PUBLIC SERVICE
COMMISSION
OSEC-FILES

1998 APR 23 PM 4: 44

Bell Atlantic
1095 Avenue of the Americas, New York, NY 10036
37th Floor
Tel 212 395-6503
Fax 212 768-7568

Maureen F. Thompson
Counsel

Bell Atlantic

April 23, 1998

ORIG-FILES
C98-C-0426
COPIES:
MS. K. BURGESS (W/EXTRA)
MR. A. BAUSBACK

BY HAND

Hon. John C. Crary
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 98-C-0426

Dear Secretary Crary:

Enclosed for filing is an original and five (5) copies of Bell Atlantic - New York's Response To Complaint And Request For Emergency Relief Of CTC Communications Corp.

We appreciate the extension of time in which to file this response.

Very truly yours,

Maureen F. Thompson /g

MFT/itr

cc: Mr. Daniel Martin
Warren Anthony Fitch, Esq.
Melissa B. Rogers, Esq.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint and Request for Emergency Relief for CTC Communications Corp. against New York Telephone Company d/b/a Bell Atlantic - New York for Violation of § 251(c)(4) and § 252 of the Communications Act of 1934, as amended, Violation of N.Y. Pub. Serv. Law § 91 and Violation of Resale Tariff No. 915	Case 98-C-0426

RESPONSE OF BELL ATLANTIC - NEW YORK TO COMPLAINT AND REQUEST FOR EMERGENCY RELIEF OF CTC COMMUNICATIONS CORP.

New York Telephone Company, d/b/a/ Bell Atlantic - New York ("BA-NY"), hereby responds to the Complaint and Request for Emergency Relief of CTC Communications Corp. ("CTC") that alleges BA-NY is violating its PSC No. 915 Tariff ("Resale Tariff"), Sections 251 and 252 of Telecommunications Act of 1996 ("Act"), and Section 91 of the Public Service Law. CTC requests that the Commission grant emergency relief by issuing an order declaring BA-NY's conduct unlawful and prohibiting BA-NY from enforcing its tariff termination liability provisions when customers terminate BA-NY's service to obtain service from CTC.

CTC's claims are without merit. CTC demands that the Commission deny BA-NY the right to enforce the early termination provisions of its lawfully-filed and Commission-approved term and volume contracts. For the reasons set forth below, the Commission should find that BA-NY's early termination liability provisions are lawful and that BA-NY's conduct with respect to such termination provisions violates neither the Resale Tariff, the Act, nor state law.

I. INTRODUCTION

BA-NY's Commission-approved tariffs for a number of business provide for rate plans which offer discounts from the standard month-to-month charges if the customer agrees to retain the service for a specified period. The customer selects a payment option by signing a contract with BA-NY that incorporates the tariffs by reference and identifies the service period selected by the customer. The payment plans also include a termination liability that is payable in the event the customer terminates service prior to the agreed-upon service period.

A carrier operating in New York may resell any of BA-NY tariffed retail services and may take advantage of the term and volume payment plans under the same terms and conditions as BA-NY's retail customers. In addition to the term and volume, the Reseller will receive an additional discount on both the non-recurring and recurring charges for the payment option selected by the Reseller pursuant to Section 252(d)(3) of the Act. The discount levels for BA-NY's resold services have been determined by the Commission in Case 95-C-0657 and are set forth in BA-NY's Resale Tariff. Despite the fact that CTC will be able to market and sell these volume and term services at double discount, CTC seeks to deny BA-NY its contractual right to recover tariffed termination charges from customers which abandon their term and volume commitments.

CTC challenges the Company's position, claiming that it is anti-competitive and constitutes unjust and unreasonable discrimination under New York law, is contrary to the terms of the Resale Tariff, and violates the Act. CTC also maintains that BA-NY's current position is an unlawful change in a former policy which allowed customers to terminate contracts by assignment to other carriers without incurring termination liabilities. [1]

[1] For a clear understanding of the actual circumstances regarding these allegations, see the Declaration of Jack H. White attached.

II. DISCUSSION

A. The Termination Liability Provisions of BA-NY's Service Contracts Are Reasonable and Authorized by the Commission

BA-NY's early termination liability provisions for term and volume contracts which are terminated by end users prematurely are contained in BA-NY's lawfully filed and Commission approved tariffs. BA-NY is therefore, entitled -- indeed *required*[2]-- to enforce such terms and conditions unless and until its tariffs are amended or superseded.[3]

Beyond the legal requirement to enforce these terms, the termination liability provisions challenged by CTC are reasonable and justified as the *quid pro quo* for the discount afforded optional payment subscribers from month-to-month tariffed charges set out in the schedules.

Customers of BA-NY's telecommunications services can receive substantial discounts off the normal tariff rates in return for making term and volume commitments to BA-NY. BA-NY introduced discount plans in response to competition in specific markets. For instance, the Commission has found the market in which BA-NY offers Centrex to be highly competitive. BA-NY accordingly has developed payment plans for its Centrex services (such as Intellipath II) precisely to enable BA-NY to remain a viable competitor. If BA-NY's services are to be competitive, the Company must offer a service period that provides the customer rate stability and price levels comparable to competitive offerings. BA-NY, however, also has a responsibility

---

[2] Pursuant to Section 92(2)(d) of the Public Service Law:

> No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service.

[3] Termination liability would not apply if a contract is not terminated but assumed by another end user. In such situations BA-NY continues the local carrier/end-user relationship.

to shareholders and rate payers to ensure that these plans provide recovery of capital investment and non-recovered expenses that would result from premature termination of the service. The termination liability provisions of the tariff provide such protection and are reasonable commercial terms. In addition to recovering capital investment, protection from premature termination is necessary to ensure appropriate compensation to BA-NY for services rendered. It is generally recognized that when two parties enter into a contract, each incurs a liability for any failure to fulfill the terms of the contract. In the case of BA-NY's payment plans, customers receive the benefit of a service at reduced rates for a specified period. If, for example, BA-NY develops a payment plan at discounted rates in order to be competitive, it does so to ensure a revenue commitment from the customer. The termination liability is used to recover the difference between the standard tariff rate and the discounted contract rate for the period the customer receives the service. Failure to have such protection places all contract liability on BA-NY while exempting the customer from any. Even in the New Hampshire decision cited by CTC that granted a limited "fresh look" opportunity for BA-NY's competitors, the Commission took steps to ensure that BA-NY was not deprived of the reasonably anticipated benefit of its bargain and maintained a modified form of termination liability. *Freedom Ring, L.L.C.*, Order No. 22,798 at 11 and 15.

In addition, the end user's term and volume commitment, enforced by applicable termination provisions, provides a rational basis for distinguishing between end users taking service pursuant to such arrangements and those end users taking service under the standard tariff offerings (*i.e.*, month-to-month subscribers). If a subscriber could abrogate a term/volume commitment without penalty yet receive the discount rates, its service commitment would be no different from that of a month-to-month subscriber incurring the standard tariff charges. Absent a termination liability, a term and volume discount could be viewed as undue discrimination.

Finally, many of the firms with which BA-NY competes are not regulated by the Commission (*e.g.*, PBX vendors and competitive services offered by IXCs under interstate rates). These competitors are free to offer payment plans that offer protection against stranded investment or lost revenues due to premature termination of a contract. It is anti-competitive to impose market restrictions on one provider of a service that results in artificially enhancing the competitive position of other providers. To do so places BA-NY at an unfair competitive disadvantage and distorts the competitive operation of the marketplace.

Accordingly, BA-NY has been properly permitted to include termination liability provisions as part of its terms and conditions for optional payment arrangements, and BA-NY may lawfully enforce such provisions in the event of early termination by a customer desiring to transfer its telecommunications services to another carrier.

B. The Enforcement of Early Termination Liabilities Violates Neither the Telecommunications Act Nor the Resale Tariff

CTC's Complaint alleges that, notwithstanding the lawful force and effect of BA-NY's tariffs, BA-NY had assured CTC that optional payment arrangements could be "assumed" by CTC without penalty. CTC asserts that BA-NY had processed such transfers for a period of time and CTC was permitted to assume an end user's optional payment arrangement without penalty and without the wholesale discount.[4] BA-NY's subsequent change in policy and refusal to consent to such an assignment is alleged by CTC to violate both the Resale Tariff and the Act.

The assertion in the Complaint that CTC was somehow prejudiced by this change in Bell Atlantic policy is false. Attached to this Response are the statements of Jack H. White and John

[4] On January 21, 1998, BA-NY ceased permitting assignment of the end-user optional payment arrangements.

B. Messenger which conclusively refute CTC's claim that BA-NY's policy of enforcing termination liability provisions in optional payment arrangements was never communicated to CTC. CTC had notice in advance of January 21st of BA-NY's intention to enforce the termination liability language in its New York contracts and with that knowledge commenced operation under the Resale Tariff. Nothing in the Resale Tariff precludes BA-NY's enforcement of its rights by separate contract with end users.

In addition, nothing in the Act or the FCC's orders and regulations implementing the Act specifically prohibits BA-NY from enforcing the termination liability provisions of optional payment arrangements with end users. CTC admits this is true. (Complaint at ¶ 19.)[5]

Moreover, BA-NY offers Resellers the same term and volume payment arrangements that it offers to retail customers under the same terms and conditions at the applicable wholesale discount. Accordingly, BA-NY has met its obligation to make available for resale at a wholesale price, all of the telecommunications services BA-NY offers at retail.

C. Assignment of Optional Payment Arrangements to CTC Is Neither Required Nor Appropriate

CTC claims that although its status as a Reseller entitles it to a wholesale discount under the Act when CTC obtains the services provided to end users under optional payment plan arrangements, CTC nevertheless is willing to merely "assume" the existing end-user contracts without the discount. BA-NY is not required to permit such an assumption by CTC with or without a wholesale discount.

As discussed above, BA-NY's obligations under the Act are to "offer for resale at wholesale rates any telecommunications service [BA-NY] provides at retail to subscribers who

[5] In fact, the FCC has indicated that a case-by-case analysis is required to assess in particular cases whether termination penalties are unreasonable restrictions against resale. *In the Matter of Application of Bell South*

are not telecommunication carriers." Section 251 (c)(4) of the Act. The Act does not require the assignment of existing retail contracts to Resellers, as posited by CTC, but rather requires that the service provided to retail customers be offered to Resellers at a discount under the same terms and conditions. BA-NY has satisfied that obligation. BA-NY offers to all Resellers, including CTC, the ability to obtain any existing BA-NY retail contract for telecommunications services under the same terms and conditions, with the applicable wholesale discount.

Under its tariffs governing some of the services for which BA-NY offers optional payment plans, BA-NY may permit assignment of such plans by its end users subscribing to such plans. CTC would have the Commission *require* BA-NY without discretion to permit such an assignment in every instance to a Reseller. Such a requirement is unwarranted. First, in those cases where assignment is permitted, the end user may only assign with BA-NY's permission. The end user does not have an absolute right to assign the selected payment plan.

Further, while BA-NY has permitted assignment by one end user to another end user of such plans, BA-NY should not be required to permit assignment to Resellers. Resellers and end users are different classes of customers. While it may appear on a superficial level that Resellers and end users may be similarly situated, such is not the case. They are distinctly different from both a legal and practical view. First, Resellers are carriers, end users are not. As carriers, Resellers are subject to regulatory requirements and have certain obligations under law that end users do not.

Second, BA-NY has special obligations towards Resellers that are different from its obligations to its end users. BA-NY must provide different ordering, provisioning and maintenance systems to care for Resellers. BA-NY must provide electronic billing information

---

Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, Memorandum Opinion and Order, CC Docket No. 97-208, at ¶ 222.

to Resellers. In the performance of its provisioning and maintenance activities, BA-NY must be ever mindful to carefully preserve the relationship between the Reseller and its end user. For example, when making a visit to an end user's premises on behalf of a Reseller, BA-NY personnel must know they are performing activities on behalf of the Reseller and communicate that information as appropriate. BA-NY must implement different billing arrangements for Resellers to ensure that Resellers are not billed for Gross Receipt Taxes. Resellers do not "stand in the shoes" of an end user.

Finally, and perhaps most importantly, Resellers are competitors. Indeed, they are competitors of BA-NY for the same retail end users. It would stand the competitive framework contemplated by the Act on its head to require one provider to simply assign its customers to its competitors. CTC claims that BA-NY would not be harmed by requiring assignment of the optional payment plans to CTC and other Resellers at the retail rate because BA-NY will receive the same revenue as it would from the end user. CTC misses the point. In a competitive martket, the customer/provider relationship is key. BA-NY seeks to provide its services in a manner that nurtures that relationship and recognizes its value. Assigning its customers to other providers does not reflect sound economic and marketing principles, and there is no valid reason for BA-NY to conduct its business in such a manner.

D. The Commission Has No Authority to Grant Injunctive Relief as Requested by CTC

It is well-established in New York that an administrative agency has only those powers which are conferred upon it by statute. *See, e.g., City of New York v. Public Service Commission*, 53 A.D.2d 164 (3rd Dept. 1976), *aff'd* 42 N.Y.2d 916 (1977); and *City of New York v. Maltbie*, 274 N.Y. 90 (1937). CTC cites to no statute which grants the Commission authority to issue injunctions. Indeed, there is no statute that gives the Commission this authority. On the contrary, Section 26 of the Public Service Law expressly provides that if the Commission seeks to enjoin conduct of a common carrier because the carrier is acting unlawfully or violating the terms of an order, the Commission must bring an action in Supreme Court to obtain such relief. Section 26 states in relevant part:

> Whenever the commission shall be of the opinion that a public utility company, corporation or person and the officers, agents or employees thereof is failing or omitting or is about to fail or omit to do anything required of it by any provision of this chapter or by order or regulation, adopted under the authority of this chapter or is doing anything or about to do anything, or permitting anything or about to permit anything to be done contrary to or in violation of any provision of this chapter or an order or regulation adopted pursuant to this chapter, the commission may direct counsel to the commission to commence an action or special proceeding in the supreme court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented.

Thus, even when it is seeking to enforce its own orders, the Commission may not issue an injunction but must obtain that relief from the courts. CTC argues as though it may obtain injunctive relief from the Commission; however, no such authority resides with the Commission under New York law.

Moreover, even if the Commission had the broad powers urged on it by CTC, it should not exercise such powers under the circumstances presented in this case. First, CTC can point to no explicit statute, Commission order, rule or regulation allegedly violated by BA-NY. Thus, even if the Commission were inclined to fashion a temporary order to preserve the *status quo*, BA-NY's challenged conduct is entirely lawful under its filed tariffs and until such time as the Commission determines such practices, terms or conditions are unjust or unreasonable, the *status quo* permits BA-NY to enforce language in its contracts.

Further, the Commission is constitutionally prohibited from adopting any relief which impairs BA-NY's contract rights. Article 1, Section 10 of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." The inquiry into whether there has been a Contract Clause impairment has three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Opinion of the Justices (Furlough)*, 135 N.H. 625, 631 (1992) *quoting General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109 (1992). "The severity of the impairment measures the height of the hurdle the . . . legislation must clear." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723 (1978).

While the police power may give state authorities the power to impair contract rights under certain circumstances, those instances are clearly limited. *Allied Structural Steel Co. v. Spannaus*, *supra*, at 241, 98 S.Ct. at 2721. In this case, it in not entirely clear that CTC's professed goal of promoting competition is sufficiently compelling to qualify as an exercise of the government's sovereign right "to protect the lives, health, morals, comfort and general welfare of the people." *Allied*, 438 U.S. at 241. However, even if one were to accept the proposition that the promotion of competition in the telecommunications industry is encompassed within the valid exercise of the police power, the particular measure requested by CTC is neither necessary to achieve that purpose, nor is it reasonable in light of the circumstances. Therefore, it cannot justify the severe impairment to the existing contracts between BA-NY and its customers.[6]

---

[6] In *Allied*, the Court set forth the factors which historically have been weighed in consideration of the legitimacy of state action which interferes with existing contractual relations. Those factors have included the existence of an emergency; the need to protect a basic societal interest and not a favored group; the narrow tailoring of the relief to meet the public purpose; the reasonableness of the conditions imposed; and limiting the relief to the duration of the

In addition to impairing existing contractual relations, the relief sought by CTC constitutes an unconstitutional taking of private property in violation of the United States Constitution. The United States Supreme Court has stated on several occasions that contract rights are a form of property and as such may be taken for a public purpose only if just compensation is paid. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19, n.16, 97 S.Ct. 1505, 1516 (1977); *Contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 38 S.Ct. 35 (1917). There is "no greater right of the government to 'take' merely because a regulated utility is involved." *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1071 (1982).

---

emergency. *Id.*, 438 U.S. at 242, 98 S.Ct. at 2721 (1978); *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 444-47, 54 S.Ct. 231, 242-43 (1934). However, more recent courts, including the *Allied* court, have placed their emphasis on the reasonableness of the state's exercise of power, and its necessity to achieve a purpose that is genuinely public, rather than serving a merely private interest. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 94 S.Ct. 1505, 1517-18 (1977).

III. CONCLUSION

For the foregoing reasons, the Commission should dismiss CTC's complaint.

Respectfully submitted,

New York Telephone Company
d/b/a Bell Atlantic - New York

Maureen F. Thompson

By: Maureen F. Thompson
1095 Avenue of the Americas
New York, New York 10036
(212) 395-6503

Dated: New York, New York
April 23, 1998

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint and Request for Emergency Relief for CTC Communications Corp. against New York Telephone Company d/b/a Bell Atlantic - New York for Violation of § 251(c)(4) and § 252 of the Communications Act of 1934, as amended, Violation of N.Y. Pub. Serv. Law § 91 and Violation of Resale Tariff No. 915	Case 98-C-0426

DECLARATION OF JACK H. WHITE IN SUPPORT OF BELL ATLANTIC'S RESPONSE TO CTC'S COMPLAINT

I, JACK H. WHITE, under the penalty of perjury, state and declare as follows:

1. I am employed by Bell Atlantic Network Services, Inc. as Assistant General Counsel. I have held other positions as an attorney within Bell Atlantic's legal department since February, 1984. I have personal knowledge of the facts set forth below. This affidavit is submitted for the purpose of demonstrating that CTC had full knowledge prior to entering into a resale agreement with Bell Atlantic that then-current practices relating to assignment of end-user contracts and waiver of termination liabilities were not going to be continued, and that this position was reiterated to CTC on several occasions prior to CTC's commencement of resale activities.

2. Pursuant to a series of agreements dating back to 1984, the most recent of which was executed effective February 1, 1996 (hereafter the "Sales Agency Agreement"), CTC acted as an authorized sales agent for New England Telephone and Telegraph Company and New York Telephone Company (hereafter individually and collectively referred to as "Bell Atlantic"). In addition to the other usual and customary terms and conditions that are typical in this sort of agreement, the Sales Agency Agreement contained a non-compete provision that was intended to prohibit CTC, for twelve months following

termination of the Sales Agency Agreement, from promoting or selling competing services to the Bell Atlantic customers for whom CTC had been responsible.

3. In July, 1997, CTC issued a press release announcing its intention to begin competing with Bell Atlantic as a reseller of Bell Atlantic services, beginning in the first quarter of 1998. In light of the obvious conflict between CTC's obligations under the Sales Agency Agreement and its future role as a competing reseller, CTC and Bell Atlantic began a series of meetings to address the many significant business and legal issues raised by CTC's migration from its role as a Bell Atlantic sales agent to its future role as a reseller in direct competition with Bell Atlantic. I participated personally in those negotiations beginning in August, 1997.

4. From the outset of this negotiation process, I made clear to CTC that Bell Atlantic would in no way stand in the way of CTC's efforts to become a reseller. To that end, I arranged for representatives of Bell Atlantic's wholesale group to give CTC an overview of the general framework in which resale is accomplished in New York and the New England states. This meeting occurred on September 10, 1997.

5. On September 18, 1997, I met with representatives of CTC at Bell Atlantic's offices in New York City. (Attending for CTC were Robert Fabbricatore, CTC's Chairman and CEO, Dave Mahan, CTC's Vice President for Marketing, Leonard Glass, counsel for CTC, and Rodger Young, also counsel for CTC.) At that meeting, we discussed a number of issues, including questions arising out of the wholesale presentation. One of these issues, which we continued to discuss in numerous related negotiating sessions, was how Bell Atlantic intended to handle the migration of customers from Bell Atlantic to CTC in situations where the customer is receiving service from Bell Atlantic under a term or volume commitment agreement. Typically, these contracts incorporate by reference filed tariff provisions that provide for early termination liabilities in the event the customer does not

fulfill its volume or term commitments. (Attached as Exhibit 1 are tariff provisions for several services.) Specifically, CTC wished to know whether Bell Atlantic would be willing to permit "assignment" of these contracts to CTC (effectively waiving Bell Atlantic's entitlement to early termination penalties), and if so, whether the resulting contract price would be at the full contracted rates or at the wholesale discount prescribed for the service in question.

6. In response, I explained that contractual service arrangements (such as term and volume offerings) are generally available for resale throughout the Bell Atlantic region at the prescribed wholesale discount to any reseller who meets the conditions set forth in the contract being made available for resale. I also explained, however, that when the reseller's customer receives service from Bell Atlantic under a contractual arrangement, then that end user would be required to pay any applicable termination liability for terminating its agreement with Bell Atlantic -- like any other Bell Atlantic customer subject to the same tariffed early termination provisions.

7. With respect to assignment of custom contracts, I pointed out that it would not be a true "assignment" if the reseller were to receive a different, i.e., discounted, rate for the contracted service, since the reseller would not then be "standing in the shoes" of the customer with respect to price, perhaps the most important single provision in a contract. At a minimum, therefore, any "assignment" of a contract would have to be at the full contract price. I further explained, however, that the Telecommunications Act only requires that we resell telecommunications services. It does not require that Bell Atlantic "assign" contracts to its competitors. Furthermore, Bell Atlantic has no obligation under the Telecommunications Act or otherwise to waive tariff or contracted-for termination liabilities, which is the net effect of permitting the assignment of a contract to one's competitor.

8. Finally, I noted that neither our contracts nor any regulatory requirements of which I am aware prohibit Bell Atlantic from permitting assignment when it chooses to do so,

and that given the difficulties inherent in implementing an entirely new resale process, it was very likely that a number of such assignments were no doubt occurring in the resale context. (Neither I nor the managers whom I was advising at that time were aware that many such purported "assignments" were being permitted to occur at a discounted rate.) I emphasized, however, that this practice would cease in the near future. (Since Bell Atlantic Corporation at that time had only recently merged with NYNEX Corporation, we were still in the process of identifying actual practices across the region and standardizing those practices in accordance with all applicable rules and regulations.)

9. The issue of assignment of retail contracts came up in several subsequent meetings and discussions with CTC as our settlement negotiations continued through October and November. On each occasion, I reiterated that Bell Atlantic was under no legal obligation to permit assignment of contracts, and that our practices would eventually conform to that view.

10. Although I was not directly involved in discussions regarding the requirements of the PSC No. 915 Tariff (Resale Tariff) with CTC, I did take steps to ensure that all of CTC's questions and issues were dealt with expeditiously.

11. At no point during the time CTC was beginning its resale activities under the Resale Tariff did CTC bring to my attention that it had received contrary information from any Bell Atlantic attorney or manager regarding the issues of assignability and termination liability. Also, at no time did CTC protest that Bell Atlantic's position, as I relayed it to CTC management and counsel at many meetings, were in any way inconsistent with the terms of Bell Atlantic's Resale Tariff. Had CTC done so, I would have immediately taken steps to investigate the matter.

12. The issue of assignability was still part of our settlement discussions with CTC during the weeks before Christmas. On December 19, 1997, 1 forwarded a detailed

settlement offer to CTC that would have effected an orderly transition from CTC's sales agency role to its reseller role. As part of that settlement offer, however, I reiterated to Rodger Young, counsel for CTC, that Bell Atlantic would not agree to assign customer contracts to CTC or any other reseller, even at the full retail rate. I reiterated this position on December 22, 1997, when Mr. Young called me to clarify certain aspects of Bell Atlantic's proposed settlement offer.

13. CTC effectively terminated our settlement discussions on December 23, 1997, by filing a lawsuit in the U.S. District Court for the District of Maine. Around that same time, CTC released a letter to the Bell Atlantic customers it previously served as Bell Atlantic's agent announcing the commencement of CTC's resale activities. On December 30, 1997, Bell Atlantic terminated CTC's sales agency agreement for breach, and shortly thereafter filed a lawsuit against CTC in the U.S. District Court for the Southern District of New York.

14. Because CTC's efforts to resell services to the very customers it had represented as Bell Atlantic's sales agent was a violation of its non-compete, proprietary information and related obligations under the sales agency agreement, Bell Atlantic filed a motion with Judge Kimba Wood in the Southern District of New York: (i) for a preliminary injunction and temporary restraining order to stop these continuing breaches of contract; and (ii) demanding that CTC submit the issues raised in both the New York and Maine actions to binding arbitration. On January 30, 1998, Judge Kimba Wood issued an order granting Bell Atlantic's request for injunctive relief, but rejecting Bell Atlantic's demand for arbitration. A copy of Judge Wood's order is attached as Exhibit 2. Since that date, CTC has been under a court order that, among other things, bars CTC from promoting, marketing, or selling resold Bell Atlantic services to the customers CTC serviced as Bell Atlantic's sales agent.

Meanwhile, Bell Atlantic has appealed that part of Judge Wood's order that rejects Bell Atlantic's demand for binding arbitration.

Jack H White

JACK H. WHITE

Dated: Arlington, Virginia
April 22, 1998

EXHIBIT 1

TO

DECLARATION OF JACK H. WHITE

P.1. NYNEX LOCAL USAGE DISCOUNT PLAN (Cont'd)

A. GENERAL (Cont'd)

Enrollment Option 2

For the first year of the plan, the customer may select a base period qualifying usage level (Tier 1, 2 or 3) as specified in Paragraph P.1. C. (2), provided that the minimum usage level of the selected tier does not exceed the customer's base period qualifying usage charges calculated as set forth in Enrollment Option 1. At the end of the first year of the plan, the customer's actual pre-discounted qualifying usage charges incurred during the first year of the plan shall be used as the base period qualifying usage charges for subsequent years of the plan.

For customers under Enrollment Option 2, during the first year of the plan the discounts as specified in Paragraph P.1. C. (2) will apply to all qualifying usage charges. During the first year of the plan the customer agrees to maintain the qualifying usage charges at a level at least equal to the lowest qualifying usage charge level for the selected tier to receive all discounts and credits under the plan ("Minimum Commitment"). After the first year of the plan, the discounts as specified in Paragraph P.1. C. will apply to qualifying usage charges in excess of 80% of the base period level of such charges. After the first year of the plan, the customer agrees to maintain qualifying usage charges at a level at least equal to 80% of the base period qualifying usage charges to receive all discounts and credits under the plan ("Minimum Commitment"). (C)

B. REGULATIONS

1. In computing usage for purposes of this plan, a customer may aggregate its own qualifying usage with that of any subsidiary in which it has a 50% or greater ownership interest.

2. (D)
(D)

3. Qualifying usage charges are defined as charges for Home Region and Bands A, B, C and D calls that are dialed and completed without the assistance of a Company operator. Collect calls, conference calls, calling card calls, person-to-person calls and any other classification of operator-handled calls, are not qualifying calls. Additionally, to be qualifying, a call must be carried by New York Telephone and billed by New York Telephone to the customer participating in the plan. (C) (T)

4. Calls placed to CIRCUIT 9 Service, Information Numbering Plan Service, Interactive Information Network Service, Mass Announcement Service, 700, 800, and 900 Services and Group Bridging Service telephone numbers are not qualifying calls under the plan.

5. The Company will provide a summary report of the customer's qualifying usage charges under the plan on a monthly basis.

6. BTNs of residential service will not be included in the plan. (C)

P.1. NYNEX LOCAL USAGE DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

7. If a customer participating in the plan adds lines to the plan that were previously included in BTNs that are not included in the plan or if a customer participating in the plan adds additional BTNs to the plan, the base period qualifying usage charges and the Minimum Commitment will be increased by the annualized amount of qualifying usage charges of the additional lines or BTNs. The annualized amount of qualifying usage charges of the additional lines or BTNs shall be determined using the method for calculating annualized base period qualifying usage charges specified for Enrollment Option 1. If the additional lines or BTNs had no prior qualifying usage charges, the base period qualifying usage charges and the Minimum Commitment will remain unchanged. (C)

8. Local Usage Discount Plan discounts will be provided to customers and applied as specified in Paragraph P.1. C. The customer must sign a Letter of Commitment (C) subscribing to the plan for a commitment period from one to five years long and (C) selecting an Enrollment Option. The Company will apply the aggregate discount (C) on all BTNs each month based on the assumption that the customer has achieved in that month the monthly equivalent of 100% of its base period qualifying usage charges.

9. At the end of each year of the customer's commitment period, a billing review will be performed to compare the customer's actual qualifying usage charges for the year under review with the assumed estimate of such charges. If the Minimum Commitment has not been achieved, the customer must return to the Company all discounts received during the year under review. Alternatively, the customer may pay the difference between the Minimum Commitment and the actual qualifying usage charges for the year under review to retain the discounts. If the Minimum Commitment has been achieved, but the base period qualifying usage charges have not been achieved, the Company will reduce the discounts for the year under review to reflect the actual qualifying usage charges achieved. If the base period qualifying usage charges have been achieved, the customer shall retain all discounts received during the year under review. If the base period qualifying usage charges have been exceeded, the Company will increase the discounts for (C) the year under review to reflect the actual qualifying usage charges achieved.

10. (a) The customer may terminate its subscription to the plan upon 60 days written notice to the Company, which notice shall be effective at the end of the first bill period following the end of the 60 day notice period.

(b) If a customer's termination is effective prior to the end of the first year of the plan, the customer's actual qualifying usage charges during such first year shall be annualized. Based on such annualized qualifying usage charges, the customer's account shall be handled as set forth in Paragraph P.1. B. 9., except that, if the base period qualifying usage charges have been exceeded, the Company will not increase the discounts for the year under review to reflect the annualized qualifying usage charges achieved. Instead, the customer shall retain all discounts received during the year under review.

P.1. NYNEX LOCAL USAGE DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

10. (Cont'd)

10. (c) If a customer's termination is effective at the end of the first year of the plan, the customer's account shall be handled as set forth in Paragraph P.1. B. 9., based on the customer's acutal qualifying usage charges during such first year, except that, if the base period qualifying usage charges have been exceeded, the Company will not increase the discounts for the year under review to reflect the annualized qualifying usage charges achieved. Instead, the customer shall retain all discounts recieved during the year under review. (C)

(d) If a customer' termination is effective during the second or subsequent years of the plan, the customer shall retain all discounts received pursuant to Paragraph P.1. B. 9. for completed prior years of the plan. The customer must return to the Company all discounts received during the final partial year of the plan.

11. If for any reason the Company withdraws the Local Usage Discount Plan, all customer subscriptions to the plan shall be cancelled. The customer's account shall be handled as set forth in Paragraph P.1. B. 9., based on the customer's actual or annualized qualifying usage charges for the final full or partial year of the plan, as applicable. (C)

12.

13. The Selected Service Credit may be applied either against incremental expenditures for additional products/services as specified in the Attachment to the Tariff or as a credit against qualifying usage charges. The credit may not be applied against charges accrued for previous use of the products and services or of qualifying usage. "Incremental" expenditures are charges which exceed the customers charges for the products and services which are in service as of the date of the customers enrollment in the plan. (C)

14. (D)

15. The Selected Service credit may be used towards qualifying usage charges under the plan. (C)

(C)

16. The Company reserves the right, upon ten days' notice to the Public Service Commission, to modify or change the list of additional products/services eligible for the Selective Service Credit as specified in the Attachment to this Tariff.

17. Selective Service Credits may not be sold or bartered except through programs administered by New York Telephone which may be offered to certain plan customers. (N)

18. The Company reserves the right upon 10 days' notice to the Public Service Commission to offer additional Selected Service Credits to customers for promotional purposes. Terms and conditions of promotions will be filed in an Attachment to this Section of the Tariff.

P.1. NYNEX LOCAL USAGE DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

19. Selected Service Credits will be determined at the end of each year of the customer's participation in the plan. Credits accumulated for a plan year may only be used in succeeding plan years. (T) (T)

20. The Selected Service Credit may be accumulated over the life of the plan. If the full credit available under Paragraph 19. is not used in a plan year, the remainder may be carried forward to subsequent plan years. (C) (T)

21. If a customer's termination of the plan is effective prior to the end of the first year of the plan, the customer shall not receive any Selected Service Credit. If a customer's termination of the plan is effective at or after the end of the first year of the plan, the customer will be entitled to use any previously received but unused Selected Service Credits. Unused Selective Service Credits must be used within 90 days of the effective date of termination of the plan by the customer. (C)

22. The customer has the option to migrate, without termination liability under Paragraphs 10. and 21., to an alternate usage plan developed by New York Telephone, provided that the customer qualifies under the new plan. (T) (T)

23. A customer' participation in the plan will terminate at the completion of the selected commitment period, unless the customer renews or extends the plan. (C) (C)

24. A customer may renew or extend its participation in the plan at the completion of the selected commitment period for an additional commitment period up to the maximum commitment period permitted under the plan. For purposes of receiving discounts and credits, a customer that renews or extends the commitment period shall be treated as if the old commitment period had been extended, rather than as a newly enrolled customer, except that the customer may elect to have base period qualifying usage charges recalculated as described under Enrollment Option 1 in Paragraph P.1. A. (N)

C. Rates and Charges

(1) "Aggregate" percent discounts are applied to annual qualifying usage charges in excess of 80% of the base period qualifying usage charges up to 140% of the base period qualifying usage charges. (C)

Tier	Base Period Qualifying Usage	Aggregate Usage Discount Per Year Plan Year 1	2	3	4	5	
							(C)
1	$ 75,000 - 500,000	25%	30%	40%	45%	45%	(C)
2	500,001 - 1,000,000	35%	40%	50%	55%	55%	(C)
3	1,000,001 and over	45%	50%	60%	65%	65%	(C)

M. NYNEX LINE TERMINATION SERVICE

1. General

NYNEX Line Termination Service is a terminating exchange service available from suitably equipped central offices. This service is available to Information Providers (IPs) for the transport of terminating traffic from the Telephone Company central office to the IP's point of presence and is specially engineered for high-call completion and high-call volume. This service must be purchased in groups of 24 lines. Delivery of the IP's traffic is through one of the following services: single line, Superpath 1.5 megabit/sec service, or Superpath Optical 45 megabit/sec service.

2. Features

a. Basic Feature Package:
   - Call Forwarding-Busy Line
   - Line Hunting

b. Optional Feature
   - Call Forwarding-Don't Answer

3. Feature Definitions

a. Call Forwarding-Busy Line - allows an incoming call to the subscriber's line to be automatically forwarded to a preselected telephone number when the line is busy. (N)

b. Line Hunting - a completion feature that increases the likelihood of an incoming call being completed within a customer defined group of hunting lines.

c. Call Forwarding-Don't Answer - allows an incoming call to the subscriber's line to be automatically forwarded to a preselected telephone number when the line is unanswered after a predetermined number of rings. The subscriber must designate the Variable Ring (two to seven rings).

4. Regulations

a. NYNEX Line Termination Service is a terminating exchange service offered in conjunction with the public switched network.

b. The call-originating party is responsible for all charges associated with reaching the IP. The IP subscribes to this service as a vehicle for aggregating IP traffic.

c. Lines must be purchased in groups of 24, with 48 lines being the minimum.

d. The subscriber to this service must select one of the following services for delivery of IP's traffic: single line, Superpath 1.5 megabit/sec service, or Superpath Optical 45 megabit/sec service.

M. NYNEX LINE TERMINATION SERVICE (Cont'd)

4. Regulations (Cont'd)

e. Superpath 1.5 megabit/sec service and Superpath Optical 45 megabit/sec. service delivery are available on a foreign exchange service basis. For foreign exchange service, the Superpath 1.5 megabit/sec service Rate Schedule, in Section 12, interoffice channel rate will apply for one interoffice channel between central offices for each group of 24 lines. For Superpath Optical 45 megabit/sec service delivery, the Superpath Optical 45 megabit/sec service Rate Schedule, in Section 12, interoffice channel rate will apply for one interoffice channel between central offices for each group of 672 lines or fraction thereof.

f. Single line delivery is not available on a foreign exchange service basis.

g. This service is offered under 1-year, 3-year, 5-year, and 7-year service period plans. A minimum 1-year service period is required.

h. At the conclusion of the subscriber's service period, the subscriber has the option of selecting another service period plan or to continue under the 1-year service period plan.

i. Non-recurring and recurring charges apply for establishment of this service. A service order charge as specified in Section 14, Paragraph A.3. of this tariff applies for initial and each additional installation of Line Termination Service lines, and the addition, or change of features ordered by the subscriber. Business Service Charge and Premise Visit Charge apply as specified in Section 14, Paragraph A.3. of this tariff for the initial installation, and installation of additional growth, of Line Termination Service lines. (N)

j. There is a limitation of 5 paths on Call Forwarding-Busy Line, and Call Forwarding-Don't Answer. If a subscriber requires in excess of 5 paths for Call-Forwarding-Busy Line or Call Forwarding-Don't Answer, additional paths may be ordered from the Remote Call Forwarding Tariff - PSC 900, Section 2. The maximum number of total paths that may be ordered is 99 paths.

k. Termination Liability Charge

If a customer terminates this service prior to the completion of the selected service period plan, the termination liability charge will be equal to the difference between the applicable monthly rate for NYNEX Line Termination Service minus the contracted rate the customer selected, multiplied by the number of months the customer had service.

l. Standard and Master Service Agreements:

Standard Service Agreement - Customer has the option of selecting any of the available Service Period Plans as set forth in this Tariff. There is no provision for growth lines - a request for additional lines is to be handled via a new contract for those lines.

DIGITAL DATA COMMUNICATIONS SERVICE

M. NYNEX LINE TERMINATION SERVICE (Cont'd)

4. Regulations (Cont'd)

l. Standard and Master Service Agreements: (Cont'd)

Master Service Agreement –Customer has the option of selecting any of the available Service Period Plans as set forth in this Tariff. The Customer agrees to a total commitment of Line Termination Service Lines, including additional growth lines. The initial quantity of lines to be installed is rated at the appropriate tariff rate, and subsequent installation of additional growth lines is rated at a discounted rate, consistent with the provision below.

- Additional Growth Lines: Customers may add additional Line Termination Service lines at the locations set forth in Appendix A of the Master Service Agreement. The quantity of growth lines shall be rated at the line-size tier that the customer attains with the installation of the additional lines.
- The appropriate rate for all additions of additional growth lines ordered is calculated as the monthly rate for the maximum terms (1-3, or 5-year) of time that will be achieved by the additional growth lines before the scheduled termination of the original contract.

A Record Charge as specified in Section 14, Paragraph A.3. of this tariff applies, per Line Termination Service line, for conversion from a Standard Service Agreement to a Master Service Agreement.

5. Rates and Charges

Rates and Charges for NYNEX Line Termination Service will be based on each single line and offered in groups of 24 lines.

a. SERVICE PERIOD PLANS

Single Line Delivery

Line Sizes	Monthly Rates# 1-Year	3-Year	5-Year	7-Year		Non-Recurring Charge	USOC
24 - 672	$39.75	$35.95	$34.87	$34.09			
673 - 1344	39.14	35.38	34.31	33.53		$120.00	
1345 - 3360	38.53	34.81	33.74	32.97	(C)	Per Line	
3361 - 5376	37.92	34.24	33.18	32.41			
5377 -10080	37.31	33.67	32.62	31.85			
over 10080	36.70	33.09	32.06	31.29			

\# In addition, Business End User Common Line Charge applies per line, as specified in FCC No. 1 Tariff. (N)
(N)

INDIVIDUAL, PARTY AND AUXILIARY LINE SERVICE AND STATION SERVICE

GG. LARGE VOLUME DISCOUNT PLAN

A. GENERAL

The Large Volume Discount Plan provides a discount on selected calling in exchange for a time and a usage revenue commitment from the subscriber. The discount provided to a subscriber increases as the revenue commitment increases. The discount is provided on charges for inter-region Regional Call Plan calling, Upstate toll calling, NYNEX 800 VALUFLEX Service calls, VALUFLEX Virtual WATS Pricing Plan and 800 IntraLATA calling. The discount applies to the aggregation of applicable calls on a state-wide basis for the Billed Telephone Numbers (BTNs) of the subscriber and its subsidiaries. A subscriber must commit to a minimum $10,000.00 of billed usage per year and $30,000.00 for three years. The maximum subscriber commitment is $3,150,000 per year and $15,750,000 over a five year period. There are sixteen levels of annual revenue commitment and the associated discounts vary from a minimum of 15% to a maximum of 32% based on the subscriber's commitment level. The minimum period of three years applies to this service. This Plan is available to business subscribers only. Notwithstanding any other provisions of this tariff, the Large Volume Discount Plan is available for resale in accordance with New York Telephone Company Tariff P.S.C. No. 915--Telephone. (N)

B. REGULATIONS

1. The Large Volume Discount Plan is available to qualifying subscribers placing orders with the Telephone Company.

2. The following sent paid calls if carried by and billed by New York Telephone, are included in the Plan and are eligible for the discount:

   - Inter-region Regional Call Plan calls,
   - Upstate IntraLATA toll calls,
   - WATS 800 IntraLATA calls,
   - NYNEX 800 VALUFLEX Service calls and
   - VALUFLEX Virtual WATS Pricing Plan.

3. This Plan applies to calls that are dialed and completed without the assistance of a Company operator and do not include collect calls, conference calls, calling card calls, person-to-person calls or any other classification of operator-handled calls. Calls must be carried by New York Telephone Company and billed by New York Telephone Company to the customer participating in the Plan.

4. Calls placed under the New York/New Jersey Corridor Optional Calling Plan, and any other usage discount plan provided by the Company will not be applied to the Large Volume Discount Plan unless otherwise specified in this tariff.

INDIVIDUAL, PARTY AND AUXILIARY LINE SERVICE AND STATION SERVICE

GG. LARGE VOLUME DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

5. Econopath Calling Plan Service, Virtual WATS and the NYNEX Business Link Plan cannot be established in the calling areas which qualify for discounts under the Large Volume Discount Plan. Econopath Calling Plan Service, Virtual WATS and the NYNEX Business Link Plan must be discontinued in order to subscribe to the Large Volume Discount Plan.

6. Only the New York State BTNs of a subscriber and of any subsidiary in which the subscriber has a 50% or more ownership interest, or of any agency, unit, or division of the subscriber which operates as the functional equivalent of a 50% subsidiary can be included in the Plan. However, BTNs of residential service will not be included in the Plan. (C)

7. Calls placed to CIRCUIT 9 Service, Information Numbering Plan Service, Interactive Information Network Service, Mass Announcement Service, 700, 800 and 900 Services, Group Bridging Service telephone numbers are not included in this Plan.

8. Calls placed within the subscriber's Home Region, or Bands A, B, C and D calls or calls terminating in the New York/New Jersey corridor are excluded from this Plan.

9. The Company will provide a summary report of those usage charges qualifying under the Large Volume Discount Plan on a monthly basis.

10. BTNs may be added or deleted at any time by the subscriber. The changes will be made within 30 days of written notice to the Company and will appear on the following bill of the BTN. All qualifying usage will be discounted on new connects retroactively through the prior bill period. Full rates will apply for all disconnects retroactively through the prior bill period.

INDIVIDUAL, PARTY AND AUXILIARY LINE SERVICE AND STATION SERVICE

GG. LARGE VOLUME DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

11. The subscriber may terminate the commitment upon written notice to the Company, which notice will be effective at the end of the bill period following 60 days' notice of termination. If the customer terminates the Plan prior to the end of the commitment period, the customer's annual billed usage will be estimated using the procedure described in Paragraph B. 15. following. The estimated annual bill usage will then be used to perform the billing review described in Paragraph B. 12. following.

12. At the end of each year of the subscriber's commitment, a billing review will be performed to determine if the subscriber's annual commitment has been met. If the $10,000.00 minimum commitment has not been achieved, the subscriber must pay the Company the amount of the usage discount received during the year. Alternatively, the subscriber may pay the difference between the minimum commitment and actual billed usage achieved to retain the discount. If the minimum commitment has been achieved, but the annual commitment has not been met, the Company will reduce the discount to the level applicable to the actual billed usage achieved. The subscriber will pay the Company the difference between the annual commitment discount level and the discount level applicable to the actual billed usage. The discount level applicable to the actual billed usage will then be used as the subscriber's annual commitment for the next year of the Plan. If the subscriber has exceeded the annual commitment, only the discount percentage applicable to the annual commitment will apply to the additional billed usage. The Company will credit or debit any differences as a result of the annual billing review against the BTNs of the subscriber's choice. If the subscriber has terminated the BTNs that were included in the Plan, the subscriber shall pay the Company in a lump sum any amounts due the Company under this Paragraph B.12. (C)

13. (D)

14. The Large Volume Discount Plan is furnished for a minimum period of three years.

INDIVIDUAL, PARTY AND AUXILIARY LINE SERVICE
AND STATION SERVICE

GG. LARGE VOLUME DISCOUNT PLAN (Cont'd)

B. REGULATIONS (Cont'd)

15. If for any reason the Large Volume Discount Plan is withdrawn by the Company, all subscribers will drop out of the Plan. Insofar as a subscriber may not have a full year of billed usage at that time, the average monthly actual billed usage will be used to estimate the annual actual billed usage to determine if the annual commitment has been met.

16. The subscriber has the option to migrate to an alternate usage plan developed by the Company, provided that the subscriber qualifies under the alternate plan. Where a customer discontinues the Large Volume Discount Plan in order to subscribe to the NYNEX Business Link Plan or any optional calling plan offered by the Company for at least the remaining length of its Large Volume Discount Plan commitment, the billing review described in Paragraph B.12 will not be performed. Where a customer discontinues the Large Volume Discount Plan in order to subscribe, on a month-to-month basis, to the NYNEX Business Link Plan or any optional calling plan offered by the Company then the billing review described in Paragraph B.12 will be performed. (C)

C. OBLIGATIONS OF THE SUBSCRIBER

1. To be eligible for this Plan, the subscriber must have qualifying New York Telephone billed intrastate usage revenue of $10,000.00 in the past year for services as specified in paragraph B. 2. preceding. If this data is not available, the subscriber's previous three months usage will be used to estimate the applicable IntraLATA annual usage revenue. If this data is not available, the subscriber must pay in advance, for each of three months, a sum equal to the subscriber's agreed to annual usage commitment divided by twelve. (C)

2. If the customer has less than $10,000.00 in applicable billed usage in the past year, but wishes to participate in the Plan, the subscriber must pay the difference between the $10,000.00 and the actual billed usage achieved in the past year to obtain the discount. (N)

EXHIBIT 2

TO

DECLARATION OF JACK H. WHITE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X

BELL ATLANTIC CORPORATION,

Plaintiff,

-against-

98 Civ. 0048 (KMW)
ORDER

CTC COMMUNICATIONS CORP. and COMPUTER TELEPHONE COMPANY,

Defendants.

--X

WOOD, U.S.D.J.,

Plaintiff Bell Atlantic Corporation ("Bell Atlantic"), also referred to in this action as NYNEX, brings this action by order to show cause for an order to compel arbitration with CTC Communications ("CTC"). Bell Atlantic also seeks a temporary restraining order preventing CTC from (1) selling or promoting the sale of any telecommunications services to any Bell Atlantic business customer to whom CTC has sold Bell Atlantic Service in the 12 months prior to December 30, 1997; (2) any use of Bell Atlantic's trademarks and tradename; (3) using Bell Atlantic's confidential information, which Bell Atlantic claims includes plaintiff's customer information, price lists, compensation information, information contained in Bell Atlantic confidential customer surveys, and other information that CTC acquired as an sales agent for Bell Atlantic.

Until December 30, 1997, CTC had been one of Bell Atlantic's Authorized Sales Agents. In CTC's capacity as an Authorized Sales Agent, CTC had serviced certain Bell Atlantic business customers in New England and New York. In this capacity, the relationship between CTC and Bell Atlantic was governed by a Sales Agency Agreement (the "Agency Agreement"). (Froberg Aff. Ex. 1, hereinafter cited to as "AA" with section number.) In the wake of the Telecommunications Act of 1996, 47 U.S.C. § 251 et seq. (West Supp. 1997), in November and December of 1997, CTC entered into several Resale Service Agreements ("Resale Agreements") with Bell Atlantic. (See, e.g., Fabbricatore Aff. Ex. 1.) Under these Resale Agreements, CTC agreed to purchase certain telephone services from Bell Atlantic wholesale, which CTC would then sell on its own behalf to customers. This dispute arises out of CTC's contractual obligation under the Agency Agreement and the Resale Agreements. In short, Bell Atlantic claims that arbitration of disputes is mandatory under the Agency Agreement and that CTC is soliciting the customers that CTC serviced as Bell Atlantic's sales agent in violation of its contractual obligations. CTC contests both of these claims. Other relevant facts are recounted in greater detail, as needed, in the discussion below.

For the reasons stated below, as well as those stated on the record at a hearing before the Court on January 28, 1998, the Court denies Bell Atlantic's motion to compel arbitration between Bell Atlantic and CTC. The Court grants Bell Atlantic's application for a temporary restraining order in the following respects. First, the Court grants Bell Atlantic's application to enjoin CTC from soliciting the customers CTC serviced as a sales agent for Bell Atlantic under the terms of the Agency Agreement. Second, the Court grants Bell Atlantic's application for a temporary restraining order as to CTC's use of Bell Atlantic's trademarks and tradename in promotional, advertising or other market material without written permission of Bell Atlantic. Third, the Court grants Bell Atlantic's application for a temporary restraining order as to CTC's use of certain confidential information, identified in the discussion below.

I. Discussion

A. Order Compelling Arbitration

Bell Atlantic moves for an order, pursuant to 9 U.S.C. § 4 (1970 and West Supp. 1997), compelling arbitration of all claims asserted by Bell Atlantic against CTC in this action and all claims asserted by CTC against Bell Atlantic in the action initiated by

CTC against Bell Atlantic in Maine. CTC claims that it is not required to submit to arbitration under the Agency Agreement. "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'" AT & T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986) (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). The threshold question before the Court is whether the Agency Agreement compels arbitration between the parties.

In this regard, "it has been established that where a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurances that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" Id. at 650 (quoting Warrior & Gulf, 363 U.S. at 582-83).

The arbitration provision in the Agency Agreement reads as follows:

> Upon mutual agreement, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award may be entered into in any Court having jurisdiction thereof.

(AA 1 5 L.) Bell Atlantic argues that the "[u]pon mutual agreement" language does not give the parties the option of either submitting a dispute relating to the Agency Agreement to arbitration or seeking a judicial forum. Bell Atlantic contends that reading "[u]pon mutual agreement" otherwise would render the arbitration provision meaningless -- the parties may always mutually agree to submit a dispute to arbitration. In contrast, CTC argues that "[u]pon mutual agreement" clearly means that only if the parties so agree at the time a dispute arises, they may submit the dispute to arbitration in accordance with the American Arbitration Association Rules.

The Court finds the arbitration clause is not susceptible to Bell Atlantic's preferred construction. The arbitration clause does not compel arbitration, but rather requires that if the parties agree to arbitrate a dispute, the Rules of the American Arbitration Association will govern the arbitration. This construction of the arbitration provision is required by its language and does not render the provision meaningless: it states an agreement about the rules governing arbitration, if the parties agree to arbitrate. The authorities cited by Bell Atlantic do not convince this Court otherwise. Given that this contract was drafted by Bell Atlantic (Fabbricatore Aff. ¶ 7.), even if this clause were deemed ambiguous, contract interpretation principles would mandate that the clause be construed against Bell Atlantic. See Sievert v. Morlef Holding Co., 663 N.Y.S.2d 978, 979 (N.Y. App. Div. 2d Dep't 1997) ("It is well established that any ambiguity in a contract is to be construed against the drafter . . ."). Accordingly, the Court denies Bell Atlantic's motion to compel arbitration of the disputes between the parties. The parties' arguments about the scope of the arbitration provision are thus moot.

B. Injunctive Relief

Bell Atlantic seeks a temporary restraining order restraining CTC from (1) selling or promoting the sale of any telecommunications services to any NYNEX business customer to whom CTC has sold NYNEX service in the 12 months prior to December 30, 1997; (2) any use of plaintiff's trademarks and tradename; (3) using plaintiff's confidential information, which Bell Atlantic claims includes plaintiff's customer information, price lists, compensation information, information contained in Bell Atlantic confidential customer surveys, and other information. Bell Atlantic seeks this relief based on its interpretation of the Agency Agreement and Resale Agreements and its factual contentions concerning CTC's conduct in last month.

The standard for granting a temporary restraining order is the same as for a preliminary injunction. Local 1814 AFL-CIO v. New York Shipping Ass'n, Inc., 965 F.2d 1224, 1228 (2d Cir. 1992). To obtain either a temporary restraining order or preliminary injunction, the movant must demonstrate "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Wallace Int'l Silversmiths, Inc., v. Godinger Silver Art Co., Inc., 916 F.2d 76, 78 (2d Cir. 1990).

1. Do Resale Agreements Supersede the Agency Agreement?

In response to Bell Atlantic's claims of breach of the Agency Agreement, CTC argues that the Agency Agreement has be superseded in relevant part by the Resale Agreements. Because this contention, if true, would dispose of Bell Atlantic's claims I shall address it first.

The basis for CTC's contention is an integration clause that it alleges is included in each of the Resale Agreements that it has entered into with CTC. The Resale Agreement that CTC provides the Court was entered into prior to the termination of the Sales Agreement by Bell Atlantic on December 30, 1997. (CTC Memo Ex. B.)

The integration clause in Resale Agreement provided to the Court reads as follows:

> This Agreement constitutes the entire understanding between the Parties with respect to the subject matter hereof and supersedes all prior understandings, oral or written representations, statements, negotiations, proposals and undertakings in oral [or] written form.

(Id. § 6.) This integration provision does not cause the Resale Agreements to supersede all of CTC's obligations under the Agency Agreement. The phrase in the integration provision "with respect to the subject matter hereof" does not, as CTC urges, comprehend the entire telecommunications dealings between the parties. Rather, it is more properly understood as relating to the subject matter of the Resale Agreement -- the terms of wholesale sale of local exchange services (as distinct from the terms governing acting as an agent for the sale of such services). This construction is confirmed by the fact that CTC continued to perform services under the Agency Agreement after entering into a Resale Agreement. Further, this construction does not render the integration provision a nullity, because the provision still operates to exclude previous oral and other understandings between the parties concerning the Resale Agreement. See Village on Canon v. Bankers Trust Co., 920 F. Supp. 520, 528 (S.D.N.Y. 1996) (interpreting New York law). Accordingly, the Court finds that this integration provision in the Resale Agreement does not cause the Resale Agreement to supersede CTC's obligations under the Agency Agreement.

2. <u>CTC's Resale of Services to Customers CTC Formerly Served as Bell Atlantic's Sales Agent -- Noncompetition Provision</u>

The primary basis for Bell Atlantic's claim that CTC should be restrained from selling any telecommunication services to any Bell Atlantic business customer to whom CTC has sold Bell Atlantic Service in the twelve months prior to December 30, 1997 is the noncompetition provisions in § 1.D.s. of the Agency Agreement.

Section 1.D.s. provides that CTC shall:

> Neither 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 [Bell Atlantic]. Such limitation shall apply to any Affiliate of Representative [CTC]. 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 [non-Bell Atlantic] IntraLATA services to any NYNEX [Bell Atlantic] Business Customer for whom Representative was responsible under the AMP program, or to whom Representative sold any NYNEX [Bell Atlantic] Service, within 12 months prior to such expiration or termination. . .

(AA § 1.D.s.)

The parties vigorously dispute the meaning of "non-Bell

Atlantic IntraLATA services"[3] in this noncompetition clause. CTC's primary argument is that this noncompetition provision only prohibits CTC from selling products and services that do not originate from Bell Atlantic, such as AT&T products, to the customers for whom CTC was responsible when acting as Bell Atlantic's sales agent (those customers hereinafter referred to as CTC's "agency customers"). CTC argues that in the noncompetition provision "IntraLATA service" means only local voice and data transmission service, and does not include network design, customer and technical support, and other such functions. Accordingly, CTC contends that because the "IntraLATA services" -- that is, the IntraLATA transmission services -- that CTC is selling as a Resale are Bell Atlantic's own (Fabbricatore Aff. ¶ 14), it is not selling "non-Bell Atlantic IntraLATA services" to its agency customers.

---

[3]In the Telecommunications Act of 1996:

> The term 'local access and transport area' or 'LATA' means a continuous geographic area (A) established before February 8, 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a Bell operating company after February 8, 1996, and approved by the Commission.

47 U.S.C. § 153(25) (West Supp. 1997).

The term "InterLATA service" is defined as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21).

In contrast, Bell Atlantic argues that the phrase "non-Bell Atlantic IntraLATA services" prohibits CTC from selling any IntraLATA services to its agency customers. Bell Atlantic argues that the phrase "IntraLATA services" must be construed in accordance with the AT&T Consent Decree (the "Consent Decree") and the opinions of Judge Harold Greene interpreting the Consent Decree. So construed, Bell Atlantic maintains, "IntraLATA services," like InterLATA services, does not merely include voice and data transmissions, but also "all of the functions that are normally and necessarily performed by those who are engaged in that business." Id. at 1100. On this view, the noncompetition clause prohibits CTC as a Resale from selling Bell Atlantic's IntraLATA transmission services coupled with CTC's own customer and technical support, sales contracting, billing and other non-transmission services because all the services that CTC couples with Bell Atlantic's IntraLATA transmission services are non-Bell Atlantic IntraLATA services, that is, services that are in competition with the IntraLATA service offered by Bell Atlantic (either directly or through its sales agents).

The Court finds that the term "IntraLATA services" in the Agency Agreement should be construed in accordance with the construction of analogous terms in the Consent Decree and the judicial interpretation of it. Accordingly, the Court finds that the term "IntraLATA services" in the Agency Agreement includes not only voice and data transmission services but also customer and technical support, sales contracting, billing and other such non-transmission services. Thus, under the noncompetition provision of the Agency Agreement, CTC may not attempt to sell or promote Bell Atlantic's IntraLATA transmission services in company with CTC's own customer service, customer and technical support, sales contracting, billing, and other such non-transmission services. Accordingly, the Court finds that there is a likelihood of success on the merits as to Bell Atlantic's claim that CTC is violating the noncompetition provision of the Agency Agreement.

Furthermore, Bell Atlantic has shown that it will suffer irreparable harm absent temporary relief. The potential damage to Bell Atlantic that may result if CTC is permitted to solicit its agency customers as a Resale include loss of Bell Atlantic's customer base and loss of customer goodwill. The extent of these damages cannot reasonably be calculated. See Ecolab, Inc. v. K.P. Laundry Machinery, Inc., 656 F. Supp. 894, 896 (S.D.N.Y. 1987). Accordingly, the Court finds that Bell Atlantic will suffer irreparable harm if it is not granted a temporary restraining order. Hence the Court grants Bell Atlantic's application to temporarily restrain CTC from soliciting the customers for whom CTC was responsible when acting as Bell Atlantic's sales agent under the Agency Agreement.

3. CTC's Use of Bell Atlantic's Trademarks and Tradename

Bell Atlantic's claim that CTC is using its trademarks and tradename ("marks") in breach of its agreements with Bell Atlantic is based on §§ H.6; H.10, and H.15 of the Agency Agreement, and ¶ 15 of the Resale Agreements. In substance, these provisions of the Agency Agreement require that, upon termination of the Agency Agreement, CTC not use any of Bell Atlantic's marks or release any publication mentioning or implying the name of Bell Atlantic unless Bell Atlantic grants it prior written permission. They also acknowledge that CTC's right to use Bell Atlantic's marks derives solely from the Agency Agreement. The Resale Agreement provides: "Both NET [Bell Atlantic] and Resale [CTC] agree that neither will use the other's name without the written permission of the other in connection with promotional, advertising or other market material." (Resale Agreement § 15)

CTC responds that the Resale Agreement also provides that the Resale "may advise end users that certain services are provided by the Telephone Company." (Resale Agreement Attach. A ¶ 6.2.3.4.) However, when this provision is read in light of § 15 of the Resale

Agreement and the provisions of the Agency Agreement, it does not permit CTC to use Bell Atlantic's name in advertising CTC's services, without Bell Atlantic's written permission. The authorities cited by CTC do not persuade the Court otherwise.

To support Bell Atlantic's claims, Bell Atlantic provides the Court with a letter that CTC has sent to its customers, as CTC acknowledges, and reports of conversations with CTC's former agency customers. (See Froberg Aff. ¶ 29-33.) Bell Atlantic contends that CTC's sales agents have been not only been saying to its agency customers that "nothing will change other than the name on the bill," but also actually have continued to represent that CTC is still Bell Atlantic's sales agent. Both the letter that CTC sent its former agency customers, and these incidences of contact between CTC and its former agency customers strongly suggest to the Court that CTC is using Bell Atlantic's trademarks in breach of both the Agency Agreement and the Resale Agreements. Accordingly, the Court finds that Bell Atlantic is likely to succeed on the merits as to its claims of trademark and tradename misuse. Because Bell Atlantic faces the prospect of losing an incalculable amount of business as a result of CTC's misuse of its marks, the Court also finds that Bell Atlantic will suffer irreparable harm if CTC is not enjoined from such misuse of Bell Atlantic's marks. See

Ecolab, Inc. v. K.P. Laundry Machinery, Inc., 655 F. Supp. 894, 896 (S.D.N.Y. 1987).

4. Confidential Information

Bell Atlantic also claims that CTC has breached its obligation under the Agency Agreement not to use confidential information after the termination of the Agency Agreement. The confidentiality provision of the Agency Agreement provides:

> Each party agrees to keep such information [that is, all information disclosed to either party pursuant to the Agency Agreement] confidential and not to disclose it to any other person or to use it during the term of this Agreement or after its termination except in carrying out its obligations hereunder or in response to obligations imposed by tariff or order of a court or regulatory body.

(AA § I.1.)

Bell Atlantic argues that because CTC served as its sales agent it has access to a wide range of information that is confidential, and that CTC's use of this information violates the Agency Agreement. Specifically, Bell Atlantic contends that CTC gained access to the following types of information in CTC's capacity as a sales agent for Bell Atlantic:

(1) as a participant in the Accounts Management Plan ("AMP"), CTC had access to information about services Bell Atlantic customers had purchased over time, customer service records and repair histories, customer satisfaction surveys and reports based on those surveys, Bell Atlantic's internal plans developed in response to surveys and the terms of Bell Atlantic's contractual relationships with customers, list of

Bell Atlantic customers and their serving agents. (See Frocery Aff. ¶¶ 11-16);

(2) as a sales agent for Bell Atlantic, CTC had access to information about customized pricing packages for services such as CENTREX systems, high speed private line services and frame relay networks, and knowledge of which customers have requested custom services (id. ¶¶ 16-19).

(3) as a sales agent for Bell Atlantic, CTC had access to information regarding Bell Atlantic's compensation for sales agents, compensation for individual sales agents, and reports about what improvements in service Bell Atlantic customer's seek, among other things. (Id. ¶¶ 20-24.)

Indeed, Bell Atlantic alleges that CTC has attempted to recruit Bell Atlantic's sales agents based on the confidential information it acquired concerning their compensation from Bell Atlantic. (Id. ¶¶ 20-22.)

CTC's response is directed primarily toward customer lists and pricing information. CTC contends that CTC itself located almost all the customers it had as Bell Atlantic's sales agent. (CTC Memo at 19.). CTC claims that Bell Atlantic's pricing information is also not secret because its rates are set by public utility regulatory agencies. (Id.)

Much of the information identified by Bell Atlantic, if used by CTC, would violate CTC's obligations under the Agency Agreement. Such information includes the following:

(1) information about services Bell Atlantic customers had purchased over time, customer service records and repair histories, customer satisfaction surveys and reports based on those surveys, Bell Atlantic's internal plans developed in

response to surveys and the terms of Bell Atlantic's contractual relationships with customers, list of Bell Atlantic non-CTC customers and their serving agents;

(2) information about Bell Atlantic's customized pricing packages for services such as CENTREX systems, high speed private line services and frame relay networks, and documents concerning which customers have requested custom services; and

(3) information regarding Bell Atlantic's compensation for other sales agents, compensation for individual sales agents, and reports about what improvements in service Bell Atlantic customers seek.

Because the Court finds that use of this information would likely violate CTC's obligations under the Agency Agreement, the Court finds that Bell Atlantic is likely to succeed on the merits as to its claim to enjoin CTC from use of this information. CTC's use of this information would also cause irreparable harm to Bell Atlantic, in large part because of the potential loss of the agency customers based on CTC's unfair competitive advantage. See Churchill Communications v. Demyanovich, 668 F. Supp. 207, 208, 214 (S.D.N.Y. 1987) (possible loss of goodwill and customers from competition by former employee based on information regarding electronic mail customers' volume, product requirements, and price structures of former employer constituted irreparable harm to former employer absent proof that any customers had yet been lost). For these reasons, the Court grants Bell Atlantic's application to temporarily restrain CTC from use of this confidential information disclosed to CTC in CTC's capacity as Bell Atlantic's sales agent. Because of the character of the conflicting factual contentions before the Court concerning whether Bell Atlantic's pricing of its telecommunications services fit within the confidential information conceived by the Agency Agreement, the Court does not restrain CTC from use of that information.

The Court does not find that arguments of counsel that are not discussed herein persuasive.

II. Conclusion

For the reasons stated above, the Court denies Bell Atlantic's motion to compel arbitration between Bell Atlantic and CTC. Pursuant to Federal Rule of Civil Procedure 65(b), the Court grants Bell Atlantic's application for a temporary restraining order in the following respects. Specifically, the Court grants Bell Atlantic's application to enjoin CTC from soliciting the customers CTC serviced as a sales agent for Bell Atlantic under the Agency Agreement. The Court also grants Bell Atlantic's application for a temporary restraining order to enjoin CTC's use of Bell Atlantic's trademarks and tradename in promotional, advertising or other market material without written permission of Bell Atlantic. Finally, the Court grants Bell Atlantic's application for a temporary restraining order to enjoin CTC's use of confidential information as identified in the discussion above.

SO ORDERED.

New York, New York
5:25 p.m.,
January 30, 1998

Kimba M. Wood
United States District Judge

Copies of this order have been faxed and mailed to the parties.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint and Request for Emergency Relief of CTC Communications Corp. against New York Telephone Company d/b/a Bell Atlantic - New York for Violation of Sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, Violation of N.Y. Pub. Serv. Law § 91 and Violation of Resale Tariff P.S.C. No. 915	)	Case 98-C-0426

AFFIDAVIT OF JOHN B. MESSENGER

JOHN B. MESSENGER, being duly sworn, deposes and says:

1. My name is John B. Messenger. I am employed by Bell Atlantic Network Services, Inc., as in-house Counsel in Boston, Massachusetts. I have been similarly employed by corporate predecessors of Bell Atlantic for over 19 years. I am admitted to practice law in Massachusetts. New York, and the District of Columbia.

2. I have read the "Complaint and Request for Emergency Relief of CTC Communications Corp." filed with the Commission, and the Affidavit of Jordan B. Michael in support thereof.

3. In his affidavit, Mr. Michael relates a telephone conversation he and I had on February 4, 1998. The purpose of this Statement is to correct certain mischaracterizations made with regard to statements I made during my conversation with Mr. Michael.

4. In particular, I did not "confirm" that resellers such as CTC "historically" had been allowed to assume end users' contracts, as alleged in paragraph 3 of Mr. Michael's affidavit.

5. At the outset of the conversation I made clear to Mr. Michael that I was not personally familiar with, and therefore did not purport to speak definitively about, Bell Atlantic's policy with regard to allowing an end user to assign a term agreement to a reseller such as CTC, or why (if at all) that policy had changed. What I did say was that, assuming such an assignment took place, it would be retail rates, not a wholesale discount, that should apply.

6. In Mr. Michael's e-mail note purporting to summarize our conversation, points 1 and 2 are reasonably accurate records of my statements. Points 3 and 4 are not, appearing rather to be Mr. Michael's own conclusions from what was said. We did agree that this particular matter did not seem to lend itself to informal resolution between the parties.

JOHN B. MESSENGER

Commonwealth of Massachusetts
County of Suffolk

Sworn to before me this 17th day of April 1998.

Mary Faunce, Notary Public

My Commission Expires: 5/14/2004