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. and CoxCom, Inc. (collectively "Cox"). Bova claims that Cox violated the Communications Act, 47 U.S.C. § 151 et seq., by charging certain franchise fees for the provision of cable Internet service. The case is before the court on Cox's motion to dismiss for lack of subject matter jurisdiction. For the reasons stated below, the court will grant Cox's motion to dismiss.

I.

Cox provides cable television and cable Internet services (also called cable modem service) to customers across the country, including Bova. Cox operates cable systems in various communities under franchise agreements with local governments, also called franchise authorities. Pursuant to these franchise agreements, franchise authorities charge Cox a franchise fee, which Cox passes on to its customers. In addition to charging this franchise fee for cable television services, Cox charged Bova a franchise fee for cable Internet services. Bova claims that Cox

violated the Communication Act by charging franchise fees for its cable Internet services.

II.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). Initially, Bova argued that the court had federal question jurisdiction over this action under 47 U.S.C. § 207.[1] This section provided Bova with a cause of action in federal court only if Cox's cable Internet service was classified as a "telecommunications service." Under the Communications Act, communications services are classified in one of three ways–as an "information service," "telecommunication service," or "cable service." Initially, Bova argued that Cox's cable Internet service was a telecommunication service. However, on March 15, 2002, the Federal Communications Commission ("FCC") issued a Declaratory Ruling in which it found that cable modem service was an information service and not a cable service or a telecommunications service.[2] Bova now concedes, as he must, that he can no longer bring this action under § 207.

However, Bova argues that the court has jurisdiction under 47 U.S.C. § 542, which is found in Subchapter IV of the Act. This Subchapter regulates cable services and is sometimes referred to as the Cable Act. Cox argues that Bova did not allege an implied cause of action

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[1] Specifically, Bova argued that in charging a franchise fee for cable Internet service, Cox violated 47 U.S.C. §§ 201(b), 202(a) and 203(a) in Subchapter II of the Communications Act, and that 47 U.S.C. § 207 expressly provided a private cause of action in federal district court for any person damaged by a common carrier who violated provisions in Subchapter II.

[2] See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. March 15, 2002) (hereinafter referred to as "FCC Ruling").

under § 542 in his complaint and, even if he did, § 542 does not provide an implied cause of action. The court assumes, without deciding, that Bova properly plead a cause of action under § 542. The court, however, finds that Congress did not intend to create a cause of action under § 542 for subscribers to sue cable operators to recover franchise fees. Therefore, the court will dismiss this action for lack of subject matter jurisdiction.

In determining whether § 542 provides for a cause of action, the court begins "with the presumption that if a statute does not expressly create a cause of action, one does not exist." Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 805 (4th Cir. 1996). Nonetheless, the court may infer the existence of a cause of action by applying the well-settled test of Court v. Ash, 422 U.S. 66 (1975), which requires that the court determine:

> (1) whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted'; (2) whether there is 'any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one'; (3) whether implication of a private remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action sought is 'one traditionally relegated to state law.'

Ormet, 98 F.3d at 799 (quoting Court v. Ash, 422 U.S. at 78). "Factors (2) and (3) form the heart of the inquiry." Id. It is the plaintiff's burden to demonstrate that Congress intended to create a private cause of action under a federal statute. Suter v. Artist M., 503 U.S. 347, 363-64 (1992). Given the presumption against implied causes of action, the plaintiff's burden is "a stringent one." Donaldson v. Dep't of Labor, 930 F.2d 339, 347-48 (4th Cir. 1991). Examining the legislative history and statutory scheme, the court finds no indication that Congress intended to create a private cause of action under § 542 for subscribers to sue cable operators to recover franchise fees.

Section 542 is part of a congressional scheme to balance the rights and obligations of cable operators and franchising authorities regarding governmentally-imposed cable service fees and requirements. Section 542(a) grants the franchising authority the right to charge the cable operator a franchise fee for the use of the public rights of way; subsection (b) sets a five percent cap on the amount of the franchise fee paid by the cable operator; subsection (c) provides cable operators the right to pass the franchise fees on to subscribers and tell subscribers that it is not their charge, but the franchising authority's charge; subsection (d), anticipating court actions between franchising authorities and cable operators over rate structures and franchise fees, states that the franchising authority must demonstrate that the rate structure reflects all costs of the franchise fee; and subsection (e) requires a cable operator to pass through to subscribers any decrease in a franchise fee.[3]

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[3] 47 U.S.C. § 542 provides, in part:

Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per anum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system 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 . . . .

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

For the most part, the language of § 542 governs the conduct of franchising authorities regarding the franchise fees they may lawfully impose on cable operators. Except for the provisions relating to the pass through of franchise fees, § 542 says nothing about subscribers. The language of § 542 creates no rights in subscribers regarding the amount of the franchise fee a franchising authority can charge a cable operator.

Bova argues that the five percent cap on franchise fees was intended to benefit subscribers. Cox, however, argues that the five percent cap was intended to protect cable operators from excessive fees charged by franchising authorities. After reviewing the legislative history, the court finds that the five percent cap in § 542(b) was primarily designed to protect cable operators;[4] however, subscribers also benefit from the cap because cable operators

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> (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.. . . .
>
> (d) Court actions
>
> In any court action under subsection (c) of this section, the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.
>
> (e) Decreases passed through to subscribers
>
> Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.
>
> 47 U.S.C. § 542.

[4] "The overriding purpose of the 5-percent fee cap was to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns." 129 Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater). "The committee feels it is necessary to impose such a franchise fee ceiling because the committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors." S. Rep. No. 98067, at 25 (1983).

eventually pass the fees on to the subscribers. Similarly, the legislative history of § 542(c) reveals that Congress was interested in protecting cable operators and ensuring that franchising authorities were politically accountable for the hidden taxes and fees that were passed on to the subscriber.[5] Therefore, the court cannot find that § 542 is intended for the "especial benefit" of subscribers. Nor does the fact that subscribers obtain some benefit from § 542's franchise fee cap advance Bova's argument that Congress intended to create a cause of action for subscribers to sue cable operators to recover franchise fees. Nothing in § 542 suggests an intention to confer rights directly on individual subscribers who may benefit from the provision. The Supreme Court "has noted that there [is little] reason to infer a private remedy in favor of individual persons where Congress, rather than drafting the legislation with an unmistakable focus on the benefitted class, instead has framed the statute simply as a general prohibition . . . ." Universities Research Ass'n v. Coutu, 450 U.S. 754, 772 (1981).

Bova argues that the reference in § 542(d) to court actions under § 542(c) implies that Congress intended to create a cause of action for subscribers against cable operators to challenge the amount of the franchise fee. The court disagrees. When § 542(d) was drafted and enacted, §

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[5] In introducing the amendment which eventually became the final version of § 542(c), Senator Lott explained:

> The fact is sometimes the rates [for subscribers] have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and the cable company passes on to the consumers, and it is not explained. . . . I would like to offer my amendment . . . dealing with the subscriber bill itemization to give the cable companies an opportunity to itemize these so-called hidden costs, to explain to the people what is involved in the charges so they will know it is not just the cable company jacking up the prices.

138 Cong. Rec. S561-02 (January 29, 1992) (statement of Sen. Lott).

542(c) was different than it is now. Then, § 542(c) provided that cable operators could pass through increases in franchise fees to subscribers unless the franchising authority demonstrated that the rate structure already reflected all costs of franchise fees.[6] Congress included § 542(d) because it anticipated that disputes would arise between franchise authorities and cable operators over whether various franchise requirements were "increases." There is no indication in the legislative history or structure of the statute that Congress intended to create a cause of action for subscribers against cable operators regarding franchise fees.

Although there have been cases in which franchising authorities and cable operators litigated franchise fee disputes under § 542 in federal court,[7] Bova fails to cite a single case finding an implied federal cause of action for subscribers to sue over franchise fees. This failure is not surprising. Section § 542 contemplates court actions between franchising authorities and cable operators over certain rights and obligations, but it does not contemplate lawsuits brought by subscribers.

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[6] Before the 1992 Amendments to the Act, subsection (c) read:

> (c) Increases passed through to subscribers
>
> A cable operator may pass through to subscribers the amount of any increase in a franchise fee, unless the franchising authority demonstrates that the rate structure in the franchise reflects all costs of the franchise fees and so notifies the cable operator in writing

47 U.S.C. § 542(c) 1991.

[7] See, e.g., Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084 (3d Cir. 1988), Charter Comm., Inc. v. County of Santa Cruz, 133 F. Supp. 2d 1184 (N.D. Cal. 2001), Robin Cable Sys., L.P. v. City of Sierra Vista, 842 F. Supp. 380 (D. Ariz. 1993), Time Warner Entm't Co. v. Briggs, No. 92-40117-GN, 1993 WL 23710 (D. Mass. Jan. 14, 1993), Birmingham Cable Comm. Inc. v. City of Birmingham, No. CV-87-L-0755-S, 1989 WL 253850 (N.D. Ala. May 5, 1989).

Bova argues that without an implied cause of action, the requirement in § 542(e) that cable operators pass through to subscribers any decrease in franchise fees would be unenforceable and that subscribers would be unable to receive refunds for overcharges. Cox, however, argues that Congress meant for local franchising authorities or the FCC to enforce the provisions in § 542 and not the individual subscribers.[8] Cox's argument makes sense given the legislative history and structure of the Act.[9] The court, however, will not wade into this regulatory thicket. Whatever Bova's remedies might be, a cause of action in federal court under § 542 is not one of them. Given the complex and technical nature of the Communications Act and FCC regulations, the court is especially reluctant to enter this regulatory thicket and declare an implied cause of action where Congress refused to explicitly create one.

Furthermore, "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1971). Congress has expressly provided for causes of action in other sections of the Communications

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[8] According to Cox, subscribers hold franchising authorities politically accountable for increases in franchise fees, and if there is a miscalculation in the amount of the franchise fee a subscriber pays to the cable operator, the franchising authority can order a refund. See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, 11 F.C.C.R. 388, 434, ¶ 113 (1995). Also, the FCC has indicated that it might exercise its jurisdiction to resolve the issue of previously collected franchise fees based on cable modem service revenues. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. March 15, 2002) at ¶ 107.

[9] See Belluso v. Turner Communications Corp., 633 F.2d 393, 397 (5th Cir. 1980) ("[C]reation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the [Communications] Act in the expert agency"); Lechtner v. Borwnyard, 679 F.2d 322, 327 (3d Cir. 1982) (The "focus of the [Communications] Act is the general public, with the FCC, not the private litigant, as its champion.").

Act, including other sections in Subchapter V.[10] "Therefore, Congress' express provision of private remedies under several sections of the [Cable Act] militates heavily against a finding that Congress chose to impliedly provide a private remedy under another section of the [Cable Act]." Aventura Cable Corp. v. Rifkin/Narragansett S. Fla. CATV L.P., 941 F. Supp. 1189, 1195 (S.D. Fla. 1996).

In summary, Bova has not met his burden of demonstrating that there is an implied cause of action in 47 U.S.C. § 542 for subscribers to sue cable operators over franchise fees. Accordingly, the court will grant Cox's motion to dismiss for lack of subject matter jurisdiction.

III.

The court also will deny Bova's motion to amend the complaint. Bova seeks to add two additional claims–one a claim under § 207 and the second a supplemental state law claim. Where it would be futile to add new counts to a complaint, a motion to amend should be denied. See New Beckley Mining Corp. v. Int'l Untion, United Mine Workers of Am., 18 F.3d 1161, 1164 (4th Cir. 1994). Given the recent FCC ruling, Bova's § 207 claims fails to state a claim for which relief can be granted. As stated above, the court is dismissing Bova's purported implied right of action claim for lack of subject matter jurisdiction. Thus, there will no longer be a federal question cause of action in this case, and the court would decline to exercise supplemental jurisdiction over the state law claim. Since the court would dismiss the claims Bova seeks to add to his complaint, the court will deny Bova's motion to amend.

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[10] See e.g. 47 U.S.C. § 551 (subscriber has private right of action for violation of his or her privacy); §§ 545, 546 (cable operators may sue if local franchising authority denies operator's franchise renewal application or proposal to modify franchise obligations); § 532(d) (person aggrieved by cable operator's refusal to make channel capacity available may sue in federal court); § 553 (person harmed by unauthorized interception of cable services may bring civil action).

IV.

For the reasons stated above, the court will deny Bova's motion to amend the complaint and grant Cox's motion to dismiss for lack of subject matter jurisdiction. All other motions will be denied as moot. An appropriate order will be entered this day.

ENTER: This _____ day of July, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE

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.	)	**FINAL ORDER**
	)	
COX COMMUNICATIONS, INC.,	)	**By: Samuel G. Wilson**
and COXCOM, INC.,	)	**Chief United States District Judge**
	)	
Defendants.	)	

For the reasons stated in the court's accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that Kimberly and William Bova's motion to amend the complaint is **DENIED** and Cox Communications Inc. and CoxCom Inc.'s motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. All other motions are **DENIED** as moot. The court orders this matter stricken from the active docket of the court.

ENTER: This _____ day of July, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE