Before the
Federal Trade Commission
Washington, DC 20580

In the matter of Competition and Consumer Protection in the 21st Century Hearings	Project Number P181201

COMMENTS OF PUBLIC KNOWLEDGE

7. Evidence and analysis of monopsony power, including but not limited to, in labor markets. [1]

Consumer protection, fairness, and competition policy in today's digital economy require substantially stronger enforcement of antitrust law, more aggressive use of existing regulatory powers and new laws to fill in important policy gaps. Public Knowledge commends the FTC for launching this proceeding and a series of public hearings to examine competition and consumer protection in the 21st century, and today offers some initial observations and ideas to consider on the topics the Commission has identified as central to its inquiry. We will augment these ideas through our participation in Commission workshops and through follow up filings as the Commission refines the focus of its efforts.

The recent explosion in internet distribution of goods and services, growing dependence of democratic processes on nondiscriminatory and open digital communications platforms, and ongoing market dominance of entrenched media and communications companies makes it imperative for the FTC to become more vigilant and assertive to protect incipient and potential competition, to apply all qualitatively relevant elements to its consumer welfare analysis, and to update its consumer protection enforcement to reflect the complexities of the digital marketplace. As an expert agency with a specific mandate from Congress, it is also important for the FTC to inform lawmakers and the public of market imperfections and problems it lacks the tools and resources to address

[1] Public Knowledge staff John Bergmayer, Allie Bohm, Ryan Clough, Harold Feld, Meredith Rose, Kory Gaines, Dylan Gilbert, and Gus Rossi contributed to the comments filed in this proceeding.

and to propose policy adjustments that would more effectively address inequities in the oversight of today's economy.

Today, we are highlighting a number of the complexities and issues regarding application of FTC authority to the digital economy and the exploding internet economy in response to the Commission's request for comment. Rather than delineate precisely what deserves treatment under antitrust, consumer protection or some new legal authority, we instead highlight many of the problems that deserve careful attention, definition, further analysis and refinement before precise policy action should be considered. We offer this as a first step because we believe:

- the explosion of the digital market calls first for understanding precisely what is going wrong and therefore deserves fixing;
- identifying what are the best policy tools available to fix the problems;
- evaluating how best to apply existing policy tools; and
- proposing new policy tools to address problems that fall between the gaps under existing law.

This document contains our comments relating to evidence and analysis of monopsony power.

We look forward to working with the FTC and all other stakeholders to flesh out the details of the concerns raised in our comments and propose meaningful policy adjustments and enforcement practices to help the Commission fully protect competition and consumers in the digital marketplace.

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The FTC should consider monopsony power in a number of contexts, since the costs of excessive market power—in terms of higher prices, slower innovation, or reduced quality—are always ultimately borne by end consumers. Consumers are affected by upstream monopolies and monopsonies just as they are affected by excessive market power held by the companies they interact with directly. Specifically, the FTC should consider monopsony power in merger review, and as a factor in determining whether a business practice is unfair when engaged in by a monopsonist.

There has, of course, been increased academic and political attention directed toward monopsonists that deals directly, for example, with monopsonies in labor markers. But some media, telecommunications, and platform providers can also possess distribution monoposony power that is relevant to the FTC's jurisdiction.

Broadband providers, for example, stand as gatekeepers in between internet users and the content and services they want to access online. This is necessarily true, of course. But exacerbating that fact that most broadband providers do not face local competition, a few broadband providers are so large that they are effectively monopsonists, as well. Comcast, for instance, serves about 26.2 million households, and Charter serves about 24.2 million.[2] Together, these two providers alone serve more than half the entire market—and this number would be even larger using a definition of broadband limited to higher speeds, e.g. 25 Mbps and up.

This broadband distribution bottleneck means that, over and above the threats to an open internet that any ISP can cause, the few largest ISPs can effectively shape the online ecosystem in ways that few other companies can. If the largest ISPs block or degrade an edge service, refuse to provide adequate interconnection facilities, or otherwise impede their customer's ability to access the content and services of their choice, they can make those services economically non-viable entirely, harming internet users as a whole. Additionally, the fact that larger broadband companies have this ability at all gives them the opportunity to raise costs on edge providers in other ways that full short of outright blocking; for instance, demanding exorbitant interconnection rates or "tolls" they or content delivery networks must pay, merely to provide the traffic that the broadband company's own customers have requested. For these and other reasons no analysis of consumer protection or market power issues in broadband is complete without taking full account of the monopsony power many large ISPs possess.

Nor are broadband ISPs the only distributors whose distributor monopsony power may harm consumers. The largest broadband providers are also the largest cable TV providers, with an outsized influence on what independent programming can reach consumers, for instance. And while the online video marketplace in some senses is more

[2] https://www.leichtmanresearch.com/800000-added-broadband-in-1q-2018/

competitive than other video markets, the available outlets for certain kinds of video are quite narrow. For example some independent creators simply must be carried on YouTube, which is not merely a hosting provider but a video portal, recommendation engine, and social network rolled into one. These independent creators can be significantly affected by YouTube's changing content, recommendation, and monetization policies.

For these and many other reasons monopsony power should be an integral part of the FTC's analysis.

Respectfully submitted,
Public Knowledge
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