

**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,)

v.)

COX COMMUNICATIONS, INC.,)
and COXCOM, INC.,)
Defendants.)

Civil Action No. 7:01CV00090

MEMORANDUM OPINION

By: Samuel G. Wilson
Chief United States District Judge

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. and CoxCom, Inc. (collectively “Cox”). Bova claims that Cox 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 Cox’s motion to dismiss on substantive grounds, under Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. For the reasons stated below, the court will deny Cox’s motion to dismiss.

I.

Cox provides cable television and cable Internet services to customers across the country, including Bova. Cox operates cable systems in various communities under franchise agreements with local governments, also called local franchise authorities (“LFAs”). Pursuant to these franchise agreements, LFAs charge Cox a cable service franchise fee, which Cox usually passes on

to its customers. In addition to charging this franchise fee for cable television services, Cox charges Bova a franchise fee for cable Internet services. This lawsuit is essentially a dispute over whether it is lawful under the Communications Act for Cox 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,” “telecommunication service,” or “cable service.” Bova argues that in providing cable Internet service, Cox is providing a “telecommunication service,” and that under the Communications Act, Cox cannot charge a franchise fee for “telecommunication services.” Cox, however, argues that its cable Internet service is either a “cable service” or an “information service,” and that its franchise fees are legal.

An opinion by the Ninth Circuit Court of Appeals, AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000), suggests that cable Internet service is a “telecommunications service.” After the Ninth Circuit’s decision, Cox stopped charging franchise fees for cable Internet services to customers in the Ninth Circuit; however, Cox continued to charge franchise fees for cable Internet services to customers outside the Ninth Circuit, including Bova.

Bova claims that these franchise fees are unjust and unreasonable under § 201(b) of the Communications Act, that the discrimination between customers in the Ninth Circuit and elsewhere is unjust and unreasonable under § 202(a) and that Cox violated § 203(a) by not filing certain tariffs.

II.

Under Federal Rule of Civil Procedure 12(b)(6), the court must dismiss an action where the complaint fails to state a claim upon which relief can be granted. The court must accept the

allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. The court should not dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that “the facts alleged in the complaint, even if true, fail to support the claim.” Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

Cox argues several theories in support of its motion to dismiss under Rule 12(b)(6). First, Cox argues that as a cable operator it has a federal right to pass through to the consumer all cable service franchise fees imposed by LFAs. See 47 U.S.C. § 542(c) (allowing a cable operator to identify “the amount of the total bill assessed as a franchise fee” as a separate line item on each subscriber’s bill)¹; City of Dallas v. FCC, 118 F.3d 393, 397 (5th Cir. 1997) (finding that cable operators may “pass the entire cost of the franchise fee onto the consumer.”)

However, the pass through defense requires the court to conclude that in providing cable Internet service, Cox is a cable operator providing a cable service. Bova, however, alleges that in providing cable Internet service, Cox is not a cable operator providing a cable service, but a telecommunications carrier providing telecommunications services. Assuming the facts alleged in the complaint are true, the pass through protections of § 542(c) do not apply to Cox.

Similarly, Cox claims that the FCC has exclusive jurisdiction to determine the propriety of the pass through of its cable franchise fees and that the Communications Act does not provide a private right of action for subscribers to challenge the appropriateness of a cable operator’s pass through of franchise fees. Again, these arguments are premised upon the claim that Cox is acting

¹The Communications Act also provides that the amount of the franchise fee paid by a cable operator, which the cable operators are allowed to pass through to the consumer, “shall not exceed 5 percent of such cable operator’s gross revenues derived in such period from the operation of the *cable system* to provide *cable services*.” 47 U.S.C. § 542(b) (emphasis added).

as a cable operator providing cable services. Bova, however, alleges that by providing telecommunications services, Cox is a common carrier and that § 207 of the Communications Act authorizes the recovery of damages.

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

42 U.S.C. § 207.

In Count I, Bova claims that Cox imposed an unlawful franchise fee charge. Bova argues that the franchise fee is unlawful because Cox did not file with the FCC various schedules and tariffs containing its charges, as required under § 203(a) of the Communications Act.² Also, Bova argues that the franchise fee violates § 201(b), which requires that the charges be “just and reasonable.”³ Bova argues that under the Communications Act, Cox may not lawfully collect cable franchise fees from customers for services that are not cable services. Since Cox is not acting as a cable operator when providing cable Internet service, argues Bova, it may not justly or reasonably impose a franchise fee which only cable operators may impose. Bova argues that after the AT&T v. City of Portland decision, Cox knew that it was legally prohibited from collecting

² “Every common carrier, except connecting carriers, shall within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require . . .” 47 U.S.C. § 203(a).

³ “All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .” 47 U.S.C. § 201(b).

franchise fees; however, it continued to do so.

Cox, however, argues that it does not have to file a tariff under § 203(a) because the FCC has not yet established regulations governing such tariffs and that since its cable Internet service is not a telecommunications service, its charges are not unjust and unreasonable.⁴ Ultimately, Cox may prevail on these arguments. However, in a motion to dismiss, the court must accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. Therefore, the court finds that in Count I Bova has stated a claim upon which relief can be granted.

In Count II, Bova claims that Cox violated § 202(a) which makes it unlawful for “any common carrier to make any unjust or unreasonable discrimination in charges”⁵ Bova claims that Cox violated this provision by charging Bova certain fees for cable Internet service while exempting customers in the Ninth Circuit from such fees. Cox responds by claiming that the difference in charges is not unreasonable because it is based on a difference in applicable law. Again, although Bova may prevail on this argument later, the court will not grant Cox’s motion to dismiss on this basis.

Cox also argues that Virginia’s voluntary payment doctrine bars recovery. Under this

⁴ In the various “briefs” submitted to the court, the arguments center on the classification issue. Cox argues that cable Internet service is an information service or cable service and Bova argues that it is a telecommunications service. Again, since this issue partly involves a factual question, the court will not rule on it in a motion to dismiss.

⁵ “It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, 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.” 47 U.S.C. § 202(a).

doctrine, a person is not entitled to recover money that he paid voluntarily with full knowledge of the facts, or with the means of such knowledge, when the payment or charge subsequently turned out to be unauthorized by law. See e.g. Williams v. Consolvo, 379 S.E.2d 333, 336 (Va 1989). Bova argues that Virginia's voluntary payment doctrine does not apply because Bova's cause of action arises out of § 207 of the Communications Act which preempts the common law voluntary payment defense. Although this might be true, the court finds that even if the voluntary payment doctrine is not preempted by federal law, Bova's complaint, on its face, states a claim for which relief may be granted. Generally, "a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein." Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). "[N]evertheless, dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." Id. Here, it is not clear from the face of the complaint that Bova and the other plaintiffs paid the franchise fee voluntarily with a full knowledge of the facts, which is a necessary element of the voluntary payment defense. Therefore, Cox's motion to dismiss under Rule 12(b)(6) will be denied.

Lastly, Cox argues that to the extent this class action purports to extend to plaintiffs outside of Virginia, the court should dismiss the action under Rule 12(b)(7) for failure to join a necessary and indispensable party under Rule 19. However, in the court's order (decided December 12, 2001) certifying this action as a class action, the court limited the class to individuals and entities who, inter alia, reside in the Western District of Virginia. Therefore,

Cox's motion to dismiss pursuant to Rule 12(b)(7) is denied as moot.⁶

III.

For the reasons stated above, the court will deny Cox's motion to dismiss under Rules 12(b)(6) and 12(b)(7). An appropriate order will be entered this day.

ENTER: This ____ day of March, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

⁶ In its motion to dismiss on jurisdictional grounds, Cox argued that the court should dismiss this action under the theory of primary jurisdiction. On June 1, 2001, the court took this motion, as well as the motion to dismiss for lack of personal jurisdiction and the motion to dismiss on substantive grounds, under advisement. Today's opinion only relates to Cox's motion to dismiss on substantive grounds, under Rules 12(b)(6) and 12(b)(7), and does not preclude dismissal under the doctrine of primary jurisdiction. Given the close connection between the primary jurisdiction question and the classification question, which the parties address in their motions for summary judgment, the court will, if necessary, rule on the primary jurisdiction question during summary judgment. Also, in addition to classification and primary jurisdiction, the court expects the parties will address other issues in their summary judgment oral arguments. Assuming that Cox is a telecommunications carrier providing a telecommunications service: (1) are Cox's charges "unjust and unreasonable" under § 201(b); (2) is the discrimination between customers in the Ninth Circuit and outside the Ninth Circuit "unjust and unreasonable" under § 202(a); and (3) is Cox liable to plaintiffs for not filing tariffs under § 203(a)? While these questions are not suitable for determination on a motion to dismiss, they may be decided in a summary judgment setting. If the court finds, under the proper summary judgment standards, that the answers to these questions are "no," then the court need not address the more complicated classification issue or the primary jurisdiction issue.

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ORDER

By: Samuel G. Wilson
Chief United States District Judge

For the reasons stated in the court's Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that Cox Communication, Inc. and CoxCom, Inc.'s motion to dismiss on substantive grounds, under Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure, is **DENIED**.

ENTER: This ____ day of March, 2002.

CHIEF UNITED STATES DISTRICT JUDGE