

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Inquiry Concerning High-Speed)
Access to the Internet Over)
Cable and Other Facilities)

GEN Docket No. 00-185

**REPLY COMMENTS OF
HIGH SPEED ACCESS CORP.**

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SUMMARY

High Speed Access Corp. ("HSA"), as a major third party provider of high-speed Internet access services via cable modem technology, has a keen interest in this proceeding. HSA strongly opposes government-compelled access by multiple Internet Service Providers ("ISPs") to cable television system facilities. Practical and sound public policy reasons advocate against forced access.

HSA has a unique role in fostering cable delivery of broadband services. HSA works closely with cable systems, particularly those serving exurban areas, to deploy cable modem services. HSA offers its cable partners a variety of services, ranging from comprehensive end-to-end turnkey operations to selected network services. While the HSA/cable operator relationship remains fairly inter-dependent, HSA's services on behalf of the cable operator are transparent to the end user for whom access to the full panoply of services available on the Internet is made simple, quick and efficient.

HSA's extensive experience working with cable operators to provide broadband services has led it to believe that the complexities and difficulties involved with providing cable modem services are best left to marketplace solutions, not government regulation. HSA does not believe that a standardized business model can or will be achieved that would be appropriate for all cable systems and/or any ISP that may wish to employ particular broadband facilities. A variety of practical, business and technical issues come into play, none of which are appropriate subjects of government regulation. Some aspects of these issues are being addressed in cable/ISP discussions and tests already underway. HSA fully expects that as the marketplace evolves, cable operators will naturally transition their services to accommodate multiple ISPs. To that end HSA has been deeply involved in addressing certain technical issues and has designed a technical solution to facilitate customer choice. HSA demonstrated its "Network Solution" at the Western Cable Show last month. HSA's solution, like any other that may

become available, will involve a great deal of coordination between operators and ISPs. Regulatory intervention into this process would only slow progress, not accelerate it. The Commission should therefore continue its current policy that allows for the evolution of marketplace solutions.

Forced access would also have the effect of broadening the digital divide. The initial success in measuring the closing of a potential divide requires looking at how widespread geographically and demographically high-speed Internet and other services can be pushed. The progress of the cable, satellite, and other wired and wireless industries in increasing the availability of new competitive high-speed Internet access services to the broadest possible universe of homes has been driven by marketplace forces. These developments will spur the deployment of other advanced services. Government intervention and micromanagement, however, will only deter such progress and widen the digital divide. The Commission should therefore allow those same marketplace forces to continue to address the deployment of consumer choice in ISPs.

Finally, HSA believes that cable modem services do not trigger universal service fund obligations. The USTA wrongly cites AT&T v. City of Portland as holding that transport offered over all broadband cable systems must be a telecommunications service and that cable operators, therefore, are telecommunications carriers. The Court's holding, in fact, found only that cable modem service was not a cable service. Furthermore, as discussed by many commenting parties, cable modem service, if not a cable service, is at most an information service; cable modem service is not a telecommunications service. As cable operators providing cable modem services are not telecommunications carriers, the arrangements that cable operators have with HSA do not involve a telecommunications service offering that would prompt the imposition of a universal service fund obligation triggered solely by HSA's provision of Internet access.

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**REPLY COMMENTS OF
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I. INTRODUCTION

High Speed Access Corp. ("HSA") is a major third party provider of high-speed Internet access services via cable modem technology to residential customers and small and medium enterprises nationwide. HSA's Internet access services are provided to residential end users through partnerships with cable system operators located primarily in exurban areas (defined as communities of 100,000 homes or fewer). The size of communities currently served by HSA varies enormously, including many with fewer than 10,000 households.

HSA opposes the propriety of, or necessity for, government compelled access by multiple Internet Service Providers ("ISPs") to cable television system facilities. In initial comments submitted in this proceeding last December, the Commission was presented with a number of articulate and persuasive discussions of the complex legal and regulatory impediments to imposing access requirements.¹ HSA does not intend to

¹ See, e.g., Comments of the National Cable Television Association in Gen Docket No. 00-185 (December 1, 2000) ("NCTA Comments") at 18-38 for extensive discussion of pertinent statutory dictates and judicial pronouncements prohibiting government intrusion.

burden the Commission with further lengthy discussions of these points. Rather, HSA will address some of the practical and sound public policy reasons why the Commission should maintain its careful monitoring of continuing progress but refrain from imposing regulatory restraints or permitting others to impose restraints on this still evolving form of broadband communications services over cable.

HSA is joining this proceeding at this time to address four issues in particular: the need for regulatory restraint, especially in smaller markets; the progress being made to be ready for market-driven introduction of multiple access; effects on the “digital divide”; and the Universal Services Fund issue.

II. DISCUSSION

At the outset, it is important to note HSA’s rather unique role in fostering cable delivery of high-speed Internet access services. As noted above, HSA has focused its activities on working with cable systems serving smaller communities. We have worked with over 140 cable systems to successfully deploy cable modem services. Unlike most ISPs, HSA offers its cable partners a wide variety of services, ranging from comprehensive end-to-end turn-key operations to selected network services. HSA’s technical know-how and experience has facilitated the growth of these services in communities where other broadband service providers have demonstrated less interest.

HSA’s core service is “connectivity.” It provides its cable partners with “local content” of particular interest to local subscribers as well as a “start page” designed in coordination with the operator. The high-speed Internet access service is branded by the cable operator, not HSA. HSA may also facilitate the delivery and integration of local content with national content provided by a brand-name portal (Yahoo, MSN), and can provide e-mail services using a cable operator branded domain. What is most important to note is that HSA’s services on behalf of the cable operator are transparent

to the end user for whom access to the full panoply of services available on the Internet is made simple, quick and efficient. Behind the scenes, HSA provides the cable operator with a broad menu of services, including network design, equipment configuration and installation; network monitoring and trouble-shooting services (on a 24/7 basis); world class customer care services (on a 24/7 basis); e-mail management and administration; and billing and technical support services. This array of services enables the operator to carefully assess his own limited financial and technical resources and partner with HSA where its capabilities and skills are necessary.

The resulting HSA/cable operator relationship is fairly inter-dependent and may differ greatly from situations in larger cable systems where operators may have a broader range of internal skills and resources. Nonetheless, HSA understands that many cable operators will naturally transition their services to accommodate multiple ISPs and fully expects marketplace conditions will impact smaller communities as well. Indeed, to that end HSA is itself deeply involved in developing technical solutions to accommodate subscriber choice among ISPs. A number of participants in this proceeding have described trials that are underway and others that are soon to be deployed. Before turning to the particulars of HSA's accomplishments to date, however, it is important to review some of the circumstances and complexities that need to be addressed and resolved before any workable solution can be implemented. And it is the very nature of these complexities, as well as others yet to be identified, that dictate against the intrusion of government, at any level, in this arena.

A. The Need for Regulatory Restraint

As a result of its extensive experience, especially with operators in smaller communities, HSA has developed a keen understanding of the complexities and

difficulties of providing cable modem services.² It cannot be assumed that providing cable modem access services is uniformly profitable for the operator and his chosen ISP, especially in the early phases of deployment; nor, more importantly, that consumers would greatly benefit from some form of compulsory multiple ISP access. Putting aside the apparent fact that there is no “accepted” or “uniform” notion of what constitutes open access, government intrusion would be particularly disruptive in communities like those served by HSA.

Each kind of Internet access, be it narrowband or broadband, comes with its peculiar costs, assets, and relative appeal to particular customers. For the provider of Internet access services, there are also a variety of costs and likely assets influenced by the peculiarities of the market and the availability of potential subscribers. The capital investments on the part of cable systems to implement high-speed cable modem access services are significant. Many smaller systems also lack the technical resources to deploy and maintain this new technology. HSA has been able to fulfill many of these needs. It remains difficult, nonetheless, to recoup investments over the short-term where communities have fewer potential customers than may be the case in larger markets. It is all too clear that the provision of advanced communications services to smaller or exurban markets is very costly – in some cases too costly,³ especially in the early years of deployment.

² As NCTA details in its comments, “issues such as bandwidth management, service provisioning, billing and operations support are complex and do not readily lend themselves to government regulation. See NCTA Comments at 69-76.

³ Recently the ISP Channel announced financial difficulties in continuing to provide Internet access services to smaller communities and it is terminating those contractual relationships. HSA has acquired certain rights to negotiate with those cable operators for the transition of certain data subscriber services to HSA. This will provide operators with the opportunity to continue offering uninterrupted broadband services to their customers. See Jeff Baumgartner and Linda Haugsted, “HSA Steps Into the ISP Breach,” MULTICHANNEL NEWS ONLINE (November 20, 2000), located at <http://www.multichannel.com/weekly/2000/47/lspch47.htm>.

The FCC's policy needs to foster, not undercut, efforts to provide services to these markets. Initial exclusivity is important to recoup costs associated with the deployment of service. Any form of mandatory access would impose additional costs resulting from the need to redesign operations to accommodate multiple ISPs. Over time and in many communities, the opportunity for customer choice may drive greater numbers of potential modem subscribers. But this may not prove to be a universal phenomenon. The potential for subscriber growth is initially dictated by the number of homes passed in the community and personal computer ("PC") penetration levels. These factors are especially critical in smaller communities.

HSA does not mean to suggest that competitive ISP services would never be provided in smaller communities. To the contrary, we anticipate that marketplace demands for alternative services will develop. And it is in anticipation of that development that HSA is today expending so much time and resources to develop an efficient and workable technical solution for managing multiple ISP services no matter what the size of the subscriber base being served.

Some cities and municipal agencies would like to claim legal authority over cable's delivery of Internet services.⁴ Presumably, they would dictate a host of standards to protect consumers using cable modem services, including when and how cable operations are redesigned to accommodate some form of multiple ISP services.⁵

⁴ See, e.g., Comments of Marin Telecommunications Agency in Gen Docket No. 00-185 (December 2000) at 3; Comments of the City of New Orleans in Gen Docket No. 00-185 (October 20, 2000) at 3 (advocating classification of Internet services as "cable services," for which local franchising authorities may collect franchise fees).

⁵ See "FCC Asked to Allow Cities to Regulate Cable Internet Service," COMMUNICATIONS DAILY (November 29, 2000); see also Comments of Marin Telecommunications Agency in Gen Docket No. 00-185 (December 2000) at 7. MCTA alludes to the presence of numerous customer service problems. To the extent they may exist, problems in delivery are not unique to cable modem services. See John Borland, "Phone Companies Face Critical Months for DSL," CNET.com (January 3, 2001) located at <http://news.cnet.com/news/0-1004-200-4363340.html>; see also Simon Romero, "D.S.L. Service for Linking to Internet is Problem Ridden," THE NEW YORK TIMES ON THE WEB (December 28, 2000) located at <http://www.nytimes.com/2000/12/28/technology/28PHON.html>. Great strides are being made to

Local regulatory intrusion, however, would be especially unwise. The practical and technical complexities associated with this issue cannot be resolved by regulatory fiat. That transition will occur,⁶ but it cannot occur overnight. Nor can the speed of change be accelerated through government regulation, no matter its purported good intentions. The marketplace is and will continue to exert its influences on all cable services, be they traditional video services or advanced services employing the Internet Protocol ("IP") technology.⁷ The FCC should therefore continue its current policy that allows for evolution of marketplace solutions.

B. HSA's Efficient and Workable Solution

As indicated above, HSA has anticipated the evolving IP marketplace and has designed a possible technical solution to manage the complexities associated with providing customer choice to ISPs over the cable network. HSA, however, has not yet sought to address the many complexities that would be associated with the particular terms and conditions for cable modem access. HSA does not believe that a standardized business model can or will be achieved that would be appropriate for all cable systems and/or any ISP that may wish to employ particular cable system facilities. These business relationships will need to address many known and as yet unknown contingences. Only as the parties try to work through various possibilities will an accord be possible.

improve services at all levels; difficulties are common with the deployment of new technologies. Indeed government regulations could well have the unintended effect of increasing deployment and customer service difficulties.

⁶ In his presentation to the Western Cable Show, Robert Sachs, President of the National Cable Television Association, spoke of the cable industry's commitment to providing customer choice among ISP services. See Ted Hearn, "Cable Asks FCC For Access Forbearance," MULTICHANNEL NEWS ONLINE (December 4, 2000), located at <http://www.multichannel.com/weekly/2000/49/regs49.htm>

⁷ Others have already submitted substantive discussions of recent growth in the ever-increasingly competitive marketplace for the delivery of Internet services. These trends will continue to drive incentives to develop efficient and workable business and technical solutions. See NCTA Comments at 41-47.

Charges associated with shared use of the cable operator's facilities are not readily determinable.⁸ Nonetheless, it is the cable operator that ultimately bears the risks of developing and deploying services to customers. The costs of doing business in this sense, however, are only one small piece of a large, complex puzzle. Agreements will be needed over the intricacies of customer provisioning and billing; bad debt and dispute resolutions; e-mail services, if offered; customer care; the scope of services to be offered; the breadth of activities to be handled by the operator; and traffic forecasting and other network-related information that are critical to the operator's ability to engage in efficient spectrum management and traffic engineering. This list is probably just the tip of the iceberg of issues to be encountered. As more and more cable systems engage in actual trials, additional issues will likely arise.⁹

However, assuming resolution of business issues, there remains the task of how to actually accommodate customer choice of ISP services. Given its technical acumen, this has been the area of HSA's focus: the design of a potential technical solution to enable multiple ISPs to achieve access through the cable system network.

HSA has focused on bandwidth and traffic management and a range of operational and billing matters that proponents of forced access would seek to ignore. Customer provisioning, customer support and systems integrations are just part of the challenge. Overall spectrum management will be critical to ensure smooth operations

⁸ This point has already been demonstrated by the now lengthy and as yet unsuccessful experiences in Canada. See Comments of François D. Ménard in Gen Docket No. 00-185 (December 1, 2000) (discussing the Canadian experience concerning cable modem Internet access services); see also NCTA Comments at 58-59.

⁹ Major MSOs have started to conduct multiple ISP trials and entered into agreements with unaffiliated ISPs. See, e.g., Jeff Baumgartner, "Comcast Taps Juno for Philly Test," MULTICHANNEL NEWS ONLINE (December 4, 2000), located at <http://www.multichannel.com/weekly/2000/49/juno49.htm>; see also Jeff Baumgartner, "AT&T Kicks Off 'Choice' Trial," MULTICHANNEL NEWS ONLINE (November 6, 2000), located at <http://www.multichannel.com/weekly/2000/45/Boulder45.htm>; see also "Time Warner Taps First Outside ISP," MULTICHANNEL NEWS ONLINE (July 31, 2000), located at http://www.multichannel.com/daily/2000/jul31/073100/juno32d_073100.htm.

for the benefit of the end user, to facilitate appropriate subscriber billing, and to ensure reasonable compensation to the cable operator for services and/or facilities provided to a particular ISP. HSA's progress in developing a practical solution for the cable operator was demonstrated last month at the Western Cable Show held in Los Angeles.

In effect, HSA has developed a means for providing a functional protocol for managing multiple ISPs. The solution utilizes source-based routing. HSA worked closely with Alopa Networks to develop a provisioning system that will enable customers to self-install a cable modem, select among various ISPs and, depending upon the offerings of that ISP, select a particular service level. For the customer, initiating service is virtually instantaneous. As the customer inputs his selections and billing data, he is assigned an IP address for that ISP. (This process assumes that ISPs providing services over the cable system have already assigned a block of IP addresses for the operator to assign to the end user.) At any time, the end user may use this same self-provisioning process to switch service levels or ISPs.

The HSA solution was designed to work with any DOCSIS certified cable modem. Operationally the HSA solution contemplates shared use of the cable system's Cable Modem Termination Systems ("CMTS"). The provisioning system is fully integrated with the operator's billing system thereby enabling usage tracking and accurate reporting capabilities back to the ISP. In addition, HSA's network operations center ("NOC") is able to monitor the network on a 24/7 basis to ensure that end user systems, the cable operator and the ISPs are all working in concert. As with its core connectivity services, HSA has designed this solution with a number of built-in flexibilities to better accommodate individual operator needs.

HSA's Network Solution is operational. At the same time, however, HSA is cognizant of the fact that its solution is not ready for "off-the-shelf" deployment. In every

instance appropriate interfaces must be written for particular e-mail systems, billing systems, web pages, and transfers of customer data information. HSA is confident that its overall plan will be readily adaptable once the marketplace is ready to proceed.

HSA's solution, like any other that may become available, will involve a great deal of coordination between operators and ISPs. Regulatory intervention into this process would only slow progress, not accelerate it. As HSA's technical solution makes clear, the industry has made tremendous strides over the past 12 months and will continue to seek ways to accomplish its goals.

C. Forced Access Would Broaden the Digital Divide.

1. Initial exclusivity is important for cost recovery.

As noted, HSA currently pursues exclusive contracts with cable operators for the range of Internet access services it offers. Initial exclusivity is important to cost recovery of IP deployment. While HSA has been working diligently to design its Network Solution, it realizes that deployment will impose even greater costs on the cable operator, which suggests that premature deployment would burden end users with greater costs and make ISP choice less desirable. More importantly, the so-called "digital divide" is better addressed by first making possible the availability of broadband service, rather than focusing on how many options may be offered by a particular broadband system. The initial success in measuring the closing of a potential divide requires looking at how widespread geographically and demographically high-speed Internet and other services can be pushed. The progress of the cable, satellite, and other wired and wireless industries in increasing the availability of new competitive high-speed Internet access services to the broadest possible universe of homes should be applauded. The same marketplace forces that have motivated these achievements, not forced access, will continue to address the concerns of policy makers.

2. Cable modem service will launch further advanced services.

The FCC must also appreciate the market dynamics of cable broadband services. Rapid and widespread deployment of DOCSIS cable modems will enable a whole range of new companion, follow-on services including cable IP telephony, data transfer services and interactive television. Cable operators are rebuilding systems and partnering with HSA so they can deliver video, Internet, data and voice to subscribers in an attractive package and at great value. Internet access begins this process of utilizing state of the art technology. The development of high-speed Internet access over cable, if delayed or deterred by regulatory micro-management, will spread the digital divide far beyond the issue of multiple ISP access to swallow up a much broader range of services that might otherwise be on the horizon. For the consumer who craves high-speed service, any regulatory classification or interference that impedes risk-taking and investment is problematic.

To date, the forced access debate has focused largely on cable access with less emphasis on, or concern about, whether new high-speed Internet access service offerings by satellite providers and other new entrants merit government intrusion.¹⁰ Giving cable operators the same discretion and leeway is the only correct course of action and will best alleviate the digital divide concern.¹¹

¹⁰ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry in Gen Docket No. 00-185, FCC 00-355 (released September 28, 2000). While the Commission seeks comment on the appropriateness or necessity of imposing forced access on other technologies' delivery of broadband services, the public debate has generally focused on forced access with respect to cable.

¹¹ It is particularly ironic that one of cable's primary competitors (especially in smaller markets like those served by HSA), DBS provider EchoStar, would use this proceeding to try to leverage access to the cable plant for itself. See *generally* Comments of EchoStar Satellite Corporation in Gen Docket No. 00-185 (November 27, 2000). Both EchoStar and DirecTV offer bundled packages of multichannel video programming and high-speed Internet access service. See DISH Network homepage at www.dishnetwork.com/content/promotions/starband/index.shtml; and DirecPC Homepage at <http://www.directpc.com/consumer/scoop/twoway.html>. Indeed both DBS providers have now begun to make available two-way satellite-delivered high-speed Internet access services. See Comments of StarBand Communications, Inc. in Gen Docket No. 00-185 (December 1, 2000) at 2 (describing the two-way satellite delivered high-speed Internet access

D. Cable Modem Service Does Not Trigger Universal Service Fund Obligations.

The United States Telecom Association (USTA) has demanded that cable operators or their affiliates that provide telecommunications services be subject to universal service obligations pursuant to section 254(d) of the Communications Act.¹² The USTA wrongly cites AT&T v. City of Portland¹³ as holding that transport offered over all broadband cable systems must be a telecommunications service and that cable operators, therefore, are telecommunications carriers. The Court's holding, in fact, found only that cable modem service was not a cable service.¹⁴ As has been discussed at length by other participants in this proceeding,¹⁵ if cable modem service is not a cable service, it is, at most, an "information service" and not a telecommunications service. Cable operators providing cable modem services are not telecommunications carriers. Likewise, the arrangements that cable operators have with HSA do not involve a telecommunications service offering that would prompt the imposition of a universal service fund obligation triggered solely by HSA's provision of Internet access.¹⁶

service offered by StarBand, which includes EchoStar as a strategic partner); see also DirecPC homepage at <http://www.direcpc.com>. The Commission must not heed EchoStar's attempts to thwart fair competition to secure a competitive advantage at the expense of its competitors.

¹² See Petition for Declaratory Ruling of the United States Telecom Association, *Public Notice*, DA 00-2329 (released Oct. 12, 2000); see also Comments of the United States Telecom Association in Gen Docket No. 00-185 (December 1, 2000).

¹³ 216 F.3d 871 (9th Cir. 2000).

¹⁴ See also *Gulf Power Company et al v. FCC*, 208 F.3d 1263 (11th Cir. 2000) *rehearing denied*, 226 F.3d 1220 (holding that cable modem service is not a telecommunications service).

¹⁵ See, e.g., NCTA Comments at 5-18.

¹⁶ Should the FCC determine at some point that there is a telecommunications component in the provision of Internet access by cable operators (or their partners, such as HSA), even that would not necessarily compel a finding of a universal service fund obligation.

III. CONCLUSION

For the reasons set forth above, the Commission should find there is no legal justification or factual need for government-mandated access. To effectively implement this conclusion, the Commission should preempt local regulation and oversight of the provision of cable modem services by cable operators or entities such as HSA. Let the trials proceed. Let the marketplace evolve and negotiations continue unabated.

Respectfully submitted,

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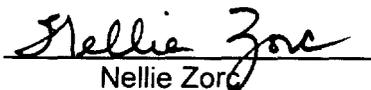
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