Comments on Mozilla's Proposal

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Executive Summary

Mozilla has suggested that the FCC should classify a newly defined service, which it calls "remote edge provider delivery service," as a telecommunications service. This service, as defined by Mozilla, is offered by broadband Internet access providers to providers of Internet applications, content or services ("edge providers") and encompasses the transport of an individual edge provider's data across the ISP's access network to and from all of an ISP's subscribers. According to Mozilla, this classification would allow the FCC to adopt rules banning blocking, discrimination, and access fees under Title II of the Communications Act.

Unfortunately, Mozilla's proposal does not grant the FCC the authority to adopt such rules. Any attempt to nevertheless adopt such rules under Mozilla's approach is unlikely to survive judicial scrutiny. If the FCC pursues the Mozilla proposal—rather than the Title II reclassification preferred by nearly all network neutrality advocates—the FCC is likely to lose in court a third time.

Indeed, all of the legal obstacles facing Mozilla's proposal will equally impede other "sender-side" proposals (such as the one by Tim Wu and Tejas Narechania) because problems inherently arise when classifying the relationship between an ISP and an edge provider, rather than the relationship between the ISP and the end user. Although these proposals were put forward in good faith and with great creativity, the same objections, detailed below, would sink sender-side proposals in court.

***First,* Mozilla's proposal would not provide the FCC with authority under Title II to adopt rules banning blocking and discrimination against edge providers that do not pay a fee.**

The Communications Act's definition of telecommunications service requires that a service has to be offered "for a fee." However, most edge providers do not pay a fee to their users' broadband Internet access providers.

To get around this difficulty, Mozilla suggests two unreasonable interpretations of the statute.

First, Mozilla acknowledges that edge providers usually don't pay a fee to their users' broadband Internet access providers. It argues, however, that *other* parties (like the ISP's subscribers) pay a fee to the ISP in exchange for a service that includes the ability to send and receive data from edge providers. According to Mozilla, fees from these other

parties might fulfill the statute's "for a fee" requirement, even if edge providers do not pay any fees "first-hand."

Mozilla's interpretation does not comport with the plain meaning of the Communications Act. Rather, the statute's text suggests that the entity *to which the service is offered* must pay the fee, not some other party.

Alternatively, Mozilla contends that while edge providers don't pay any monetary fees, the very act of *using* the service should be considered "a fee." When edge providers let an ISP transport their data across the ISP's access network to the ISP's subscribers, they make the ISP's Internet access service more valuable, so Mozilla argues that an edge provider's use of the remote delivery service provides "value" that constitutes a "fee" the edge provider pays in exchange for the service.

This interpretation violates a basic canon of statutory interpretation and contradicts FCC rulings in analogous contexts.

All telecommunications services receive value from network effects. In other words, any additional user increases the number of people users can communicate with through the service, making the service more valuable for all users of the service. This increase in value allows the service provider to attract even more users or to charge a higher price to existing users.

Because all telecommunications services are subject to direct network effects and, often, to economies of scale, Mozilla's proposal would transform the use of *any* telecommunications service into use "for a fee." Thus, Mozilla's interpretation leaves no telecommunications service that is not offered "for a fee." Put another way, Mozilla's suggestion renders the term "for a fee" meaningless, violating a fundamental canon of statutory construction.

Further, although the FCC has recognized that "a fee" can be "something of value" other than monetary payment, the FCC has, in analogous contexts, implicitly rejected the argument that use of a service constitutes "a fee."

Edge providers who do not pay a fee to their users' ISPs do not receive a telecommunications service. Thus, the FCC would not have Title II authority to adopt rules protecting them against blocking or discrimination.

***Second*, Mozilla's proposal would most likely not allow the FCC to ban access fees altogether.**

As the overwhelming majority of commenters have made clear, it is imperative that the FCC prohibit ISPs from charging fees to edge providers, whether it's for access to ISP subscribers or for preferential treatment on ISP access networks.

But an FCC effort to ban access fees under Mozilla's proposal is unlikely to succeed, as Mozilla's interpretation is in conflict with the plain meaning of the Communications Act. Under the statute, it would be unreasonable for the FCC to first classify the service provided to an edge provider as a telecommunications service based on it charging "a fee," only to then use its newly gained authority under Title II to ban all such fees. This path is as unreasonable as defining a service as a "telecommunications service" and then forbidding its providers from "offering" "telecommunications" – two definitional components of the "telecommunications service" that are no more integral than the definitional requirement that the offering be "for a fee."

Because it will neither preserve the open Internet nor survive judicial scrutiny, the FCC should not adopt Mozilla's proposal.

Introduction

As part of the debate over the best way to adopt network neutrality rules, Mozilla has suggested the FCC should classify a newly defined category of service, which it calls "remote edge provider delivery service," as a telecommunications service. According to Mozilla, this classification would allow the FCC to adopt rules banning blocking, discrimination and access fees under Title II of the Communications Act.[1] Mozilla's proposal is motivated by the concern that Section 706 would not allow the FCC to adopt such rules.[2] Unfortunately, Mozilla's proposal would not allow the FCC to adopt these rules, either.

Broadband Internet access providers like Comcast, AT&T, Verizon or T-Mobile connect Internet users to the Internet. This service, which allows a subscriber to send and receive data from all computers attached to the Internet, is currently classified as an information service under Title I of the Communications Act.

According to Mozilla, broadband Internet access providers also furnish a previously unrecognized service to "edge providers" – companies like Google, Netflix, Tumblr, Skype, or the New York Times that offer Internet applications, content and services to the ISPs' subscribers: Broadband Internet access providers transport a specific edge provider's traffic across their access networks, allowing that provider to send and receive data from all of an ISP's subscribers. For example, when a Comcast subscriber requests a video from Netflix, Comcast transports the request for the website from the subscriber to the edge of Comcast's access network, and, when Netflix sends the video, Comcast delivers it from the point where it enters Comcast's network to the subscriber who requested it. Remote edge provider delivery service, as defined by Mozilla, includes the transport of an edge provider's traffic in both directions – from individual subscribers to the edge of the access network (for traffic that these subscribers sends to the edge provider) and from the edge of the access network to individual subscribers (for traffic that the edge provider sends to these subscribers).[3] The service explicitly excludes

[1] Mozilla (2014a); Mozilla (2014b), pp. 9-10; Mozilla (2014b), pp. 4-14.

[2] Mozilla (2014b), pp. 5-9.

[3] By contrast, while otherwise similar to the Mozilla petition, Narechania and Wu would only classify the transporting of "downstream" traffic across the access network as a telecommunications service. Thus, it would only apply to traffic that is sent from the edge provider to an ISP's subscribers. It would not apply to the "upstream" traffic that a subscriber sends to an edge provider. Narechania & Wu (2014).

interconnection.[4] Mozilla has asked the FCC to classify that service, which it calls "remote edge provider delivery service," as a telecommunications service.[5]

Mozilla's proposal would not empower the FCC to enact the network neutrality rules that are needed to effectively protect users and edge providers. *First*, Mozilla's proposal would not allow the FCC to adopt rules banning blocking and discrimination against edge providers that, like almost all edge providers, do not pay a fee to their users' ISPs. *Second*, Mozilla's proposal would allow the FCC to require ISPs to charge nondiscriminatory fees to edge providers in return for preferential treatment such as paid prioritization or zero-rating, but it would most likely not allow the FCC to ban access fees altogether.

This paper examines only a subset of the potential legal shortcomings in Mozilla's proposal – it is not intended as an exhaustive summary.

A. Mozilla's Proposal Would Not Allow the FCC to Adopt Rules Prohibiting Blocking and Discrimination Against Edge Providers That Do Not Pay Fees to Their Users' ISPs

Because most edge providers do not pay a fee in return for "remote edge provider delivery service," this service is not a telecommunications service. Thus, Mozilla's proposal would not provide the FCC with authority under Title II to adopt rules banning blocking and discrimination against edge providers that do not pay a fee, because those providers would not be offered a telecommunications service.

The Communications Act of 1934 defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(53).

Thus, as a matter of definition, to be a telecommunications service, a service has to be offered "for a fee." However, while an edge provider pays for its own access to the Internet, it does not typically pay a fee to its users' ISPs.

[4] Mozilla (2014b), p. 11 ("[The scope of the Mozilla proposal] would not encompass interconnection or peering practices directly, as the scope is defined for only routing activities within the local network, up to but not including the point of interconnection"); Mozilla (2014b), pp. 8-9.

[5] Mozilla (2014a); Mozilla (2014b), pp. 9-10; Mozilla (2014b), pp. 4-14.

Thus, most edge providers do not – as the statute requires – pay "a fee" in return for "remote edge provider delivery service."

To get around this difficulty, Mozilla suggests two unreasonable interpretations of the statute. First, it argues that, while most edge providers do not pay "a fee," the text of the statute is satisfied if some *other* party pays a fee. Failing that, Mozilla contends that while edge providers don't pay any monetary fees, the very act of *using* the service should be considered "a fee."

Mozilla's first interpretation does not comport with the plain meaning of the Communications Act. Rather, the statute's text suggests that the entity *to which the service is offered* must pay the fee, not some other party. Mozilla's alternative interpretation violates a basic canon of statutory interpretation and would contradict existing FCC precedent. The plain text of the statute does not permit construing *use* as "a fee." And although the FCC has recognized that "a fee" can be "something of value" other than monetary payment,[6] it has, in analogous cases, implicitly rejected the notion that mere *use* of a service can constitute "a fee."

I. Mozilla's claim that a fee can be paid by third-parties violates the plain meaning of the statute.

Mozilla acknowledges that edge providers usually don't pay a fee to their users' broadband Internet access providers.[7] It argues, however, that *other* parties (like the ISP's subscribers) pay a fee to the ISP in exchange for a service that includes the ability to send and receive data from edge providers.[8] According to Mozilla, fees from these other parties might fulfill the statute's "for a fee" requirement, even if edge providers don't pay any fees "first-hand."[9]

However, the Act defines telecommunications service as "the *offering* of telecommunications *for a fee directly to the public*."[10] A natural reading of this provision suggests that it is the entity *to which the service is offered* that must pay the fee – not

[6] Federal Communications Commission (1997), para 784.

[7] Mozilla (2014b), pp. 11-12.

[8] Subscribers to broadband Internet access service do not pay for remote edge provider delivery service: An individual subscriber pays its ISP to be able to send and receive data to and from any computer attached to the Internet (including to and from edge providers). By contrast, remote edge provider delivery service allows an individual edge provider to send and receive data across the ISP's access network to and from all of the ISP's subscribers.

[9] Mozilla (2014b), pp. 11-12.

[10] 47 U.S.C. §153(53) (*emphasis added*).

merely that *some* party must pay a fee. In other words, an "offer[] of [a service] for a fee" is an "exchange"[11] between a service provider and a fee-paying recipient. Thus, remote edge provider delivery service can only be a telecommunications service if edge providers themselves pay a fee for this service; fees paid by others do not suffice.

Against this common-sense interpretation of the statute, Mozilla argues that end-users pay fees to ISPs *in order* to access data from edge-providers. This is undoubtedly so. But that only shows that *end users* are being offered a service for a fee; it doesn't affect the nature of the exchange between ISPs and edge providers.

Because Mozilla's interpretation conflicts with the "plain meaning of the statute," it is untenable.[12]

II. Mozilla's claim that *use* of the service can constitute a fee violates a basic canon of statutory interpretation and contradicts existing precedent.

Alternatively, Mozilla suggests that restricting the term "for a fee" to include only "first-hand *monetary payment[s]*" is too narrow.[13] It contends that the term "fee" can be interpreted to mean "anything of value."[14]

When edge providers let an ISP transport their data across the ISP's access network to the ISP's subscribers, they make the ISP's Internet access service more valuable to its subscribers. After all, subscribers buy Internet access in order to use the applications, content and services available on the Internet. Based on this line of reasoning, Mozilla argues that an edge provider's use of the remote delivery service provides "value" to the ISP, and that this value is a "fee" that the edge provider pays in exchange for the service.[15]

The FCC has recognized that "a fee" can be "something of value" – it does not need to be a monetary payment.[16] But the FCC has, in analogous contexts, implicitly rejected the argument that *use* of a service constitutes "a fee." Moreover, by conflating *use* with *use*

[11] "We find the plain meaning of the phrase 'for a fee' means *services rendered in exchange* for something of value or a monetary payment." Federal Communications Commission (1997), para 784.

[12] *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

[13] Mozilla (2014b), p. 11-12 (*emphasis added*).

[14] Mozilla (2014b), p. 12; Mozilla (2014b), pp. 9-10, 12-13.

[15] Mozilla (2014b), p. 12; Mozilla (2014b), pp. 9-10, 12-13.

[16] Federal Communications Commission (1997), para 784: "We agree with the Joint Board's interpretation of the plain language of section 3(46) and find that the plain meaning of the phrase "for a fee" means services rendered in exchange for something of value or a monetary payment."

for a fee, Mozilla's proposal effectively reads the term "for a fee" out of the law, violating a fundamental canon of statutory construction.

1. Mozilla's interpretation that the use of service is a "fee" violates the surplusage canon.

According to Mozilla, an edge provider's use of an ISP's service constitutes a "fee" because the edge provider's use of the service provides value to the ISP. But if this interpretation is correct, any use of a telecommunications service is "for a fee."

All telecommunications services are subject to direct network effects:[17] Any additional user increases the number of people users can communicate with through the service, making the service more valuable for all users of the service. This increase in value allows the service provider to attract even more users or to charge a higher price to existing users.

If the service (like many telecommunications services) is also subject to economies of scale, additional users provide even more value to the provider of the service.[18] In this case, any additional subscriber allows the provider to spread the fixed costs of providing the service over a larger number of subscribers, lowering the average costs of providing that service. This allows the provider to increase its profit at the existing price or to charge a lower price for the service than competing providers that have fewer subscribers. Under Mozilla's interpretation, these benefits from a subscriber's use of a service would constitute a "fee" paid by that subscriber.

Because all telecommunications services are subject to direct network effects and, often, to economies of scale, Mozilla's proposal would transform the use of *any* telecommunications service into use "for a fee." Thus, Mozilla's interpretation leaves no telecommunications service that is not offered "for a fee." Put another way, Mozilla's suggestion renders the term "for a fee" meaningless.

But, as the Supreme Court has recognized, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."[19] Known as the

[17] See, e.g., Nuechterlein & Weiser (2013), pp. 3-8; van Schewick (2010a), p. 229.

[18] See, e.g., Nuechterlein & Weiser (2013), pp. 8-9.

[19] *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia J., plurality opinion). *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect, if possible, to every word Congress used."); *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

surplusage canon, this principle means that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used."[20]

Because Mozilla's proposal runs afoul of this basic rule, any FCC interpretation that adopted it would be unlikely to survive judicial scrutiny. Courts do not extend *Chevron* deference to agency interpretations that conflict with the clear meaning of a statute under "traditional tools of statutory construction."[21] Where, as here, an interpretation would violate the surplusage canon and "deprive a statutory provision of virtually all effect, a court should not affirm the agency's interpretation absent 'legislative history of exceptional clarity.'"[22]

In this case, the legislative history strongly suggests that Congress intended to give independent meaning to the terms "for a fee" and "directly to the public."

Congress replaced a single phrase, "on a common carrier basis," with two separate factors that, together, describe what it means to be a common carrier – the offer of telecommunications "for a fee" *and* "to the public." The change suggests that Congress meant the two factors to have independent meaning.

The current definition of "telecommunications service" was inserted into the Communications Act by the Telecommunications Act of 1996. The House's draft of the Telecommunications Act originally contained a different definition:

> ''(50) TELECOMMUNICATIONS SERVICE.—The term 'telecommunications service' means the offering, on a common carrier basis, of telecommunications facilities, or of telecommunications by

[20] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[21] Mozilla's proposal would encounter serious difficulty despite the deferential standard set out in *Chevron, U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Under *Chevron* "step one," "if a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9 (*emphasis added*). *See Independent Ins. Agents of America, Inc. v. Hawke*, 211 F.3d 638, 645 (D.C. Cir. 2000) (employing the canon of "avoiding surplusage" in tandem with the canon of "*exressio unius*" to find that a statute was not "ambiguous within the meaning of *Chevron*," at step one). Even under *Chevron* step two, an agency must point to "legislative history of exceptional clarity to induce [a court] to adopt an interpretation" that nullifies a statutory provision. *Am. Fed'n Gov't Employees, AFL-CIO, Local 2782 v. Fed. Labor Relations Auth.*, 702 F.2d 1183, 1187 (D.C. Cir. 1983) (Scalia J.). *See Lamb v. Thompson*, 265 F.3d 1038, 1052 n.16 (10th Cir. 2001) ("Even if we were to assume the statute is ambiguous, we would conclude in the second step of *Chevron* that the [agency's] interpretation of [the provision] cannot stand because it renders words in the statute 'mere surplusage.'" (citations omitted).

[22] *Am. Fed'n Gov't Employees, AFL-CIO, Council of Locals No. 214 v. Fed. Labor Relations Auth.*, 798 F.2d 1525, 1528 (D.C. Cir. 1986).

> means of such facilities. Such term does not include an information service.''[23]

The House report accompanying the draft bill explained that:

> "By defining 'telecommunications service' as those services and facilities offered on a 'common carrier' basis, the Committee recognizes the distinction between common carrier offerings that are provided indifferently to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services."[24]

Following a conference committee to resolve differences between the House and Senate versions of the Telecommunications Act, the final bill replaced the House's definition with the definition proposed by the Senate, and this definition became law.[25]

It "require[s] legislative history of exceptional clarity to induce [a court] to adopt an interpretation which, as described above, would deprive [a statutory provision] of virtually all effect."[26] The legislative history of the Telecommunications Act provides no basis – let alone an exceptionally clear basis – for concluding that Congress used the phrase "for a fee" carelessly or redundantly. As a result, Mozilla's suggested interpretation is unlikely to survive judicial review.

2. Mozilla's interpretation that the use of a service is a "fee" also contradicts existing precedent.

Mozilla suggests that when edge-providers *use* an ISP's service, edge-providers are paying a "fee" to the ISP because their use provides value to the ISP. In contrast to alternatives it deems legally or politically unworkable, Mozilla argues that this view "is a narrow and reasonable interpretation of existing law and precedent."[27]

But the FCC has implicitly rejected this interpretation of the law in several analogous cases. Even when the use of a service added value to the provider, the FCC decided that the service did not qualify as a telecommunications service because it was offered without monetary exchange, and therefore not "for a fee."

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[23] United States House of Representatives (1995), pp. 46-47.

[24] United States House of Representatives (1995), part I, p. 126.

[25] United States Senate (1995), Section 8(b)(mm); United States House of Representatives (1996), pp. 114-116.

[26] *Am. Fed'n Gov't Employees, AFL-CIO, Local 2782 v. Fed. Labor Relations Auth.*, 702 F.2d 1183, 1187 (D.C. Cir. 1983) (Scalia J.).

[27] Mozilla (2014b), p. 4.

a. Pulver's Free World Dialup Service

Pulver's Free World Dialup (FWD) service was a free computer-to-computer Internet telephony service. The service allowed any FWD user to call any other FWD user over the Internet for free.[28] In a 2004 Declaratory Ruling, the FCC decided that FWD was not a "telecommunications service," because it was "free of charge to users and, in order to be a telecommunications service, the service provider must assess a fee for its service," citing the definition of telecommunications service in 47 U.S.C. 153(46).[29] In recent years, the FCC has relied on this portion of the order in a series of decisions in the access stimulation context, discussed below.[30]

Under Mozilla's analysis, the FCC would have to reach the opposite result. Like all telecommunications services, FWD's service is subject to direct network effects: By joining the service and getting an FWD number, each user increases the number of people that users of FWD's service can call via the service, making the service more valuable. Thus, under Mozilla's interpretation, users pay a "fee" even though FWD is offered free of charge, since their use of the service provides value to FWD. But the FCC's 2004 Declaratory Ruling found that the FWD's service was not offered "for a fee."[31]

b. Access Stimulation

Mozilla's interpretation – that any use of a service that adds value to the provider is use "for a fee" – also directly contradicts existing precedents in the access stimulation context.

In an access stimulation arrangement, a local exchange carrier in a rural area provides free service to entities like conference calling companies that attract a large volume of incoming long distance calls. This arrangement allows the rural local exchange carrier to earn large profits by charging above-cost access charges to the long distance providers that deliver these calls.[32,33]

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[28] For a more detailed description of the service, see Pulver.com (2003), pp. 2-4; Federal Communications Commission (2004), p.3-5, paras 4-7.

[29] Federal Communications Commission (2004), p. 7, para 10.

[30] See the discussion in the next subsection.

[31] Federal Communications Commission (2004), p. 7, para 10.

[32] On access stimulation, see, e.g., Federal Communications Commission (2011a), p. 212, para 656-657; Nuechterlein & Weiser (2013), pp. 259-260. For a specific example, see Federal Communications Commission (2009), pp. 5-9, paras 11-17, p. 10, para 21.

[33] Under the FCC's old access charge regime, long-distance carriers paid local exchange carriers a fee (called "access charge") for terminating long-distance calls to the local exchange carrier's customers. In rural areas, exchange carriers' access charges were often considerably above costs. In its 2011 Intercarrier

In a series of cases, long-distance carriers challenged this practice. Under the FCC's access charge regime, local exchange carriers could only charge long distance companies their tariffed, above-cost access charges for terminating incoming long-distance calls to the local exchange carrier's users if those users were customers of a "telecommunications service" as defined by the Act.[34]

Citing its decision in FWD, the FCC determined that because the conference calling companies were using local exchange carriers' services free of charge, the local exchange carriers were not offering their services to those companies "for a fee."[35] As a result, their services were by definition not "telecommunications services" and local exchange carriers couldn't charge long distance providers the normal tariffed, above-cost access charges for calls to those companies.

Mozilla's interpretation would have required the opposite result. A conference calling company's *use* of the local exchange carrier's service provided enormous value to that carrier by allowing it to charge long distance carriers above-cost access charges for terminating long-distance calls to the conference calling company.[36] Under Mozilla's interpretation, this value should be considered a fee. But in the context of access stimulation, just as in FWD, the FCC explicitly found that the service to conference calling companies was not offered "for a fee."

Compensation Reform Order, the FCC decided to abolish terminating access charges, subject to a transition period in which terminating access charges are gradually reduced until they reach zero. Federal Communications Commission (2011a), Parts X and XII; Nuechterlein & Weiser (2013), pp. 263-279.

[34] For a longer explanation, see Federal Communications Commission (2011b), pp. 4-6, paras 7-9.

[35] Federal Communications Commission (2011b), pp. 5-10, paras 9-10 and fn. 39. See also Federal Communications Commission (2011c), p. 4, para 7, pp. 5-6, para 9 and fn. 29.

[36] The FCC's Second Order on Consideration in Quest v. Farmers offers the clearest explanation of the value that conference calling companies' provided to the local exchange carrier by using the latter's service: "The evidence overwhelmingly demonstrates *that Farmers willingly incurred all of the expenses associated with providing the underlying services to the conference calling companies*, including the payment of a fee to these companies, *in exchange for these companies directing the "free service" they offered to the public to Farmers' exchange.*" (*emphasis added*), Federal Communications Commission (2009), p. 9, para 17. The arrangement "allowed the conference calling companies to reap benefits from a free service offered only to them, which thereby enabled Farmers to dramatically increase its access charge billing to Qwest." Federal Communications Commission (2009), p. 10, para 21. *See also* Federal Communications Commission (2011a), p. 212, ¶¶ 656-657 (describing the benefits of these arrangements to the local exchange carrier); Nuechterlein & Weiser (2013), p. 260 (calling access stimulation arrangements a "win-win-win" for the local exchange carrier, the free conference call service, and for that service's users.)

c. Universal Service

As discussed above, the legislative history of the Telecommunications Act strongly suggests that Congress intended the terms "for a fee" and "to the public" in the definition of "telecommunications service" to have independent meaning.[37] In the context of universal service, the FCC has given a distinct meaning and effect to each term.

In determining which entities should contribute to universal service, the FCC both distinguishes between services offered "to the public" and on a private contractual basis and, separately, between services offered "for a fee" and those offered "free of charge." Together, these distinctions determine (a) whether an entity has to contribute to universal service, and (b) based on which statutory authority. These distinctions operate independently of one another, creating four relevant categories. (See Table 1 below.)

Table 1: The FCC's Current Universal Service Regime

	"For a Fee"	**"Free of charge"**
"To the Public "	*Common carriage* Subject to §254(d) S.1 Required to contribute to Universal Service Fund	*To the public free-of-charge* Subject to §254(d) S.3 Not required to contribute to Universal Service Fund
"On a private contractual basis"	*Private carriage* Subject to §254(d) S.3 Required to contribute to Universal Service Fund	*Private service free-of-charge* Subject to §254(d) S.3 Not required to contribute to Universal Service Fund

Required to contribute to Universal Service Fund
Not required to contribute to Universal Service Fund

As a matter of policy, the FCC decided that only entities that provide telecommunications "for a fee" are required to contribute to universal service. Thus, whether a service is provided "for a fee" or free of charge determines whether its provider has to contribute to universal service.[38] In other words, it does not matter whether a service is "private" or offered "to the public" – as long as it is offered "for a fee," it has to contribute to universal service. At the same time, even a service offered "to the public" does not have to contribute if its services are not offered "for a fee."

[37] *See The Surplusage Canon, supra.*

[38] Federal Communications Commission (1997), paras 795-796, 799.

The distinction between services offered "to the public" and "private" services determines which statutory provision applies. If the service is provided "for a fee" *and* "to the public," the provider of the service is required to contribute under Section 254(d) S.1 [39] which *requires* "every telecommunications carrier that provides telecommunications services" to contribute to universal service. [40] If the service is provided "for a fee", but on a private contractual basis, the provider is required to contribute under Section 254(d) S. 3 based on the FCC's exercise of its permissive contribution authority.[41]

Finally, services offered free of charge are always subject to Section 254(d) S. 3, whether they are offered "to the public" or on a private contractual basis, and could be required to contribute to universal service if it was in the public interest, but the FCC does not require them to contribute.[42]

Thus, the terms "for a fee" and "to the public" are analytically and operationally distinct. Mozilla's interpretation would make these distinctions meaningless. As explained above, any offering of telecommunications is subject to network effects and, often, economies of scale. As a result, any additional user of a telecommunications service (whether that service is offered "to the public" or on a private contractual basis) confers value on the provider of that service sufficient to, under Mozilla's interpretation, meet the "for a fee" requirement.

In eliding this distinction, Mozilla's proposal would undermine a critical component of the FCC's universal service contribution regime. Under the current regime, any entity which offers telecommunications "for a fee" is required to contribute to universal service. If every service offering telecommunications is "for a fee," then all services offering telecommunications (whether they are offered "to the public" or as a "private" service)

[39] The text of section 254(d) S.1 applies to "telecommunications services." Based on the "statutory language and legislative history" of the definition of telecommunications service, the FCC concluded that only providers offering telecommunications "for a fee *and* to the public" – i.e. common carriage – could be required to contribute to universal service under the mandatory contribution authority. If one of these factors is missing – i.e. if the service is provided free of charge or on a private contractual basis, or both – its provider can only be reached under the FCC's permissive contribution authority under §254(d) S. 3 and is only required to contribute to universal service if the FCC explicitly determines that doing so would be in the public interest. Federal Communications Commission (1997), paras 793-794.

[40] 47 U.S.C. 254(d) S. 1: Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.

[41] Section 254(d) S.3, *permits* the FCC to require "any other provider of interstate telecommunications" to contribute to universal service, if the public interest requires it. Federal Communications Commission (1997), paras 793-796.

[42] See the discussion in footnote 39 above.

would be required to contribute to universal service, including those that, under the FCC's current interpretation of the term "for a fee" were understood to be "free-of-charge." (See Table 2.)

Table 2: Impact of Mozilla's Interpretation on Universal Service

Category of Service: Offering of Telecommunications	**Current Universal Service Regime**	**Universal Service Regime under Mozilla's Interpretation**
To the public, for a fee	Subject to §254(d) S.1; required to contribute	Subject to §254(d) S.1; required to contribute
Private, for a fee	Subject to §254(d) S.3; required to contribute based on exercise of permissive contribution authority	Subject to §254(d) S.3; required to contribute based on exercise of permissive contribution authority
To the public, free of charge (under existing interpretation)	Subject to §254(d) S.3; not required to contribute	Subject to §254(d) S.1; required to contribute
Private, free of charge (under existing interpretation)	Subject to §254(d) S.3; not required to contribute	Subject to §254(d) S.3; required to contribute based on exercise of permissive contribution authority

Required to contribute to Universal Service Fund

B. Mozilla's Proposal Would Not Allow the FCC to Ban Access Fees (Including Paid Prioritization and Zero-Rating)

An FCC effort to ban access fees under Mozilla's proposal is unlikely to succeed because Mozilla's interpretation is "in conflict with the plain meaning" of the Communications Act.[43] The best the FCC could do under that proposal is ensuring that these fees are just, reasonable and not unreasonably discriminatory. This alone is reason to reject Mozilla's proposal. As the overwhelming majority of commenters have made clear, it is imperative that the FCC prohibit ISPs from charging edge providers, whether it's for access to ISP subscribers or for preferential treatment on ISP access networks.[44] Based on historical

[43] *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

[44] Access fees are fees that a broadband Internet access provider imposes on application and content providers who are not its Internet service customers. Access fees come in two variants:

In the first variant, provider of broadband Internet access charges application or content providers for the right to access the network provider's Internet service customers. Applications whose providers do not pay the access fee cannot be used on the network provider's access network.

and policy arguments, the FCC's 2010 Open Internet Order clearly banned access fees under the no-blocking rule and "ominously" suggested that access fees for priority would be deemed unreasonable.[45]

Even under the generally deferential structure of *Chevron*, agency interpretations must fall "within the bounds of reasonable interpretation."[46] In this, "reasonable statutory interpretation must account for both 'the specific context . . . in which language is used' and 'the broader context of the statute as a whole.'"[47]

Under the plain text of the statute, a telecommunications service must be offered "for a fee," or else it is not a telecommunications service. Therefore, a rule that would prevent an ISP from collecting *any fee* in connection with a service would, by definition, prevent that service from being classified as a telecommunications service.

Thus, given that the classification of a service as a telecommunications services requires the charging of a fee, it is plainly unreasonable for the FCC to simultaneously: (1) classify a service because it charges fees and (2) ban those fees based on the statutory authority gained as a result of that classification.

If the mere *use* of a service is "a fee," as Mozilla argues, then an ISP could be prevented from charging access fees while still meeting the statutory definition of a telecommunications service – one type of fee would be banned (access fees), but another type of fee would remain (use).

But if, as we argue above, Mozilla is wrong and use is not "a fee" under the plain terms of the statute, Mozilla's proposal can no longer be employed to ban access fees: If the use of a service is not a fee, then any outright ban on fees collected from edge providers

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In the second variant, sometimes called "paid prioritization" or "third-party-paid prioritization," a provider of broadband Internet access charges application providers for prioritized or otherwise enhanced access to the network provider's Internet service customers. For example, if an application provider has paid such an access fee, the application's data packets may receive a better type of service (e.g., priority, or a guaranteed amount of bandwidth) on the ISP's access network or may not count against a user's monthly bandwidth cap ("zero-rating").

For an analysis of the policy rationale behind the calls for banning access fees, see, e.g., van Schewick (2010b); van Schewick (2014b), Section "3. Allowing access fees is bad policy"; van Schewick (2014a), Section "Tough Lessons From Mobile and Music."

[45] On the treatment of access fees in the FCC's Open Internet Order, see Federal Communications Commission (2010), paras 24-34, 67, 76; van Schewick (2014b), Section 1. "Allowing pay-to-play access fees is a significant reversal from earlier policies."

[46] City of Arlington, Tex. V. F.C.C., 133 S. Ct. 1863, 1868 (2013).

[47] *Util. Air Regulatory Grp. v. EPA.*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

would necessarily threaten that service's status as a telecommunications service, thereby undermining the very authority invoked to regulate it in the first place.

In other words, if edge providers were paying broadband Internet access providers so that their content would load faster or would not count against users' monthly bandwidth caps, these payments would constitute a "fee" in exchange for that service. But if the use of the service does not constitute a "fee," then these kinds of payments are the only way to meet the "for a fee" requirement needed to classify the service as a telecommunications service, and banning those fees would remove the very basis for classifying the service as a telecommunications service in the first place – a result plainly incongruous with the terms of the statute.

While it would not be able to ban access fees, the FCC could, however – if the other elements of the definition of a telecommunications service were met – use its authority under Sections 201 and 202 of the Communications Act to ensure that the access fees are just, reasonable and not unreasonably discriminatory. This outcome conflicts with the FCC's 2010 Open Internet Order, President Obama's recent statements, and the overwhelming majority of the commentary from those supporting the open Internet.

In sum, the FCC's ability to ban access fees under Mozilla's proposal turns on whether Mozilla's belief that the use of a service can constitute a fee will be able to withstand judicial scrutiny.[48]

If, as we argue above, that interpretation is foreclosed, it would be unreasonable for the FCC under the plain terms of the statute to first classify the service provided to an edge provider as a telecommunications service based on it charging a fee, only to then use the newly gained authority under Title II to ban such fees. For this reason, an FCC effort to ban access fees under Mozilla's proposal is unlikely to succeed.

[48] It also turns on whether the other elements of the definition of a telecommunications service are met, a question that is outside the scope of this paper.

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