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

In the Matter of	)	
	)	WC Docket No. 17-108
"Restoring Internet Freedom"	)	

OPENING COMMENTS OF VIMEO, INC.

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OPENING COMMENTS OF VIMEO, INC.

Vimeo, Inc. ("Vimeo") respectfully submits the following opening comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking in WC Docket No. 17-108, captioned "Restoring Internet Freedom" (the "2017 NPRM").[1]

I. EXECUTIVE SUMMARY

Vimeo supports the strong, enforceable net neutrality rules established by the Commission's 2015 Open Internet Order (the "2015 Order").[2] Those rules are working and are needed to preserve continued investment and innovation in Internet services and applications, particularly for online video, which has emerged as an alternative to traditional viewing choices like cable television. Repealing the rules at this critical time would unsettle expectations, jeopardize investment, and reduce consumer choice.

We urge the Commission to retain the 2015 Order in its entirety and we specifically urge the retention of:

- The "bright-line" rules that prohibit broadband Internet access service ("BIAS" or "broadband") providers from blocking, throttling, and prioritizing traffic;

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1 2017 WL 2292181 (Apr. 27, 2017).

2 *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Dkt. No. 14-28, 30 FCC Rcd 5601 (2015) (the "2015 Order").

- The "general conduct standard," which provides a fallback rule to address discrimination not specifically banned by the bright-line rules;
- The classification of BIAS as a common carriage "telecommunications service" subject to Title II of the Communications Act;
- The regulation of BIAS on an end-to-end basis, including points of interconnection; and
- The application of the net neutrality rules to both fixed and wireless broadband.

II. INTRODUCTION

In the 2015 Order, the Commission correctly recognized the threat posed by broadband providers to a key promise of the Internet—the ability of consumers to obtain the content and services of their choosing. A small, powerful group of broadband providers possesses both the technical ability and the economic incentive to impede this choice by manipulating traffic just before it reaches consumers. Nowhere is this more apparent than with streaming video, which competes with integrated broadband providers' own video offerings. Without regulation, these incumbents can—and will—disadvantage third party streaming services to protect their revenue streams, to the detriment of would-be disruptors and consumers alike. This competitive reality requires clear *ex ante* rules that allow online video companies to innovate and reach their customers.

The 2017 NPRM proposes to repeal parts of the 2015 Order on the premise that alleged over-regulation threatens broadband investment and deployment. This

contention is both incorrect and myopic. *First*, it is incorrect because broadband investment—and broadband output—has increased in the past two years. Nor is there any reason to believe that the 2015 Order's carefully tailored, light-touch approach to Title II has dampened broadband investment. *Second*, the 2017 NPRM's thesis is myopic because it focuses on the investment decisions of only one part of the market and ignores the edge providers and consumers that drive the demand for Internet access in the first place. The 2017 NPRM ignores the deleterious effects its policy change could have on investment and innovation in the edge.

Moreover, the unstated premise of the 2017 NPRM is that there is robust competition in the broadband market, which will somehow dampen the incumbents' worst, anti-competitive impulses. There is not. A handful of large incumbents dominate the market for advanced broadband (at least 25 Mbps downloading speed). In many geographic markets, many consumers have no choice as to their broadband provider. Even when there is choice, high switching costs and lack of transparency preclude any meaningful market discipline. The 2015 Order anticipates and addresses these market deficiencies.

In addition, the legal basis for the net neutrality rules—the classification of broadband as Title II "telecommunications service"—should remain. After three visits to the D.C. Circuit, it is abundantly clear that Title II is a prerequisite for

strong net neutrality rules.[3] Reversing the Title II classification of broadband will strip the Commission of authority to maintain the net neutrality rules and will therefore have the same effect as outright repeal of those rules. Nor is there any basis to reclassify broadband. Consumers see broadband as a gateway to the Internet and nothing more. Time has proven Justice Scalia right when he declared that cable broadband "merely serves as a conduit for the information services" provided by website operators like Vimeo.[4]

Retaining the net neutrality rules and Title II will not reduce broadband investment, but will ensure that investment in the Internet's application layer—the online content and services that people use and visit with their broadband access—remains robust. This will ensure that consumers continue to use and demand high-bandwidth services like HD video and beyond. That is the best way of ensuring demand for broadband. The Commission should therefore leave the 2015 Order intact.

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[3] *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (vacating order against Comcast for lack of authority); *Verizon v. FCC*, 740 F.3d at 623 (D.C. Cir. 2014) (vacating 2010 Open Internet Order for lack of authority); *US Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (upholding 2015 Open Internet Order and denying petition to vacate).

[4] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1010 (2005) (Scalia, J., dissenting).

III. BACKGROUND ON VIMEO

Vimeo provides consumers with tools to upload, share, and watch original videos. Founded in 2004, Vimeo reaches a global audience of more than 240 million unique users per month.

The videos hosted by Vimeo are diverse: They include personal home videos, animation, documentaries, and narrative films uploaded by consumers, amateur and professional filmmakers, artists, entertainment companies, nonprofits, educational institutions, religious organizations, politicians, and assorted businesses with video hosting needs. Those videos can be watched on Vimeo properties (our website and applications) or through "embeds" of the Vimeo player on third party websites and applications. Thus, we provide both a destination for user-generated content as well as an online video distribution (OVD) service for video creators.

We believe that Vimeo occupies a unique position in the video market in that it draws and makes available high-quality independent content that might not otherwise be found through traditional media (such as television networks and theaters) or even other online video services. We believe that our platform draws such unique content because, among other things, Vimeo does not serve advertising within its video player. Viewers watching Vimeo-hosted videos will

not see pre-roll, overlay, or other interrupting advertisements. This provides an uncluttered viewing experience in the manner intended by the video creator.

Vimeo offers basic services for free and premium creator tools for a fee. Our subscription offerings provide features like advanced video privacy options, lead generation, and video review tools.[5] One premium tool, Vimeo On Demand, allows creators to sell their video titles to consumers while retaining 90% of the revenue after transaction costs. This provides a cost-effective self-distribution means for creators to reach a wider audience than traditional independent distribution methods.[6] Today, Vimeo On Demand features over 15,000 sellers offering over 50,000 titles spanning a variety of genres.

Vimeo also operates VHX (or Vimeo OTT Services), which provides a white-label video distribution service that allows anyone with a series of videos to launch and operate an over-the-top (OTT) video subscription service.[7] Vimeo hosts the front-end websites and applications (which may include those for Roku, Apple TV, Android TV, and Fire, among others) and handles video fulfilment, transaction processing and billing, and customer service in exchange for a low-cost

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[5] https://vimeo.com/upgrade.

[6] Ben Fritz, "Video On Demand Gives Low-Budget Films Wider Audience," *Wall Street Journal* (Apr. 30, 2017) (describing experience of independent filmmaker Marina Bader with her film "Anatomy of a Love Seen" on Vimeo On Demand).

[7] Vimeo acquired VHX Corporation in April 2016.

structure that scales based upon the number of monthly subscribers.[8] This solution allows creators and licensors to focus their time and resources on programming (content production or licensing) and customer acquisition (e.g., marketing). Not surprisingly, many of our over 500 OTT creators are emerging media companies that focus on a specific genre or interest. Popular independent channels include:

- Ali Huda, https://alihuda.vhx.tv ("Netflix for Muslim Kids," $9.95 per month);
- Black & Sexy TV, http://www.blackandsexy.tv (independent drama/comedy series," $6.99 per month);
- Dekkoo, http://www.dekkoo.com ("the very best gay entertainment," $9.99 per month);
- MHz Choice, http://watch.mhzchoice.com ("international mysteries, dramas & comedies," $7.99 per month);
- Veteran Television or "VET Tv," http://www.veterantv.tv ("comedy central of the military," $5 per month); and
- Yoga with Adriene, https://yogawithadriene.vhx.tv (yoga/fitness, $9.99 per month).

Because online video distribution is a high-bandwidth business that poses a competitive threat to some of the larger, integrated broadband providers, Vimeo—and the creators and viewers it serves—will be particularly impacted by the Commission's proposed rulemaking.

[8] https://vhx.tv./pricing.

IV. THE COMMISSION SHOULD RETAIN THE 2015 RULES.

A. Net Neutrality Is Essential to Innovation in the Video Space.

The online video space illustrates the "virtuous cycle" of edge provider innovation, consumer demand, and broadband investment that underpins the 2015 Order.[9] As the Commission has recognized, "the growth of online streaming video services has spurred further evolution of the Internet."[10] At the end of 2015, streaming video and audio accounted for over 70% of North American Internet traffic during peak evening hours, double the percentage from just five years earlier.[11] Consumers have at their fingertips an ever-increasing array of online streaming services in addition to programming provided via traditional methods. This demand for streaming has spurred consumer adoption of broadband, which has in turn led to greater broadband investment and deployment.[12]

At the same time, online video services "confront the video businesses of the very companies that supply them broadband access to their customers."[13] These vertically integrated companies (which offer broadband and video programming) have the technical ability to manipulate Internet traffic flowing to consumers and

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9 2015 Order, 30 FCC Rcd at 5603, paras. 2-4.

10 *Id*. at 5605-6, para. 9.

11 *See* https://www.sandvine.com/pr/2015/12/7/sandvine-over-70-of-north-american-traffic-is-now-streaming-video-and-audio.html (2015).

12 2015 Order, 30 FCC Rcd at 5603, para. 2.

13 *Id*.

have a strong incentive to use this gatekeeper status to disadvantage online competitors. Net neutrality rules prevent such abuses.

Vimeo is an example of an online video service that has flourished due to network neutrality. Vimeo's success as a video platform depends upon its ability to deliver a high-quality viewing experience to its users at a predicable cost that has historically decreased, on a per unit basis, over time. If broadband providers could block, throttle, or charge arbitrary fees, Vimeo's incentive to make capital investments would be severely reduced. Not having to worry about arbitrary decisions by broadband providers has allowed Vimeo to provide users with increasingly bandwidth-intense innovations, such as allowing users to upload videos without length restrictions (since inception); allowing users to upload full HD videos (in October 2007); providing a fully open video sales platform (*i.e.*, Vimeo on Demand, launched March 2013) that returns 90% of revenue to the creator after transaction costs; and launching a marketplace for 360 video (March 2017).

B. The Categorical Net Neutrality Rules Should Be Retained.

The spirit of net neutrality is captured in the Open Internet Order's three "bright line" or categorical rules: no blocking; no throttling; and no paid prioritization. Each serves a distinct important purpose and should be retained.

1. No blocking. The Commission states in the NPRM that "we oppose blocking lawful material," but nonetheless requests comment on the rules barring it.[14] There is no reason—and none has been suggested by any major broadband carrier—why a BIAS provider should be permitted to engage in blocking of specific services or applications. There is no pro-competitive or pro-consumer reason for blocking. Because the no-blocking rule already permits reasonable network management practices and the blocking of unlawful content, the rule bars only arbitrary and capricious blocking of edge providers. Such blocking, if it were implemented in a widespread manner, would negatively impact investment in the edge and would likely be anti-competitive in nature. Further, such blocking would undercut the promises made by broadband carriers in their advertising about providing fast access to the entire Internet.

2. No throttling. The no-throttling rule logically follows from the no-blocking rule because throttling, in certain forms, can effectively replicate blocking. Indeed, throttling may even be more nefarious as the reasons for a website's slowness may not be apparent to the end user. A hard block is unlikely

[14] 2017 NPRM, WC Dkt. No. 17-108, para. 79.

to be perceived as the website's fault.[15] But a slow website may be attributed to the website operator rather than the broadband provider.

Throttling need not be severe to damage edge providers, particularly in the high-bandwidth field of video. Throttling could take the form of a permanently reduced, but stable speed for a specific video provider as compared to its competitors. If the provider uses adaptive bitrate streaming, the provider will likely still be able to stream, but at lower resolutions than supported by the user's device. This might mean, for example, streaming an SD video on an HD (or even 4K) television—an immediately noticeable difference. And if the provider does not have an SD version of a video to provide,[16] then it will be forced to stream the HD version with delay or interruption. Either way, the video provider is significantly disadvantaged vis-à-vis competitors that are not throttled.

Throttling could also take the form of providing less than stable service such that bandwidth may decrease (or increase) in the middle of a video's streaming. Throttling midstream will almost certainly result in rebuffering (pausing as the data stream catches up) or bitrate changes (downscaling or upscaling resolution to fit

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[15] For example, employees at a company that does not allow streaming UGC video on its network will attribute the ban to the company's IT department, not the individual websites.

[16] This might the case if the video provider has only the license to distribute the HD version.

the change in bandwidth), both of which damage the viewer's quality of experience.

Delays and interruptions can have dramatic impacts on the viability of a streaming service. Internet users are, by and large, an impatient group and nowhere is their patience more tested than in the case of video. Though it ought to go without saying that people hate rebuffering video, multiple studies and surveys have confirmed that viewers punish services that consistently fail to provide a quality viewing experience.

A 2011 paper by researchers at the University of Massachusetts found that:

- A rebuffering rate of 1% (*i.e.*, a video pauses for 1 out of every 100 seconds) results in 5% less video watched overall.
- There is a "2-second rule" for video watching: People are willing to wait 2 seconds for a video to load, but the rate of abandonment increases significantly thereafter if the video fails to load.
- Viewer patience is influenced by the expectation of speed from the viewing platform and the perceived value of the content.
- Poor viewing experiences lead not just to abandonment of a particular video, but also to a lower rate of watching *other* videos: Users who experienced a "failed visit" were 2.3% less likely to watch another video in a given week.[17]

[17] *See* S. Shunmuga Krishnan and Ramesh K. Sitaraman, *Video Stream Quality Impacts Viewer Behavior: Inferring Causality using Quasi-Experimental Designs*, at 3-4 http://people.cs.umass.edu/~ramesh/Site/PUBLICATIONS_files/imc208-krishnan.pdf (Nov. 2012).

A 2016 paper by Columbia University researchers showed that consumers dislike rebuffering more than bitrate changes.[18] A single rebuffering event causes abandonment at three times the rate as a single bitrate change. However, if there are frequent bitrate changes, the abandonment rate increases fourfold compared to a video that has no bitrate changes.

Consumer surveys paint an even starker picture: A 2017 survey conducted by Mux found that 20.4% of respondents will stop watching after just one rebuffering event, with nearly 52.7% reporting that they would wait until the video stalls two to three times.[19] Similarly, a 2015 survey conducted by Conviva, 20% of respondents said they will abandon poor video experiences immediately; the same percentage of respondents reported that they would not return to a video service that provided a poor experience.[20] As Conviva put it, "viewers abandon quickly, often remember having done so, and will punish the offending service by avoiding them in the future."[21]

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[18] Hyunwoo Nam, Kyung-Hwa Kim & Henning Schulzrinne, "QoE Matters More Than QoS: Why People Stop Watching Cat Videos," IEEE INFOCOM 2016, available at www.cs.columbia.edu/~hn2203/papers/11_infocom2016.pdf (2016).

[19] Mux, "2017 Video Streaming Perceptions Report," available at https://static.mux.com/downloads/2017-Video-Streaming-Perceptions-Report.pdf (2017).

[20] Conviva, "OTT: Beyond Entertainment, How Quality of Experience Impacts Streaming Video Across Genres" (2015), available at http://www.conviva.com/conviva-customer-survey-reports/ott-beyond-entertainment-csr.

[21] *Id.*

Consumer abandonment may take place rapidly as there are few exit barriers in online video. Many services offer free-trial periods and make it easy to cancel or pause a subscription once billing has begun so that consumers feel comfortable subscribing in the first place. Further, there is a competitive market for streaming services, with new entrants joining all the time. When viewers can easily compare quality of two or more streaming services on the same device, they will opt for the service that provides the better experience and abandon those that do not. Particularly at risk are streaming services that are new or which feature less mainstream content and thus depend upon consumer experimentation.[22]

3. No paid prioritization. Paid prioritization is a logical extension of throttling as it requires a multi-speed Internet to work. To induce edge providers to pay for premium delivery, the delta between premium delivery and regular delivery must give the paid traffic an edge with consumers. And if broadband providers can extract marginal revenue from priority access fees, they will have little incentive to maintain a high-quality "standard lane" experience for edge providers unwilling or unable to pay. They need not take actions to downgrade the "standard" experience; they can achieve the same result by failing to improve it as bandwidth needs grow compared to the premium experience.

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[22] In addition, consumer patience is determined in part by the genre of the content, its length, and its perceived value.

Moreover, so long as there is any disparity between the two experiences (which is precisely the point), consumer expectations will be shaped by the premium experience. Once consumers have become accustomed to viewing 4K video without interruption, they will view services that provide anything less as substandard. Consumers are unlikely to know (or care) about why they cannot view a video at a certain resolution or why it is constantly rebuffering, and will abandon those edge providers that they perceive as providing a less enjoyable experience.

This two-tiered Internet would privilege certain business models and types of content over others. For example, edge providers that provide studio content (*e.g.*, content originating from major motion picture companies and broadcasters) are better positioned to pay premium rates. Because of the existing demand for this content, these providers may be able to pass increased delivery costs onto consumers in the form of higher transaction or subscription prices.

Not all video content, however, allows for such fee shifting. Videos that are made for personal and non-commercial purposes generally cannot be monetized on a transactional basis in the same way (or at all) as professional-grade entertainment

content.[23] In a two-tiered world, non-studio content will generally be relegated to the "slow lane," thus diminishing its potential audience. Some platforms may be able to offset higher delivery costs by serving in-video advertisements, but platforms that do not serve in-video ads, like Vimeo, might not be able to do so.[24] Thus, the proposed rules will have a disproportionate impact on innovative business models like Vimeo's and would likely lead to greater homogenization of online video offerings.

By the same token, paid prioritization will impact independent film creators. The cost of film distribution is a well-known problem: The traditional business model involves filmmakers sacrificing a large percentage of the film's potential take in exchange for limited distribution—often a short theatrical run in a few large

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[23] The Commission typically distinguishes among (1) "professionally produced" (*i.e.*, studio quality) content; (2) "semi-professionally produced video," which is "consumer or user-generated content that has professional or industrial qualities," and (3) "user-generated content that is publicly available and created or produced by end users, often with little to no brand equity or brand recognition." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, MB Dkt. No. 15-158, 31 FCC Rcd. 4472, 4526, para. 131 n.390 (2016) (the "2016 Video Competition Report"). All three types of content may be found on Vimeo with the second and third categories dominating.

[24] Even advertising-supported platforms may not be able to profitably monetize content that reaches a limited audience. YouTube, for example, does not provide ad revenue sharing for channels with less than 10,000 lifetime views. *See* YouTube Creator Blog, "Introducing Expanded YouTube Partner Program Safeguards to Protect Creators (Apr. 6, 2017), https://youtube-creators.googleblog.com/2017/04/introducing-expanded-youtube-partner.html.

cities.[25] Platforms like Vimeo On Demand allow filmmakers to bypass this structure and make their film widely available while still retaining the lion's share of the film's receipts. Increasing online distribution costs forces filmmakers to choose between distribution on the one hand and production and marketing on the other, thus undercutting one of the key benefits of online self-distribution and ultimately limiting consumer choice.

C. The General Conduct Standard Should Be Retained.

The general conduct standard provides a backstop to conduct that violates the spirit of the categorical rules, but somehow evades their text. The rule is designed to provide a flexible, rule-of-reason approach to practices that may not always be harmful per se or have not yet been created. Given that the field of telecommunications is forever evolving, it would be unwise to proceed with only categorical rules designed to combat what is technologically possible today. To paraphrase the Supreme Court this past term, "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that [policymakers] must be conscious that what they say today might be obsolete tomorrow."[26]

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[25] *See* Alyssa Rosenberg, "What net neutrality means for independent film," WASH. POST (May 2, 2014), http://www.washingtonpost.com/news/act-four/wp/2014/05/02/what-net-neutrality-means-for-independent-film.

[26] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be.").

D. Market Intervention Is Needed.

The net neutrality rules anticipate and correct a market deficiency: The lack of competition in the broadband market, particularly for fixed broadband services, and the economic incentives of the largest incumbents to disadvantage edge providers that compete with their own video programming services.

U.S. households continue to depend upon fixed broadband service to satisfy high-bandwidth needs such as HD streaming and uploading large files—both core Vimeo services—while making increasing use of mobile broadband service for less intensive activities.[27] The market for fixed broadband remains heavily concentrated: Over 75% of fixed broadband access is provided by one of five companies.[28] Further, one type of service—cable—accounts for approximately 59% of all fixed broadband subscriptions.[29] With merger activity on the rise, we will likely see only more industry consolidation.

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27 *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capacity to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 2016 Broadband Progress Report, GN Docket No. 15-191, 41 FCC Rcd 699, 701 para. 2 (2016) (the "2016 Broadband Progress Report").

28 U.S. Department of Commerce, Economics and Statistics Administration, "Competition among U.S. Broadband Service Providers," at 4, available at https://esa.doc.gov/sites/default/files/competition-among-us-broadband-service-providers.pdf (2014).

29 2016 Broadband Progress Report, 31 FCC Rcd at 710-11, para. 26.

This concentration translates into a lack of consumer choice in many geographic markets. By 2016, 51% of U.S. consumers had access to only *one* fixed broadband service providing what the Commission defines as "advanced telecommunications capability," *i.e.*, speeds of 25 Mbps for downloads and 3 Mbps for uploads.[30] Even when there is choice, the number of options is usually no more than two: As of mid-2016, only 29% of residential blocks had access to at least two broadband providers at this speed, and only 13% had access to three or more options.[31]

In contrast to the stagnant fixed broadband market, the online video distributor (OVD) market is vibrant and dynamic: "Players continue to enter and exit, and business models, including those for advertising-based, subscription, and rental OVDs, are diverse and evolving."[32] These emerging players threaten the business models of the largest broadband providers, which also offer video programming—so called multichannel video programming distributors (MVPDs)—such as cable operators. "[R]egardless of whether online video currently is a complement to or a substitute for MVPD service, it is at least potentially a substitute product." It is no secret then, that "MVPDs increasingly

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30 *Id*. at 736, para. 86 & table 6.

31 *Internet Access Services: Status as of June 30, 2016*, at table 4, available at https://www.fcc.gov/internet-access-services-reports (FCC Nov. 1, 2016).

32 2016 Video Competition Report, 31 FCC Rcd at 4232, para. 143.

see themselves competing with OVDs for viewers, subscription revenue, and advertising revenue."[33]

In recent years, trends have favored OVDs over MVPDs, with cable MVPDs losing the most ground.[34] Despite paring subscribers, MVPDs overall have increased revenue, in part by raising prices.[35] They have also responded to OVDs and the attendant threat of "cord cutting" or "cord shaving" by offering "skinny bundles" of their programming and "TV everywhere packages," which allow users to access their cable programming on non-TV devices.[36]

It is not difficult to imagine that some of these entities might, if permitted, take more aggressive actions to preserve their programming revenue streams. These entities have an incentive to distribute their own content through the fastest means possible. Likewise, they have an incentive to degrade the streams of competing OVDs or to charge OVDs fees that prevent them from offering a profitable service.

These incentives are well-documented by the MVPDs themselves. In reviewing the Comcast-NBC Universal merger, the Department of Justice, Antitrust Division found that "Comcast and other MVPDs recognize the impact of

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[33] *Id*. at 4496, para. 61.

[34] *Id*. at 4474, para. 3.

[35] *Id*. at 4474, para. 5.

[36] *Id*. at 4492-93, paras. 59-62.

OVDs. Their documents consistently portray the emergence of OVDs as a significant competitive threat."[37] Because the combined Comcast/NBCU entity "would have the ability . . . to give priority to non-OVD traffic on its network and . . . favor its own services by not subjecting them to the network management practices imposed on other services,"[38] the Department of Justice adopted the commitment of the combined entity to "not prioritize affiliated content over unaffiliated Internet content."[39] More recently, in reviewing Charter Communications' proposed acquisitions of Time Warner Cable and Bright House Networks, the Antitrust Division again recognized that "Because of the threat OVDs pose to their video business, some MVPDs have an incentive to engage in tactics that would diminish OVDs' ability to compete."[40]

Some integrated broadband providers have acted upon their impulses by discriminating against edge provider traffic. As the D.C. Circuit acknowledged in *Verizon v. FCC*, the "threat that broadband providers would utilize their gatekeeper

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37 *See, e.g.*, *United States v. Comcast*, Proposed Final Judgment and Competitive Impact Statement, 76 Fed. Reg. 5440, 5443, para. 36 (2011).

38 *Id*. at 5456.

39 *Id*. at 5462.

40 *United States v. Charter Comms., Inc.*, Proposed Final Judgment and Competitive Impact Statement, 81 Fed. Reg. 30,550, 30,554, at para. 29 (May 17, 2016) (concluding that Time Warner "has been the most aggressive MVPD in the industry in seeking and obtaining restrictive contract provisions in its agreements with programmers that limit the programmer's ability to license programming to OVDs").

ability to restrict edge-provider traffic is not . . . 'merely theoretical.'"[41] Indeed, the threat has materialized repeatedly: "a mobile broadband provider block[ed] online payment services after entering into a contract with a competing service; a mobile broadband provider restrict[ed] the availability of competing VoIP and streaming video services; a fixed broadband provider block[ed] VoIP applications; and, of course, Comcast[] impair[ed] . . . peer-to-peer file sharing . . . ."[42] More recently, in 2013 and early 2014, broadband providers degraded Netflix traffic through gamesmanship at the point of interconnection.[43]

Further, some broadband providers' activities regarding zero-rating today may provide a blueprint for their paid prioritization practices tomorrow. Zero-rating, which exempts certain traffic from a broadband subscriber's monthly data limits, leverages the broadband carrier's ability to identify and isolate the edge traffic travelling through its network. It is not difficult to imagine that zero-rating identification methods could be used to slow down or speed up traffic.

Incumbents who choose to discriminate against certain Internet traffic are unlikely to be disciplined by the marketplace. As discussed above, there is only

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41 *Verizon*, 740 F.3d at 648.

42 *Id*.

43 Comments of Netflix, Inc. at 12-14, *In re Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28 (filed July 15, 2014); Petition to Deny of Netflix, Inc. at 56-58, *In re Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Dkt. No. 14-57 (filed Aug. 27, 2014).

limited competition in the fixed broadband market. Consumers with no choice as to broadband provider cannot do anything to change their provider's policies. Even when choice exists, "broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions."[44] There are ample reasons to conclude that consumer uproar will not materialize.[45] For example, consumers may lack information as to why they are experiencing poor quality with a single streaming service. And even if they do recognize that it is the broadband provider's fault, they may not be willing to switch providers over a single OVD, especially if the OVD is a new entrant or one that provides niche content. On the other hand, consumers are readily able to cancel their OVD subscriptions and move on to what they perceive as superior services.

E. *Ex Ante* Rules Are Needed.

The NPRM asks whether existing antitrust laws may address the problem of broadband providers favoring their own content.[46] We do not believe that such laws provide an effective substitute for clear rules that bar discriminatory activity.

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[44] *Verizon*, 740 F.3d at 648.

[45] *See* 2015 Order, 30 FCC Rcd at 5631, para. 81 ("Among the costs that consumers may experience are: high upfront device installation fees; long-term contracts and early termination fees; the activation fee when changing service providers; and compatibility costs of owned equipment not working with the new service").

[46] 2017 NPRM, WC Dkt. No. 17-108, at para. 78.

Problems with video quality that are not addressed in the near term can have profound and lasting impacts on an edge provider's user base and market share. A private antitrust lawsuit is a costly proposition that takes years to investigate and prosecute,[47] by which time any damage will have been done and irreversibly so. Most Internet startups do not have the resources to fund the battery of lawyers and technical and economic experts required to demonstrate whether a poor streaming experience was caused by the streaming service or the broadband carrier and whether the broadband carrier acted in an anti-competitive fashion.

The NPRM asks more generally about whether any *ex ante* rules should be retained at all.[48] The lack of *ex ante* rules precludes meaningful enforcement options and remedies by market participants who are injured by discriminatory actions of broadband carriers. In *Comcast*, the D.C. Circuit took a dim view of the Commission's attempt to regulate Comcast's throttling BitTorrent traffic without

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47 *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 ("determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking").

48 2017 NPRM, WC Dkt. No. 17-108, at para. 77.

having first promulgated rules and articulated a legal basis for them.[49] The Commission should not repeat this mistake by engaging in *ad hoc* policymaking.[50]

The lack of enforceable rules will affect investment decisions in the online video space by unsettling expectations. If the market believes that broadband providers may engage in rampant discrimination against edge providers without penalty, investors will be reluctant to fund activities that threaten broadband provider revenue streams. As Union Square Ventures' Brad Burnham has explained, "Without confidence that a web start-up service can reach consumers unfettered by that consumer's ISP, we would have to be much more selective about where we invest. We would, for instance, need to first convince ourselves that the service in question was not competitive with an ISP's current or planned services or those of their existing or future partners."[51]

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[49] *See Comcast Corp.*, 600 F.3d at 113. As an alternative, it might be possible to set forth rules that would spring into place if certain conditions were met. However, we see such an approach as creating needless uncertainty for both sides of the market.

[50] *See, e.g.*, *XP Vehicles v. Dep't of Energy*, 118 F. Supp. 3d 38, 79 (D.D.C. 2015) ("Plaintiffs' fact-based contention that the LG Program was run in an ad hoc manner is sufficient to state a claim under the APA for arbitrary and capricious agency action.").

[51] Declaration of Brad Burnham, Exhibit No. 14 to Opposition of Intervenors to Petitioners' Motion for Stay, at para. 10, *U.S. Telecom Ass'n v. FCC*, No. 15-1063, Dkt. No. 155371 (filed May 22, 2015).

E. The Commission Should Maintain Consistent Rules for Fixed and Mobile Broadband.

While we have focused on fixed broadband in the above sections, we do not believe that the rules should differ for mobile broadband. Consumer use of mobile devices to receive video continues to increase. Half of Vimeo.com's visitor traffic comes from a mobile device. We see mobile usage as continuing to grow, especially in the case of shorter form content. And while the wireless broadband market remains more competitive than the fixed broadband market, many of the same economic rationales for market intervention apply (e.g., gatekeeper status, switching costs, concerns over affiliated content, etc.).

V. THE COMMISSION SHOULD KEEP BROADBAND INTERNET ACCESS CLASSIFIED AS A TITLE II TELECOMMUNICATIONS SERVICE.

A. The 2015 Order Properly Classified Broadband Internet Access Service as a Title II "Telecommunications Service."

Broadband provides a *pathway* to the Internet for residential consumers with connected devices (computers, phones, TVs). That pathway should not be conflated with the online information that people access and upload through their broadband subscriptions.[52] Because broadband serves as a mere conduit for that information, it readily satisfies the statutory definition of "telecommunications"—"the transmission, between or among points specified by the user, of information

[52] *See* 2017 NPRM, WC Dkt. No. 17-108, at para. 29.

of the user's choosing, without change in the form or content of the information as sent and received."[53] In selling high speed Internet access, BIAS operators are "offering . . . telecommunications for a fee directly to the public"[54] and are therefore providing "telecommunications services." The late Justice Scalia had it right when he proclaimed that "it remains perfectly clear that someone who sells cable-modem service is 'offering' telecommunications."[55]

While the Supreme Court ultimately concluded that the Commission could classify a broadband carrier as "offering," in the aggregate, *either* a telecommunications service or an information service, it has always been understood that BIAS's pathway component was a telecommunications service.[56] Thus, the Commission could properly conclude, in 2002, "that cable modem service, *as it is currently offered*, is properly classified as an interstate information service, not as a cable service, and that there is no *separate* offering of

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53 47 U.S.C. § 153(50). The notion that end users do not know precisely where the information is stored is beside the point; not knowing the location of the person on the other end of a telephone call does not prevent telephone service from being a telecommunications service.

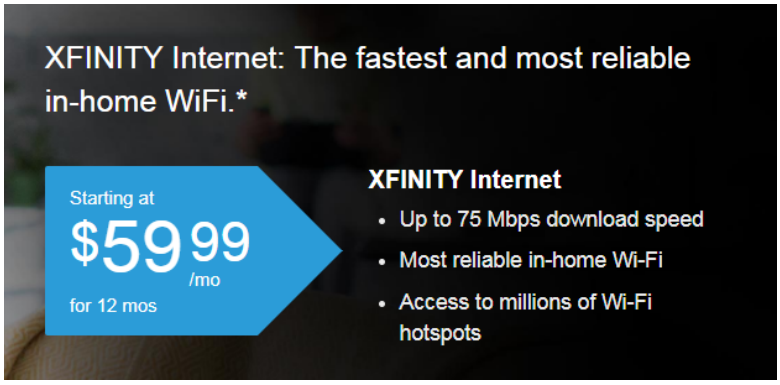
54 47 U.S.C. § 153(53).

55 *Brand X*, 545 U.S. at 1014 (Scalia, J., dissenting) ("After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is 'offering' telecommunications.").

56 *Brand X*, 545 U.S. at 990 ("The question, then, is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.").

telecommunications service."[57] That conclusion rested heavily on the notion that cable operators provided a bundled service with amenities like email and web portals.[58]

Today, carrier-provided email and portals are relics of a bygone era in which people dialed up to AOL and visited Geocities websites. Carriers have either abandoned such ancillary services or have stopped talking about them. Instead, they advertise a pure pathway to the Internet and play up its speed, reliability, and cost. A typical advertisement resembles the one below:[59]



The service depicted in this advertisement is a telecommunications service, not an information service. Consistent with the way they are positioned, consumers look to their broadband subscriptions as a gateway to the Internet, not

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57 *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Dkt. No. 00-185, CS Dkt. No. 02-52, 17 FCC Rcd 4798, 4802, para. 4 (2002).

58 *Id*. at para. 18.

59 https://www.connecttoxfinity.com (last visited and screenshot taken July 12, 2017).

for content itself. As the D.C. Circuit concluded in *US Telecom Association v. FCC*, "Even the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content."[60]

In light of the changed perception of broadband and its use to access, almost exclusively, third party websites, the Commission concluded that BIAS providers were offering telecommunications as a standalone service. The D.C. Circuit upheld this reclassification as a reasonable exercise of authority under the Communications Act.[61]

Any suggestion that a broadband provider today nonetheless provides an "information service" elides the distinction between edge providers and network providers. An edge service like Vimeo provides a paradigmatic example of an "information service," which is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing."[62] Although Vimeo in some ways serves as a conduit for content between creators and viewers, there are a host of things that Vimeo does that BIAS

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60 *US Telecom Ass'n*, 825 F.3d at 698.

61 *Id*.

62 47 U.S.C. § 153(20).

providers do not. To start, Vimeo displays a user interface for uploading or viewing content, through both its website and applications. Next, Vimeo provides a capacity for permanently storing content uploaded by a user. Further, Vimeo processes video content uploaded by a user by transcoding it into multiple files optimized for streaming at different resolutions and linking it to other information of the user's choosing (such as a title and description). Vimeo presents all of this information to viewers, who may interact with a video by playing it, pausing it, scrubbing forward or backward, "liking" it, sharing it, or saving it to be watched at a later time.

None of these capabilities are offered or performed by a broadband carrier. When end users stream a video from Vimeo, they see the video that Vimeo has stored at another user's direction, as presented by Vimeo, without any change to the content thereof by the intermediary broadband provider. The only element the broadband carrier could conceivably vary is the speed at which the Vimeo service may be accessed. This is not an element that confers on carriers the ability to process, store, or publish information.

B. There Is No Basis for Reclassification Within Just Two Years.

Nothing has changed so drastically in the past two years that would justify a complete reversal of the Commission's decision to classify BIAS as a "telecommunications service." The Commission correctly found in 2015 that

consumers perceived BIAS as providing a pathway to the Internet and nothing more. That has not changed.

The Commission suggests that Title II somehow threatens broadband investment.[63] The facts belie this claim. Investment in broadband infrastructure has continued to increase since the 2015 Order.[64] NCTA, the cable industry's trade association, proudly states that "cable has invested over $250 billion in capital infrastructure" over the past twenty years along with a chart showing the cumulative investment:[65]

This does not look like an industry retrenching over heavy-handed regulation.

63 2017 NPRM, WC Dkt. No. 17-108, at paras. 4-5.

64 *See* Comments of Internet Association, WC Dkt. No. 17-108, at Part II.A.

65 https://www.ncta.com/industry-data, "Tracking Cable's Investment in Infrastructure" (screenshot taken on and last visited July 12, 2017).

C. Under the Existing Legal Framework, Title II Is Necessary to Support Strong Net Neutrality Rules.

The NPRM asks whether alternative sources of authority exist for the net neutrality rules outside of Title II.[66] While we believe that Section 706 of the Telecommunications Act of 1996[67] does provide an independent source of authority for the rules, that authority is necessarily constrained when BIAS is classified as an "information service" rather than a "telecommunications service."

The Communications Act provides that "[a] telecommunications carrier [i.e., a provider of telecommunication service] shall be treated as a common carrier under this chapter *only to the extent that it is engaged in providing telecommunications services*."[68] In *Verizon*, the D.C. Circuit held that this sentence limits the use of any other part of the Act to regulate non-telecommunications service providers as common carriers.[69] Because the FCC had not then classified BIAS as a telecommunications service, it could not impose no-blocking and no-discrimination rules, which the Court deemed common carriage *per se* rules.[70] As the NPRM concedes, "[t]he *Verizon* court made clear that the

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66 2017 NPRM, WC Dkt. No. 17-108, at para. 100.

67 47 U.S.C. § 1302.

68 47 U.S.C. § 153(51).

69 *Verizon*, 740 F.3d at 640.

70 *Id*. at 655-56.

Commission's 2010 no-blocking rule impermissibly subjected Internet service providers to common-carriage regulation."[71]

Consequently, unless broadband operators remain classified as telecommunications carriers, Section 706 cannot support the full panoply of net neutrality rules. For the same reasons, use of Section 230(b) of the Communications Decency Act[72] alone is unlikely to fare better.

VI. CONCLUSION

For the reasons set forth above, we urge the Commission to retain the 2015 Open Internet Order's strong net neutrality rules and to keep broadband Internet access service providers classified as Title II telecommunications carriers.

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Respectfully submitted,

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[71] 2017 NPRM, WC Dkt. 17-108, para. 81.

[72] 47 U.S.C. § 230(b); *see* 2017 NPRM, WC Dkt. No. 17-108, at para. 101.