BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Granite Telecommunications, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. 17-1713-TP-CSS**
	)	
Ohio Bell Telephone Company	)	
d/b/a AT&T Ohio,	)	
	)	
Defendant.	)	

AT&T OHIO'S MEMORANDUM CONTRA GRANITE'S MOTION TO COMPEL AT&T OHIO TO RESPOND TO DISCOVERY REQUESTS

The Ohio Bell Telephone Company ("AT&T Ohio"), by its attorneys, hereby files its memorandum contra Granite's Motion to Compel AT&T Ohio to respond to discovery requests.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

AT&T Ohio's motion to dismiss explains why the Commission lacks authority to resolve the issues raised by the Amended Complaint, and why Granite's Amended Complaint in any event fails to state a cause of action.[2] The motion to dismiss raises several independent threshold barriers to the Commission's proceeding on Granite's claims, and discovery should be suspended pending a final ruling on the motion to dismiss. *First*, the FCC has placed a nationwide ban on requirements to provide the UNE Platform (for which LWC is a replacement). Indeed, in April 2017 the FCC expressly rejected Granite's requests to require ILECs like AT&T Ohio to provide

[1] This memorandum responds to the portion of Granite's October 13 "combined" filing ("Granite Mem.") that is a motion to compel AT&T Ohio to respond to discovery. On October 20, AT&T Ohio filed a reply in support of its motion for protective order, responding to the portion of Granite's combined filing responding to that motion. AT&T Ohio is filing this separate response to Granite's motion to compel because the Commission's rules provide a longer time period for a response to a motion to compel.

[2] AT&T Ohio's Memorandum in Support of Motion to Dismiss Amended Complaint ("AT&T MTD Mem.").

UNE Platform replacement products (like LWC) or to regulate their rates.[3] Thus, under federal law, LWC is not a regulated telecommunications service, but rather is a product offered exclusively through privately-negotiated agreements. There is nothing that the Commission can properly do here: it cannot set the prices of LWC generally, and it cannot require parties to enter into private agreements for LWC, much less dictate the terms of those agreements.

Second, consistent with this federal mandate, Ohio state law makes clear that the Commission may not establish any requirements for the unbundling of network elements, resale, or network interconnection "that exceed or are inconsistent with or prohibited by federal law." O.R.C. § 4927.16. Similarly, the Commission "shall not establish pricing" for unbundled elements, resale, or interconnection "that is inconsistent with or prohibited by federal law." *Id.* What is more, none of the Ohio statutes Granite relies on in its Amended Complaint apply here. See AT&T Ohio MTD Mem. at 17-20. Accordingly, the provisioning and pricing of LWC is preempted by federal law, and the Commission lacks statutory authority under Ohio law to resolve Granite's core grievance – that the rates (*i.e.*, the "prices") AT&T Ohio is proposing to charge Granite for LWC under the parties' private contract are "unreasonable and discriminatory." (*See* Granite Mem. at 6).

Third, not only does the Commission lack authority, but Granite's complaint is not ripe in any event. The parties are currently negotiating a successor agreement to the existing LWC contract, which expires on December 31, 2017. Granite's assertion that AT&T Ohio has made "an unreasonable and discriminatory final offer for a Local Wholesale Complete ("LWC") agreement to succeed the parties' current agreement" (*see* Granite Mem. at 3) is not only premature when the parties are still negotiating, but is an improper effort to concoct a private

[3] *Business Data Services in an Internet Protocol Environment*, 2017 WL 1632988, ¶¶ 287-88 (FCC 17-43, rel. April 28, 2017) ("*Business Data Services"*).

grievance (which affects only one CLEC) to impose state rate regulation on a service that federal and Ohio law exempt from such regulation. AT&T MTD Mem. at 12-17, 20-25.[4]

Fourth, while Granite tries to manufacture a claim about an as-yet non-existent successor agreement, Granite is violating its obligations under its *existing* agreement with AT&T Ohio. Section 5.3 of the LWC Attachment to the current LWC Agreement expressly forbids Granite from challenging pricing or bringing *any* claim at all regarding the LWC product or terms regarding its provision (including a complaint involving future rates). It is difficult to see how Granite can pursue its claims and discovery requests in good faith when its contract prohibits such claims.

In short, Granite's claims are preempted, and the amended complaint does not state a cognizable claim, whether the claim is brought in this Commission or in some other tribunal. There is thus no lawful basis for the Commission to order AT&T Ohio to respond to discovery.

GRANITE'S MOTION TO COMPEL DOES NOT REBUT AT&T OHIO'S ARGUMENTS OR JUSTIFY THE DISCOVERY GRANITE SEEKS

Granite's motion to compel offers no lawful basis for the Commission to order AT&T Ohio to respond to discovery before the Commission decides (i) whether it has jurisdiction over Granite's complaint and (ii) whether Granite's complaint states a claim.[5]

1. The Commission should not allow any discovery into the merits of the dispute unless and until the Commission concludes that it has the authority to adjudicate this matter. It is well-settled, in Ohio as elsewhere, that a tribunal must determine that it has jurisdiction before it

[4] As AT&T Ohio's motion to dismiss explains, Granite would have no basis to complain about the terms of AT&T Ohio's offer for a new agreement in any event – private LWC agreements, and the negotiations relating to them, are not subject to Commission oversight.

[5] If AT&T Ohio is required to respond to Granite's discovery requests, it will likely have additional objections to specific requests. It is premature for AT&T Ohio to raise those specific objections here. AT&T Ohio reserves its right to make those objections in its response to the specific discovery requests, should the Commission decide that a response is required.

can properly take any action relating to the merits of a complaint. *See, e.g., Duncan v. Hopkins*, 2005 WL 5967444 (Ohio Com.Pl.) (Trial Order), Court of Common Pleas, Summit County, May 11, 2005 (granting a motion for protective order and noting that "federal courts have held that, generally, a plaintiff may be allowed limited discovery with respect to the jurisdictional issue, but until [plaintiff] has shown a reasonable basis for assuming jurisdiction, [plaintiff] is not entitled to any other discovery") (citations omitted) (attached as Exhibit A).

As the motion to dismiss explains, the Commission lacks authority to regulate or set rates for LWC. The FCC long ago placed a "nationwide ban" on requirements to provide the UNE Platform, and LWC is just a replacement for the UNE Platform.[6] Granite does not even allege that LWC is required by federal law or its ICA, and the LWC Agreement itself (first WHEREAS clause) states that LWC is not subject to Sections 251-252 of the 1996 Act. Moreover, in April of 2017 the FCC expressly rejected Granite's requests to require ILECs to provide UNE Platform replacement products or to regulate their rates.[7]

Thus, no regulation of LWC could be could be undertaken without being inconsistent with, conflicting with, interfering with, undermining, or impeding achievement of the goals of federal law.[8] *First*, it is well established that when the FCC decides that a network element (or combination) is not required under the 1996 Act, states are preempted from re-imposing that requirement under state law.[9] States therefore are precluded from requiring ILECs to provide a

---

[6] *Triennial Review Remand Order*, ¶ 204.

[7] *Business Data Services*, 2017 WL 1632988, ¶¶ 287-88 (FCC 17-43, rel. Apr. 28, 2017).

[8] *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [1996 Act]," and any state-imposed requirement "is preempted 'if it interferes with the methods by which the federal statute was designed to reach [its] goal.'").

[9] *Qwest Corp. v. Minnesota Public Utils. Comm'n*, 684 F.3d 721, 729 (8th Cir. 2012); *BellSouth Telecommunications, Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 708-09 (6th Cir. 2012); *BellSouth Telecomms., Inc. v. Ga. Pub. Serv. Comm'n*, 555 F.3d 1287, 1288 (11th Cir. 2009) (per curiam); *Illinois Bell Tel.*

UNE Platform replacement product like LWC. And because states cannot require LWC *at all*, they necessarily also cannot regulate the rates for LWC. *Second*, if there were any doubt that such preemption includes any rate regulation of non-required network elements or combinations, the federal courts and FCC have made clear that such non-required network elements and combinations are to be provided at market-based rates and are not subject to any state rate regulation, including state-law "just and reasonable" rate requirements.[10] *Third*, the *only* time the 1996 Act's local-competition provisions mention an ILEC's retail service rates is in the *resale* provisions, which apply only to an ILEC's retail services, not to a *wholesale* product like LWC.[11] *Fourth*, the FCC has recognized that requiring or regulating UNE Platform-type products undermines network investment and innovation, and therefore is contrary to federal competition policy.[12] In short, by seeking to impose rate regulation on LWC by requiring LWC rates to be equal to or below retail rates, Granite seeks exactly what the FCC and courts have said cannot be required.

Accordingly, Granite's claims are preempted, and the Commission lacks authority to adjudicate this dispute. While discovery may be permitted when it is directed to the issue of a court or commission's jurisdiction, Granite's discovery requests have nothing to do with the Commission's jurisdiction. Rather, as AT&T Ohio's motion for protective order and memoranda in support explain, the discovery is a far-reaching and burdensome fishing

---

Co., Inc. v. Box, 548 F.3d 607, 611 (7th Cir. 2008); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 682-83 (5th Cir. 2008); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7, 9 (1st Cir. 2007).

[10] *Qwest Corp.*, 684 F.3d at 731-32; *BellSouth Telecomms.*, 669 F.3d at 709; *Illinois Bell*, 548 F.3d at 612; *NuVox Comms., Inc. v. BellSouth Comms., Inc.*, 530 F.3d 1330, 1335 (11th Cir. 2008) (per curiam).

[11] *See* 47 U.S.C. §§ 251(c)(4) & 252(d)(3).

[12] *Business Data Services*, ¶¶ 287-88; *Triennial Review Remand Order*, ¶ 204.

expedition into matters that are the subject of private negotiations between the parties for a new LWC agreement. *See, e.g.*, Interrogatory Nos. 16 and 18 and Document Requests 7, 9, and 11, which ask for AT&T Ohio to disclose all of its internal communications, notes, and strategies to the party it is negotiating with. Granite admits that this action is a "dispute regarding the LWC agreement." Granite Mem. at 5. There is no question that all of the proposed discovery seeks information purportedly relevant to "the parties' dispute regarding the LWC agreement" (Granite Mem. at 5).

2. Not only is Granite's claim preempted, but the Commission lacks authority under Ohio law. O.R.C. § 4927.16 makes clear that Commission may not require either the provisioning or pricing of any unbundled elements, resale, or interconnection "that is inconsistent with federal law." The FCC does not permit the regulation of services, like LWC, that replaced the UNE-P platform. What is more, none of the statutes Granite cites in its Amended Complaint address or support Granite's claims. *See* AT&T Ohio MTD Mem. at 17-20. There is thus no lawful basis for the Commission to proceed in this complaint proceeding.

3. Even if the Commission were to determine that it has authority under Ohio law, and that the issues are not preempted, Granite's Amended Complaint fails to state a claim. This dispute involves a private contract that governs the parties' relationship until the contract expires on December 31, 2017. In particular, the contract exclusively governs the pricing of LWC and *affirmatively forbids Granite from challenging that pricing or bringing <u>any</u> claim regarding the LWC product or terms regarding its provision <u>at all</u> (such as a complaint to affect future rates*):

> In entering into this Attachment, each Party agrees to abide by and honor the terms and conditions, including pricing, set forth in this Attachment without challenging its provisions . . . [Granite] further agrees that it shall not seek and/or otherwise initiate . . . any . . . state or federal regulatory . . . proceeding relating or applicable to, or which would reasonably be expected to affect, the LWC product, including, without limitation,

> any docket or proceeding that required [AT&T Ohio] [to] make available LWC (or a similar offering) at prices different than those in this Attachment.

LWC Agreement, Attachment 02 – Local Wholesale Complete, § 5.3.[13] While Granite complains about AT&T Ohio's negotiating position with respect to a new contract, Granite is in breach of the existing contract. The Commission should not permit Granite to escape its contractual obligations. There is no point in requiring carriers to enter into private agreements if one of the parties can disregard the agreement it has made and bring a "claim" in the Commission for relief relating to that agreement or a possible successor agreement. Granite's claims should be rejected for that reason alone.

4. Although AT&T Ohio is under no obligation to enter into a new LWC agreement with Granite,[14] it has offered to enter into a new LWC agreement when the current one expires. The parties' negotiations for a new agreement are ongoing. Accordingly, any claim that AT&T Ohio is proposing "unfair" terms for a new agreement is not ripe for adjudication.[15] It is not the Commission's role to act as a referee in an ongoing private negotiation of a commercial contract, and Granite is not entitled to obtain – under the guise of "discovery" requests – proprietary and confidential data that AT&T Ohio may use to determine how to negotiate with Granite. In any case, AT&T Ohio's executed LWC agreements are on file with the FCC, and Granite can easily review the terms that AT&T Ohio has agreed to with other CLECs if Granite wishes to do so. AT&T MTD Mem. at 3. Whether or not Granite chooses to enter a successor LWC agreement

[13] The LWC Agreement is attached to AT&T Ohio's motion to dismiss the amended complaint.

[14] LWC Agreement, 2014 Amendment, § 8.6.5 (AT&T has discretion to decide whether to negotiate toward a successor agreement, and need only negotiate in response to a carrier's request to negotiate for a successor agreement "if AT&T accepts" that request).

[15] There is no claim that AT&T Ohio has violated the terms of the existing LWC agreement.

with AT&T Ohio is up to Granite. Granite has all the information it is entitled to have to make that decision.

5. Granite's claim that AT&T Ohio is proposing "unreasonable and discriminatory" rates for LWC is foreclosed by the Supreme Court's decision in *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 530, 534 (2008) (holding that when two carriers enter into a contract for wholesale service – the case here – the rates in that contract are presumed to be just and reasonable). *See* AT&T Ohio MTD Mem. at 22.

6. Granite's attempt to distinguish the *McCleod* ruling (*see* AT&T MTD Mem. at 2; Granite Mem. at 7) is unavailing. *McLeod* involved the same procedural facts as those presented here: a plaintiff who served wide-ranging discovery requests on AT&T Ohio; a well-founded motion to dismiss filed before the discovery responses were due; the plaintiff's refusal to agree to wait for discovery responses until the motion to dismiss was decided; and plaintiff's filing of a motion to compel. Indeed, AT&T Ohio's position here is stronger than in *McLeod* because AT&T Ohio is challenging the Commission's authority to order AT&T Ohio to respond to discovery. Accordingly, the Attorney Examiner's decision in *McLeod* to stay potentially "wasteful and unnecessary" discovery that might never be needed is persuasive authority here.

7. Granite's decision to include a preview of its jurisdictional argument in its response to a discovery motion only reinforces the necessity of the Commission's deciding the jurisdictional issue before allowing any discovery – especially discovery that will be extensive and burdensome.[16] *See* AT&T MTD Mem. at 3-4. Granite thus tacitly acknowledges that the

[16] Among other things, Granite seeks all of AT&T Ohio's contracts with multi-location business customers for the past five years. Interrogatory No. 6 and Document Request No. 2. Responding to these requests would involve locating, reviewing, and producing thousands of agreements – a burdensome and expensive undertaking for any company and its employees. Although Granite makes light of the burden on AT&T Ohio (*see* Granite Mem. at 11, noting that AT&T Ohio's parent company ranks high on the Fortune 500 list), there can be no serious question that Granite's requests are unreasonably burdensome, particularly since this dispute involves negotiation of a private agreement, not ratemaking.

question of the Commission's authority must be resolved before the Commission can issue any orders regarding discovery.

8. While AT&T Ohio will be unreasonably and unnecessarily burdened if it must respond to Granite's discovery now, Granite will not be prejudiced if the Commission suspends AT&T Ohio's obligation to respond to Granite's merits discovery until the Commission decides the jurisdictional issue. Even if the parties do not agree to a new LWC agreement, AT&T Ohio has offered to continue to provide LWC for Granite's LWC lines in Ohio that have not transitioned to resale or another option by December 31, 2017, albeit at the higher, standard LWC base rates for those lines. If Granite wants lower rates, it can negotiate for them (and indeed, AT&T Ohio has already offered them). Granite cries wolf when it asserts that this case represents "an existential threat" to the service Granite provides to Ohio business locations (Granite Mem. at 9). Any harm to Granite's customers resulting from a failure to agree to a new LWC agreement is a problem of Granite's own making.

* * *

There is neither a legal basis nor a practical necessity for the broad discovery Granite seeks now. To the contrary, allowing the discovery to proceed would set a bad precedent that would embolden CLECs to violate their contracts and seek "relief" from this Commission (and others) that it lacks authority to provide, and it would impose an unreasonable burden on AT&T Ohio that would be avoided altogether if the Commission grants AT&T Ohio's motion to dismiss.

CONCLUSION

For the foregoing reasons, and those set out in AT&T's motion for a protective order and memoranda in support, the Commission should deny Granite's motion to compel discovery in this case pending a ruling on AT&T Ohio's motion to dismiss the Amended Complaint.

Dated: October 27, 2017

Respectfully submitted,

AT&T OHIO

By: /s/ Mark R. Ortlieb

Mark R. Ortlieb (0094118)
AT&T Services, Inc.
225 West Randolph, Floor 25D
Chicago, IL 60606
312-727-6705
mo2753@att.com

J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
312-701-8600
jcovey@mayerbrown.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this 27th day of October 2017 by U.S. Mail and/or electronic mail on the parties shown below.

/s/ Mark R. Ortlieb
Mark R. Ortlieb

L. Douglas Jennings
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43231
doug.jennings@puc.state.oh.us

Michael D. Dortch
Richard R. Parsons
Justin M. Dortch
KRAVITZ, BROWN & DORTCH, LLC
65 East State Street, Suite 200
Columbus, OH 43215
mdortch@kravitzllc.com
rparson@kravitzllc.com
jdortch@kravitzllc.com

2005 WL 5967444 (Ohio Com.Pl.) (Trial Order)
Court of Common Pleas of Ohio.
Summit County

Esther DUNCAN, et al., Plaintiffs,
v.
Harold H. HOPKINS, et al., Defendants.

No. CV 2005 01 0554.
May 11, 2005.

Order

Attorney John W. Solomon, Attorney Lawrence J. Scanlon, Attorney Michael J. Elliott, Attorney Earle R. Frost, Jr., Steven Hopkins, Vista Financial Group, Inc., Vista Financial Services Corporation, Horizons Benefit Administration Corporation, Flagship Administration Ltd.

Brenda Burnham Unruh, Judge.

This matter comes before the Court on the following pleadings:
1) Plaintiffs' Motion for a Continuance to Permit Discovery in Order to Respond to Defendant Sterling's Motion to Dismiss;

2) Plaintiff, Mary Ann Schneider's Motion Pursuant to Civil Rule 56(F);

3) Defendant, Sterling's Response to Plaintiff's Motion for Continuance to Permit Discovery;

4) Defendant, Sterling's Motion for Protective Order; and

5) Plaintiff, Esther Duncan's Response and Brief in Opposition to Defendant Sterling's Motion for Protective Order.

6) Plaintiff Mary Ann Schneider's Motion for Leave to File First Amended Set of Interrogatories and Requests for Production of Documents directed to Defendant Sterling Trust;

On March 22, 2005, Defendant, Sterling Trust Company ("Sterling") filed a Motion to Dismiss pursuant to Civil Rule 12(B)(2) for lack of personal jurisdiction. On March 25, 2005, Plaintiffs filed a Motion for a Continuance to Permit Discovery in Order to Respond to Sterling's Motion. Defendant, Sterling does not oppose the additional discovery time requested by the Plaintiffs to respond to Sterling's Motion to Dismiss. However, Sterling *does* object to any discovery requests which are not limited to the jurisdictional issues raised in Sterling's Motion to Dismiss.

Sterling has also filed a Motion for a Protective Order wherein it requests that the Court limit the Plaintiffs' discovery requests to jurisdictional issues only. Sterling argues that, if this Court lacks personal jurisdiction, Sterling is not subject to any discovery issued pursuant to this Court's authority. Sterling argues that discovery must be limited to jurisdictional issues until such time as the Motion to Dismiss has been ruled upon.

Plaintiff, Esther Duncan ("Duncan") has filed a response to Defendant, Sterling's Motion for a Protective Order. Duncan argues that "inconvenience and expense alone does not justify a denial of discovery." Duncan acknowledges that Sterling has also argued that it is not subject to the jurisdiction of this Court. In response to this issue, Duncan argues that some of the interrogatories contained in Plaintiffs' First Set of Interrogatories to Defendant Sterling *are* directed towards obtaining information regarding jurisdiction. However, Duncan does not claim, nor does it appear, that *all* of the interrogatories contained in the First Set of Interrogatories are limited to jurisdictional issues.

When faced with this same question, federal courts have held that, generally, a plaintiff may be allowed limited discovery with respect to the jurisdictional issue, but until he or she has shown a reasonable basis for assuming jurisdiction, he or she is not entitled to any other discovery. *Filus v. Lot Polish Airlines,* 907 F.2d 1328, 1332 (2nd Cir. 1990) *citing, Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, & n. 13, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978).

Upon due consideration, and based upon the persuasive authority of the federal case law cited above, the Court rules as follows:
1) Plaintiffs' requests for additional time to conduct discovery are hereby GRANTED and Plaintiffs' responses to Defendant, Sterling's Motion to Dismiss shall be due on or before August 16, 2005.

2) Defendant, Sterling's Motion for Protective Order is hereby GRANTED. All discovery directed to or from Defendant Sterling shall be reasonably calculated to lead to information which is directly related to the determination of personal jurisdiction over Defendant Sterling.

3) Plaintiff Mary Ann Schneider's Motion for Leave to File First Amended Set of Interrogatories and Requests for Production of Documents directed to Defendant Sterling Trust is hereby GRANTED.

IT IS SO ORDERED.

<<signature>>

JUDGE BRENDA BURNHAM UNRUH

Attorney John W. Solomon

Attorney Lawrence J. Scanlon

Attorney Michael J. Elliott

Attorney Earle R. Frost, Jr.

Steven Hopkins

Vista Financial Group, Inc.

Vista Financial Services Corporation

Horizons Benefit Administration Corporation

Flagship Administration Ltd.

Summary: Memorandum AT&T OHIO'S MEMORANDUM CONTRA GRANITE'S MOTION TO COMPEL AT&T OHIO TO RESPOND TO DISCOVERY REQUESTS electronically filed by Mr. Mark R Ortlieb on behalf of AT&T Entities and AT&T Ohio and Ohio Bell Telephone Company