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

In the Matter of	)	
Service Rules for Advanced Wireless Services In the 2155-2175 MHz Band	)	WT Docket No. 07-195

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SUMMARY

Commenters strongly support the deployment and ubiquitous availability of broadband services across the country. We are concerned, however, that the Commisson's proposed rule requiring content-filtering on broadband offered over the AWS-3 band destroys the "Internet" character of the service. The Internet is distinguished by its flexibility as a platform on which new services can be built with no pre-arrangement. While requiring filtering of known protocols in itself raises serious First Amendment conflicts, forcing the blocking of unknown or unrecognized traffic hampers both speech and innovation. We therefore urge the Commission to drop the filtering conditions from its Final Rule.

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COMMENTS

Commenters are individuals whose research, teaching, and entrepreneurial interests center on the open Internet and its success as a platform for uses as varied as education, politics, technology, business, journalism, and culture. We support the broad roll-out of true broadband Internet, and the spread of Internet access, in modes that preserve the pure utility and flexibility that has already made the Internet a potent force for free speech, civic engagement, and business development. We oppose any government-imposed filtering requirement.

1 Broadband Is Not Broadcast

The Commission's proposed Rule is intended to "promote the deployment and ubiquitous availability of broadband services across the country."[1] Commenters heartily endorse this goal. We therefore believe it is important that the Commission take a comprehensive view of "broadband Internet," so that its rules can properly serve those goals. The filtering required in the proposed Rule would directly contradict the Commission's stated goals and subtract value from the Internet itself.

Fron its inception, the Internet has always been an inherently peer-to-peer system: any two machines connected to the Internet can talk to each other. The mutual reachability of Internet hosts has led to the proliferation of a diversity of technologies at the edge of the network, including networked file systems, web servers, real-time messaging and group collaboration systems, video streaming, and many others. One need not be a "carrier" to provide these services; ordinary users with residential or small business Internet connections can be full, first-class participants, creating new applications, services, and resources for others. That the Internet does not intrinsically discriminate against users or uses on the basis of how they are connected is core to the Internet's architecture and what makes participation and experimentation possible. The value of the Internet increases directly as additional users connect and contribute new communications and services.

To characterize the Internet as a system for controlled "content" transmission is to undermine its salient characteristic as a participatory environment. The value of the Internet is created by the contributions of its participants.[2] Some of these participants are large media outlets, but the vast majority of them are not. The Internet is not the same as broadcast, and the use of spectrum for Internet access is qualitatively, fundamentally different from the use of spectrum for one-way broadcasting.

The service that could be provided under the Commission's rule is not "broadband" as it has been defined since the concept first arose. The essence of "Internet" is not the content of any particular application, but carriage open to any

[1] WT Dkt. No. 07-195, Further Notice of Proposed Rulemaking ("FNPRM") 1 at ¶1.

[2] *See* Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale Univ. Press (2006).

application, known or as yet unanticipated. The Internet was not designed for web pages, voice, video, or multiplayer gaming, but its generic low-level protocols gave innovators the flexibility to design all those—and combinations among them—on top. Moreover, the Internet allows for such design to be decentralized. No one need ask a central authority for permission to deploy a new service; developers can launch and see what catches on. Choosing among profit and not-for-profit business models and competing vigorously for attention, such developers have brought us the World-Wide Web, graphical web browsers, weblogs and blog-readers, photo- and video-sharing, instant-message notifications from the Mars Rover, and collaboratively edited encyclopedias.[3] None of these was in the original specifications when a "LOGIN" was sent across the first links of the Internet, yet all have been possible on that basic architecture.

A mandate that "content" be "filtered," by contrast, requires that licensees know what content they carry, in order to assess its potential prurient nature. It requires the licensee to watch traffic and to discriminate as directed by the government based on the content of the speech being sent or received. A licensee who could not predict all the innovations over the Internet would instead have to foreclose them, constraining the network's flexibility for untold beneficial uses.

2 The Market Is Best Served by Unfiltered Internet

Treating broadband as carrier-controlled content transmission poses barriers to innovation in both the build-out of Internet service and the provision of applications and services over the Internet. Leaving filtering to the end-users, by dropping the licensee mandate, better allows markets to develop in and around the network—including markets for filters themselves.

2.1 A filtering mandate harms application innovation

A filtering mandate will create barriers to entry in application innovation. First, the Rule suggests that the licensee block by default communications types it does not recognize. Second, even those who employ existing protocols and applications on the Internet face the risk that their offerings will not be broadly reachable.

The structure of the proposed Rule impedes adaptation and evolution of Internet design. Rather than limiting its filtering mandate to a known protocol or set for which filters are known, the Commission demands that its AWS-3 licensees err on the side of overblocking what they do not recognize:

[3] *See, e.g.,* Tim Berners-Lee, *Weaving the Web* (1999); hypertext spurred Mosaic, Netscape, Internet Explorer, and Mozilla; Livejournal, http://www.livejournal.com, Blogger, http://www.blogger.com/, Wordpress, http://www.wordpress.org/; Flickr, http://flickr.com/, Snapfish http://www.snapfish.com/, YouTube http://youtube.com/; MarsPhoenix on Twitter, http://twitter.com/MarsPhoenix; Wikipedia, http://wikipedia.org/.

> [Licensees must] use best efforts to employ filtering to protect children from exposure to inappropriate material as defined in paragraph (a)(1). Should any commercially-available network filters installed not be capable of reviewing certain types of communications, such as peer-to-peer file sharing, the licensee may use other means, such as limiting access to those types of communications as part of the AWS-3 free broadband service, to ensure that inappropriate content as defined in paragraph (a)(1) not be accessible as part of the service.[4]

A network built to these specifications will tend toward stasis, allowing transit for what it already recognizes, but resisting new uses and applications.

By contrast, both the engineering principle of end-to-end system design and economic research on general-purpose technologies highlight the value of simplicity and extensibility. A basic network, open and flexible to customization by its downstream users, can serve as the root for broad commercial development.

The end-to-end argument states that application-level functions should not be built into the network core, but rather should be left to the applications on top:

> The function in question can completely and correctly be implemented only with the knowledge and help of the application standing at the endpoints of the communications system. Therefore, providing that questioned function as a feature of the communications system itself is not possible.[5]

The argument "provides a rationale for moving functions upward in a layered system, closer to the application that uses the function."[6] Whereas endpoints will be able to ascertain the appropriateness and effectiveness of application-level features such as content filters, the same services offered as "features" of the communications network will still require endpoint verification. Thus adding features to the core imposes overhead on applications that do not require their services, and inflexibility even upon those that do. End-to-end, application-agnostic, minimal design has helped the Internet anticipate the unexpected.

The Internet as deployed provides a general-purpose technology platform: low-level protocols that can be adapted by end-users and service providers to a range of services, both known and yet-to-be-discovered.[7] It has provided a platform upon which numerous independent cultural, economic, and social innovations have flourished. Treating its general-purpose technology as *content*-oriented, which the Rule does by specifying content-based filtering, cripples that platform. Content-based inspection and blocking raises barriers to innovation and entry both in the provision of Internet service and in the provision of applications and services on and via the Internet.

A platform technology is most useful when it gives the greatest flexibility. Like a painter's white canvas, it does not presume or preempt uses to which it might be put, nor is the painter limited to painting what was painted in the

[4] FNPRM, Proposed §27.1193(b)(2).

[5] *See* J.H. Saltzer, D.P. Reed & D.D. Clark, *End-to-End Arguments in System Design*, ACM TOCS 2(4) 277-88, November 1984.

[6] *Id.*

[7] *See* Timothy Bresnahan and Manuel Trajtenberg, *General purpose technologies 'Engines of growth'?* (1992), reprinted in J. Econometrics 65, 83 (1995).

past. While the drafter of architectural drawings might prefer a pre-lined grid, a landscape painter or portrait artist would find that "enhancement" cumbersome, and would need to paint an extra layer to re-cover the grid. It would be absurd for the government to mandate the sale of only grid-lined media.

To benefit the widest range of users and application developers, an architecture should not presuppose the use of specific application protocols.[8] Architecture built around the presumption that communication will take a particular form leads to entrenchment: implementing new forms of communication or changes to the existing form will carry additional cost. John Stuart Mill recognized this as a barrier to innovation, proposing that we "give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs."[9]

The Commission's *Carterfone* ruling embraced these precepts. By permitting both users and carriers to interconnect non-harmful devices with the network, including the radio-to-telephone link at issue there, *Carterfone* increased the network's utility to all.[10] Before that, the *Hush-A-Phone* court had similarly noted the economic benefits of allowing wider interoperation with a network: "A system whereby [incumbent AT&T] may market equipment until such time as the Commission orders a halt, while [Hush-A-Phone] may not market competitive equipment until the Commission gives them an authorization, seems inherently unfair." *In Re Hush-A-Phone*, 238 F.2d 266, 268 n9 (D.C. Cir. 1956).

Filtering is an application- or content-level feature. The filters required to block "inappropriate material" will vary from application to application, from medium to medium, and from one definition of "inappropriate" to another. Filtering should therefore be left to the user and application level, not the network.

Mandated network-layer filtering raises barriers to the developer of new applications. New, as-yet-unfiltered applications will not automatically be available to all Internet users. They will remain unavailable to users of AWS-3 broadband until they have reached sufficient popularity to engender commercially-available filters. In a chicken-and-egg fashion, the unavailability of this audience diminishes the new application's potential viability. To compete in application-provision then, web-based application providers will have to invest additional resources, either to seek advance accomodation from the provider of filtered broadband or to ensure at deployment that their services reach customers on this fragmented sub-network and take measures to counteract filters' false-positives.

This intrusion imposes an extra degree of centralization, making the network less hospitable to a variety of innovators: Commercial entrepreneurs who face new barriers to entry may choose to deploy investment elsewhere, depriving markets of the potential "disruptive innovations" that enhance wealth overall but not necessarily that of the incum-

[8] *See, generally* Jonathan L. Zittrain, *The Generative Internet*, 119 Harv. L. Rev. 1974 (2006).

[9] John Stuart Mill, On Liberty and Other Essays 75 (John Gray ed., 1998).

[10] *See In re Carterfone*, 13 F.C.C.2d 420 (1968): "[A] customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others."

bents.[11] User-innovators, the community of those who know the Internet and their needs best, may also be frustrated by barriers to their own development.[12] Networked, user-led innovation has already revolutionized the creative and cultural industries, the digital economy, and many fields of scientific and technological research. In the interests of remaining competitive in the global economy, the United States must preserve the free and open Internet as a catalyst of future innovations and economic growth.

In the drive to filter "harmful" content in the network, moreover, there appears to be no logical stopping point. To comply with the Commission's order "to protect children" by "reviewing ... communications," wireless operators would have to block not only unknown applications but data they did not understand—including foreign language texts and encrypted data. Without knowing what might be lurking in encrypted or untranslated traffic, licensees would have to err on the side of blocking unknown applications and data rather than risking their licenses. An ISP that blocks end-to-end encryption would do far more than stop a few pictures; for its customers, it would destroy electronic commerce, in which consumers and businesses depend on encryption to keep their financial transactions secure.[13]

"Limiting access" to unknown applications freezes us with the current subset of known, filter-able designs. If we had made the same choice fifteen years ago, would we have told licensees they should block the new-fangled "world-wide web" because it might carry images, where commercially available filters might exist only for text?

Because of the way network applications are developed and deployed, filtering a substantial portion of the public's Internet access would hurt not only the users of the filtered network, but those elsewhere in the Internet as well. Even un-filtered users suffer as they lose the network effects of those locked out of full network participation. Would portions of the web, such as Wikipedia or Facebook, go dark to millions of potential participants simply because these tools might be considered "harmful to minors"?

Because of this uncertainty, even content or applications operating over well-known existing protocols will be harmed by the AWS-3 rules. Commercially-available filters are known to overblock, whether classifying "breast cancer" as prurient or blocking entire shared hosting services because one user's page contains objectionable material.[14] Providers, both corporate and individual, who wish to be reachable to the 95% of the country with access to filtered broadband, will face additional overhead of testing their materials for compatibility with filters and debugging erroneous matches.

Finally, and ironically, the requirement that licensees offer filters "that must be active at all times on any type of free broadband service offered to customers or consumers through an AWS-3 network" will limit competition in the

[11] *See* Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*, Harvard Business Press (1997).

[12] *See* Eric von Hippel, *Democratizing Innovation*, MIT Press (2005).

[13] The U.S. Census Bureau estimates that U.S. consumers spent more than $120 billion on e-commerce retail purchases in 2007, $32.4 billion in the first quarter of 2008. U.S. Census Bureau, Quarterly Retail E-Commerce Sales, 1st Quarter 2008, http://www.census.gov/mrts/www/data/html/08Q1.html.

[14] *See CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Penn. 2004).

development of filtering technology. The presence of an active filter bundled with their network service will deter consumers from seeking alternate filters in the marketplace, even though alternatives might be better adapted, for example to children of different ages or to the standards of local communities. While there may be some competition to become the global filter-provider, there will be little opportunity for entry. The centralized provision of filtering will crowd out innovation even in this application.

2.2 A filtering mandate harms carrier competition

As well as hindering application-development on the network, the Commission's proposed Rule hampers competition for Internet carriage. The Rule operates as a subsidy for the particular model proposed by M2Z (and previously rejected as not in the public interest for a grant of free spectrum). By specifying a particular business model, the Rules make the AWS-3 spectrum less attractive to competitive bidders, driving down its cost to the bidder whose business model it matches—and this rule-set was made-to-order for M2Z. The conditions thus amount to a subsidy to that model.[15] In turn, mandating the provision of free "broadband" service (what commenters term "filterband") directs a particuarly fierce competition at existing or prospective Internet carriers across the country. As those other carriers' networks will tend to be characterized by economies of scale, the presence of this free filterband competitor will directly reduce their efficiency. As they struggle to compete with inferior but free service, consumer choice will suffer.

Further, mandating the deployment of filtering technologies imposes a significant technological and legal burden upon carriers. Under the proposed Rules—in a sharp departure from current practice—carriers would face legal liability based upon the content that traverses their networks.

To the extent that the rules regulating content restriction are specific, licensees will be liable both for the deployment of technology that implements the specific filtering rules and for the legal assurance that the deployed technology satisfies the requirements. In particular, licensees bear several costs, including but not limited to:

- developing or licensing of the filtering technology,
- integrating the filtering technology into their infrastructure,
- auditing the filtering technology within their infrastructure,
- maintaining consistency with evolving blacklists, new protocols, and changes in policy,
- insuring themselves against liability for errors in their implementation, and
- responding to legal queries about the effectiveness of the technology as deployed in implementing the rules correctly.

[15] As the U.S. Chamber of Commerce notes in its Comment in these proceedings, the Commission has previously rejected subsidizing this model with free use of spectrum, yet now proposes rules which would drive its market price down very near to free.

As a result of these pressures, licensees will be inclined to overblock.

To the extent that the rules regulating content restriction are vague, licensees will be liable for their specific interpretation of the rules. In particular, each licensee needs to be able to argue that the filtering policy implied by the choice of technology is both necessary and sufficient to satisfy the requirements of the restriction policy.

The various complexities associated with implementing filtering technology are costly enough to significantly encumber any potentially new entrants to the Internet access market, thus reducing competition among carriers in a market already at risk of concentration. Similarly, it is not clear that a separate market for filtering technology can be efficient under this Rule.

3 The First Amendment Bars Content-Discrimination

The Commission's proposed Rule requiring filtering of the AWS-3 band violates longstanding First Amendment principles that bar the government from imposing—or mandating that others impose—content-based restrictions on speech.[16] When the government regulates speech on the basis of its content, as the Commission is proposing to do here, a strong presumption of constitutional invalidity applies.[17] The Supreme Court has made clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]."[18] The Supreme Court has repeatedly warned that government censors may not "reduce the population . . . to reading only what is fit for children."[19] Faced with content-based restrictions on online speech similar to those proposed here, the Court has consistently found such restrictions impermissible under the First Amendment.[20]

3.1 The proposed Rule must pass strict scrutiny because it mandates content-based restrictions on protected speech

The proposed rule is clearly a content-based restriction on speech. In fact, the Commission's proposed filtering requirement would limit all users of the free broadband service to speech fit for a five-year old:

> (a) The licensee of the 2155-2188 MH band (AWS-3 licensee) must provide as part of its free broadband service a network-based mechanism:
>
> (1) That filters or blocks images and text that constitute obscenity or pornography and, in context, as measured by contemporary community standards and existing law, any images or text that otherwise

[16] Commenters support the First Amendment concerns raised by the American Civil Liberties Union in its June 5, 2008 Comments.

[17] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[18] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (finding unconstitutional an ordinance criminalizing the showing of movies that contain nudity at drive-in theaters that are viewable from a public street or place).

[19] *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002); *United States v. Playboy Enter. Group*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

[20] *See*, *e.g.*, *Reno*, 521 U.S. at 875 (striking down the Communications Decency Act); *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004) (upholding injunction against the Child Online Protection Act).

> would be harmful to teens and adolescents. For purposes of this rule, teens and adolescents are children 5 through 17 years of age ....[21]

While obscene speech is outside the scope of the First Amendment's protection,[22] expression that is "pornography" or "harmful to teens and adolescents" is fully protected expression.[23] Because the proposed rule seeks to limit speech that would be lawful for adults to send and receive, it must pass strict scrutiny.[24] As a result, the Commission bears the burden of demonstrating that its proposed filtering requirements are narrowly tailored to a compelling government interest and that there are no less restrictive alternatives that would be at least as effective in achieving that interest.[25]

The Supreme Court has consistently held that online speech is entitled to full First Amendment protection. Although in *FCC v. Pacifica*, the Court upheld the Commission's authority to ban indecent speech on broadcast radio,[26] the Supreme Court has repeatedly rejected Congress's and the Commission's attempt to extend its "emphatically narrow"[27] holding in that case to the other types of media, including the Internet.[28] As the Court explained in *Reno v. ACLU*, the Internet—unlike broadcast media—is not subject to a history of extensive government regulation, does not have scarce available frequencies, and does not "invade" a person's home or computer by surprise.[29] Internet over wireless broadband is no different—it requires affirmative steps from its users to receive communications.

The Commission cannot avoid the requirements of the First Amendment simply by "outsourcing" the filtering to private party licensees. As a condition of granting a license to the 2155-2188 MHz band, the Commission's proposal mandates that licensees perform network-level filtering of content. If the government mandates that a private party deny others the exercise of their First Amendment rights, it does not matter that a private party carries out the discrimination; it is still state action for First Amendment purposes because the government is exercising its coercive power.[30] The government may not delegate to private actors a power it does not possess.[31]

The potential future availability of other, unfiltered, wireless broadband networks does not save the current proposed rule from strict scrutiny either. The availability of alternative fora for speech is only relevant in the analysis of content-neutral "time, place, and manner" restrictions.[32] Moreover, the implicit subsidy to content-discriminatory networks will have the effect of driving content-neutral offerings from the market. The requirement that the licensee must blanket 95% of the country with its free, filtered service would seriously displace the commercial offerings others

[21] FNPRM, Proposed §27.1193(a).

[22] *See generally Miller v. California*, 413 U.S. 15 (1973) (defining obscenity).

[23] The proposed regulation is easily distinguishable from *Ginsburg v. New York*, 390 U.S. 629 (1968), where the Court upheld a New York statute prohibiting the sale of material that is obscene to minors but not to adults. The statute did not prohibit adults from purchasing the material at issue.

[24] *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

[25] *Ashcroft*, 542 U.S. at 665.

[26] 438 U.S. 726 (1978).

[27] *Sable*, 492 U.S. at 127.

[28] *See*, *e.g.*, *Reno v. ACLU*, 521 U.S. at 865-67; *Sable*, 492 U.S. at 128.

[29] *Reno*, 521 U.S. at 868-69.

[30] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (noting that a State is normally responsible for a private decision when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State).

[31] *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

[32] *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).

might seek to provide.

Furthermore, allowing adult users to circumvent the filtering by providing age verification would not obviate constitutional scrutiny. Even if viable age verification procedures were to exist,[33] the proposed Rule would still burden protected speech and therefore must still survive strict scrutiny. In *United States v. Playboy Entertainment Group*, the Court rejected the government's assertion that allowing cable operators to choose between scrambling sexually explicit channels or limiting such programming to certain hours was sufficient to allow adults to access sexually explicit content: "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[34]

3.2 The Commission cannot show that its mandated filtering is narrowly tailored

Although the government has an interest in protecting children from potentially harmful materials, the Commission's proposal pursues this interest by suppressing a large amount of speech that adults have a constitutional right to send and receive.[35] Because the proposed Rule lacks the precision the First Amendment requires when government regulates the content of speech, it is not narrowly tailored and cannot survive strict scrutiny.

In fact, the filtering regime the Commission is considering instituting would be wholly unprecedented in its breadth. Not only does the proposal require the blocking of images *and text* that constitute lawful pornography, it also requires the blocking of material that would be "harmful to teens and adolescents," as determined by undefined "contemporary community standards."

The Supreme Court has repeatedly invalidated the use of community standards to censor speech that is not obscene.[36] Moreover, the difficulty of distilling a set of "contemporary community standards" from a community as disparate as that which exists on today's Internet, not to mention the question of who would be responsible for determining whether material is harmful to teens and adolescents on the basis of this amorphous standard, makes the proposed Rule impermissibly vague and overbroad.

Even if the Commission were to remove the requirement that licensees block "harmful" speech, the proposed Rule is overbroad just in its prohibition of material that constitutes pornography. Clearly all pornography cannot be deemed

[33] As the ACLU notes in its comments, the proposed age verification procedures suffer from significant practical limitations. Comments of the American Civil Liberties Union dated June 5, 2008, at 6-9; *see also ACLU v. Gonzales*, 478 F.Supp. 2d 775, 811 (E.D. Pa. 2007) ("Credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age. As a result, their use does not, in good faith, 'restrict [ ] access' by minors.")

[34] *Playboy Enterprises*, 529 U.S. at 812.

[35] As the Supreme Court has frequently cautioned, "regardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983)).

[36] *See*, *e.g.*, *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (noting "where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression").

obscene even as to minors, nor can such broad restrictions be justified by any other government interest pertaining to minors. "Speech that is neither obscene as to minors nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[37] The values protected by the First Amendment are no less applicable when government seeks to control the flow of information to those who have not yet reached adulthood.[38]

As a result, the proposed Rule is not narrowly tailored. To the contrary, its burden on protected speech would be substantial. Filters will block adults and children from accessing lawful content of their choosing. Filters are known to overblock,[39] and some material deemed "harmful" to minors based on community standards may be perfectly acceptable to parents of some teens and adolescents, as well as to adults generally. Moreover, as we describe above, the proposed rule will force licensees to block unknown traffic, even when there is no indication that such traffic contains material that would be considered harmful to minors.

Because the Commission's proposal to force licensees to filter pornography and all other material that would be harmful to teens and adolescents will invariably result in the blocking of constitutionally protected speech, it is facially unconstitutional and should be rejected.

3.3 Less restrictive alternatives exist that would be at least as effective in protecting minors from harmful online content

The Commission's proposed Rule also fails because there are less restrictive alternatives available that will accomplish the stated objective of protecting minors from harmful Internet content. One such alternative would be the use of end-user filters. As the Supreme Court recognized in *Reno v. ACLU* and *Ashcroft v. ACLU*, voluntary end-user filtering is a less restrictive alternative to blocking constitutionally protected speech,[40] as well as being more respectful to the end-to-end nature of Internet communications.[41]

End-user filtering software is also likely to be more effective as a means of restricting children's access to materials harmful to them. Because end-user filters allow users to determine what material is filtered rather than being forced to adopt universal restrictions at the source or in the network, parents can decide for themselves what is harmful for their children. Moreover, under an end-user filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to otherwise blocked speech on the same terms simply by adjusting or turning off the filters on their

[37] *Erznoznik*, 422 U.S. at 213.

[38] *See Tinker v. Des Moines School District*, 393 U.S. 502, 515 (1969).

[39] *See CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Penn. 2004).

[40] *Reno*, 521 U.S. at 875 (striking down the Communications Decency Act); *Ashcroft*, 542 U.S. at 666-7 (upholding injunction against the Child Online Protection Act).

[41] The Third Circuit just this week offered a detailed description of the variety of end-user content-filtering options available to parents, in a decision again rejecting COPA's government mandate. *ACLU v. Mukasey*, – F.3d –, slip op. at 36-51 (3d Cir., July 22, 2008). Mandatory network-level filtering would foreclose these individual choices.

home computers.[42]

By contrast, while the Commission's proposed Rule speaks the language of "filters," its filters differ in location and operation from those proffered as less restrictive alternatives in the Court's *Reno* and *Ashcroft* decisions—both of which struck down overbroad restrictions on Internet speech—and the filter system upheld in *United States v. American Library Association*, which allowed for unblocking by the end-user. Mandatory network-level filters, as required in the Commission's proposed rule, apply to everyone, adult or child, and they "must be active at all times on any type of free broadband service offered to customers or consumers through an AWS-3 network." As a result, the Commission's proposed network-level filtering requirement would impermissibly limit all users of the free broadband service to speech fit for a five-year old.

The Commission's proposed Rule requiring mandatory network-level filtering of the AWS-3 band cannot survive First Amendment scrutiny because it is neither narrowly tailored to achieve the government's interest in protecting minors nor is it the least restrictive alternative available. We urge the Commission, however laudable its objectives, to reject any licensing scheme that would impose unconstitutional conditions on wireless broadband licensees.

4 The Proposed Rules Conflict with Stated Commission Policy

A set of rules granting unfiltered use of the spectrum in question would most appropriately fit with recent Commission policy statements.

In 2002, the Commission undertook a comprehensive analysis of its spectrum allocation practices by convening the Spectrum Policy Task Force (SPTF). The SPTF considered the success and failure of historical FCC policy in this area, and concluded that the "command-and-control" model was inefficient and rarely optimised for the public interest. The task force recommended that rather than specifying particular uses for particular bands, the Commission adopt parallel strategies of licensed property-like allocation and unlicensed commons-like designation.[43] Unfortunately, the currently proposed rules adhere far more closely to the outmoded "command-and-control" model than either of the SPTF-recommended alternatives. By specifying both the business model and the technology to be employed, the Commission stacks the deck against efficient spectrum use and innovation. At the time of its study, the SPTF and its leadership understood the clear benefits of freeing spectrum for future innovation rather than relying upon the FCC to mandate the desires of a single company.[44]

[42] In *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), in which the Court upheld a law requiring recipients of Federal e-Rate funds to impose filters on their patrons' Internet access, the Court found it important that the filters left control close to the end-user: "When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter." *Id.* at 209. This end-point control was critical to the votes of Justices Kennedy and Breyer, whose concurrences were necessary to uphold the law's constitutionality.

[43] Spectrum Policy Task Force, ET Docket No. 02-135, Report (rel. Nov 2002).

[44] Commenters generally support the innovation-promoting opportunities of unlicensed spectrum, and note that the amount of spectrum dedicated to unlicensed use is meager in comparison to property-like allocations of late.

The Commission has repeatedly emphasized the policy goal of "open" and "neutral" broadband.[45] The Commission's call for "open devices" and "open applications"[46] in this proceeding is in keeping with this approach. As the Commission has recognized, such openness promotes complementary innovation and free speech. A filtering mandate, by contrast, not only allows but requires violation of this clear policy.

The Commission forcefully stated its approach in a 2005 Policy Statement.[47] That statement expounds fundamental freedoms for Internet users, including that "consumers are entitled to access to the lawful Internet content of their choice" and "consumers are entitled to run applications and use services of their choice." The AWS-3 Rules, as currently crafted, deny access to any lawful content or applications that the licensee's technology cannot understand. This is not "free" broadband at all. Although consumers would gain access without charge, use of the network itself would be highly constrained. The Commission should not surrender its fundamental principles of openness by imposing an ill-advised filtering mandate.

Signed

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[45] *See, e.g., Adelphia Order,* 21 F.C.C. Rcd at 8299.
[46] FNPRM at ¶3.
[47] Policy Statement, FCC 05-151, September 23, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.doc

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