

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Request by State Broadcasters Associations)
For Declaratory Ruling Concerning the) MB Docket No. 07-137
Application of the Commission's Political)
Programming Regulations)

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction and Summary.

The National Association of Broadcasters (“NAB”)¹ hereby files comments in response to the State Broadcasters Associations’ request for declaratory ruling² as to whether a broadcast station that participates in Internet sales programs must include the sale price of online-sold airtime in calculating a station’s lowest unit charge (“LUC”)³ for each class of time sold.³ Internet sales programs provide stations an opportunity to sell remnant inventory to advertisers whom they may not be able to attract on an individual station basis. Advertising sold online is purchased at rates unavailable to even the most favored commercial advertiser who seeks to purchase time directly from the station. As discussed below in Section II, consistent with

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

² Request for Declaratory Ruling of the Named State Broadcasters Associations, filed on June 19, 2007 (“Request”) and placed on *Public Notice* on July 5, 2007 (DA 07-2985).

³ Petitioners’ use of the term Lowest Unit Rate or LUR is the equivalent of the Lowest Unit Charge or LUC.

Commission precedent and Congressional intent, these programs are analogous to unwired networks. Therefore, as separate class of time, they should not be factored into an individual station's LUC. And as detailed in Section III, because candidates may wish to avail themselves of the benefits of Internet sales programs during the 2008 political cycle, the Commission should not take any action that would discourage candidate and commercial use of this nascent business model.

II. The Commission's Prior Precedent of "Unwired Networks" Is Directly Applicable to Online Auction of Advertising Spots.

In enacting the 1971 Federal Election Campaign Act ("FECA"), Congress intended to promote greater candidate access to the media and to "to halt the spiraling cost of campaigning for public office."⁴ A fundamental tenet of FECA was to put political candidates, when purchasing time from a broadcast or cable licensee, on par with a station's "most favored advertiser."⁵ In doing so, Congress sought to balance the need to contain costs associated with candidates' political speech with respect for the First Amendment rights of broadcaster and cablecasters. To achieve this balance, Congress established what are now commonly referred to as "LUC windows" or "political windows." These are specified periods of time before election periods in which:

[t]he charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed —(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and at any other time [outside the LUC Windows], the charges made

⁴ S. Rep. No. 580, 92d Cong., 1st Sess., p.2 (1971).

⁵ S. Rep. No. 96, 92d Cong., 1st Sess., p.27 (1971).

for comparable use of such station by other users thereof. 47 U.S.C.A. § 315(b).

Thus, during an “LUC window” candidates are entitled to the lowest rate for each type of class and amount of time for the same period.⁶ A candidate is entitled to the benefits of all discounts, frequency and otherwise, offered to the most favored commercial advertiser, without regard to the frequency of use by the candidate. Congress also amended the Communications Act to define access, equal opportunities and sponsorship identification for political programming aired on broadcasts and cablecasts. *See* 47 U.S.C.A §§ 312, 315 and 317. The Commission subsequently amended its rules and issued guidelines to, among other things, determine “reasonable access” for federal candidates and the rates charged⁷ for use of a station by legally qualified candidates (“candidates”).⁸

Since FECA’s enactment, the Commission has issued several rulings upholding Congressional policy of placing candidates on par with a licensee’s most favored commercial advertiser, and has clarified which types of sales practices do or do not affect rates charged to candidates during the “LUC windows.”⁹ The Commission has also addressed the applicability

⁶ The term “class” refers to categories such as fixed-position, non-preemptible, immediately preemptible, preemptible with notice and run-of-schedule. The term “amount of time” refers to the unit of time purchased (e.g., 30 second spot or 60 second spot). The term “same period” refers to the period of the broadcast day such as prime time, drive time, class A or any other system of classification established by the station.

⁷ *See* 47 C.F.R. § 73.1942.

⁸ *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510 (1972).

⁹ *See, e.g., See Letter to Mike Barnhart*, 7 FCC Rcd 4332 (1992) (in which the Commission determined that bonus spots, whether or not aired during the political window, affect the LUC); *Letter to KRSN*, 35 FCC 2d 663 (1972); *Letter to Fred Fickenwirth*, 7 FCC Rcd 4311 (1992) (in which the Commission determined that the LUC is not affected by situations when an advertiser is not charged an amount for any of his announcements).

of the LUC for airtime that is not purchased directly from an individual station, but rather a group or “network” of stations.

For over thirty-two years, the Commission has taken great care to distinguish between individual station rates for LUC purposes, and those rates set by and sold from outside parties for advertising that is aired on a group or “network” of stations. When airtime was being sold by third parties to target a national and regional audience, the Commission in 1975 directly addressed whether these transactions should be factored into a station’s LUC for the class of time in question. Specifically, the Commission determined that any transaction where a “national time sales organization” buys time on a “defined group of stations” at rates unavailable to any licensee’s most favored commercial advertiser would be called a “special rate package.”¹⁰ Significantly, these rates would not be used to figure an individual station’s LUC for selling time directly to candidates on that station.

Consistent with this approach, the Commission in 1976 distinguished unwired networks as transactions that were also outside stations’ LUC calculations, reasoning that “[n]o commercial advertiser, even the ‘most favored,’ would be able to go directly to the station and receive a rate comparable to that which is offered to the network.”¹¹ The Commission reaffirmed this position in its *1984 Political Primer*, stating that compensation received by an individual station from an unwired network would not be considered in figuring LUC for direct sales to candidates.¹² This statement is consistent with the Commission’s policy that a “network’s position with respect to individual stations is not comparable to that of a commercial

¹⁰ *Letter to Michael H. Bader*, 56 FCC 2d 840 (1975).

¹¹ *Letter to Robert L. Olender*, 61 FCC 2d 694 (1976).

¹² *Political Primer 1984*, 100 FCC 2d 1476 at ¶ 66(f).

advertiser.”¹³ In essence, the Commission’s policy sensibly requires the LUC only to be calculated based on rates given by the individual station *directly* to its commercial advertisers.

In conjunction with the development of its unwired network policy, the Commission has addressed the limits on LUC calculations while accounting for emerging technology in the field of advertising sales on multiple stations or channels. In 1990, *Adlink*, an advertising sales representative for a network of cable television systems, sought Commission clarification as to whether their selling ads (as opposed to direct sales from the individual cable operator) and their subsequent distribution by satellite regionally and nationally, would affect the LUC calculations by those individual licensees running the ads.¹⁴ Consistent with past decisions, the Commission determined these “special package rates” were indeed a separate class of time that should not factor into LUC calculations, noting that there was “no reason for treating Adlink’s network relationship with its cable system affiliates any differently from the broadcast station networks.”¹⁵

The issue in the present proceeding is whether the sale price under certain Internet sales programs (*e.g.*, *Bid4Spots, Inc.*, *SoftWave Media Exchange*, and *dMarc Broadcasting, Inc.*) must be taken into consideration when stations compute their LUC offered to political candidates.¹⁶ Admittedly, the Commission’s decisions detailed above predate commercial use of the Internet. But while the technology to create dynamic networks of stations has evolved, fundamentally these sales practices are no different from those of the traditional unwired network. Instead of satellite, these programs distribute their content via the Internet, also an

¹³ *Letter to Robert L. Olender*, 61 FCC 2d 694 (1976).

¹⁴ *Letter to Charles M. Firestone*, 5 FCC Rcd 3255 (1990) (“*Adlink*”).

¹⁵ *Id.*

¹⁶ *Public Notice* at 1.

unwired technology. Each of these Internet sales programs consists of a group of stations providing platforms for either matching up or making open bids on commercial airtime. These systems, like never before, allow extremely specific matches for unused radio and television advertising inventory based on a buyer's target demographics.

Although sales practices vary, through conversations with counsel with Internet sales program companies, it is NAB's understanding that an advertiser is precluded from specifying that its advertisement air on a particular radio or television station(s), and in some instances, the rate-per-station is not disclosed to the advertiser.¹⁷ Instead, the purchase order is made on a cost-per-thousand ("CPM") basis. The rates generated on these sites continue to be generated based on a "market-wide basis"¹⁸ on the program sites, with rates determined by the aggregate of advertisers, and not sold by the individual stations. Again, a "most favored advertiser" is unable to receive these same rates directly from the individual station. Thus, consistent with Commission precedent and Congressional intent, they should be exempt from an individual station's LUC calculation.

III. Internet Sales Programs Benefit Candidates And The Public Interest.

In addition to the precedent supporting the logical extension of the Commission's unwired network case law, there are other policy implications at stake. Because Internet sales programs are a nascent service, the Commission should refrain from regulations that could stifle their development. Internet sales programs constitute a very small percentage of total advertising inventory – broadcast stations only place unsold inventory on Internet sales programs on a short time frame, *i.e.*, it is advertising time that would otherwise remain unsold. Individual stations

¹⁷ It is also our understanding that each company will be submitting comments detailing their business operations.

¹⁸ *Charles M. Firestone*, 5 FCC Rcd 3255 (1990).

benefit from these programs because they can attract local, regional and national advertisers who otherwise might not be interested in purchasing time on a single station. In turn, the programs provide local, regional and national advertisers with a more efficient, and cost-effective, way to purchase air time, thereby increasing competition among stations and networks.

Should the Commission determine that airtime sold through Internet sales programs must be calculated as part of a station's LUC rate, the potential harm to licensees could be considerable. Any transactional benefits associated with cost-efficient online sales could be eviscerated by the devaluing of a station's advertising inventory. The chilling effect of such regulation could completely undermine the Internet sales program business model. Such regulation would not benefit stations, advertisers or the public interest. In fact, it ultimately could have a detrimental effect on radio and television broadcast licensees' ability to serve their local communities. Internet sales programs have afforded stations an additional stream of revenue which, in turn, directly supports free-over-the air news, emergency information and a variety community-centric programming. Nor would such regulation benefit candidates, who would, in effect, be precluded from availing themselves of the benefits of Internet sales programs if broadcasters are discouraged from using these programs due to their significant impact to LUC calculations. For these reasons, the NAB urges the Commission to exclude advertisements purchased through Internet sales programs from a station's LUC for each class of time sold. At the very least, the Commission may wish to refrain from acting in this evolving area until after the 2008 election when industry, candidates and the Commission have gained experience with Internet sales programs as a nascent business model.¹⁹

¹⁹ Absent clarification, the Commission should continue to rely on the good faith judgment of broadcasters in calculating the LUC for each class of time sold.

Indeed, as the 2008 election cycle is already underway, Internet sales programs may be an attractive alternative for political candidate, providing them with a new approach to targeting different demographic groups and giving them greater choices in purchasing airtime. Because of the dynamic nature of Internet sales programs, candidates who purchase time from participating online companies rather than directly from licensees may be able to purchase “a network” at a CPM significantly lower than what is available directly from an individual station. Although their use by candidates is relatively novel, Internet sales programs may represent an affordable option for targeting specific demographics in one or even multiple markets. As experience with these programs grows, candidates may be able to utilize direct purchases from stations in conjunction with Internet sales programs to maximize audience reach while minimizing cost. If not inhibited by premature and unnecessary regulation, candidates should thus benefit from receiving discounted advertising time on multiple advertising platforms: (1) Internet sales programs and (2) direct sales from broadcast stations and cable systems.

NAB anticipates that, in accordance to Section 315(b) of the Communications Act, legally qualified candidates who purchase time through an Internet sales program will be afforded the LUC for each network configuration for the various types of time sold to commercial advertisers during the “political windows.” Further, any legally qualified candidate who makes a timely request for equal opportunities should be provided the same or equivalent network of stations and classes of time at the same charge as his or her opponent. *See* U.S.C. § 315(a). In this instance, the class of time would be defined on a CPM basis to a targeted demographic.

Broadcast licensees who receive requests from candidates wishing to avail themselves of equal opportunities for time that is sold through participating Internet sales programs will be

referred to the company that sold the advertising inventory. This is consistent with current practice for all network sales (*e.g.*, sales made through a television network and not through an affiliate station). Moreover, companies that run Internet sales programs that sell to federal candidates should be viewed as satisfying the requirements of reasonable access in compliance with Section 312(a)(7) of the Communications Act. *See Carter-Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979) (in which the Commission determined that the statutory term “broadcasting station” refers to both networks and licensees), *recon. denied*, 74 FCC 2d 657 (1979), *aff’d sub nom. CBS v. FCC*, 629 F. 2d 1 (D.C. Cir. 1980), *aff’d*, 453 U.S. 367 (1981).

Finally, broadcasters anticipate that companies that accept political candidate advertisements through Internet sales programs will either maintain at its headquarters office, or provide participating stations with, a list of chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group or other entity where the particular programming material provided through an Internet sales program is political matter or matter involving the discussion of a controversial issue of public importance. *See* 47 C.F.R. § 73.1212(e).

IV. Conclusion.

While the medium of delivery and the sophistication of advertising practices have evolved over time, the Commission has wisely continued to recognize the distinct nature of unwired networks from the rate setting mechanism of individual stations for purposes of figuring the LUC. Therefore, should the Commission determine that it is appropriate to issue a declaratory ruling, NAB urges the Commission to reaffirm its precedent and conclude that these Internet sales programs are analogous to unwired networks; therefore, they are excluded from an individual station’s LUC calculations. Alternatively, the Commission may wish to revisit this

issue after the 2008 election after all parties have gained experience with evolving online models. Any decision to the contrary would be incongruent with precedent, could lead to uncertainty for licensees in previously settled areas of LUC calculation and would not serve the public interest.

Respectfully submitted,



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