

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

In the Matter of	)	
	)	
Request by State Broadcasters Associations	)	
for Declaratory Ruling Concerning the Ap-	)	MB Docket 07-137
plication of the Commission's Political	)	
Broadcasting Rules	)	

**REPLY COMMENTS OF CAMPAIGN LEGAL CENTER**

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**REPLY COMMENTS OF CAMPAIGN LEGAL CENTER**

The Campaign Legal Center (“CLC”),<sup>1</sup> by its attorneys, Media Access Project, respectfully submits reply comments addressing the June 19, 2007 *Request for Declaratory Ruling* (“*Request*”) filed by state broadcasters associations representing 47 states and the District of Columbia (“Associations”).

CLC supports strong enforcement of the equal opportunities, non-discrimination and lowest unit charge provisions of Section 315 of the Communications Act, the reasonable access provisions of Section 312(a)(7) of the Communications Act and the sponsorship identification requirements of Section 317 of the Communications Act. CLC welcomes the creation of any mechanism which advances the goals of those statutes. The development of auction-based tools which may afford opportunity to improve the efficiency and transparency of the political airtime markets is therefore a desirable development. However, CLC emphasizes that these technologies must not be allowed to be a vehicle for non-compliance with existing political broadcasting laws.

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<sup>1</sup>CLC’s Media Policy Program shapes political broadcasting policy by promoting awareness and enforcement of political broadcasting laws through FCC rulemaking proceedings, Congressional action, and public education. The Legal Center supports efforts to revitalize competition in our democratic process by ensuring that the public airwaves serve as a forum for open and vibrant political debate, especially among candidates, through stronger public interest obligations for digital broadcasters and efforts to make the airwaves accessible to more candidates - not just those with deep pockets or access to special interest dollars to pay for political advertising.

The plans presented to the Commission in response to the July 5 *Public Notice* are three very different and highly innovative mechanisms which undoubtedly provide great benefits to advertisers, broadcasters and audiences. However, this does *not* mean that they should automatically be excluded from LUC calculations or, indeed, that all three are compatible with insuring compliance with Sections 312(a)(7), 315 and 317. Simply put, particular plans may make very valuable contributions to the modernization of the broadcasting industry but may *not* be suitable, or even permissible, for sales of airtime to candidates for public office.

### SUMMARY

CLC has reviewed the comments filed in this docket including, specifically, those of the three specific “programs” identified in the Commission’s July 5, 2007 *Public Notice* in this docket. As is set forth more fully below, CLC believes that

- The Commission should rule separately and narrowly on the applicability of Section 315(b) to each particular “program” based on the facts presented;
- Any ruling authorizing exclusion of any of these “programs” from the lowest unit charge (“LUC”) calculations required by Section 315(b) ruling be limited to the 2008 campaign, so that the Commission can thereafter examine the important legal and policy questions presented based on actual experience;
- The Commission must emphasize that employment of these programs must allow complete adherence to all other provisions of Section 315 and the requirements of Sections 312(a)(7) and 317;
- The same digital age technology which permits creation of new mechanisms for the sale of airtime allow the Commission to require real-time disclosure to candidates and the public of political airtime sales of all information required to be placed in the stations’ public files.
- In general, the SoftWave auction program permits compliance with the political broadcasting rules.

- The dMarc and Bid4Spots auction programs do not permit full compliance with the political broadcasting rules.

**I. THE REQUEST AS SUBMITTED IS OVERLY BROAD AND MUST BE DENIED.**

The Associations' *Request* seeks extremely broad relief. They ask for a ruling which would exempt from LUC calculations

airtime sales programs *such as* those currently being offered by BidSpots, Inc. (Bid4Spots"), SoftWave Media Exchange ("SoftWave") and Google, Inc.-owned dMarc Broadcasting, Inc. (Google").

*Request* at 1 (emphasis supplied).

In seeking public comment on the *Request*, the Commission has said that "The Associations ask that the Commission issue a declaratory ruling regarding "whether a broadcast station participating in any of [three specific Internet sales programs] must" comply with the LUC requirements of Section 315(b). July 5, 2007 *Public Notice* at 1. This is a narrow construction of what is in fact a request for sweeping and highly generalized relief.

CLC commends the Commission for treating the Associations' *Request* in this manner, but CLC observes that the comments submitted in this docket by broadcast interests demonstrate the potential dangers of an excessively broad ruling in this matter. CLC believes the Commission must clearly and unambiguously deny the *Request* in the form submitted, because it would be a blank check for all manner of "programs" which the proprietors consider to be remotely similar (*i.e.*, are "programs such as those currently being offered") to the three "programs" identified in the Request. Instead, the Commission must continue to treat the *Request* as being for rulings limited to consideration of the "three specific Internet sales programs" cited in the *Request*. It should caution that the facts of any specific new auction mechanism should be presented to the Commission for review if

those utilizing it expect to be relieved of LUC obligations or otherwise to be in compliance with the Commission's political broadcasting rules.

**II. THE COMMISSION SHOULD ISSUE SEPARATE TEMPORARY RULINGS TAILORED TO THE SPECIFIC FACTS PRESENTED AND REQUIRING REAL-TIME DOCUMENTATION OF ALL SALES CONDUCTED PURSUANT TO SUCH RULINGS.**

Based on the comments filed by the operators of each of the three identified "programs," it is clear that they are very different in operation, and that each presents different questions with respect to the Commission's political broadcasting regime. Because it is impossible to generalize, and in light of the importance of the Commission's obligations to enforce Sections 312, 315 and 317, CLC believes it is essential that each program be separately analyzed and that the Commission issue separate rulings narrowly tailored to the facts of each of the three plans.

Any rulings the Commission may issue in response to the Request should also be limited to apply only to the forthcoming 2008 election campaign. The Commission can and should thereafter review the impact of such rulings in light of actual experience.

There is great danger in a generalized ruling which might be considered to authorize other, new auction schemes without individualized FCC review. Without reference to any of the three specific plans presented for the Commission's consideration, CLC notes that it is extremely easy to "game" particular auction mechanism in a manner which could greatly undermine the enforcement of Section 315(a). It might be possible for an unscrupulous broadcaster to "tip" a candidate that a particular block of airtime might be made available for during a particular auction, or that low bids would be accepted on a particular day at a particular time. Experience with the recent AWS spectrum auction also demonstrated that, at least without anonymous bidding, it is possible to target particular

bidders to keep them from prevailing in specific auctions.<sup>2</sup>

To facilitate meaningful enforcement and to promote well-informed decisionmaking, regardless of how the Commission rules on the application of the LUC provisions, it should require comprehensive documentation of all transactions entered into by the three specified programs and any others which the Commission may thereafter examine. The same technologies which have permitted development of digital age reverse auctions and similar schemes also enable the prompt and complete documentation of transactions involving purchase of airtime by candidates for public office. Data generated by these sales should be promptly be made available to the public in downloadable and consistent formats so that candidates can enforce their rights and to permit effective policymaking thereafter.

### **III. COMMISSION PRECEDENT RELATING TO “UNWIRED NETWORKS” IS RUDIMENTARY AND HIGHLY GENERALIZED.**

There are three extremely short and terse Commission decisions on which the parties place reliance in seeking to exclude “Internet sales programs” from LUR calculations. Two of these decisions are two pages in length and more than 30 years old; the third is 15 years old and fits on one page of the *FCC Record*. Taken together, they offer little guidance, and they certainly do not offer any meaningful precedent with respect to digital age, real-time auctions conducted in a manner bearing no resemblance to industry practices of 30 years ago. CLC respectfully suggests that the Commission should view these decisions as merely providing guidance in assessing questions that are in fact issues of first impression.

*Michael H. Bader*, 56 FCC2d 840 (1975), contemplates a “national time sales organization”

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<sup>2</sup>See, e.g., Gregory Rose, *How Incumbents Blocked New Entrants in the Aws-1 Auction: Lessons for the Future*, filed by PISC in Docket 06-150.

which “does not sell time on individual stations.” It is unclear from the facts presented in the decision whether the applicant was operating as an agent for stations or actually reselling airtime. In arguing that airtime sold by this entity should not be included in LUC calculations, the applicant emphasized that it would treat political candidates on a non-discriminatory basis, offering them “the identical national advertising facilities, rates, services and availabilities...” *Id.* Advertisers knew the stations on which they were buying time and the seller knew if it was selling time to candidates.

*Robert L. Olender*, 61 FCC2d 694 (1976), ruled on a request involving the sale of airtime to a network which purchased airtime in bulk and resold it to candidates. The network produced its own programming which contained advertising sold by the network to large national advertisers who purchased packages of spots on a minimum of 20 stations at a time. Advertisers knew the stations on which they were buying time and the network knew that if it was selling time to candidates. Based on these facts, the Commission stated that “The unique relationship of a network and its affiliated stations is, we believe, beyond the intended scope of [Section 315(b)].”

*Charles M. Firestone*, 5 FCCRcd 3255 (1990), involved a regional cable advertising sales representative which sold national and regional advertising. It appears that the network was effectively purchasing time in bulk at wholesale rates and then selling it at retail to advertisers who could only purchase time on the entire network of cable systems, not on particular stations. Thus, advertisers knew the stations on which they were buying time and the network knew if it was selling time to candidates. The cable systems retained at least 50% of their airtime for local sales, and the Commission made plain that “a candidate who buys time directly from an...affiliate must be provided that individual cable system’s LUC for the various classes of time it offers commercial advertisers.”

**IV. THE “THREE SPECIFIC INTERNET SALES PROGRAMS” VARY GREATLY FROM EACH OTHER AND FROM THE CIRCUMSTANCES CONSIDERED IN PRIOR COMMISSION PRECEDENT.**

The plans presented to the Commission are different from each other, and bear little resemblance to the decades-old “unwired network” airtime sales organizations considered in Commission case law. They all involved the block sales of time on a static and known group of stations utilizing negotiable, but more or less standard rates. The buyer and seller were known to both parties. It was possible to make identical packages available to opposing candidates and to accommodate federal candidates’ specific requests pursuant to Section 312(a)(7).

While SoftWave’s procedures most nearly resemble those considered in the three cited cases, the differences in all three of the plans presented to the Commission are far greater than the similarities.

**A. SoftWave**

SoftWave’s comments present its scheme essentially as a transparent reverse auction mechanism which allow advertisers to specify a particular set of demographic and geographic characteristics which are taken into account in creating a bid for airtime on a CPM basis. In particular, advertisers may specify particular stations on which they seek to purchase time.<sup>3</sup> Stations may accept or reject these bids. Depending on which of two SoftWave marketing models are used, stations may or not be able to counteroffer.

It is of particular importance to this proceeding that SoftWave evidently has designed its system to permit compliance with Section 315. Specifically, political candidates seeking airtime “will

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<sup>3</sup>Without more details, it is impossible to conclude whether this feature would afford the capacity to assure compliance with Section 312(a)(7).

be given the SWMX LUC for the various kinds of time it sells to commercial advertisers.” (Apparently, this will be expressed in a CPM rate.) Even more importantly, “[e]very legally qualified opposing candidate for the same political office who makes a timely claim for equal opportunities will be provided with an equal opportunity over the same or a comparable network of stations with comparable classes of time.” SoftWave Comments at 6. Political candidates’ ads are identified as such prior to broadcast and “affiliates are advised that they may not censor candidate advertisements, thus fulfilling another of the objectives of Section 315 of the Communications Act.” *Id.*

## **B. dMarc**

dMarc’s comments describe a blind “web-based advertisement aggregator and auction platform.” dMarc Comments at 1. Advertisers submit CPM-based bids based on “target markets and station formats....Throughout this process, the interface does not display or enable requests for placement on any particular broadcast station.” *Id.* at 2. The identity of the broadcast station is not revealed to the advertiser until after the transaction is completed.

dMarc states that it provides services to some 1700 radio stations, all in the top 100 markets. “Some stations allocate their entire unsold inventory into the dMarc aggregation system.” *Id.* The product sold by dMarc is undifferentiated audience access on a CPM basis. “No advertiser is buying or selecting an advertisement spot from any particular station.” *Id.*

There is no indication in dMarc’s comments that it has any procedures in place to identify political candidates seeking to buy time, much less any means of assuring compliance with the various political broadcasting laws. In fact, dMarc states that “stations have the technical capacity to reject any advertisement before it airs, and they reserve the contractual right to do so.”

### **C. Bid4Spots**

Bid4Spots offers an “auction service” for the sale of “remnant advertising time” using “an individualized ‘reverse’ auction” on a number of stations at the same time. The system “maintain[s] the confidentiality of the advertising rates of the individual stations that participate in the auctions.” Comments of Bid4Spots at 3. Bid4Spots “preserves the privacy of the stations’ individual rates.” Under the Bid4Spots model, an advertiser does not have certainty as to what stations its ads ultimately will appear on, or the per-ad rate it will ultimately pay, until the outcome of the auction is determined.” *Id.* at 4. Bid4Spots says that it contracts with advertisers and sellers and that they do not contract with each other. *Id.* at 6.

Advertisers seeking to use Bid4Spots design a bid during any week based on demographics, amount of time, etc. Significantly, it appears that stations are allowed to review proposed advertisements and reject them on content-based criteria. *See id.* at 5. (“The advertiser provides a description of its actual advertisement,..and loads a .wav or .mp3 file of the advertisement onto the website for viewing by participating stations.”)

Bid4Spots argues that the Commission should not apply LUC obligations to individual stations participating in its auctions. However, it describes a methodology for accommodating opposing candidates’ requests for creating comparable bid packages during the following week. Bid4Spots represents that its “experience confirms that, in practice, a candidate can expect to replicate closely the results achieved in the preceding week’s auction, thus satisfying the underlying policy objectives” of Section 315.

### **D. Comparison of Current Plans With Traditional “Unwired Networks.”**

There are, indeed, similarities between each of the “three specific internet sales programs” and

the “unwired networks” considered in Commission precedent. However, there are very important differences.

The “unwired networks’ transparently sold time to a specific and known package of stations or cable systems at reasonably stable rates. In essence, the networks were acquiring blocks of airtime wholesale and reselling it at retail. The identity of the purchasers of airtime was known to the seller.

The plans described in comments in this docket are real-time reverse auctions conducted dynamically, so that the number of stations and the packages of airtime are individualized and constantly changing. Regardless of who is contracting with whom, the three real auction plans essentially involve the facilitation of transactions with a particular station or group of stations.

It is of particular importance to the current proceeding that the technologies used in the unwired networks’ schemes allowed adequate lead time and the opportunity to assure compliance with all political broadcasting requirements. While it was difficult or impossible to calculate individual LUC rates, the networks were in a position to sell airtime to candidates and afford equal opportunities and reasonable access. *See Michael H. Bader, 56 FCC2d at 840.* This is not the case with the dMarc and Bid4Spot programs.

**V. APPLICATION OF LUC REQUIREMENTS TO THE “THREE SPECIFIC INTERNET SALES PROGRAMS”**

From the above descriptions, it appears that SoftWave’s methodology permits it to calculate individual LUC rates. By contrast, it seems that it is difficult or impossible to develop individual LUC calculations for airtime purchased using the dMarc and Bid4Spots services. However, based on their submissions, CLC believes that it is possible to calculate a “network” LUC rate for purchases made by dMarc and Bid4Spots customers.

Although Bid4Spots suggests that it can achieve what would amount to substantial compliance with network LUC requirements, it makes no commitment that it will insure that other candidates will receive the same rates in a subsequent auction. There are several obvious problems with this approach, most notably that a station participating in an auction during a particular week may choose to reduce or discontinue its use of the Bid4Spots system during the following week.

CLC sees no reason why stations Bid4Spots and dMarc services cannot function as networks and require their customers to make equal opportunities available by carrying essentially identical packages of airtime for opponents when political candidates purchase time *via* their auctions.

**VI. THE COMMISSION HAS NO JURISDICTION, OR POLICY JUSTIFICATION FOR WAIVING ENFORCEMENT OF EQUAL OPPORTUNITIES, NO CENSORSHIP, REASONABLE ACCESS, SPONSORSHIP IDENTIFICATION REQUIREMENTS**

Although the Commission solicited comment on the implications of the three auction plans for enforcement of the equal opportunities, reasonable access and sponsorship identification provisions of the Communications Act, the comments filed in response to the Commission's July 5 *Public Notice* are remarkably bereft of meaningful discussion of these requirements.

There is no statutory or legal basis for the Commission to excuse compliance with these political broadcasting requirements.<sup>4</sup> The Commission must therefore be very explicit in holding that any sales under an auction scheme of any kind must be conducted so as to enable with full compliance with all of these political broadcasting requirements.<sup>5</sup>

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<sup>4</sup>The Associations' requested ruling, that sales under the three auction schemes can be excluded from the calculation of the Section 315(b) LUC for each individual station is premised on notion that there is in effect no such LUC for an individual station, not that the LUC requirement can or should be waived.

<sup>5</sup>The National Association of Broadcasters ("NAB") commendably agrees that the Commission must assure compliance with Section 315(a). Comments of NAB at 8. It does not expressly

Reviewing the three specific plans presented to the Commission, CLC believes that SoftWave's program affords the means of achieving complete compliance with the requirements of Sections 312(a)(7) and 315. It also appears to be compatible with Section 317, although SoftWave appears not to collect information about the sponsors of controversial political advertising. It is therefore a model which competitors can use in designing means of selling airtime. However, there are clearly shortcomings with respect to the dMarc and Bid4Spots plans. In CLC's opinion, they must be modified if the Commission is to issue any ruling which would permit their use in the sales of airtime to candidates for public office.

dMarc's "auction platform" does not appear to assure compliance with Sections 312(a)(7) and 315.<sup>6</sup> Most importantly, it appears to allow advertisers to preview and reject any advertisement presented for broadcast under its program. A candidate seeking to obtain equal opportunities has no means of obtaining relief under the dMarc approach.

Bid4Spots also appears to tolerate discrimination by broadcasters in the sales of airtime. This shortcoming would have to be modified if the Commission were to authorize the Bid4Spots program to be used for sales to political candidates. Nor does Bid4Spots' plan appear to provide for complete compliance with the equal opportunities requirements of Section 315; instead, Bid4Spots offers what it presumably considers to be substantial compliance by assuring the Commission that it will attempt

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address Sections 312(a)(7) and 317, but CLC presumes from the thrust of the NAB's comments that it does not oppose enforcement of these provisions in any use of the identified plans.

<sup>6</sup>One characteristic of dMarc's presentation bears special scrutiny. It appears that some stations are offering their entire available inventory *via* dMarc. This might make it impossible to comply with equal opportunities and reasonable access claims. The Commission must therefore clearly direct that any use of the dMarc platform be conditioned on making airtime available as needed to comply with these provisions.

to allow opposing candidates to purchase a similar package of airtime during the following week. This voluntary and unenforceable mechanism is insufficient to meet the terms of Section 315.<sup>7</sup> CLC sees no reason why it is not possible to permit candidates to purchase an exact replica of their opponents' package outside of the auction process, and urges that the Commission so rule.

### CONCLUSION

The comments filed in response to the Commission's July 5 *Public Notice* demonstrate that it is possible to devise auction schemes which do not sacrifice enforcement of the all-important political broadcasting rules. CLC urges that the Commission deny the Associations' request for a ruling in the form submitted, issue separate rulings with respect to each of the three specific plans mentioned in the Associations' Request consistent with the limitations described above, that it take care to assure that the political broadcasting rules will be fully enforced, and that it grant all such other relief as may be just and proper.

Respectfully submitted,

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<sup>7</sup>As with the other two plans, Bid4Spots makes no representation that it will facilitate compliance with Section 317's requirements.