***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***CTC COMMUNICATIONS CORP.,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 97-395-P-H*** |
| | ***)*** | |
| ***BELL ATLANTIC CORPORATION,*** | ***)*** | |
| | ***)*** | |
| ***Defendant*** | ***)*** | |

***RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS***

The defendant, Bell Atlantic Corporation ("Bell"), moves to dismiss the first amended complaint in this action brought by CTC Communications Corp. ("CTC"), which alleges breach of various contracts and violation of several federal statutes in a total of six counts. The action arises out of the decision of CTC, previously an agent of Bell, to become a reseller of Bell services and products. I recommend that the court grant the motion in part and deny it in part.

## I. Standard of Review

Bell brings its motion to dismiss pursuant to Fed. R. Civ. P. 12(b), without specifying the applicable subsection of that rule. However, a review of Bell's motion suggests that it is based on Rule 12(b)(1), lack of jurisdiction over the subject matter, and Rule 12(b)(6), failure to state a claim upon which relief may be granted. When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision*

*Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

**II. Factual Background**

The first amended complaint includes the following relevant factual assertions. CTC is in the business of selling telecommunication services to customers in New York and New England. First Amended Complaint (Docket No. 21) ¶ 3. Bell is a telecommunications carrier that sells telecommunication services in the mid-Atlantic states, New York and New England. *Id.* ¶ 4. Bell is the corporate successor to NYNEX. *Id.* ¶ 5. Bell provides local exchange telephone service within a specified geographic area. *Id.* ¶¶ 10, 23. The Telecommunications Act of 1996, codified in part at 47 U.S.C. § 251, imposes certain obligations on local exchange carriers to foster the growth of competition for telecommunications services involving calls that originate and terminate within a local access and transport area ("LATA"). *Id.* ¶¶ 13, 21-22. Such services are known as "intraLATA services." *Id*. ¶ 13.

Beginning in 1984, CTC sold intraLATA services pursuant to a series of agency agreements with NYNEX; NYNEX also sold these services directly. *Id.* ¶ 25. The most recent agency agreement between CTC and NYNEX is dated February 1, 1996 ("the Agency Agreement"). *Id*. ¶ 27 & Exh. B. The Telecommunications Act of 1996 (sometimes "the Act") took effect on February 8, 1996. *Id*. ¶ 31; Act of February 8, 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 161. In light of certain provisions of the Act, CTC "has positioned itself to resell the IntraLATA services of Bell Atlantic . . . and to become a Reseller of such IntraLATA services in competition with Bell Atlantic." First Amended Complaint ¶ 36. CTC has entered into written Resale Service Agreements with Bell for the resale of Bell's intraLATA telecommunications services("the Resale Agreements") and has obtained approval to resell these services from the relevant state public utility commissions. *Id.* ¶¶ 37, 90.

Beginning in March 1997 Bell refused to pay CTC all of the commissions Bell owed to CTC under the Agency Agreement. *Id*. ¶ 39. Bell has taken the position that the Agency Agreement prohibits CTC from reselling Bell's intraLATA services to any customers that were served by CTC under the Agency Agreement. *Id*. ¶ 40. Bell refuses (i) to sell voice mail to CTC, (ii) to sell other services to CTC at wholesale prices, (iii) to permit customers who switch from Bell to CTC to retain discounts, (iv) to allow CTC to communicate with Bell's technical support personnel, which would aid CTC's resale of Bell's services, and (v) to allow CTC to state publicly that it has authority to market and resell Bell services. *Id*. ¶ 41.

Bell has monopoly power in the relevant market for intraLATA services for business customers and has complete control over the hardwire and network systems that allow for the provision of intraLATA services in New York and New England. *Id*. ¶¶ 54-55. Bell has entered into illegal tying arrangements in New England by refusing to provide or sell its brand of voice mail service unless customers also purchase its brand of Centrex service directly from Bell. *Id.* ¶ 67. Bell has sufficient economic power within the market for the tied products so as to restrain a not insubstantial amount of commerce in that market. *Id*. ¶ 68.

The Agency Agreement, which was drafted exclusively by Bell's predecessor, NYNEX, includes a non-competition clause. *Id*. ¶¶ 28, 74. After this action was filed, Bell brought suit against CTC in the United States District Court for the Southern District of New York in January 1998 alleging that CTC had breached the Agency Agreement. *Id.* ¶ 40; Docket No. 1. Bell has refused to process orders for certain customers and to allow certain customer accounts to be assumed by CTC. First Amended Complaint ¶ 93.

The First Amended Complaint includes six counts: Count I alleges breach of the Agency Agreement; Count II alleges monopolization and attempted monopolization in violation of 15 U.S.C. § 2 (the Sherman Antitrust Act); Count III alleges an illegal tying arrangement in violation of 15 U.S.C. § 1; Count IV alleges that certain terms of the Agency Agreement are in restraint of trade, in violation of 15 U.S.C. § 1; Count V (hereafter "Count V-1")alleges violation of the Telecommunications Act of 1996, specifically 47 U.S.C. § 251; and a second Count V (hereafter "Count V-2") alleges breach of the Resale Agreements.

## III. Discussion

### A. The Primary Jurisdiction Doctrine

Bell contends that Counts II through V-1 must be dismissed in deference to the primary jurisdiction of state and federal regulators over the claims raised in those counts. The primary jurisdiction doctrine is

> specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a "referral" to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.

*Reiter v. Cooper*, 507 U.S. 258, 268 (1993). The court may retain jurisdiction or, "if the parties would not be unfairly disadvantaged," dismiss the case without prejudice. *Id.* Referral to an administrative agency is justified by the interest in informing the court's ultimate decision with the agency's expert and specialized knowledge. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976). Prior agency determination of certain issues in dispute between the parties may aid the court in deciding whether an antitrust claim is available to a plaintiff. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305 (1973). The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956). The federal agency at issue in this case is the Federal Communications Commission ("FCC"), which was "created by Congress specifically to enforce the provisions of the Communications Act of 1934," *AT&T Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 244 (D. Mass. 1995), of which 47 U.S.C. § 251 is by amendment a part. The state agencies at issue are the state public utilities commissions, which apparently have jurisdiction over telecommunications services within their borders.

Here, Bell seeks dismissal of counts alleging violation of the Telecommunications Act of 1996 and antitrust violations on this basis. CTC responds that application of the doctrine of primary jurisdiction is discretionary, not mandatory, and inappropriate in cases like this one because 47 U.S.C. § 207 gives the courts jurisdiction over claims for damages brought under the Act, and that its claims merely require the sort of statutory interpretation in which courts regularly engage. Well before enactment of the Telecommunications Act of 1996 amending, *inter alia*, chapter 5 of Title 47, the Communications Act provided, at 47 U.S.C. § 207, that

> [a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

CTC contends that its claims in this action represent an election of remedies under section 207 that the court may not disturb. However, CTC cites no authority in support of its position, and the courts have not adopted it. *See, e.g., Allnet Communication Serv., Inc. v. National Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1122 (D. C. Cir. 1992).

In Count V-1 of the first amended complaint CTC alleges that Bell violated 47 U.S.C. § 251 in fifteen specific ways, among others. First Amended Complaint ¶ 86. These include refusing to sell voice mail to resellers at wholesale or retail prices or to customers who buy intraLATA services from resellers, refusing to sell to resellers at wholesale prices data services subject to FCC tariffs, refusing to permit customers who switch to resellers from Bell to retain certain discounts, refusing to sell intraLATA services at wholesale to resellers who seek to sell to customers who signed contracts with Bell before enactment of the Telecommunications Act of 1996 unless the customers pay "unreasonable" termination fees, imposing "unreasonable" economic terms on payment by resellers for intraLATA services, refusing to allow CTC to state publicly that it has authority to market and resell Bell intraLATA services, and refusing to allow resellers to communicate with Bell's technical design, engineering and support personnel to aid in the resale of Bell's intraLATA services. *Id.*

Count II alleges that Bell has monopoly power in the relevant market of intraLATA services for business customers in New England and New York, that Bell controls the hardware and network systems necessary for the provision of intraLATA services, and that it has acted to exclude competitors and competition and injured competitors and competition, in part through thirteen specific actions similar to those alleged as violations of 47 U.S.C. § 251. *Id.* ¶¶ 54-58.

Count III alleges that Bell has illegally tied its brand of Centrex service to its brand of voice mail service, two separate products, in New England in restraint of trade, preventing CTC from competing in the tied product market. *Id.* ¶¶ 61-71.

Count IV alleges that Bell's interpretation of paragraph D.1.s of the Agency Agreement to bar the resale of its intraLATA services by CTC to its former customers is unreasonable, in bad faith and anticompetitive in violation of 15 U.S.C. § 1. *Id.* ¶¶ 74-80. The clause provides that CTC, identified as Representative, agrees to

> [n]either represent for sale, refer, promote, negotiate or otherwise market any other network service which displaces, or is in competition with, IntraLATA service offered by NYNEX. . . . Furthermore, for a period of twelve (12) months after the expiration or termination of this Agreement Representative may not sell, represent, or promote any non-NYNEX IntraLATA services to any NYNEX Business Customer for whom Representative was responsible under the AMP Program, or to whom

> Representative sold any NYNEX Service, within 12 months prior to such expiration or termination.

Agency Agreement ¶ D.1.s at 8. Neither party contends that the Agency Agreement has been terminated. It expires by its own terms on December 31, 1998. *Id.* ¶ C.1 at 3.

Neither party suggests that the matters presented in Counts II-V-1 are presently before the FCC. Bell has provided evidence that CTC has brought one of the issues before state public utility commissions in Maine, New York, Massachusetts and Rhode Island. Exh. 5 to Motion of Defendant Bell Atlantic to Dismiss First Amended Complaint ("Motion") (Docket No. 28).

The First Circuit has stated that the doctrine of primary jurisdiction is intended to serve "as a means of coordinating administrative and judicial machinery" and to "promote uniformity and take advantage of agencies' special expertise." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979). There are three factors that guide the decision whether to defer a matter to an agency under the doctrine:

> (1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.

*Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995), quoting *Mashpee Tribe*, 592 F.2d at 580-81. Here, CTC does not challenge the rates established for Bell's services, a claim that clearly requires referral to the agency setting the rates, *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101, 104-07 (1st Cir. 1990), but its claims may be construed to challenge the "reasonableness" of Bell's practices in applying those rates, *see id.* at 107-08.

CTC mentions the *Mashpee Tribe* factors but discusses them only in conclusory fashion, preferring to emphasize its argument that referral of any of its claims to the FCC will cause it additional harm due to the delay in resolution of its claims that will inevitably result. CTC does not provide the court with any evidence, statistical or otherwise, in support of its assertions that delay will be inevitable and that it will exist to such a degree that CTC's very existence will be imperilled. *But see National Communications Ass'n, Inc. v. AT&T Co.*, 46 F.3d 220, 225 (2d Cir. 1995) (agency decision-making often imposes costly delay; parties estimated delay involved in referral to FCC at 2-5 years). Indeed, since CTC's breach-of-contract claims set forth in Count I and Count V-1 would not be subject to referral to the FCC and seek monetary damages of approximately $12 million, First Amended Complaint ¶ 50, it would appear that any such delay would be potentially fatal to CTC only if action on the contract counts were stayed pending the outcome of any referral on the remaining counts. Bell does not seek a stay on this basis.

The first *Mashpee Tribe* factor — whether the matter at issue is cental to the agency's authority and responsibility, *see New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172 (1st Cir. 1989) — initially appears to be met in this instance, where CTC is alleging a violation of one section of the Communications Act. The FCC was created "for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Reported case law interpreting the recently enacted section 251 is not extensive. However, the Eighth Circuit has held that the FCC is not authorized to issue rules concerning any portions of section 251 other than sections 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g) and 251(h)(2), *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 794-99 & n.10 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Util. Bd.*, 118 S. Ct. 879 (1998), because the FCC lacks jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service," 47 U.S.C. § 152(b). *Accord*, *California v. FCC*, 124 F.3d 934, 939-42 (8th Cir. 1997) (addressing intraLATA services).

I find the Eighth Circuit's reasoning persuasive. While the first amended complaint does not specify the subsections of 47 U.S.C. § 251 invoked by CTC, its objection to the motion to dismiss refers to sections 251(c)(4), 251(c)(4)(A), 251(b)(1) and 251(c)(2)(D). Objection to Motion of Defendant Bell Atlantic to Dismiss Complaint ("Objection") (Docket No. 32) at 5-7 & n.3. None of these subsections of section 251 gives the FCC specific authority for its administration, unlike the six subsections listed in *Iowa Utilities.* CTC's claims thus do not go to the core authority and responsibility of the FCC.[1] Accordingly, I conclude that the doctrine of primary jurisdiction is not applicable to CTC's claims insofar as the FCC is identified as the agency to which this court should defer.

Bell also suggests that referral to the various public utilities commissions of the states in which CTC operates is required under the primary jurisdiction doctrine, and that argument is not foreclosed by the *Iowa Utilities* analysis. Only one of the cases cited by either party involves invocation of the primary jurisdiction doctrine when a state regulatory agency is the body alleged to have primary jurisdiction. In *Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co.,* 505

[1] Bell states, in conclusory fashion, that "[t]he FCC and numerous state commissions have already considered or are currently reviewing the policy issues raised in CTC's Communications Act claims." Motion at 5. However, it does not explain which issues have been or are before the FCC, if any. Later, in addressing a different issue, Bell refers to two orders of the FCC, *id.* at 6-7, but, in the absence of any specification by the parties, this court will not sift through those orders, each of which exceeds 200 pages, in order to attempt to determine whether either of them contains discussion of the issues, whatever they may be, to which Bell refers in connection with its primary jurisdiction motion.

F.2d 152 (9th Cir. 1974), the parties' dispute concerned beeper services in the Los Angeles area. *Id*. at 153-54. The defendants had filed proposed tariffs for this service with the California Public Utilities Commission ("PUC"), and applied for licenses from the FCC. *Id*. at 154. The plaintiffs challenged the PUC filings and requested a stay of the FCC proceedings. *Id*. They also filed a complaint in federal district court, alleging conspiracy to violate the anti-trust laws. *Id.* The Ninth Circuit held that the primary jurisdiction doctrine was applicable to the case because the proceedings were then under consideration by an agency with extensive regulatory powers over the subject matter and parties involved.[2] *Id*. at 156-57. However, the Ninth Circuit has recently called into question its willingness to refer matters to state regulatory agencies under the doctrine of primary jurisdiction. *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 949 n.12 (9th Cir. 1996).

The only other reported case unearthed by my own research in which a federal court deferred to a state regulatory agency proceeding, then underway, is *Associated Tel. Answering Exchs., Inc. v. AT&T Co*., 492 F. Supp. 921, 925 (E. D. Pa. 1980), where the court relied on *Industrial Communications*. The Fifth Circuit in *Litton Sys., Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 421 (5th Cir. 1976), raised the question whether application of the primary jurisdiction doctrine is appropriate when a state regulatory agency is involved, but did not find it necessary to answer the question.

Here, the only issue raised by the first amended complaint that has been brought before the

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[2] More recently, a federal district court has held to the contrary when the agency involved was the FCC. *AT&T Co. v. Eastern Pay Phones, Inc.*, 767 F. Supp. 1335, 1343 (E. D.Va. 1991) (antitrust concerns within province of court and require no regulatory expertise, especially in case of FCC), order vacated in part on other grounds, 789 F. Supp. 925 (E. D.Va. 1992).

state regulatory agencies, according to Bell, is "the contract termination fee issue (¶ 86(e) of the Amended Complaint)." Motion at 3. Even if the primary jurisdiction doctrine is available when the regulatory agency involved is a state agency, one of the primary purposes of the doctrine, to promote uniformity of regulation, *Mashpee Tribe*, 592 F.2d at 580, will not be served by waiting for four different state public utilities commissions to rule on one issue out of fifteen or more raised in the complaint.

On balance, I conclude that this court should exercise its discretion in favor of retaining all of CTC's claims for judicial review rather than applying the doctrine of primary jurisdiction to refer one or more of those claims for action by a regulatory agency.

### B. Voice Mail (Count V-1)

Bell next urges the court to dismiss that portion of CTC's claim in Count V-1 that alleges Bell violated 47 U.S.C. § 251 by refusing to resell its voice mail service. Bell bases its argument on the FCC's recent statement that the terms "information services" and "telecommunications services" are separate categories and that information services do not constitute telecommunications services within the meaning of the Telecommunications Act of 1996, specifically 47 U.S.C. § 251(b) & (c). Voice mail, Bell asserts, is an information service, as defined at 47 U.S.C. § 153(20). The provisions of section 251 that Bell is alleged by CTC to have violated refer only to telecommunications services, a term which is defined at 47 U.S.C. § 153(46).

The definition of an information service found at section 153(20) does not specifically include voice mail, nor does the definition of a telecommunications service specifically exclude it. Bell refers to the decisions of six state regulatory agencies which have found that voice mail is an information service under the 1996 Act. Exh. 8 to Motion. Bell dismisses the decisions of the six state agencies to the contrary cited by CTC, Objection at 5 n.3, as "few" and "outside the Bell Atlantic region," Motion at 7, although all six states cited by Bell are outside CTC's New York and New England service area, and five are outside the Bell Atlantic region as well.

In any event, section 251 sets forth the obligations of a telecommunications carrier only with respect to telecommunications services. After all of the state agency orders or opinions cited by the parties were issued, the FCC issued its Second Report and Order and Further Notice of Proposed Rulemaking *In the Matter of Implementation of the Telecommunications Act of 1996,* Docket No. 96-115, adopted February 19, 1998, released February 26, 1998 ("Order"), reprinted at 11 Communications Reg. (P & F) 69-3145. While the Order concerns interpretation of 47 U.S.C. § 222, a section of the Telecommunications Act of 1996 that deals with the privacy of consumer information, rather than section 251, there is no reason to believe that the FCC's interpretation of the statutory definitions of "telecommunications service" and "information service" set forth in the Order would be any different for the purpose of that agency's interpretation of section 251. Indeed, the Order notes that the FCC's interpretation of those definitions is consistent with FCC precedent under the Telecommunications Act of 1996. Order ¶ 46. The FCC concludes that voice mail is not a telecommunications service. *Id.* ¶ 72.

The Supreme Court has directed federal courts to accord "considerable weight" to a federal agency's construction of the statutory scheme that it is entrusted to administer and to uphold the agency's interpretation if it is reasonable. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). I cannot say that the FCC's interpretation of the statutory definition of "telecommunications service" to exclude voice mail is unreasonable.

Accordingly, Bell is entitled to dismissal of any claims raised in Count V-1 that it violated 47 U.S.C. § 251 by virtue of a refusal to sell voice mail to resellers.

### C. Data Services (Count V-1)

Bell seeks dismissal of any claim set forth in paragraph 86(d) of the first amended complaint that its refusal to resell unspecified data services subject to FCC tariff violates 47 U.S.C. § 251. Based on an assumption about the nature of these services, Bell refers to an FCC order as authority for the proposition that access services are not within the scope of services subject to 47 U.S.C. § 251(c)(4). Motion at 7-8. CTC does not respond to this argument other than to assert that actions not in themselves violative of section 251 may be considered as evidence of violation of section 251 as part of a course of conduct. Objection at 6-7.

Section 251(c)(4) deals with resale of certain telecommunications services at wholesale rates. Section 251(b)(1) deals with resale of telecommunications services in general. It is impossible to discern from the language of paragraph 86(d) of the first amended complaint into which statutory category, if any, the "data services" fit, or whether Bell's assumption is justified. The motion to dismiss this claim must therefore be denied.[3]

### D. The Filed Rate Doctrine

Bell seeks dismissal of claims set forth in paragraphs 56 (Count II) and 86 (Count V-1) of

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[3] Bell requests in a footnote that, if CTC does not mean what Bell assumes it to mean by the term "data services," the court order CTC to file a more definite statement pursuant to Fed. R. Div. P. 12(e). Motion at 7, n.7. This is not the appropriate manner in which to request relief under Rule 12(e).

the second amended complaint on the ground that Bell is required to act in the manner set forth in those allegations by the terms of its tariffs. It invokes the filed rate doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). CTC responds that Bell is violating the terms of those tariffs. The tariffs have not been provided to the court. The fact that Bell and CTC dispute both the content of the tariffs and the characterization of Bell's actions makes it clear that this is not a matter appropriate for resolution by means of a motion to dismiss. These are factual matters outside the allegations of the first amended complaint. The motion to dismiss on this basis must be denied.

**E. The Noerr-Pennington Doctrine**

Bell argues that certain conduct set forth in paragraph 56 (Count II) of the first amended complaint cannot violate the antitrust laws as alleged because it is immunized by the Noerr-Pennington doctrine. The specific allegations included in Bell's argument for dismissal are that Bell (i) refused to pay disputed sales commissions, (ii) threatened to enforce the non-competition clause in the Agency Agreement, (iii) enforced early termination provisions in certain agreements with its customers, (iv) refused to allow CTC to "publish" that it had authority to resell Bell services, (v) refused to allow resellers to communicate with certain Bell personnel, (vi) executed unreasonable non-competition covenants regarding intraLATA services, and (vii) filed sham litigation against CTC in bad faith. Motion at 10-11.

The Noerr-Pennington doctrine, named for two Supreme Court cases, provides that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional*

*Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Only sham recourse to governmental agencies and the courts is not immune. *Id.* at 58. Evidence of anticompetitive intent alone cannot transform otherwise legitimate activity into a sham for this purpose. *Id*. at 59. To qualify as a sham, litigation "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and it must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process. *Id.* at 60-61.

The doctrine immunizes only actions that are directed toward governmental agencies or officials. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1159 (7th Cir. 1983). The fact that a party's act or decision "may eventually provoke agency action or review does not alone call the *Noerr-Pennington* doctrine into play." *Id.* at 1160. Acts that are "reasonably and normally attendant upon protected litigation" are entitled to immunity to the same extent as the related litigation. *Matsushita Elec. Corp. v. Loral Corp.*, 974 F. Supp. 345, 359 (S.D.N.Y. 1997).

Of the seven allegations identified by Bell as subject to dismissal under the doctrine, only the second and the seventh appear to fit within the Supreme Court's explanation of the scope of the doctrine. Bell is not entitled to dismissal of any of the other listed allegations under the Noerr-Pennington doctrine. The threat to sue set forth in paragraph 56(b) of the first amended complaint, without any allegation that the threat was made in bad faith and in view of the fact that Bell did in fact sue CTC, is immunized. *See Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 706 (E.D. Mich. 1992) (mere threat to sue not within sham exception to doctrine). The seventh allegation refers to the action brought in the Southern District of New York by Bell against CTC which has now been consolidated with this action, endorsement granting Motion to Consolidate (Docket No. 2), *Bell*

*Atlantic Corporation v. CTC Communications Corp.*, Docket No. 98-79-P-H, and requires further discussion.

Bell argues that the New York action cannot be considered baseless litigation because Bell's request for a preliminary injunction was granted in that case. Amended Order dated February 2, 1998, *Bell Atlantic Corporation v. CTC Communications Corp.*, Docket No. 98-CV-48 (KMW), United States District Court for the Southern District of New York, Exh. 1 to Motion. The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a subsequent trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). An initial success in obtaining preliminary injunctive relief is relevant to, but not determinative of, the question whether litigation is a sham. *Boulware v. State of Nevada, Dep't of Human Resources*, 960 F.2d 793, 799 (9th Cir. 1992). "The court hearing the antitrust claim must make its own assessment of the objective merits of the predicate suit." *Id.* At the pleading stage, a claim that a party has won a preliminary injunction is insufficient to establish that the action in which the injunction was obtained was not baseless. The first amended complaint states a claim upon which relief may be granted on this point.

**F. The Tying Claim (Count III)**

CTC alleges in Count III of its first amended complaint that Bell has violated section 1 of the Sherman Act, 15 U.S.C. § 1, by creating a tying arrangement between its brand of voice mail service (the "tying" product) and its brand of Centrex service (the "tied" product). First Amended Complaint ¶¶ 61-71. The statutory section provides:

> Every contract, combination in the form of trust or otherwise, or

> conspiracy, in restraint to trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. Persons injured by acts violating this section have a private right of action against the violator. 15 U.S.C. § 15(a).

A tying arrangement for purposes of antitrust analysis is a refusal to sell two products separately with a resulting restraint on competition. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). The Supreme Court has "condemned tying arrangements when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." *Id*. at 13-14.

> When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie.

*Id*. at 14-15 (citation omitted). Such activity is illegal under the Sherman Act. *Id*. at 15.

According to the First Circuit,

> [t]here are essentially four elements to a *per se* tying claim: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

*Data Gen. Corp. v. Grumman Sys. Support Corp*., 36 F.3d 1147, 1178 (1st Cir. 1994). Bell asserts that CTC has failed to plead that Bell has sufficient market power or that the tie forecloses a substantial amount of commerce. Motion at 12. However, paragraphs 65 and 68 of the first amended complaint do appear to make such allegations, although not precisely in the language of the *Grumman* opinion, and Bell accordingly expands upon its argument.

On the issue of sufficient economic power in the market, Bell argues that, because CTC alleges that the relevant product market is only Bell's own brand of voice mail, CTC must also allege that there is no reasonably interchangeable product, citing *Tarrant Serv. Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 614-15 (6th Cir. 1993), and *Re-Alco Indus., Inc. v. National Ctr. for Health Educ.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993). CTC responds that the uniqueness of Bell's voice mail service is only one of several ways to show market power, none of which must be specifically pleaded in order to withstand a motion to dismiss, relying on *National Communications Ass'n, Inc. v. AT&T Corp*., 808 F. Supp. 1131, 1134 (S.D.N.Y. 1992) ("*NCA*"). Objection at 13. Both *Re-Alco* and *NCA* deal with the issue of market power in the context of a claim under 15 U.S.C. § 2. *Re-Alco*, 812 F. Supp. at 389; *NCA*, 808 F. Supp. at 1134. The *Re-Alco* plaintiff also asserted a claim under 15 U.S.C. § 1, 812 F. Supp. at 389, and the opinion treats the requirements for alleging market power as the same under both sections, *id.* at 391-92.

The problem with CTC's position on this issue is that its first amended complaint alleges that the two Bell products in question each "constitutes a relevant product market." First Amended Complaint ¶¶ 61 & 62. Thus, CTC has already limited the market power to be shown as one involving uniqueness of a single product. In *NCA*, the market alleged was long distance voice telecommunications services and the argument for dismissal was that the allegation failed to include communication services for data transmission. 808 F. Supp. at 1134. The factual situation in *Re-Alco* is much closer to that presented in the first amended complaint here. In *Re-Alco*, the complaint defined the relevant market solely as the market for a single product. 812 F. Supp. at 391. The court held that

> [t]he complaint in an antitrust case must allege a basis for finding that commodities which are in some way unique . . . are a market unto themselves. Plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market. If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand, . . . a court may grant a Rule 12(b)(6) motion.

*Id*. at 391. The *Re-Alco* court based its decision on *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 392-93 (1956), in which the Supreme Court established a test for the market element of an antitrust claim that "asks whether there are substitutes reasonably available to buyers, not whether plaintiff has been prevented from selling a particular . . . product." *Re-Alco,* 812 F. Supp. at 391.

I find the *Re-Alco* court's reasoning persuasive and applicable here. The first amended complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products or to allege other facts relating to cross-elasticity of demand. Essentially, it alleges that CTC has been prevented from selling a particular product. Accordingly, Bell is entitled to dismissal of Count III.[4]

**G. Monopolization Claim (Count II)**

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Bell asserts that CTC's claim in Count II that Bell has monopoly power in the market of intraLATA telecommunications services for business customers in New England and New York and the probability of acquiring such power in other relevant markets, First Amended Complaint ¶ 54, is based on an "essential facilities" theory. Bell argues that CTC's failure to allege that Bell has refused to provide CTC with access to such facilities requires dismissal. CTC responds that its complaint is not so limited, although it discusses

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[4] Bell argues in addition that CTC's failure to allege that the tie "actually affected consumer choice" also requires dismissal of this count. Motion at 13. Bell later refines this argument to assert that CTC must "plead that at least one consumer has been coerced into the alleged tying arrangement." Reply Memorandum of Defendant Bell Atlantic in Support of Its Motion to Dismiss the Amended Complaint ("Reply Memorandum") (Docket No. 40) at 4. The authority cited by Bell does not support its argument. This argument would not provided a basis for dismissal of Count III.

only an essential facilities claim in its Objection, and that its claim is not that Bell refused to provide access to such facilities but rather that Bell refused to provide access on a nondiscriminatory basis.

The essential facilities doctrine "aims to prevent a firm with monopoly power from extending that power 'from one stage of production to another, and from one market into another.'" *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987), quoting *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). Denial of access to a facility that a competitor needs in order to compete "is at least arguably 'unreasonable' or 'exclusionary' in the antitrust sense, and therefore unlawful." *Id*.

Bell correctly points out that Count II of the first amended complaint does not allege that Bell has denied CTC or anyone else access to its essential facilities, but only that Bell has imposed "unreasonable economic terms" on the sale of those facilities. First Amended Complaint ¶ 56(j). CTC asserts that these economic terms are both discriminatory and intended to restrain competition, and that such allegations are sufficient to state a claim under 15 U.S.C. § 2. In *MCI Communications*, the Seventh Circuit stated that "the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." 708 F.2d at 1132.

Bell relies on *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737 (3d Cir. 1996), in which the Third Circuit, without discussion, held that a plaintiff that alleged that a defendant overcharged for use of an essential facility, rather than denying its use altogether, could not state an antitrust claim under the essential facilities doctrine.[5] *Id*. at 748. An opinion of the Third Circuit

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[5] Bell also relies on *Anserphone, Inc. v. Bell Atlantic Corp.*, 955 F. Supp. 418 (W.D. Pa. 1996) to support its argument, but that decision is based solely on *Ideal Dairy* and accordingly adds (continued...)

is of course not binding in this circuit. The First Circuit apparently has not spoken on this issue. I am reluctant to recommend that the court adopt a similar limitation in this case, in light of the Supreme Court's statement in the seminal antitrust "essential facilities" case, *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912), that relief from an antitrust violation must include access to essential facilities afforded to competitors "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Id*. at 411. This language does not suggest to me that only outright denial of access, as opposed to constructive denial through unreasonably high charges or other means, may serve as the predicate for an antitrust violation.

For the foregoing reasons, and because CTC's contention that its first amended complaint alleges a theory or theories of antitrust violation other than the essential facilities theory is not without support in Count II as written, I recommend that Bell's motion to dismiss Count II be denied.

### H. Withheld Payment as Anticompetitive Action

The first amended complaint alleges that Bell's withholding of payment due to CTC constitutes an anticompetitive act in furtherance of Bell's illegal monopolization or attempted monopolization. First Amended Complaint ¶ 56(a). Bell seeks dismissal of any antitrust claim based on this withholding because failure to make payments pursuant to a contract is not an injury

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[5](...continued)
no weight to Bell's position. *Id*. at 429.

of the type the antitrust laws were intended to prevent. Only a practice that harms the competitive process is an antitrust injury, Bell asserts. CTC's allegation, it argues, sets forth only an injury to CTC, a single competitor. Motion at 16-17. CTC responds that the withholding of payment prevented it from using the money as working capital to penetrate Bell's market and therefore "constitute[s] anticompetitive conduct leading to antitrust injury." Objection at 16.

"[A] practice is not 'anticompetitive' simply because it harms competitors." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990). "Rather, a practice is 'anticompetitive' only if it harms the competitive process." *Id.* In a case cited by Bell, the court held that a plaintiff seeking to establish a violation of the Sherman Act "must show that the injury of which he complains was caused by an act having a competition-reducing effect." *Naso v. Park,* 850 F. Supp. 264, 271 (S.D.N.Y. 1994). If CTC had alleged that it is Bell's only competitor in the relevant market, its argument about the effect of Bell's alleged failure to pay it might meet this test. However, the first amended complaint makes no such allegation.

The case law cited by CTC does not lead me to a different conclusion. In each case, while a particular injury to the plaintiff was alleged, the courts found that the allegations or the evidence provided by the plaintiff were sufficient to suggest or show that consumers would receive less under the challenged action or practice. *See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994). Here, there is no allegation that the failure to pay CTC, even if the result was to drive CTC out of business, would necessarily prevent consumers in the relevant market from obtaining lower prices, better products, or more efficient production methods. *Sullivan v. National Football League,* 34 F.3d 1091, 1097 (1st Cir. 1994).

Bell is entitled to dismissal of any claim raised in Count II that is based on paragraph 56(a) of the first amended complaint.

## I. Covenant Not to Compete (Count IV)

CTC alleges that the covenant not to compete included in the Agency Agreement, as interpreted by Bell, constitutes a violation of 15 U.S.C. § 1. Count IV also alleges that other unspecified noncompetition clauses executed by Bell violate the antitrust laws. First Amended Complaint ¶ 80. Bell focuses on the clause in the Agency Agreement, arguing that CTC, having signed the agreement, lacks standing to assert that the clause violates the Sherman Act.

The Supreme Court has held that "agreements not to compete, with the aim of preserving or extending a monopoly" are violations of section 2 of the Sherman Act. *Otter Tail Power Co. v. United States*, 410 U. S. 366, 377 (1973). However, the agreements in that case were apparently between the defendant and third parties, not the plaintiffs and the defendant. *Id*. at 378. The case law cited by Bell concerning standing does not, as Bell asserts, equate execution of a covenant not to compete with a voluntary withdrawal from the market, thus depriving the executing party of standing to challenge the covenant under the Sherman Act. In those cases, it was the sale of all of the plaintiff's stock that constituted such a withdrawal. *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983); *Chrysler Corp. v. Fedders Corp*., 643 F.2d 1229, 1235 (6th Cir. 1981). In each case, the court mentions the fact that the plaintiffs executed covenants not to compete merely as additional evidence of their intent to withdraw from the market.[6]

On the showing made by Bell, it is not entitled to dismissal of Count IV.

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[6] Bell's assertion that the holding it erroneously discerns in *McDonald* and *Fedders* was "expressly adopted" by the First Circuit in *Turner v. Johnson & Johnson*, 809 F.2d 90 (1st Cir. 1986), is incorrect.

### J. Breach of Contract (Count I and Count V-2)

Count V-2 of the first amended complaint alleges that Bell has breached several written Resale Agreements with CTC, with each agreement being governed by the law of the state covered by that agreement. First Amended Complaint ¶¶ 90, 91. Making factual assertions about what the agreements provide and what it has actually refused to do, Bell argues in perfunctory fashion that the count should be dismissed. Motion at 19. Such argument is appropriate for summary judgment, but not in support of a motion to dismiss. My review of the allegations confirms that they meet the pleading requirements of New York law, *Tagare v. NYNEX Network Sys. Co.*, 921 F. Supp. 1146, 1149-50 (S.D.N.Y. 1996), one of the states for which the Resale Agreements were executed, First Amended Complaint ¶ 90. Nothing further is required. The motion to dismiss Count V-2 should be denied.

Count I alleges breach of the Agency Agreement. Bell argues that the count should be dismissed because CTC has failed to perform one of its obligations under the contract. However, on a motion to dismiss the allegations of the complaint are taken as true, and the first amended complaint clearly alleges that CTC has performed "all of its material obligations under the Agency Agreement." First Amended Complaint ¶ 49. Bell's argument is appropriate for a motion for summary judgment, not a motion to dismiss. CTC unfortunately responds to Bell's argument in kind. Objection at 18-20. None of this material is helpful to the court at this time.[7] Bell's motion to dismiss Count I should be denied.

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[7] Bell's motion for a stay and an order compelling CTC to proceed with an audit under the terms of the Agency Agreement that is included in its Reply Memorandum is not properly before the court. It will not be considered further here.

## IV. Conclusion

For the foregoing reasons, I recommend that Bell Atlantic Corporation's motion to dismiss be **GRANTED** as to Count III of the first amended complaint, any claims asserted in Count II of the first amended complaint arising out of paragraph 56(a), any antitrust claims arising out of paragraph 56(b), and any claims in Count V-1 arising out of an alleged refusal to sell voice mail services; and otherwise **DENIED**.

## ***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 22nd day of May, 1998.***

***David M. Cohen***
***United States Magistrate Judge***