D. The Case Law Does Not Support Plaintiffs' Position That Providing "Cable Modem Services" Transforms Cable Operators Into Common Carriers.

Plaintiffs ask this Court to be the first to carve out a non-functioning telecommunications "component" from an Internet access service for regulation as a telecommunications service and to force an Internet access service provider into the role of a common carrier. The Amended Complaint relies heavily on the Ninth Circuit's opinion in AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000), but that decision is neither binding nor persuasive as to the issue raised in this case for several reasons.

In Portland, the Ninth Circuit considered a Portland ordinance that purported to require, as a condition to transfer the local cable franchise to a new operator, that the new cable operator provide non-discriminatory access to unaffiliated ISPs over its cable system – so-called "open access." In the first part of its Portland opinion, the Ninth Circuit held that the local ordinance was preempted under federal law, because cable Internet service was not a "cable service" subject to Portland's regulatory authority. 216 F.3d at 877. The open access condition in the ordinance, by its own terms, applied only so long as cable Internet service was determined to be a cable service. Accordingly, the decision that cable Internet service was not a cable service was sufficient to render the ordinance ineffective, and it was legally sufficient to resolve the controversy before the Ninth Circuit.[30]

The Ninth Circuit's holding that cable Internet services are not cable services rendered Portland's open access ordinance inapplicable, and any further discussion of the regulatory

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[30] Rather than repeat all the arguments made in CCI's pending motion to dismiss distinguishing the Portland decision from this case, defendants incorporate those arguments here and ask the Court to consider them on summary judgment.

classification was unnecessary to disposition of the case, rendering it dicta.[31] The Ninth Circuit went on, however, in the second part of its opinion to state that traditional high-speed Internet service over cable contained two "components" – (1) content, which was an unregulated "information service," and (2) "transport" or "pipeline" service, which was a "telecommunications service." Id. at 878.

Even if it were not dicta, the Ninth Circuit's analysis in the second part of its opinion is legally incorrect. Among other things, the discussion completely overlooked the Act's separate definitions of "telecommunications" and "telecommunications service." The Ninth Circuit conflated, without analysis, AT&T's use of telecommunications to offer cable Internet service with the offering of a telecommunications service itself. The reasoning in Portland is also flawed because, as discussed above, a separate component of an integrated service (e.g., the "telecommunications" component of an information service) cannot be carved out of the integrated service and subjected to regulation separately as a "telecommunications service." See Report to Congress, 13 F.C.C.R. at 11539.

It is not surprising that the Ninth Circuit's analysis was incomplete. The parties never briefed the issue discussed in the second part of the decision, and there was no record developed on the issue. In contrast, this case is the first to conduct discovery and develop a record that shows, among other things, that the cable modem platform (at least CoxCom's platform) does not and cannot offer a separate transmission path to subscribers. In any event, the Ninth Circuit

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[31] The conclusion that the Ninth Circuit's discussion is dicta finds support in the Fourth Circuit's recent decision in MediaOne Group, Inc. v. County of Henrico, 257 F.3d 356 (4th Cir. 2001), which invalidated an "open access" ordinance without requiring a determination of whether the cable Internet service is a telecommunications service; the Fourth Circuit expressly left the classification issue to the expertise of the FCC.

made clear that it was leaving the proper regulatory treatment of such services to the FCC. Portland, 216 F.3d at 879-80.

In contrast to the Ninth Circuit's Portland decision, the Fourth Circuit's recent decision in MediaOne emphasized the difference between (a) the use of telecommunications and telecommunications facilities on the one hand, and (b) the offering of telecommunications service on the other. The Fourth Circuit held that an LFA's requirement for the cable operator to provide its cable modem platform to multiple ISPs – which would thereby limit the operator's role solely to providing a facility for the transmission of information of the ISPs' choosing – would constitute a requirement that the cable operator provide "telecommunications facilities," in violation of 47 U.S.C. § 541(b)(3)(D). MediaOne, 257 F.3d at 363. The court explained that, "[b]ecause the open access condition violates § 541(b)(3)(D) of the Communications Act, our analysis of federal law may stop at that [rather than] go[ing] further [to] determine the specific regulatory classification of" the cable modem service. Id. at 364.[32]

The Fourth Circuit expressly intended that its holding would leave entirely open the regulatory classification of the cable modem Internet service. Id. This determination reflected a recognition that, as the FCC explained in its amicus brief to the court, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications

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[32] The Fourth Circuit's decision affirmed Judge Williams' holding that the "open access" ordinance violated 47 U.S.C. § 541(b)(3)(D) because it required the cable operator to provide telecommunications facilities. Judge Williams also had held that MediaOne's Internet service contains "news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access," and that "therefore it [falls] under the statutory definition of 'cable service.'" MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000), aff'd, 257 F.3d 356 (4th Cir. 2001). In Gulf Power Co. v. FCC, 208 F.3d 1263, 1278 (11th Cir. 2000), cert. granted in part, 121 S. Ct. 879 (2001), the Eleventh Circuit held that cable Internet service is an information service.

service' under the Act's specialized definition of that term." FCC Amicus Brief in MediaOne, at 21 (attached as Ex. B to July 18, 2001 letter to The Hon. Samuel G. Wilson from David E. Mills). The court explicitly left the decision regarding the regulatory classification of cable Internet service "to the expertise of the FCC." MediaOne, 257 F.3d at 365.[33]

This case is the first to develop a record of facts to determine (among other things) whether cable Internet service could be divided into separately functioning pieces. As discussed above, the record here establishes that (a) CoxCom's cable Internet service is engineered and provided to the public as a unified offering of Internet access, content and other enhanced information services functions, and (b) under the current cable modem architecture, there is no separately functioning transmission path to be carved out from this unified offering. Plaintiffs cannot meet their burden to prove the existence of a separately functioning transmission path. Nor can they cite any precedent for carving out a non-functioning telecommunications "component" from an Internet access service for separate regulation as a telecommunications service. Accordingly, plaintiffs' claims should be dismissed.

III. COUNT II FAILS BECAUSE THE DIFFERENCE IN CHARGES TO SUBSCRIBERS WITHIN AND WITHOUT THE NINTH CIRCUIT IS BASED ON A DIFFERENCE IN LAW.

Apart from the issues discussed above, plaintiffs have no facts to support their discrimination claim under Count II for violation of 47 U.S.C. § 202(a). Plaintiffs allege in Count II that CoxCom is violating 47 U.S.C. § 202(a) solely because subscribers outside the

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[33] The Fourth Circuit in MediaOne discussed what the open access ordinance would require if enforced – i.e., it would require the cable operator to provide separate telecommunications facilities. The court did not address whether this could be done, because that was unnecessary to the decision. It is clear from the opinion, however, that the Fourth Circuit believes that determining the proper classification will require an examination of the service as a whole, not in

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Ninth Circuit pay franchise fees on cable Internet service while subscribers within the Ninth Circuit do not. (Am. Compl. ¶ 37.) The undisputed facts make clear that the only reason CoxCom systems treat these two groups of subscribers differently is because of the final legal ruling in the Ninth Circuit (and nowhere else) that cable Internet service is not a cable service. A difference in charges based on a difference in applicable law is legally justified and not unreasonably discriminatory as a matter of law. This issue was briefed by the parties in defendant CCI's motion to dismiss, and defendants adopt the arguments there as support for summary judgment.

IV. THE COURT SHOULD DEFER TO THE FCC'S PRIMARY JURISDICTION.

Discovery and briefing demonstrate that, in order for plaintiffs to prevail on their theory in this case, this Court would have to establish new telecommunications policy, even while the FCC currently is considering the same issues. As the Fourth Circuit recently observed, the proper regulatory classification of cable Internet service "will have a marked effect on the provision of Internet service." MediaOne, 257 F.3d at 365.[34] The Court may defer to the primary jurisdiction of the FCC at any point in the litigation,[35] and defendants maintain that the

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pieces. The Fourth Circuit was specific in leaving to the FCC the question of how to classify what it called the whole "bundled" service. 257 F.3d at 365.

[34] Courts such as the Ninth Circuit in Portland, the Eleventh Circuit in Gulf Power and the Eastern District of Virginia in MediaOne confronted the issue of regulatory classification of cable Internet service before the FCC had taken any action to resolve this question. When the Fourth Circuit ruled in MediaOne, it noted that the FCC had initiated an NOI to examine the proper regulatory classification of cable Internet service and the policy "implications of adopting any particular classification," with the input of the myriad entities affected by these determinations. MediaOne, 257 F.3d at 365. Accordingly, the Court concluded it was proper to "leave these issues to the expertise of the FCC." Id.

[35] See, e.g., Telecom Int'l Am., Ltd. v. AT&T Corp., 67 F. Supp. 2d 189, 218-21 (S.D.N.Y. 1999) (granting partial summary judgment in part on the primary jurisdiction of the FCC);

continued...

Court should defer to the agency, even at this stage, before allowing plaintiffs to proceed on their theory.

Dismissal of plaintiffs' claims on the ground that defendant's cable Internet service is not a telecommunications service would have minimal impact on the FCC's primary jurisdiction.[36] Such a ruling would be based on current law and would not require a determination of whether the service is a cable service, an information service or both. This narrow ruling would not interfere with the FCC's ability to establish a uniform national policy. In contrast, a ruling for plaintiffs would subject CoxCom's cable Internet service to Title II regulation. Accordingly, defendants ask the Court to dismiss the case on narrower grounds and leave the issue of regulatory classification of cable Internet service, with its widespread policy implications for the growth and regulation of the Internet, to the expertise of the FCC.

V. PLAINTIFFS CANNOT SATISFY THEIR BURDEN TO PROVE THAT CCI HAS THE REQUISITE "MINIMUM CONTACTS" WITH VIRGINIA TO SUPPORT PERSONAL JURISDICTION.

CCI should be dismissed from this lawsuit. Having now had a full opportunity to develop the record, plaintiffs cannot satisfy their burden "to prove the existence of a ground of

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Jackson v. Swift-Eckrich, Inc., 836 F. Supp. 1447, 1456 (W.D. Ark. 1993) (granting post-trial motion for judgment as a matter of law based on primary jurisdiction), aff'd, 53 F.3d 1452 (8th Cir. 1995).

[36] Deferral to the FCC will not unduly delay consideration of plaintiffs' claims. The day after the Fourth Circuit's MediaOne opinion was issued, the FCC's Deputy Cable Bureau Chief William Johnson acknowledged the Fourth Circuit's deference on the classification issue and stated that the agency hoped to produce a report this fall. 4th Circuit Ruling Signals End of Local Access Moves, Communications Daily, Vol. 21, No. 135, 2001 WL 5053626 (Friday, July 13, 2001). "Where the duration of the administrative process is short, the case for deferring to the agency is great." Total Telecomm. Servs., Inc. v. Am. Tel. & Tel. Co., 919 F. Supp. 472, 482 (D.D.C. 1996), aff'd, 99 F.3d 448 (D.C. Cir. 1996).

jurisdiction by a preponderance of the evidence." Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989). The record does not establish that the exercise of personal jurisdiction over CCI would comport with the Virginia long-arm statute or the Due Process Clause. CCI's sworn statements demonstrate that CCI is a Delaware corporation with its principal place of business in Georgia; has no officers, offices or any other place of business in Virginia; does not own, maintain or possess any bank accounts in Virginia; does not maintain a telephone listing or mailing address in Virginia; is not registered or qualified to do business in Virginia; has no authorized agent to accept service of process in Virginia; does not maintain any books or records in Virginia; does not file or pay taxes in Virginia; and does not have any interest in, own or possess any real property in Virginia. (Declaration of James Hatcher, CCI's Senior Vice President, Legal and Regulatory Affairs ("Hatcher Decl.") ¶¶ 4-7, 9 & 12 (Ex. A to Def.'s Mot. to Dismiss Compl. on Jurisdictional Grounds).)

CCI already addressed several purported grounds for personal jurisdiction in its pending motion to dismiss. Rather than repeat those arguments here, CCI respectfully incorporates the arguments and evidence submitted with that motion and addresses here only the four grounds for personal jurisdiction plaintiffs identified in their discovery responses: (1) that lawyers identified CCI as a client in correspondence to the City of Roanoke; and similarly, that the Cox@Home subscriber agreement in Roanoke contains references to CCI, (2) that CCI regularly solicits and advertises business in Virginia over the Internet; (3) that CoxCom is CCI's "alter ego"; and (4) that CCI has guaranteed the performance of CoxCom obligations in Virginia. (See Pls.' Resp. to Def.'s First Interrogs. Nos. 2 & 3 (Ex. N to Defs.' Statement of Facts); Pls.' Resp. to Def.'s Second Interrogs. No. 1 (Ex. O to Defs.' Statement of Facts).) These arguments should be rejected.

A. Personal Jurisdiction Cannot Be Based On Mistaken References To CCI's Corporate Name.

Plaintiffs' reliance on mistaken references to CCI's corporate name is misplaced. Plaintiffs note that a lawyer representing CoxCom before the City of Roanoke in connection with cable franchise renewals referred to its client in correspondence as "Cox Communications, Inc." rather than CoxCom. (See Pls.' Resp. to Def.'s First Interrogs. No. 2.) Plaintiffs also note that the subscriber agreement CoxCom provided to Roanoke customers of the Cox@Home service contains references to CCI's corporate name. (Id.)[37]

Unless plaintiffs can show that the references were not mistakes (which they cannot show), the fact remains that CoxCom was the corporate entity involved in each transaction. The lawyer representing CoxCom was Wilburn Dibling, and he already explained in an affidavit that he was unfamiliar with the proper corporate names and was proposing to represent CoxCom, Inc. d/b/a Cox Communications Roanoke (not CCI).[38] (See Declaration of Wilburn C. Dibling, Jr. ("Dibling Decl.") ¶¶ 3-4.) With regard to the Cox@Home subscriber agreement that CoxCom provided to Roanoke customers, the record shows that it simply contains a typographical error. (Sangston Dep. at 12.) This is confirmed by Catherine McCollough, the general manager of the

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[37] In the deposition of Robin Sangston, plaintiffs' counsel also identified documents indicating that CCI has applied for approval to build certain facilities in Northern Virginia. As Ms. Sangston pointed out, that reference was an error, and the proper applicant was CoxCom, Inc. (Deposition of Robin H. Sangston ("Sangston Dep.") at 6, 7 (Ex. Q to Defs.' Statement of Facts).) In fact, at the time of the application, CoxCom was the franchisee in Northern Virginia and had been for nearly a year. CCI plainly could not have been the proper party for the application involved. (See Sangston Dep. at 2 (denoting land use application dated September 1, 2000); Def.'s Resp. to Pls.' First Interrogs. No. 11 (noting franchise transferred to CoxCom on September 28, 1999).)

[38] CCI brought this to the Court's attention at oral argument, and the declaration of Mr. Dibling was admitted into the record.

CoxCom Roanoke system, who has taken steps to correct the error in future printings of the form, which should reflect the trade name for CoxCom as Cox Communications or Cox Communications Roanoke. (Declaration of Catherine McCollough ("McCollough Decl.") ¶ 8 (attached as Ex. M to Defs.' Statement of Facts).) The form itself plainly is a Roanoke form, because it uses Roanoke addresses and telephone numbers, which belong to CoxCom, not CCI. (Id. ¶ 7.) It is also clear on the face of the form that it is a CoxCom form, because it states that CoxCom, Inc. is the party "doing business" with the subscriber. (Id.)

People make mistakes, and this has resulted in some confusion. But the issue is whether CCI is really the party involved in these transactions, and the answer is no.

B. Personal Jurisdiction Cannot Be Based On Operation Of A Passive Website.

CCI has already shown that it maintains only a "passive website," i.e., a website that posts general information and advertisements. (See Reply Mem. in Supp. of CCI's Mot. to Dismiss Compl. on Jurisdictional Grounds ("Def.'s Reply Mem.") at 14-17.) Nonetheless, plaintiffs continue to mischaracterize the limited features of the site, suggesting that CCI's website "permits customers ... to access their accounts" from Virginia. (See Pls.' Resp. to Def.'s First Interrogs. No. 2.)

This is incorrect. Although CCI's website is accessible to residents of Virginia and elsewhere, the website only offers general information and "links" to online visitors. (Declaration of Leslie F. Spasser, Senior Counsel, CCI's Legal Department ("Spasser Decl.") ¶¶ 3-4 (attached to Def.'s Reply Mem.).) Online visitors to the CCI website do not enter into transactions with CCI at that site. (Id. ¶ 7.) To the extent the CCI website indicates that customers can do more than access general information (such as upgrade cable service or pay one's bills online), those online services are all provided by the local cable operator through its own, separately controlled website, not by CCI. (Id. ¶¶ 5-7.) The CCI website merely provides

"links" to the local cable operator sites, and the customer does not engage in interactive online services with CCI or its subsidiaries on CCI's website. (Id. ¶ 7.)

As already briefed, merely linking online visitors from the CCI site to another website is insufficient to warrant the exercise of personal jurisdiction. See CIVIX-DDI LLC v. Microsoft Corp., 52 U.S.P.Q.2d 1501, 1507-08 (D. Colo. 1999) (a parent who operates a passive website cannot be made subject to jurisdiction based on a link to its subsidiary's website); see also 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373 (Fed. Cir. 1998) (no specific jurisdiction where parent company advertised subsidiary's products on its Internet site and forwarded visitors' e-mail inquiries to its subsidiary).

C. The Facts Do Not Support Finding Personal Jurisdiction Based On A Theoretical Alter Ego Relationship Between CCI And CoxCom.

CCI already has demonstrated that plaintiffs' arguments regarding an alter ego relationship are baseless. (See Def.'s Reply Mem. at 17-21.) Plaintiffs nevertheless argue that CCI does business in this forum through its subsidiary. Plaintiffs suggest an alter ego relationship because (1) CoxCom is wholly-owned by CCI; (2) there is an overlap in directors and officers; (3) CCI provides certain services to some CoxCom cable systems; (4) the trade name "Cox Communications" appears on certain solicitations, customer bills and vehicles; and (5) CCI has entered into contracts in connection with the Cox@Home Internet service. (Pls.' Resp. to Def.'s First Interrogs. Nos. 2 & 3; Pls.' Resp. to Def.'s Second Interrogs. No. 1.) These grounds, standing alone or in combination, are insufficient to justify a decision to pierce the corporate veil between CCI and CoxCom.

Under Virginia law, plaintiffs must meet a stringent test before the Court will disregard the corporate form. Perpetual Real Estate Servs., Inc. v. Michaelson Props., Inc., 974 F.2d 545, 547-48 (4th Cir. 1992); Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 985 F. Supp. 640, 645 n.11

(E.D. Va. 1997) (noting Virginia's "rather rigorous test for deciding when to disregard a corporation's separate identity"). Virginia courts abide by the assumption that corporations are independent and distinct from one another and will treat them as one only in "extraordinary" circumstances. Perpetual Real Estate Servs., Inc., 974 F.2d at 548 (citing Cheatle v. Rudd's Swimming Pool Supply Co., 234 Va. 207, 360 S.E.2d 828, 831 (1987)). Absent "undue domination and control" by a parent, see Perpetual Real Estate Servs., Inc., 974 F.2d at 548, and perhaps even more, the activities of the subsidiary are insufficient to establish jurisdiction over the parent. See Maday v. Toll Bros. Inc., 72 F. Supp. 2d 599, 606 (E.D. Va. 1999) (refusing to treat separate corporations as one in analyzing citizenship for diversity jurisdiction purposes because "[i]t is hornbook law that a parent and its subsidiary are treated as having separate citizenships, 'even though the parent corporation exerts a high degree of control through ownership or otherwise'").

In this matter, there is no evidence showing "undue domination and control" over CoxCom. CCI and CoxCom are separate and distinct organizations. They have separate books and records, separate accounting procedures, and separate directors' meetings. (See Supplemental Declaration of James Hatcher ("Hatcher Supp. Decl.") ¶ 7 (attached to Def.'s Reply Mem).) The fact that CoxCom is a wholly-owned subsidiary of CCI is legally insignificant. "[C]omplete ownership of a subsidiary found or transacting business in a forum is, alone, insufficient to deem the parent corporation also present in the forum." Reynolds Metals Co. v. Columbia Gas Sys., Inc., 669 F. Supp. 744, 748 (E.D. Va. 1987); see also Goldrick v. D.M. Picton Co., 56 F.R.D. 639, 642 (E.D. Va. 1971) ("The doing of business of a subsidiary corporation in a state does not without more confer jurisdiction over the non-resident parent corporation.").

Moreover, the "corporate veil . . . may not be pierced solely because of an overlap (or even identity) of corporate officers and directors." United States Fire Ins. Co. v. Allied Towing Co., 966 F.2d 820, 828 (4th Cir. 1992) (citing Crown Cent. Petroleum Corp. v. Cosmopolitan Shipping Co., 602 F.2d 474, 476 (2d Cir. 1979)); Zaist v. Olson, 227 A.2d 552, 558 (Conn. 1967); see also Hukill v. Auto Care, Inc., 192 F.3d 437, 444 (4th Cir. 1999) ("One-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying an alter-ego theory to pierce the corporate veil.") (quoting Johnson v. Flowers Indus., Inc., 814 F.2d 978, 982 (4th Cir. 1987)), cert. denied, 120 S. Ct. 1978 (2001); Maday, 72 F. Supp. 2d at 605 n.24 (two corporations who share officers and directors does not warrant disregarding separate corporate forms). Here there is some overlap in directors and officers, but it is limited. CCI and CoxCom share only one director, and they share less than a majority of common officers. (See Def.'s Resp. to Pls.' First Interrogs. No. 13.)

Likewise, the fact that CoxCom uses the trade name "Cox Communications" (not Cox Communications, Inc.) in certain solicitations, enrollment forms, customer bills, or even on its customer service vehicles, cannot establish jurisdiction over CCI. A trade name is just a name; the relevant inquiry is which corporation is using the name to do business in Virginia. The evidence shows that it is CoxCom. (See McCollough Decl. ¶¶ 6-7.) Even though CCI and CoxCom share a common advertising strategy, that does not indicate undue control by a parent over a subsidiary's marketing or business operations. See J.L.B. Equities, Inc. v. Ocwen Fin. Corp., 131 F. Supp. 2d 544, 550 (S.D.N.Y. 2001) ("[A] failure to distinguish between parent and

subsidiary on a web page is [not] sufficient to show that the parent controls the subsidiary's marketing and operational policies.").[39]

Similarly, the fact that CCI provides administrative services to some CoxCom cable systems is immaterial. It is axiomatic that "a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction." Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 945 (7th Cir. 2000), cert. denied, 121 S. Ct. 1406 (2001). As one court explained:

> Parent corporations regularly provide certain services to their subsidiaries. Such parents do not expect that performing these activities may subject them to liability because of the actions of the subsidiaries. Thus, such standard services are not sufficient minimum contacts to support the exercise of jurisdiction.

Reimer Express World Corp., 230 F.3d at 945. see also Dunn v. Svitzer, 885 F. Supp. 980, 988-89 (S.D. Tex. 1995) ("This court has been able to find no authority that states that the mere provision of administrative and data management services under contracts [between the parent and subsidiary], by itself, shows exercise and control.").

Here, CCI provides some services to support to certain CoxCom cable systems. (Def.'s Resp. to Pls.' First Interrogs. No. 10.) However, these services are performed in Georgia, and CCI charges a management fee for them. (See Declaration of Robin H. Sangston ("Sangston

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[39] At times, the CCI website collectively describes the business services of all CCI-related entities, including the services of CoxCom in Virginia. (Spasser Decl. ¶ 3.) CCI uses collective descriptions because it is convenient to do so. Listing the activities for each of CCI's subsidiaries would be enormously impractical. For similar reasons, and because federal regulations and generally accepted accounting principles require it, CCI collectively describes services provided by all CCI-related entities (and not just CCI) in CCI's Form 10-K. (See Hatcher Supp. Decl. ¶ 9.) As previously shown, such collective descriptions of the overall, combined business of CCI and its subsidiaries are not an adequate basis for jurisdiction. (See Def.'s Reply Mem. at 11-13.)

Decl.") ¶ 3 (Ex. P to Defs.' Statement of Facts).) Local CoxCom systems retain their own outside legal counsel (see Sangston Dep. at 8), prepare their own payrolls, accounts payable and bookkeeping (see Sangston Decl. ¶ 4), and pay their own local business taxes (id.).

Plaintiffs have not demonstrated and cannot show that CCI controls the every-day affairs of CoxCom.[40] Although CCI provides some administrative services to its subsidiary, this is a typical business relationship between a corporate parent and its subsidiary. Courts have refused to exercise alter ego jurisdiction in such circumstances. See, e.g., Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001) ("[A]lthough plaintiffs present evidence of numerous loans from [the parent] to its subsidiaries, the evidence indicates that the loans are interest-bearing and that [the parent] has maintained the corporate formalities . . . ."); Savin Corp. v. Heritage Copy Prods., Inc., 661 F. Supp. 463, 470 (M.D. Pa. 1987) (no control of subsidiary by parent in absence of any evidence that parent "was merely paying [subsidiary's] bills or that [parent] will not require the payment of interest on the loans that have been advanced"); Johnson v. Warnaco, Inc., 426 F. Supp. 44, 51 (S.D. Miss. 1976) (no finding of jurisdiction where "payment for corporate services rendered by [parent] . . . was accomplished by means of a 'corporate charge' which was applied to all subsidiaries"); Porter v. LSB Indus., Inc., 600 N.Y.S.2d 867, 873 (N.Y. App. Div. 4th 1993) ("[A]lthough [parent] provides [subsidiary] with certain legal, accounting, banking and insurance services, it charges market rates for those services. There is no evidence that [the parent] fails to observe corporate formalities in its relationship with its subsidiaries.").

Moreover, even proof of domination or control would be insufficient under Virginia law to treat a corporation as an alter ego. There must also be evidence "that the corporation was a

device or sham used to disguise wrongs, obscure fraud, or conceal crime." See Perpetual Real Estate Servs. Inc., 974 F.2d at 548 (citing Virginia cases). There is no evidence whatsoever to suggest that CCI has used CoxCom as a "device" or "sham" or to avoid litigation.

Finally, the fact that CCI has entered into contracts dealing with the Cox@Home Internet service is inconsequential. CCI entered into contracts with At Home in contemplation of the roll-out of the Cox@Home Internet service. (See Sangston Decl. ¶ 5.) The contracts established a framework for distribution of Cox@Home to CoxCom customers and instituted quality standards for the provision of the @Home service. (See id.) CCI's involvement in the formation of these contracts does not subject it to jurisdiction in Virginia. CCI entered into the contracts outside of Virginia, and the contracts are not being performed by CCI in Virginia. (See Sangston Decl. ¶ 5.) All the services are being provided by each local CoxCom system within its own state, including CoxCom's Roanoke system. (Id.) The contracts clearly contemplated local CoxCom systems would enter into separate arrangements with At Home regarding the Cox@Home service. (Id.) These contracts show only that CCI has ties to its subsidiaries, not that CCI has any ties to Virginia. Such arrangements have never been a valid justification for piercing the corporate veil and finding a subsidiary to be merely an alter ego. See Doe, 248 F.3d at 927 ("A parent corporation may be directly involved in . . . macro-management of its subsidiaries . . . without exposing itself to a charge that each subsidiary is merely its alter ego.").

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[40] Indeed, the service at issue in this case, cable Internet service, originates with and is provided by CoxCom, not CCI. (See Hatcher Supp. Decl. ¶¶ 5-7.)

D. CCI's Guaranty Of Performance Under A 1985 Franchise Agreement Is An Insufficient Basis For Personal Jurisdiction.

Plaintiffs suggest that because "CCI has guaranteed performance of CoxCom, Inc. obligations" (Pls.' Resp. to Def.'s First Interrogs. No. 3), the Court should find jurisdiction over CCI. This is incorrect. The record shows that, over fifteen (15) years ago, CCI guaranteed the performance of a franchise agreement that its subsidiary at the time (CoxCom did not yet exist) entered into with the Town of Vinton.[41] (Sangston Dep. at 40-41.)

The settled law is that merely signing a guaranty is an insufficient basis for general personal jurisdiction. See Reverse Vending Assocs. v. Tomra Sys. US, Inc., 655 F. Supp. 1122, 1127 (E.D. Pa. 1987) ("[A] non-resident defendant's contract . . . alone cannot automatically establish sufficient minimum contacts."); Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner, 671 N.Y.S.2d 905, 908 (N.Y. App. Div. 1st 1998) ("[T]he mere furnishing of a guaranty by a non-domiciliary on behalf of a foreign corporation does not serve to confer in personam jurisdiction."); United Buying Group, Inc. v. Coleman, 251 S.E.2d 610, 616 (N.C. 1979) ("The mere act of signing [a guaranty] or endorsement does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident.").[42]

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[41] Pursuant to the guaranty agreement dated December 31, 1985, CCI agreed to guarantee the performance by Cox Cable Roanoke, Inc. of all the terms and conditions of the franchise agreement granted by the Town of Vinton. (Sangston Decl. ¶ 6.) Since the date of the guaranty, Cox Cable Roanoke, Inc. changed its corporate name to Cox Communications Roanoke, Inc., and eventually merged into CoxCom. (Id.)

[42] Certainly, signing a guaranty of performance many years ago is not the type of "continuous and systematic" contact necessary to exercise general personal jurisdiction.

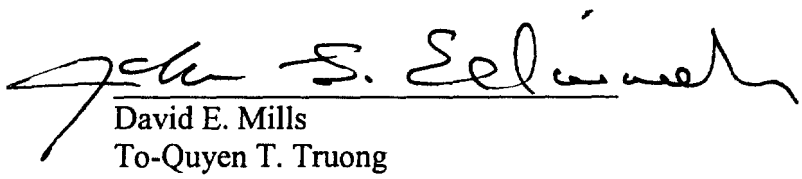
Accordingly, the courts analyze whether a guaranty of a contract is sufficient to support the exercise of specific jurisdiction, not general jurisdiction.[43] See Reverse Vending Assocs., 655 F. Supp. at 1127 (examining execution of a guaranty under specific jurisdiction test); United Fed. Savs. Bank v. McLean, 694 F. Supp. 529, 534 (C.D. Ill. 1988) (applying specific jurisdiction test with respect to signing of guaranty agreement); Renda v. Peoples Fed. Sav. & Loan Ass'n, 538 So.2d 860, 863-64 (Fla. Dist. Ct. App. 1988) (same). In order to find specific jurisdiction, "the underlying action [must] arise[] from the transactions identified by the Plaintiff in support of the exercise of jurisdiction." Chiaphua Components Ltd. v. West Bend Co., 95 F. Supp. 2d 505, 509 (E.D. Va. 2000). Here, there is no argument that CCI's 1985 guaranty of obligations later assumed by CoxCom in Vinton has any direct (or indirect) connection with the facts in this suit or with plaintiffs' causes of action.

[43] In Reverse Vending Assocs., 655 F. Supp. at 1124, a parent's execution of a guaranty of performance under contracts entered into by a wholly-owned subsidiary did not satisfy the requisites for jurisdiction. The parent's "act of guaranteeing its subsidiary's contract with plaintiff cannot be fairly characterized as an attempt to enter and exploit the Pennsylvania marketplace." Id. at 1127. The benefits and protections derived from the subsidiary could not be imputed to the parent, because "[t]o casually impute them to [the parent] would be fundamentally inconsistent with the liberty values preserved by the minimum contacts inquiry which . . . 'properly focuses on the relationship among the defendant, the forum and the litigation.'" Id. (citations omitted).

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that the Court enter summary judgment for defendants on all counts in the Amended Complaint.

Respectfully submitted,



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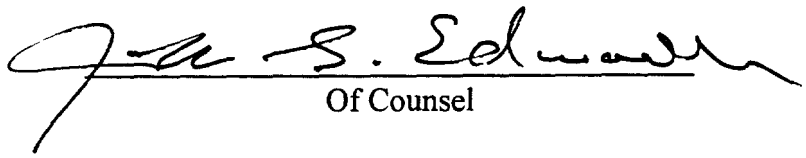
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Defendants' Motions for Summary Judgment was served upon counsel for the plaintiffs by hand delivering a true copy thereof to John P. Fishwick, Jr., Lichtenstein and Fishwick, P.L.C., 101 South Jefferson St., Suite 400, Roanoke, Virginia 24011, this 19th day of September, 2001.



Of Counsel

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

KIMBERLY D. BOVA and WILLIAM L. BOVA, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 7:01 CV 00090
v.	)	
COX COMMUNICATIONS, INC. AND COXCOM,. INC.	)	
Defendants.	)	

STATEMENT OF FACTS

Defendants Cox Communications, Inc. ("CCI") and CoxCom, Inc. ("CoxCom") submit the following statement of facts in support of their motions for summary judgment.

CoxCom Enters The Residential Internet Services Market.

1. Since 1996, CoxCom has invested billions of dollars to upgrade its cable network to increase its capacity and to handle new broadband services. (Declaration of Michael P. Hale ("Hale Decl.") ¶ 5 (attached hereto as Ex. A); Declaration of Roger Baiers ("Baiers Decl.") ¶ 4 (attached hereto as Ex. B).) As a result, CoxCom has been able to offer residential cable Internet service in many of its markets as a competitive alternative to the services of other Internet service providers ("ISPs"), including dial-up ISP services. (Hale Decl. ¶ 5 (Ex. A); Baiers Decl ¶ 4 (Ex. B).)

2. In systems where CoxCom offers cable Internet service, it is only one ISP among many, and most subscribers still obtain dial-up Internet access through one of the more than 5,000 ISPs operating in North America. (Deposition of Osman Balci dated

August 29, 2001 ("Balci Dep.") at 8, 75, 81, 109 (noting number of ISPs in North America) (attached hereto as Ex. C); Declaration of Steven Gorman ("Gorman Decl.") ¶ 11 (attached hereto as Ex. D).)

CoxCom Offers Cable Internet Service As A Single Service For A Single Fee.

3. CoxCom offers 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 (relevant portions attached hereto as Ex. E); Deposition of William Bova dated August 29, 2001 ("W. Bova Dep.") at 28 (relevant portions attached hereto as Ex. F); Gorman Decl. ¶ 7 (Ex. D); Baiers Decl. ¶ 5 (Ex. B).)[1] This residential high-speed Internet service over cable is referred to as "cable Internet service" (Am. Compl. ¶¶ 18, 22) or "cable modem service" (Am. Compl. ¶¶ 3-5, 18-19, 21-22, 29, 34, 39).

4. CoxCom offers cable Internet service under the brand names Cox@Home, Cox Road Runner and Cox Express. (Def.'s Resp. to Pls.' Second Interrogs. No. 2 (attached hereto as Ex. G).) In some systems, CoxCom has business arrangements with third parties (e.g., At Home Corporation, ServiceCo, LLC or others) to provide to CoxCom certain services or facilities so that CoxCom can provide cable Internet service to subscribers. (Id.) In other systems (i.e., Cox Express systems), CoxCom provides all the content, services and facilities. (Id.)

5. Regardless of the brand name, all CoxCom cable Internet services offer residential subscribers the complete Internet access and content service for a single price.

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[1] Only residential cable Internet service is discussed here, because only residential service (not business service) is involved in this case. (Am. Compl. ¶ 9; W. Bova Dep. at 19, 21 (Ex. F).)

(K. Bova Dep. at 13 (Ex. E); W. Bova Dep. at 28 (Ex. F); Gorman Decl. ¶ 7 (Ex. D).) In all systems, 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 (Ex. F); K. Bova Dep. at 12-13 (Ex. E); Baiers Decl. ¶ 10 (Ex. B); Gorman Decl. ¶ 8 (Ex. D).) Plaintiffs and other subscribers pay CoxCom a single price to receive access to a wide variety of information that CoxCom makes available through the cable Internet service, some of which is described below. (Am. Compl. ¶ 22.)

6. CoxCom does not offer, and has never offered, its cable Internet service in separate "components," such as a pure data transmission path service and a separate Internet access and content service. (See W. Bova Dep. at 28 (Ex. F); K. Bova Dep. at 13 (Ex. E); Balci Dep. at 110 (Ex. C); Baiers Decl. ¶ 11 (Ex. B); Gorman Decl. ¶ 10 (Ex. D).) CoxCom does not offer, and has never offered, subscribers the option to purchase only a cable modem transmission path to allow subscribers to connect to any end point of the subscriber's choosing, such as another ISP. (See K. Bova Dep. at 13, 27 (Ex. E); Balci Dep. at 110 (Ex. C); Gorman Decl. ¶ 10 (Ex. D).) In each system, CoxCom's cable Internet service provides connection to the Internet at a point of the service provider's choosing, not at a point of the subscriber's choosing. (Deposition of Fred R. Goldstein dated September 6, 2001 ("Goldstein Dep.") at 56, 72-73 (attached hereto as Ex. L); Hale Decl. ¶ 6 (Ex. A).) Subscribers can access other ISPs using CoxCom's cable Internet service only by first accessing the Internet through CoxCom's service. (Id.)

CoxCom's Internet Service Includes The Same Internet Access, Content And Applications As Other ISPs.

7. CoxCom's cable Internet service offers subscribers the same Internet access, content and applications as other ISPs, such as America Online or Earthlink. (Balci Dep. at 6, 76-77 (Ex. C); W. Bova Dep. at 27-28 (Ex. F); K. Bova Dep. at 10-11 (Ex. E); Def.'s Resp. to Pls.' First Interrogs. No. 2 (attached hereto as Ex. H); Baiers Decl. ¶ 5 (Ex. B).) For example, the Cox@Home service (which CoxCom's Roanoke system provides to the named plaintiffs) makes available to its subscribers all of the following:

a. Access to the Internet: CoxCom's cable Internet service provides subscribers with access to the Internet. (W. Bova Dep. at 27 (Ex. F); K. Bova Dep. at 9 (Ex. E).) Cox@Home has arrangements with Internet backbone facilities that provide access to a wide variety of websites on the Internet. (Def.'s Resp. to Pls.' First Interrogs. No. 2 (Ex. H).) CoxCom determines what Internet information to provide its subscribers, and it has chosen to make all Internet information available to all its subscribers. (Goldstein Dep. at 73-74 (Ex. L); Hale Decl. ¶ 7 (Ex. A).) Cox@Home makes available to subscribers a wide range of information and services provided by third parties through the Internet, including other ISPs. (Balci Dep. at 117-18 (Ex. C); Report of Osman Balci ("Balci Rept.") ¶ 3 (attached hereto as Ex. I).) These services include online chat, Internet telephony, teleconferencing and meeting services. (Balci Dep. at 117-18 (Ex. C); Balci Rept. ¶ 3 (Ex. I).)

b. Content Created or Aggregated by CoxCom: CoxCom provides Cox@Home subscribers with a welcome page and subsequent content pages containing news, community events, weather, sports, and advertising, among other things. (W. Bova Dep. at 27-29 (Ex. F); K. Bova Dep. at 10 (Ex. E); Balci Dep. at 114 (Ex. C); Def.'s Resp. to Pls.' Second Interrogs. No. 2 (Ex. G).) CoxCom or its various content suppliers aggregate or create and organize the content on the welcome page and subsequent content pages that CoxCom provides to all subscribers generally. (Balci Dep. at 117 (Ex. C); Def.'s Resp. to Pls.' Second Interrogs. No. 2 (Ex. G).) CoxCom also offers subscribers the ability to customize their welcome pages by selecting from an array of options provided by the cable Internet service. (W. Bova Dep. at 31 (Ex. F); K. Bova Dep. at 11 (Ex. E); Balci Dep. at 115-116 (Ex. C).)

c. Storage or "Caching" of Popular Content and Information: 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 (Ex.

C); Hale Decl. ¶ 8 (Ex. A).) For example, plaintiffs' favorite websites are the popular cnn.com and espn.com. (W. Bova Dep. at 30 (Ex. F); K. Bova Dep. at 10 (Ex. E).) 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 (Ex. C) (confirming Report of Fred Goldstein ("Goldstein Rept.") ¶ 3(c)(i) (attached hereto as Ex. J)); Deposition of Michael Hale dated September 6, 2001 ("Hale Dep.") at 32-34 (attached hereto as Ex. K).) The stored information plaintiffs receive from CoxCom thus may not be the same as the information then on the distant Web site. (Hale Dep. at 65 (Ex. K).) This caching feature significantly enhances plaintiffs' experience because retrieval of content from locally placed cache servers significantly speeds plaintiffs' access. (Hale Dep. at 32 (Ex. K); Goldstein Dep. at 54 (Ex. L).)

d. Internet Newsgroups: The CoxCom cable Internet service includes newsgroup service, whereby Cox@Home selects certain online newsgroups to make available to subscribers. (Balci Dep. at 118 (Ex. C); Hale Dep. at 74 (Ex. K).) Cox@Home provides subscribers with passwords to log into the service's news computer servers which are used to store and to send to subscribers these newsgroup articles. (Hale Dep. at 74 (Ex. K).) The Cox@Home service enables subscribers to retrieve and view previously stored newsgroup articles, and to post their own articles, which in turn are stored on Cox@Home newsgroup servers, forwarded to other news servers and thus made available to other participants. (Balci Dep. at 118-19, 132 (Ex. C) (confirming Goldstein Rept. ¶ 3(c)(i) (Ex. J)).)

e. Web Hosting Services: CoxCom provides a web hosting service that provides information and programming necessary for subscribers to use Cox@Home servers to create personal web pages. (W. Bova Dep. at 31, 33 (Ex. F); K. Bova Dep. at 11 (Ex. E); Balci Dep. at 132 (Ex. C) (confirming Goldstein Rept. ¶ 3(c)(iv) (Ex. J)).) Subscribers can use this programming service to store and make available to others personal web pages. (Hale Decl. ¶ 9 (Ex. A).) A subscriber can store information on the computer space CoxCom provides, and CoxCom makes that information available to others who request to view it. (Id.)

f. Electronic mail: The cable Internet service provides subscribers with their own e-mail addresses and "electronic mailboxes," i.e., space on a Cox@Home (or Cox Road Runner or Cox Express) mail server to receive, store and forward information. (W. Bova Dep. at 27 (Ex. F); Balci Dep. at 118 (Ex. C).) When subscribers seek to send an e-mail message, the domain name system ("DNS") server (discussed below) provides the fully-qualified host name and Internet Protocol ("IP") address of the mail server serving the subscribers. (Hale Dep. at 16-17 (Ex. K).) Using the information from the DNS server, the message is then sent to the mail server, which stores the message, looks inside it to identify the recipients, and communicates with the DNS server to determine the server name and IP address to send the information to the recipient. (Id.) The mail server then establishes a connection to forward the information to the next mail server in

the chain. (Id.) The recipient mail server will notify the Cox@Home server whether the message was successfully sent. (Hale Decl. ¶ 10 (Ex. A).)

g. Domain Name Service: The CoxCom cable Internet service provides IP address translation to subscribers as an integral part of the provision of the foregoing services. (Hale Dep. at 34-35 (Ex. K).) All entities on the Internet – including the subscriber's cable modem; e-mail, news and other servers; websites; and all users on the World Wide Web – are identified by an IP address. (Hale Decl. ¶ 11 (Ex. A).) The IP address consists of a long series of numbers and is very difficult to find and inconvenient to use. (Id.) Most websites and Internet users therefore have a popular web address that is associated with the technical IP address. (Id.) CoxCom's cable Internet service stores on its dedicated DNS servers, and allows subscribers to access and use, domain name resolution information, other Internet host information and programming that translates these commonly used domain names into IP addresses to enable routing. (Id.; Hale Dep. at 13, 34 (Ex. K).) Without this service, Internet access would be impractical for most users. (Hale Decl. ¶ 11 (Ex. A).)

8. CoxCom makes the foregoing information and services available to all its cable Internet service subscribers generally. (Hale Decl. ¶ 12 (Ex. A).) Just as subscribers to CoxCom's 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 "links" or type popular names of desired websites on CoxCom's cable Internet service to select and view a variety of information options such as the homepage (with weather, news and the like), games, web hosting programs, cached websites, newsgroups and other information. (Id.)

9. CoxCom, like other cable operators, has dedicated a limited available portion of its cable bandwidth to its cable Internet service. (Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H).) CoxCom's cable Internet service provides all of the information described above on a one-way downstream channel to its subscribers through a single 6 MHz "channel" of the cable network radio frequency ("RF") spectrum dedicated to that use. (Id.) This channel is directly adjacent to similar 6 MHz channels used to transmit traditional cable television video programming. (Id.)

10. Upstream traffic necessary for subscribers to select and use the information or content and otherwise use the service is provided over a separate and smaller upstream channel in a lower portion of the RF spectrum dedicated to such signals. (Hale Decl. ¶ 13 (Ex. A).) This network arrangement, whereby information is sent downstream, one way, to the subscriber through a single 6 MHz channel in one portion of the spectrum, and subscriber communications are sent upstream to the cable operator through a different, smaller channel in another portion of the cable spectrum, is the same configuration that cable operators utilize to provide "video on demand," a service that allows subscribers to select and view from a menu of movies that a cable operator makes available. (Id.)

CoxCom's Cable Modem Architecture Cannot Provide An Independently Functioning Transmission Path Separate From Any Enhanced Functions.

11. The current cable modem network architecture used for CoxCom's cable Internet services does not and cannot offer to subscribers a transmission service or facility separate from its Internet access services and applications. (Balci Dep. at 93-94, 133 (Ex. C) (confirming Goldstein Rept. ¶ 4 (Ex. J)); Goldstein Dep. at 72 (Ex. L); Baiers Decl. ¶ 11 (Ex. B).) Enhanced functions such as assignment of IP addresses, protocol conversion and DNS functions must be performed by CoxCom to enable the subscriber to transmit or receive any information using the cable modem platform to or from anywhere. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 4 (Ex. J)); Goldstein Dep. at 72-73 (Ex. L); Baiers Decl. ¶ 10 (Ex. B).) The current cable modem architecture requires CoxCom to perform these functions as an integral part of its network. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 4 (Ex. J)); Goldstein Dep. at 72-73 (Ex. L).)

12. In some Cox@Home systems (such as Roanoke), CoxCom works with At Home Corporation (as well as other companies) to provide some of the capabilities and elements necessary to the Internet access and content service. (Def.'s Resp. to Pls.' First Interrogs. No. 2 (Ex. H).) In other systems, such as Cox Express systems, CoxCom has no arrangement with At Home and obtains elements necessary to provide Internet services from other parties or supplies them itself. (Def.'s Resp. to Pls.' Second Interrogs. No. 2 (Ex. G); Hale Decl. ¶ 14 (Ex. A).)

CoxCom's Shared Cable Modem Architecture Requires It To Perform Different Functions And Offer A Different Service Than The Dedicated Transmission Lines Offered By Telephone Companies.

13. The CoxCom cable Internet service is provided over a shared cable network architecture that is unlike a telephone company's dedicated-loop network architecture. (Balci Dep. at 111, 133 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)); Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H).) CoxCom's basic cable system architecture is typically referred to as "tree-and-branch." (Balci Dep. at 111 (Ex. C); Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H); Baiers Decl. ¶ 8 (Ex. B).) CoxCom's cable network (which it uses to deliver all of its residential communications services) starts with the coaxial cable coming out of the subscriber's home. (Hale Decl. ¶ 15 (Ex. A).)

14. For cable Internet services, the subscriber's cable modem is connected to the same coaxial cable used to connect the subscriber's television to the traditional video programming service. (W. Bova Dep. at 19-20 (Ex. F); Goldstein Dep. at 49 (Ex. L).) The coaxial cable connects subscribers' homes in each local area to a local cable node. (Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H); Goldstein Dep. at 49 (Ex. L).) The

cable node aggregates traffic to and from subscribers in the neighborhood and connects to the cable modem termination system ("CMTS") at the cable head-end by hybrid fiber coaxial lines ("HFC network"). (Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H).) The other side of the CMTS connects to additional network elements used to provide the cable Internet service, which network elements ultimately connect to the public Internet at Network Access Points. (Id.)

15. The "shared" nature of the cable network means that all information is broadcast from the CMTS to all subscribers on a node, and information from all subscribers on a node is sent together over the same lines to the CMTS. (Def.'s Resp. to Pls.' First Interrogs. No. 3 (Ex. H).) The bandwidth between the cable modem and the cable operator's head-end is "shared" among all subscribers on a neighborhood node, which typically serves up to a thousand homes. (Id.)

16. Telephone networks are designed entirely differently. (Balci Dep. at 111, 133 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)).) Telephone networks have a dedicated line (not a shared line) between each user and the telephone company's central office. (Id.) A user can purchase a telephone or digital subscriber line ("DSL") for a dedicated transmission path to transmit any information to any destination of the user's choosing – e.g., a voice call to an individual, a data call to any ISP of the user's choice to request Internet access service, or a data transmission to an office's corporate local area network ("LAN"). (Id.)

17. The current cable modem platform does not have the technical capability to offer a dedicated transmission path between the user and the ISP of the user's choice. (Goldstein Dep. at 72-73 (Ex. L).) CoxCom provides connection to the Internet at a point

specified by the service provider, rather than at a point specified by individual subscribers. (Id. at 56, 72-73; Hale Decl. ¶ 6 (Ex. A.).) 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 (Ex. A).) The result of offering a "pure transmission path" would be an unusable network, 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.)

18. CoxCom, as the cable network operator, must provide the user with the higher functions that are necessary to access the Internet. (Goldstein Dep. at 72-73 (Ex. L).) In order to use the cable modem network for any transmissions at all, the current cable modem architecture requires the HFC network, the CMTS, and the provisioning servers (among other network elements) to work together (a) to assign the user's cable modem and computer their IP addresses, (b) to make the user's computer visible to the Internet, (c) to provide DNS resolution, and (d) to perform other enhanced functions. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 4 (Ex. J)); Goldstein Dep. at 72-73 (Ex. L).)

19. 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.[2] (Hale Decl. ¶ 21 (Ex. A).) The CMTS will not be able to

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[2] Because of their limited supply, IP addresses are assigned on a "dynamic" basis rather than permanent basis, such that new IP addresses are assigned each time a user seeks access to the Internet. (Balci Dep. at 121-22 (Ex. C).) The IP addresses are

continued...

recognize and use an IP address obtained separately by the user from an ISP that is not part of the CoxCom network (i.e., the IP addresses must be known to and within the capacity of the CMTS equipment and other network elements). (Id.) The CMTS can only recognize and accommodate IP addresses provisioned by the dedicated DHCP server associated with the CMTS, which is part of the same network. (Id.) Likewise, a user cannot obtain DNS information from another ISP to facilitate communications unless CoxCom has provided the user with access to the Internet to reach that ISP. (Hale Decl. ¶ 21 (Ex. A); Goldstein Dep. at 72-73 (Ex. L).)

20. CoxCom must perform network telemetry and other functions to ensure proper bandwidth sharing among users of the same bandwidth capacity and to avoid congestion on the network, e.g., by having the CMTS set bandwidth limiting parameters for customer premises equipment. (Balci Dep. at 137 (Ex. C) (confirming Goldstein Rept. ¶ 6 (Ex. J)); Hale Decl. ¶ 17 (Ex. A).) Services such as caching popular content are also critical to enable the high speed that plaintiffs identify as the most important aspect of the service. (W. Bova Dep. at 15-16, 22 (Ex. F).)

21. The Cox@Home residential subscriber agreement contains restrictions on certain uses of the service – e.g., a prohibition on use of the service to operate a commercial computer server – to prevent congestion on the shared cable network. (Def.'s Resp. to Pls.' Second Interrogs. No. 6 (Ex. G).) These restrictions are set forth in the Excite@Home Acceptable Use Policy. (Id.) Cox Road Runner and Cox Express

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...continued

assigned by a dedicated dynamic host control protocol ("DHCP") server, which is another essential part of CoxCom's cable Internet service. (Id. at 121.)

systems also have Acceptable Use Policies applicable to subscribers in those systems. (Gorman Decl. ¶ 9 (Ex. D).)

CoxCom Performs Net Protocol Conversion On Information.

22. The shared nature of the cable modem network requires the use of one common computer language or "protocol" to be specified by the cable operator. (Hale Dep. at 75 (Ex. K).) CoxCom systems use the Data Over Cable Service Interface Specification ("DOCSIS") protocol to transmit data over the HFC portion of their networks. (Balci Dep. at 128 (Ex. C); Hale Dep. at 56, 69-70 (Ex. K).)

23. Among other functions, CoxCom's CMTS utilizes the DOCSIS protocol to provide a security function for subscribers by establishing a "flow" to each individual user's cable modem that is not accessible by other users. (Hale Dep. at 69-70 (Ex. K).) This security function is necessary to prevent other users sharing the same cable node from monitoring or receiving information intended for an individual user as it traverses the HFC network. (Id.)

24. Telephone companies offering DSL and telephone lines need not provide the security functions required on cable networks, because they use a transmission path that is dedicated to the individual user and is not accessible by others. (Balci Dep. at 137 (Ex. C) (confirming Goldstein Rept. ¶ 6 (Ex. J)); Hale Dep. at 70 (Ex. K).) 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 (Ex. K).)

25. In providing the cable Internet service, CoxCom specifies that all subscribers must utilize the TCP/IP computer language of the Internet, with encapsulation

in the DOCSIS protocol when information is transmitted over the HFC network. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)); Hale Dep. at 75 (Ex. K).) Information leaves the user's cable modem and enters CoxCom's cable network in the form of TCP/IP encapsulated in DOCSIS protocol. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)); Hale Dep. at 53-54, 75 (Ex. K).)[3] DOCSIS was specifically designed for cable systems, and it is not used in other types of networks. (Hale Decl. ¶ 18 (Ex. A).)

26. 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 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)); Hale Dep. at 53-54 (Ex. K).) CoxCom performs this net protocol conversion – from DOCSIS to ATM or PPP – in the CMTS. (Balci Dep. at 133 (Ex. C) (confirming Goldstein Rept. ¶ 5 (Ex. J)); Hale Dep. at 53 (Ex. K).)

CoxCom's Cable Internet Service Adds Content To Information Sent And Received By Subscribers, Including Electronic Mail And Newsgroup Articles.

27. When subscribers send or receive information using CoxCom's cable Internet service, the service changes the information as sent or received in certain circumstances. For example, when plaintiffs send an e-mail message, that message is

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[3] The user's cable modem and computer are pieces of customer premises equipment ("CPE"), similar to cable set-top boxes that also communicate with the cable head-end in the provision of traditional cable video service. (Hale Dep. at 52 (Ex. K); Hale Decl. ¶ 19 (Ex. A).) The user controls the cable modem, computer and set-top box by turning them on and off, and the user may buy the cable modem from a retailer or buy or lease it from the cable operator. (Balci Dep. at 96, 126-27 (Ex. C); Hale Dep. at 52 (Ex. K).)

sent to a Cox@Home mail server. (Hale Dep. at 16 (Ex. K).) Before forwarding the information to the next mail server in the chain to the recipient, the Cox@Home mail server creates and adds to the e-mail message a header message that contains the time and date the message was sent, information regarding the Cox@Home mail server as the sending server, and the "time to live" ("TTL") for the message. (Goldstein Dep. at 35 (Ex. L).) With in-coming e-mail, the Cox@Home mail server adds the time and date it received the message, information regarding the Cox@Home server, and the TTL for the message. (Id. at 46.)

28. Cox@Home news servers similarly append information concerning the relevant servers, the time and date of posting of each newsgroup article, and its TTL value. (Goldstein Dep. at 46 (Ex. L).) A TTL field also is attached to other packets of information such as subscriber requests for a webpage and the information provided to the subscriber in return. (Id.) Each time such an information packet enters the Cox@Home network, it decreases the value of the TTL field by one. (Id.) The information will cease to exist (and will no longer travel on the networks) when the value of the TTL field is reduced to zero. (Id.; Hale Decl. ¶ 20 (Ex. A).)

CoxCom Provides The Cox@Home Service To The Named Plaintiffs And Collects And Pays Cable Service Franchise Fees To Roanoke LFAs.

29. In the Roanoke area, CoxCom operates cable systems in the City of Roanoke, County of Roanoke, and Town of Vinton ("Roanoke LFAs"). (Declaration of Catherine McCollough ("McCollough Decl.") ¶ 4 (attached hereto as Ex. M).) CoxCom's franchise agreements with these LFAs are substantially identical, and each franchise agreement requires CoxCom to pay the LFA a franchise fee of five percent of gross revenues from the operation of the cable system. (Id. ¶ 5.)

30. As in other CoxCom systems, the Roanoke LFAs impose a cable service franchise fee on gross revenues from the provision of cable Internet services, and CoxCom passes through these government-imposed fees to subscribers and itemizes the charges as cable service franchise fees. (McCollough Decl. ¶ 5 (Ex. M); see Pls.' Opp'n to CCI's Mot. to Dismiss on Jurisdictional Grounds at 4; Bova's Cable Bill (attached as Ex. B to Pls.' Reply Mem. In Support of Its Mot. to Certify Class Action).)

CoxCom No Longer Collects Cable Service Franchise Fees On Cable Internet Service In The Ninth Circuit.

31. In June 2000, the Ninth Circuit issued its decision in AT&T Corp. v. City of Portland, holding that cable Internet service is not a "cable service." 216 F.3d 871 (9th Cir. 2000). Although disagreeing with the Ninth Circuit's analysis, CoxCom cable systems in the Ninth Circuit acknowledged the holding that cable Internet service is not a "cable service" and thus suspended payment and collection of cable franchise fees on revenues generated by cable Internet services, pending further clarification of the classification issue by the FCC. (Deposition of Robin H. Sangston ("Sangston Dep.") at 33 (relevant portions attached hereto as Ex. Q).)

32. Outside the Ninth Circuit, there is no final court decision holding that cable Internet service is not a cable service, and LFAs continue to impose cable service franchise fees on CoxCom's cable Internet service. (See McCollough Decl. ¶ 5 (Ex. M).) Where required to pay these fees to LFAs, CoxCom systems continue to collect from subscribers and to pay to LFAs cable service franchise fees on cable Internet services. (See McCollough Decl.¶ 5 (Ex. M); Am. Compl. ¶ 24 (incorporating CCI Reply Comments).)

The Bovas File This Class Action Lawsuit.

33. On the day this suit was filed, plaintiffs Kimberly and William Bova, residents of Roanoke, Virginia, first subscribed to CoxCom's Cox@Home service. (Am. Compl. ¶ 8.) Plaintiffs purport to represent a nearly nationwide class of persons (excluding residents of California, Nevada, Arizona, or Idaho) who subscribe to the residential cable Internet services provided by CCI or "its affiliates" and who have paid a franchise fee to CCI or "its affiliates" in connection with receipt of those services. (Id. ¶ 11.)

34. Plaintiffs bring two counts, both under Title II of the Communications Act, alleging that they have been charged an "illegal franchise fee" because cable Internet services are allegedly telecommunications services, not cable services. (Am. Compl. ¶ 29.) They say it is "double counting" to impose a franchise fee on cable Internet service when they already pay a franchise fee on traditional cable video programming service. (W. Bova Dep. at 17-19 (Ex. F).) They claim that the calculation of the fee is incorrect, because it includes revenues from cable Internet service. (Id.) They do not challenge the amount of the charge for the cable Internet service itself. (Id.)

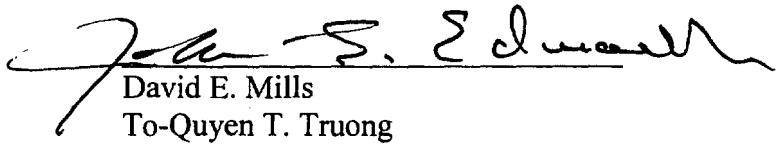
35. Plaintiffs initially sued CCI, a Delaware corporation with its principal place of business in Atlanta, Georgia. (Am. Compl. ¶ 9.) In discovery, plaintiffs have set forth the bases on which they claim that jurisdiction over CCI is proper. (See Pls.' Resp. to Def.'s First Interrogs. Nos. 2 & 3 (attached hereto as Ex. N); Pls.' Resp. to Def.'s Second Interrogs. No. 1 (attached hereto as Ex. O)). CCI is not "transacting business" in the Commonwealth (see Declaration of James A. Hatcher ("Hatcher Decl.") ¶¶ 8, 11, 15 (Ex. A to Def.'s Motion to Dismiss Compl. on Jurisdictional Grounds); Declaration of Leslie F. Spasser ("Spasser Decl.") ¶¶ 3-7 (attached to Def.'s Reply Mem. in Supp. of

CCI's Mot. to Dismiss Compl. on Jurisdictional Grounds ("Def.'s Reply Mem."); Declaration of Robin H. Sangston ("Sangston Decl.") ¶ 5 (attached hereto as Ex. P); McCollough Decl. ¶ 4 (Ex. M); Sangston Dep. at 6, 7, 12, 40 (Ex. Q); Def.'s Resp. to Pls.' First Interrogs. No. 11 (Ex. H); Declaration of Wilburn C. Dibling, Jr. ("Dibling Decl.") ¶¶ 3-4 (admitted into the record at oral argument)), it has no substantial corporate presence in the Commonwealth (see Hatcher Decl. ¶¶ 5-7, 9, 12-13 (Ex. A to Def.'s Motion to Dismiss Compl. on Jurisdictional Grounds)), it has not contracted to supply services or things in the Commonwealth (see id. ¶¶ 10, 14-15; Sangston Decl. ¶¶ 3-4 (Ex. P)), and it lacks any "continuous and systematic" contact with the Commonwealth (see Hatcher Decl. ¶¶ 4-13 (Ex. A to Def.'s Motion to Dismiss Compl. on Jurisdictional Grounds); Spasser Decl. ¶¶ 3-7 (attached to Def.'s Reply Mem.); Sangston Decl. ¶¶ 5-6 (Ex. P)).

36. CoxCom, a CCI subsidiary, is a distinct and independent entity from CCI. (See Supplemental Declaration of James A. Hatcher ("Hatcher Supp. Decl.") ¶¶ 6-9 (attached to Def.'s Reply Mem.); Sangston Decl. ¶¶ 3-4 (Ex. P); McCollough Decl. ¶¶ 4-8 (Ex. M); Def.'s Resp. to Pls.' First Interrogs. Nos. 10, 13 (Ex. H); Sangston Dep. at 8, 24 (Ex. Q).) CoxCom owns and operates cable television systems in locations throughout the country, including the cable system in Roanoke, Virginia. (See Hatcher Decl. ¶ 16 (Ex. A to Def.'s Motion to Dismiss Compl. on Jurisdictional Grounds).) Through these cable networks, CoxCom provides advanced video, voice and data services. (Id. ¶¶ 16-17; Hatcher Supp. Decl. ¶ 5 (attached to Def.'s Reply Mem.).) In Roanoke (where the named plaintiffs reside), CoxCom provides analog and digital video programming, as well as an Internet access and content service under the brand

Cox@Home. (McCollough Decl. ¶ 4 (Ex. M).) CoxCom, not CCI, collects the franchise fees from the named plaintiffs in Roanoke, Virginia. (Hatcher Decl. ¶¶ 16-17 (Ex. A to Def.'s Motion to Dismiss Compl. on Jurisdictional Grounds).)

Respectfully submitted,



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Dated: September 19, 2001

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Statement of Facts was served upon counsel for the plaintiffs by hand delivering a true copy thereof to John P. Fishwick, Jr., Lichtenstein and Fishwick, P.L.C., 101 South Jefferson St., Suite 400, Roanoke, Virginia 24011, this 19th day of September, 2001.

Of Counsel