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March 7, 2005

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

Dear Sir or Madam:

Enclosed please find the original and eleven (11) copies of Discount Cellular's Brief Contra Ameritech's Motion to Compel.

Please cause the same to be filed with the Public Utilities Commission of Ohio.

Please return a time stamped copy of the motion to my office in the self addressed stamped envelope enclosed.

I thank you for your kind consideration in this matter. If you have any questions do not hesitate to contact me.

Very truly yours,

Carla M. Tricarichi
Carla M. Tricarichi

CMT/jg
Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Discount Cellular,)	
)	Case No. 04-236-RC-CSS
Complainant,)	
)	Hearing Examiner Scott Farkas
v.)	
)	
Ameritech Mobile Communications Inc.)	
n.k.a. Cingular Wireless; Ameritech)	
Mobile Communications, LLC; and)	
Cincinnati SMSA Limited Partnership,)	
)	
Respondents.)	

**DISCOUNT CELLULAR'S
BRIEF CONTRA AMERITECH'S MOTION TO COMPEL**

I. INTRODUCTION

In an effort to make this case seem more complicated than it is, Ameritech is attempting to create discovery disputes where none exist. Discount Cellular has offered the deposition of the key person in its organization – Keith Schwartz, President and C.E.O. of Discount Cellular – but Ameritech has refused the invitation. Discount Cellular has offered to produce any relevant documents that Ameritech no longer has in its possession, but Ameritech has refused to identify those documents.

Instead, Ameritech wants Discount Cellular to incur the expense of finding and copying documents that Ameritech already has in its possession, making duplicate copies, and shipping them back to Ameritech. Virtually all of the information which Ameritech seeks will most likely come from a simple deposition of Discount Cellular's Chief Executive Officer. Until then, it is not clear that there is any material, good-faith dispute.

Moreover, Ameritech's focus is fundamentally misplaced. The Commission's inquiry and focus are concerned solely with the wholesale level. However, many of Ameritech's

requests seek information about retail operations. This information might relate to the damages suffered by Discount Cellular, but damages are not at issue before the Commission. Moreover, Discount Cellular's retail operations are unrelated to Ameritech's obligation to offer non-discriminatory wholesale rates.

For the reasons explained below, Ameritech's Motion to Compel is without merit, is premature, and should be denied.

II. ANALYSIS OF AMERITECH'S DISCOVERY DISPUTES

INTERROGATORY NO. 2:

In this interrogatory, Ameritech has requested that Discount Cellular "Identify each person with knowledge of any facts relating to any of the allegations set forth in the Complaint, and state generally the facts known by each person." Discount Cellular has responded to this interrogatory by first stating:

RESPONSE:

Objection. This request calls for speculation regarding to the mental state of third parties to this action. It is also vague and ambiguous. Without waiving this objection, Discount Cellular responds that:

1. Keith Schwartz: Mr. Schwartz is generally aware of facts relating to all of the factual allegations set forth in the Complaint.
2. Melissa Schwartz: Ms. Schwartz is aware of the execution of certain documents and is generally aware of facts relating to some of the factual allegations set forth in the Complaint.
3. Officers, executives, employees and legal counsel of Ameritech Mobile and its affiliates, including, but not limited to, Convergys Inc.
4. Employees of Discount Cellular may have become aware of related facts during the course of their employment. The names of all Discount Cellular employees during the limited time period will be produced. The level of their factual knowledge can be determined through appropriate depositions.

As promised, in an effort to be complete, Discount Cellular also produced to Ameritech a list of the forty-seven Discount Cellular employees. This list is attached hereto as Exhibit A. Ameritech has not requested a single deposition of any of these individuals.

In an effort to create a dispute, Ameritech has also refused to depose the key individual -- C.E.O Keith Schwartz, and instead claims that Discount Cellular has not adequately responded.

It is impossible for Discount Cellular to answer Interrogatory No. 2 as written in any greater detail. The phrase "any facts relating to any of the allegations" is incapable of precise and complete identification. The allegations in the Complaint deal with the business dealings between Ameritech and Discount Cellular. There may be literally hundreds of facts which have *some* relationship to the particular allegation. It is impossible for Discount Cellular to distinguish between facts that Ameritech *might* believe are minor and those that Ameritech believes have importance to this case. Discount Cellular is not in a position to speculate as to what Ameritech might think is relevant. For example, the sole issue before the Commission is whether Ameritech offered Discount Cellular wholesale service the same wholesale rates, terms and conditions that Ameritech provided to Ameritech's own affiliated retail operation. The sole necessary determination by the Commission is whether Ameritech offered that service at the same zero rate that the affiliate received. For that reason, Discount Cellular does not believe that anyone other than Keith Schwartz, and possibly Melissa Schwartz, has relevant information. These two individuals were specifically identified in Discount Cellular's response to Interrogatory No. 2.

However, Ameritech wants to create discovery disputes where none exist. Ameritech wants to be able to claim that Discount Cellular is simultaneously withholding information and providing too much information. Ameritech cannot have it both ways. Keith Schwartz is the

individual most likely to be able to provide the information sought by Ameritech. However, in the interests of further disclosure, Discount Cellular also provided to Ameritech a list of all of its employees during the time frame. Given that there may be facts that could possibly “relate” to Ameritech, even if not relevant to this case, Discount Cellular, in an effort to be as complete as possible, has provided a list of each of its employees and former employees which it believes may have information responsive to this request. This information was provided in an effort to make full disclosure of any potential material witness.

It is likewise impossible to “state generally the facts known by each such person.” There simply is no way to be complete. If Discount Cellular attempted to summarize the facts known, Ameritech will claim that Discount Cellular was misleading it. The facts known will necessarily require that specific questions be asked in the context of a deposition. Ameritech needs to ask the questions itself. Discount Cellular is not going to depose its own employees on behalf of Ameritech. Ameritech knows that there are no relevant facts held by Discount Cellular’s employees that go to the issue of whether Ameritech treated Discount Cellular identically to its own affiliated retail operation. Its discovery is merely a fishing expedition designed to make this case appear much more complicated than it is. Rather than file a baseless and premature motion to compel, Ameritech should depose C.E.O Schwartz and, then, determine whether any further depositions are still needed.

INTERROGATORY NO. 13(c)¹:

In this Interrogatory, Ameritech requested that Discount Cellular “identify any representatives of Complainant who had contact with Respondent concerning the purchase of

services.” Although it posed an objection to this request, Discount Cellular proceeded to answer the interrogatory. Specifically, Discount Cellular stated that “Keith Schwartz had contact with Respondents concerning the purchase of services.”

Further responding, Discount Cellular proceeded to provide a list of the employees of the company during the relevant time frame. The reason that this list was provided was due to the fact that Discount Cellular purchased service from Ameritech for all relevant time frames. While Keith Schwartz was the primary contact on behalf of Discount Cellular, it is possible that from time to time others on behalf of Discount Cellular may have had some level, albeit a low level, of communication concerning the purchases that Discount Cellular was making. There is no way of knowing at this time the extent, if any, of those possible communications. Likewise, there is no way of knowing whether such communications, if they occurred, “concern[ed] the purchase of service” to an extent that would make such communications relevant to this request. To be as inclusive as possible, Discount Cellular named Keith Schwartz and all other people that could possibly fit into the requested category.

INTERROGATORY NO. 4.

With respect to Interrogatory No. 4, Ameritech requested: “Identify all communications, whether in writing, by telephone, in person, electronically, or any other means, between you and Respondents.” Discount Cellular provided the following response:

RESPONSE:

¹ In its Motion to Compel, Ameritech combined its argument on Interrogatory Nos. 5 and 13(a). For the sake of clarity, Discount Cellular is following the sequence in Ameritech’s Motion even though Ameritech did not follow a numerical order.

Objection. This request seeks information that is already within the knowledge, custody and/or control of Cingular. Any communication between Cingular and Discount Cellular is automatically within Cingular's possession. Accordingly, this request is unduly broad and overly burdensome because it seeks information which already is, or should be, within the control of Cingular.

It is also overbroad because it is not limited to information relating to Cingular's violation of Ohio law. It is also unduly burdensome. Discount Cellular does not make a record of every telephone call made by any of its employees to Cingular.

Without waiving this objection, Discount Cellular will produce some documents from which some of this information may be determined. This question is more specifically responded to in later interrogatories numbers 11, 12, 15 and 16.

In its February Response, Discount Cellular stated that:

Your complaint appears to evidence a misunderstanding. Discount Cellular has no problem with providing you with documents that it has in its possession. The basis of Discount Cellular's objection is simply that it is unduly burdensome for it to provide Ameritech with copies of documents that are already in Ameritech's possession. Discount Cellular's objection did not pertain to documents which were once in Ameritech's possession, but which Ameritech no longer has. Rather, the objection pertains to those documents that were, *and continue to be*, in Ameritech's custody and control. For example, Ameritech sent out billings to Discount Cellular. Those billings are currently within the custody and control of Ameritech. It is unduly burdensome to expect Discount Cellular to assemble and copy those documents solely to give Ameritech multiple sets of documents it already possesses. If there are documents which Ameritech provided to Discount Cellular and which Ameritech no longer has in its possession, please identify those documents and Discount Cellular will make them available.

In fact, the law is clearly on Discount Cellular's side. Courts have consistently granted protective orders to prevent parties from incurring the expense of discovery where the information is available from a "less burdensome" or "less expensive" source. *See Tower Press Bldg., Inc. v. White*, 165 F.R.D. 73 (N.D. Ohio 1996). This is the unanimous rule among federal courts. *See e.g. Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189 (1st Cir. 2001); *U.S. E.P.A. v. General Elec. Co.*, 197 F.3d 592 (2nd Cir. 1999); *Bayer A.G. v. Betachem, Inc.*, 173 F.3d 188 (3^d Cir. 1999); *Nicholas v. Wyndham Intern. Inc.*, 373 F.3d 537 (4th Cir.

2004); *Patterson v. Avery-Dennison Corp.*, 281 F.3d 676 (7th Cir. 2002). Research did not reveal a single case in which a party was required to produce and copy documents that were already in the possession of the requesting party. Clearly, a “less burdensome” or “less expensive” and better source is Ameritech itself. Ameritech either generated or received every document which it now wants Discount Cellular to duplicate for Ameritech’s benefit.

Ameritech refused to identify any documents which it believed that it no longer possessed. Instead, Ameritech reiterated its ambiguous request for “general” correspondence regardless of whether Ameritech already had such documents in its possession. With regard to Interrogatory No. 4, Discount Cellular stated:

You have requested “general” correspondence between the parties. Discount Cellular has no way of differentiating “general” correspondence from any other correspondence. Further, your request seems to seek irrelevant information. Since there is no dispute that your client actually sold service to Discount Cellular at rates, terms and conditions different than those imposed upon Ameritech’s own affiliated retail operations, it is inconceivable that any correspondence between the parties would be relevant to the issues in this case. However, in the spirit of cooperation, Discount Cellular provided Ameritech with responsive correspondence.

As can be seen from the pleadings and correspondence of the parties, Discount Cellular provided Ameritech with responsive documents. In fact, based on a reasonable search of Discount Cellular’s primary place of business, Discount Cellular provided all correspondence it is aware of between the parties, with the exception of billing tapes which were generated by Ameritech itself. Further, to the extent that Ameritech already has certain documents in its possession, Discount Cellular is not obligated to provide Ameritech with yet another copy. If there are specific relevant documents that Ameritech does not have, but believes that Discount Cellular may have, Ameritech should identify those documents. Discount Cellular has and will

continue to make every effort to supply relevant, non-duplicative documents, consistent with the applicable discovery rules. Ameritech's current "general" request does not provide enough specificity to permit Discount Cellular to ascertain the specific non-duplicative, relevant documents which Ameritech seeks.

INTERROGATORY NO. 5:

The issue in this case is whether Ameritech offered Discount Cellular the same zero rate for wholesale service that it provided to its own affiliated retail operation. The focus in this case is solely on Ameritech's conduct and its treatment of Discount Cellular. Ameritech has been consistent that there were never any circumstances under which Discount Cellular could ever have qualified for the wholesale rate which it provided to its affiliated reseller. In this interrogatory, Ameritech is asking for detailed information regarding Discount Cellular's operations. For example, it seeks the total number of Discount Cellular employees, the identity of the owners, the identity of people with financial interests in Discount Cellular, the location of the sales offices and the identity of the sales representatives of Discount Cellular. Not one of these requests is even remotely related to whether Discount Cellular was offered the same wholesale rate. Likewise, because even Ameritech agrees that Discount Cellular could not receive that same wholesale rate under any circumstances, there cannot be an argument that any circumstances relative to Discount Cellular are at all relevant to whether Ameritech engaged in discrimination.

Discount Cellular has provided a response to Interrogatory No. 5(e) which asks for the geographic areas in which Discount Cellular served. The only relevance there is that Discount Cellular served Ohio, which is the response provided. Whether Discount Cellular also did

business in other states is of no relevance to whether *Ameritech discriminated* against Discount Cellular. For example, Discount Cellular was entitled to the same zero rate that *Ameritech* provided its own retail affiliate in Ohio. What happened in other states does not bear at all on what happened in Ohio. There is no dispute that *Ameritech* did not provide Discount Cellular with the same zero rate. *Ameritech's* defense is not impacted at all by what happened in other states.

INTERROGATORY NO. 13(a):

In Interrogatory No. 13(a) *Ameritech* seeks the identity of the people responsible for setting Discount Cellular's retail rates. During the relevant time, the Commission only regulated the wholesale rates charged by *Ameritech's* wholesale operations. The rates that Discount Cellular then charged its own retail customers are not a regulated issue. Moreover, neither those rates nor Discount Cellular's treatment of its own customers is at all relevant to whether Discount Cellular was the victim of wholesale rate regulation. *Ameritech* would have this Commission believe that somehow its defense is impacted by the rates that Discount Cellular charged its own retail operation. However, the fact remains that there was no circumstance that would have permitted Discount Cellular access to the zero rate provided to *Ameritech's* own retail operation. There is no treatment of its own retail operations that even theoretically would have permitted Discount Cellular with access to non-discriminatory rates. The only issue that Discount Cellular's retail rates would impact is on the amount of damages that were incurred by Discount Cellular. As the Commission held in the Cellnet litigation, damages are not an issue to be dealt with by the Commission, but are left to the appropriate Court of Common Pleas.

INTERROGATORY NO. 6:

In Interrogatory No. 6, Ameritech seeks to know the number of minutes and the rates that it charged Discount Cellular. It is *disingenuous* for Ameritech to seek that information from Discount Cellular. Ameritech sold the minutes to Discount Cellular. Surely, Ameritech has its own sales records. Specifically, Ameritech created detailed electronic billing tapes by which it tracked the minutes sold to Discount Cellular and the rates charged. Ameritech is asking for Discount Cellular to copy and return Ameritech's own files. However, if Ameritech were to search its records and find that it was unable to locate its own sales records, Discount Cellular would attempt to provide that information to Ameritech.

More importantly, the information that Ameritech seeks is irrelevant in the context of this PUCO case. No one disputes that Ameritech charged Discount Cellular for service while at the same time providing its own retail affiliate with a rate of zero. At this stage, it makes no difference how much service was purchased. Likewise, knowing the rate that Discount Cellular paid relates solely to being able to show the impact of the discriminatory treatment, not to the issue of whether discrimination occurred in the first place. The amount of service purchased by Discount Cellular at the above-zero rate relates solely to the damages suffered by Discount Cellular.

INTERROGATORY NO. 8:

In the course of the Cellnet case, the Commission was not concerned with the precise date on which the reseller began doing business in Ohio. The Commission left the exact date up to the Common Pleas Court for later determination. Indeed, in the Cellnet case the Commission determined that Cellnet had been the victim of Ameritech's unlawful discrimination despite the

fact that Cellnet was never allowed to do business in Ohio with Ameritech. Likewise, no part of the Cellnet decision was predicated on the precise date upon which Cellnet did business in Ohio. Based on the Cellnet decision, fundamental principles of collateral estoppel operate as a final determination that between 1993 and 1998 Ameritech provided service to its own affiliated retail operation at a rate of zero. Based on the depositions of Alan Ferber and Gib Wolf, that same conduct occurred in 1999 as well. *See* Deposition of Alan Ferber (January 21, 2005) and Deposition of Gilbert Wolf (November 11, 2004)² Ameritech agrees that there was no set of circumstances that could have existed which would have entitled any reseller, including Discount Cellular, to the same zero rate. Ferber and Wolf testified that there was never any time, in any market, under any circumstances, when a reseller could have obtained the same wholesale rates provided to Ameritech's affiliated reseller. *Id.*

Discount Cellular requested service in 1997 and began doing business in Ohio in 1998. Because that entire time frame is within the violation period first found in the *Cellnet* case, and because that case shows that a violation occurs even without the Plaintiff ever having actually purchased service, there is simply no relevance to the request contained in Interrogatory No. 8. The date upon which Discount Cellular sought service in 1997 will be relevant to establish the precise damages that Discount Cellular seeks in the Common Pleas phase of this dispute.

INTERROGATORY NO. 9:

Ameritech claims with respect to Interrogatory No. 9 that it needs the names of Discount Cellular's retail customers, the retail contract terms that such customers were on with Discount Cellular and the date that such customer requested retail service from Discount Cellular.

Ameritech's claimed relevance is that it is "relevant to the pricing plans that Discount Cellular may have been eligible to obtain." Likewise, Ameritech claims that such information is "relevant to whether price discrimination occurred and whether a like and contemporaneous service was provided under similar circumstances." Both of these arguments are completely without merit and defy any logic. Ameritech is confusing wholesale and retail service.

There is no fact related to Discount Cellular's retail customer base that is of any import to this proceeding. Ameritech provided free wholesale service to its own affiliate. It did not make that free service available to Discount Cellular or anyone else. There were no circumstances under which any other reseller could have been "eligible" for the same treatment. Other than the blanket statements in its Motion, Ameritech has not explained how Discount Cellular's treatment of its own customers has any bearing on Ameritech's wholesale discrimination in general or provides any defense to the uncontested fact that Ameritech's wholesale operation would not, under any circumstances provide service to Discount Cellular at the same zero rate it provided to the Ameritech retail affiliate.

The request for Discount Cellular's retail information is mere harassment and distraction. It is meant to try to take the focus off of Ameritech's illegal conduct. However, unless there was some way for Discount Cellular to have ever, even theoretically, obtained treatment equal to that which was afforded to Ameritech's retail affiliate, there is no merit to the request by Ameritech for Discount Cellular's retail information prior to the damage proceeding.

² The Deposition of Alan Ferber (January 21, 2005) and the Deposition of Gilbert Wolf (November 11, 2004) were attached as Exhibits 1 and 2 to Discount Cellular's Reply Brief In Support of Its Motion To Adopt The

INTERROGATORY NOS. 10 AND 11:

Ameritech's Motion to Compel is simply incorrect. Discount Cellular provided responses to Interrogatory Nos. 10 and 11. Moreover, neither response contained an objection or any other qualifying language. When asked in Interrogatory No. 10 to state when Discount Cellular first requested service, Discount Cellular responded "Complainant first requested service from Respondents in 1997." Moreover, Interrogatory No. 11 requested the name of the person first requesting service from Ameritech. To that inquiry, Discount Cellular responded: "Discount Cellular, acting by and through certain natural persons including but not limited to Keith Schwartz, requested service from Respondents in or around 1997." Neither of these responses is vague. The response states that service was requested in 1997 and that Keith Schwartz requested that service. There are a number of employees and ex-employees who may have had contact with Ameritech at that time, but which information is not presently known to Discount Cellular. However, as discussed above, Discount Cellular has provided the names of all employees who might have responsive information. This is a situation where Ameritech is simply trying to make an issue where none exists. There is no further information that can be provided in response to this inquiry. If Ameritech chooses, it may depose Keith Schwartz, Discount Cellular's principal to get a better understanding of the situation. To date it has chosen not to do so.

INTERROGATORY NOS. 17, 18, 20 and 21:

Here again, Ameritech is picking a fight where none exists. Paragraph 47 of the Complaint simply alleges that Discount Cellular was delayed in being able to offer certain retail products in Ohio. That allegation goes to damages only. Moreover, it is clear that Discount

Cellular was never able to offer any retail plan that was based on the wholesale rate offered to Ameritech's own retail operation. Furthermore, the Commission found in the reseller's favor in *Cellnet* without ever addressing whether Cellnet could or could not offer certain retail services as a result of the unlawful conduct. Again, the inquiry at this phase is not on what Discount Cellular could or could not offer to its retail customer. The inquiry before the Commission is exclusively at the wholesale level. The Commission is only concerned with whether there was wholesale discrimination by Ameritech. That inquiry does not require any analysis of whether or to what degree Discount Cellular's retail operations were impacted by that discrimination. In fact, even if Discount Cellular had no damages resulting from the conduct of Ameritech, which is not the case, that circumstance would have no impact at all on this Commission's review of Ameritech's conduct. The Commission's determination relates to Ameritech's actual conduct, not the impact of Ameritech's conduct on Discount Cellular. Here, that conduct is not in dispute. Ameritech's retail operations were given service for free and Discount Cellular was not. Likewise there were no facts or circumstances under which Discount Cellular could have qualified for such treatment. The Commission's analysis begins and ends there.

INTERROGATORY NO. 25:

Here again, Ameritech is seeking information regarding Discount Cellular's retail pricing plans. In determining whether there was wholesale discrimination the Commission will look to whether Discount Cellular received the same zero wholesale rate as Ameritech's own retail operations were found to have received in the *Cellnet* case. It is undisputed that Discount Cellular paid for its service and thus did not receive it at a zero wholesale rate. The rates and terms that Discount Cellular passed on to its own retail customers do not make the existence of discrimination by Ameritech any more or less likely and, thus, that issue is irrelevant to this

proceeding. Discount Cellular's treatment of its own retail customers, on the one hand, is entirely unrelated to Ameritech's wholesale treatment of its own retail operations on the other hand. It is ludicrous to suggest that Discount Cellular's treatment of its own retail customers provides any justification for Ameritech's refusal to offer Discount Cellular the same wholesale terms and conditions as it offered to its own retail affiliate. Ameritech's argument simply makes no sense and is designed for harassment purposes only.

INTERROGATORY NOS. 26, 27; DOCUMENT REQUEST NO. 3:

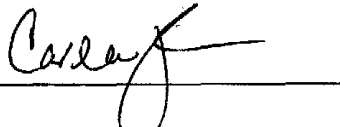
In these interrogatories and document requests, Ameritech seeks Discount Cellular's retail pricing information. This information would only be relevant if Discount Cellular's retail pricing to its own end users had any impact on the rate which Discount Cellular was charged by Ameritech for wholesale cellular service. As even Ameritech would admit, there is no fact or circumstance surrounding Discount Cellular's retail pricing which had any impact on the wholesale rate being charged by Ameritech. As Alan Ferber testified, all unaffiliated resellers had access to the same pricing matrix. Deposition of Alan Ferber (January 21, 2005). The price within that matrix was dependent only on the number of subscribers that the reseller had. Thus, if any such information were relevant at all, it would only be the sheer number of customers that Discount Cellular had. However, Discount Cellular's complaint is not about where on the matrix it should have been qualified. Discount Cellular's complaint is that there was a wholesale rate that is entirely off the matrix that was provided to Ameritech's retail operations, but not to any other reseller. The uncontested fact is that Ameritech's pricing matrix for unaffiliated resellers such as Discount Cellular, did not contain any level at which Discount Cellular or any other reseller could obtain the same zero rate that Ameritech provided its own retail affiliate. Thus, for

purposes of this case it does not matter how many customers Discount Cellular had (indeed Cellnet had no Ameritech customers and still received judgment in its favor) or the terms that Discount Cellular imposed on its own customers. As was the case in *Cellnet*, Ameritech's failure to offer Discount Cellular the zero rate without any justification puts an end to any real inquiry. It certainly eliminates the argument that there are any real discovery disputes in this case.

III. CONCLUSION

For all the foregoing reasons, the Commission should deny Ameritech's Motion to Compel.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing Brief Contra Ameritech's Motion to Compel was served via regular U.S.

Mail this 7th day of March 2005, upon the following:

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