

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

In the Matter of	)	
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Service Rules for Advanced Wireless Services	)	WT Docket No. 07-195
In the 2155-2175 MHz Band	)	
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**COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION**

Michael Macleod-Ball, Chief Legislative and Policy Counsel  
James Thomas Tucker, Policy Counsel

American Civil Liberties Union  
Washington Legislative Office  
915 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-1313  
(202) 544-1681

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## **SUMMARY**

The ACLU supports making broadband services more accessible to the public through universal access and expansion of the broadcast spectrum, including efforts to develop the vast unused portions of the wireless spectrum. The Commission should ensure that any licenses granted to utilize that spectrum, including the 2155-2175 MHz band that is the subject of the Petition in this matter, guarantee users access to the lawful Internet content of their choice, using applications and services of their choice. At the same time, the Commission should decline to impose unconstitutional conditions on license applications, such as a requirement for so-called “family friendly” filters that would censor lawful content.

## COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) and the Technology and Liberty Project of the ACLU have been principal participants in nearly all of the Internet censorship and neutrality cases that have been decided by the United States Supreme Court in the past two decades, including *Reno v. ACLU*,<sup>1</sup> *Ashcroft v. ACLU*,<sup>2</sup> *Ashcroft v. Free Speech Coalition*,<sup>3</sup> and the *Brand X* decision, in which the Court held that cable companies providing broadband Internet access were “information service providers” for purposes of regulation by the FCC under the Communications Act.<sup>4</sup> We also have provided comments on several of the recent petitions filed with the Commission that implicate neutrality principles.

The ACLU agrees with many of the concerns raised by Free Press, the Media Access Project, New America Foundation, and Public Knowledge about the troubling conditions that the Petition and the Commission’s Notice of Proposed Rulemaking would impose on a free and open Internet. However, we will limit our own comments to the Commission’s proposed requirement for “family-friendly” filters as a condition of granting a license for the 2155-2175 MHz band:

For example, in its application, M2Z proposes “automatic, default blocking of access to pornographic, obscene, and/or indecent material” that could be disabled for paying customers that provide “proof that they are of the age of the majority.” Should we

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<sup>1</sup> 521 U.S. 844 (1997) (striking down the Communications Decency Act and holding that the government cannot engage in blanket censorship in cyberspace).

<sup>2</sup> 542 U.S. 656 (2004) (upholding a preliminary injunction of the Child Online Protection Act, which imposed unconstitutionally overbroad restrictions on adult access to protected speech).

<sup>3</sup> 535 U.S. 234 (2002) (striking down restrictions on so-called “virtual child pornography”). The ACLU’s amicus brief is available at 2001 WL 740913 (June 28, 2001).

<sup>4</sup> See *National Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). The ACLU’s amicus brief is available at 2005 WL 470933 (Feb. 22, 2005).

mandate the provision of broadband services with mechanisms designed to filter content inappropriate for children? If so, how should we implement such a requirement? Should it be an opt-in or an opt-out requirement? How should we define inappropriate content? Should the content subject to blocking be defined consistently with our existing standards for over the air broadcasts? Would requiring mandatory filtering for a free tier service and filtering using an “opt out” approach for a premium tier service, as proposed in M2Z’s Application, raise constitutional or statutory concerns, as suggested by PISC?

WT Dkt. No. 07-195, Notice of Proposed Rulemaking 44 at ¶ 90. Commissioner Tate echoed the cautionary note posed by the Commission’s final question, requesting “input as to how the Commission should balance the needs of families in protecting their children with constitutional and statutory requirements.” *Id.* at 86.

Concerns about whether the proposed rule is unconstitutional are well-founded. In *ACLU v. Ashcroft* and *ACLU v. Reno*, the Supreme Court struck down similar content-based restrictions in the Child Online Protection Act (“COPA”), Pub. L. No. 105-277, 112 Stat. 2681, and the Communications Decency Act of 1996 (“CDA”), P.L. No. 104-104, 110 Stat. 103. Like the proposed “family friendly” filter, COPA and CDA were unconstitutional attempts by the government to impose mandatory regulations on the Internet to protect children. In this context, it does not matter that the censorship would be by a private licensee, if it is included by the Commission as a condition for issuing the license.

**I. THE PROPOSED RULE IS A CONTENT-BASED RESTRICTION ON SPEECH SUBJECT TO STRICT SCRUTINY REVIEW.**

The proposed rule would impose a content-based restriction on speech by requiring “automatic, default blocking of access to pornographic, obscene, and/or indecent material” that only adult paying customers could disable. In *ACLU v. Reno*, the Court made it clear that the Internet is subject to the same constitutional standards that

apply to content-based restrictions through other modes of communications.<sup>5</sup> “Sexual expression which is indecent but not obscene is protected by the First Amendment.”<sup>6</sup> Therefore, strict scrutiny applies to the proposed content-based regulation of speech, requiring the Commission to establish that it is the least restrictive means of furthering a compelling governmental interest.<sup>7</sup>

We can assume, without further comment, that the government has a compelling interest in protecting minors. But “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.”<sup>8</sup> And even if the speech is not completely banned but merely burdened, the restrictions nevertheless are subject to strict scrutiny review.<sup>9</sup> The Commission therefore bears the burden of demonstrating that the proposed regulation is the least restrictive means of accomplishing a compelling government interest.<sup>10</sup> The Commission cannot meet this burden because the proposed rule’s content-based restriction deprives adults of access to protected speech.

## **II. THE PROPOSED RULE WOULD PROHIBIT ADULT ACCESS TO MATERIALS AND CONTENT PROTECTED BY THE FIRST AMENDMENT.**

The Commission’s proposed rule would automatically block access to “pornographic, obscene, and/or indecent material.” However, the rule offers no guidance

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<sup>5</sup> See 521 U.S. at 870 (“our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied” to the Internet).

<sup>6</sup> *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 814 (2000).

<sup>9</sup> See *id.* at 812 (“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.”).

<sup>10</sup> See *id.* at 818 (“When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government, not with the citizen.”).

of what would meet that definition. Determination of what constitutes unprotected “obscene” material must comply with the standard set out by the Court in *Miller v.*

*California*:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>11</sup>

The absence of guidance on how the proposed rule could meet the *Miller* standard raises a host of questions. Who is going to make that determination? Will the Commission do so? Will it be the service provider? How will it be accomplished consistent with the neutrality principles the Commission embraced in 2005?<sup>12</sup> Additionally, what contemporary community standards are to be applied? Is the relevant community the worldwide community of Internet users, the local community in which the user resides, or some other community? Furthermore, what would be subject to being blocked? Would it be a single visible screen on which the material appears (which may be significantly less than a single Web page)? Would it include links to the Web site as a whole? Does it also include linked Web sites? Moreover, what state law prohibiting “patently offensive” materials would apply? Would it be the state in which the service provider is located, the location of whoever is responsible for creating or maintaining the Web page or site, or where the user is located?

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<sup>11</sup> 413 U.S. 15, 24 (1973).

<sup>12</sup> The Commission established “Four Freedoms” in its 2005 policy statement, including user “access to the lawful Internet content of their choice” and running “applications and services of their choice.” See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260435A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf).

The Supreme Court found that a similarly overbroad restriction in the CDA made it impossible to apply *Miller* in any meaningful way:

The general, undefined terms “indecent” and “patently offensive” cover large amounts of non-pornographic material with serious educational or other value. Moreover, the “community standards” criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.<sup>13</sup>

The Court described several examples of constitutionally protected speech that would be barred by such a blanketed prohibition: “discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library.”<sup>14</sup> Similarly, it could apply to a link that a parent e-mailed to a seventeen year old college freshman on birth control even though “neither he, his child, nor anyone in their home community found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought otherwise.”<sup>15</sup> By doing so, it would give a heckler’s veto to communities with the most restrictive standards, even if the vast majority of other communities, including the user’s own community, disagree.

Even if it were possible to resolve the problems with the proposal under *Miller*, neither the Commission nor M2Z has explained how all material that is protected by the First Amendment would continue to be accessible. The reason is simple: some constitutionally protected material and speech would necessarily be blocked by the filtering requirement. In the process, the automatic mandatory filter would chill protected speech in violation of the First Amendment. The proposed rule’s application to

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<sup>13</sup> *Reno v. ACLU*, 521 U.S. at 877-78.

<sup>14</sup> *Id.* at 878.

<sup>15</sup> *Id.*

“pornographic, obscene, and/or indecent material” is unworkable, and would inevitably deny adult users access to constitutionally protected materials and speech. As such, it is facially unconstitutional.<sup>16</sup>

**III. THE PROPOSED RULE’S EXCEPTION FOR PAYING ADULT CUSTOMERS TO IDENTIFY THEMSELVES AS ADULTS EXACERBATES ITS VIOLATIONS OF THE FIRST AMENDMENT.**

Another unconstitutional aspect of the proposed rule would only permit paying customers to disable the automatic filter after providing “proof that they are of the age of the majority.” On its face, the rule would prevent non-paying adult users from removing the filter at all, denying all such users of their right to materials and information protected by the First Amendment. The Supreme Court has struck down similar restrictions that attempt to “reduc[e] the adult population... to ... only what is fit for children.”<sup>17</sup> Specifically, in the context of the Internet, regardless of the stated interest in protecting children, “the level of discourse... cannot be limited to that which would be suitable for a sandbox.”<sup>18</sup> Treating adult users differently on the basis of whether they pay for using the service – notable because M2Z has touted its license application as purportedly providing free Internet access – is an unconstitutional condition on the adults’ First

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<sup>16</sup> See *id.* at 874; see also *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-68 (1984) (“Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State’s objectives are too imprecise, so that in all its applications the statute creates and unnecessary risk of chilling free speech, the statute is properly subject to a facial attack.”).

<sup>17</sup> *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996).

<sup>18</sup> *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

Amendment rights. Those rights cannot be limited by allowing a service provider to extract a fee as a condition for their exercise.<sup>19</sup>

The requirement likewise violates the First Amendment rights of paying adult subscribers. The Supreme Court already has found that requiring users to prove “that they are of the age of the majority” does not cure unconstitutional restrictions imposed on adults. In *Reno*, the Court summarized the many problems of a similar requirement in the CDA, which provided for age verification by requiring a user to provide a credit card number:

[T]he imposition of such a requirement “would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material”.... “There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password”.... An adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be “beyond their reach”....

“Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18.”<sup>20</sup>

The Court observed that “[t]hese limitations must inevitably curtail a significant amount of adult communication on the Internet.”<sup>21</sup> As a result, *Reno* concluded that “there is no effective way to determine the identity or the age of a user who is accessing

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<sup>19</sup> See generally *Smith v. California*, 361 U.S. 147, 150 (1959) (“It is of course no matter that the dissemination [of speech] takes place under commercial auspices,” it is still protected by the First Amendment).

<sup>20</sup> *Reno v. ACLU*, 521 U.S. at 856-57 (quoting the district court’s opinion).

<sup>21</sup> *Id.* at 877.

material” online.<sup>22</sup> In *Ashcroft*, the Court upheld a preliminary injunction prohibiting enforcement of COPA,<sup>23</sup> in part because the adult identification requirements it included – like those in the CDA – did not “constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”<sup>24</sup>

Moreover, requiring credit card or age-verification screening for access to the filter to disable it would severely burden the expression of both users and content providers. In the COPA challenge, the district court found that “consumers on the Web do not like the invasion of privacy from entering personal information” and that any requirement they do so “would have a negative effect on users because it will reduce anonymity to obtain the speech... resulting in a loss of traffic to Web sites.”<sup>25</sup> It also would force users to disclose personal information to a third party prior to being afforded access to constitutionally protected speech. In the process, it would place users in an untenable position: protect their privacy and forgo access to constitutionally protected speech and information, or exercise their First Amendment rights and forgo privacy.

Anonymous speech is protected under the First Amendment.<sup>26</sup> Federal courts have struck down identity requirements for other communications media regulated by the Commission. For example, the Third Circuit struck down a law requiring adults to obtain

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<sup>22</sup> *Id.* at 855.

<sup>23</sup> *See* 542 U.S. at 656.

<sup>24</sup> *Reno v. ACLU*, 521 U.S. at 882.

<sup>25</sup> *ACLU v. Reno*, 31 F. Supp.2d 473, 487, 491 (E.D. Pa. 1999); *see also id.* at 487 (“in general, users of the Web are reluctant to provide personal information to Web sites unless the are at the end of an online shopping experience and prepared to make a purchase.”).

<sup>26</sup> *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (recognizing that anonymous political speech is protected under the First Amendment and striking down a requirement that the speaker identify themselves).

access codes or other identification numbers in order to place a call to a telephone message service:

[T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions.... [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.<sup>27</sup>

Another court struck down a similar requirement under New Mexico law "because it prevents people from communicating and accessing information anonymously."<sup>28</sup> As the Supreme Court explained in *Denver*, conditioning speech on identification requirements "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."<sup>29</sup> Any affirmative requirement for users to identify themselves and provide personal information as a condition for accessing material and information protected by the First Amendment is unconstitutional.

#### **IV. VOLUNTARY FILTERS ARE A LESS RESTRICTIVE MEANS OF ALLOWING ADULTS TO RESTRICT THE ACCESS OF THEIR CHILDREN TO CONTENT ON THE INTERNET.**

The proposed requirement for an automatic filter also is unconstitutional because there are less restrictive means available for parents to block their children's access to protected indecent speech and materials on the Internet. Specifically, *voluntary* "[b]locking and filtering software is an alternative that is less restrictive... and in addition, likely more effective as a means of restricting children's access to materials

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<sup>27</sup> *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 785-86 (3d Cir. 1990).

<sup>28</sup> *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

<sup>29</sup> 518 U.S. at 754.

harmful to them.”<sup>30</sup> As the Supreme Court explained in describing a voluntary filter in *Ashcroft*:

Under a 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 the same speech on the same terms simply by turning off the filter on their home computers.<sup>31</sup>

The Court recognized that the government may encourage voluntary filtering by “enacting programs to promote the use of filtering software... [that] could give *parents* that ability without subjecting protected speech to severe penalties,” but the government may not make a filter mandatory.<sup>32</sup> That is where the power to impose a filter on the content that children view rightfully belongs: with the parents, not the Commission, a licensee, or service provider.

The proposed rule would be unprecedented in the Commission’s broadband licensing system. Never before has the Commission conditioned a license for the broadband spectrum on a requirement that the licensee impose a mandatory block or filter of an entire class of protected speech. Never before has the Commission placed limitations on adults who can remove a mandatory filter by requiring that they first pay the licensee to access constitutionally protected material. As explained above, the reason is obvious: such a censorship model plainly violates the First Amendment and would be struck down when challenged. A paternalistic rule that authorizes the Commission to parent the parents through a mandatory filter that many adults – and perhaps the

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<sup>30</sup> *Ashcroft v. ACLU*, 542 U.S. at 666-67.

<sup>31</sup> *Id.* at 667.

<sup>32</sup> *Id.* at 670 (emphasis added).

overwhelming majority of adults<sup>33</sup> – will not be able to disable is unwarranted and facially unconstitutional. We urge the Commission to avoid setting a dangerous precedent of imposing unconstitutional conditions on licensees in the broadband spectrum.

## CONCLUSION

The ACLU and Technology and Liberty Project of the ACLU endorse efforts to exploit unused portions of the wireless broadband spectrum and to make the Internet more accessible for all Americans. However, even well-intentioned efforts to provide universal access or to make broadband services more affordable cannot come at the expense of the First Amendment. The Commission should reject all unconstitutional conditions on license applications for the 2155-2175 MHz band that is the subject of the Petition, including the proposed requirement that the licensee implement an automatic “family friendly” filter that only paying adult customers can remove. The Commission is entrusted with the public airwaves and wireless broadband spectrum, and as part of that trust must enforce neutrality rules that guarantee Internet access free of government or service provider censorship. We urge the Commission to act in a manner consistent with those principles.

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<sup>33</sup> We believe that based upon the evidence developed in *Ashcroft*, it is likely that the overwhelming majority of adult subscribers to a “free” Internet service undoubtedly would find a requirement to pay to view blocked content or to provide personal information a barrier to exercising their First Amendment rights.