

June 5, 2008

The Honorable Kevin J. Martin, Chairman
The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Robert M. McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

Re: *Ex Parte Letter in Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band (WT Docket No. 07-195) (AWS-3)*

Dear Commissioners:

The Center for Democracy & Technology (CDT) respectfully submits this *ex parte* letter in the above proceeding.

We are excited by the possibility of a free nationwide wireless network to enable Americans to access the Internet from almost anywhere in the country, and we applaud the Commission for pursuing this possibility. It would be very unfortunately, however, for the development of such a network to be significantly delayed because of litigation over what would be an unconstitutional governmental mandate to censor access to lawful Internet content, as contemplated in Paragraph 90 of the NPRM in this proceeding. If this Commission adopts a content filtering mandate, a constitutional challenge is very likely (and would very likely be successful), undoubtedly leading to uncertainty and delay of the deployment of the network.¹

We urge the Commission to avoid a filtering mandate. In addition to being unconstitutional, such a mandate is also both unnecessary and unwise, as detailed below.

¹ These comments are limited to the constitutionality and appropriateness of a filtering mandate and take no position on the other issues raised by commenters in this proceeding.

1. A Government-Imposed Filtering Mandate Would Be Unconstitutional

In litigations overturning both the Communications Decency Act (CDA) and the Child Online Protection Act (COPA), the federal courts – including the Supreme Court – have held unconstitutional Congressional attempts to censor or block access to lawful content on the Internet (including “indecent” content as contemplated in this proceeding). In both of those cases, the court have held that the availability of *user installed and controlled* filtering software represents a “less restrictive alternative” to governmentally-imposed blocking of access to lawful content.

Although the goal of protecting children is without question a valid goal, the government may only “regulate the content of constitutionally protected speech [e.g., indecency] in order to promote a compelling interest if it chooses *the least restrictive means* to further the articulated interest.” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (emphasis added). In the seminal challenge to the CDA, the Supreme Court squarely endorsed user-controlled technology as a less restrictive means to further a governmental objective. *See Reno v. ACLU*, 521 U.S. 844, 877 (1997) (noting significance of “user based” alternatives to governmental regulation of speech on the Internet). In the most recent decision in the challenge to COPA, the district court found that filtering and other technological “user empowerment” tools are a less restrictive alternative to the direct government regulation and censorship of content on the Internet. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775, 813-14 (E.D. Pa. 2007). The Supreme Court has reached the same conclusion in the cable television context. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

There is nothing about the proposed wireless network that changes the legal conclusion that the least restrictive means to shield users from undesired content on the Internet is for the users (or their parents) to install filtering software *on their own Internet access devices*. The crucial difference between the broadcast context (in, for example, the *Pacifica* case) and the Internet context is *not* that something is being transmitted wirelessly. Instead, the critical difference is that at the time of *Pacifica*, radio devices did not have the capability to allow user control of access to content, while almost by definition Internet access devices have substantial internal “intelligence” that allows them to operate user control software. Moreover, unlike in *Pacifica* (when a listener could be assaulted by content immediately upon turning on the radio), Internet access is inherently *proactive*, requiring affirmative access to access content (and allowing amply opportunity for filtering software to be turned on prior to accessing content). These critical differences are at the core of the constitutional analysis, and make plain that an FCC mandate to block access to lawful Internet content would be held to be unconstitutional.

The possibility that content filtering could be imposed on an “opt out” basis would not in any way change the conclusion that user-based filtering tools are a less restrictive (and thus

constitutional) alternative to a government mandated filtering system. The proposed wireless network will provide general purpose access to the entirety of the Internet, and the government cannot constitutionally erect an additional hurdle for access to a slice of lawful content that the government disfavors. As the lower court in the COPA case found, user-installed filtering tools are highly effective at blocking access to undesired content and have the further important advantage of allowing parents to choose the exact type and style of filtering that is suitable for their children. Even an opt-in approach would not avoid the constitutional difficulties raised by the *government* essentially anointing a single (or at most a limited number) of content censorship services on what is otherwise an open network allowing access to the full universe of human thought on the Internet.

2. A Government-Imposed Filtering Mandate is Unnecessary

Under existing federal law, all Internet service providers must offer their customers content filtering tools that the customers can install on their own access computers and devices. *See* 47 U.S.C. 151 note. That mandate would apply to any network operator who offered service pursuant to this proceeding. This mandate leaves the decision to install filtering, and the decision about what filtering to install, exactly where it should be – with the parent or user. Moreover, there is a broad diversity of existing filtering and user empowerment tools already available, without any need for further FCC action. *See* <http://www.getnetwise.org> (indexing vast array of user empowerment products available to protect kids online); Adam Thierer, Parental Controls and Online Child Protection: A Survey of Tools and Methods, available at <http://www.pff.org/parentalcontrols/>.

3. A Government-Imposed Filtering Mandate would be Unwise

Finally, a content filtering mandate would be unwise for at least two policy reasons. First, as a practical matter, a mandate would lead a network operator to select one provider of content filtering services (because offering more than one different service would increase the cost and complexity of the filtering). This selection – under a government mandate – of a sole provider of filtering would dramatically chill the market for such services and would reduce innovation in the market. In the Internet space, there has been an explosion of innovation in user empowerment tools over the past 15 years, in stark contrast (until very recently) to the lack of innovation in the broadcast space following the government’s designation of the V-chip as the one approved user control tool. Although the V-chip can be useful, its existence (under a government mandate) seriously chilled innovation, and an effective selection of a sole provider of filtering in this network would have the same effect.

Second, any government mandated content filtering (whether mandatory, opt-out, or opt-in) would inevitably lead to numerous challenges about the decisions of the access provider to block or not to block specific websites or portions of websites or other content. Content

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providers who believe that their content is improperly blocked by the filtering will challenge the filtering decision. Because this would be a *government-mandated* filtering system, each of these disputes would be constitutional in nature, and each would be brought against the FCC in the first instance. Moreover, the FCC would likely also receive legal challenges by people who believe that the filtering system blocks *too little*. By mandating a filtering system under this proceeding, the FCC will be inviting an endless and likely numerous series of litigations and challenges.

We respectfully urge the Commission to move forward with this proceeding *without* any content filtering mandate. We appreciate your consideration of our views on this point.

Respectfully submitted,

/s/

John B. Morris, Jr.

cc: Ms. Marlene H. Dortch
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