

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 15-158
Competition in the Market for the Delivery of)	
Video Programming)	
)	
)	

COMMENTS OF NESN

New England Sports Network (“NESN”) submits these comments in response to the Media Bureau’s *Public Notice* in this matter.¹ NESN was launched in 1984 as one of the first regional sports networks (“RSNs”) in the country. Today, NESN is a preeminent and independent RSN that provides live coverage of the games of the National Hockey League’s Boston Bruins and Major League Baseball’s Boston Red Sox. In addition, NESN produces and televises other programming to provide subscribers with content that entertains and informs.

Throughout its 30+-year history, NESN has embraced distribution of its content through new technologies — first through cable, then through DBS, and later through telco distribution. NESN has never faced any industry opposition or criticism for doing so. Subject to negotiation about appropriate terms and conditions, NESN fully intends to make its programming available to emerging online video providers. A number of such providers have in fact engaged NESN in discussions about potential distribution arrangements.

¹ *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, MB Docket No. 15-158, DA 15-784 (MB rel. July 2, 2015) (“*Public Notice*”).

NESN files these comments to make a brief point about such online video providers: it wishes to address the *Public Notice*'s request for comment on "the extent of substitution between OVDs [online video distributors] and MVPDs [multichannel video programming distributors like cable and DBS operators] and between OVDs and over-the-air broadcast services."² As NESN will show below, online video distribution is currently a full-fledged substitute for broadcast, cable, and satellite technology, and consumers access online video both via TV sets and via devices like tablets and phones that substitute for TV sets.

For RSNs like NESN (and indeed for any producers and packagers of video programming), it is vitally important that there be robust competition at the video-distribution level, lest video-programming distributors undisciplined by market forces restrict video-programming supply to the detriment of both programmers and consumers.³ And, as the Commission has recognized, video distributed online directly competes with video distributed via broadcast-television spectrum, via satellite spectrum, and via cable-television or telephone wireline spectrum.⁴ That only makes sense: "consumers are focused on the content they receive, rather than the specific method used to deliver it to them."⁵

² *Id.* at 17.

³ See, e.g., *Applications of AT&T Inc. and DirecTV for Consent To Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 14-90, FCC 15-94, ¶ 234 (rel. July 28, 2015) ("*AT&T/DirecTV Order*") ("Given the Commission's interest in promoting supply and quality of programming, we consider carefully the potential harms that could arise from the loss of a potential video programming distributor We are particularly attentive to [any] decrease [of] consumer welfare by reducing the output or quality of programming.").

⁴ See *id.* ¶ 68 ("OVDs typically offer consumers choices that . . . compete with some portion of the services MVPDs offer, such as VOD."); *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, ¶ 83 (2015) ("*Sixteenth Report*") ("MVPDs increasingly compete with OVDs for viewing time, subscription revenue, and advertising revenue."); *id.* ¶ 215 ("When the same

Even now, however, a tendency exists among some industry observers to characterize online video as somehow different from (and inferior to) broadcast-, cable-, or satellite-delivered video: to some, online video continues to conjure up images of teenagers watching herky-jerky clips of amateur-produced video on phone- or tablet-screens while away from home. Whatever may have been true in the past, that perception is now outdated. The Commission concluded in 2010 that “improvements in streaming technology and broadband availability enable [online video] programming to be ‘comparable to programming provided by . . . a television broadcast station.’”⁶ And the Commission has recognized that online video now includes “video content akin to the professional programming traditionally offered by broadcast stations, or broadcast and cable networks.”⁷

Moreover, with the aid of set-top boxes and USB sticks offered by the likes of Apple, Roku, Google, and Amazon, any online video that can be viewed on-the-go via a phone or tablet now can and will be viewed on large-screen high-definition (“HD”) TV sets from the comfort of

program is offered by both an OVD and an MVPD, an OVD may be perceived as a substitute.”); *Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent To Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 41 (2011) (“regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product”); *id.* ¶ 79 (“the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.”).

⁵ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, ¶ 24 (2014).

⁶ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 129 n.408 (2010) (quoting 47 U.S.C. § 522(20)).

⁷ *Sixteenth Report* ¶ 214 (2015).

consumers' couches.⁸ Smart TVs, which are quickly becoming ubiquitous, make even these boxes and sticks unnecessary: they come with “apps for online video already installed.”⁹ Nothing could be better evidence that online video is a substitute for traditional television viewing than the fact that viewers are widely consuming online video via their traditional TV sets.¹⁰ To the extent that online video is enjoyed on tablets and other non-TV devices, then, it is because such devices constitute a substitute and replacement for traditional TV sets — not because online video cannot be enjoyed on traditional TV sets.¹¹ Devices like tablets merely improve upon consumers' experience by providing an additional screen and allowing for mobility.

It is important, then, that the Commission now definitively and in the clearest of terms recognize and acknowledge that, whatever may have been true in the past, online video distribution, as a technology, is currently a full substitute for broadcast, cable, and satellite

⁸ See *id.* ¶ 243 (“Apple, Google, and Amazon sell set-top boxes that enable users to watch online video on their television sets — AppleTV, Google TV, Google Chromecast, and Amazon Fire TV.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, ¶ 234 n.832 (2013) (“Apple introduced the version of Apple TV that enables high definition viewing in March 2012.”).

⁹ *Sixteenth Report* ¶ 334 (“Smart TVs, with advanced electronics, have apps for online video already installed.”). For example, streaming video from MLB.TV is currently viewable on most new Samsung TV sets without any need for additional hardware. See <http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=samsung>.

¹⁰ See, e.g., Michelle Clancy, *IAB: Streaming Video Has Become Completely Mainstream* (Apr. 21, 2015), available at <http://www.rapidtvnews.com/2015042138001/iab-streaming-video-has-become-completely-mainstream.html#axzz3iRJEx2CR> (“One in three Americans over the age of 18 owns either a smart TV or a device that streams video to their TVs, with two in five (38%) of those individuals spending at least half of their TV viewing time streaming video to their television.”).

¹¹ This no doubt explains why traditional MVPDs — through initiatives like TV Everywhere — have sought to make their video programming available on-the-go via tablets and other, similar, devices. See, e.g., *id.* ¶¶ 18, 85.

technology. The Commission should further recognize and acknowledge that online video can be and is consumed via regular TV sets and that, insofar as it is consumed via tablets and like devices, those devices substitute for and improve upon TV sets. At this stage, the main difference between online video and more traditional video-delivery technologies involves “the ability of OVDs to acquire or create compelling programming that will attract viewers and subscribers.”¹² Although NESN at this time takes no position on specific policy and regulatory proposals affecting that ability, NESN submits that a thorough understanding of the substitutability discussed above must be the foundation of any sensible policy in this area. A clear statement by the Commission is critical to provide industry stability and certainty for networks such as NESN that intend to expand their programming to online video distribution platforms.

Respectfully submitted,

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¹² *Sixteenth Report* ¶ 253. It is this difference that explains why the Commission has to date found “that, for most consumers today, OVD services are not substitutes for MVPD services.” *AT&T/DirectTV Order* ¶ 68. As the Commission determined: “Most OVDs today do not offer a substantial amount of the most popular video programming that is provided by MVPDs, including live sports programming and local broadcast programming, nor do most OVDs offer bundles of linear programming such as those offered by traditional MVPDs.” *Id.* ¶ 58. But this in no way undermines our point in the text: as a technology, online video distribution is currently a full substitute for broadcast, cable, and satellite technology.