ARGUMENT

I. SUMMARY JUDGMENT IS MANDATED WHERE PLAINTIFFS CANNOT PROVE AN ESSENTIAL ELEMENT OF THEIR CLAIMS.

Summary judgment for defendants should be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 318 (1986). Once discovery is completed, summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Where a movant shows a lack of evidence to support an essential element of the nonmovant's case, the burden shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 394 (4th Cir. 1994). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)).

Here, the material facts are undisputed, and based on those facts plaintiffs cannot meet their burden of proving that defendants provide a common carrier telecommunications service, an essential element of plaintiffs' Title II claims.

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE THE CABLE INTERNET SERVICE IS NOT A "TELECOMMUNICATIONS SERVICE."

A. To Succeed Under Section 207, Plaintiffs Must Prove That CoxCom's Cable Internet Service Is A "Telecommunications Service."

Both of plaintiffs' claims are asserted under Title II of the Communications Act, 47 U.S.C. § 207, which requires that the service be a "telecommunications service":

> Only those services which are considered to be 'telecommunications services' are subject to regulation under Title II of the Communications Act. 'Information services' are excluded from regulation.

Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, Notice of Proposed Rulemaking, 13 F.C.C.R. 20391, 20410 (1998); Computer II Final Decision, 77 F.C.C.2d at 419; 47 C.F.R. § 64.702(a).

Plaintiffs can meet this burden only by showing that the entire service, as actually offered to the public, is a telecommunications service. Plaintiffs cannot meet this burden merely by showing that the service "involves telecommunications." Section 153(43) defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The use of telecommunications is necessary to all services that require the transport of information electronically from Point A to Point B. However, not all communications service providers who use "telecommunications" provide a "telecommunications service."

The Communications Act defines "telecommunications service" separately from "telecommunications." A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (emphasis added). The FCC has explained that Congress limited the definition of "telecommunications service" to the offering of just the transmission path as a separate, commercial offering to the public. See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, Order on Remand, CC Docket No. 96-149, FCC 01-140, ¶ 18 (rel. Apr. 27, 2001) ("Non-Accounting Safeguards Order II") ("[T]he terms

'telecommunications service' and 'information service' . . . are defined by reference to the act of 'offering,' [i.e., the service's] availability as a separate offering.").

> [Only] an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications."

Report to Congress, 13 F.C.C.R. at 11520.

Where a provider does not offer simply a pure transmission path but rather conjoins transmission with enhanced functions in its offering to the public, the provider does not offer a telecommunications service but an information service. An "information service" is defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Thus, the Act defines an information service as a service that uses telecommunications. As the FCC has repeatedly made clear, information service and telecommunications service are "mutually exclusive;" a service cannot be both an information service and a telecommunications service. See Report to Congress, 13 F.C.C.R. at 11508, 11516-26; In re Application of BellSouth Corp., Memorandum Opinion and Order, 13 F.C.C.R. 20599, 20781 (1998).

In contrasting the two types of services, the FCC explained as follows:

> [A]n entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it uses telecommunications to do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals. . . .
>
> [The] classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can

> receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.

Report to Congress, 13 F.C.C.R. at 11536 (footnote omitted).

It is well settled that information service providers are not subject to telecommunications regulation. The FCC and Congress (in the 1996 Act) drew a bright line between telecommunications services and information services "in a manner which distinguishes wholly traditional common carrier activities, regulable under Title II of the act, from historically and functionally competitive activities not congruent with the act's traditional forms." Computer II Final Decision, 77 F.C.C.2d at 435. As the FCC explained, "[it is] the intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation." Report to Congress, 13 F.C.C.R. at 11523.[17]

[17] This policy decision reflected a recognition that the highly competitive information services market has no need of the extensive regulatory oversight applicable to telecommunications services. See Computer II Final Decision, 77 F.C.C.2d at 433 ("'We expect the competitive environment within which data processing services are now being offered to result in substantial public benefit by making available to the public, at reasonable charges, a wider range of existing and new data processing services.'") (citation omitted). Indeed, as a matter of communications policy, imposing on information service providers the broad range of Title II requirements and constraints "could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the health and competitive development of the enhanced-services industry." Report to Congress, 13 F.C.C.R. at 11524.

B. CoxCom's Cable Internet Service Is Not A Telecommunications Service.

1. All Internet Access Services Are Information Services And Not Telecommunications Services.

The FCC has repeatedly held that Internet access services are "information services."[18] In deciding that "Internet access services are appropriately classed as information, rather than telecommunications services," the FCC found that "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." See Report to Congress, 13 F.C.C.R. at 11536. The FCC also relied on the fact that Internet access providers "'alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.'" Id. at 11516-17 (citing Universal Service Order, 12 F.C.C.R. at 9180). The FCC contrasted these functions with the statutory definition of telecommunications service, which only "includes transmissions that do not alter the form or content of the information sent." Universal Service Order, 12 F.C.C.R. at 9180.[19]

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[18] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 F.C.C.R. 385, 401 (1999) ("[I]nformation service is provisioned by [an ISP] 'via telecommunications' . . . although the Internet service itself is an 'information service' . . . rather than a telecommunications service."); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order, 16 F.C.C.R. 7418, 7420 (2001) ("Information services" "comprise services such as . . . e-mail and other Internet services . . . and protocol processing, among others."); Universal Service Order, 12 F.C.C.R. at 9179.

[19] Congress and the FCC have adopted a deregulatory policy toward information services to encourage the growth of information services in general and Internet access services in particular. "Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming." Internet Ventures, Inc., Internet On-Ramp, Inc., Memorandum Opinion and Order, 15 F.C.C.R. 3247, 3253 (2000).

The courts have consistently upheld the FCC's analysis and concluded that Internet access service is an information service and not a telecommunications service. See, e.g., AOL v. GreatDeals.Net, 49 F. Supp. 2d 851, 856-57 (E.D. Va. 1999) (ISPs such as AOL are information service providers and "this Court will not be the first to" impose common carrier regulation on such providers); Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 6-7 (D.C. Cir. 2000) (ISPs "are 'information service providers,' . . . which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. . . . Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers.") (internal quotations and citations omitted); Howard v. AOL, 208 F.3d 741, 752-53 (9th Cir. 2000) (An ISP is not a common carrier subject to Title II regulation because it "does not act as a mere conduit for information."); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025 (S.D. Ohio 1997) ("Internet service providers have been held not to be common carriers."); Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1369, n.12 (N.D. Cal. 1995) (An ISP "does more than just 'provide the wire and conduits.' Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier.") (citation omitted).

2. CoxCom's Cable Internet Service Offers Internet Access And Other Enhanced Functions Already Found To Be Information Services.

There is no dispute of fact in this case that CoxCom offers named plaintiffs and other residential subscribers a single cable Internet access and content service for a single fee. (Deposition of Kimberly Bova dated August 29, 2001 ("K. Bova Dep.") at 13 (Ex. E to Defs.' Statement of Facts); Deposition of William Bova dated August 29, 2001 ("W. Bova Dep.") at 28 (Ex. F to Defs.' Statement of Facts); Declaration of Steven Gorman ("Gorman Decl.") ¶ 7 (Ex. D

to Defs.' Statement of Facts); Declaration of Roger Baiers ("Baiers Decl.") ¶ 5 (Ex. B to Defs.' Statement of Facts).)[20] Plaintiffs repeatedly acknowledge that the Cox@Home service is an Internet access service. (K. Bova Dep. at 13; W. Bova Dep. at 28; Pls.' Opp'n to Mot. to Dismiss on Substantive Grounds at 14-15 (claiming that defendant's service provides "numerous functionalities and interactivity" and "connectivity" to the Internet); Am. Compl. ¶ 3 (alleging defendant provides "cable modem high-speed Internet access services (also known as 'broadband data' service and referred to hereinafter as 'cable modem service')"), ¶ 11 (defining the purported class to include persons who have purchased "cable modem services"), ¶¶ 18, 22 (alleging several times that defendant provides "cable Internet service").)

Plaintiffs also repeatedly acknowledge that CoxCom's cable Internet service provides the functionalities associated with information services and, specifically, the same functions as other ISPs. (Balci Dep. at 6, 76-77; W. Bova Dep. at 27-28; K. Bova Dep. at 10-11; Def.'s Resp. to Pls.' First Interrogs. No. 2 (Ex. H to Defs.' Statement of Facts); Baiers Decl. ¶ 5; Pls.' Opp'n to Mot. to Dismiss at 11-12 ("[C]able modem services permit their subscribers to transmit and receive e-mail from others" and "permit their subscribers to access the Internet which, in turn, permits the subscriber to engage in an endless variety of interactive activities such as retail shopping, internet chat rooms, and voice communications").) In fact, plaintiffs' own expert testified that his opinions in this case apply equally to all ISPs. (Balci Dep. at 77-78.)

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[20] The opinions in Professor Osman Balci's expert report and testimony should be given little or no weight as expert testimony, because they consist solely of (a) factual statements not requiring any expertise, and (b) legal opinions. (Report of Osman Balci (Ex. I to Defs.' Statement of Facts)); United States v. Harris, 995 F.2d 532 (4th Cir. 1993) (expert testimony simply reiterated facts already "within the common knowledge" of jurors); Forrest Creek Assocs. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238 (4th Cir. 1987) (expert testimony amounted to a conclusion of

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More specifically, it is undisputed here that, in order to enable subscribers to access the Internet and interact with World Wide Web content and other users using CoxCom's cable Internet service, CoxCom must perform enhanced functions, including protocol conversion and protocol processing, assigning the user's cable modem and computer their IP addresses, making the user's computer visible to the Internet, providing domain name resolution, and establishing a flow between defendant's CMTS with each subscriber's cable modem to ensure that requested information is accessible only to that subscriber and not to subscribers sharing the same cable node. (Balci Dep. at 133 (confirming Report of Fred Goldstein ("Goldstein Rept.") ¶ 4 (Ex. J to Defs.' Statement of Facts)); Goldstein Dep. at 72-73; Baiers Decl. ¶ 10.) These are precisely the same computer processing applications upon which the FCC relied in finding that Internet access services are information services. See Report to Congress, 13 F.C.C.R. at 11516-17.

Although providing Internet access itself renders the cable Internet service an information service, CoxCom's service includes several other functions that make it indistinguishable from the FCC's "paradigmatic example of an information service," i.e., "the database proprietor offering subscribers access to information it maintains on-site." Report to Congress, 13 F.C.C.R. at 11538. For example, like other ISPs, CoxCom's cable Internet service provides subscribers with a variety of enhanced functions including subscriber browsing and retrieval of files from the World Wide Web, access to other users and ISPs on the Internet, and use of electronic mail. (W. Bova Dep. at 27; K. Bova Dep. at 9; Balci Dep. at 118.) Cox@Home also selects and stores online articles on its news servers to allow subscriber access and interaction with newsgroups

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law). Nonetheless, even if they are considered, his report and testimony support defendants' case.

(Balci Dep. at 118; Deposition of Michael P. Hale dated September 6, 2001 ("Hale Dep.") at 74 (Ex. K to Defs.' Statement of Facts)); provides subscribers with content such as news, weather reports, advertising and games on its welcome page and subsequent pages (W. Bova Dep. at 27-29, K. Bova Dep. at 10; Balci Dep. at 114; Def.'s Resp. to Pls.' Second Interrogs. No. 2 (Ex. G to Defs.' Statement of Facts)); provides subscribers with access to "cached" content stored on its servers for faster subscriber retrieval (Balci Dep. at 114, 119-20; Declaration of Michael P. Hale ("Hale Decl.") ¶ 8 (Ex. A to Defs.' Statement of Facts)); and offers subscribers the ability to customize their welcome pages by selecting from an array of content provided by the service (W. Bova Dep. at 31; K. Bova Dep. at 11; Balci Dep. at 115-116).

The same functions that plaintiffs and their expert attribute to the CoxCom cable Internet service the FCC has found to be functions of information services:

- electronic mail

> "The fact that an electronic mail message is stored on an Internet service provider's computers in digital form offers the subscriber extensive capabilities for manipulation of the underlying data. . . . The service thus provides more than a simple transmission path; it offers users the 'capability for . . . acquiring, storing, transforming, processing, retrieving, utilizing, or making available information' through telecommunications."

Report to Congress, 13 F.C.C.R. at 11539.

- subscriber capability to retrieve information from the World Wide Web

> "Subscribers can retrieve files from the World Wide Web, and browse their content, because their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information.'"

Report to Congress, 13 F.C.C.R. at 11538; see also Balci Dep. at 122 (subscribers' "Web surfing" requires defendant to perform protocol conversion and processing and data processing).

- subscriber capability to create personal "home pages" on the Internet

> "When subscribers store files on Internet service provider computers to establish 'home pages' on the World Wide Web, they are, without question, utilizing the provider's 'capability for . . . storing . . . or making available information' to

> others. The service cannot accurately be characterized from this perspective as 'transmission, between or among points specified by the user;' the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files."

Report to Congress, 13 F.C.C.R. at 11537.

- subscriber access to "newsgroups"

> "[W]hen Internet service providers offer their subscribers access to Usenet newsgroup articles[, the] Internet service provider receives and stores these articles . . . on its own computer facilities. . . . In providing this service, the Internet service provider offers 'a capability for generating, acquiring, storing, . . . retrieving . . . and making available information through telecommunications.' Its function seems indistinguishable from that of the database proprietor offering subscribers access to information it maintains on-site; such a proprietor offers the paradigmatic example of an information service."

Report to Congress, 13 F.C.C.R. at 11538.

In addition, CoxCom's cable Internet service stores on its regional "cache" computer servers information that it determines to be most popular with subscribers, (including popular websites) as well as proprietary content created or aggregated by the service. (Balci Dep. at 114, 119-20; Hale Decl. ¶ 8.) For example, plaintiffs' favorite websites are the popular cnn.com and espn.com. (W. Bova Dep. at 30; K. Bova Dep. at 10.) When subscribers like plaintiffs click on these sites, Cox@Home provides a copy of a webpage previously stored on its cache server at a regional data center closer to plaintiffs' home, rather than a copy obtained at that time directly from the distant Web site. (Balci Dep. at 89-90, 113, 132 (confirming Goldstein Rept. ¶ 3(c)(i)); Hale Dep. at 32-34.) This, too, is the function of an information service, because it constitutes "the database proprietor offering subscribers access to information it maintains on-site." Report to Congress, 13 F.C.C.R. at 11538.

Even plaintiffs portray CoxCom's cable Internet service as providing a "client server distribution software system" that necessarily performs "data processing." (Balci Dep. at 31-34, 58-59.) Such "data processing" is plainly an enhanced function, the antithesis of the offering of

a pure transmission path under the telecommunications service definition. See Computer I Final Decision, 28 F.C.C.2d at 295; Computer II Final Decision, 77 F.C.C.2d at 433; Report to Congress, 13 F.C.C.R. at 11539-40.

In short, it is undisputed (and indisputable) that defendant's cable Internet service offers subscribers the Internet access and enhanced functions offered by other ISPs, which the FCC and the courts already have determined to be "information services." Based on these undisputed facts, the law requires the conclusion that the cable Internet service CoxCom actually offers to the public is not a telecommunications service, and plaintiffs' claims fail as a matter of law.

3. Coxcom's Cable Internet Service Is Also A Cable Service Because It Provides Programming Services And Subscriber Interaction For The Selection And Use Of Such Programming Services.

This Court need not decide the final classification of cable Internet service, because plaintiffs' inability to prove that it is a telecommunications service is fatal to their claims. Nonetheless, particularly now that the factual record is developed, it is important to note that CoxCom's cable Internet service qualifies as both an information service and a cable service under the Act.[21]

The Act defines cable service more broadly than just traditional "video programming":

> [T]he term "cable service" means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber

[21] As the FCC long has recognized, unlike telecommunications service and information service, cable service and information service are not mutually exclusive categories, and indeed, cable service can be considered a form of information service. See Robert M. Pepper, Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy and Institutional Change, FCC OPP Working Paper Series No. 24, at 25 (Nov. 1988); H.R. Conf. Rep. No. 104-458, at 169 (1996) (amendment of cable service definition is "intend[ed] . . . to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services") (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 182 ("1996 Conference Report").

> interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6) (emphasis added). The term "other programming service" means "information that a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14), and it includes online computer services that provide information that is accessible by all subscribers. H.R. Rep. No. 98-934, at 41 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4678.[22]

In enacting the Telecommunications Act of 1996, Congress purposefully expanded the definition of "cable service," recognizing that cable services would include upstream transmissions (interaction) from subscribers and subscriber manipulation of data and related programming offerings:

> [The amendment is] intend[ed] . . . to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.

1996 Conference Report at 169, 1996 U.S.C.C.A.N. at 182 (emphasis added). The plain language of the statute includes interactivity in the definition of cable services, and any interpretation that would exclude interactivity from the definition would render part of the statute inoperative, nullifying Congress' expansion of the level of interactivity properly included under Title VI services.[23]

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[22] The definition includes the provision of information, including news, commentary and other information, even if it is of interest to only some subscribers. Id. at 41-44, 1984 U.S.C.C.A.N. at 4678-81. The definition of cable services does not "restrict the manner in which cable operators may obtain the information provided as a cable service." Id.

[23] This would violate the basic principle of statutory interpretation that a "'[s]tatute should be interpreted so as not to render one part inoperative.'" Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (citation omitted); see also Wenger v. Lumisys, Inc., 2 F.

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CoxCom's cable Internet service fits within the definition of a cable service, because it provides "other programming service" (i.e., information made available to all subscribers generally) and subscriber interaction necessary to use that programming or information. See 47 U.S.C. § 522(14). For example, just as CoxCom selects, packages and provisions multiple channels of video programming (largely supplied by third parties) to provide its traditional cable video service, CoxCom selects, packages and provisions content such as news, weather reports, advertising and games and makes this information available to all its subscribers on its welcome page and subsequent screens. (W. Bova Dep. at 27-29; K. Bova Dep. at 10; Balci Dep. at 114; Def.'s Resp. to Pls.' Second Interrogs. No. 2.) Just as subscribers to traditional cable video service can click on their remote or input a channel number to select and view a video channel, subscribers to the cable modem service can click on the "links" on the service's homepage and subsequent screens or input the names of desired websites to select and view information. (Hale Decl. ¶ 12.)

In addition, CoxCom's cable Internet service stores and provides to subscribers access to a variety of information on its own computer servers. The service selects, downloads, and stores in its regional "cache" servers popular information for fast subscriber access. (Balci Dep. at 89-90, 113, 132 (confirming Goldstein Rept. ¶ 3(c)(i)); Hale Dep. at 32-34.) Thus, when plaintiffs seek information from their favorite websites (e.g., espn.com and cnn.com), they actually are accessing information stored in the service's computer servers rather than obtaining information directly from the distant Web site. (W. Bova Dep. at 30; K. Bova Dep. at 10; Balci Dep. at 89-

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Supp. 2d 1231, 1242 (N.D. Cal. 1998) (noting that a statute should not be construed "in a way that leads to absurd or futile results at variance with policy or legislation as a whole").

90, 113, 132 (confirming Goldstein Rept. ¶ 3(c)(i)); Hale Dep. at 32-34.) Similarly, CoxCom's cable Internet service includes newsgroup services, whereby Cox@Home selects certain online newsgroups to make available to subscribers. (Balci Dep. at 118; Hale Dep. at 74.)[24] Plaintiffs admit that the foregoing information is made available to all subscribers generally and constitutes content provided to subscribers. (Balci Dep. at 118; see also Pls.' Resp. to Def.'s First Interrogs. No. 4 (Ex. N to Defs.' Statement of Facts).)[25]

Moreover, all of the information or "programming services" provided over CoxCom's cable Internet service is sent one-way over a single downstream channel to all subscribers.[26] Def.'s Resp. to Pls.' First Interrogs. No. 3.) This network arrangement, whereby information is sent downstream to the subscriber through a 6MHz channel in the upper portion of the spectrum and subscriber interaction is provided through an upstream transmission through a separate and smaller channel in the lower portion of the cable spectrum, is the same configuration that cable operators utilize to provide "video-on-demand," a cable service that allows subscribers to select

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[24] Cox@Home provides subscribers with passwords to log into the service's news computer servers which store and send newsgroup articles to subscribers. (Hale Dep. at 74.)

[25] Plaintiffs argue that a cable service is one where (a) the cable operator downloads information at the subscriber's request and (b) the information provided is video programming. (Balci Dep. at 32.) This is flatly wrong. The statute includes a broader definition of cable service that expressly includes "other programming service" in addition to "video programming." CoxCom's cable Internet service falls squarely within the definition of "other programming service," because it makes information available to all subscribers and downloads information at subscribers' request.

[26] Information is sent over a single dedicated 6MHz channel on the cable network, which is directly adjacent to similar 6MHz channels used to transmit traditional video cable programming to subscribers of the cable video service. (Def.'s Resp. to Pls.' First Interrogs. No. 3.) The cable Internet service uses a separate single channel of approximately 3.2MHz, located in a lower portion of the cable spectrum, to allow upstream transmission for subscriber interaction to select, use and manipulate data and related programming offerings. (Id.)

and view from a menu of movies that the cable operator makes available. (Hale Decl. ¶ 13.) As plaintiffs recognize, video-on-demand is indisputably a cable service. (Balci Dep. at 113.)

C. It Is Improper To Carve A Telecommunications Component Out Of An Information Service And Treat It Separately As A Telecommunications Service.

Plaintiffs cannot show that CoxCom offers a pure data transmission path service for a fee directly to the public, so they urge the Court to ignore CoxCom's actual service offering and instead segregate a portion of the service to regulate separately as a telecommunications service. Plaintiffs' argument fails both as a matter of law and as a matter of undisputed fact.

1. As A Matter Of Law, The Telecommunications Component Of An Internet Access Service Cannot Be Carved Out For Separate Regulation As A Telecommunications Service.

A provider's use of "telecommunications" to provide Internet access service cannot be equated with the provision of a separate telecommunications service. As the FCC has stated, "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information." Report to Congress, 13 F.C.C.R. at 11529. "[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services . . . that should be deemed to have separate legal status." Id. The FCC long has recognized that, when ISPs use telecommunications to provide an information service, telecommunications is merely an input for the information service and such providers are not "offering" telecommunications services to the public. Computer II Final Decision, 77 F.C.C.2d at 428-35 (1980). Entities providing information services are not thereby providing telecommunications services. See Universal Service Order, 12 F.C.C.R. at 9179.

The FCC very recently reaffirmed this fundamental principle in the Non-Accounting Safeguards Order II. In that Order, the FCC reiterated that "simply using telecommunications as a means of providing an information service to end users" "does not have the effect of imposing

common carrier obligations on information service providers." Non-Accounting Safeguards Order II, FCC 01-140, ¶¶ 32-38. The reason for this rule is that all information services include a telecommunications component, and an analysis that separated out such components would render all such providers "telecommunications service" common carriers for that component. Id.

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."

Report to Congress, 13 F.C.C.R at 11539-40 (emphasis added).

Accordingly, the cable Internet service's data transport "component" legally cannot be separated from its information-processing components and treated as a "telecommunications service" as though the cable operator were offering it separately to the public for a fee. The fact that Internet access providers, like enhanced service providers before them, "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service," Report to Congress, 13 F.C.C.R. at 11540, distinguishes them from providers of common carrier telecommunications services and excludes them from Title II regulation.

Moreover, the ownership of facilities by an information service provider is irrelevant to the analysis of the service offered to the public. The Communications Act classifies services and service providers by reference to the provider's actual service offering, rather than its ownership of facilities. Thus, for example, a reseller of local telephone service that owns no facilities to consumers' homes still is classified as a telecommunications service provider, because it is offering a pure transmission path for a fee directly to the public. See 47 U.S.C. §§ 251, 252.

Likewise, the cable operator's ownership and use of its own facilities to offer an information service does not change its status as an information service provider. As the Commission reasoned in the Report to Congress:

> When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.

Report to Congress, 13 F.C.C.R. at 11534 n.138 (emphasis added).

The FCC thus recognized that a service provider's "furnishing [of] raw transmission capacity to itself," id. at 11528, as an integral element of its Internet services sold to the public cannot be equated with the separate offering of telecommunications "for a fee directly to the public." Whether the service provider self-provisions part or all of the transmission facilities or obtains them from another entity, the nature of the provider's offering to the public does not change. The customer still is getting the same service from the provider, and the customer still is not purchasing a pure transmission path but an integrated offering of "information-service capabilities inextricably intertwined with data transport." Report to Congress, 13 F.C.C.R at 11539-40. The facilities-based service provider is a user of telecommunications rather than a provider of telecommunications service to the public.

Plaintiffs suggest that "cable modem service is not transformed into an information service merely because it is bundled with an ISP much like phone service does not become an information service because it provides voicemail." (Pls.' Resp. to Def.'s First Interrogs. No. 6.) This misses the point entirely. Both voicemail and telephone services are offered as separate services to the public, and telephone service has a separate purpose that functions independently from voicemail. As explained above, CoxCom does not offer telecommunications to the public,

but rather uses telecommunications itself in providing an information service. See Report to Congress, 13 F.C.C.R. at 11534 (to the extent an Internet service provider furnishes raw transmission capacity to itself, "one could argue" that the Internet service provider is "providing telecommunications" – but only to itself, not as either a common or a private carrier).

Plaintiffs seem to rely on the rule that a common carrier who provides a pure transmission path to the public as a separate telecommunications service offering (e.g., voice-grade telephone service or frame relay service) cannot avoid regulation as a common carrier by combining that transmission path with enhanced functions in a second offering (e.g., offering a voice-grade telephone service together with a voice mail service or an Internet service for a single price). See Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration, 13 F.C.C.R. 5318, 5474 n.827 (1997) ("Universal Service Order II"); Independent Data Communications Manufacturers Ass'n, Memorandum Opinion and Order, 10 F.C.C.R. 13717, 13720, 13722-23 (1995) ("Frame Relay Order").[27] That rule simply does not apply here, because CoxCom does not offer (and has never offered) a pure transmission path over its cable modem platform. Indeed, it is the converse of the rule that applies here: A provider who utilizes telecommunications (whether self-provisioned or obtained from another

[27] In the Frame Relay Order, the FCC faced a situation where AT&T, a common carrier, offered a basic transmission service, and separately offered an enhanced service together with the underlying basic service. AT&T charged separately for the two services – a flat monthly rate for the basic service and a per minute charge for the enhanced portion. Id. at 13720. AT&T offered customers just the basic service without the enhanced portion, and in fact 90% of AT&T's customers did purchase only the basic service. Id. The FCC also relied heavily on the fact that many other providers provided the same service under tariffs. Under those circumstances – not applicable here – the FCC concluded that AT&T could not escape regulation of its basic transmission service by selling it together with an unregulated enhanced service. Id. at 13723.

entity) as an input to provide an information service cannot be regulated as a common carrier, so long as it does not offer a pure transmission path for a fee directly to the public.

It is undisputed that CoxCom offers its cable Internet service as a single service for a single fee. (K. Bova Dep. at 13; W. Bova Dep. at 28; Gorman Decl. ¶ 7; Baiers Decl ¶ 5.) There is no allegation, nor could there be, that CoxCom offers or provides to subscribers a separate transmission path service that it is "bundling" with another service. Plaintiffs and their expert admit that CoxCom neither markets nor offers to the public two services – a pure common carrier data transmission service and a separate Internet service. (W. Bova Dep. at 28; K. Bova Dep. at 13, 27; Balci Dep. at 110; see also Baiers Decl. ¶ 11; Gorman Decl. ¶ 10.) CoxCom's subscribers request and receive a single, integrated Internet service provided over CoxCom's cable modem facilities. CoxCom (and only CoxCom) is the service provider to subscribers – the subscriber calls CoxCom to subscribe; CoxCom sends a service technician to install the service; the subscriber calls CoxCom customer service with any service problems; the subscriber signs a subscriber agreement only with CoxCom; and the subscriber receives only one bill from CoxCom for the cable Internet service. (W. Bova Dep. at 23-26; K. Bova Dep. at 12-13; Baiers Decl. ¶ 10; Gorman Decl. ¶ 8.)

Accordingly, on the facts of this case, CoxCom is not a common carrier by its own action, and it cannot be forced into that role unless Congress or the FCC makes a policy decision and adopts a change in law. This case, however, is not about a theoretical future common carrier service. It is about CoxCom's current and actual offering to the public of an "Internet connection and content" service, as it is described by plaintiffs' expert. (Balci Dep. at 104, 121.) The law will not ignore CoxCom's actual service offering and carve out a telecommunications component to force CoxCom into the role of a common carrier.

2. As A Matter Of Undisputed Fact, There Is No Independent Data Transmission Path That Functions Separately From The Enhanced Information Service Functions Of CoxCom's Cable Internet Service.

In addition to the absence of legal support for their theory that CoxCom's cable Internet service should be divided into pieces for separate regulation, the plaintiffs also lack any factual foundation for their theory. As a matter of logic, if plaintiffs would have the Court divide the service into pieces according to separate functions, each piece would have to be capable of functioning independently. That simply is not true in this case. Although CoxCom's service uses various facilities in order to transmit data, there is no separate transmission path that could function independently of the higher functions that are included in the service.

Plaintiffs' expert testified that the allegedly separate "components" of CoxCom's cable Internet service are (1) an Internet connection, and (2) content.[28] (Balci Dep. at 104, 121.) The current cable modem network architecture used for CoxCom's cable Internet services does not and cannot offer to subscribers a data transmission service or facility separate from its Internet access services and applications. (Balci Dep. at 93-94, 133 (confirming Goldstein Rept. ¶ 4); Deposition of Fred Goldstein dated September 6, 2001 ("Goldstein Dep.") at 72 (Ex. L to Defs.' Statement of Facts); Baiers Decl. ¶ 11.) Plaintiffs concede that a subscriber could neither access the Internet nor perform any other useful functions solely through the theoretical use of the cable modem platform's data transmission capability, as currently designed. (Balci Dep. at 133

[28] It is important to note that, even accepting a split like this (which would be improper), each of these "components" constitutes an information service, not a telecommunications service. Plaintiffs do not (and cannot) claim any distinction between "Internet connection" and "Internet access," which requires the same computer processing functions that the FCC has identified as information service functions. Universal Service Order, 12 F.C.C.R. at 9179-81. Thus, this argument is flawed from the outset, because neither component would qualify as a telecommunications service. We therefore assume plaintiffs mean that the separate "component" is a pure transmission path.

(confirming Goldstein Rept. ¶ 4); Goldstein Dep. at 72-73; Baiers Decl. ¶ 10.) Additional enhanced functions must be performed to enable the subscriber to transmit any data, connect to the Internet, or interact with World Wide Web content and other users. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 4); Goldstein Dep. at 72-73; Baiers Decl. ¶ 10.) The architecture of the cable modem platform would have to be changed from its current form in order for subscribers to be able to make any transmissions at all, to obtain these enhanced functions, or to access the Internet through another ISP. (Balci Dep. at 93, 133 (confirming Goldstein Rept. ¶ 4).)

CoxCom's service stands in sharp contrast to the telecommunications services offered by local exchange carriers ("LECs"), which include plain old telephone lines and digital subscriber lines ("DSL"). This distinction is described in the Wireline Services Order frequently cited by plaintiffs for the unremarkable proposition that "an end-user may utilize a telecommunications service together with an information service, as in the case of Internet access." Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, 13 F.C.C.R. 24012, 24030 (1998). This has been true since the beginning of Internet access, where subscribers used their separately provided telephone service to dial up to an ISP's network. In the Wireline Services Order, the FCC was faced with a situation where "[i]ncumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path." Id. According to the FCC, the service ILECs were providing routed data traffic "to the location selected by the customer, for example, a corporate local area network or an Internet service provider (chosen by the end user)." Id. at 24027.

Unlike telephone lines which are dedicated to individual users, CoxCom's shared cable modem network cannot provide, without substantial modification, a pure transmission path that the subscriber can use to transmit information to "a corporate local area network or an Internet service provider (chosen by the end user)." Id.; (Hale Decl. ¶ 16; Goldstein Dep. at 72-73.) The hybrid fiber coax ("HFC") portion of a cable modem network is shared by all subscribers on a neighborhood node, covering up to a thousand households. (Def.'s Resp. to Pls.' First Interrogs. No. 3.) The "shared" nature of the cable network means that all information is broadcast from the cable head-end to all subscribers on a node, and information from all subscribers on a node is sent together over the same lines to the head-end. (Id.)

Unlike DSL or traditional telephone lines, which can be used for any transmission purpose because there is only one subscriber using the dedicated line, the shared cable modem network cannot function as a "dumb pipe." (Goldstein Dep. at 72-73.) The broadcast characteristics of the shared cable network prevent CoxCom from being able to offer to subscribers its cable modem network as a pure transmission path to all ISPs, because a multitude of ISPs would broadcast simultaneously to a multitude of subscribers on each cable node. (Hale Decl. ¶ 16.) The result would be an unintelligible babble, with the individual subscriber being unable to establish or maintain contact with any ISP to obtain Internet access or carry on any kind of communication. (Id.)

There are several critical differences between telephone lines offering a pure transmission path and CoxCom's cable Internet service (all of which are undisputed facts in this case) that illustrate this point:

- CoxCom Must Provide Enhanced Functions: A user can purchase a telephone or DSL dedicated transmission path to any ISP of the user's choice and obtain Internet access, IP addressing, domain name system ("DNS") resolution, and other enhanced information service functions from that ISP. (Balci Dep. at 111, 133 (confirming Goldstein Rept. ¶ 5).)

In contrast, CoxCom does not have the technical capability to offer such a dedicated transmission path between the user and the ISP of the user's choice. (Goldstein Dep. at 72-73.) CoxCom's cable architecture requires that CoxCom itself provide the user with all of these enhanced functions. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 4); Goldstein Dep. at 72-73.) Current cable architecture mandates integrated operation of the HFC network, the CMTS, and the provisioning servers (among other network elements) to perform all Internet access functions. (Id.) For example, the CMTS cannot send information to or from the user's cable modem and computer unless these pieces of customer premises equipment have IP addresses assigned to them. (Hale Decl. ¶ 21.) The CMTS will not be able to recognize and use an IP address obtained separately by the user from an ISP that is not part of the CoxCom network. (Id.) The CMTS can only recognize and accommodate IP addresses provisioned by the dedicated dynamic host control protocol ("DHCP") server associated with the CMTS, which is part of the same network. (Id.)[29]

- CoxCom Must Specify The Internet Connection Point: A user can purchase a telephone or DSL transmission path dedicated to connecting the user to a corporate LAN or an ISP of the user's choosing. (Balci Dep. at 111, 133 (confirming Goldstein Rept. ¶ 5).) That ISP then connects the subscriber to the Internet. In contrast, CoxCom's cable modem architecture cannot offer the user a dedicated line to the destination of the user's choosing. (Goldstein Dep. at 72-73.) CoxCom offers a shared network that provides all users with the same access to the Internet through an Internet connection point or points of the service provider's choosing. (Id. at 56, 72-73; Hale Decl. ¶ 6.)

- CoxCom Must Specify The Computer Language Or Protocol Used: A user can purchase a telephone or DSL dedicated transmission path to transmit information using any language or protocol for any purpose – e.g., a data transmission to a corporate LAN using the Novell computer language, rather than the computer language used on the Internet. (Hale Dep. at 75.) In contrast, CoxCom's shared cable network requires that all subscribers use one set of protocol – TCP/IP, with encapsulation in the DOCSIS protocol – when information is transmitted over the HFC network. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 5); Hale Dep. at 75.)

- CoxCom Must Provide Unique Security Functions: A user can purchase a telephone or DSL dedicated transmission path that is not accessible by other users. In contrast, the cable HFC network is shared and accessible by all users on a "node," typically serving up to a thousand

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[29] In performing these Internet access functions, CoxCom may work independently, as in the CoxExpress service, or in part through arrangements with other entities, as in the Cox@Home service. (Def.'s Resp. to Pls.' Second Interrogs. No. 2; Hale Decl. ¶ 14.) In all cases, however, the cable modem platform's requirement for integrated operation of these network elements mandates a unified offering of all Internet access functions to the public. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 4); Goldstein Dep. at 72-73.)

homes. (Def.'s Resp. to Pls.' First Interrogs. No. 3.) Consequently, to prevent other users on the node from monitoring or receiving information intended for an individual user, CoxCom must provide enhanced security functions such as using the DOCSIS protocol to enable the CMTS to establish a "flow" to the individual user's cable modem that is not accessible by other users. (Hale Dep. at 69-70.)

- CoxCom Must Provide Net Protocol Conversion: A user can purchase a telephone or DSL dedicated transmission path to transmit any information using any protocol, without requiring any protocol conversion or with protocol conversion performed by a third party. (Balci Dep. at 137 (confirming Goldstein Rept. ¶ 6); Hale Dep. at 70.) In contrast, CoxCom must perform net protocol conversion in the process of enabling user access to the Internet: Information leaves the user's cable modem and enters the cable network in the form of TCP/IP encapsulated in DOCSIS protocol. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 5); Hale Dep. at 53-54.) To be understandable by other networks on the public Internet, information must leave CoxCom's network in the form of TCP/IP encapsulated in a more common wide-area network protocol, such as Asynchronous Transfer Mode ("ATM") or Point-to-Point Protocol ("PPP"). (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 5; Hale Dep. at 53-54.) CoxCom performs this net protocol conversion – from DOCSIS to ATM or PPP – in the CMTS. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 5); Hale Dep. at 53.)

In short, the current cable architecture does not allow CoxCom to offer subscribers a separately functioning transmission path, i.e., a "telecommunications service" that the subscriber could use to transmit any information or to connect to a separate ISP for Internet access. Plaintiffs admit that a subscriber could not retrieve or send information anywhere using CoxCom's cable modem platform if CoxCom did not provide enhanced information service functions such as IP addressing and net protocol conversion. (Balci Dep. at 133.) In order for the subscriber to make any use of CoxCom's service, CoxCom must provide several enhanced information service functions in its unified cable Internet service offering. (Balci Dep. at 133 (confirming Goldstein Rept. ¶ 4; Goldstein Dep. at 72-73; Baiers Decl. ¶ 10.) There is no separable and functional transmission path here to be regulated as a telecommunications service, and plaintiffs cannot meet their burden to prove that CoxCom is actually offering such a service to the public.