

level) as one that supersedes rates whenever negotiations fail. But Section 252 of the Act provides for arbitration when negotiations fail. The Board's policy thus violates the Act.

Verizon and the Board's arguments on the construction and purposes of the Telecommunications Act of 1996 (Act), preemption by the Federal Communications Commission (FCC), standing and mootness are all built upon their incorrect, post hoc view that the Board's ruling applied to the AT&T arbitration only. Their remaining statutory arguments lose all force once the second mischaracterization -- that the Board found the AT&T arbitrated rates non-Act compliant -- is corrected. Thus, every argument the Board or Verizon offer fails once the Board's ruling is correctly understood as the application of a generally applicable policy to the AT&T arbitration.

Regardless of their misstatements of the Board's actions, appellees offer no argument that reconciles the Board's action of superseding the AT&T arbitrated rates with the statutory language that (a) gives carriers the option to arbitrate "any open issues" and (b) limits Commission action on completed arbitrations to "approv[all] or reject[ion], with written findings as to any deficiencies." Verizon's contention, for example, that the Board has authority to supersede arbitrated rates because of its "broad authority" and "flexibility" would give legal effect to ambiguous non-statutory terms while ignoring specific statutory language to the contrary. Appellees' other arguments suffer from similar defects of statutory interpretation and legal relevancy.

LEGAL ARGUMENT

POINT I

The Board Announced and Applied a General Policy That "GENERIC RATES SHOULD SUPERSEDE ARBITRATED RATES"

We begin Point I by explaining what the Board itself made clear in its last administrative ruling on the AT&T-Verizon Interconnection Agreement: "the rates determined in the [Generic Proceeding] do in fact supersede any arbitrated decisions."¹ We then explain why Verizon is wrong in its assertion, repeated throughout its brief, that the Board "rejected" the AT&T-arbitrated rates not because they varied from the generic rates but because they were "non-Act compliant." The Board never discussed the arbitrated rates, let alone found them unlawful. Instead, the Board simply applied to the AT&T arbitration its announced general policy of superseding all arbitrated rates.

A. Appellees Offer Nothing to Contradict the Mandatory, Generally Applicable Feature of the Board's Generic Rate Policy

Verizon tries repeatedly to recast the Board's general policy as AT&T-specific. See, e.g., Verizon Brief 23 (District Court's holding "is limited to the court's affirmance of the Board's authority to substitute the Generic Proceeding rates for arbitrated rates in the AT&T/BA-NJ Interconnection Agreement"); id. at 44 ("the Board did not mandate that the rates from the Generic Proceeding replace all arbitrated rates"); id. at 54 (the Board

¹ Board Order on AT&T Interconnection Agreement, Docket Nos. TO96070519 and TO96070523 (Dec. 22, 1997) -(159a) (emphasis added).

"encouraged" rates other than its generic rates). The Board makes similar arguments. Board Brief at 24 (Board "made no ruling and issued no directive precluding ILECs and CLECs² from prospectively negotiating or arbitrating in an attempt to obtain more favorable terms....").

We give below four distinct reasons why Verizon's recasting is wrong. Turning to the Board, we caution that the Board cannot on brief alter, post hoc, the scope of its previous rulings.

1. The Board Unambiguously Established a Policy Providing That its Generic Rates Supersede All Arbitrated Rates

The Board announced and repeated its generic policy on multiple occasions.

Generic Proceeding Order (Dec. 2, 1997): The Generic Proceeding Order ("Generic Order") -- an order applicable to all ILECs and CLECs in New Jersey -- is the only written order on generic rates. The Board discusses the scope of its generic rate policy in Section IV under the heading: "WHY GENERIC RATES SHOULD SUPERSEDE ARBITRATED RATES." The heading emphasizes the policy's general applicability.

Over the next four pages of its Order (123a-26a)³, the Board elaborates. Its reasons bristle with general applicability. The Board describes the "great importance" of the generic proceeding in

² "ILEC" refers to an Incumbent Local Exchange Carrier and "CLEC" to a Competitive Local Exchange Carrier.

³ Refers to appendix filed by Appellant Ratepayer Advocate in support of its initial brief.

establishing rates "which are consistent statewide."⁴ Conversely, the Board bemoans the "inconsistent outcome" in the AT&T arbitration because the arbitrated rates "would be unique in the State." (148a) (emphasis added). Finally, the Board contrasts its superseding policy with its previous approach (referred to as its "initial determination"):

"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." (emphasis supplied)

12/2/97 Order at 224 (grammatical errors in the original) (126a).

Thus the Board felt "compelled" to supersede the arbitrated rates, not because anything was wrong with the arbitrated rates but because the generic rates were deemed by the Board to be just and reasonable.⁵ The Board could not have made its policy of general applicability any clearer.

⁴ Verizon ignores (at 47) the Board's extensive discussion of the "great importance" of having rates "which are consistent statewide." Generic Order at 245 (147a). Verizon suggests (at 47-48) that the Board merely "acknowledged a benefit" of consistent statewide rates and ruled based on its analysis of the Hatfield model. Verizon's characterization of the Generic Decision veers sharply from the Board's decision. The Generic Order discusses the Hatfield model (id. at 248-49 (150a-51a)) only after its longer elaboration of the "great importance" of consistent statewide rates (id. at 245-48 (147a-50a)).

⁵ The District Court reversed as arbitrary and capricious the Board's finding that the generic rates were just and reasonable. See District Court opinion at 25-31 (30a-36a).

The Board's July 17, 1997 Public Agenda Meeting: At this meeting, the Board first ruled that the generic rates would supersede all arbitrated rates. The Board also informed the parties to the only agreement which did not provide for the generic rates (AT&T and Verizon) "that a fully executed agreement must be submitted utilizing the Board approved generic rates, terms and conditions." (emphasis added) Generic Proceeding Order at 221, footnote 19 (123a). Further, the Deputy Attorney General (the Board's legal advisor) advised the Board that under the Board's new policy, "rates are going to be virtually uniform as of today." [see, p. 78 of transcript of Board Agenda meeting of July 17, 1997] (127sa)⁶

The September 9, 1997 Public Agenda Meeting: The Board here reaffirmed its policy, first announced at the July 17 meeting, of superseding all arbitrated rates. Specifically, the Board ruled that "the generic interconnection rates, terms and conditions should supersede any arbitrated findings" and that "Board policy [is] that the generic proceeding now supersedes the arbitrated guidelines." (122sa) (emphasis added).

Order Approving AT&T Interconnection Agreement (Dec. 27, 1997): In this final administrative action addressing the scope of its policy of superseding arbitrated rates, the Board describes how its prior rulings had made clear "its position that the rates determined in the [Generic Proceeding] do in fact supersede any

⁶ Refers to supplemental appendix of Appellee Verizon.

arbitrated decisions" and how it had "informed both Parties [AT&T and Verizon] that they were required to adhere to the Board's guidelines and [that they] must file a fully executed interconnection agreement that complies with the decision in the [Generic] proceeding." The order is unequivocal: the Board adopted a generally applicable policy of superseding arbitrated rates and then applied the general policy to the AT&T arbitration.⁸

Conclusion: The Board has issued multiple, unambiguous statements that generic rates will supersede arbitrated rates. As discussed in the next subsections, appellees do not contradict this fact.

2. Appellees' Only Evidence of a Non-Generic Policy is Actually the Application to AT&T of the Generic Policy

Appellees' only evidence of a non-generic policy are mentions by the Board and District Court of the Board's discussion of the

Board Order on AT&T Interconnection Agreement, Docket Nos. T096070519 and T096070523 (Dec. 22, 1997) (159a) (emphasis added).

In its supplemental brief before the District Court (dated March 10, 1999; at pp. 7-8) the Board relied on Section 51.513 of the FCC's regulations as providing it authority to set permanent rates. Subsequent to the District Court's opinion, however, the U.S. Court of Appeals for the 8th Circuit vacated Section 51.513. See Iowa Utils. Bd. v. FCC, 219 F.3d. 744 (8th Cir. 2000), cert granted, January 22, 2001. Because the 8th Circuit vacated the regulation, it can no longer be used as support for the Board's generic rate policy. See GTE South, Inc. et al., v. Morrison, 199 F.3d. 733, 742-43 (4th Cir. 1999) (Courts lack jurisdiction to review rules that are subject to review by another Court of Appeal under 28 U.S.C. § 2112(a) and other case law interpreting the Hobbs Act). See also Southwestern Bell Telephone Company v. Missouri Public Service Commission, ___ F.3d. ___ (8th Cir. January 8, 2001) (action by a State commission pursuant to an FCC rule which is vacated is not valid) (Exhibit A).

AT&T-Verizon agreement. See Verizon Brief at 44-45; Board Brief at 3; 24. These sightings of AT&T-specific language do not negate the Board's repeated statement of a generic policy. An application of the general policy to that case is necessarily consistent with the existence of a general policy.

Appellees' citations are not strengthened by their selectivity. Verizon ignores the express language of the Board's decisions quoted above, as well as the District Court's much broader description of its holding as "affirm[ing] the Board's decision to substitute generic rates for arbitrated rates as a proper exercise of authority under the Act." Opinion at 9 (14a).⁹

3. The Board Never "Encouraged" Rates Other Than the Generic Rates

In support of its contentions that the Board's actions were limited to the AT&T case, Verizon argues that the Board has indicated willingness to accept non-generic rates. Again quoting selectively, Verizon states (at 45) that "the Board expressed its willingness to consider rates other than those approved in the Generic Proceeding 'should events dictate,' and 'encourag[ed] the parties to work together' to develop an alternative methodology." (emphasis added).

Read in context, the Board's comments refer to the possibility that the Board might reconsider the generic rates themselves, not

⁹ Regardless of the particular language used in the District Court's opinion, the District Court affirmed what the Board actually did in terms of superseding arbitrated rates, as Verizon acknowledges (at 45).

that it might accept rates other than the generic rates. The Board's own brief says as much. Citing to the same text (see sa16-17), the Board states (at 12) that in the Generic Order it indicated its willingness to "monitor the competitive market and revisit generic rates is [sic] had established, if appropriate." (emphasis added).

4. A Theoretical Ability to Negotiate Is Rendered Meaningless by the Board's General Policy on Arbitration

Verizon (p. 45 n. 69) quotes language from the Board's Generic Proceeding stating that it will apply the generic rates to the AT&T/Verizon agreement "to the extent that those rates, terms and conditions have not been successfully negotiated." This language, Verizon argues, supports its contention that the Board has not adopted a general policy of superseding arbitrated rates. See also Verizon Brief at 47.

Verizon is wrong. That the Board may have permitted carriers the ability to negotiate rates other than the generic has no logical bearing on the question of whether the Board has adopted a general policy to supersede arbitrated rates. Even if a logical connection did exist, a carrier's theoretical ability to negotiate non-generic rates is of no practical value to it, due to the Board's policy of superseding all arbitrated rates with generic rates, See Point III.A, infra (explaining why negotiation is largely futile if carriers cannot seek arbitration).

5. The Board Cannot Alter, Post Hoc, the Scope of its Multiple Superseding Statements

Contradicting the Board's own rulings, the Board's lawyers contend (at 24) that the Generic Order has no prospective impact on arbitrated rates beyond "guiding" future arbitrators; ILECs and CLECs may arbitrate "more favorable terms, subject to approval by the Board."

These attorney arguments have no legal foundation. No citations, quotations or analysis of the Board's Generic Order appear in the brief. Try as they might, the Board's attorneys cannot override the Board's unambiguous rulings that "the generic rates are controlling and must supersede arbitrated rates," Generic Order at 226 (126a), and that "the [generic] rates ... do in fact supersede any arbitrated decisions." Order Approving AT&T Interconnection Agreement (159a). The action under review in this appeal is what the Board actually did -- not what the Board's lawyers say the Board did. See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action.")

Furthermore, the Board's brief elsewhere acknowledges (at pp. 15 & 25) that the Board in this case did apply its general policy of superseding any arbitrated rates. The Board's brief thus describes the Generic Order ruling as concluding

"that, to the extent that rates, terms and conditions had not been successfully negotiated, the generic rates, terms and conditions were applicable."

Id. This statement, put affirmatively, is this: the Board imposed its generic rates, terms and conditions because negotiations failed. Put another way: where rates are not negotiated successfully, the generic rates apply. This statement exposes the decision's unlawfulness. Under the Act, failed negotiations proceed to arbitration (Section 252(b)); under the Board's policy, failed negotiations mean generic rates. What triggers the Board's generic rate is the failure of negotiation, not the particular terms of a particular arbitration.

As we show in the next section, this policy is precisely what the Board applied to the AT&T arbitration: negotiations failed, and the Board imposed its generic rates -- without ever considering the merits of the rates arrived at through arbitration. That procedure violated Section 252 of the Act.¹⁰

Both the Board and Verizon argue that the generic policy resulted from a generic proceeding which the Board characterizes as a rulemaking. See Board Brief at 6, 7, and 25 and Verizon Brief at 13 (Verizon characterizes the Generic Proceeding as the setting of rates). Their belated attempt to characterize developments below as a rulemaking, does not strengthen their position in this appeal. Prior to this appeal, neither the Board nor Verizon claimed that the Generic Proceeding was a rulemaking. Now, however, by merely relabeling the proceeding a rulemaking, the Board cannot otherwise convert a contested case into a rulemaking without complying with the NJ Administrative Procedure Act, which the Board has failed to do.

B. Contrary to Verizon's Recasting of the Board's Decision as An Evaluation of AT&T-Arbitrated Rates, the Board Never Made Findings on Those Rates and In Fact Never Even Mentioned Them

1. The Board Never Addressed the Merits of the Arbitrated Rates

To support its inaccurate contention that the Board did not issue an order of general applicability, Verizon argues that the Board analyzed the arbitrated rates under Section 252(e)(2)(B), and rejected them based on this analysis. See, e.g., Verizon Brief at 46 ("it is beyond dispute that the 'arbitrated' rates could not withstand scrutiny under the Act"). To emphasize its characterization of the Board's decision, Verizon then labels the arbitrated rates "non-Act compliant" and "flawed." Id. at 30, 32, 33, 35, 38, 47, 48.

Verizon again mischaracterizes the Board's actions. The Board never considered the merits of the arbitrated rates, never assessed them against the criteria of Section 252(e)(2)(B) and never found them "non-Act compliant." Indeed, the Board's order never mentions the rates. At no point in any oral or written proceeding is there a Board discussion, let alone an evaluation, of the arbitrated rates. The District Court could not impute to an agency a finding that the arbitrated rates are unreasonable when, as here, the agency has not even described what the rates are. The Board here neither cited the rates nor even explained how they related to the Hatfield model's result.

The Board's failure to apply the statutory criteria yields only one logical inference: that Board replaced the arbitrated rates with generic rates because the Board was applying its generally applicable policy.

2. Verizon's Assertion that the Board Analyzed the Arbitrated Rates, and Then Rejected Them Because They Were Based on the Defective Hatfield Model, Is Based on a False Premise

Faced with a Board order lacking any evidence of an AT&T specific finding, Verizon tries to fill this void with the following reasoning:

- a. The Board decided that the Hatfield model, by itself, could not produce just and reasonable rates.
- b. The arbitrated rates were based "solely" on the Hatfield model; that is, they were equal to rates produced by the Hatfield model.¹¹
- c. Therefore, the Board's condemnation of the Hatfield model is the logical equivalent of a finding that the arbitrated rates were not just and reasonable.

This reasoning is pure manufacture, because the Board never used it. In any event, the argument is wrong because its premise (in b. above) is wrong. The arbitrated rates were not based "solely" on the Hatfield model. Since the Board limited its condemnation of the Hatfield model to situations where the model was the sole basis of the rate, the Board's attack on the Hatfield model cannot be the

¹¹ See Verizon Brief at 45 n.68 (the Hatfield model "alone provided the basis for the AT&T arbitrator's recommendation"); id. at 3 (asserting that the arbitrated rates were "based solely on a cost study that the Board determined did not produce just and reasonable rates as required by the Act") (emphasis added).

equivalent of an attack on the arbitrated rates.

That the Hatfield model was not the sole basis of the arbitrated rate is clear from the arbitrator's order. To arrive at the arbitrated rates, the arbitrator changed every result of the Hatfield model, and for some rates he disregarded the model's results altogether. See, e.g., Arbitration Order at 7 (105a) (explaining that he relied on the Hatfield model along with "other information to arrive at a just result"); (108a) (setting rates for unbundled loop at \$11.76 per month, compared to the Hatfield model rate of \$10.92); (109a) (disregarding the Hatfield results altogether in favor of Verizon's factor). Cf. Board Brief at 22 (acknowledging "that the arbitrator relied in part upon the FCC default proxy rates").

Verizon's only evidence that the Board condemned the arbitrated rate is the Board's attack on the Hatfield model. But Verizon's effort to equate the Board's condemnation of the Hatfield model with a rejection of the arbitrated rates is contradicted by the Board's own statement (151a) (emphasis added):

"[B]ecause it is under-engineered, use of the model by itself would result in rates which would not fairly compensate BA-NJ. Thus, we find in this proceeding that the Hatfield model ... cannot alone be utilized hereafter as the basis for rates for interconnection and unbundled network elements...."

The Board's findings regarding the Hatfield model cannot support Verizon's proposition that the arbitrated rates are "non-Act compliant" because those findings are limited to use of the Hatfield model by itself; yet the arbitrator in computing his

rates did not use the Hatfield model by itself.

Since the arbitrator did not base the arbitrated rates on the Hatfield model by itself, the Board's attack on the model cannot support Verizon's contention that the Board found the arbitrated rates "non-Act compliant." In fact, in using the phrase "by itself," the Board signaled that it would allow use of the Hatfield with modifications: exactly what the Board did when it based its own generic rates 40% on the results of the Hatfield model. See Generic Order at 254 (156a).

POINT II

Minus Their Mischaracterizations of the Board's Rulings, Appellees Arguments On the Language and Purposes of the Act, FCC Preemption, Standing, and Mootness Lose Their Foundation.

A. Stripped of Their Mischaracterizations, Appellees' Statutory Arguments Are Without Legal Foundation

In its initial brief, the Ratepayer Advocate (Initial Brief at 28-35) argued that in superseding all arbitrated rates with generic rates, the Board contradicted the specific text of the Act, its basic structure and assumptions, and Congress' policy to promote -- through the processes of arbitration and negotiation -- diversity and competition, rather than uniformity and regulation.

Appellees do not dispute our explanations regarding statutory construction and congressional purposes." Verizon instead insists that our arguments do not apply "Because Neither the Board Nor The District Court Mandated Uniform Statewide Rates For All Arbitrated Rates." Initial Brief at 44, 46. Verizon made this argument

central to its case, and had to because otherwise the statutory text would invalidate the Board's policy.

Verizon's reasoning is faulty. Point I explained, in the Board's own words, that the Board has mandated that the generic rates "do in fact supersede any arbitrated decisions." The Board's clarity on this point leaves the Ratepayer Advocate's legal analysis uncontroverted and the Board's decision unsupportable. Insisting on "one size fits all," the Board has eroded one of the underpinnings for local telephone competition: arbitrated interconnection rates.¹²

Correcting appellees' characterizations of the Board's policy thus exposes the legal errors. In enacting Section 252(b), Congress entitled a carrier to invoke arbitration of "any open issues" after negotiation. Under the Board's policy, interconnection rates are no longer an "open issue" available for arbitration; thus a carrier's statutory right to rate arbitration is destroyed. By sweeping away all arbitrated rates regardless of their merits, the Board's policy also violates Section 252(e) which limits the criteria upon which state regulators may reject arbitrated rates. Under Section 252(e), "inconsistency with generic rates" is not a permissible criterion. See Initial Brief at 36-41.

¹² See Special Agenda Meeting Transcript of January 16, 1997 at 4-6, where the Board accepted the recommendation of its staff that the Board should pursue consistency in rates for all interconnection agreements. (4asa-6asa). "asa" refers to Appellant's supplemental appendix enclosed with reply brief of Appellant, Ratepayer Advocate.

B. Appellees' FCC Preemption Arguments Fail Because They Also Depend on a Mistaken View of the Board Policy

The Ratepayer Advocate has argued that the FCC preempted a state from imposing generic rates on the arbitration process. See Initial Brief at 36-41. Attempting to defend against preemption, Verizon presents only one rationale: that the Board did not preclude arbitration pursuant to its general policy of superseding arbitrated rates. See, e.g., Verizon Brief at 51-52 (contending that the Board did not "set any minimum\maximum, one-rate requirement"). Further, Verizon attempts (at 53-54) to distinguish the Board's actions from the FCC orders on the grounds that the Board in its Generic Proceeding "encouraged" parties to negotiate rates different from its generic rates.

Verizon does not argue that the FCC did not preempt a policy of mandating generic as a substitute for arbitrated rates. Thus the Ratepayer Advcoate's preemption argument stands. Correcting for Verizon's misdescription of the Board decision, as Point I above does, again eliminates Verizon's legal argument.

C. Verizon's Mootness and Standing Arguments Are Premised on its Mischaracterizations of the Board's Actions and the District Court's Holding

1. Mootness

Verizon contends (at 28) that the Ratepayer Advcoate is seeking a "purely advisory opinion" because "there can be no reasonable expectation that the alleged violation will recur because AT&T in its new arbitration has determined to rely on the rates determined in the current Generic Proceeding." But there are

many CLECs other than AT&T, and the Board's generally applicable policy applies to them too. See, Friends of the Earth, Inc. v. Laidlaw Env. Services, Inc., 528 U.S. 167 (Jan. 2000); see also Dow Chemical Company v. EPA, 605 F.2d 673 (3rd Cir. 1979). Verizon's mootness bid therefore must fail for the same reason its statutory and preemption arguments fail: because the Board's policy was general, not AT&T-specific. AT&T's "new arbitration" is irrelevant.

A mootness claim cannot co-exist with a generally applicable policy, because a general policy continues to assert itself in each and every new agreement.¹³ There has been and will be no arbitration for interconnection rates in New Jersey. Consequently, there is not merely a "reasonable expectation ... that the alleged violation will recur," Verizon Brief at 27-28, but future violations are certain, and no intervening actions by AT&T could have "irrevocably eradicated the effects of the alleged violation" of precluding arbitration. Id. at 28 (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (internal quotations omitted)).

Were AT&T the only CLEC that ever will come to New Jersey, perhaps one could imagine a scenario that would render the Board's decision here moot. Attempting to describe such a scenario,

¹³ The Generic Proceeding rates have been applied in each and every interconnection agreement, as indicated in Verizon's compliance filing which was filed with the Board on February 1, 2000 pursuant to the Board's Summary Order (22asa). See Summary Order at page 9, I/M/O of the Board's Investigation Regarding the Status Of Local Exchange Competition In New Jersey, Docket No. TX98010010 (October 6, 1999). (12asa-21asa)

Verizon asserts (at 27) that in its new arbitration proceeding AT&T "has indicated that ... it would abide by the outcome of the ongoing Generic Proceeding commenced by the Board following the District Court's remand." (citing AT&T Arbitration' Petition filed Nov. 15, 2000 (133sa-48sa)).

At best, Verizon's statement proves nothing, since AT&T could have decided to abide because it likes the outcome, or because it is hemmed in by the Board's unlawful act. To infer AT&T's satisfaction would require one to ignore AT&T's own statements. AT&T's petition lists rates as one of several "open and disputed issues ... that are not being raised in this arbitration because they are pending before the Board in other proceedings." AT&T Petition for Arbitration at 11 (emphasis added) (143sa). In its January 8, 2001 letter to the Court, AT&T explains its situation:

"[I]t is simply not factually accurate to argue, as Verizon (Verizon Brief at 51-54) and the Board (Board Brief at 24-25) do, that the Board's actions have not had a chilling effect on the willingness of CLECs to arbitrate rate issues in New Jersey. Indeed, the decision of AT&T to forgo further negotiation and arbitration of pricing issues ... was influenced by the Board's prior actions."¹⁴

2. Standing

As with mootness, Verizon's standing arguments depend on its position that the Board acted on AT&T alone. Verizon treats the Board and District Court decision as addressing AT&T's rates only. Since the District Court remanded based on the unlawfulness of the

¹⁴ AT&T Communications of NJ, filing with the Court received Jan. 9, 2000, at 3.

rates, Verizon (at 29) accuses the Ratepayer Advocate of asking this Court to "affirm the District Court's remand on additional grounds." Under Verizon's formulation of the Board's ruling, the remand would cause no change in the status quo (wherein the Board must redo AT&T's rates), thus causing the Ratepayer Advocate to fail the redressability prong of the standing test.

The argument is wrong because the premise is wrong: the Board took action of general applicability, and the District Court explicitly upheld this feature of the Board's action. A reversal of the District Court's decision on this point would remove the rigid confines of the Board's approach. Similarly, Verizon's attack on the Ratepayer Advocate's requested relief (*id.* at 30) works only if its false premise is accepted. The appropriate relief, given the Board's error, is to require the Board to allow CLECs to arbitrate their rates, an opportunity presently denied them.

On characterizing the Board's proceeding accurately, as an elimination of the rate arbitration process for all CLECs, one quickly sees five types of direct, palpable injury. Specifically:

1. Retail prices charged by CLECs are necessarily higher, because the Board's initial generic rates are higher than the AT&T arbitrated rates. For the local loop, the generic rate was \$16.21, while the arbitration rate was \$11.76. See transcript of the July 17, 1997 public agenda meeting, pp.82-83 (9asa-11asa). Interconnection rates are a substantial part of the total telephone service cost incurred by CLECs. It is quite likely, therefore,

that the retail prices charged by the CLEC to its customers will be higher due to the Board's decision. See Environmental Action v. FERC, 996 F.2d 401 (D.C. Cir. 1993) (finding standing exists when the regulator sets rates higher than those sought by the ratepayer).

2. Ratepayers will lose the benefits of continuous cost-cutting. Generic rates deprive the ratepayers of the ongoing benefits of technological advancement. Congress insisted on pegging interconnection rates to forward-looking cost. Forward-looking cost is dynamic: it changes with technology (as each innovation changes the underlying cost structure in multiple ways), with competitive pressures (as each new entrant pressures existing players to find new economies), with legal developments (as each of the many jurisdictions promulgating laws and regulations creates new pressures and opportunities), market structure (as each new merger, divestiture and joint venture produces new challenges and opportunities) and consumer tastes (as preferences for pricing and products change).

A negotiation/arbitration regime would capture this dynamic change with relative precision. Each new competitor, seeking the lowest possible interconnection rate, would gather evidence of the latest cost reduction; each new arbitration outcome would reflect this evidence. And, since the ILEC must extend each new pricing package to other CLECs, see Section 252 of the Act, the other CLECs' customers would benefit from these cost reductions, increasingly and continuously.

The Board cut this dynamic process off. Instead of a continuous trend of cost reduction, the Board imposed a regime of fits and starts: a massive generic hearing to try to determine future costs, accompanied by a freeze on any arbitrated cost reductions indefinitely until the next massive generic rate case, which would produce another long-term freeze. The replacement of a declining continuous curve with a declining step function with a declining continuous function, necessarily increases the area under the curve, which represents the total CLEC payments under the interconnection rate schedule. Higher CLEC payments mean higher ratepayer cost.

3. The Board's substitution of generic rates for arbitrated rates eliminates product and price diversity. The 1996 Act mandated a competitive retail market. In a competitive market, each competitor strives for least-cost performance by combining its internal resources with inputs supplied by others. This process of arranging and rearranging resources, in almost countless combinations, creates cross-pressures among competitors that, in turn, yield continuous reductions in cost, and increases in product diversity, for the consumer.

For a competitor to find the best mix of internal and external resources, it must negotiate with others. Negotiations allow parties to increase the pie, by finding that mix of resources that best serves the customer. The 1996 Act, bent on increasing competitiveness, thus mandates negotiations and, where they fail, arbitrations. By cutting off this process, the Board harmed

ratepayers, by depriving them of countless outcomes of negotiations and arbitrations that would produce diversity of price and product.

4. The Board's action will deter competitive entry into the local exchange market by raising entry costs and discouraging differentiation. A CLEC cannot enter the local exchange without interconnection. Interconnection is therefore an entry cost. The higher the entry cost, the fewer the entrants. Fewer entrants means less competition, and less competition means higher rates and less product innovation and diversity. This line of reasoning demonstrates a direct, non-attenuated cause and effect between the Board's decision and customer harm.

Another deterrent to market entry, distinct from entry cost, is the uniformity imposed by the Board. In competition, each competitor seeks to distinguish itself by product and price differentiation. It can achieve this differentiation by negotiating (or arbitrating) different pricing arrangements, based on its negotiating skills, internal resources and ability to identify new combinations of its assets and the ILEC's assets. By imposing on all competitors the same exact interconnection rates, the Board deprived entrants of a key means of differentiation. That deprivation necessarily will discourage entry, to the disadvantage of consumers.

5. The Office of Ratepayer Advocate will face increased workload arising from the foregoing four harms. As a ratepayer itself, the Ratepayer Advocate will suffer each of the foregoing injuries. The Ratepayer Advocate also will suffer unique injury.

Among the Ratepayer Advocate's many responsibilities is receiving and responding to customer complaints. These complaints will grow due to the diminution in competitive accountability discussed above. The lack of competitive accountability means more possibilities of abuse by the ILEC, such as tying arrangements, reduced quality, nonresponsiveness to customer complaints and reductions in service quality. These behaviors will produce more consumer complaints about high rates, low service quality, absence of diversity and lack of competitive options. As a ratepayer itself, the Ratepayer Advocate suffers each of the foregoing injuries. However, the Ratepayer Advocate will also suffer unique injury.

Should this Court affirm the Board's authority to supersede rates, the Ratepayer Advocate would effectively be prevented from fulfilling its organizational purpose to "represent, protect, and advance the interests of all consumers of utility services . . . in an effort to protect and promote the economic interests of all New Jersey ratepayers." N.J.S.A. 13:1D-1 (Exhibit B). The Ratepayer Advocate could not effectively protect consumers against anticompetitive practices when, as here, Board policies encourage these practices. The lack of competitive accountability resulting from the Board's actions poses an increased risk of anticompetitive behavior by the ILEC which poses a imminent threat of increased rates, low service quality, and the absence of diversity.

Causation and Redressability: Each of these five types of injuries described is caused directly by the Board's decision.

They are redressable by this Court's reversal. If the Court holds that the Board may not impose generic rates as a substitute for arbitrated rates,

- a. arbitrated rates that are lower than the generic rates will re-emerge, thereby lowering retail service rates;
- b. the process of continuous cost-cutting that characterizes negotiations and arbitration will return, yielding over time lower costs for ratepayer;
- c. CLECs will be free to lower ratepayer costs and increase product innovation and diversity reaching arbitrated results that reflect their individual mixes of resources and skills;
- d. barriers to entry will diminish, allowing for more downward pressure on costs and upward pressure on product diversity, and
- e. the Ratepayer Advocate's opportunities to foster and encourage a competitive marketplace in accordance with the Act will be enhanced.¹⁵

Verizon appears to argue that a Court reversal would not redress the ratepayer harm because AT&T has indicated its willingness to use the generic rates. But what Verizon characterizes as willingness is the necessary result of choicelessness. Because the Board eliminated the arbitration option, AT&T has no choice but to accept the generic rates. Had the Board kept open the arbitration option while also creating a generic option, no one can say which one AT&T would have chosen. Therefore Verizon's redressability argument must fail.

¹⁵ See also, N.J.S.A. 13:1D-1 (Exhibit B).

Finally, Verizon's cited cases do not apply. The Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), involved a problem of derivative standing not present here. Armotek Indus., Inc. v. Employers Ins., 952 F.2d 756, 759 n.3 (3d Cir. 1991), actually says that even a "party who has prevailed on the merits may be able to appeal if that party still retains a personal stake in the appeal which satisfies Article III." Here the Ratepayer Advocate did not prevail on the merits concerning the Board's policy of general applicability. Citizens Util. Ratepayer Bd. v. McKee, 946 F.Supp. 893 (D.Kan. 1996), does not apply, because this appellate proceeding is not an appeal of an arbitration decision, but of a Board policy, and District Court affirmance thereof, requiring generic rates to supersede arbitrated rates in all situations. Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) does not apply because the Ratepayer Advocate is not seeking an advisory opinion, but a ruling that the Board's actual, explicit preclusion of arbitrated rates is unlawful.

In sum, as the statutory representative of the ratepayers, N.J.S.A. 13:1D-1, the Ratepayer Advocate has the authority and the obligation to prevent the injury caused by the Board's policy of choicelessness.¹⁶

¹⁶ See, N.J.S.A. 13:1D-1 (Exhibit B).