

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of)
)
Service Rules for Advanced Wireless) WT 07-195
In the 2155-2175 Band)
_____)

***EX PARTE* COMMENTS OF
THE PUBLIC INTEREST SPECTRUM COALITION**

The Public Interest Spectrum Coalition (PISC), applauds the Commission for considering a proposal which has the potential to provide wireless broadband access to all Americans. As the Commission well knows, broadband access can have a transformative effect on people's lives and has become a critical ingredient for education, economic development, and civic engagement. The public interest obligations the Commission intends to impose upon the proposed new AWS-3 service will advance the specific public interest goals of Section 309(j), the broader goals of the Communications Act, and the goals of the First Amendment in enhancing civic discourse and diversity of information sources. In addition, the presence of a service which provides a genuine alternative to the current wireline cable modem/DSL duopoly will put pressure on cable and telecom providers to enhance their service offerings. The presence of an unrestricted network will also provide further pressure on wireless carriers to open their networks to the full range

of content and applications as well as the potential for innovation denied to all Americans today under the existing wireless “walled garden” regime.

To achieve these goals, however, it is critical that the Commission adopt rules that both allow the new service to flourish and ensure that the free service will provide a *genuine* open alternative. The Commission must take care that it does not impose conditions, such as mandatory filtering, which place the very legality of the service at risk. Further, the Commission must take steps to ensure that while the premium service provides sufficient revenue to make the AWS-3 service sustainable, it cannot allow the licensee to neglect the free service or constrict it to the point of uselessness.

The PISC understands that in the last few days, the Order has been modified to reflect concerns raised by the PISC with regard to mandatory content filtering on the free tier, assuring an open interface with the network, and permitting open applications on the free tier. At the same time, questions remain as to the nature of the filtering that the Commission will require, and the capacity that the licensee will make available to the free service. Given the uncertainties and the lack of an adequate record, PISC recommends that the Commission issue a *Further Notice of Proposed Rulemaking* that would ask whether to adopt an opt in or opt out filtering mechanism, and how to implement any filtering requirement adopted.

The PISC also wish to recommend to the Commission that, particularly in light of the results of the 700 MHz auction and increasing

consolidation in the wireless market, that the Commission impose eligibility restrictions on both the AWS-2 and the AWS-3 auctions to promote competition and prevent “excessive concentration of licenses” in accordance with 47 U.S.C. §309(j)(3)(B). Specifically, the PISC proposes that the Commission use the existing 95 MHz “spectrum screen” as a spectrum cap for purposes of this auction.

Finally, to resolve the difficult question of balancing possible interference issues in the AWS-3 band with the interests of AWS-1 licensees and potential AWS-2 licensees, PISC recommends that the Commission issue a *Further Notice* on tight deadline asking whether to reallocate 5 MHz from the AWS-2 band to the AWS-3 band. The PISC does not at this time take any position on whether it would be preferable to enhance competition in PCS by making the full 10 MHz paired currently allocated to AWS-2 available in the AWS-2 auction, or if it would better serve the public interest to allocate additional spectrum to the AWS-3 service. Rather, because the questions raised are difficult, and because there is a question of whether the Commission could reallocate spectrum to AWS-3 if that would better serve the public interest, the Commission should instead issue a *Further Notice* to develop a complete record.

I. FILTERING RAISES SUBSTANTIAL CONCERNS AND SHOULD BE REQUIRED, AT MOST, AS AN “OPT IN” FILTER CONSISTENT WITH SECTION 230(d).

Mandatory filters violate Section 326's direct prohibition on censorship of any radio service. In *FCC v. Pacifica*, 438 U.S. 726 (1978), the Supreme Court explained that the critical difference between prohibited Commission rules or conditions under Section 326 and enforcing Congress' prohibition on the broadcast of indecency lies in whether the FCC requires any prescreening of content or whether it sanctions content after the fact. *Id.* at 736-38. Further, in holding that the FCC's actions did not infringe on the right of adults to access constitutionally protected indecent content, the Court explicitly emphasized the narrowness of its holding. Not only did the Court make plain that it did not reach the question of whether the indecency statute could ever apply to two-way radio communication, the Court also emphasized the importance of the fact that adults could find the content elsewhere and that the restrictions only applied when children were *most likely* to watch. *Id.* at 747-50. Further, even when children are most likely to watch, the Court explained that precise judgments as to the context of the indecent speech and the likelihood that such speech will damage children must be considered. *Id.* at 750 n.29 (observing that a performance of Chaucer's "Wife of Bath" might not be indecent even if performed in prime time). The extremely limited holding of *Pacifica* and its application only to broadcast services as defined by Section 3(10) of the Communications Act was emphasized by the Court again in *Sable Communications* and *Reno v. ACLU*.

Filtering, by definition, engages in precisely the kind of prescreening of content prohibited by Section 326 under *Pacifica*. Furthermore, filters by are inherently incapable of the precise contextualized judgment that *Pacifica* requires to ensure that enforcement of the prohibition does not “reduce the adult population to only what is suitable for children.” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989) (citations omitted). Given that 18 U.S.C. §1464’s prohibition on the broadcast of indecent content may not even apply to a two-way radio service, the Commission’s authority for extending indecency authority to the AWS-3 is both highly questionable and constitutionally suspect.

A. Opt In Filters Do Not Create the Same Concerns As Opt Out Filters.

As noted above, it is entirely unclear if the Commission’s authority to prevent the broadcast of indecency extends to a service not defined as “broadcasting” under Section 3(10) of the Act. The PISC observes that in all previous cases in which the Commission has acted to limit access by children to indecent content, the Commission has acted pursuant to a direct Congressional mandate. Absent a clear directive from Congress, the Commission has never proactively sought to impose any kind of filtering regime.

The record before the Commission does not provide any basis for why the Commission should abandon its traditional approach and act proactively

to pre-screen indecent content for the purposes of protecting minors. Further, while it is certainly true that the protection of minors is an important state goal, the Commission cannot point to any language in the Communications Act that would make this an important goal of the *Commission* to pursue under its general public interest authority. Particularly in light of the direct prohibition on pre-screening content contained in Section 326, the Commission would do well to proceed with extreme caution.

If the Commission determines that filtering would serve the public interest, the Commission should use an “opt in” filter rather than an “opt out” filter. Such an approach is consistent with Section 230(d), which generally requires ISPs to make knowledge of filtering software available to subscribers. Indeed, looking to Section 230, and Section 230(d) in particular, it becomes clear that Congress has generally found it the wisest course to use regulation to enable parents to protect their children on their own initiative rather than impose restrictions that necessarily interfere with the rights of adults to access constitutionally protected content.

For the same reason, to the extent the Commission requires filtering, it would better serve the interests of parents and the public interest in protecting minors to require that the licensee make available filtering on the devices, and to allow parents to select any other filtering software. For example, parents using a particular type of filtering software already

customized for what settings they find appropriate should be permitted to simply load their choice of filter onto the customer premise equipment (CPE) rather than be required to use the filter supplied by the licensee. This will also allow the licensee to preserve needed resources by enabling the licensee to simply install commercially available filtering software that a parent can activate.

By contrast, the Commission should not require the licensee to locate the filtering in the network itself. Requiring a licensee to provide filtering is not only expensive and contradictory to the inherent philosophy of openness and end-to-end nature of the Internet architecture, it also makes the licensee responsible for what is inherently the impossible task of perfect filtering. Such a condition would be contrary to Congress' intent in Section 230 to make ISPs immune to civil liability or other penalty if their best efforts to offer family filtering and family friendly services fail. Indeed, at this time it is unclear if Section 230 would convey immunity to an enforcement action by the Commission.

It is important to note that a requirement for age verification and mandatory opt out provisions may also violate Section 326, especially where adults would have no alternative means of accessing the desired indecent content. Especially at a time when the nature of the Commission's indecency authority is pending before the Supreme Court, it seems unwise to sail into such uncharted waters. In particular, the absence of a substantial record

should give the Commission pause before proceeding so boldly into the unknown.

B. The Record is Inadequate to Support Opt Out As the Least Restrictive Means Necessary to Protect Children.

The inadequacy of the existing record also raises questions as to whether the requirement under *Pacifica* that the Commission narrowly tailor its indecency regulations to limit, to the greatest extent possible, the intrusion on the First Amendment rights of adults has been met. The Commission cannot rely on the regulation of indecent speech on the telephone that the court found acceptable in *Carlin Communications, Inc.* 837 F.2d 546 (2nd cir. 1986), as that case involved an extensive record, and the court explicitly instructed the Commission to reopen proceedings as technology advanced. In the more than 20 years since *Carlin Communications*, it is almost certain that advances in technology require a more thorough analysis than simple reliance on this previous determination.

Carlin Communication also provides uncertain authority for a mandatory opt in provision for two other reasons. First, the FCC imposed the regulations at issue in *Carlin* pursuant to a direct statutory mandate. That requirement does not exist here. To the extent Section 230 provides relevant authority for a filtering mandate, that authority would only extend to an “opt in” filter rather than an “opt out” filter. Second, the *Carlin Communications* court addressed wireline communication. Accordingly, the

potential conflict with the explicit statutory prohibition on pre-screening found in Section 326 did not exist.

By far the safest course, if the Commission determines it must have some kind of filtering to protect children, would be to issue a *Further Notice of Proposed Rulemaking* on the nature of the filtering it should require. This would provide an opportunity to develop the necessary record and address the complex legal problems raised by the imposition of filtering. Such a proceeding need not delay the auction, as the Commission could proceed to the auction while this aspect of the rulemaking remains pending. In any event, whatever delay the rulemaking on this single issue would cause will likely prove far less burdensome than the potential litigation risk of moving forward without a record.

II. THE COMMISSION SHOULD NOT CAP THE FREE TIER AT ONLY 25% OF CAPACITY.

The PISC understands that under the proposed business model, a viable pay service must subsidize the free service. This includes maintaining a higher level of speed and capacity for the paid service. At the same time, however, the Commission should not encourage the licensee to throttle the capacity of the free service where it is not necessary to do so. Where capacity is available to allow more free customers to connect at the speed designated by the Commission as suitable for the free tier, the licensee should use the available capacity.

Accordingly, while it is reasonable to require that the licensee reserve no more than 25% of its capacity for the free service when it is operating at 100% capacity, the Commission should not allow the licensee to make the 25% a cap on capacity when it has excess capacity. Otherwise, the service will be needlessly crippled, and the public interest benefits brought about by the availability of the service will be sharply diminished for no purpose. Rather, the 25% capacity should be seen as a floor that ensures that there will always be some level of free service available, rather than as a cap to artificially constrain the free service.

III. THE COMMISSION SHOULD SET SPECTRUM CAPS ON THE AWS-2 AND THE AWS-3 AUCTION, AND SHOULD CONDUCT A FURTHER NOTICE ON WHETHER TO REALLOCATE AWS-2 SPECTRUM TO AWS-3.

In the AWS-2 notice, the Commission sought comment on whether or not to impose any eligibility requirements. At the time, the Commission stated that it tentatively did not believe eligibility requirements were justified, but that changes from elimination of the spectrum cap might give rise to concerns that the market would become unduly consolidated.

Since release of the AWS-2 *NPRM*, consolidation in the industry has taken place at an enormous rate. The recently announced acquisition of Altell by Verizon Wireless is only the latest in a series of mergers that has tended to reduce the number of national and regional competitors. In addition, the 700 MHz auction outcome reinforced the dominant positions of Verizon Wireless and AT&T, the largest and second largest wireless carriers.

Given this change in circumstances, it would indeed be prudent to adopt an eligibility requirement for the AWS-2 and AWS-3 auctions to ensure that a sufficient number of carriers have sufficient spectrum to remain competitive – especially in the emerging wireless broadband market.

PISC therefore proposes that the Commission use the existing 95 MHz screen as an eligibility restriction in the AWS-2 auction, and prohibit participation in the AWS-3 auction where parties would exceed the screen in any major market area. Such a precaution will ensure that competing wireless carriers will be able to use the AWS-2 auction to supplement their spectrum holdings and offer next generation wireless services on a competitive footing with the largest national carriers.

These same competitive concerns, however, give rise to a difficult consideration for the allocation of the AWS-2 and AWS-3 spectrum. Under the current allocation of spectrum between the bands, carriers argue that without strict out of band emission (OOBE) limits they face a real danger of harmful interference. On the other hand, M2Z argues that the recommended OOBE limits would render the AWS-3 band commercially useless. Alternatively, if the Commission were to reallocate 5 MHz from the AWS-2 band to the AWS-3 band, it would resolve the interference concerns while making less spectrum available to competing PCS carriers.

Because opponents of reallocating spectrum from the AWS-2 band have also raised issues of notice under the APA, the wisest course appears to be an

expedited *Further Notice of Proposed Rulemaking*. Such a rulemaking could also address the issues pertaining to filtering discussed above in Part I. While neither the interests of competition nor the problem of digital inclusion benefit from delay, the Commission must balance the need for action with the need to make a decision on a record adequate to support any challenge. Better to delay an additional few months than to rush to a solution that may well be undone by the courts.

CONCLUSION

The proposed service rules for the AWS-3 band represent a potential positive step forward for both U.S. wireless policy and broadband policy. But this opportunity must not be diminished with risky filtering mandates or needless capacity restraints. In addition, the Commission should seize this opportunity to improve competition in wireless services, which has grown increasingly consolidated since the repeal of the Commission's spectrum cap.

Respectfully submitted,

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