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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

The Ohio Bell Telephone Company ("AT&T Ohio"), by its attorneys, hereby files its reply memorandum in support of its motion for a protective order ("Motion") providing that discovery "not be had" pending a ruling on AT&T Ohio's October 6, 2017 motion to dismiss the Amended Complaint in this action.[1]

AT&T Ohio's motion to dismiss explains why the Commission lacks jurisdiction over the Amended Complaint.[2] The motion to dismiss also explains that Granite's claim – 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's Memorandum Contra AT&T's Motion For A Protective Order Regarding Discovery at 3) – fails to state a claim

[1] This reply in support of AT&T Ohio's Motion for Protective Order Regarding Discovery responds to the portion of Granite's October 13, filing in this proceeding that is a "memorandum contra to" AT&T Ohio's Motion. Granite's "combined" pleading also is designated as a "motion to compel," but under the Commission's rules the time for AT&T Ohio to respond to a motion by Granite is longer than the time AT&T Ohio has to file a reply in support of its own Motion. AT&T Ohio therefore will respond separately to Granite's Motion to Compel in the time allotted by the Commission's rules.

[2] AT&T Ohio's Memorandum in Support of Motion to Dismiss Amended Complaint, at 17-20 ("AT&T MTD Mem.").

even if the Commission concludes that it does have jurisdiction. AT&T MTD Mem. at 12-17, 20-25.

Granite's memorandum in opposition to the Motion does not provide any basis for the Commission to allow Granite's discovery to proceed at this time.

First, the Commission should not allow any discovery into the merits of the dispute unless and until the Commission concludes that it has jurisdiction over this matter. It is well-settled, in Ohio as elsewhere, that a tribunal must determine that it has jurisdiction before it 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). Granite's discovery requests have nothing to do with the Commission's jurisdiction. Rather, as AT&T Ohio's Motion and memorandum in support explain, the discovery is a far-reaching and burdensome fishing expedition into matters that are the subject of private negotiations between the parties for a new LWC agreement. 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), and none of it relates to the Commission's jurisdiction.

Second, even if the Commission were to determine that it has subject matter jurisdiction, Granite's Amended Complaint fails to state a claim because this proceeding is a dispute about a privately negotiated 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.[3] Granite agreed that it would not bring the very claim that it filed in this case. That agreement should be enforced.

Furthermore, although AT&T Ohio is under no obligation to enter into a new LWC agreement with Granite,[4] it has offered to enter into a new LWC agreement with Granite. But any claim that AT&T Ohio is proposing "unfair" terms for a new agreement is not ripe for adjudication. The Commission's role is not 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 or whether or not to enter into a successor LWC agreement with Granite. In any case, as AT&T Ohio's memorandum in support of its Motion points out, AT&T Ohio's signed 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 Granite chooses to enter a successor LWC agreement with AT&T Ohio is up to

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

[4] 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).

Granite. The Commission lacks authority under federal or state law to impose an LWC agreement on AT&T Ohio, or to dictate the terms of any such agreement.

Third, 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 in this motion: 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. Indeed, the pending Motion is stronger than the motion that was granted in *McLeod* because the pending motion challenges the Commission's jurisdiction—and thus its power 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.

Fourth, Granite's decision to include, in its response to a discovery motion, a preview of its jurisdictional argument in opposition to AT&T Ohio's motion to dismiss only emphasizes the necessity of the Commission's deciding the jurisdictional issue before allowing any discovery – especially discovery that will be extensive and burdensome. *See* AT&T MTD Mem. at 3-4. Granite tacitly acknowledges that jurisdiction, as always, must come first.

Finally, 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 is willing 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, although it will charge the higher, standard LWC base rates for those lines. Granite's assertion that this case represents "an existential

threat" to the service Granite provides to Ohio business locations (Granite Mem. at 9) is therefore unfounded. Any threat to Granite's customers resulting from a failure to agree to a new LWC agreement is Granite's responsibility, not AT&T Ohio's.

Accordingly, 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 impose an unreasonable burden on AT&T Ohio that would be avoided altogether if the Commission grants AT&T Ohio's motion to dismiss.

For these reasons, and those set out in AT&T's Memorandum, the Commission should suspend discovery in this case pending a ruling on AT&T Ohio's motion to dismiss the Amended Complaint.

Dated: October 20, 2017

Respectfully submitted,

AT&T OHIO

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this 20th day of October 2017 by U.S. Mail and/or electronic mail on the parties shown below.

/s/ Mark R. Ortlieb
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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

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Summary: Memorandum AT&T Ohio's Reply Memorandum in Support of its Motion for Protective Order electronically filed by Mr. Mark R Ortlieb on behalf of AT&T Entities and AT&T Ohio and Ohio Bell Telephone Company