

June 26, 2008

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

Re: *Ex Parte* Presentation – Service Rules for Advanced Wireless Services (WT Docket Nos. 04-356 & 07-195)

Dear Ms. Dortch:

The Commission's *Further Notice* in the Advanced Wireless Service ("AWS") proceedings proposes to require the AWS-3 licensee to use up to 25 percent of the AWS-3 network capacity for a free broadband offering that contains an "always on," network-based content filtering mechanism.<sup>1</sup> CTIA–The Wireless Association® shows below that the Commission lacks statutory authority to require free wireless broadband Internet access service, and that a government mandate to filter content is both unlawful and unconstitutional.

**The Commission Lacks the Legal Authority  
to Require Free Wireless Broadband Internet Access Service**

A requirement to make service available to the public indiscriminately at a specific rate (even zero) is classic common carrier regulation. Under Title II of the Communications Act, *with respect to common carrier services*, the Commission has authority to prescribe rates and practices to ensure they are just and reasonable and not unreasonably discriminatory, and service must be provided upon a reasonable request.<sup>2</sup>

The Commission cannot rely on Title II for jurisdiction here, however, because the service at issue – wireless broadband Internet access service – is an information service, not a telecommunications/common carrier service.<sup>3</sup> As the Commission recently held, the service is "not subject to Title II common carrier obligations applicable to telecommunications service providers."<sup>4</sup> Indeed, the Communications Act specifically prohibits common carrier regulation of an information service even if provided by a common carrier: "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."<sup>5</sup>

<sup>1</sup> *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, Further Notice of Proposed Rulemaking, FCC 08-158, Appendix A Proposed Rules §§ 27.1191 & 27.1193 (rel. June 20, 2008) ("AWS FNPRM").

<sup>2</sup> See 47 U.S.C. §§ 201(a), 201(b), 202(a), 205.

<sup>3</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

<sup>4</sup> *Id.*, 22 FCC Rcd at 5916 ¶ 41.

<sup>5</sup> 47 U.S.C. § 153(44).

The Commission lacks any other potential jurisdictional basis to require a free offering of wireless broadband Internet access service as well. In particular, the Commission lacks jurisdiction under Section 706 of the Telecommunications Act of 1996<sup>6</sup> or under its Title I ancillary jurisdiction.

First, although Section 706 “encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability,” it does not provide an independent grant of jurisdiction to the Commission.<sup>7</sup> As the Commission has observed:

After reviewing the language of Section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that Section 706(a) does not constitute an independent grant of forbearance authority or *authority to employ other regulating methods*. Rather, we conclude that Section 706(a) directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.<sup>8</sup>

Thus, the Commission must find some underlying grant of authority other than Section 706(a) to require that an information service such as wireless broadband Internet access be provided indiscriminately at a specific rate of zero. No such underlying grant of authority exists.

The Commission also cannot rely on its ancillary jurisdiction to impose the kind of access and rate regulation at issue here. The Commission’s ancillary jurisdiction derives in part from Section 4(i) of the Act, which limits such authority to actions that are “not inconsistent with” the Act itself.<sup>9</sup> Similarly, under Section 303(r), the Commission’s authority to adopt rules or impose conditions is limited to the extent that it may not be “inconsistent with law . . .”<sup>10</sup> Accordingly, for any ancillary jurisdiction analysis, “it is appropriate to inquire, as did the Supreme Court in *Southwestern*, whether any statutory commandments are directly contravened by the assert[ion] of ancillary jurisdiction.”<sup>11</sup> Here, as discussed above, Section 3(44) of the Act specifically prohibits imposing this kind of common carrier regulation on the provision of an information service such as wireless broadband Internet access service. In an analogous circumstance, the Supreme Court held that the Commission lacked ancillary jurisdiction to require cable systems to provide public access channels in a non-discriminatory fashion on the basis of its statutory authority over broadcasting because the Act prohibited treating broadcasters as common carriers.<sup>12</sup>

Notably, M2Z fails to provide any other legal authority for a Commission rule directing a licensee to provide wireless broadband service “free of subscriber and service charges.”<sup>13</sup> Although

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<sup>6</sup> Pub. L. No. 104-104, 110 Stat. 56, 153 (1996).

<sup>7</sup> *Id.* § 706(a).

<sup>8</sup> *Deployment of Wireline Services Offering Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 24044-45 ¶ 69 (1998) (emphasis added), *recon. denied*, *Deployment of Wireline Services Offering Telecommunications Capability*, Order on Reconsideration, 15 FCC Rcd 17044, 17044-48 ¶¶ 6-7 (2000). The Commission has continued to follow this interpretation. *See, e.g., Petition of the Embarq Local Operating Companies for Forbearance*, 22 FCC Rcd 19478, 19503 n. 170 (“Section 706 is not an independent grant of forbearance authority”) (2007).

<sup>9</sup> 47 U.S.C. § 154(i).

<sup>10</sup> *Id.* § 303(r).

<sup>11</sup> *National Ass’n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (footnote omitted), citing *United States v. Southwestern Cable Company*, 392 U.S. 157, 169 n. 29 (1968).

<sup>12</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). *See* 47 U.S.C. § 153(10) (“a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”).

<sup>13</sup> Comments of M2Z Networks, Inc., WT Docket No. 07-195, at 19 (filed Dec. 14, 2007).

the Commission cannot mandate a free broadband offering, nothing precludes M2Z or any other party from pursuing a free broadband business model.

### **A Commission Mandate to Include Content Filtering is Without Statutory Authority and is Unconstitutional**

CTIA wholeheartedly supports the important goal of protecting children from inappropriate content on mobile devices. To that end, CTIA has worked with the wireless industry to create the Wireless Carrier Content Classification and Internet Access Control Guidelines. All the major wireless providers and many others offer consumers tools to limit content at no charge, and parents can search their carrier's website to find information about the parental controls available to them. As CTIA has stated, parents of young wireless users have the ability to: request that Internet access capabilities be turned off, filter web content, and block unwanted text messages or phone calls, as well as keep track of their child's whereabouts with mobile GPS applications and monitor their wireless usage.<sup>14</sup>

The proposed content filtering mandate, however, is unconstitutional. Even if the Commission wishes to risk a constitutional battle, Congress has never provided the Commission with the statutory authority to adopt the proposed rule. A content filter is a potent censor and should be in the hands of parents, not the government.

Here, the Commission seeks to require the AWS-3 licensee to incorporate a network-based content filter on its free service, "active at all times," to block "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 would be harmful to teens and adolescents."<sup>15</sup> The proposal is a content-based regulation subject to First Amendment strict scrutiny standards – namely, any regulation must be the least restrictive means of furthering a compelling government interest.

The Supreme Court has concluded that previous government mandates to block or censor lawful material on the Internet are unconstitutionally overbroad and vague<sup>16</sup> – and the FCC's proposed rule is equally deficient. First, the proposed regulation would bar adult access to lawful content and there are less restrictive alternatives available. In *Reno v. ACLU*, the Court stated that a statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."<sup>17</sup> At that time, back in 1997, the Court noted the existence of reasonably effective "user-based" filtering technologies and found there were less restrictive means to further the government's interest, rendering the Communications Decency Act ("CDA") unconstitutional.<sup>18</sup> In *Ashcroft v. ACLU*, the Court upheld a lower court injunction against the Child Online Protection Act and again honed in on the availability of filtering technologies that "impose selective restrictions on speech *at the receiving end*, not universal restrictions at the source."<sup>19</sup> The Court went on to suggest that "programs to

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<sup>14</sup>See Steve Largent, President & CEO, CTIA-The Wireless Found., Remarks at the Department of Justice Internet Safety Briefing (June 4, 2008), *available at* <http://www.ctia.org/blog/index.cfm/2008/6/4/Cyberbullying-A-Serious-Problem-Facing-Kids-Today>; *see also* CTIA *Ex Parte* Presentation, WT Docket Nos. 05-194 & 08-27, at 1 (June 11, 2008).

<sup>15</sup> *AWS FNPRM* at Appendix A Proposed Rule § 27.1193(a).

<sup>16</sup> *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>17</sup> *Reno*, 521 U.S. at 874.

<sup>18</sup> *Id.* at 877-78.

<sup>19</sup> *Ashcroft v. ACLU*, 542 U.S. at 667 (emphasis added).

promote use of filtering software . . . could give parents [monitoring] ability without subjecting protected speech to severe penalties.”<sup>20</sup>

In a similar case, *US v. Playboy Entertainment Group, Inc.*, the Court upheld a lower court ruling that mandatory scrambling of sexually explicit programming required by Section 505 of the Telecommunications Act of 1996 was unconstitutional because a less restrictive alternative was available; viewers could order signal blocking on a household-by-household basis.<sup>21</sup> The Court held that when a “plausible, less restrictive alternative is offered to a content-based speech restriction,” the Government may employ content regulation only if it can show that the less restrictive alternative “will be ineffective to achieve its goals.”<sup>22</sup>

As noted above, wireless carriers are making parental control features available to consumers, offering a less restrictive and effective means to give parents the ability to monitor their children’s access to content – and establishing the factual basis for a finding that the proposed regulation is unconstitutionally overbroad.

In addition, the content filtering proposal is impermissibly vague. In *Reno v. ACLU*, the Court found that the scope of the CDA’s coverage – which relied on the terms “indecent,” “patently offensive,” and “in context” – was so vague as to “provoke uncertainty among speakers” and would prevent them from divining what speech would violate the statute.<sup>23</sup> The Court added that the “vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”<sup>24</sup> The standard under consideration here goes well beyond the CDA’s indecency standard to cover “any image or text that otherwise would be harmful to teens and adolescents.”<sup>25</sup> Courts will no doubt conclude that a standard as vague as “harmful to teens and adolescents” will have a chilling effect on free speech, is overly vague, and unconstitutional.

Even if the Commission were to ignore the constitutional problems at issue here, there is no statutory authority for the proposed filtering requirement. Section 326 of the Act expressly prohibits censorship in connection with radio communications.<sup>26</sup> A Commission rule requiring a licensee to filter certain Commission-defined conduct would run afoul of the Supreme Court’s ruling on the no-censorship provision: “The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves.”<sup>27</sup> Moreover, the Commission’s rulemaking authority regarding radio obscenity, indecency and profanity is limited to broadcasting, and thus does not apply to wireless broadband Internet access.<sup>28</sup>

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<sup>20</sup> *Id.* at 670.

<sup>21</sup> *U S v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). See also *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 753-760 (1996) (finding a provision of the Cable Television Consumer Protection and Competition Act of 1992 that required leased channel operators to segregate and block sexually explicit material to be unconstitutionally overbroad because a less restrictive alternative, scrambling, was available).

<sup>22</sup> *Reno*, 521 U.S. at 816.

<sup>23</sup> *Id.* at 871 (citations omitted).

<sup>24</sup> *Id.* at 871-72 (citations omitted).

<sup>25</sup> *AWS FNPRM* at Appendix A Proposed Rule § 27.1193(a).

<sup>26</sup> 47 U.S.C. § 326 (“Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”)

<sup>27</sup> *FCC v. Pacifica*, 438 U.S. 726, 735 (1978).

<sup>28</sup> Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (emphasis added) (the FCC shall promulgate regulations regarding “the *broadcasting* of indecent programming”). Nor could the Commission find authority under its Title I ancillary jurisdiction. The D.C. Circuit has unequivocally held that

Finally, the Commission should take note that in Section 230 of the Act, Congress required providers of interactive computer services to *notify* customers of the “commercial availab[ility]” of “parental control protections ... such as filtering services” but did not require (or give the Commission authority to require) that such providers themselves provide the filtering, let alone for free.<sup>29</sup>

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Accordingly, for the reasons set forth above, the AWS-3 proposal is unlawful let alone misguided policy and the Commission should reconsider its approach to the AWS-3 service rules. There is no statutory basis for the Commission to require the AWS-3 licensee to make available free broadband Internet access service, and the content filtering proposal is unconstitutionally overbroad and vague. The Commission should refrain from adopting such requirements.

Pursuant to Section 1.1206 of the Commission’s Rules, this letter is being electronically filed with your office. If you have any questions regarding this submission, please contact the undersigned.

Sincerely,

*/s/ Paul W. Garnett*

Paul W. Garnett

cc: Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Aaron Goldberger  
Bruce Gottlieb  
Renée Crittendon  
Wayne Leighton  
Angela Giancarlo

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the Commission cannot use ancillary jurisdiction to regulate content, even in the area of broadcasting. *See Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (“To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content.”).

<sup>29</sup> 47 U.S.C. § 230(d).