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The Honorable Makan Delrahim
Assistant Attorney General
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Public Workshop on Competition in Television and Digital Advertising

Dear Assistant Attorney General Delrahim:

We at the R Street Institute ("R Street") commend you and the Department of Justice ("DOJ" or "Department") for holding a workshop and seeking public input on competition in television and digital advertising markets.[1] Many of the most popular video and digital services today are funded either in whole or in part by advertising revenue, so it is vital to preserve and promote vibrant competition in these advertising markets. Moreover, the once-separate television and digital advertising markets are increasingly converging into a single advertising market. This convergence creates new opportunities for firms competing in these markets and new challenges for regulators trying to oversee them. As such, the Department's recent hearing was both appropriate and timely.

R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government. As part of that mission, we have researched and commented

[1] U.S. Dept. of Justice, *Public Workshop on Competition in Television and Digital Advertising* (May 2–3, 2019), http://bit.ly/2wAyoZ1.

on multiple policy issues related to American media regulation, including some of the rules currently in place at the Federal Communications Commission ("FCC") governing portions of the television marketplace.[2] These comments summarize and expand upon R Street's previous work in this area to make three key points.

First, the Department should recognize that the once-distinct markets for television and digital advertising are increasingly converging into a single advertising marketplace. This convergence is being driven by multiple factors, including technological developments and changes in consumer viewing habits. Such convergence within, and transformation of, advertising markets will present new opportunities for industry in trying to reach consumers, as well as new challenges for the Department and other regulators in trying to preserve and promote vibrant competition in these markets.

Second, the Department should account for ongoing convergence in advertising markets by expanding the definition of these markets for purposes of antitrust analysis. Discussion during the DOJ's workshop clearly demonstrated that television and digital advertising firms are increasingly competing head-to-head for advertising revenues, which should constrain the ability of firms in any portion of this market to raise prices above a competitive level.

Third, to the extent that commenters are still concerned about the effects that advertising competition may have on small businesses, the Department should consider the available market-based mechanisms for leveling any competitive imbalance. Certain members of Congress have recently proposed an antitrust exemption that would allow local advertisers to form a cartel,

[2] *See, e.g.*, Tom Struble & Joe Kane, Comments of R Street Institute, *In the Matter of Modernization of Media Regulation*, MB Docket No. 17-105 (Fed. Commc'n Comm'n July 5, 2017), http://bit.ly/2wA0jbK.

restrict output, and raise prices as a way to support local news and other services, but such collusion is "the supreme evil of antitrust"[3] and should be avoided if at all possible.

I. Television and Digital Advertising Markets are Converging

The Department should recognize that the once-distinct markets for television and digital advertising are increasingly converging into a single advertising marketplace. Evidence of this was presented during the first day of the Department's workshop, as panelists discussed Advertising 101 and the nuts of bolts of advertising in different media outlets, and during the second day of the workshop, as panelists debated this very issue and tried to predict future trends in advertising markets.

A. Television and Digital Advertisements Have Historically Served Different Purposes for Advertisers

During the opening presentations and panels, participants made multiple references to the "marketing funnel"—a model used to visualize the advertising market as a series of steps on the consumer's journey.[4] While this journey is not always linear, it generally ranges from building brand awareness and interest at the start, to evaluating specific offers and making purchases at the end.[5] Notably, the consumer journey is remarkably similar for both subscription-based and "freemium" services, despite their different business models.[6]

Historically, different types of advertisements were targeted at different layers in the funnel. The format of television advertisements—usually 30-second or longer audiovisual clips,

[3] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[4] *See, e.g.*, Dep't of Justice, Public Workshop on Competition in Television and Digital Advertising, *Lecture: Advertising 101 — An Overview of Advertising and Key Issues to Be Explored at the Workshop*, at 13:30–16:30 (May 2, 2019), http://bit.ly/2XAvIXo.

[5] *Id.*

[6] *See id.* at 22:50–23:50.

often with high production value and compelling narratives—has generally been more suitable for marketing at the top of the funnel, as consumers are more likely to watch and remember these advertisements than the less interactive and engaging advertisements typically placed on websites and newspapers.

On the other hand, digital advertising on websites or mobile applications has generally been more suitable for marketing at the bottom of the funnel, as those consumers are seeing advertisements in an environment where they can readily make purchases with only a series of clicks or taps, leading to more conversions. However, technological developments and changes in consumer viewing habits are upending this traditional paradigm at both ends of the funnel.

B. Cord-Cutting and Connected Viewing are Blurring the Traditional Distinction Between Television and Digital Advertising Markets

Recent technological improvements in broadband adoption and streaming media have enabled new business models to arise in the video marketplace, often with tremendous success. And with these changes in the video marketplace, advertising markets are changing as well. Two trends are worth drawing attention to here: Cord-cutting and connected viewing.

Cord-cutting refers to the recent trend of consumers canceling or foregoing traditional cable and satellite video services and instead relying upon free over-the-air broadcast video and online streaming video services.[7] Online streaming video services vary widely in their formats—which include video-on-demand and live television services; in their business models—which include free, advertisement-supported services (e.g., YouTube, Twitch), à la carte paid services (e.g., iTunes, Google's Play store), and paid subscription services (e.g., Netflix, Sling TV); and

[7] *See, e.g.*, Edward Carlson, Nat'l Telecomm. & Info. Admin., *Cutting the Cord: NTIA Data Show Shift to Streaming Video as Consumers Drop Pay-TV* (May 21, 2019), http://bit.ly/2XsfH5D.

in their content offerings—which include popular programming that appeals to a wide audience (e.g., CBS All Access, HBO Now) and niche programming that appeals to only a small segment of overall viewers (e.g., Fubo TV for sports, Crunchyroll for anime).

While traditional pay-television services are tremendously popular and, in fact, are still the dominant form of viewing, online streaming video services and cord-cutting continue to grow in popularity, especially among younger viewers.[8] And while online advertisements in the late 1990s and early 2000s were generally limited to static images and links, the advertisements that accompany online streaming video services today are often indistinguishable from advertisements on broadcast and cable television services. Indeed, not only are many online video advertisements as high in quality as traditional television advertisements, they often can be more precisely targeted to a specific audience by relying on behavioral targeting in addition to contextual and geographic targeting. Thus, as cord-cutting continues to grow, and as online advertisements continue to improve in quality, these advertisements are increasingly becoming a direct substitute for traditional television advertisements and can be used to effectively target consumers at the top of the funnel and build brand awareness.

Meanwhile, technological improvements in the traditional television viewing experience are also enabling television advertisements to effectively target consumers at the bottom of the funnel and yield conversions. Broadly, these improvements and the opportunities they present can be referred to as "connected viewing."[9] This term "essentially refers to the multiple ways viewers engage with media in a multiscreen, socially networked, digital entertainment

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[8] *See id.* (showing that 86 percent of Internet users between the ages of 15 and 24 watched video online in 2017, up from 67 percent in 2013, compared to only 40 percent of Internet users over the age of 65, up from 16 percent in 2013).

[9] *See, e.g.*, Jennifer Holt et al., *Introduction: The Expanding Landscape of Connected Viewing*, 22 Convergence: The Int'l J. of Res. into New Media Tech. 341 (2016), http://bit.ly/2XF38El.

experience."[10] For example, a consumer watching broadcast or cable television on their couch may have a smartphone, tablet, or laptop computer with them. Any one of these screens can be used to enhance the viewing experience—such as by offering video clips and highlights during a live sporting event, as ESPN does with its mobile app, or by offering viewers a way to comment and discuss a live video in real time on social media. Similarly, these screens can also be used to enhance the advertising experience—such as by showing consumers more advertisements or, importantly, by allowing consumers to make actual purchases, perhaps with a promotional discount code presented on one screen and redeemed on another.

While these developments have thus far been more pronounced in online advertising, connected viewing still holds tremendous promise for advertising on broadcast and cable television going forward. And with the impending deployment of the new ATSC 3.0 broadcast standard,[11] on the one hand, as well as ongoing efforts by programmers[12] and others[13] to develop new standards for addressable (i.e., personalized) advertising in traditional television services, on the other, television advertisements will continue to look more and more like online advertisements. This transformation and convergence between television and online advertising markets will present new opportunities for industry in trying to reach consumers—as well as new challenges for the Department and other regulators in trying to preserve and promote vibrant competition in these markets.

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[10] *Id.* at 342.

[11] *See, e.g.*, Phil Kurz, *FCC to Begin Accepting ATSC 3.0 Applications*, TV Tech. (May 23, 2019), http://bit.ly/2wGvXUL.

[12] *See, e.g.*, Todd Spangler, *Disney, NBCU, Turner, CBS and More Join Vizio-Led Addressable TV Advertising Consortium*, Variety, Mar. 12, 2019, http://bit.ly/2wHczqC.

[13] *See, e.g.*, Google, *Addressable TV Advertising: Creating a Better, More Personal TV and Video Experience*, Think With Google (June 2016), http://bit.ly/2wEapbq ("Addressable TV advertising is the ability to show different ads to different households while they are watching the same program.").

II. Advertising Markets Should be Defined Broadly to Account for this Convergence

In recent years, many commenters have warned that big technology companies, including Google and Facebook, have effectively monopolized online advertising markets, to the detriment of both smaller competitors and consumers.[14] Even within the context of online advertising, these claims cannot withstand scrutiny. Google—the current leader—has less than a 40-percent market share, and the Google-Facebook "advertising duopoly" is now under siege from Amazon, whose market share grew from 6.8 percent to 8.8 percent last year.[15] During this timeframe, Google's share fell by 1 percent and Facebook's rose by only 0.3 percent, to 22.1 percent.[16]

However, as explained above, online advertising increasingly competes head-to-head with television advertising at all levels in the marketing funnel, so "online advertising" is not the relevant market to consider. Discussion during the DOJ's workshop clearly demonstrated this point, as firms increasingly consider the advertising market to be an integrated whole with television, online, print, and other forms of advertising all used interchangeably. Firms do not budget separately for each type of advertising, but instead budget once for advertising overall and then allocate those advertising funds across different platforms depending on factors like price, availability, and audience demographics.

This increasing substitutability and competition between different forms of advertising should constrain the ability of firms in any portion of the advertising market to restrict output and raise prices above a competitive level. The Department should therefore account for this ongoing

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[14] *See, e.g.*, Nyshka Chandran, *Big Tech Monopolies are "Going to Be a Problem More and More," Media Expert Warns*, CNBC (Sept. 11, 2018), https://cnb.cx/2wJhwzw.

[15] *See, e.g.*, Felix Richter, *Amazon Challenges Ad Duopoly*, Statista (Feb. 21, 2019), http://bit.ly/2wROlud.

[16] *Id.*

convergence and increasing competition in advertising by expanding the definition of the advertising market for purposes of antitrust analysis. It is certainly possible that a single firm could gain market power across all advertising platforms and use that power to restrict output and raise prices, but no firm has such power today. Moreover, the new opportunities presented by convergence between television and online advertising will likely make it impossible for any firm to achieve such power in the near future. As such, the Department should be less concerned about single-firm conduct and more concerned about potential collusion and cartelization in advertising markets.

III. The Department Should Encourage Open and Fair Competition in the Advertising Market by Opposing Any Efforts to Collude and Form Advertising Cartels

The advertising market appears to be generally competitive and healthy today, but some commenters are still concerned about the effects that advertising competition may have on small firms that rely on advertising revenue to support their businesses. Indeed, certain members of Congress are so concerned about the impact of advertising competition that they have recently proposed creating an antitrust exemption to allow publishers to form an advertising cartel.[17] This proposal would harm consumers and should be opposed.

If publishers are granted an antitrust exemption and allowed to collude to form an advertising cartel, they would surely use that power to restrict output and raise prices. In doing so, the cartel members would gain more advertising revenue that could be used to support their business operations—which may have some societal value if, say, it were used to promote local news reporting. However, those gains would come at a direct cost to consumers (i.e.,

[17] *See, e.g.*, Margaret Sullivan, *Google and Facebook Sucked Profits from Newspapers. Publishers are Finally Resisting.*, Wash. Post, June 5, 2019, https://wapo.st/2XBgr8A (discussing recent bills introduced in the House and Senate to give an antitrust exemption to news publishers).

advertisement buyers), as they are forced to pay supra-competitive prices in order to advertise their products and services. And, of course, there is no guarantee that the cartel members' supra-competitive revenues would be reinvested into the members' publishing operations, as they may instead be used to boost profit margins or finance any number of other operations. Surely, this would be a net harm for consumer welfare.

Such collusion could theoretically be justified if it were the only viable means of preserving local news reporting or other services that provide significant societal (but evidently not economic) value to consumers. However, it is not. In late 2017, the FCC repealed many of the ownership restrictions that previously governed local media markets.[18] Broadcast media ownership is still limited by rule at the national level, but local broadcasters are now free to merge with local newspapers, as well as with other local broadcasters, under certain conditions.[19]

The current local media ownership rules are still more restrictive than general antitrust law, ostensibly to preserve and promote diversity of ownership and content in local media. But these rules are much less restrictive than they used to be. As such, if newspapers, broadcasters, or any other media outlets want to grow their advertising revenues, they can simultaneously increase their advertising inventories and negotiating leverage in advertising sales by simply merging with one another. Horizontal mergers and acquisitions can certainly harm consumers and competition by removing one or more competitors from the market. But they can also benefit consumers and competition where the merging firms create a stronger competitor to a market

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[18] *See, e.g.*, Brian Fung, *The FCC Just Repealed a 42-Year-Old Rule Blocking Broadcast Media Mergers*, Wash. Post, Nov. 16, 2017, https://wapo.st/2XBjmy4. Previously, common ownership of both a newspaper and a broadcast television or radio station in the same market was prohibited.

[19] *Id.*

leader. Collusion, on the other hand, is the "the supreme evil of antitrust"[20]; it invariably harms both consumers and competition. Given the availability of market-based mechanisms for leveling any competitive imbalance between local newspapers and broadcasters, on the one hand, and national or multinational advertising giants on the other, the Department should oppose any efforts to collude and form advertising cartels.

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The R Street Institute thanks the Department of Justice for the opportunity to submit comments in response to its recent public workshop on competition in television and digital advertising. R Street recommends that the Department pursue the above-identified areas in its ongoing work to protect competition and promote innovation in television and online advertising.

Respectfully submitted,

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[20] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).