

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

In the Matter of)
)
Request by State Broadcasters Association)
For Declaratory Ruling Concerning) MB Docket No. 07-137
Application of the Commission’s Political)
Programming Regulations to Three Internet)
“Airtime Sales Programs”)

REPLY COMMENTS OF GOOGLE INC.

Google Inc. (“Google”), by its attorney, files these reply comments on behalf of its dMarc subsidiary, in response to initial comments submitted in the above-referenced proceeding.¹ The Commission should recognize that a dynamic auction environment inherently serves the intent of the federal statutes in question. Given the many benefits outlined in comments thus far, the Commission should encourage the use and development of these online advertising aggregator and auction platforms. The 2008 election cycle offers a valuable opportunity to observe the platforms at work while still in their nascency, rather than hastily importing detailed and mismatched regulation.

In its initial comments, Google explained how dMarc’s web-based advertisement aggregator and auction platform operates, and how it efficiently connects advertisers and stations via an inherently equitable auction process. The comments submitted by other parties confirm that the use of alternative advertising auction platforms like dMarc does not and should not affect an individual station’s lowest unit charge (LUC) calculation.

¹ Google also offers a similar advertisement aggregation and auction platform for television.

I. DISCUSSION

A. Although the Online Platforms Differ Significantly In Structure and Operation, Each Offers a Novel and Nascent Alternative to Direct Station Sales

As shown in the initial comments submitted by dMarc, Bid4Spots, and Software Media Exchange (SWMX), although these online advertising platforms differ in significant respects in structure and operation, they share certain characteristics that appear to bear upon the question presented by the declaratory ruling petition.

Structural differences underscore the nascent and evolving nature of these platforms. For example, Bid4Spots indicates that its platform conducts an individualized reverse auction, whereby stations are invited to participate in an advertiser's desired auction. Stations bid by "daypart" to win the auction. In contrast, dMarc provides a forward auction through which advertisers compete for unspecified advertising inventory in a given market. The dMarc platform produces a market-wide rate determined by the advertisers participating in the auction. The SWMX system appears to offer a blended approach, where advertisers can create a grouping of stations and specify a desired rate; depending on the model, the stations then either accept the ad at the set rate or propose a different rate.

In addition, the platforms appear to employ various operational arrangements for obtaining advertising inventory from participating stations. While other programs appear to offer unsold remnant inventory, the dMarc inventory is a mix of pre-paid and unsold inventory. Most, but not all, of dMarc's inventory varies dynamically based on daily availability from stations. A large portion of dMarc's inventory is made available to the dMarc platform at the close of business the day before the airing, when stations close out

their log for the following day. The net effect is that a bid based on identical criteria may yield very different results from day-to-day, and advertiser-to-advertiser.² Moreover, Bid4Spots indicates that its system is designed to offer time on a nonpreemptible basis, while much of dMarc's inventory is preemptible.

Various levels of automation also are employed in the programs. The way in which station inventory is ultimately allocated in the dMarc platform is dynamic and entirely automated. dMarc aggregates the different types of inventory it obtains from participating stations into its system. The system then automatically matches up the desired parameters of advertisers with available market inventory, without giving advertisers the option of choosing specific stations. In the dMarc system, spots are primarily provided on a cost per thousand (CPM) basis, but can also run on a cost-per-inquiry (CPI) basis.

With respect to the auction process, both Bid4Spots and dMarc noted that an advertiser does not know which stations ultimately will air its ad until after the outcome of the auction. dMarc auctions are conducted in a highly automated nightly process, while Bid4Spots indicates it conducts auctions on a weekly basis. The dMarc auction format is designed to deliver efficient market-based pricing that offers neither a discount nor premium to any bidder.

Despite these structural and operational distinctions, the platforms share at least one common element: rather than negotiating directly with an individual station, advertisers using these platforms purchase an ad hoc collection of spots on various

² Commenters point out that currently the programs are used for only a fraction of overall broadcast advertising inventory. With dMarc, no station offers their entire inventory, but some do offer their entire *unsold* inventory. This unsold inventory is allocated for auction only the day before air, and only after being available for direct sale for some time. Other stations offer a portion of their unsold inventory; still others offer some inventory upfront.

participating stations based on the advertisers' chosen parameters. The program descriptions demonstrate how the online platforms operate outside of traditional station sales practices. The advertising is procured at a rate that is not available to commercial advertisers directly from the station. In this way, the platforms operate entirely independent from what a licensee offers to its most favored commercial advertiser or anyone else who seeks to purchase time, even last minute inventory, directly from the station.³ Indeed, the automated nature of the platforms allows for efficiencies beyond what an individual station could provide.

Thus, these disparate platforms constitute a nascent and novel approach to advertising, one entirely distinct from traditional broadcast station sales.⁴

B. Drawing Upon Longstanding Precedent, the Commission Should Declare that Aggregate Auction Platforms Do Not Affect an Individual Station's Lowest Unit Charge Calculation

For more than thirty years, the Commission has repeatedly determined that certain advertising arrangements fall outside the scope of the lowest unit charge (LUC) obligations of individual licensees. As numerous commenters in this proceeding point out, the reasoning used in these prior cases bears on the question presented in the declaratory ruling petition – namely, whether the use of an online aggregation platform implicates an individual station's LUC calculations.

Commenters agree that, historically, the Commission has not attributed rates from non-wired networks and similar multi-outlet arrangements to an individual station's LUC. In reaching those decisions, the Commission reasoned that the rates generated by

³ Thus, discounts, fire sale or otherwise, offered by a station to commercial advertisers are not implicated here. To the extent that a station directly offers a discount or engages in the last-minute sale of inventory, that will be reflected in the station's LUC calculation for the class of time during which the ad ran.

⁴ See Bid4Spots at 12, NAB at 6.

such networks would not be available to advertisers through traditional single-station sales transactions.⁵ Accordingly, the Commission found that the rates under the network arrangements are effectively special rates unavailable to commercial advertisers who choose to buy directly from an individual station.

Most commenters point out that similar circumstances are present in the online programs at issue here. The means by which the dMarc inventory is aggregated from multiple stations and dynamically auctioned via efficient market-based pricing differs fundamentally from the sales practices for an individual station. The aggregation of multiple station inventory into the dMarc system is similar to the grouping of various stations in the types of arrangements that the Commission found should not affect the individual station's LUC calculation.

Commenters also note that the Commission has excluded a number of arrangements from a station's LUC obligation where the rates charged to advertisers are unpredictable and outside the direct control of the station.⁶ The rates generated through the innovative dMarc auction format are similarly unpredictable and beyond a station's direct control.

Accordingly, for purposes of determining whether use of the programs at issue affects an individual station's LUC calculations, the Commission should apply the reasoning of similar factual circumstances present in the network arrangements. It should be noted, however, that online auction-based platforms like dMarc's promise far more efficient, equitable, and dynamic markets than the networks previously examined by the Commission.

⁵ See *Michael H. Bader*, 56 FCC 2d 840 (1975); *Robert L. Olender*, 61 FCC 2d 694 (1978); *Charles M. Firestone*, 5 FCC Rcd 3255 (1990); *Political Primer*, 100 FCC 2d 1476 (1984).

⁶ See, e.g., *Robert B. McKenna*, 87 FCC 2d 1016 (1981).

C. Declaring That Use Of Online Auction Programs Does Not Affect a Station's LUC Would Be Entirely Consistent With Important Policies Underlying the Political Broadcasting Regulations

Through the LUC requirements, Congress sought to ensure that candidates are treated as favorably as a licensee's most favored commercial advertiser. As the Commission has noted, "Congress' purpose in enacting the 'lowest unit charge provision' was to put a political candidate on a par with the 'most favored advertiser' when purchasing time on a station".⁷

The dMarc platform is designed to achieve a fair market value for advertising inventory through an efficient process that treats participating advertisers equitably. The innovative system design and open and transparent process are intended to produce even-handed pricing. By its nature, the dMarc auction platform places participating advertisers on equal footing to bid for the opportunity to obtain a desired audience reach. The auction structure and automated nature of the dMarc platform mean that no advertiser will receive favorable treatment or a sweetheart deal that is denied to other participating advertisers.

Given that candidates can obtain the lowest unit rate directly from individual stations, and that the online aggregate platforms treat participating advertisers equitably, determining that use of these programs does not affect a station's LUC obligation is entirely consistent with the valuable policy objectives underlying the LUC and other political broadcasting requirements. By contrast, attributing the results of the programs to an individual station's LUC would not advance the purposes underlying such regulations.

⁷ See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 at ¶ 50 (1991).

For these reasons, concerns that previously led the Commission to apply broadcasting regulations to network licensees are simply not present here.⁸ The Commission should avoid imposing such mismatched regulations upon these nascent aggregation platforms that provide an alternative to direct station negotiations. In any event, the dynamic auction format and automated nature of the dMarc platform, with unique and constantly changing rates based upon supply and demand, call into question the need for and practicality of importing such political broadcasting regulations to the dMarc platform.

D. The Commission Should Encourage New Platforms that Provide Alternative Choice and Economic Benefit

As a general matter, the Commission should encourage the use of these nascent and innovative new ways of connecting advertisers with available aggregate inventory in desired markets. Numerous commenters discussed the benefits that such programs could bring to advertisers, to broadcast stations, and to political candidates.⁹

For example, the general public gains appreciably from the availability of alternative advertising platforms that offer greater efficiency, more transparency and accountability, and advances in technology and system design. Advertisers of all sizes

⁸ As dMarc explained in its comments, it is not a licensee under the Communications Act, nor does it own or operate any licensees. At least one commenter appears to suggest, however, that the FCC's holding in *Carter-Mondale* supports application of LUC obligations to non-licensees. See Joint Broadcasters at 4-5. In fact, as the Supreme Court acknowledged, *Carter-Mondale* involved “‘multi-station licensee[s] fully reachable by [the express license] revocation authority’ granted under § 312 (a)(7).” *Complaint of Carter-Mondale Presidential Committee against ABC, CBS and NBC Television Networks*, 74 FCC.2d 631, *recon. denied*, 74 FCC.2d 657 (1979), *aff’d sub nom, CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff’d* 453 U.S. 367, 391, n.14 (1981) (citations omitted). Indeed, the FCC has acknowledged previously that its authority to impose political broadcasting obligations on non-licensees may be open to question, and that generally, when Congress acts to impose such restrictions on non-licensees, it does so expressly. See *Subscription Video Services*, 51 FR 1817, ¶ 39 n.36 (FCC 1986); 47 U.S.C. § 315(c) (amending section 315's definition of broadcast station to include a cable operator for purposes of LUC)

⁹ SWMX at 11-12; Bid4Spots at 13-14; NAB at 2, 6-8; Rubber City Radio Group at 2.

benefit through a convenient, cost-effective, and targeted way to achieve a specified audience reach, with expanded opportunities for verifying, monitoring, and gauging the success of a particular ad campaign.

Aggregate auction platforms also benefit broadcast stations by offering new ways to fill the broadcast schedule. Stations may find that using these platforms attracts new local, regional, or national advertisers that had not previously appeared on that station or in that market, or might not otherwise be interested in purchasing time on a single station.

Many comments, including those of Bid4Spots and SWMX, demonstrate that alternative approaches to connecting advertisers with market-specific advertising inventory can greatly benefit political candidates.¹⁰ The commenters explain that programs such as Bid4Spots and SWMX give candidates an affordable option that can supplement purchases made from individual stations.¹¹ For contractual and other reasons, including the dynamic nature of dMarc's auction mechanism, the dMarc platform currently is not available for political use.

E. At Minimum, The Commission Should Use the 2008 Election Cycle to Gain Experience With These Platforms Before Considering Whether to Import Existing Regulation to New Advertisement Aggregator and Auction Systems

With such direct and clear-cut benefits to the public, advertisers, and broadcasters, the Commission should declare that advertising aggregate auction platforms like that offered by dMarc have no bearing on an individual station's LUC. Such a declaration would benefit advertisers large and small through greater choice and market efficiency. Providing an alternative choice can help minimize the cost of campaigns and encourage

¹⁰ SWMX at 6-7, 11-12; Bid4Spots at 3, 6-7, 13-14; NAB at 6-8.

¹¹ See SWMX at Exhibit B (containing a letter of gratitude from a nationally recognized political consulting firm).

greater political participation and debate. In contrast, as commenters note, overlaying individual station LUC requirements on these platforms would frustrate the public benefits.¹²

If the Commission has further questions about the nature of the platforms, the extent of their use, and the implications of such platforms on existing regulatory requirements, dMarc supports the suggestion by National Association of Broadcasters (NAB) that the Commission revisit this area after gaining experience during the 2008 election.¹³ Given the evolving nature of the new platforms, a period during which advertisers and broadcasters can participate without uncertain regulatory implications will enable the Commission to better understand each program's unique structure and the additional efficiencies and benefits delivered to advertisers. Doing so would be especially prudent because the programs likely will continue to be used for only a fraction of broadcast inventory through the upcoming political cycle. On the other hand, an overhanging threat of mismatched regulations in this area could cause major disruptions to this nascent market and derail its long-term potential for public benefit.

II. CONCLUSION

Google respectfully requests that the Commission declare that use of new online advertisement aggregation and auction platforms does not affect an individual station's lowest unit rate obligations. Alternatively or in parallel, the Commission should seize the opportunity of the 2008 election cycle to observe these dynamics at work, which could

¹² Bid4Spots at 3, 8, 13-14.

¹³ See, e.g., NAB at 9-10. As dMarc previously indicated, the Petition notably seeks only a declaratory ruling on the Commission's existing precedent and cannot be the basis for a more far-reaching decision that adopts new rules and regulations.

inform any future action that might be necessary. Such an approach would encourage the development of these innovative platforms, to the benefit of all parties involved.

Respectfully submitted,

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