IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

KIMBERLY D. BOVA,	)	
WILLIAM L. BOVA, individually and	)	
on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	**Civil Action No. 7:01CV00090**
	)	
v.	)	**MEMORANDUM OPINION**
	)	
COX COMMUNICATIONS, INC.,	)	**By: Samuel G. Wilson**
and COXCOM, INC.,	)	**Chief United States District Judge**
	)	
Defendants.	)	

This is a class action suit filed by Plaintiffs Kimberly D. Bova and William L. Bova, (collectively "Bova") individually and on behalf of all others similarly situated, against Defendants Cox Communications, Inc. ("CCI") and CoxCom, Inc. ("CoxCom"). Bova claims that CCI and CoxCom violated the Communications Act, 47 U.S.C. § 151 et seq., by charging unreasonable and discriminatory fees for the provision of cable Internet service. The court has subject matter jurisdiction under 47 U.S.C. § 207 and 28 U.S.C. § 1331. The case is before the court on Bova's motion to certify the lawsuit as a class action pursuant to Federal Rule of Civil Procedure 23. The court grants Bova's motion to certify the lawsuit as a class action.

I.

CCI, a Delaware corporation with its principal place of business in Atlanta, Georgia, owns subsidiaries that, among other things, deliver cable television programming and high-speed Internet access to homes and business. Bova alleges that CCI provides cable Internet service to over 480,000 customers in several states. CoxCom, one of CCI's subsidiaries, provides cable

Internet service to Bova. CoxCom operates cable systems in various communities in Virginia, and other states, under franchise agreements with local governments, also called local franchise authorities or "LFAs." In the Western District of Virginia, CoxCom's LFAs include the City of Roanoke, the County of Roanoke, and the City of Vinton. Pursuant to franchise agreements, LFAs charge CoxCom franchise fees and CoxCom passes these fees on to its customers, including Bova. This lawsuit is essentially a dispute over whether it is lawful under the Communications Act for CoxCom to charge franchise fees for its cable Internet services.

Under the Communications Act, communications services are classified in one of three ways–as an "information service," "telecommunications service," or "cable service." The regulation of the service depends upon its classification. For example, the Act allows LFAs to assess cable operators a franchise fee of up to five percent of gross revenue from "cable services," and cable operators are permitted to pass these franchise fees on to their customers. 47 U.S.C. § 542. Bova, however, claims that Defendants' cable Internet service is a "telecommunications service"– not a "cable service." Thus, Bova argues that the Communications Act does not allow Defendants to charge the franchise fees. Defendants, however, claim that their cable Internet service is either a "cable service"or an "information service," in which case the franchise fees are legal.

Bova relies on a decision by the Ninth Circuit Court of Appeals in which the court stated that cable Internet service included "telecommunications services." AT&T Corp. v. City of Portland, 216 F.3d 871, 878 (9th Cir. 2000). After the Ninth Circuit's decision, the Defendants stopped charging franchise fees to cable Internet customers in the Ninth Circuit; however, they continued to charge franchise fees to cable Internet customers outside the Ninth Circuit, including

Bova. Bova claims that these franchise fees are unlawful and unreasonable under § 202(a) of the Telecommunications Act and that by charging different fees in different geographic locations, Defendants make unreasonable discrimination or preference in charges in violation of § 202(a).[1] Bova seeks a refund of these franchise fees.

Bova also seeks to certify this lawsuit as a class action. Bova seeks to represent a near-nationwide class, including all persons and entities outside of the Ninth Circuit (California, Nevada, Arizona and Idaho) who on or after November 1, 2000, have purchased and/or paid for cable Internet services from Defendants or its affiliates. Defendants, however, argue that Bova has not met the requirements for a class action under Rule 23, and, alternatively, that the class should be limited to those who actually paid for cable Internet services and live in the Western District of Virginia.

II.

Federal Rule of Civil Procedure 23 requires a two-step analysis to determine if class certification is appropriate. First, the plaintiff must demonstrate that the prerequisites of Rule 23(a) are satisfied. Second, the plaintiff must demonstrate that one of the conditions in Rule 23(b) is satisfied. When making these determinations, the court "should accept as true the plaintiff's allegations concerning the merits of the case." Talbott v. GC Services Ltd. P'ship, 191 F.R.D. 99, 101 (W.D. Va. 2000).

Rule 23(a) requires a showing that:

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[1] 47 U.S.C. § 202(a) makes it unlawful for "any common carrier to make any unjust or unreasonable discrimination in charges . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Here, Bova has satisfied the prerequisites of Rule 23(a). The class of plaintiffs is so numerous that joinder of all members is impracticable. Bova argues for a near-nation wide class of close to half of a million of Defendants' customers. Joinder of all of the members of this class if obviously impracticable. Defendants argue that if the court certifies a class, the class should be limited to Defendants' customers in the Western District of Virginia. Even with this geographic limitation, the class members would number in the hundreds and joinder of all members still would be impracticable. Next, there are questions of law and fact common to the class. The central issue in this litigation is whether cable Internet service is classified under the Communications Act as a "telecommunications service," "cable service," or "information service." This classification issue is common to all members of the class. Also, the court finds that Bova's claims are representative of the claims of the rest of the class members and Bova and their counsel will fairly and adequately protect the interests of the class. Therefore, Bova has met the prerequisites of Rule 23(a). However, to be certified as a class action, Bova must also satisfy one of the three criteria set forth in Rule 23(b). Here, Bova relies on subsections 23(b)(1)(A) and 23(b)(3).

An action may qualify under Rule 23(b)(1)(A) if the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Bova argues that the prosecution of separate actions by thousands of individual class members in different courts across the country would create the

risk of varying and contradictory legal decisions. These decisions, in turn, would create incompatible standards of conduct for Defendants because Defendants may be allowed to or even required to assess franchise fees in some jurisdictions and prohibited from doing so in other jurisdictions.

Although this risk might be real, the court doubts that class certification would solve the problem. Several courts have already addressed the classification question and issued contradictory opinions. According to Bova, the Ninth Circuit has, in effect, already ruled in AT&T v. City of Portland that cable Internet service is a "telecommunications service." 216 F.3d 871, 878 (9th Cir. 2000). However, the Eleventh Circuit reached a different conclusion when it suggested that cable Internet service was an "information service." Gulf Power Co. v. FCC, 208 F.3d 1263, 1275-78 (11th Cir. 2000). The Eastern District of Virginia reached yet another conclusion when it held that cable Internet service was a "cable service." MediaOne Group, Inc. v. Henrico 97 F. Supp. 2d 712, 715 (E.D. Va. 2000). On appeal, the Fourth Circuit recognized the complexity and far-reaching consequences of a decision on the classification issue and avoided deciding it. MediaOne Group, Inc., 257 F.3d 363, 364-65 (4th Cir. 2001). Since various courts have already issued contradictory opinions, class certification would not eliminate the risk of inconsistent adjudications or incompatible standards of conduct for Defendants. Ultimately, the Supreme Court, Congress, or the FCC needs to decide the issue, and until then there will be confusion among the courts. Certification of a near nation-wide class in this lawsuit will not resolve this issue and will, perhaps, only result in more confusion.

Certification of a smaller class, however, is appropriate under Rule 23(b)(3). An action may qualify under Rule 23(b)(3) if "the court finds that the questions of law or fact common to

the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b) lists several factors for the court to consider:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As noted earlier, the central issue in this lawsuit is the proper classification of cable Internet service under the Telecommunications Act, and this issue is a common question for all of the class members. The only question unique to each individual would be the amount of damages, which would simply depend upon the amount of franchise fees each class member paid, assuming the Plaintiffs were successful.[2] Thus, the questions of law and fact common to the class members predominate over any questions affecting only individual members.

A class action, limited to the Western District of Virginia, is superior to other available methods for the fair and efficient adjudication of the controversy. "Efficiency is the primary focus to determine if a class action is the superior method to resolve a controversy, and the court looks to judicial integrity, convenience, and economy." Talbott v. GC Services Ltd. P'ship, 191 F.R.D. 99, 106 (W.D. Va. 2000). It would be inefficient for all of Defendants' customers to bring individual lawsuits to recover the relatively small amounts of money they each paid to Defendants

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[2]Defendants claim that the voluntary payment defense would create individual questions of law and fact because the elements of the defense would change from state to state. Assuming that this state-law defense would apply, if the class were limited to plaintiffs in the Western District of Virginia, then the court would only have to apply Virginia's version of the voluntary payment doctrine.

for the purportedly illegal franchise fee. In many cases, individual class members would not bring suit because they would be unaware that they were allegedly overcharged or because the cost of litigation would exceed their potential recovery. "It is proper for the court to consider the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." Id. (quotation omitted). A class action, then, is a fair and efficient way for these class members to enforce their rights under the Communications Act.

A multi-state class action, however, would not be a superior method for the fair and efficient adjudication of the controversy. The LFAs outside Virginia cannot be made parties to this action because the court lacks personal jurisdiction over them. Defendants argue that the court cannot equitably adjudicate this action without the presence of these LFAs. First, the LFAs derive a significant amount of revenue from the franchise fees for cable Internet service. A ruling from this court that prohibits CoxCom from collecting the franchise fees would likewise prevent the LFAs from receiving this revenue. Without deciding whether the LFAs are indispensable parties to this lawsuit, the court does note that the LFAs do have a significant interest in the outcome of the lawsuit and their participation in this lawsuit might be desirable. Second, if a multi-state class action is certified and the Plaintiffs are successful, CoxCom would be legally prohibited from collecting franchise fees for cable Internet services from its subscribers. However, the LFAs who are not parties to this action could continue to impose the franchise fees on CoxCom, pursuant to their franchise agreement, and seek collection of the fees in another forum, with the possibility of contradictory court rulings. Limiting the class to individuals in the Western District of Virginia and limiting the effect of the court's ruling to the Western District of

Virginia would solve this problem. This way, Defendants will not be bound by the court's determination outside of this jurisdiction.

Similarly, certification of a class that includes the Eastern District of Virginia would be problematic. The Eastern District addressed the classification issue in MediaOne Group, Inc. v. Henrico, 97 F. Supp. 2d 712 (E.D. Va. 2000). There, the Eastern District held that cable Internet service was a "cable service." Id. at 715. On appellate review, the Fourth Circuit did not squarely address the classification issue; however, the Fourth Circuit did not overrule the Eastern District's holding. See MediaOne Group, Inc., 257 F.3d at 364-65. Therefore, the district court's decision in MediaOne Group, Inc. is still precedent in the Eastern District of Virginia. If the court certifies a class that includes the Eastern District of Virginia, then a decision by this court could conflict with precedent in the Eastern District of Virginia.

In short, certification of a class consisting of individuals outside of the Western District of Virginia would be problematic because the court's decision would have unnecessarily far-reaching effects that could conflict with decisions issued by other courts and create incompatible standards of conduct for Defendants. However, certification of a class limited to the Western District of Virginia would be a superior means of addressing the issues raised in this litigation.

Therefore, the court grants Plaintiff's motion to certify this lawsuit as a class action. However, the court limits the class to individuals and entities who reside in the Western District of Virginia and who on or after November 1, 2000, have paid a franchise fee for cable modem broadband Internet data transmission services from CCI or CoxCom or their affiliates. Excluded from the class are Defendants, the officers and directors of Defendants, any entity in which any excluded person has a controlling interest, and the legal representatives, heirs, successors and

assigns of any excluded person. Furthermore, the effect of the court's ruling on this case should be limited to the Western District of Virginia.

According to Rule 23(c)(2), the court must direct to the members of a class certified under subdivision (b)(3) "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Both the Plaintiffs and Defendants have suggested notice via email; however, it is unclear whether this type of notice would be legally adequate. The court would like to hear from both the Plaintiffs and Defendants on this issue. Specifically, the court is interested in (1) whether notice by email and publication on Defendants' web-site would be enough to provide due process to the members of the class, and (2) who should bear the cost of sending notice and determining to whom to send notice. Additionally, the court requests that the Plaintiffs propose a draft notice for the court's approval.

III.

For the reasons stated above, the court will grant Bova's motion for certification of this lawsuit as a class action as described above. An appropriate order will be entered this day.

ENTER: This ____ day of December, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

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ROANOKE DIVISION

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Plaintiffs,	)	**Civil Action No. 7:01CV00090**
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v.	)	**ORDER**
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COX COMMUNICATIONS, INC.,	)	**By: Samuel G. Wilson**
and COXCOM, INC.,	)	**Chief United States District Judge**
	)	
Defendants.	)	

For the reasons stated in the court's Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that Kimberly D. Bova and William L. Bova's Motion to Certify Class Action, under Federal Rule of Civil Procedure 23, is **GRANTED**. The class shall consist of individuals and entities who reside in the Western District of Virginia and who on or after November 1, 2000, have paid a franchise fee for cable modem broadband Internet data transmission services from CCI or CoxCom or their affiliates. Excluded from the class are Defendants, the officers and directors of Defendants, any entity in which any excluded person has a controlling interest, and the legal representatives, heirs, successors and assigns of any excluded person.

ENTER: This ____ day of December, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE