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

In the Matters of	
Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band	WT Docket No. 07-195
Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands	WT Docket No. 04-356

JOINT PUBLIC INTEREST AND INDUSTRY COMMENTS SUBMITTED ON BEHALF OF

CENTER FOR DEMOCRACY & TECHNOLOGY; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN LIBRARY ASSOCIATION; ASSOCIATION OF RESEARCH LIBRARIES; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; DEFENDING DISSENT FOUNDATION; DKT LIBERTY PROJECT; ELECTRONIC FRONTIER FOUNDATION; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; NATIONAL COALITION AGAINST CENSORSHIP; NETCHOICE; NETCOALITION; ONLINE PUBLISHERS ASSOCIATION; PEACEFIRE.ORG; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PUBLIC INTEREST SPECTRUM COALITION; REPORTERS WITHOUT BORDERS; SPECIAL LIBRARIES ASSOCIATION; ADAM THIERER, SENIOR FELLOW, PROGRESS & FREEDOM FOUNDATION; VOICE ON THE NET (VON) COALITION; and WOODHULL FREEDOM FOUNDATION

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SUMMARY

The undersigned commenters represent a very broad coalition of public interest and industry groups that have divergent views on many of the issues raised in this proceeding, but that strongly agree on one point: the content filtering mandate proposed by the Commission would be unconstitutional and unwise. The undersigned strongly urge the Commission to abandon the proposed filtering mandate.

The filtering proposal has numerous constitutional and legal problems. First, the reach of the filtering mandate is extraordinarily broad, and would attempt to censor content far beyond any content regulation regime that has been previously upheld in the face of constitutional challenge. By requiring an AWS-3 service provider to block access to any text or video content that might harm a 5-year-old child in any way, the Commission would be reaching past the narrow categories of content regulation that the Supreme Court has upheld in the past.

Second, even if the scope of the filtering mandate were more narrowly focused, it would conflict with the First Amendment analysis that the Supreme Court applied to Internet access in the seminal *Reno v. ACLU* decision. In that case, the Court ruled that the use of filtering software *by parents and individual users* was a constitutionally less restrictive alternative to governmental regulation of Internet content. Because of the nature of the Internet – whether delivered by wire or wirelessly – users (and parents) can control the content they access, without any need for governmental regulation of content. Neither the *Pacifica* nor *American Library Association* cases would support a different conclusion.

Moreover, even if the Commission were to require filtering on an "opt out" or "opt in" basis, the Constitutional problems would not be avoided. Opt-out filtering would impose an unconstitutional burden on listeners and recipients of Internet communications, and both opt-out

and opt-in filtering would violate the First Amendment rights of *speakers* and other content providers on the Internet. Simply put, the First Amendment does not allow a government-mandated "blacklist" of websites to be blocked.

Beyond the serious constitutional problems raised by the filtering proposal, the requirement would also violate the terms and intent of two federal statutes – 47 U.S.C. § 326 (which prohibits the Commission from "interfer[ing] with the right of free speech") and 47 U.S.C. § 230 (which promotes *user* control over content and limits burdens on service providers). The filtering requirement would also limit what people could do online using the free AWS-3 service so dramatically that the usefulness of the service would be radically reduced. Finally, the mandated filtering would also certainly lead to legal challenges that would delay the implementation of the proposed access service.

For all of these reasons, the Commission should step back from its proposed mandate and should – as directed by the Supreme Court in *Reno v. ACLU* – allow parents and individual Internet users to decide for themselves whether to use filtering technology and what filtering scheme to use.

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Center for Democracy & Technology, American Booksellers Foundation For Free Expression, American Library Association, Association of Research Libraries, Computer & Communications Industry Association, Defending Dissent Foundation, DKT Liberty Project, Electronic Frontier Foundation, Information Technology Association of America, National Coalition Against Censorship, NetChoice, NetCoalition, Online Publishers Association, Peacefire.org, People For The American Way Foundation, Public Interest Spectrum Coalition,[1]

[1] The members of the Public Interest Spectrum Coalition are: The CUWiN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, Free Press (FP), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), the Open Source Wireless Coalition (OSWC), Public Knowledge (PK), and U.S. PIRG.

Reporters Without Borders, Special Libraries Association, Adam Thierer (Senior Fellow, Progress & Freedom Foundation), Voice On The Net (VON) Coalition, and Woodhull Freedom Foundation respectfully submit these comments in opposition to the Commission's proposed mandate that any free broadband service offered in the 2155-2188 (AWS-3) band must include network-based filtering of content. Such a filtering mandate would be both unconstitutional and in conflict with two federal statutes. If the Commission wishes to initiate the proposed broadband service, it should not hamper and delay that service by appending an illegal filtering requirement.

The undersigned commenters represent a diverse group of public interest and industry organizations. The undersigned generally support the goal of improving and expanding nationwide Internet access, although they may not agree on how best to achieve that goal. And while the undersigned may not agree on many technical and policy points raised by the Commission and other commenters in this proceeding, the signatories all are in strong agreement that the proposed filtering mandate would be unconstitutional and a bad policy choice.

I. THE PROPOSED MANDATORY FILTERING REQUIREMENT WOULD VIOLATE THE FIRST AMENDMENT.

Any effort to protect minors from harmful content must be undertaken consistent with the Constitution. Proposed Section 27.1193 would violate the First Amendment, both because of its unprecedented broad reach and because of its failure to use the least restrictive means to achieve its objective.

A. The Filtering Mandate Would Censor Content Far Beyond Anything Ever Upheld By Any Court for Any Medium.

Under the Supreme Court's First Amendment decisions, the government can regulate only specific and narrow categories of speech, including three categories of sexual content:

obscenity, child pornography and – as to minors – content which is deemed to be "harmful to minors." Section 27.1193, however, goes far beyond these categories to attempt to regulate content that cannot constitutionally be regulated in any context.[2]

Section 27.1193(a)(1) would regulate "pornography," a term that (a) has no clear meaning either in the proposed regulations or in modern First Amendment jurisprudence, and (b) is often understood to include a broad range of mild sexual content that, because it is neither "obscene" nor "harmful to minors," cannot constitutionally be regulated in any context.[3] Since at least the Supreme Court's decision in *Miller v. California*, 413 U.S. 15 (1973), the term "pornography" does not define any category of content that can constitutionally be regulated. Any FCC mandate to block access to "pornography" would, we submit, be struck down as vague and overbroad.

The second portion of the proposed rule's definition of the content to be censored is even more vague and overbroad. The proposed requirement in § 27.1193(a)(1) to regulate "any images or text that otherwise would be harmful to teens and adolescents" could sweep in vast categories of content – including significant non-sexual content – that no court in this country has ever allowed to be regulated by the government. This is especially true in light of the proposed rule's specification that any content deemed to be harmful to a *five*-year old child must be blocked. Under this standard, for example, the AWS-3 licensee might have to block access to

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[2] The proposed rule does seek to regulate obscenity, but even with obscenity there are difficult questions about what community standard would be used in a nationwide network. Although this discussion is confined to the non-obscenity categories of content, even imposing a filtering requirement for obscenity would raise serious technical and policy concerns.

[3] *See* West, Caroline, "Pornography and Censorship", The Stanford Encyclopedia of Philosophy (Fall 2005 Edition), Edward N. Zalta (ed.), available at http://plato.stanford.edu/archives/fall2005/entries/pornography-censorship/ (discussing various definitions of "pornography"); Traditional Values Coalition, "Pornography Comes to the Mall" (Oct. 6, 2005), available at http://www.traditionalvalues.org/modules.php?sid=2455 (asserting that displays and catalogs from Victoria's Secret are "pornography").

many news reports that discuss events that might be disturbing to very young children.[4] This prohibition would plainly infringe on the rights of adults to access broad categories of lawful speech, and would also infringe on the rights of older minors to access speech that is lawful but might arguably be "harmful" for a five-year old.

B. Even If a Filtering Requirement Were to Be Narrowly Focused, It Would Fail Strict Scrutiny Under a Number of Supreme Court Decisions.

Even if the Commission were to narrow the proposed filtering requirement to a constitutionally-permissible category of content – such as content that is "harmful to minors"[5] – the requirement would still fail constitutional scrutiny because it is not the least restrictive means to achieve the governmental objective.

The proposed filtering requirement regulates speech on the basis of its content (whether defined broadly as currently drafted or in a narrowed form), and it regulates speech that is *lawful and protected for adults* (whether or not it is lawful for minors to access). Under the First Amendment, content-based regulations of protected speech are presumptively invalid. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Content-based regulations will be upheld only if the government meets its burden of demonstrating both (a) the existence of a compelling government interest, and (b) that the law is "narrowly tailored" to effectuate that interest. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997). That test only permits the government to "regulate the content of constitutionally protected speech . . . in order to promote a compelling interest if it

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[4] Some researchers have suggested that viewing news coverage of the September 11th tragedy may have been harmful to some children. *See, e.g.,* "Study Examines 9/11 Effects on Children," Georgetown University Hoya, May 17, 2002, available at http://web.archive.org/web/20020602013850/http://www.georgetown.edu/departments/psychology/News/9.11study.html.

[5] Regulation of content termed "indecent" has been upheld in only one narrow context – broadcasting – and the constitutional analysis of the 30-year old decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is no longer sound. Moreover, the Supreme Court has specifically rejected the use of the term "indecent" in the context of regulation of Internet content. *See Reno v. ACLU*, 521 U.S. 844, 871-74 (1997).

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). Although the undersigned assume solely for purposes of these comments that the government has a compelling interest,[6] the proposed regulation is not narrowly tailored if there are – as here – "less restrictive alternatives" to achieve the government objective.

The United States Supreme Court and other federal courts have struck down previous attempts by the government – in the Communications Decency Act ("CDA") and Child Online Protection Act ("COPA") – to censor lawful content on the Internet. In both instances the courts found the availability of user-installed and user-controlled filtering software to be a less restrictive alternative to government censorship. 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*, 521 U.S. at 877 (noting significance of "user based" alternatives to governmental regulation of speech on the Internet). In the most recent COPA decision, the district court found that *client-side* 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 Third Circuit Court of Appeals specifically affirmed this conclusion just a few days ago. *See ACLU v. Mukasey*, No. 07-2539, slip op. at 51 (3d. Cir. July 22, 2008).

[6] The government may have compelling interest in protecting minors from *some* content (such as obscenity). But as detailed in Section I.A. above, the proposed regulation sweeps far beyond the limited categories of content for which the courts have found the government's interest to be "compelling." Nevertheless, solely for purposes of these comments, we will assume that the government's interest is compelling. This assumption, however, does not relieve the Commission of its obligation to establish the compelling interest in blocking the full range of content targeted by the proposed regulation. The Commission, in issuing its Further Notice of Proposed Rulemaking, was completely silent on its reasoning underlying the overbroad filtering requirement, and so we are unable to comment on the Commission's rationale. Once the Commission articulates its rationale, we will at that time consider whether the asserted rationale warrants challenge before the Commission or a subsequent reviewing court.

The Supreme Court previously reached the same conclusion in the context of cable television. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The *Playboy* case is particularly instructive because the challenged regulation in that case closely parallels the proposed filtering mandate here. In *Playboy*, the network owner (the cable company) was required to completely block access by adults to lawful sexual content during certain hours of the day in an effort to protect children. The Supreme Court struck this requirement down as unconstitutional because individual parents had the means (the "less restrictive alternative") to protect their children without *any* burden on the rights of willing adults to access the sexual content. The Court reasoned that "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Id.* at 814. As in *Reno v. ACLU*, the existence of *user*-controlled "client-side" filtering is a constitutionally "less restrictive alternative" to network-operated filtering that blocks access by adults to lawful content. Under the very well established reasoning of the CDA, COPA, and *Playboy* decisions, we submit that the proposed filtering mandate fails strict scrutiny and is unconstitutional.

C. The *Pacifica* and CIPA Decisions Are Inapplicable and Cannot Save the Proposed Filtering Mandate.

Neither the Supreme Court's *Pacifica* decision nor its ruling upholding filtering in libraries in *United States v. American Library Association*, 539 U.S. 194 (2003), suggests that the Commission's proposed filtering mandate would be upheld. Instead, both cases highlight the unconstitutionality of the Commission's proposed rule.

1. *Pacifica* Is Inapplicable Because Users Have Tools to Control Their Internet Experience and Must Take Affirmative Steps to Access Internet Content.

Even if one assumes that the Supreme Court's decision in *FCC v. Pacifica Foundation* is still good law,[7] that case would do nothing to save a filtering mandate. That decision turned on particular characteristics of the broadcast medium as it existed in the 1970s, and is wholly inapplicable to the wireless Internet access context in the twenty-first century. The *Pacifica* Court itself "emphasize[d] the narrowness of [its] holding." *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

There are many key differences between wireless broadband access and the wireless transmission of information. First, unlike broadband, the "users" in *Pacifica* (the radio listeners) were unable to shield themselves from unwanted radio content (apart from turning off the radio itself). At the time of *Pacifica*, radio devices did not have the capability to allow user control of access to content. In contrast, Internet access devices have substantial internal computing capability 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 a user to take affirmative steps to access content (and allowing ample opportunity for filtering software to be turned on prior to accessing content). These critical differences – apparently ignored by the Commission – are at the core of the constitutional analysis, and further demonstrate why any FCC mandate to block access to lawful Internet content would be unconstitutional.

Viewed from another perspective, there is *absolutely nothing* in the seminal Internet case of *Reno v. ACLU* suggesting that the case would have been any different in a wireless broadband

[7] *But see* Adam Thierer and John Morris, "Still 'Dirty' After All These Years," July 2, 2008, available at http://blog.cdt.org/2008/07/02/still-dirty-after-all-these-years/.

context. Indeed, in the *Reno* decision, the Supreme Court specifically *rejected* the government's argument that *Pacifica* saved the CDA, emphasizing the absence of government regulation of the Internet and concluding that "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." *Reno*, 521 U.S. at 866-67. In distinguishing *Pacifica*, the *Reno v. ACLU* court did *not* look at the wireless nature of the communications in *Pacifica*; instead, what was critical in *Reno* was the nature of Internet communications, which allowed users to protect themselves from unwanted content without government intervention. Those key characteristics of the Internet – that allow ample opportunity for user control – are equally present whether Internet access is delivered by wire or wirelessly.

2. *United States v. American Library Association* Would Not Control a Constitutional Challenge to a Filtering Mandate.

Similarly, the *United States v. American Library Association*, 539 U.S. 194 (2003) ("*ALA*"), upholding the Children's Internet Protection Act (CIPA), would not save an FCC-imposed filtering mandate. There are at least three constitutionally-significant differences between the *ALA* case and the Commission's proposed filtering mandate.

First and foremost, in *ALA* it was critical that *no one* was ever blocked from accessing lawful content. In fact, the Supreme Court construed the CIPA statute as requiring that adults always be given access to any lawful content they desired to reach. *Id.* at 209. In stark contrast, the FCC's proposed filtering mandate *completely* blocks access to lawful content for everyone, including adults. Second, in *ALA* the end users (the people the law intended to protect) did not themselves have the opportunity to implement user-controlled filtering tools to choose what content to access, and thus the "less restrictive means" that were available to users in the CDA case were unavailable in the CIPA context. Here in contrast, users of the wireless network will

themselves be able to choose whatever "less restrictive alternative" each user (or each user's parent) decides is best for them. Thus, the users to be protected (e.g., children) can in fact be protected without any governmentally imposed burden on speech available to adults. Third, the legal analysis in *ALA* addressed strings attached to government funds where the libraries could choose to decline funding and thereby avoid any government mandate. Here, the filtering requirement is mandatory, and will affect all users of the AWS-3 service. In light of these and other important distinctions, *ALA* will not save the filtering mandate from being struck down.

D. Voluntary Client-Side Filtering Is Effective, and Is a Less Restrictive Alternative to a Filtering Mandate.

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. Thus, decisions on whether to install and use filtering, and what filtering software or tools to use, would be left exactly where it should be – with the parent or user. A broad diversity of existing filtering and user empowerment tools is already available, without any need for further FCC action.[8]

In the recent COPA decision, the district court undertook an extensive assessment of client-side filtering tools and found them to be highly effective at shielding minors from unwanted content. *See ACLU v. Gonzales*, 478 F. Supp. 2d at 789-97. The court also made the following findings of fact:

> 87. Filters are widely available and easy to obtain. Numerous filtering products are sold directly to consumers, either in stores or over the Internet. Filters are also readily available through ISPs. . . .
> . . .

[8] *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/.

> 92. Filtering programs are fairly easy to install, configure, and use and require only minimal effort by the end user to configure and update
> . . .
> 103. Filtering products have improved over time and are now more effective than ever before. . . .

Id. at 793-95. As the court found, filters are widely available and very effective – and are available and effective *without* any government mandate or requirement.

As noted above, the *Sable* decision makes clear that in any content-based regulation of speech the government must choose "*the least restrictive means* to further the articulated interest," *Sable,* 492 U.S. at 126 (emphasis added), and numerous courts from the Supreme Court on down have held that user-installed filtering tools are "less restrictive alternatives" to government imposed censorship.

For all of these reasons, the filtering mandate proposed in § 27.1193 violates the First Amendment and would be struck down.

II. MAKING THE FILTERING "OPT OUT" OR "OPT IN" WOULD NOT AVOID THE CONSTITUTIONAL PROBLEMS.

Although § 27.1193 as proposed is unconditional, the Commission has apparently entertained the possibility of making a filtering mandate "opt out" or "opt in," but neither of these approaches would save the requirement under the First Amendment.

A. An "Opt Out" Filtering Requirement Would Still Be Unconstitutional Because It Would Violate the Free Speech Rights of Both Listeners and Speakers.

Under an opt-out approach, an adult could sign up to an "adult content access list" in order for the network-level filtering to be disabled when the adult is using the Internet. Although this approach might superficially seem appealing, it would nevertheless still be unconstitutional for at least three reasons.

First, as noted in Section I.A. above, the § 27.1193 filtering mandate is so sweeping in its scope that it would violate the rights of older minors to receive content to which they have a constitutional right to access (but which arguably might be "harmful" to a five-year old). Second, the stigma of having to sign up for a central, nationwide list of – effectively – "people who want access to adult content" would be a chilling and unconstitutional burden on adults' right to access lawful content. Under the First Amendment, the government cannot force people to "sign up" in order to receive lawful speech. *See, e.g,, Lamont v. Postmaster General*, 381 U.S. 301 (1965). This is especially true because of the broad sweep of content blocked by § 27.1193 and the availability of highly effective and less restrictive alternatives in the form of *client-side* filtering tools.

Third and finally, wholly apart from the constitutional rights of those accessing the Internet through the AWS-3 network, the proposed filtering mandate would also violate the constitutional rights of *speakers and content providers* on the Internet who want to speak to the broadest audience possible. It would be flatly unconstitutional for the government to select and anoint one, or even a limited number of, filtering "blacklists" of content that must be blocked – even if a private party (the AWS-3 licensee) does the selection under an FCC mandate. Unless the filtering "blacklist" *only* contained sites that had been *adjudicated* to be illegal for minors (on a nationwide basis, presumably), the filtering mandate would be precisely the sort of unconstitutional prior restraint squarely rejected by the Supreme Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Bantam Books*, a state government commission pressured the distributors of certain magazines to discontinue carrying the magazines, and the Supreme Court held that to be an unconstitutional prior restraint in a case brought by the magazine publishers. Similarly, the FCC is effectively requiring the distributors (the ISPs) to discontinue access to

certain websites, and we submit that a court will conclude (in actions brought by the websites) that this is an unconstitutional prior restraint.

Under the "prior restraint" doctrine, the government cannot directly or through a private party select content to be censored, without going through the full panoply of substantive and procedural protections afforded by the First Amendment. As the Supreme Court has made clear, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id*. at 70. Even content that is asserted to be obscene cannot be subject to a prior restraint without following very strict procedural safeguards[9] – safeguards that are not even remotely present with the proposed government-mandated, privately-implemented filtering system.

Because at least some adult users would not "opt out" of the filtering system (whether because of the stigma, inertia, or other reasons), the filtering system would implement a government-imposed prior restraint on the right of the *speakers* to reach the broadest possible audience. That is simply not permitted under the First Amendment without the strictest of procedural safeguards – safeguards that are not present in the FCC's proposed rule.

B. An "Opt In" Filtering Requirement Would Also Be Unconstitutional, and Would Inevitably Lead to Constitutional Challenges Against Both the FCC and the Service Provider.

Even an "opt in" filtering mandate would be an unconstitutional prior restraint under the *Bantam Books* line of cases discussed above. There is simply no way around the fact that the filtering "blacklist" would be *government*-mandated censorship of content, without any of the procedural safeguards required by the First Amendment. The FCC cannot constitutionally serve as a censorship board that selects which Internet websites should be available to all Americans.

[9] *See Freedman v. State of Md.*, 380 U.S. 51 (1965)

Yet that is *exactly* what the § 27.1193 mandate would create. That conclusion is not altered by the Commission's suggested outsourcing of that censorial function to a private company (which would in turn subcontract the function out to a filtering company). The First Amendment does not allow the FCC (or any private entity acting pursuant to FCC mandate) to function as an "Internet board of review."

That individual users might "opt in" to use this government-mandated and selected blacklist of censored content does not cure the blacklist of its constitutional defects. The users would be opting-in to the filtering list to be able to access sites that the government deems to be "safe" to access. Yet that infringes on the rights of *speakers* to be able to offer content to those "opting in" users. If the *users* choose not to go to a particular speaker's website, there is no constitutional problem. And critically, if the *users* choose to use a particular private filtering system to block access to content, there is also no constitutional problem. But if *the government* selects and approves what websites are "safe" for users to access – without the full panoply of procedural protections required by the First Amendment, and even if done through a license to a private party – then there is a significant constitutional problem. At the end of the day, not only do *user*-controlled client-side filtering tools provide less restrictive alternatives to a government-selected blacklist, the use of such tools ensures that it is the *users*, and not the government, that select what content is "safe."

Finally, on a more practical level, any type of filtering mandate – even an "opt in" filtering mandate – would inevitably lead speakers and other content providers to bring constitutional challenges against the Commission and the AWS-3 licensee for improper and unconstitutional inclusion of a particular website on the government-mandated blacklist. Such a mandate would lead to an on-going morass of litigation for both the Commission and the AWS-3 service provider.

III. THE FILTERING REQUIREMENT WOULD VIOLATE BOTH 47 U.S.C. § 326 and 47 U.S.C. § 230.

The filtering requirement would directly violate the specific language of 47 U.S.C. § 326, and would violate the broader policy of 47 U.S.C. § 230.

Section 326 of the Communications Act, 47 U.S.C. §326, flatly states that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by radio communication." In the *Pacifica* decision, the Court specifically considered § 326 and declared that 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." 438 U.S. at 735 (emphasis added). Yet this is *exactly* what the Commission would be doing with the § 27.1193 filtering mandate – deciding *in advance* to "excise material considered inappropriate" for the Internet access service. Congress has squarely and plainly spoken – the Commission lacks the authority to mandate filtering.

In a similar vein, the proposed mandate that an Internet service provider act as a "traffic cop" of the Internet to select what content is "okay" for delivery to end-users directly violates the policies and intent articulated in 47 U.S.C. § 230, enacted at the same time as the CDA in 1996. One key finding in § 230 is that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation." Id.* § 230(a)(4) (emphasis added). Congress declared in § 230 that ISPs and other server providers should not be responsible for content posted by others on the Internet. *Id.* § 230(c)(1). Congress articulated only a limited number of contexts in which ISPs could bear some level of responsibility relating to content provided by others (such as with intellectual property) – but Congress did not include any action by the Commission as one of the exceptions to Section 230. Moreover, Congress made plain in § 230 that it should be the *users*, not the government, that

decide what content to access (and implicitly, what "user empowerment" tools to utilize). *See id.* § 230(b)(3).

By creating a procedure under which the AWS-3 licensee can be held liable for the failure of the mandated filtering system, *see* § 27.1191(h), the Commission would be trying to force the AWS-3 licensee to be the traffic cop of the Internet, in violation of Congressional policy set out in 47 U.S.C. § 230. This is in addition to the direct violation of the terms of § 326.

IV. THE PROPOSED BREADTH OF THE FILTERING REQUIREMENT WOULD CRIPPLE ANY INTERNET ACCESS SERVICE.

On top of the broad First Amendment problems raised by the proposed filtering mandate, the breadth of the mandate would leave the Internet access service crippled to only permit access to "safe" websites. Under § 27.1193(b)(2), the AWS-3 licensee would be required to block access to any technology that could not be filtered using commercially-available filtering tools. The implications of this requirement are breathtaking. Wholly apart from the radical harm to innovation that would flow from this - because effectively no new technology could be used on the AWS-3 network - the requirement would also prohibit the most basic and invaluable of Internet technologies: e-mail.

The Wiretap Act would prohibit an AWS-3 licensee from reviewing the content of e-mail. It does this by broadly prohibiting providers of electronic communications service from intercepting the contents of electronic communications (18 U.S.C. § 2511(1)), and then by creating exceptions to that prohibition (18 U.S.C. § 2511(2)), none of which are applicable here. Because it would be illegal under the Wiretap Act for the AWS-3 licensee to review the content of e-mails to ensure that they do not contain text that might be harmful to minors, the AWS-3 licensee would be required to block access over the free access service to *all* e-mail (whether or not the e-mails were addressed to minors). This is just the tip of the iceberg of examples that

demonstrate how overbroad the filtering mandate would be and how it would completely distort the Internet service offered over the network. For example, the AWS-3 service would have to block access to all the leading social networks, blogs, instant messaging services and other sites that allow user-to-user communications via text transmissions. Not only does this extraordinary overbreadth have severe constitutional implications under the First Amendment, it also risks making the free broadband service useless. Indeed, it would be misleading even to call the crippled wireless service "Internet" access, because so much of the Internet would be off limits.

V. INCLUDING A FILTERING REQUIREMENT WOULD LEAD TO LITIGATION AND SIGNIFICANT DELAY IN THE DEPLOYMENT OF ANY ACCESS NETWORK.

Given the insurmountable constitutional problems raised by the filtering mandate, and the crippled nature of the resulting access service, the filtering mandate contained in § 27.1193 would certainly be the target of one or more legal challenges, against possibly both the Commission and (if any AWS-3 auction were allowed to proceed in the first place) the AWS-licensee. If the Commission believes that the proposed AWS-3 network is a good idea in general, it should not burden the proposed network with the unavoidable delay caused by legal challenges to a patently unconstitutional filtering mandate.

CONCLUSION

For the foregoing reasons, the Commission should not adopt the mandated filtering scheme proposed in § 27.1193, or any variation of that scheme.

[list of signers on following page]

SUBMITTED ON BEHALF OF

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AMERICAN LIBRARY ASSOCIATION
ASSOCIATION OF RESEARCH LIBRARIES
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
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