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

In the Matter of	)	
	)	GN Docket No. 14-28
Protecting and Promoting the Open Internet	)	

REPLY COMMENTS OF VIMEO, LLC

Vimeo, LLC ("Vimeo") respectfully submits the following reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") May 15, 2014 Notice of Proposed Rulemaking ("NPRM" or "Notice"), GN Docket No. 14-28, in the above-captioned proceeding.

Michael A. Cheah
General Counsel
Vimeo, LLC
555 West 18th Street
New York, New York 10011
212-314-7457
michael@vimeo.com

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I. Introduction

The public has spoken loudly and clearly: It wants a truly open Internet, one in which there are no "fast lanes" for those who can afford to pay and "slow lanes" for everyone else. The overwhelming majority of the nearly 1.5 million comments filed by consumers, businesses, and public interest groups strongly support true "net neutrality" rules.[2] President Obama has even reminded the Commission that his administration supports net neutrality: "[Y]ou don't want to start . . .

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1 This reply supplements our opening comments filed on July 15, 2014 (hereinaferer, "Vimeo Opening Comments").

2 *See* Bob Lannon and Andrew Pendleton, Sunlight Foundation blog, "What we can learn from 800,000 public comments on the FCC's net neutrality plan," http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/ (published Sept. 2, 2014, last visited Sept. 9, 2014) (based upon analysis of 800,959 comments, the authors "estimate that less than 1 percent of comments were clearly opposed to net neutrality"); Brooks Boliek, "Sorry, Ms. Jackson: FCC hits new record," *Politico*, http://www.politico.com/story/2014/09/fcc-net-neutrality-record-110818.html?hp=l2 (published and last visited Sept. 10, 2014) (as of date of publication, FCC had received 1,477,301 public comments—a record for an FCC proceeding).

differentiat[ing] in how accessible the Internet is to different users. You want to leave it open so the next Google and the next Facebook can succeed."[3]

The proposed rules do not follow the President's lead. Instead, they pave the way for a two-tiered Internet in which broadband providers can charge content providers tolls for fast lanes subject only to a nebulous "commercially reasonable" standard of review. This does not provide a roadmap for protecting and promoting the country's "most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment."[4] To achieve its policy goals, Commission must adopt strong and unambiguous net neutrality rules that prohibit broadband providers from engaging in technical and paid discrimination with respect to traffic within their networks. In order to do that, the Commission must reclassify broadband providers as Title II telecommunications providers.

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3 *See* Brian Fung, "Obama on net neutrality: My administration is against Internet fast lanes," *The Washington Post*, The Switch blog, http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/05/obama-strikes-a-populist-tone-on-net-neutrality/ (published Aug. 5, 2014, last visited Sept. 9, 2014). This is consistent with the President's position as a candidate in 2007. *See* Anne Broache, CNet, "Obama Pledges Net Neutrality Laws if Elected President," http://www.cnet.com/news/obama-pledges-net-neutrality-laws-if-elected-president/ (published Oct. 29, 2007, last visited Sept. 9, 2014).

4 Open Internet NPRM ¶ 1.

II. The Internet Needs Net Neutrality Rules.

The Commission has correctly determined that an open Internet best preserves and promotes the "virtuous circle" of innovation, consumer demand, and broadband deployment.[5] The Commission's proposed rules would not, however, achieve these objectives as they allow broadband providers to discriminate against content within their networks by, among other things, charging edge providers for so-called "priority" delivery. This would result in a two-tiered Internet experience where broadband providers, not consumers, determine winners and losers in the market for content and services. This would stifle innovation, reduce consumer demand, and harm broadband deployment.

As we explained in our opening comments, delivery speed is critical to a video-sharing service such as Vimeo.[6] Bad viewing experiences can lead users to not only abandon the videos they want to watch at the moment, but also to refrain from watching other videos at later times. Because users are not well positioned to determine the cause of poor service, they may blame the video provider. Netflix's recent objections to the proposed Comcast-Time Warner merger demonstrate just

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5 *Id*. ¶¶ 23, 26.

6 *See* Vimeo Opening Comments, Part III.C.

how damaging network congestion can be to a video provider.[7] Consequently, service providers that lack the ability to enter into prioritization arrangements will be penalized if the current rules are adopted.

Rules setting minimum standards for quality of service would not effectively address these problems because, as we have explained, there would be little incentive to maintain "robust" minimum service levels, and merely having a two-tier system would alter consumer perceptions of speed such that non-prioritized traffic would become viewed as slow.[8] Having the ability to file a regulatory complaint against unreasonable practices will not help smaller companies in such an environment.[9]

The carriers argue that network neutrality regulations are unnecessary, citing their alleged commitments to an "open Internet" and the alleged lack of paid

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7 Petition to Deny of Netflix, Inc., MB Docket No. 14-57 (filed Aug. 27, 2014) at 57-58 (discussing business impact of congestion at interconnection caused by Comcast in 2013 and early 2014).

8 *See* Vimeo Opening Comments, Parts III.B & C.

9 Filing a regulatory complaint is not a cost-free affair. Unlike the big broadband companies who have filed comments in this proceeding, Vimeo does not have a regulatory department or even a single person with a regulatory affairs title. Vimeo's Legal Department consists of its General Counsel, a Corporate Counsel (responsible for transaction work), a Compliance Attorney (responsible for copyright compliance), and Moderation Manager (responsible for trust and safety issues).

prioritization since the inception of the Internet.[10] But such hitherto forbearance,[11] whether due to technical inability (in the early days), regulatory uncertainty, or consent decree,[12] is unlikely to continue if the Commission blesses paid prioritization—exactly what the proposed rules would do. After all, carriers objected to the 2010 Open Internet Rules precisely because they did not allow paid prioritization.

Net neutrality rules are needed to protect and promote a truly open Internet. The Commission should adopt rules that ban technical and paid discrimination.

III. The Commission Must Reclassify Broadband in Order to Pursue True Net Neutrality Rules.

To ensure that rules requiring true net neutrality will survive judicial scrutiny, the Commission must reclassify broadband as a "telecommunications service" subject to common carrier regulation under Title II.

A. Reclassification Is A Necessary and Sufficient Condition to Adopting Rules Banning Technical and Paid Prioritization.

Some carriers argue that reclassification will not give the Commission authority to adopt net neutrality rules because Title II supposedly does not permit

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10 *See* Comments of AT&T Services, Inc., GN Docket No. 14-28 (filed July 15, 2014) (hereinafter "AT&T Comments") at 3; Comments of Comcast Corp., GN Docket 14-28 (filed July 15, 2014) (hereinafter, Comcast Comments") at 11-13.

11 *See* Open Internet NPRM ¶ 36.

12 Comcast agreed to the 2010 Open Internet Order's no-blocking and nondiscrimination rules in order to acquire NBC Universal. *See* Comcast Comments at 11-12.

the banning of paid prioritization.[13] This is incorrect. Title II authorizes the Commission to prohibit conduct that constitutes "unjust or unreasonable discrimination," confers an "undue or unreasonable preference or advantage," or results in an "undue or unreasonable prejudice or disadvantage."[14] This grant of authority is more than sufficient to ban practices like technical and paid discrimination by broadband providers.

Further, the Commission need not rely on Title II alone. In *Verizon v. FCC*, the D.C. Circuit affirmed the Commission's broad authority under Section 706(a) to adopt network neutrality rules in order to ensure the timely and reasonable deployment of broadband.[15] Despite this, the court found that the Commission's power was limited by its prior decision to classify broadband as an "information service" instead of a "telecommunications service."[16] Having done so, the Commission could not impose *per se* common carrier regulation (*e.g.*, the non-discrimination rule, in the court's view) on broadband providers. The upshot of *Verizon* is that reclassifying broadband as a Title II telecommunications service will unleash the Commission's broad powers under Section 706(a).

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13 *See* Comcast Comments at 50-54.

14 47 U.S.C. § 202(a).

15 740 F.3d 623, 642-45 (Fed. Cir. 2014); *id*. at 649 ("section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers").

16 *Id*. at 650.

One carrier argues that reclassification is unnecessary altogether because the Commission can use Section 706(a) alone to ban most forms of traffic discrimination.[17] This argument flies in the face of *Verizon*. While we agree that Section 706(a) cloaks with Commission with broad authority, *Verizon* teaches that this power is limited when the Commission classifies a service as an information service subject only to Title I regulation. The Commission should take the D.C. Circuit at its word and lay a solid foundation for true net neutrality rules, instead of adopting weak rules supported by flimsy legal stilts.

B. The Commission Has the Authority to Reclassify Broadband.

Congress left it up to the Commission to classify service providers as either "telecommunications services" or "information services." The carriers suggest that the Commission cannot revisit its decisions of the early 2000s classifying broadband as an "information service."[18] They are wrong. In *National Cable and Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that because of the inherent ambiguity in the statutory definitions, the Commission may classify broadband as *either* an information service or a telecommunications service and that its decision will be accorded deference.[19]

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17 *See* AT&T Comments at 30-35.

18 *See* AT&T Comments at 40; Comcast Comments at 54.

19 545 U.S. 967, 981 (2005); *see also Verizon*, 740 F.3d at 631.

Indeed, in *Brand X*, the Commission had classified broadband as an information service despite judicial precedent holding that "the best reading [of the Communications Act] was that cable modem service was a 'telecommunications service.'"[20]

Contrary to the carriers' suggestions, Commission interpretations are "not instantly carved in stone."[21] The Supreme Court has held that an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis"[22] in response to, for example, "changed factual circumstances, or a change in administrations."[23] Indeed, "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."[24]

Nor is a change in interpretation subject to a higher level of scrutiny than the original interpretation. An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it

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20 545 U.S. 967 at 984 (citing *AT&T Corp. v. Portland*, 216 F.3d 871, 877-80 (9th Cir. 2000)).

21 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

22 *Id*.

23 *Brand X*, 545 U.S. 967 at 981.

24 *Chevron*, 467 U.S. at 865. Indeed, both *Chevron* and *Brand X* are cases in which the Supreme Court deferred to agency changes in interpreting their governing statutes.

suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[25] As set forth below, there are plenty of good reasons to reclassify broadband.

C. Broadband Is Properly Classified as a Telecommunications Service.

Only in the world of telecommunications law could broadband Internet service be considered anything other than a "telecommunications service." Yet here we are. But having made this mistake, the Commission should not compound it by refusing to admit its error. Justice Scalia got it right when he concluded that it is "perfectly clear that someone who sells cable-modem service is 'offering' telecommunications."[26]

Pure broadband service undoubtedly qualifies as "telecommunications." Nevertheless, the carriers argue that broadband service cannot be separated from the myriad "information services" that they provide alongside broadband service and that this combination automatically makes them an "information service,"

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25 *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (emphasis in original). Where the policy change is based upon new facts or where the prior policy engendered "serious reliance interests," the agency should provide a more detailed statement of its reasons. *See id.* In this case, the carriers have no serious reliance interests when it comes to net neutrality rules. As the D.C. Circuit recognized in *Verizon*, "even as the Commission exempted broadband providers from Title II common carrier obligations, it left open the possibility that it would nonetheless regulate these entities." *Verizon*, 740 F.3d at 631.

26 *Brand X*, 545 U.S. 967 at 1014 (Scalia, J., dissenting).

rather than a "telecommunications service." This presents a false dichotomy and ignores the realities of the services that consumers actually use.[27]

The carriers point to services like DNS lookup and email that they typically offer as evidence of the intertwined nature of their services.[28] But offering these "other" services does not prevent the core service—broadband Internet access—from being considered a "telecommunications service." DNS is "scarcely more than routing information"[29] and is properly excluded from the definition of "information service."[30] After all, DNS' analog equivalents—the old-time switchboard, live operator, directory assistance, or a phone book—never made Ma Bell an "information service." And to the extent DNS can even be considered an

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27 Nothing in the Communications Act suggests that the classifications are mutually exclusive. Indeed, the Act recognizes that a service provider may play multiple roles: A service provider is to be treated as a common carrier "only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). Likewise, it "cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer." *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C. Rcd. 5901, 5909, ¶ 50 (2007); *cf. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (under Communications Decency Act, "[a] website operator can be both a service provider and a content provider").

28 AT&T Comments at 48.

29 *Brand X*, 545 U.S. at 1012 (Scalia, J., dissenting).

30 *Id.* at 1013; 47 U.S.C. § 153(24) (information service "does not include any use of any . . . capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service"); *compare* AT&T Comments at 48 ("DNS matches the Web site address that an end user types into her browser with the IP address of the Web page's host server.").

"information service," it is plainly *de minimis*.[31] The remaining "other" services, like carrier-provided email and carrier web portals, are distinct and ancillary services, usually provided at no additional charge.[32] While broadband carriers may commonly provide them as part of a subscription package, they are not necessary to access the Internet, do not drive the broadband subscription, and are unlikely to be used much today given consumers' widespread adoption of superior alternatives.[33] As such, combining them with a broadband service package does not alter the character of the core broadband service.[34]

Besides offering an opportunity to correct a statutory interpretation mistake, this rulemaking presents important policy issues that were not before the Commission when it originally classified broadband as an information service. The Commission did not consider issues involving technical and paid

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31 *Brand X*, 545 U.S. 967 at 1012 (Scalia, J., dissenting).

32 *See* AT&T Comments at 48-49. AT&T also points to instant messaging, streaming music, and on-demand video. *See id*. These offerings show that the carriers are attempting to compete with edge providers.

33 For example, the use of services like Gmail and Yahoo email is now ubiquitous. AT&T asserts, without any factual support, that "consumers view [carrier-provided information services] as core components of their broadband service offering." AT&T Comments at 49. Even if true, the fact that consumers expect additional services does not mean that they cannot distinguish between the separate services being offered or that they actually want or need those services.

34 *See Brand X*, 545 U.S. 967 at 1006-7 (Scalia, J., dissenting) ("The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way.").

discrimination when it classified broadband in the early 2000s. Nor did the Commission address whether broadband providers served as carriers of edge providers' services and content.[35] These issues can and should inform how the Commission views broadband.[36]

D. Reclassification Will Not Lead to Wholesale Regulation of the Internet.

Perhaps the oddest argument against reclassification is that it would somehow compel the Commission to regulate "broad swaths of the Internet ecosystem" and classify search engines, video-streaming services, and cloud storage providers as telecommunications services subject to common carrier regulation.[37] This argument borders on the absurd.

The carriers confuse content with the *means* to provide content. There is a critical difference between a content provider like Vimeo and a broadband provider

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35 From an edge provider's perspective, a broadband is plainly a telecommunications service since the "relevant service broadband providers furnish to edge providers is the ability to access end users if those end users so desire," *Verizon*, 740 F.3d at 656, and edge providers receive none of the information services that broadband carriers provide to consumers. Thus, the Commission could classify the access service furnished by broadband providers to edge providers as a Title II telecommunications service without revisiting the classification of broadband service vis-à-vis consumers.

36 That a change in interpretation is made to pursue a policy goal does not make it "arbitrary and capricious." *See* AT&T Comments at 50. Part of the reason why agencies are afforded deference is so that they can balance "conflicting policies" that Congress did not resolve. *Chevron*, 467 U.S. at 865.

37 AT&T Comments at 39, 56.

such as AT&T or Comcast. Vimeo manipulates data and presents it to the user[38] through telecommunications pathways supplied by others. It falls squarely into the definition of "information service" because it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[39] In contrast, a broadband provider "merely serves as a conduit for the information services" assembled by companies like Vimeo.[40] It is a "telecommunications service" because it offers to the public for a fee "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[41]

Arguments that edge providers like Vimeo offer a "telecommunications service" because its service involves the delivery of content using

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38 Vimeo, like any other website operator, manipulates data numerous ways. Vimeo determines the look and feel of its website and its video player and provides various features that enable content discovery (such as search tools and groupings of content). As a technical matter, Vimeo transcodes all of the videos uploaded into formats that are best streamed, assigns them a unique ID number, and makes them available through its website. In some cases, Vimeo curates content for users to watch. It also exercises editorial control when it removes videos that do not comply with its content guidelines or are subject to takedown requests from third parties. A carrier, on the other hand, performs none of these functions in delivering broadband access.

39 47 U.S.C. § 153(24) (definition of "information service"). The carriers' arguments would effectively render this definition nugatory.

40 *Brand X*, 545 U.S. 967 at 1010 (Scalia, J., dissenting).

41 47 U.S.C. § 153(50) (definition of "telecommunications"); *id*. § 153(53) (definition of "telecommunications service").

telecommunications collapse the distinction between content and delivery and are equivalent to arguing that all restaurants offer "delivery" simply because "the ingredients of the food they serve their customers have come from other places." As Justice Scalia put it, "This is nonsense."[42]

E. Reclassification Will Not Deter Broadband Investment.

The carriers further claim that reclassification would subject carriers to intrusive and outdated regulations that would stop broadband deployment in its tracks.[43] But reclassification is not an all-or-nothing proposal, and no one is arguing that broadband providers should be subject to "1930s-style public utility regulation."[44] The Commission has the power—and, indeed, the obligation—to forbear from the full panoply of Title II regulation as the public interest requires.[45] Here, the public interest would likely require exemption from many of Title II's requirements, including rules that are, by their terms, applicable only to landline

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42 *Brand X*, 545 U.S. 967 at 1011 (Scalia, J. dissenting). Even if it had a statutory basis to do so, the Commission has no to reason to regulate edge providers as common carriers. Nor does the Commission have the power to regulate Internet *content*. *See Reno v. ACLU*, 521 U.S. 844 (1997) (provisions of Communications Decency Act banning distribution of "obscene or indecent" material online violated First Amendment; considerations justifying FCC regulation of broadcast media do not apply to the Internet).

43 *See* AT&T Comments at 51-53.

44 *Id*. at 52.

45 47 U.S.C. § 160.

telephone operators.[46] With appropriate forbearance, there is no reason to believe that reclassification and implementation of net neutrality rules would chill broadband investment.

Indeed, a bright-line rule barring technical and paid discrimination would provide certainty to all market participants. In contrast, the Commission's proposed rules would create much uncertainty as to what practices would be considered "commercially reasonable." As the carriers agree, innovation and investment are more likely to flourish in an environment where the rules are certain and not subject to endless litigation.[47]

IV. Conclusion

For the reasons set forth above and in its opening comments, Vimeo respectfully urges the Commission to:

1. Adopt the proposed no-blocking and transparency rules.

2. Adopt true net neutrality rules prohibiting broadband providers from engaging in technical or paid discrimination with respect to edge provider traffic.

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46 The appropriate level of forbearance need not be determined now, but should be addressed within the Commission's ordinary forbearance petition process.

47 *See, e.g.*, Comcast Comments at 26 (arguing that the commercially reasonable standard "threatens to subject broadband providers to new and uncertain obligations and invite abuse from other parties"); AT&T Comments at 79 n.252 (arguing that adopting a "reasonable person" standard for purpose of the no-blocking rule would "generate substantial and investment-deterring uncertainty as to what is lawful").

3. Reclassify broadband as a "telecommunications service" subject to Title II common carrier regulation to ensure that the Commission's rules will survive judicial review.

4. Eliminate the distinction between "fixed" and "mobile" broadband for the purpose of these rules.

5. Adopt rules concerning the delivery of traffic into last-mile networks through interconnection.

We thank the Commission for the opportunity to comment on this important matter.

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Respectfully submitted,

/s/ Michael A. Cheah

Michael A. Cheah
General Counsel
Vimeo, LLC
555 West 18th Street
New York, New York 10011
212-314-7457
michael@vimeo.com