UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:97-CV-709-H

GUS "SKIP" DALEURE, JR., et al. PLAINTIFFS

V.

COMMONWEALTH OF KENTUCKY, et al. DEFENDANTS

MEMORANDUM OPINION

Defendants move to dismiss Counts Two and Three of Plaintiffs' Complaint. Defendants argue that telecommunications services are not "commodities" for purposes of § 2(a) of the Robinson-Patman Act claim, nor "goods, wares or merchandise" for purposes of § 2(c) of the Robinson-Patman Act claim.[1] Likening telephone calls to electricity, Plaintiffs argue the Robinson-Patman Act applies to collect calls. This Court concludes that telephone calls are not properly classified as goods or services under the Robinson-Patman Act.

Metro Communications Co. v. Ameritech Mobile Communications, Inc., 984 F.2d 739, 745 (6th Cir. 1993), provides helpful guidance. In *Metro Communications*, the Sixth Circuit determined that a cellular telephone service system does not qualify as a commodity under the Robinson-Patman Act. The Court specifically addressed and rejected the electricity analogy with a compelling analysis. Distinguishing *City of Kirkwood v. Union Electric Company*, 671 F.2d

[1] The Commonwealth of Kentucky and its Department of Corrections, the State of Missouri and its Department of Corrections, the Indiana defendants and the Arizona defendant, have each been dismissed on other grounds.

1173 (8th Cir. 1982), the Court noted "...telephone service is very different from electricity. It cannot be produced, felt, or stored, even in small quantities. The plaintiff do not buy a quantity of it, store it, and resell it to their customers. They simply provide customers with access to the service." *Metro Communications*, 984 F.2d at 745.

The Sixth Circuit also rejected the argument that because telephone services require tangible goods, their "dominant nature" is as a commodity.[2] *See* id. The Court pointed out that a customer can purchase telephone equipment from a different company than telephone services. Thus, telephone services and equipment are not sufficiently interrelated to trigger dominant nature analysis.[3] *See* id.

Providing collect calling services is closely analogous to providing cellular telephone services. Collect calls cannot be "produced, felt or stored" any more than cellular activation can be. *Id.* Plaintiffs argue that the issue in this case is not resale but rather price discrimination of each individual phone call. In the Court's view, this misses the significance of the *Metro Communications'* analysis. Commodities, by their nature, are capable of being produced, felt and stored. Under the Sixth Circuit's analysis in *Metro Communications*, this Court cannot characterize collect calls or long distance telephone service as a commodity. *See id.*, 984 F.2d at 745.

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[2]The Sixth Circuit has held that the Robinson-Patman Act applies to transactions involving the sale of both goods and services only when the "dominant nature" of the transaction is a sale of goods. *See General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942), *Metro Communications*, 984 F.2d at 745.

[3]Plaintiffs in this case argue that telephone calls are only useful because of their physical properties. Following the Sixth Circuit, this Court finds that argument unpersuasive. Telephone calls require equipment, but the alleged price discrimination stems from the provision of services, namely the rate charged to call collect, not the telephone equipment itself.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Defendants have moved to dismiss Counts Two and Three of the Complaint, which contain claims under the Robinson-Patman Act. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motions to dismiss Counts Two and Three of the Complaint are SUSTAINED and the claims contained in those counts are DISMISSED WITH PREJUDICE.

This _____ day of October, 1999.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record