6, 1996. See Order Approving Interconnection Agreement, I/M/O the Joint Petition of Bell Atlantic-New Jersey, Inc. And MFS Intelenet of New Jersey, Inc. For Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Bell Atlantic-New Jersey, Inc. Interconnection Agreement with MFS Intelenet of New Jersey, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, Docket Nos. TO96070527 and TO96070526 (March 10, 1997) (MFS Order). The revised agreement approved by the Board provided rates for non-recurring and recurring unbundled local loop elements which would apply on an interim basis until such time as the Board set permanent rates. See Exhibit A to the BA-NJ/MFS Interconnection Agreement, revised as of October 21, 1996, ¶4.a.

By letter dated August 15, 1996, Eastern Telelogic Corporation (ETC) and BA-NJ submitted a joint petition to the Board for arbitration, and by joint application dated September 16, 1996 they submitted a negotiated interconnection agreement covering other issues to the Board for its approval. The arbitrated issues were resolved by a decision of the arbitrator dated November 25, 1996, and a revised exhibit to the negotiated agreement already submitted which reflected the arbitrator's decision was submitted to the Board by letter dated November 25, 1996. The Board approved the interconnection agreement on January 8, 1997. See Order Approving Interconnection Agreement, I/M/O the Joint Petition of Bell Atlantic-New Jersey, Inc. and Eastern Telelogic Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Joint Application of Bell Atlantic-New Jersey, Inc. and Eastern Telelogic Corporation for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996, Docket Nos. TO96080599 and TO96090661 (April 10, 1997) (ETC Order). Again, the agreement approved by the Board provided that BA-NJ shall charge the non-recurring and monthly recurring rates for unbundled local loops and other network elements as set forth in Exhibit A to the agreement, as revised per the arbitrator's decision, until such time as the Board adopts permanent rates. ETC Order at 3.

MCI Telecommunications Corporation (MCI), on behalf of its competitive LEC affiliate, MCImetro Access Transmission Service, Inc. (MCImetro), requested negotiations with BA-NJ on March 26, 1996. By letter dated August 27, 1996, MCI filed a petition for arbitration of the unresolved issues in its interconnection negotiations with BA-NJ. During the arbitration proceeding, MCImetro relied upon the Hatfield model, while BA-NJ recommended that proxy rates be adopted as permitted by the FCC's First Report and Order in I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos 96-96 and 95-185, FCC Order No. 96-325 (released August 8, 1996) (First Report and Order). By letter dated December 19, 1996, the arbitrator issued his award. The arbitrator accepted BA-NJ's position, choosing to adopt the FCC's proxy rates as interim rates for unbundled network elements until such time as the Board could "examine in detail the costs of providing unbundled network elements in [its] generic proceeding." See Award and Opinion of Arbitrator dated December 19, 1996 at 11-17. The arbitrator also awarded interim reciprocal compensation rates to be set for termination of local traffic based upon the FCC's proxy rates for end office and tandem switching. Id. at 3-6. The arbitrator also adopted the FCC default range in setting BA-NJ's wholesale discount rate, and did so also on an interim basis pending further Board action. Id. at 20. The arbitrator also set collocation rates on an interim basis based upon FCC proxy rates, to be adjusted by the Board at such time as BA-NJ TELRIC costs were examined by the Board. Id. at 24-25. Finally, the arbitrator also set non-recurring charges and cross-connect rates on an interim basis subject to Board revision at such time as BA-NJ submits its TELRIC costs. Id. at 35-36, 39. Thus, notwithstanding the presence of TELRIC cost data in the record as offered by MCI in the form of its Hatfield model, and in the absence of a TELRIC cost model offered by BA-NJ, the arbitrator set interconnection rates on an interim basis to be adjusted by the Board depending upon its review of BA-NJ's costs in the generic proceeding. In setting interim rates for unbundled network elements based upon the FCC's proxies, the arbitrator indicated his belief that BA-NJ's position in favor of interim rates pending the outcome of the generic proceeding was correct and consistent with the finding in the MFS arbitration. Id. at 17.

Subsequently, rather than submit a fully executed interconnection agreement to the Board which incorporated the arbitrator's decision within five days, as required by the Board's arbitration procedures, on January 30, 1997, MCImetro and BA-NJ submitted an interim agreement to the Board for its approval. MCImetro and BA-NJ agreed that the interim interconnection agreement would remain in effect and be subject to monthly extensions until the effective date of a comprehensive interconnection agreement between MCImetro and BA-NJ. On April 17, 1997, this interim agreement was approved by the Board. See Order Approving Interim Interconnection Agreement, I/M/O the Joint Application of Bell Atlantic-New Jersey, Inc. and MCImetro Access Transmission Services, Inc. for Approval of an Interim Interconnection Agreement Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. TO97010065 (April 17, 1997).

On July 1, 1997, MCImetro and BA-NJ filed with the Board an interconnection agreement dated as of June 26, 1997 providing for interim rates pending the Board's adoption of permanent rates in the generic proceeding, and containing alternative positions on two issues which the Board was asked to resolve. The unresolved issues were the proper interpretation of the arbitrator's December 19, 1996 award with regard to BA-NJ sharing of directory assistance database information with MCImetro, and whether MCImetro should be obliged to provide BA-NJ with one point of interconnection per LATA or one point of interconnection per BA-NJ access tandem. All other issues were fully resolved by negotiation.[22]

The only other arbitration request[23] filed with the Board pursuant to Section 252 of the Act which proceeded to a decision by the arbitrator was one which was filed by AT&T on July 15, 1996 (Docket No. TO96070519), and contemporaneously by BA-NJ (Docket No. TO96070523). As permitted by 47 U.S.C. §252(b)(1), AT&T's request for arbitration followed by 135 days its request for negotiations with BA-NJ which it filed on March 1, 1996. Thus, at the time of AT&T's arbitration request, there remained 135 days for an arbitration to be conducted and concluded. On August 8, 1996, BA-NJ filed a response to AT&T's request. On August 15, 1996, contemporaneous with the release of the Board's Arbitration Order, the Board selected an arbitrator to conduct the AT&T/BA-NJ arbitration. Prehearing conferences on August 15, September 4 and September 12, 1996. Twelve days of arbitration hearings followed beginning September 23, 1996 and concluding October 15, 1996. AT&T presented ten witnesses; BA-NJ presented seven witnesses. Post-hearing briefs were filed and culminated in an arbitrator's award issued on November 8, 1996.

In reaching a decision, the arbitrator was confronted with a cost of service record which contained only AT&T's cost study, utilizing the Hatfield Model, Version 2.2.2, and BA-NJ's recommendation to set interim rates based upon the default and proxy rates set forth in the FCC's First Report and Order. The arbitrator opined that because BA-NJ had not submitted a cost study which comported with the FCC's TELRIC requirements that his choice then "for all intents and purposes [was] between the default rates

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22At its agenda meeting of September 10, 1997, the Board decided the two open issues, consistent with its rulings in the within proceeding rendered at the Board's July 17, 1997 agenda meeting, and thus approved a final interconnection agreement between the parties.

23Requests for arbitration were also filed by TotalTel USA Communications, Inc. (Docket No. TO96080617), Sprint (Docket No. TO96090670), and New Jersey Fiber Technologies (Docket No. TO97010026). These requests were either withdrawn or otherwise not pursued by the requesting carrier.

set by the FCC and the rates produced by the Hatfield Model." Arbitrator's Opinion at 8-9. Wishing to avoid setting interim rates because doing so "only prolongs the problem of balancing the interest of all of the parties which of necessity must take place through experience," the arbitrator rejected the use of the FCC's default and proxy rates and based his decision setting the rates for unbundled local loops and switching on the only model in the record before him, the Hatfield Model. Id. at 9.

By letter dated November 19, 1996, BA-NJ filed a Motion for Resolution of Arbitration Between AT&T and BA-NJ with Interim Rates and For Expedited Relief, arguing again that the FCC's default proxies should be used on an interim basis pending a decision in the generic proceeding based upon a full evidentiary record. On November 21, 1996, the arbitrator conducted a conference with the parties to discuss his Opinion, clarify the basis for his decision, and respond to questions regarding his analysis. Following the conference, by joint letter to the arbitrator dated November 27, 1996, AT&T and BA-NJ advised the arbitrator that based on his decision, as clarified, they had calculated the wholesale discount at 20.37% and had deaveraged the local loop rate of $11.76 into four rate groups. By letter dated January 7, 1997, BA-NJ withdrew its Motion, reserving its rights to reassert its arguments at an appropriate later time.

Thus, the Arbitrator's November 8, 1996 award was issued less than three months after the arbitrator was selected, and it was issued on the 253rd day following AT&T's request for negotiations, within the Act's nine month (270 day) time frame for resolution of unresolved issues. See 47 U.S.C. §252(b)(4)(C).

By joint letter dated January 17, 1997, AT&T and BA-NJ informed the Board that the process of reducing the arbitrator's decision to a contract consumed considerably more time than previously anticipated. In their letter, AT&T and BA-NJ advised the Board that they are "continuing in their negotiations, and will inform the Board as soon as possible of further developments towards completion of the final interconnection agreement." Although the Board's procedures on arbitrations called for an interconnection agreement to be submitted to the Board within five days after receipt by the parties of the arbitrator's decision, at the time of the Board's consideration of this matter at its July 17, 1997 agenda meeting, no interconnection agreement had been presented to the Board, nor had either of the parties requested or sought Board assistance in reaching an agreement.

Just prior to this joint letter, pursuant to a decision of the Board at a special agenda meeting on January 16, 1997, and by letter from the Board's Secretary dated the same day, the Board requested comment from interested parties on the possibility of amending its Arbitration Order in Docket No. TX96070540 to set interim rates until the Board's generic proceeding could be concluded.

In response to the Secretary's letter, comments were duly filed by AT&T, MCI, Sprint, ETC, TCG, BA-NJ and the Advocate. AT&T commented that the Board must adhere to what it argued was its original position, that rates set in the arbitration proceeding are permanent and not to be modified by the generic proceeding. AT&T argued that in the Board's generic Local Competition docket, the Board held that the generally available terms and conditions resulting from the proceeding will not supersede arbitrated terms and conditions or those contained in negotiated agreements. AT&T contended that none of the reasons stated by Staff at the January 16, 1997 special meeting as supporting a modification of the Board's prior rulings in fact warrant such a reversal. AT&T argued that, contrary to Staff's view, the FCC's pricing guidelines were foreseen by BA-NJ in its AT&T arbitration, and as a result, BA-NJ had an opportunity to submit a proper cost study during the arbitration. As support for this position, AT&T pointed to the Act's pricing standards which require that rates for the interconnection of facilities and equipment and for network elements be based on the cost of providing the interconnection of network elements without reference to a rate-of-return or other rate-based proceeding and which became effective on February 8, 1996. AT&T also offered as support the fact that the FCC notified the telecommunications industry that it had reached a tentative conclusion that the Act precludes states from setting rates based upon a carrier's historical costs and rate base and requires the setting of rates based upon a forward-looking cost methodology. See Notice of Proposed Rulemaking, I/M/O Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-182 (released April 19, 1996), ¶¶123-27.

Next, AT&T argued that the October 15, 1996 Eighth Circuit stay of the FCC's pricing provisions does not justify a revisit of the Board's prior rulings because the stay was based upon the Court's view of the FCC's lack of jurisdiction to promulgate national pricing guidelines and not on the substance of those guidelines. Thus, according to AT&T, the Board and the AT&T arbitrator remained free to independently adopt the FCC's pricing guidelines.

Third, AT&T argued that the Board should not be concerned about inconsistency among arbitration results because the FCC's "pick and choose" rule, although stayed by the Eighth Circuit, may ultimately be allowed by the Court.[24] Moreover, AT&T argued that the pick and choose rule may well be compelled by Section 252(I), requiring ILECs to make available any interconnection, service, or network element provided under an agreement to which it is a party to any other requesting carrier upon the same terms and conditions, and by Sections 252(c)(2) and (d)(1), requiring that interconnection rates be non-discriminatory, and Section 251(c)(4), forbidding ILECs from imposing discriminatory conditions or limitations on resale. AT&T argued that even were the pick and choose rule not compelled by the Act, a carrier would remain free to select another carrier's entire agreement with the ILEC. Thus, according to AT&T, the Board already has the authority to achieve consistency between arbitration results. Furthermore, AT&T argued that to "downgrade" the rates set in the AT&T/BA-NJ arbitration to interim status subject to the outcome of the Board's generic rulemaking would (1) violate the jurisdictional time limits prescribed by the Act, (2) constitute unlawful retroactive rulemaking and (3) deprive AT&T of due process of law. Finally, AT&T argued that "downgrading" its arbitration rates to interim status would delay the advent of local exchange competition because vigorous entry into the marketplace would not occur until CLECs knew what New Jersey's actual rates, terms and conditions of interconnection would be.

MCI stated in its comments that having set the rules knowing the potential for inconsistent arbitration results, the Board should stay the course chosen. MCI argued that changing the rules now, when several arbitrations have been concluded, would be detrimental to parties who relied on the first set of rules and brought their individual proceedings to a conclusion in accordance with those rules. MCI acknowledged the possibility of a difference in permanent rates established in an arbitration and those established in the

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24The so-called "pick and choose" rule, set forth at 47 C.F.R. §51.809, provided, in pertinent part, that:

> (a) an incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

generic proceeding. However, MCI argued that this difference would soon be eliminated by parties' requests for a particular interconnection or unbundled network element under terms and conditions appearing in any approved agreement. MCI argued that the FCC's pick and choose rule allowing such requests has a basis not only in the stayed FCC rules, but in the language of Section 252(I) of the Act.

Sprint's comments supported the use of interim rates in arbitrations pending the results of the generic proceeding. However, Sprint noted that any final decision by the Board that a party's arbitration rates are permanent should be subject to the ability of any competitive local exchange carrier to pick and choose the most favorable terms from any completed interconnection agreement pursuant to 47 U.S.C. §252(I).

Eastern TeleLogic Corp. and Teleport Communications Group filed joint comments in support of any party that has relied on the Board's previous June 20, 1996 directive to obtain permanent rates from its arbitration. ETC and TCG argued that amending its Order retroactively would unfairly prejudice AT&T and other parties which relied on the Board's prior rulings. ETC and TCG commented that the Board should amend its Order on a prospective basis only so that parties presently considering filing for Section 252 negotiations or arbitrations would be placed on notice of the interim nature of their actions and proceed accordingly.

BA-NJ asserted in its comments that the Board should continue to approve agreements which incorporate only interim rates until the generic proceeding has been concluded. BA-NJ based its recommendation on several propositions. First, BA-NJ argued that the Board had not yet reviewed the FCC decision of August 8, 1996, when it decided how to proceed with its decision on arbitrated rates. According to BA-NJ, the FCC's August 8, 1996 Report and Order directed that each state set rates for interconnection based on a cost of service methodology which was different from the existing cost methodology, requiring reassessment and modification of the existing way of looking at cost development. Second, BA-NJ asserted that the FCC itself acknowledged that the introduction of the FCC's new TELRIC methodology would require ILECs to spend time developing new cost studies and therefore provided and recommended interim default rates, an option that had not been available to the Board when it originally issued its June 20, 1996 Order. Third, BA-NJ argued that since the FCC Order was issued, agreements submitted by CLECs and BA-NJ have incorporated the FCC interim proxy rates, pending the Board's conclusion of the generic proceeding. Moreover, according to BA-NJ, the generic proceeding would be the first opportunity that the Board would have to review and examine TELRIC cost of service studies. Fourth, BA-NJ asserted that the arbitrations conducted up to that point did not include BA-NJ TELRIC cost studies and BA-NJ argued that the Board could not reasonably approve permanent rates based on evidence from any arbitration which did not consider an ILEC's TELRIC study. Fifth, BA-NJ asserted that the Eighth Circuit stay of the First Report and Order placed the responsibility of rate setting squarely on the states, thus increasing the importance of the generic proceeding, and requiring the states to be prepared to support their decisions on their own.

BA-NJ indicated that action by the Board to make the individual arbitration rates interim would not constitute retroactive rulemaking, as suggested by AT&T, and that making the interconnection rates interim pending completion of the generic proceeding would guarantee, not impede, due process and fundamental fairness. BA-NJ also suggested that the Board may act to make individual arbitration rates interim while still satisfying the time frames established by the Act. In summary, BA-NJ recommended that the Board declare that any arbitrated interconnection and network element prices will be interim until completion of the relevant portion of the generic proceeding.

The Advocate asserted its belief that completed interconnection agreements establishing permanent interconnection rates, terms and conditions should remain binding upon the parties to those agreements, and that the Board should not, at this late date, change the rules and designate all negotiated, mediated and arbitrated rates, terms and conditions as interim. The Advocate argued that CLECs have entered into negotiations and arbitration proceedings with BA-NJ expecting that the rates, terms and conditions created would be permanent. The Advocate argued that designating interim rates is unfair and inconsistent with the ideal of fostering competition and would delay CLEC entry in the New Jersey local market. The Advocate also argued that the Board, as matter of policy, is not precluded from adopting the FCC's pick and choose rule, although it has been stayed by the Eighth Circuit. The Advocate asserted that when parties entered into negotiations they understood that they would be allowed to select more favorable terms from other parties' agreements.

Thus, the parties to this proceeding had substantial notice that the Board was actively considering making arbitration rates interim pending our determination in this proceeding, and, moreover, were given a full opportunity to submit comments to the Board regarding this possible action. We have carefully considered these comments in determining whether to substitute the generic rates set forth herein for the AT&T/BA-NJ arbitration rates.

In reaching our decision on this issue, we initially note that the Board's June 20, 1996 Order was issued prior to the unfolding of certain meaningful later events which the Board was obligated to consider. As we have already noted, the FCC issued its national interconnection and resale pricing rules on August 8, 1996 in its Report and Order in I/M/O the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, as well as a so-called "pick-and-choose" rule by which an incumbent LEC was obligated to make available to any requesting carrier "any individual interconnection, service, or network element arrangement contained in any [state commission] agreement to which it is a party." See First Report and Order, Appendix B, 47 C.F.R. §§51.501 et seq.; §51.601 et seq.; §§51.701 et seq.; and §51.809. These rules spelled out the obligations of both ILECs and LECs as the local exchange marketplace would open to competition, and required that a TELRIC cost methodology be utilized to set the costs of interconnection. The August 8, 1996 release of the First Report and Order occurred just after the filing of arbitration requests by AT&T on July 16, 1996, by TCG on July 16, 1996, and by MFS on July 17, 1996, and shortly before the August 15, 1996 request of ETC and the August 27, 1996 request for arbitration filed by MCI. The release of the FCC's First Report and Order forced the parties to these arbitrations to immediately attempt to both interpret and apply to their arbitrations this new and complex set of controversial federal rules. Furthermore, the arbitrators were then faced with navigating the uncharted local competition waters with the assistance of FCC pricing guidelines which had never before been applied.

Shortly thereafter, on October 15, 1996, the Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing rules, creating enormous uncertainty in the telecommunications industry. Iowa Utilities Board v. FCC, 109 F.3d 420 (8th Circuit 1996).[25] The FCC's so-called "pick and choose" rule, which

[25] These rules were largely vacated on July 18, 1997. Iowa Utilities Board et al. v. FCC, 120 F.3d 753 (8th Cir. 1997). Among the rules now vacated are the FCC's regulations regarding the availability of preexisting

would have allowed CLECs to select any rate, term or condition from previously or subsequently executed interconnection agreements between ILECs and other CLECs, which some had argued could be utilized to resolve any inconsistencies among such agreements, was also stayed. Id. Consequently, the legal viability of the very rules to which the parties, arbitrators and the Board were looking for guidance, albeit reluctantly on the part of some, was thrown into doubt.

In staying the FCC's pricing rules, including the pick and choose rule, the Eighth Circuit spoke clearly of irreparable harm which these rules were already causing and noted the Congressional intent to have interconnecting parties negotiate their differences. The following discussion illustrates the Court's concerns:

> [w]e are persuaded, however, by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down due to the competitors' desire to hold out for the FCC's proxy rates. Moreover, given the time constraints under the Act, some state commissions have already felt obliged to impose the proxy rates in their arbitrations. These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the interests of petitioners. If the FCC's rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based on the national pricing rules and to recreate the atmosphere of free negotiations that would have existed

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agreements to other parties (47 C.F.R. §51.303), the pricing of network elements, interconnection and methods of obtaining access (47 C.F.R §§51.501 et seq.), the pricing of LEC services offered for resale (47 C.F.R. §§51.601 et seq.), and the availability of provisions of agreements to other carriers, i.e., the "pick-and-choose" rule (47 C.F.R. §§51.809).

The Eighth Circuit vacated the FCC's pricing rules because it concluded that the FCC lacked the jurisdiction necessary to impose regulation over matters connected with intrastate service per 47 U.S.C. §152(b), and because of the Act's clear grant of ratemaking authority to state commissions. Thus, the Court found it unnecessary to review the pricing rules on their merits. Iowa Utilities Board et al., supra, 120 F.3d at 800.

> in the absence of the FCC's dictated presumptive prices. Without a stay, the opportunity for effective private negotiations will be irretrievably lost. We initially believe that this result would be contrary to Congress's intent that these matters be resolved through negotiation and/or arbitration.
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> [Iowa Utilities Board et al., supra, 109 F.3d at 425-26].

Thus, the Court suggested that the FCC's pricing rules, including the pick and choose rule, interfere with the ability of ILECs and this Board to effectively negotiate and arbitrate interconnection agreements contrary to Congressional intent.

The FCC's pick and choose rule, 47 C.F.R. §51.809, is its interpretation of Section 252(i) of the Act. As noted earlier, Section 252(i) provides that:

> [a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The FCC interpreted Section 252(i) to mean that a requesting carrier had a right to obtain from an ILEC any individual interconnection, service or network element arrangement contained in any agreement to which the ILEC is a party under the same rates, terms and conditions as those provided in the agreement. 47 C.F.R. §51.809(a). The FCC believed that Congress, in its formulation of the very language of Section 252(i), drew a distinction between individual interconnections, services and network elements and agreements in their totality. First Report and Order at ¶1311. The FCC was convinced that the promotion of competition and prevention of discrimination required this result. Id. at ¶¶1313-15. Moreover, the FCC extended this interpretation to encompass the ability of requesting carriers to obtain individual interconnections, services or network elements as they are contained in both pre-existing and subsequent ILEC agreements. Id. at ¶¶1316-22.

As we have already noted, the Eighth Circuit disagreed. In reaching its conclusion that the FCC's pricing rules must be stayed, the Court noted the petitioners' arguments that the "[C]ongressional preference for negotiated agreements would be undermined [by the pick and choose rule] because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized." Iowa Utilities Board et al., supra, 109 F.3d at 423.

As a result of the changing legal landscape which the arbitrators and parties to the AT&T and MCI arbitrations, as well as the Board and the parties to this proceeding, have had to negotiate, the schedule of this proceeding has been substantially extended, and parties and decision-makers alike have had to cope with a great deal of uncertainty. As a consequence of this uncertainty at the federal level, a climate has been created in which reliance on this State proceeding has increased during the process of negotiating and arbitrating interconnection agreements. This reliance on the generic proceeding is evidenced by the repeated incorporation of the rates, terms and conditions to be determined in this generic proceeding in both the negotiated and arbitrated agreements which have thus far come before the Board.

Another important change which occurred after the issuance of its June 20, 1996 Order related to the timing of the conclusion of the generic proceeding. At the time it issued its June 20, 1996 Order, the Board anticipated that the generic proceeding would be concluded in time for its results to be incorporated into interconnection agreements. The Board announced its intent to "establish generally available terms and conditions that will be available to any entity choosing to provide service in New Jersey and therefore, avoid the need to arbitrate or negotiate each and every company's request." Decision and Order, Local Competition (June 20, 1996), at 2. In order to expedite this proceeding, the Board directed that a prehearing conference be held on July 9, 1996. Ibid. In its Prehearing Order, the Board denied requests to delay consideration of interconnection and resale issues because it wanted to "develop general terms and conditions of interconnection for parties not yet requesting arbitration." Prehearing Order, Local Competition at 3. The Board recognized, moreover, that arbitrations already in progress might yield conflicting results, and consequently it also advised that the information developed in the generic proceeding might be "relevant in assisting the Board to avoid disparate or inconsistent arbitration decisions." Ibid. The Board scheduled the generic hearings to commence on

September 9, 1996, and expected them to be concluded by October 11, 1996, prior to Board decisions on agreements resulting from arbitrations. Id. at 6.

In our August 15, 1996 Arbitration Order, the Board again discussed the potential effect of the generic proceeding on the arbitrations:

> Significantly, the local exchange competition hearings in Docket No. TX95120631 are currently scheduled to begin on September 9, 1996 and conclude October 11, 1996. See Prehearing Order dated August 7, 1996. Thus, the Advocate, as a full participant, will have the opportunity to present testimony during that proceeding and will have an opportunity to provide the Board with its input on the issues of the cost of basic service, interconnection, and wholesale rates, prior to the Board's decisions on agreements resulting from the pending arbitrations, the earliest of which must be made by no later than November 8, 1996. The Advocate will, therefore, be able to bring issues and concerns affecting the public interest to the Board's attention in a timely manner both within the framework of the Board's procedures for review of arbitrated agreements and also within the local exchange competition proceeding.
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> [Arbitration Order at 16].

Later, the hearing schedule was adjusted several times to accommodate, among other things, the difficulties of parties in producing cost studies for review in a timely manner and the problems of parties in completing reviews of their adversaries' cost studies in light of issues of openness of the models and problems of confidentiality of certain components of and inputs to some cost models. The resale and interconnection hearings which were originally expected to conclude no later than October 11, 1996, finally concluded four months later on February 7, 1997.

When it became clear that the Local Competition proceedings would not conclude by the time originally anticipated, as noted earlier, by letter from the Board's Secretary dated January 16, 1997, the Board requested comment from interested parties on the possibility of amending its Order in Docket No.

TX97070540 to set interim rates until the Board's generic proceeding can be concluded.

With the generic proceeding now having been concluded, the generic rates established herein reflect the best information available to the Board, and reflect a far greater body of relevant information than what was before the AT&T/BA-NJ arbitrator during the less than three month arbitration proceeding. The Board cannot ignore the cost evidence in this much more extensive proceeding in ascertaining just and reasonable rates for interconnection and network elements, which must be based on cost and be nondiscriminatory. 47 U.S.C. §252(d). Moreover, the Board cannot hereafter ignore its determinations in the within proceeding as to the appropriate costs upon which just and reasonable rates must be based.

Significantly, the AT&T/BA-NJ arbitrator did not have before him a BA-NJ cost model, and so was not able to make judgements regarding BA-NJ's costs based on cost analysis information from BA-NJ itself. We note, however, that BA-NJ has asserted that it was "unable to present its own [cost] model because--on August 8, 1996, the day before its response to AT&T's [arbitration] petition was due--the FCC mandated a [TELRIC] costing methodology to which BA-NJ's existing cost studies did not fully conform. As a result, BA-NJ could not propose its studies." BA-NJ Motion for Resolution of Arbitration at 6. BA-NJ instead relied on the FCC default rates. Irrespective of the reason for the absence of this information during the AT&T/BA-NJ arbitration, the fact is that the AT&T/BA-NJ arbitrator did not have all the information which the Board has in the generic Local Competition proceeding. The public interest requires us to structure rates based upon the best information currently available. As noted earlier, faced with a similar situation, the MCI arbitrator prudently chose interim rates based on the FCC proxies which could later be adjusted by the Board after review of complete cost study information.

The serious weakness in the AT&T/BA-NJ arbitrator's record did not occur in the generic proceeding, in which the Board had the advantage of having before it studies analyzing BA-NJ's costs submitted jointly by AT&T and MCI, BA-NJ and the Advocate, and thoroughly tested and commented on by all the parties. The generic rates adopted herein reflect a full opportunity by all the parties, including AT&T, to dispute all aspects of all positions advanced by all parties. In the resale and interconnection phases of this matter, AT&T presented individually, and in some cases jointly with MCI, no fewer than twelve witnesses, two more than it presented during its BA-NJ arbitration, BA-NJ presented fourteen witnesses, and all the other parties, namely, the Advocate, Sprint, MCI, Teleport, DOD/FEA, WorldCom, MFS, and NJCTA, presented a total of nineteen witnesses. Thus, AT&T, as well as all other parties, had a fair opportunity to make its case for the most favorable interconnection rates, terms and conditions possible.

Although the Board expended substantial effort to conduct this proceeding in a deliberate manner, the Board's early estimates of time frames for this proceeding have proved, in hindsight, to have been optimistic. In fact, the resale and interconnection hearing phases of this proceeding alone lasted about five months (from October 7, 1996 to February 7, 1997), and then the briefing schedule and period of time for Board review added another four months. In contrast, the AT&T arbitration, including time for discovery, lasted 85 days, from referral to the arbitrator to issuance of his decision, and reflected twelve days of hearings at which seventeen witnesses were presented. The generic proceeding, on the other hand, not including time for discovery, lasted nine months from the beginning of the resale evidentiary hearings to the date of the Board's within decision, and reflected sixteen days of hearings in which forty-five witnesses were presented. The record in the generic proceeding is far more complete, and the parties and the decision-makers have had more time to create and weigh this record, than in the AT&T arbitration.

Moreover, of great importance to the Board is the fact that this generic proceeding has allowed the Board to establish rates, terms and condition for interconnection with BA-NJ (and United) which are consistent statewide. As noted earlier, the Board had already advised the parties to this matter 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." See Prehearing Order, Local Competition, at 3. Unfortunately, the decisions of the arbitrators in the AT&T and MCI arbitrations presented the inconsistent outcomes which the Board sought to avoid. As noted above, both AT&T and MCI presented Hatfield model analyses of BA-NJ's costs in their arbitrations, while BA-NJ did not present its own cost of service model. However, faced with the same body of cost information and FCC pricing rules, the AT&T/BA-NJ arbitrator set permanent rates founded upon the Hatfield model, while the MCI arbitrator chose the FCC's default and proxy rates and set interim rates pending the outcome