EX PARTE OR LATE FILED

ORIGINAL

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

WASHINGTON, D.C.

1200 NEW HAMPSHIRE AVENUE, N.W. · SUITE 800 · WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 · FACSIMILE 202-776-2222

ONE RAVINIA DRIVE · SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

TO-QUYEN T. TRUONG
DIRECT DIAL 202-776-2058
ttruong@dlalaw.com

ORIGINAL

November 15, 2001

RECEIVED

NOV 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation
GN Docket No. 00-185 – Inquiry Concerning
High-Speed Access to the Internet Over Cable and Other Facilities

Dear Ms. Salas:

On Wednesday, November 14, 2001, Alexandra M. Wilson and the undersigned, counsel for Cox Communications, Inc. and its subsidiaries, met with Matthew Brill and Stacy Robinson, legal advisors to Commissioner Abernathy, regarding the above-referenced proceeding. During the meeting, we discussed with Mr. Brill and Ms. Robinson the technical, legal and policy grounds supporting a finding that cable Internet service is not a telecommunications service, and provided documents summarizing these grounds. A copy of the documents given out at the meeting is attached hereto.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary's office for the above-captioned docket and a copy is being provided to Mr. Brill and Ms. Robinson. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

To-Quyen Truong

Enclosure
cc (w/o att.): Matthew Brill
Stacy Robinson

No. of Copies rec'd 0

CLASSIFICATION OF CABLE INTERNET SERVICE

Presentation of Cox Communications, Inc. and Its Subsidiaries

I. Congress' And The Commission's Deregulatory Approach Has Made Investment In Cable Broadband Deployment Possible.

A. The 1996 Telecommunications Act recognized that regulations hamper the cable industry's ability to obtain capital to upgrade and deploy new services.

B. Cable operators are new entrants who have invested billions to develop new technology and jumpstarted competition in the provision of broadband services.

C. Cox has invested over $20 billion to acquire and upgrade cable systems for new broadband services. Full capacity of upgraded systems is required to support new services, including not only Internet, but also digital TV and telephone services.

II. The Cable Modem Shared Network Architecture Does Not And Cannot Provide A Pure Transmission Path Service.

A. DSL and dial-up telephone services provide a dumb pipe to transmit any information anywhere and don't do anything to the information: voice on phone call, image on fax, data on transmission to ISP or corporate local area network.

B. In contrast, information cannot be transmitted anywhere using the cable modem network unless the cable operator also provides IP addressing, Domain Name Server address translation, net protocol conversion, security and other enhanced functions. The Commission has held each of these functions to be an information service. (Stevens Report.)

C. Cox and other cable operators are conducting multiple ISP trials to increase consumer choice. Even under a multiple ISP model, the cable operator would have to integrate the ISPs into the cable network and provide enhanced functions. Given cable networks' limited capacity, subscribers' differing preferences for individual ISPs, and ISPs' differing needs for interconnection, capacity, etc., the cable operator must exercise discretion and negotiate individual terms with ISPs.

III. Cable Internet Service Is An Information Service, Not A Telecommunications Service.

A. The Communications Act defines telecommunications service by reference to the provider's actual offering "for a fee directly to the public," not its inputs or components.

1. A telecommunications service must be no more than a pure transmission path, offered separately to the public with no enhanced functionality. (Stevens Report; Non-Accounting Safeguards Order II.)

2. Including transport within the service does not satisfy the telecommunications service definition. An information service "bundles with it a telecommunications component, making it impossible for an information service offered to the public

to qualify as a telecommunications service." (Non-Accounting Safeguards Order II)

B. The "Actual Offering" rule applies to self-provisioning Internet service providers. A self-provisioning Internet service provider's "furnishing of raw transmission capacity to itself" cannot be equated with the offering of telecommunications service "for a fee directly to the public," because "it does not affect the relationship between the information service provider and its subscribers." (Report to Congress, Non-Accounting Safeguards Order II.)

C. Cox's cable Internet service is an information service, not a telecommunications service. It does not provide only a pure transmission path. Instead, it provides all the enhanced functions offered by other ISPs, already determined by the Commission to be information services, plus additional services and content.

IV. Cable Internet Service Is Also A Cable Service.

A. The 1996 amendment of the cable service definition was "intended to reflect the evolution of cable to include interactive services such as information services and enhanced services." (1996 Conference Report.)

B. Cable Internet service is "other programming service," defined as "information that a cable operator makes available to all subscribers generally," and included in the cable service definition. (47 U.S.C. §§ 522(6), (14).)

V. Classification Of Cable Internet Service As An Information Service And Cable Service Satisfies The Commission's Policy Objectives.

A. Consistent with Congress' warning against regulation of the Internet, classification of cable Internet service as an information service and cable service would allow the Commission to refrain from regulation under current competitive market conditions, in which there is no evidence of a market failure. Conversely, if the Commission classifies cable Internet service as a telecommunications service and does not forbear from regulation, the creation and imposition of an entire framework, necessary to regulate cable Internet service as a common carrier service, would involve substantial delay, create uncertainty and negativity in the market, and ultimately hinder broadband deployment. Moreover, treating cable Internet service as a telecommunications service would expose the entire Internet to common carrier regulation.

B. Classification of cable Internet service as an information service and cable service would allow the Commission to develop a coherent national policy to promote broadband deployment, rather than permitting policy to be made in a piecemeal fashion in the courts, local governments and state legislature.

C. Such classification would preserve the Commission's jurisdiction and authority over broadband services. Should the market fail in some fundamental respect, the Commission would retain authority under Title I and Title VI to take corrective actions permitted by the Act.

TABLE OF CONTENTS

CLASSIFICATION OF CABLE INTERNET SERVICE

	DOCUMENT	TAB
1.	Letter to Cable Services Bureau Chief	A
2.	Statement of Facts	B
3.	NOI Comments Executive Summary	C

COX ENTERPRISES, INC. 1225 Nineteenth Street, N.W., Suite 450 Washington, D.C. 20036 (202) 296-4933
Internet: alexandra.wilson@cox.com

Alexandra M. Wilson
Chief Policy Counsel

August 15, 2001

VIA HAND DELIVERY

W. Kenneth Ferree, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Ferree:

Cox Communications, Inc. ("Cox") respectfully submits this letter to address several issues you raised during our recent meeting to discuss Cox's comments in the above-referenced proceeding concerning the regulatory classification and treatment of cable modem and other broadband services. As discussed below, the regulatory classification of these services does not depend on the facilities used by the provider, but on the nature of the service offered to the public. While "telecommunications service," "information service" and "cable service" all may utilize "telecommunications," for a service to qualify as a "telecommunications service," the telecommunications must be not merely an input for the service, but the very service that is offered "for a fee directly to the public."[1] Cable modem service providers are not offering a pure transmission path for a fee directly to the public. Rather, cable modem service integrates high-speed Internet access, content, information and services, qualifying it as an "information service." Moreover, because cable modem service provides "programming" (i.e., "information that a cable operator makes available to all subscribers generally") and "subscriber interaction . . . for the selection or use of such" programming, the service also fits the definition of a "cable service."[2] Accordingly, under the Communications Act's definitions, cable modem service is not a telecommunications service, but an information service and a cable service.

---

[1] 47 U.S.C. § 153(46).

[2] 47 U.S.C. § 522(6), (14).

A. Cable Modem Service Is Not a Telecommunications Service Because It Is Not an Offering of Pure Data Transmission for a Fee Directly to the Public.

The Communications Act regulates providers by reference to the nature of the services they offer, not the facilities they use. Because regulatory obligations do not attach to "telecommunications facilities" but to "telecommunications services," the Commission need not even concern itself with whether a cable network may be a "telecommunications facility" under certain circumstances. Such a reference is relevant only to the enforcement of Section 541(b)(3)(D), which provides that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of . . . a transfer of a franchise."[3] In applying Section 541(b)(3)(D) to an "open access" local ordinance, a court need not decide whether the cable modem service offered by the cable operator to the public constitutes a "telecommunications service." Rather, the local ordinance is invalid if the court finds that the requirement for the cable operator to provide its cable system to multiple Internet service providers ("ISPs") – thereby limiting the operator's role solely to providing a facility for the transmission of information of the ISPs' choosing – constitutes a requirement that the cable operator provide "telecommunications facilities."

This was precisely the narrow ruling of the Fourth Circuit Court of Appeals in *MediaOne Group, Inc. v. County of Henrico*.[4] The Court in that case 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.[5] The Court expressly intended that its "telecommunications facilities" holding would leave entirely open the regulatory classification of the operator's cable modem service. This determination reflects a recognition that, as the Commission explained in its amicus brief to the Court, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term."[6]

Section 153(43) of the Communications Act 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."[7] The use of "telecommunications" is necessary to all services that require the transport of information electronically from Point A to Point B.[8] Consequently, a finding that the cable operator uses

---

[3] 47 U.S.C. § 541(b)(3)(D) (emphasis added).

[4] 21 U.S. App. Lexis 15540, No. 00-1680 (4th Cir. July 11, 2001) ("*MediaOne*").

[5] *Id.*, slip op. at 15.

[6] FCC Amicus Brief in *MediaOne*, at 21.

[7] 47 U.S.C. § 153(43).

[8] One could argue that even traditional video and radio programming offered by cable operators, satellites, television and radio broadcasters utilize telecommunications, because

"telecommunications" or even "telecommunications facilities" to provide cable modem service would not and does not determine whether the service is classified as a telecommunications service subject to Title II regulation, an information service under Title I, or a cable service under Title VI.[9]

Section 153(46) of the Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."[10] Thus, the Act defines "telecommunications service" by reference to the availability of the transmission path as a separate, commercial offering to the public from the service provider.[11] As the Commission explained in the Stevens Report to Congress:

---

they involve the transmission of information between or among points specified by the service provider as the user of the transmission capability.

[9] Although Congress did not define the term "telecommunications facility" in the Act, it has used the phrase in provisions other than Section 541(b)(3)(D) to refer to the physical plant and equipment used to transmit services that are not common carrier in nature. For example, Section 397(13), which relates to the public broadcasting service, defines "public telecommunications facilities" as "apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, [etc.] . . . ." 47 U.S.C. § 397(13). Yet, broadcast services, like cable services, are defined by statute not to be common carrier services. *See* 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"); 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."). Clearly, therefore, the use of "telecommunications facilities" does not render the service provider a common carrier under the Communications Act.

Likewise, the possible use of the cable platform as a "telecommunications facility" would not take it outside of the definition of a "cable system." Section 522(7) defines a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7) (emphasis added). Congress thus defines a "cable system" by reference to the inclusion of video programming service, not by reference to the exclusion of other uses of the system such as its possible use as a "telecommunications facility." Indeed, only the facilities of common carriers – i.e., carriers offering telecommunications services, not simply using telecommunications – are expressly exempted from the cable system definition (except to the extent they are used for the transmission of video programming directly to subscribers). *Id.*

[10] 47 U.S.C. § 153(46) (emphasis added).

[11] *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

> This functional approach is consistent with Congress' direction that the classification of a provider should not depend on the type of facilities used. . . . Its 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.[12]

The Commission also recently reiterated in the Non-Accounting Safeguards Order 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."[13]

Application of this standard to cable modem service makes clear that the service is not a telecommunications service. Focusing on Cox's cable modem service as an example,[14] Cox does not offer pure data transmission for a fee directly to the public. Rather, while Cox may use telecommunications as an input, it offers a cable modem service to the public that integrates high-speed Internet access, content, information and services.[15] Like other ISPs such as

---

01-140, at ¶ 18 (rel. Apr. 27, 2001) ("Non-Accounting Safeguards Order") ("Unlike the terms 'telecommunications service' and 'information service,' both of which are defined by reference to the act of 'offering,' the Act defines the term 'interLATA service' more broadly, without reference to its availability as a separate offering.").

12 *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, at ¶ 59 (1998) ("Stevens Report to Congress") (footnote omitted); *see also id.* ¶ 39 (Only "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'").

13 Non-Accounting Safeguards Order ¶¶ 32-41. In contrast, a provider who does offer a telecommunications service as a separate offering (e.g., voice-grade telephone service or frame relay service) does not cease to be a telecommunications service provider when it bundles that service with an information service in a second offering (e.g., offering bundled voice-grade telephone service and Internet service for a single price). *See In the Matter of Federal-State Joint Board on Universal Service,* Fourth Order on Reconsideration, 13 F.C.C.R. 2372, 13 F.C.C.R. 5318, at ¶ 282 n. 827 (1997); *Independent Data Communications Manufacturers Association, Inc. and AT&T Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decisions on the IDCMA Petition*, 10 F.C.C.R. 13717, at ¶¶ 19, 40, 46 (1995).

14 These services are offered primarily by Cox's subsidiary CoxCom, Inc. We refer to the service here as a "Cox" service solely for ease of reference.

15 In order to enable the subscriber to connect to the Internet and interact with World Wide Web content and other users, Cox 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

Earthlink, Cox's cable modem service provides subscribers with a variety of enhanced functions including subscriber browsing and retrieval of files from the World Wide Web, access to other Internet service providers through the Web, use of electronic mail, and access to and interaction with online newsgroups. In addition, like AOL or Yahoo, the Cox cable modem service provides the subscriber with content such as news, weather reports, advertising and games on its welcome page. Cox also provides the subscriber with the ability to customize his or her welcome page by selecting from an array of content provided by Cox's service and the ability to create "homepages" using the web hosting facilities of the service's computer servers. In short, the subscriber receives from Cox all of the enhanced functionality offered by other ISPs, already determined by the Commission to be "information services,"[16] plus additional services and content. Because the subscriber gets far more than a pure transmission path, cable modem service is not a telecommunications service, but an information service and a cable service.

B. A Cable Operator's Use of Its Own Facilities to Provide Cable Modem Service Does Not Convert This Information Service Into a Telecommunications Service.

Section 153(20) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."[17] The Commission has recognized that this statutory definition embodies Congress's intent not to tease out the telecommunications component of the service for regulation as a "telecommunications service." As the Commission stated in the Stevens Report to Congress, "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information."[18] The Commission further explained that:

> 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."[19]

---

resolution, and providing authentication, security and encryption of information to protect individual users' privacy on the shared cable network.

[16] Stevens Report to Congress ¶¶ 73-82.

[17] 47 U.S.C. § 153(20) (emphasis added).

[18] Stevens Report to Congress ¶ 57.

[19] *Id.* ¶ 80 (footnotes omitted); *see also id.* ¶ 81 (Internet access services "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.").

Accordingly, the cable modem service's data transport component 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 cable operator's use of its own facilities to provide the service does not change this conclusion. As the Commission reasoned in the Stevens 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 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.[20]

The Commission thus implicitly recognized that a service provider's "furnishing of raw transmission capacity to itself"[21] as an integral element of its Internet services sold to the public cannot be equated with the offering of telecommunications "for a fee directly to the public." Such a facilities-based service provider is a user of telecommunications rather than a provider of telecommunications service to the public. In short, the cable operator's self-provisioning of the telecommunications input within its integrated offering of Internet services and content to consumers cannot be equated with the offering of telecommunications "for a fee directly to the public."

C. Cable Modem Service Also Is a "Cable Service," Because It Offers Programming and Subscriber Interaction for the Selection and Use of Such Programming.

Section 522(6) of the Communications Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[22] Section 522(14) further defines "other programming service" as "information that a cable operator makes available to all subscribers generally."[23] As the drafters of the Cable Act of 1984 explained, the definition of "other programming services" includes online computer services that provide information that is accessible by all subscribers generally.[24] They further emphasized that the definition of cable services did not "restrict the manner in which cable operators may obtain the information

---

[20] *Id.* ¶ 69 n. 138 (emphasis added).

[21] *Id.* ¶ 55.

[22] 47 U.S.C. § 522(6).

[23] 47 U.S.C. § 522(14).

[24] H.R. Rep. 98-934, at 41-42 (1984) ("1984 Conference Report").

provided as a cable service."[25] The information cable operators make available to all subscribers of the cable modem service generally includes information provided through the service's welcome page and subsequent screens, its connections with other Internet websites and portals, and its "cache" computer servers. This information constitutes "other programming service" under the "cable service" definition.

The legislative history accompanying the amendment of the "cable service" definition in the 1996 Act explains that the addition of the term "or use" to the existing description of the subscriber interaction required for the selection of programming, 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."[26] The inclusion of the element of subscriber "use of" programming – in addition to "one-way transmission to subscribers" of programming and subscriber "selection of" programming – reflects Congress's recognition that "cable services" would include upstream transmissions from subscribers and subscriber manipulation of data and related programming offerings. The cable modem service's provision of "programming" and a capability for subscribers to select and to manipulate this data and related programming offerings qualifies the service as a "cable service" under the Communications Act.

D. Classification of Cable Modem Service as an Information Service and/or Cable Service Best Satisfies the Commission's Policy Objectives.

Besides being dictated by the relevant statutory language and Commission pronouncements, recognition of the dual classification of cable modem service as an information service and a cable service accomplishes the Commission's three primary objectives in this proceeding. First, dual classification enables the Commission to refrain from regulating cable operator's Internet services under current competitive market conditions, in which there is no evidence of market failure. Indeed, as the Commission just reported, competition for broadband services continues to grow at an impressive rate.[27] Second, dual classification permits the

---

[25] *Id.* at 41.

[26] H.R. Conf. Rep. No. 104-458, at 169 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 182 ("1996 Conference Report"). Accordingly, while "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive," (Stevens Report to Congress ¶ 39), the categories of "information service" and "cable service" are not. This conclusion is reflected not only in the 1996 Conference Report, but also in the definition of information services, which broadly encompasses all forms of stored or generated content.

[27] The Commission's summary statistics of its latest data on the deployment of high-speed services in the United States, released on August 9, 2001, reveals that the rate of growth for telephone companies' residential and small business high-speed asymmetric DSL lines was over three times the rate of growth for cable modem service for the year 2000. *High-Speed Services for Internet Access: Subscribership as of December 31, 2000*, FCC Common Carrier Bureau, Table 3 (rel. Aug. 9, 2001)(The rate of growth for residential and small

Commission to develop a coherent national policy with respect to the development and deployment of broadband services in general, and cable modem services in particular. Rather than permitting broadband policy to be made in a piecemeal fashion by local governments, state legislatures and the courts, classification by the Commission sets the ground rules for all such services on a nationwide, uniform basis. And, third, dual classification for cable modem services preserves the Commission's jurisdiction and authority over broadband services. Should the market fail in some fundamental respect, the Commission would retain authority under Title VI and /or Title I to take corrective actions permitted by the Act.[28]

In short, both the statutory language and policy considerations dictate the classification of cable modem service as an information service and a cable service, rather than a telecommunications service. While cable operators may use telecommunications as an input for the cable modem service sold to the public, cable operators do not offer telecommunications as a separate service to the public for a fee. What cable operators offer for a fee directly to the public is a cable modem service that integrates high-speed Internet access, content, information and services. Even if cable modem service were found by the Commission or the courts not to be a cable service, it most certainly fits the definition of an information service and not a telecommunications service.

---

business high-speed asymmetric DSL lines in service for the year 2000 was 447%, while the rate of growth for high-speed Internet connections over coaxial cable systems was 134%.).

[28] The policy and technical reasons for not imposing common carrier regulations on cable and other broadband service providers are discussed in detail in Cox's comments in this proceeding. *See* Comments of Cox Communications, Inc. (filed December 1, 2000).

We hope that the foregoing discussion will facilitate the Commission's analysis. Please do not hesitate to contact us if we can provide you with additional information.

Respectfully submitted,

Sandy Wilson

COX COMMUNICATIONS, INC.

David E. Mills
To-Quyen T. Truong
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Alexander V. Netchvolodoff
Alexandra M. Wilson
Cox Enterprises, Inc.
1225 19th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 296-4933

cc: Marjorie Greene, Esq.
Sarah Whitesell, Esq.
John Norton, Esq.
Royce Sherlock, Esq.

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

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED

SEP 19 2001

MORGAN E. SCOTT, JR., CLERK
BY: DEPUTY CLERK

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.

---

[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

---

[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

---

...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