September 30, 2020

VIA EMAIL & U.S. MAIL

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division, U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Re: Relevant Market Definition in Advertising Industries

Dear Assistant Attorney General Delrahim:

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the "Affiliates Associations")[1] submit this letter to express our members' concern about antiquated analysis of our industry by the Antitrust Division ("Division"). For decades, the Division has asserted that local broadcast television stations compete only against the other broadcast television stations in their local markets. While this view has persisted, satellite and cable television channels have proliferated and now serve more viewers than the broadcast networks. Internet video and digital content have grown exponentially, and broadcasters face intense competition for viewers and local advertising dollars. The Division's view no longer matches today's media market reality. Yet, the Division's outdated viewpoint frequently is outcome determinative in its reviews of broadcast transactions, stifling broadcasters' ability to achieve efficiencies to allow them to provide high-quality entertainment programming and locally-focused news, weather and sports. We respectfully submit that an update of the Division's analytical framework of local advertising competition is long overdue.

The Division's analysis of local advertising competition starts with an assessment of the relevant market. As the Division's Horizontal Merger Guidelines provide, a relevant market "helps specify the line of commerce … in which the competitive concern arises" and allows the Division "to identify market participants and measure market shares and market concentration"

[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network. Collectively, the Affiliates Associations represent more than 500 local television stations that are affiliated with the major broadcast networks. The Affiliates Associations' member stations provide news, weather, sports, entertainment, and other valuable, highly-desired video content to virtually every community in the country.

that is useful in illuminating "a merger's competitive effects."[2] Indeed, a merger transaction in a highly-concentrated market is presumed "to be likely to enhance market power."[3] The Division is likely to challenge a merger in a relevant market that is too narrowly defined, preventing the realization of important efficiencies.

The Division defines relevant markets for local advertising much too narrowly without accounting for the full array of competitive services. In defining a relevant market, the Division focuses on "demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase…."[4] With regard to local broadcast television advertising, the Division's definition excludes advertising on all other forms of media: "Broadcast television spot advertising . . . constitutes a relevant product market…." to the exclusion of cable spot advertising, digital advertising, and advertising on all other forms of media.[5] This conclusion defies evidence that audience and advertisers are substituting purchases of television advertising with advertising on digital platforms on a massive scale. According to recent Kagan estimates, digital (online/mobile) ad revenues grew by a compound annual growth rate of 17.7% from 2010-2019, with its share of total U.S. ad revenue growing from 12.6% in 2010 to 42.2% in 2019.[6] Meanwhile, local broadcast TV stations have seen their share of total ad revenue decline to 7.1% in 2019.[7] Moreover, advertisers that purchase television advertising also spend some of their advertising wallet on many different outlets. In a 2018 survey, television advertisers reported using 31 different ad platforms.[8] Nearly 78% of TV advertisers reported using targeted social media ads and almost 68% said they used mobile location aware ads.[9]

The Division has dismissed these trends on the grounds that broadcast television continues to draw large audiences and have a broad reach while advertisers view other media outlets as complements, not substitutes, for broadcast television advertising.[10] But the Division fails to account for fundamental technological shifts and changes in viewing patterns. While the broadcast television audience remains large relative to other outlets, it has become increasingly fragmented.

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[2] U.S. Department of Justice Antitrust Division & Federal Trade Commission, Horizontal Merger Guidelines § 4 (Aug. 19, 2010) ("Horizontal Merger Guidelines").

[3] *Id. §* 2.1.3

[4] *Id.* § 4.

[5] United States, et al., v. Nexstar Media Group, Inc., et al., Compl., Case 1:19-cv-02295 (D.D.C. Jul. 31. 2019), ¶¶ 35, 36-47.

[6] National Assoc. Broad., Allow Broadcasters to Compete on a Level Playing Field in the Digital Marketplace (Sep. 2020).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] United States, et al., v. Nexstar Media Group, Inc., et al., Compl., Case 1:19-cv-02295 (D.D.C. Jul. 31. 2019), ¶¶ 37, 36-47.

Nielsen estimates that the weekly time adults ages 18+ spent viewing linear TV (broadcast and cable, either live or time shifted) fell by 15.5% just from 2014-2019, by 23.7% for adults ages 35-49 and much more for adults under age 35.[11] The cable television audience collectively has long exceeded the broadcast audience, and viewers, especially younger viewers, are increasingly consuming video online. Advertisers have reacted to this trend by serving cable and internet video viewers with addressable video advertising targeted to specific geographies. The reach for video ads that was once available only on broadcast stations can now be bought with purchases across multiple platforms. The continued adherence to a market definition that has persisted for more than two decades defies the fundamental changes in consumer and resulting advertiser behavior.

The narrow and increasingly inaccurate market definition has serious policy implications. Because the Division prescribes a narrow market definition, individual local markets are almost inevitably highly concentrated and any transaction "will be presumed to be likely to enhance market power."[12] With this structural presumption, most transactions between in-market broadcasters are prohibited or face a prohibitively expensive regulatory review. The result is a type 1 error where beneficial transactions do not occur.

Broadcast transactions have the potential to increase output in the face of a declining share of advertising revenue. A broadcaster's costs are largely fixed, and the costs for acquiring and distributing quality programming have continually increased at a rate higher than inflation. Costs are particularly high when a broadcast station supports a local news operation, and they are increasingly difficult to cover when advertisers are shifting dollars to digital and other media platforms. As a result of these declining resources, broadcasters have been forced to trim or even eliminate budgets for expensive local news operations. These cuts results in lower output of journalism and local programming.

Broadcast transactions are the cure for this pernicious problem. Because the costs of operating two broadcast stations are not meaningfully greater than the costs of operating one, the potential efficiencies resulting from a broadcast combination are powerful. The costs of providing local news can be amortized across two stations, and the programming can be offered throughout the daily schedule of each outlet, leading to a substantial increase in output of both local programming and local advertising spots.[13] Such transactions push the supply curve out and put downward pressure on advertising prices while quality increases. We therefore respectfully submit that not only are broadcast transactions subjected to an outdated view of the market but that clinging to this anachronistic view has a deleterious impact on local journalism and programming.

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[11] National Assoc. Broad., Allow Broadcasters to Compete on a Level Playing Field in the Digital Marketplace (Sep. 2020).

[12] Horizontal Merger Guidelines § 5.3.

[13] In contrast to network or syndicated programming, broadcasters own all the advertising inventory in the programming they produce. In the programming provided by the network or a syndicator, the broadcaster may sell only a limited number of spots per hour.

Respectfully Submitted,

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