



# Consumer Federation of America

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## 10<sup>TH</sup> CIRCUIT RULING BOOSTS FCC'S ABILITY TO PURSUE PRIMARY GOALS OF THE COMMUNICATIONS ACT

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The ruling of the United States Court of Appeals for the 10<sup>th</sup> Circuit (May 23, 2014) provides an extremely strong foundation for the approach to network neutrality and universal service that the Consumer Federation of America (CFA) has advanced at the Federal Communications Commission (FCC). In initial comments in the Open Internet Remand proceeding (February 24, 2014, (<http://www.consumerfed.org/pdfs/CFC-Initial-Comment-in-the-Open-Internet-Remand-Docket.pdf>)) CFA urged the FCC to adopt a broad legal theory that identified multiple, complementary authorities/powers to achieve the primary goals of the Telecommunications Act of 1996. CFA also argued that the Telecommunications Act of 1996 instituted a new approach to flexibility in pursuing those goals.

Specifically, we urged the Commission to assert §706 authority to promulgate an Open Internet order and §254 authority for Universal Service, while continuing to explore the possibility of also invoking Title II authority for both.

“The FCC should assert the independent authority and explore the powers it has under several of the key, new Sections of the '96 Act to create a robust portfolio of tools to pursue the core goals of the Communications Act

Maximize the power of transparency under Section 706 to promote competition and provide consumer protection.

Develop regulation of reasonable network management to the greatest extent possible under § 706.

Implement effective universal service mechanisms under §254.

Explore Title II with forbearance (§10) for those goals of the Act that cannot be accomplished under the authorities and powers of §706 and §254, particularly for public safety, consumer protection, consumers with disabilities and privacy.”

CFA argued that this approach is consistent with the legal structure that is reflected in the United States Court of Appeals for the District of Columbia ruling on the Open Internet order (January 14, 2014) and that it makes perfect sense for the FCC to rely on that structure as part of its overall strategy for pursuing the goals of the Communication Act. In recent testimony in the U.S. House of Representatives, FCC Chairman Wheeler mentioned that this was the strategy the FCC was pursuing in its new Open Internet Notice of Proposed Rulemaking.

The ruling of the 10<sup>th</sup> Circuit that upholds the FCC's orders in which it undertook the task of "comprehensively reforming and modernizing its universal service and intercarrier compensation systems" gives a huge boost to this strategy.

- It finds that §254 is an independent sources of authority to include broadband access service in the definition of universal service.
- It identified §706 as a separate basis of authority that complements the §254 authority.
- It recognizes the important role that flexibility has always played in implementation of the Communications Act and explains the logic of the new approach to flexibility embodied in the Telecommunications Act of 1996.
- It systematically and thoroughly dispenses with a wide range of arguments that are little more than screeds against change.

The 10<sup>th</sup> Circuit ruling also reinforces the FCC's approach to network neutrality. The fact that we have two Circuit courts accepting rules based on §706 authority means the Commission can move ahead with much greater confidence this approach to network neutrality will withstand scrutiny. At the same time, the Commission can make the case for complementary Title II authority for several reasons.

- The tools available under §706 are undefined and their effectiveness unknown.
- There may be specific discriminatory behaviors that §706 cannot reach.
- For some purposes, §706 authority is triggered only where the Commission reaches a negative conclusion in the Congressionally mandated inquiry that asks "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." However, there may be situation beyond the §706 finding where network neutrality rules are needed.
- By making these complementary arguments the Commission can ensure that network neutrality rules are in place, while Title II gets its day in court.

These two court rulings also should send a message to Congress. The policy goals of the 1996 Act are clear and the Commission's authority under the Act has become much clearer. The 1996 Act enjoyed remarkable bipartisan support, passing the House by a vote of 414 to 16 and the Senate by a vote of 81-18. The Commission **must** use its legal authority, as upheld by the courts, to pursue the important goals of the Act.

Of course, Congress can change the law, or the policy goals, by passing new legislation that the President signs into law, or by overriding a presidential veto. It should not create a vacuum and put the important goals of the Act in suspended animation by taking pot shots at the Commission's efforts to implement the current law in ways that comply with the court's reading of the Act.

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*The Consumer Federation of America is an association of more than 260 non-profit consumer groups that, since 1968, has sought to advance the consumer interest through research, education, and advocacy.*