

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
The Open Internet Remand) **GN Docket No. 14-28**

INITIAL COMMENTS OF THE CONSUMER FEDERATION OF AMERICA

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February 25, 2014

The Consumer Federation of America (CFA)¹ applauds the Commission for initiating this proceeding to write an Open Internet Order² under the Section 706 authority recently outlined in the ruling of the United States Court of Appeals For The District Of Columbia Circuit.³ We believe this is exactly where the effort to build a Broadband Network Compact should start, so much so that we devote this initial early comment to a detailed analysis of why this proceeding is so important as the first step in the process.

The attached analysis, entitled *Decision Making in The Face of Complex Ambiguity: Mapping the FCC's Route to the Broadband Network Compact*, demonstrates that the FCC faces a situation of complex ambiguity in which simple solutions are inadequate. Ambiguity exists where decision makers lack knowledge about both the nature of outcomes of actions and the probabilities of those outcomes. Complexity exists where more than one aspect of a decision is subject to ambiguity.

¹ The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly. CFA has been involved in communications, media and Internet policy for decades in legislative, regulatory and judicial arenas and has advanced the consumer view in policy and academic publications.

² Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (Open Internet Order), aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC, No. 11-1355 (D.C. Cir. Jan. 14, 2014).

³ Verizon v. FCC, No. 11-1355, slip op. at 17, 63.

Reviewing the history of the classification of High Speed Data Transmission (aka Broadband Internet Access Service), it is clear that both the authority and the power of the FCC to take actions to ensure network neutrality have been unclear since the passage of the Telecommunications Act of 1996 (see Exhibits 1, 2, and 3). The D.C. Appeals Court ruling continues and compounds that complex ambiguity.

The paper notes that decision makers in many fields face the challenge of complex ambiguity and tools for improving decision making have been developed (see Exhibit 4). Although the analytic approaches come from many disciplines – financial portfolio analysis, project management, technology risk assessment, Black Swan Theory, military strategy and space exploration – the decision making frameworks have strong commonalities. The digital communications sector exhibits characteristics that make it a good candidate for the application of these analytic frameworks.

- Because it is a recursive, scalable infrastructure network that is critical to a broad range of activities in society, reliability, interconnection, interoperability, ubiquity, and affordability are highly desirable attributes that are the goals of public policy.
- The communications sector is not only increasingly central to the economy, but also has the unique characteristic that it is central to the polity, since it is the central vehicle for speech.
- It has undergone recent dramatic changes that have disturbed the basic economics basic legal structure of the sector

Most importantly, the efforts to develop decision making frameworks in these diverse fields yield a very clear set of recommendation for how to build portfolios of assets to achieve goals in the face of complex ambiguity (see Exhibit 5). Applying these principles to the terrain of decision making on which the FCC finds itself, we conclude that the prudent strategy should include the following actions.

- 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 Section 706.
- Implement effective universal service mechanisms under Section 254.
- Explore Title II with forbearance (Section 10) for those goals of the Act that cannot be accomplished under the authorities and powers of sections 706 and 254, particularly for public safety, consumer protection and consumers with disabilities and privacy.

The FCC can pursue all four of the options that lie close to the efficient frontier simultaneously by conducting different proceedings on different schedules. The idea that the FCC would have split, even fragmented jurisdiction for different sections of the Act may seem odd, but that has always been a fact of life under the Communication Act. Not only has the Congress given it different powers and authorities in different Titles, but the split basis for authority for network management was the situation for over thirty years under the Computer Inquiries, which rested on Title I ancillary authority. Jurisdictional inconsistency is the rule, rather than the exception in the complex communications space.

It would be a luxury to hit the pause button and take time to reflect on this complex challenge, but decisions about whether to appeal the court ruling must be made quickly and the political process, reflected in instantaneous, critical caricatures, does not treat delay kindly. Thus, one of the most important direction setting decisions comes early. The Commission has chosen to explore the power it has under section 706, while continuing to develop the other regulatory approaches. This paper demonstrates why it made the right choice.

Given two decades of complex ambiguity in this space, it is a mistake to think that any one of these sources of power and authority is enough. The approach chosen by the FCC

- recognizes and adapts to the new legal terrain,
- keeps options open, seeks to quickly implement new rules,
- and places only a specific set of assets at risk.

- It not only keeps options open, but advances the principle of building resilience through redundancy and diversity of authority and power.
- It also heads in an important system building direction, since Sections 706 and 254 are systemic tool that cuts across the key Titles and definitions of the Act. This is the “new” law that needs to be developed. Until the Commission tries to do so, the courts will likely avoid confronting the highest level issues.

In an editorial in which the New York Times opined on the decision to pursue section 706, it cautioned that “Having failed twice to write rules acceptable to the appeals court, the F.C.C.’s credibility is at stake. It has to prove that its latest strategy can work.”⁴ It went on to claim that “reclassifying broadband... is more likely to survive a court challenge than using the F.C.C.’s power to promote broadband.” While we disagree with that assessment, we can agree that the ability to reclassify is very far from a certainty. Under the conditions of complex ambiguity, a strategy that “can work” involves a sequence of choices that preserve options and layer outcomes, rather than making a simple binary choice.

If the 1996 law were written differently, or the decision to classify broadband as an information service (which is now over a decade old) had not been taken, the terrain would be very different and the best strategy for writing the Broadband Network Compact might be different. But, the Commission must navigate the terrain in which it finds itself, not in some alternative universe. The “all of the above” approach makes perfect sense for the FCC to pursue when confronting the complex ambiguity that has typified the terrain of communications policy since the passage of the 1996 Act. The first step is to explore the full extent of the authority and power the Commission has under Section 706 (and Section 254), while invoking Title II where additional authority and/or power are needed.

⁴ The Editorial Board, The F.C.C. Tries Again, *New York Times*, February 22, 2014.

EXHIBIT 1: COMPLEX AMBIGUITY IN THE CLASSIFICATION OF HIGH-SPEED DATA TRANSMISSION SERVICE

Year	Event	Implications for Current Classification Review
1998	Stevens Report	Ambiguous on Classification
1998	Public Interest Groups Petition for Title II Classification	Need for Nondiscrimination demonstrated
2000	<i>Portland v. AT&T Cable</i> : 9th Circuit Court of Appeals finds cable	Title II classification for cable modem service
2000	FTC imposes commercial access condition on AOL-Time Warner	Concern about bottleneck provider expressed
2002	FCC issues Cable Modem Declaratory Order classifying Cable modem service as an information (not telecommunications) service.	Classified Information Service; Title I Authority Asserted, Need to address Communications Act principles affirmed
2003	<i>Brand X v. FCC</i> – 9th Circuit Court of Appeals affirms its <i>Portland v. AT&T</i> and overturns Cable Modem order	Information Service rejected; telecommunications affirmed
2004	Chairman Powell declares Four Internet Freedoms	Importance of Nondiscrimination, Consumer protection
2005	FCC uses Title II authority to investigate undue discrimination by Madison River	Importance of Non-discrimination affirmed
2005	Supreme Court reverses 9th Circuit (6-3) on procedural grounds and upholds FCC information service classification	Information service upheld, Justices debate Title I authority
2005	FCC extends the Information service definition to mass market, high-speed data transmission services offered by telephone companies.	Title I authority claimed; Need to address Communications Act principles affirmed
2005	FCC turns Four Internet Freedoms into a policy statement	Importance of Non-discrimination, Consumer protection affirmed
2006	AT&T agrees to network neutrality Bell South merger condition	Ability to distinguish service demonstrated
2007	FCC finds Comcast illegally discriminated against peer-to-peer applications.	Need for non-discrimination affirmed, Technical ability to offer separate services demonstrated
2010	Open Internet Proceeding initiated	Need for Non-discrimination stated, Title I authority asserted
2010	National Broadband Plan	Importance of Communications Act principles affirmed Failure to achieve Communications Act goals documented
2010	D.C. Appeals Court overturns FCC action against Comcast	Title I authority questioned
2010	Broadband Internet Access Notice of Inquiry	Recognizes important of all Communications Act public service principles Documents failure to achieve goals of the Act.
2010	FCC issues Open Internet Order	Title I and s. 706 Authority to require transparency, prevent blocking and discrimination
2012	Universal Service Fund Order Challenge in 10 th Circuit	Limitation on s. 254
2012	PSTN Docket	Implementation of public service principles in the Internet era debated
2014	D.C. Appeals Court vacates anti-blocking and discrimination rules	s. 706 authority upheld, rules vacated for imposing core common carrier rules on non-common carriers

EXHIBIT 2: DETERMINANTS OF THE ABILITY TO SECURE THE NETWORK COMPACT

Source of Authority	Regulatory Reach (Effectiveness)			Prospect of Success	
	<u>Why</u>	<u>Who</u>	<u>How</u>	<u>Authority</u>	<u>Power</u>
Title I ancillary	Accomplish general purposes of the Act	Information providers	Regulation have a nexus to Title II authority	Bleak (two losses)	Difficult (narrow non-common carrier rule)
Section 706	Inadequate or unreasonable deployment	Anyone	Anything that has a nexus to deployment finding, but is not but is not core common carrier-like rule	Clear	Unclear (narrow non-common carrier rule)
Title II	Meets common Carrier definition	Common carrier	Title II regulations for which the Commission has not chosen to forbear	Difficult (change of mind)	Clear w/ authority
Section 254	Meets universal service definition	Telecom or Information service providers	Eligible Telecommunications Carrier (ETC) rules perhaps others	Unclear	Clear w/ authority

EXHIBIT 3: THE NEW TERRAIN OF LEGAL AUTHORITY AND POWER UNDER THE 1996 ACT

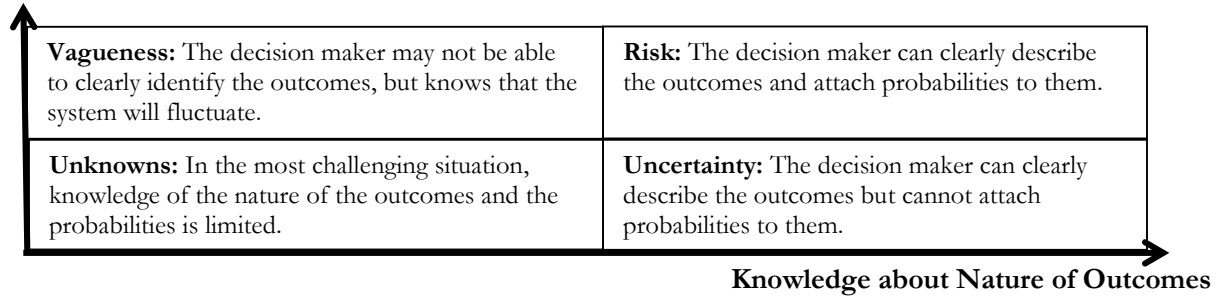
AUTHORITY

P O W E R	Weak	Weak Ancillary Authority (Cabined by the 1996 Act)	Unclear	Strong 706 Transparency (weak but could be stronger)
	Unclear		Title II with forbearance (Hard to get, has limitations)	706 Network Management (power undefined)
	Strong			254 Universal service (Yet to be decided, but Significant potential)

EXHIBIT 4: DEFINING THE TERRAIN OF KNOWLEDGE

Ambiguity Defined by Four Regions of Knowledge

Knowledge About Probabilities of Outcomes



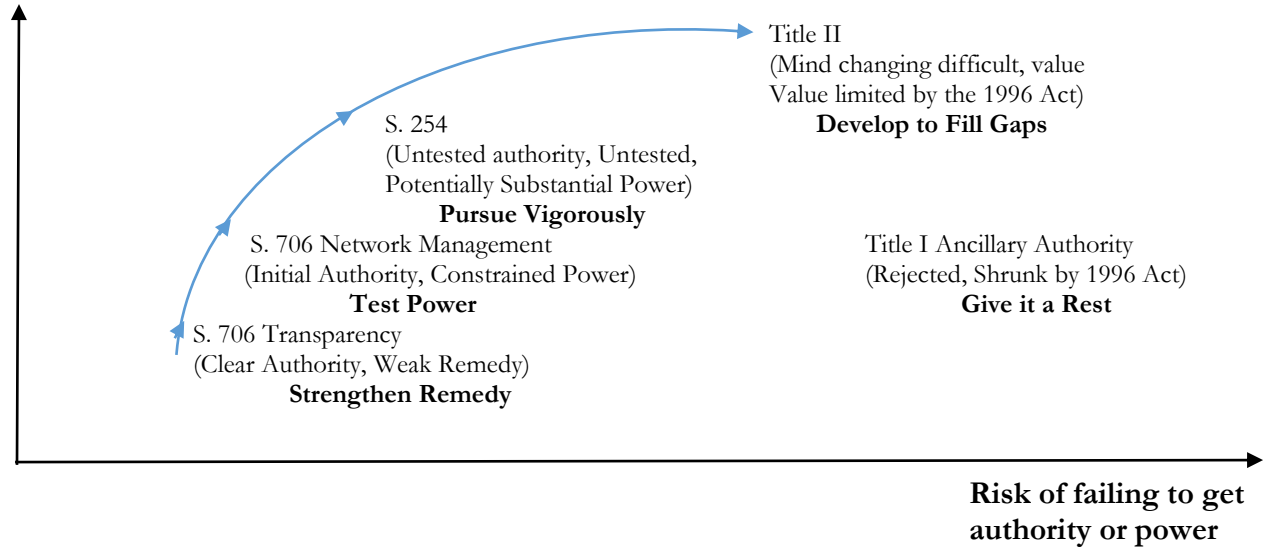
MAPPING AND NAVIGATING IN A TERRAIN OF COMPLEX AMBIGUITY

Region of Knowledge	Challenges		Strategy	Action
	Outcomes	Probabilities		
Risk	Known	Known	Hedge	Identify the trade-offs between cost and risk. Spread and hedge risk by acquiring assets that are uncorrelated (do not overlap) to lower portfolio risk
Uncertainty	Known	Unknown	Real Options	Buy time to reduce exposure to uncertainty by choosing sequences of hedges that preserve the most options. Acquire small assets with short lead times and easy exit opportunities.
Vagueness	Unknown	Known	Fuzzy Logic	Avoid long-term paths that are least controllable. Minimize surprises by avoiding assets that have unknown or uncontrollable effects. Create systems that can monitor conditions and adapt to change to maintain system performance.
The Unknown	Unknown	Unknown	Diversity & Insurance	Buy insurance to build resilience with diverse and redundant assets. Diversity requires increasing variety, balance and disparity of assets. Fail small and early. Avoid relying on low probability positive outcomes and betting against catastrophic negative outcomes.

EXHIBIT 5: DEVELOPING A ROBUST PORTFOLIO OF AUTHORITY AND POWER TO ACHIEVE THE GOALS OF THE COMMUNICATIONS ACT

Risk/ Reward Landscape of Open Internet & Universal Service Policy

Effectiveness of Authority & Power



Strategic Response to Ambiguity of Power and Authority

	Legal Basis	Effectiveness of Authority & Power		Strategy/Action	
Redundancy	Section 706 Transparency Network Management	High Moderate	Low Moderate	Strengthen remedy Test limits of power	New law needs to be explored
	Section 254 Universal Service	Potentially high but untested	Potentially high but untested	Vigorously pursue	
Low probability outcomes	Title I Ancillary Authority	Rejected by D.C. court	Shrunk by '96 Act	Give it a rest, examine potential for areas where '96 Act has not undercut	
	Title II	Requires mind changing	High, but limited by '96 Act	Develop for gaps in '96 Act	
	Failure is potentially catastrophic				
					Consumer Protection Consumers with Disabilities Public Safety