

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).)<sup>3</sup> 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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<sup>3</sup> 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.)

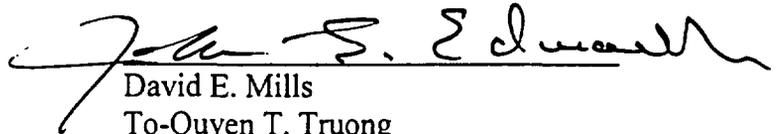
35. Plaintiffs initially sued CCI, a Delaware corporation with its principal place of business in Atlanta, Georgia. (Am. Compl. ¶ 9.) In discovery, plaintiffs have set forth the bases on which they claim that jurisdiction over CCI is proper. (See Pls.' Resp. to Def.'s First Interrogs. Nos. 2 & 3 (attached 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).)

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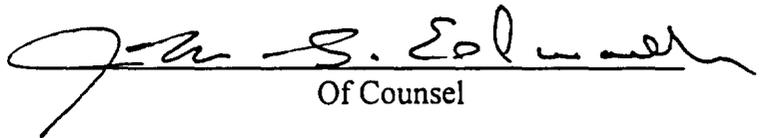
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Dated: September 19, 2001

**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 19<sup>th</sup> day of September, 2001.

  
Of Counsel



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Inquiry Concerning High-Speed )  
Access to the Internet Over ) GN Docket No. 00-185  
Cable and Other Facilities )

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COMMENTS OF COX COMMUNICATIONS, INC.

Respectfully submitted,

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## SUMMARY

Although still in its infancy, the broadband marketplace that the Commission is examining in this proceeding could hardly be healthier. Competition for broadband and other Internet access services is flourishing. Investment in broadband networks and technologies continues to grow. Consumers around the country enjoy a range of Internet service choices, both narrow and broadband. Subscribership is rising rapidly, and innovative new broadband applications continue to emerge.

All of these exciting developments have occurred with minimal government intrusion. Indeed, the Commission has steadfastly maintained that market forces, not government micro-management, will best ensure that the public interest is served. Against this backdrop, the Commission is now asking whether it should reverse this policy and respond to demands that it become intimately involved in regulating relationships among the myriad companies that help provide Internet access to consumers. Specifically, the Commission questions whether it should require broadband service providers, including cable operators, to carry unaffiliated Internet service providers (“ISPs”) on their networks on an indiscriminate basis. The only sound answer to this question – from a legal, policy and technology perspective – is “no.”

Indeed, Congress already has resolved the mandated access issue, at least as far as cable operators are concerned. High-speed Internet access services provided by cable systems meet the statutory definitions of both “cable service” and “information service” set forth in the Communications Act. In no event do they meet the statutory definition of “telecommunications services.” They thus cannot lawfully be subjected to the host of common carrier obligations imposed on telecommunications service providers under Title II of the Act.

In adopting these service definitions, Congress codified long-standing Commission precedent that information services and telecommunications services are mutually exclusive. An information service is something more than the pure, unenhanced transmission of information on behalf of a third party – it is an offering in which both provider and customer are able to choose or manipulate the form and content of the transmission. The Commission has repeatedly found that Internet service providers offer unregulated interstate information services. Information service providers do not lose their unregulated status merely because there is an integrated “telecommunications” component in their information service offering. Nor does their regulatory classification change simply because they construct and use their own transmission facilities.

The refusal by both the Congress and the Commission to subject information service providers to common carriage requirements makes perfect policy sense. The robust marketplace in which such providers compete bears no resemblance to the government-protected monopolies for which common carriage obligations were originally designed. Information service providers (including cable data providers) also enjoy no bottleneck control over “essential facilities,” a traditional pre-requisite for mandatory unbundling of networks and services.

Besides being dictated by the relevant statutory language and FCC pronouncements, an information service classification for cable Internet service also has the benefit of accomplishing the Commission’s three primary policy objectives in this proceeding. First, such a classification enables the Commission to refrain from regulating cable Internet services under current competitive market conditions, in which there is no evidence of market failure. Second, it permits the Commission to develop a coherent national policy with respect to the development and deployment of broadband services in general, and cable data services in particular. And

third, the classification ensures that the Commission has ample ability and authority to implement rules to correct any market failures or other policy concerns about cable data services that might develop in the future.

Some parties in this proceeding will implore the Commission to ignore the statutory definitions, court decisions and Commission precedent, and impose a host of common carrier obligations on cable and other information service providers. The consistent bright line distinction between regulated telecommunications services and unregulated information services, however, has been the cornerstone of the competitive market that presently exists for the Internet. Jeopardizing this cornerstone by treating the transmission component of an information service as a telecommunications service not only would be inconsistent with the express national policy that the Internet remain unregulated; it also would create a devastating entanglement for the entire Internet community, for competition and for consumer welfare.

In addition, technological limitations preclude the imposition of common carriage requirements on cable Internet service providers (and operators of other shared networks) in any event. Requiring cable operators to carry unaffiliated ISPs on an indiscriminate basis is impracticable, if not impossible, as a matter of physics and network functionality. Third-party ISP access can be accommodated, but only through the cable operator's judicious management of the spectrum it has created on its network for high-speed data services, under commercially reasonable terms and conditions, and on a provisioning schedule that the operator controls.

Significantly, cable operators already are motivated by market forces to explore relationships with unaffiliated ISPs. Internet users are making it increasingly clear that they want to have a choice of ISPs from their broadband service provider. To enhance their customers' Internet experience, cable operators are actively exploring ways to enter into

relationships with ISPs that can add value by offering special content or unique functionality. Cox itself plans to conduct a test of its shared broadband high-speed data infrastructure with several unaffiliated ISPs during the first half of 2001, with an eye to seeking relationships with third-party ISPs after its contractual obligation to its affiliated ISP expires. In such a competitive marketplace, surely the best approach is to keep the government away from the bargaining table and let the entity closest to the consumer – the cable operator – negotiate these arrangements.

Finally, there is an additional check on the Commission's authority to impose forced access on cable Internet service providers: the U.S. Constitution. Cable operators are First Amendment speakers who exercise editorial discretion not only when they decide to include a particular channel in a particular service, but also when they decide how much spectrum on their networks to allocate among a range of different services. Mandatory access requirements would fail both the strict and the intermediate scrutiny tests used to assess potential First Amendment violations, and would thus be unconstitutional. In addition, a forced access requirement that has the effect of commandeering some portion of the spectrum on a cable network for use by third-party ISPs raises concerns under the Fifth Amendment's "Takings Clause."