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

In the Matter of	)	
	)	
The 2002 Biennial Regulatory Review	)	
	)	GC Docket No. 02-390
	)	
	)	
	)	
	)	
	)	

REPORT

Adopted: December 31, 2002 **Released: March 14, 2003**

By the Commission: Chairman Powell and Commissioner Abernathy issuing a joint statement; Commissioners Copps and Adelstein issuing a joint statement; Commissioner Martin approving in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. Section 11 of the Communications Act of 1934, as amended (Communications Act), requires the Commission: (1) to review biennially its regulations that apply to the operations or activities of telecommunications service providers; and (2) to determine whether those regulations are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[1] Following such review, the Commission is required to modify or repeal any such regulations that are no longer necessary in the public interest.[2]

2. Consistent with our Section 11 regulatory review obligations, we issue this Report and concurrently release the 2002 Biennial Regulatory Review Staff Reports (Staff Reports). The Staff Reports review the rules issued under the Communications Act that apply to the operations or activities of any provider of telecommunications services to determine whether any such regulations are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[3] As appropriate, based on these Staff Reports, we will issue notices of proposed rule making to repeal or modify regulations that are no longer in the public interest.

3. The process of reviewing our rules subject to Section 11 is, in essence, ever-continuing. As the Staff Reports indicate, the number of rules subject to this review is substantial. Thus, to faithfully fulfill our obligation under the statute, our staff engages in an ongoing review, independently considering whether the relevant regulations are no longer necessary in the public interest as the result of meaningful

[1] 47 U.S.C. § 161(a).

[2] 47 U.S.C. § 161(b).

[3] 47 U.S.C. § 161(a).

economic competition.[4] To supplement this effort, the Commission issued Public Notices in September 2002 seeking suggestions from the public as to which rules should be modified or repealed as part of the 2002 Biennial Review.[5] Comments were due on October 18, 2002 with reply comments due on November 4, 2002. We received 84 comments and 26 reply comments. In response to these comments, this Report addresses several overarching legal issues regarding the biennial review process. Concurrently, the Staff Reports analyzing the rules subject to the biennial review requirement reflect the input from the comments regarding particular rules.

II. LEGAL ISSUES

4. Commenters have raised a number of broad legal concerns about our review under Section 11. As discussed below, some of these matters have been addressed in previous biennial review proceedings and we will not dwell on them. We will, however, take this opportunity to consider the congressional purpose behind Section 11; what it means for a rule to be "necessary in the public interest;" and to what extent the development of "meaningful economic competition" should define the scope of the biennial review.

5. Initially, we note that Congress added Section 11 to the Communications Act as part of the reforms in the Telecommunications Act of 1996 (1996 Act).[6] As the courts have recognized on many occasions, the overarching goal of the reforms in the 1996 Act was to promote competition in the communications industry.[7] Thus, it is not surprising that Congress also included provisions to ensure that the agency would monitor the effect of that competition as it rolled out and make appropriate adjustments to its rules to modify or eliminate those rules that were "no longer necessary in the public interest as the result of meaningful economic competition." It is against this backdrop that we consider the scope of our Section 11 review, the standard of review applicable to our consideration, and the timing of rule changes relevant to these proceedings.

---

[4] All decisions not expressly required to be made at the Commission level may be made by staff under 47 U.S.C. § 155(c)(1), subject to the filing of applications for Commission review. *See* 47 U.S.C. § 155(c)(4) and 47 C.F.R. § 1.115.

[5] *See The Commission Seeks Public Comment in the 2002 Biennial Review of Telecommunications Regulations Within the Purview of the Consumer & Governmental Affairs Bureau*, Public Notice, CG Docket No. 02-311 (rel. Sept. 26, 2002); *International Bureau Seeks Comment in 2002 Biennial Review of Telecommunications Regulations*, Public Notice, IB Docket No. 02-309 (rel. Sept. 26, 2002); *The Commission Seeks Public Comment in the 2002 Biennial Review of Telecommunications Regulations Within the Purview of the Office of Engineering and Technology*, Public Notice, ET Docket No. 02-312 (rel. Sept. 26, 2002); *The Commission Seeks Public Comment in the 2002 Biennial Review of Telecommunications Regulations Within the Purview of the Wireless Telecommunications Bureau*, Public Notice, WT Docket No. 02-310 (rel. Sept. 26, 2002); and *The Commission Seeks Public Comment in 2002 Biennial Review of Telecommunications Regulations Within the Purview of the Wireline Competition Bureau*, Public Notice, WC Docket No. 02-313 (rel. Sept. 26, 2002) (collectively "*2002 Biennial Review Public Notices*"). We incorporate the comments filed in response to those notices in this docket.

[6] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[7] *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (*Iowa Utilities Board*) (the 1996 Act "fundamentally restructures local telephone markets" to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) ("The Telecommunications Act was an unusually important legislative enactment . . . designed to promote competition"). *See also United States Telecom Association v. FCC*, 290 F.3d 415, 417 (D.C. Cir. 2002); *New York & Public Service Comm'n of New York v. FCC*, 267 F.3d 91, 96 (2nd Cir. 2001).

A. Scope of Section 11 Review

6. Several commenters raised questions regarding the scope of our Section 11 review.[8] To determine the proper scope of review, we begin with the language of the statute. Section 11 imposes two distinct obligations regarding periodic review of our rules. First, Sections 11(a)(1) and (a)(2) provide:

> (a) BIENNIAL REVIEW OF REGULATIONS.—In every even-numbered year (beginning with 1998), the Commission—
>
> (1) shall review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service;
>
> (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

Section 11(b) provides:

> (b) EFFECT OF DETERMINATION.—The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

7. We believe that this language is clear regarding the scope of our review. Quite simply, under the plain terms of Section 11(a)(1), two questions must be answered in the affirmative for a rule to come within the scope of the review. First, does the rule "apply to the operations or activities of any provider of telecommunications service"? Second, was the rule promulgated under the Communications Act? If a rule fails either criterion, it falls outside the scope of Section 11.[9] Otherwise, the rule is subject to the statutory review.

8. We recognize that there may be some confusion regarding our prior biennial review orders and the scope of review under Section 11. In previous biennial reviews, the Commission affirmatively and explicitly extended its review beyond the strict requirements of Section 11. For example, in the 2000 Biennial Review, "each Bureau and Office . . . endeavor[ed] to review all of [the Commission's] rules—not merely the rules that [were] specifically implicated by sections 11 and 202(h) and consider whether a repeal or modification of any rule might be appropriate."[10] The *2002 Biennial Review Public Notices* also signaled the expectation that the 2002 Biennial Review would similarly go beyond the statutory requirements.[11] We have reconsidered this approach.

---

[8] *See, e.g.,* Biennial Review 2002 Comments of Verizon, WC Docket No. 02-313 (Verizon Comments), at 7 (review required of all regulations issued under the Act); Biennial Review 2002 Reply Comments of Verizon, WC Docket No. 02-313 (Verizon Reply Comments), at 3 (new rules should be considered in other dockets); 2002 Biennial Review Comments of the Wyoming Public Service Commission, WC Docket 02-313 (Wyoming PSC Comments), at 2 (proper focus of inquiry is on competition); Reply Comments of BellSouth, WC Docket No. 02-313 (BellSouth Reply Comments), at 2 (Section 11 review includes rules in pending proceedings).

[9] We therefore disagree with Verizon that Section 11 mandates Commission review of every rule or regulation issued under the Communications Act, without limitation. *See* Verizon Reply Comments at 1.

[10] *In the Matter of the 2000 Biennial Regulatory Review*, CC Docket No. 00-175, Report, 16 FCC Rcd 1207, 1209 ¶ 9 (2001) (*2000 Biennial Review*).

[11] *See 2002 Biennial Review Public Notices*, *supra* note 5 (encouraging parties to comment on or recommend changes to rules that might enable the Commission to operate more efficiently and effectively, and noting that the Commission expects to continue to go beyond the statutory requirements).

9. We do not disagree with the underlying goal of continually reassessing and updating all our rules. The Commission has broad discretion to review the continued need for any rule in the absence of a congressional mandate such as Section 11. We can, should, and will exercise that power. Section 11, however, imposes particular requirements on the review of rules within its scope. For this reason, we believe it better to focus the present biennial review reports only on those rules that the statute specifically addresses. This will reduce confusion and allow us to better fulfill our statutory obligation. Other regulatory changes proposed by commenters in this proceeding will be considered outside the biennial review reporting context.

10. In their comments, Covad and Time Warner Telecom contend that many of the issues raised by commenters are already pending in other dockets and thus are inappropriate for inclusion in the biennial review.[12] While we recognize the practical nature of this suggestion, we conclude as a legal matter that the statute does not contemplate any such exemption. As noted above, if a rule applies to the operations or activities of telecommunications service providers and was promulgated under the Communications Act, it is within the scope of our Section 11 review. This is true regardless of whether it is also the subject of a pending rulemaking proceeding. Even in that case, the Commission would still need to make the statutorily required *determination* about the continued need for the particular rule. This does not mean, however, that the Commission must commence multiple proceedings. As a practical matter, where the Commission concludes that a rule in its current form is no longer necessary in the public interest, the pending rulemaking, depending on its scope, could serve as the appropriate vehicle to consider modification or repeal of that rule under Section 11(b).[13]

11. Other commenters have urged the Commission to consider generally and specifically whether any rules or regulations should be added or expanded to best address the needs of state and federal regulators, investors, and customers.[14] As noted above, however, in order to reduce confusion and improve administrative efficiency, we wish to confine this biennial Section 11 effort to the areas defined by the statute. Adding rules, as opposed to modifying or eliminating existing rules, is clearly beyond the immediate task. To the extent that commenters seek to add rules and/or seek review of rules that are beyond the scope of Section 11, we will consider those requests in appropriate context, such as petitions for rulemaking. We note that while proposing new rules is outside the scope of the biennial review, the Commission may, pursuant to its general rulemaking authority, decide to combine a biennial review rulemaking with related rulemaking proposals. In addition, as the Commission concluded in the 2000 Biennial Review, when it reviews its rules and considers competitive developments, it may consider

[12] Reply Comments of Covad Communications, WC Docket No. 02-313 (Covad Reply Comments), at 2 (arguing that it would be a mistake for the Commission to address issues pending in other dockets separately and redundantly in the biennial review); Reply Comments of Time Warner Telecom, WC Docket No. 02-313, at 1 (claiming that there is no need to address the regulations applicable to broadband service provided by ILECs and prohibitions under Section 272 in the biennial review proceeding, as they are being addressed comprehensively in separate Commission proceedings); *see also* AT&T Reply Comments at 1.

[13] Where appropriate, Further Notices could be issued to expand the scope of such pending rulemakings.

[14] For example, the Wyoming PSC argues that if the Commission continues to conduct a broad inquiry, beyond the statutory requirements in Section 11, it should invite comment on whether any rules should be added or expanded to best address regulators' needs. Wyoming PSC Comments at 2. *See also* Reply Comments of the Washington Utilities and Transportation Commission, WC Docket No. 02-313, at 2. Other commenters oppose these suggestions to add new regulations within the biennial review context, as antithetical to the purpose of Section 11. *See, e.g.,* Sprint Reply Comments, WC Docket No. 02-313 at 1; Reply Comments of the Competitive Universal Service Coalition, WC Docket No. 02-313, at 2; Reply Comments of the United States Telecom Association, WC Docket No. 02-313, WT Docket No. 02-310 (USTA Reply Comments), at 2.

whether new or different regulations are more appropriate.[15]

B. Standard of Review

12. We now turn to address several issues regarding the appropriate standard of review under Section 11. Specifically, commenters in this proceeding proffer differing interpretations of the statutory language that requires the Commission to determine whether its rules are "no longer necessary in the public interest as the result of meaningful economic competition."[16] The Commission has not previously addressed the proper interpretation of this statutory language; we take this opportunity to do so.

13. As explained below, we find, contrary to the suggestions of some of the commenters, no evidence that Congress intended to impose a new or higher standard for what is "necessary in the public interest" for purposes of Section 11 review. We look to how this term has been used in other portions of the Act and how we have applied it. We conclude that Congress did not intend that we apply a different standard from that required for the Commission to adopt a rule in the first instance. To conclude otherwise, we would have to assume that without directly saying it, Congress intended to give special meaning to the common phrase "necessary in the public interest." We cannot make that analytical leap. We further conclude that Section 11(a)(2) creates a causal connection between the existence of "meaningful economic competition between providers of [telecommunications] service" and the finding that a regulation is "no longer necessary in the public interest."

1. Necessary in the public interest

14. Several parties suggest that Section 11 obligates the Commission to eliminate immediately any rule that it cannot determine is "essential" or "indispensable" to promoting the public interest.[17] Initially, to the extent that these parties seek to rely on the D.C. Circuit's decision in *Fox Television Stations v. FCC*,[18] interpreting Section 202(h) of the 1996 Act, we note that reliance is misplaced. On rehearing, the Court deleted language in its initial decision,[19] which had indicated that the Commission applied "too low a standard" in conducting its biennial review of media ownership regulations.[20] Thus, the Court did not foreclose or circumscribe our consideration of this issue.[21]

---

[15] *2000 Biennial Review*, 16 FCC Rcd at 1213 ¶ 19.

[16] *See* 47 U.S.C. § 161(a)(2).

[17] *See* Verizon Comments at 3, CTIA Comments at 3; BellSouth Reply Comments, at 1; Sprint Reply Comments, WT Docket No. 02-310, at 2; *but see* AT&T Reply Comments at 6-7. AT&T vehemently disagrees with this reading of Section 11. AT&T contends that Section 11 only requires the Commission to review its rules to determine whether they remain "consistent with" or "useful in" the public interest. *Id.* To the extent Verizon argues that Section 11 contemplates automatic repeal, we address that interpretation in Part II.C *infra*.

[18] 280 F.3d 1027 (D.C. Cir. 2002); *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002) (*Fox*).

[19] 280 F.3d at 1050 (holding that under the correct standard set forth in Section 202(h), "a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest").

[20] 293 F.3d at 540 (agreeing with the Commission that a discussion of the meaning of "necessary in the public interest" was not essential to its decision to remand the national television station ownership rule and to vacate the cable and broadcast cross-ownership rule). We note that the language of Section 202(h) is not identical to Section 11. Section 202(h) states:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as

(continued....)

15. Given that the meaning of "necessary in the public interest" has not previously been addressed by the Commission and was left open by *Fox*, we approach this issue as one of statutory construction and thus begin with the language of Section 11.[22] In interpreting the phrase "necessary in the public interest," we recognize that the word "necessary" has an everyday meaning that implies indispensable, but as a common statutory term, it has been interpreted differently depending on the statutory context. For example, the term has been read in some contexts in a more restrictive sense to mean "indispensable" or "essential."[23] The United States Supreme Court has also interpreted the terms "necessary" or "required" to mean "useful," "convenient," or "appropriate"[24] Thus, we cannot conclude

---

(...continued from previous page)

> the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

We recognize that Section 202(h), unlike Section 11, uses the term "necessary" only in its "review" requirement and not in its "repeal or modify" requirement. We do not think that difference is significant given what we believe "necessary in the public interest" means. However, the question of the appropriate standard under Section 202(h) of the Act is squarely presented in the Commission's biennial review of its ownership rules. *See In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18510-11 ¶¶ 16-18 (2002) (seeking comment on the statutory language of Section 202(h) of the 1996 Act and the D.C. Circuit's interpretations of that language in *Fox* and *Sinclair Broadcast Group v. FCC*). We therefore will address the standard of review contemplated by Section 202(h) in that context.

[21] 293 F.3d at 540 ("[W]e accept the Commission's alternative invitation to . . . leave this question open."). The dissent suggests that the reasoning of the *Fox* panel in its original decision, which was excised by the Court on rehearing, is ultimately persuasive. Dissent, at 4-5 (arguing that in its original decision, the *Fox* panel held that the Commission applied "too lenient a standard" in conducting its biennial review of media ownership regulations and that "a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."). As we argued in our petition for rehearing, this holding is not compelled by the statute or its legislative history. Moreover, it would require the Commission to conclude that Congress intended either to modify fundamentally the statutory public interest standard (without any legislative history to that effect) or to create a dysfunctional scheme in which the agency could adopt rules upon finding them to serve the public interest, but could retain them for only two years unless they can be shown to meet a higher standard of being "essential or indispensable." *See* Petition for Rehearing or Rehearing *En Banc*, at 5, 10; *see also* discussion *infra* at ¶ 18.

[22] *See CBS, Inc. v. FCC*, 453 U.S. 367, 377 (1981), *quoting Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) ("starting point in every case involving statutory construction is the 'language employed by Congress'"); *see also Northwest Airlines, Inc. v. FAA*, 14 F.3d 64, 69 (D.C. Cir. 1994) (same).

[23] *See, e.g., Kirschbaum v. Walling*, 316 U.S. 517, 525-26 (1942) (in determining the scope of the Fair Labor Standards Act, term "necessary" would encompass employees whose duties were "indispensable" and "essential").

[24] *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992) (Interstate Commerce Commission reasonably interpreted the term "required" in the condemnation provisions of a statute as meaning "useful or appropriate" rather than "indispensable" where the former interpretation was consistent with the statute as a whole); *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 377-78 (1946) (state legislation "invalid if it unduly burdens commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplishing a permitted purpose"); *Armour & Co. v. Wantouk*, 323 U.S. 126, 129-30 (1944) (term "necessary" in the Fair Labor Standards Act, in context, means reasonably necessary to production, and not "indispensable," "essential," or "vital"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (term "necessary" in the "necessary and proper" clause of the U.S. Constitution means "convenient, or useful," and does not limit congressional power to the "most direct and simple" means available; noting that "to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entire unattainable."). *See also Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (term "necessary" in the National Bank Act means "convenient" or "useful"); BLACK'S LAW DICTIONARY 1029 (6th ed. 1990) (The word necessary "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical (continued....)

as some commenters would have us do, that there is a simple "plain meaning" for this statutory phrase.[25] It would be inappropriate for us to consider whether the term "necessary" should be read in a more or less restrictive sense in the abstract. Rather, consistent with judicial precedent, the term is best construed in its statutory context.[26]

16. Here, the legislative history of the 1996 Act and Section 11 provide persuasive statutory context. The legislative history of Section 11 indicates that Congress sought to create an ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace. The preamble to the 1996 Act explicitly provides for a national policy framework that is designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans. The 1996 Act provides for the use of procompetitive and deregulatory policies, in addition to universal service mechanisms, to create this national policy framework.[27]

17. In addition, the Conference Report adopting Section 11 states, in pertinent part:

> New subsection (a) of section 11 requires the Commission, beginning in 1998 and in every even numbered year thereafter, to review all of its regulations that apply to the operations and activities of providers of telecommunications services and *determine whether any of these regulations are no longer in the public interest because competition between providers renders the regulation no longer meaningful*. New subsection (b) of section 11 requires the Commission to eliminate the regulations that it determines are no longer in the public interest.[28]

In explaining the statutory scheme, the conferees do not utilize language that suggests absolute necessity

---

(...continued from previous page)
necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.").

[25] *See, e.g.,* Verizon Comments at 3–4; Sprint Reply Comments, WT Docket No. 02-310, at 2. We note further that other provisions of the Communications Act contain similar language using the terms "necessary," "required," and "necessity." But those provisions have been construed to require the Commission to demonstrate that the rules it adopts advance legitimate regulatory objectives—not that they are "necessary" in the sense of indispensable. *E.g.,* 47 U.S.C. § 154(i) (FCC "may . . . make such rules and regulations, . . . not inconsistent with this Act, as may be necessary in the execution of its functions."); 47 U.S.C. § 303(f), 303(r) (the Commission "as public convenience, interest, or necessity requires," shall adopt rules "necessary to prevent interference between stations and to carry out the provisions of this Act"). *See, e.g., FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978) (FCC authority under Sections 154(i) and 303(r) to adopt regulations "necessary in the execution of its functions" and "necessary to carry out the provisions of this Act" only requires that Commission regulations be based on consideration of permissible factors and be otherwise reasonable).

[26] *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (statute must be read as a whole, since the meaning of statutory language, plain or not, depends on context).

[27] Preamble to Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). For example, Section 271 of the 1996 Act—which requires incumbent LECs to comply with a competitive checklist before entering the long distance market in their regions—signals Congress's intent for deregulation to follow meaningful competition. *See* 47 U.S.C. § 271(c)-(d). Similarly, the legislative history of Section 653 notes "the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced." H. R. Conf. Rep. No. 104-458, at 178 (1996).

[28] H. R. Conf. Rep. No. 104-458, at 185 (1996) (emphasis added).

or indispensability. In fact, the Conference Report urges the Commission to focus on whether "regulations are *no longer in the public interest* because competition between providers renders the regulation *no longer meaningful*" and to repeal or modify rules that are "no longer in the public interest."[29] The use of the phrases "no longer in the public interest" and "no longer meaningful" in the legislative history reasonably suggests that the same public interest standard applies both under Section 11 and when the Commission initially adopts a rule.[30]

18. Moreover, construing "necessary in the public interest" in Section 11 to mean more than the same term when used in Section 201(b) of the Communications Act which grants the Commission general rulemaking authority, for example,[31] would unreasonably hold the Commission to a different and higher standard in deciding whether to retain an existing rule in a biennial review proceeding than in deciding whether to adopt a rule in the first place.[32] Were the Commission to adopt this interpretation of

[29] *Id.*

[30] While the dissent argues that a higher standard of review—indispensable, essential, or absolutely required—is most consistent with the statute's language, this interpretation is inconsistent with Congress's inclusion of the words "no longer" in the text of Section 11 and in the legislative history. The mandate of Section 11, that the Commission determine whether a covered regulation is "*no longer* necessary in the public interest," presupposes that each such regulation was once "necessary in the public interest." Contrary to the dissent's interpretation, our grant of rulemaking authority under the Communications Act does not require the Commission to promulgate rules pursuant to an indispensability standard and we have not done so. *See supra* note 25 (discussing the Commission's rulemaking authority under Sections 201(b), 303(f), 303(r) and 154(i) of the Communications Act and noting that under these grants of rulemaking authority the Commission need not establish that its rules are indispensable). As such, we see no evidence that Congress intended to create a higher standard of review. Rather, we believe that Congress meant what it said, that those regulations rendered *no longer* necessary as the result of competition should be modified or eliminated.

[31] 47 U.S.C. § 201(b). Section 201(b) is a 1938 amendment to the Communications Act of 1934 which establishes the Commission's basic rulemaking authority over services and charges of communications common carriers, and provides that the agency "may prescribe such rules and regulations as may be *necessary in the public interest* to carry out the provisions of this chapter." Our interpretation of the Section 11 standard is consistent with Supreme Court precedent interpreting Section 201(b). In *Iowa Utilities Board*, the Supreme Court read the language of Section 201(b) as a "general grant of rulemaking authority," that extended to the implementation of the local competition provisions of the 1996 Act. 525 U.S. at 378 (noting that it is implausible to assert that the 1996 Congress was unaware of the general grant of rulemaking authority contained within the Communications Act); *New York v. FCC*, 267 F.3d at 100-01. In construing Section 11, *Iowa Utilities Board* is notable not only for what it says, but also what it omits. The question at issue was the scope of the Commission's rulemaking authority—*i.e.,* whether primary authority to implement the local competition provisions of the 1996 Act belonged to the States rather than to the Commission. *Iowa Utilities Bd.*, 525 U.S. at 374. In rejecting this argument, the Supreme Court characterizes the language of Section 201(b), which includes the phrase "necessary in the public interest," not as a limitation on the FCC's authority, but a confirmation of it. *Id.* at 378 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act'").

[32] The dissent focuses on the word "may" in Section 201(b) to argue that the standard for adopting a rule is more lenient than the standard for retaining it under Section 11. Dissent, at 2, 6. This approach is analytically flawed. First, it ignores the fact that the Commission in either role and under either provision is making predictive judgments as to the "necess[ity]" for a particular rule. Thus, in adopting a rule under Section 201(b) the Commission is making a predictive judgment that the rule is necessary "to carry out the provisions of the Act." In the biennial review context, the Commission makes the same kind of predictive judgment: whether, in the light of the current competitive environment, the rule continues to be necessary to achieve the stated aims. In neither case is the Commission held to certain proof: It would be impossible in all but the most obvious cases to find and assert with absolute certainty that a rule is no longer necessary to achieve its ends.

Second, the dissent's focus on the word "may" in Section 201(b) still does not explain the crucial language in Section 11 that requires the Commission to determine whether a rule "is *no longer* necessary in the public interest." Dissent, at 6 n.14. While in the Section 11 context, the Commission has had some experience with the (continued....)

Section 11, it could lawfully adopt a rule determined to further the public interest by, for example, fostering diversity or competition, but it would have to repeal the rule two years later in the biennial review process unless it could satisfy the higher standard of showing that the rule was "necessary," in the sense of vital or indispensable, to fostering diversity or competition. It could thereafter, presumably, adopt the rule once again if it determined that doing so would serve the public interest—but only for two more years until the next biennial review. There is no suggestion in the text or legislative history of Section 11 that Congress intended this disjunction between the standard for adopting rules and the standard for retaining rules in the biennial review context. [33]

19. CTIA argues that given the deregulatory goals of the 1996 Act, the Supreme Court and D.C. Circuit opinions in *Iowa Utilities Board* and *GTE Service Corp. v. FCC* establish that courts now interpret the term "necessary" as "essential."[34] We disagree. These cases simply demonstrate that terms such as "necessary" and "required" must be read in their statutory context. Both of these decisions stressed that the Commission's interpretation of the terms at issue was unreasonable in the context of the particular statutory provision. In *Iowa Utilities Board*, [35] the Supreme Court held that the Commission's interpretation of the term "necessary" as used in Section 251 of the 1996 Act was overbroad.[36] Section 251(d)(2) directs the Commission to consider whether access to "proprietary" network elements is "necessary." The Court rejected the Commission's interpretation of "necessary" in this context because the Commission failed to consider whether a proprietary network element was available from sources other than the incumbent, and in doing so departed from the ordinary meaning of "necessary."[37] The Court held that the Commission ignored the ordinary meaning of "impair" in determining that any

(...continued from previous page)
rule and may have a more enlightened basis for evaluating it, the judgment essentially remains a predictive one—whether, in the light of new competition, the rule "no longer" is necessary in the public interest. If Congress had intended the Commission to apply a different standard in evaluating rules under Section 11 than in adopting them, presumably it would have used two clearly distinct standards as opposed to the same standard with different verbs—or at least provided legislative history making clear that the identical words in Sections 201(b) and 11 mean different things. There is simply nothing in the legislative history to suggest a meaningful distinction between Section 201(b)'s use of the language "may be necessary" and Section 11's use of the language "is no longer necessary" because the fundamental standard, "necessary in the public interest" remains the same. The dissent's inference to the contrary cannot bear its analytical weight.

[33] Indeed such a construction would effectively render Section 11 an absurdity, a result contrary to established principles of statutory construction. *See, e.g., Green v. Bock Laundry Mach. Co.,* 490 U.S. 504 (1989). Other provisions of the Communications Act also employ the phrase "necessary in the public interest." *See* 47 U.S.C. § 159(b)(1)(A) (regulatory fees based on "factors that the Commission determines are necessary in the public interest"); 47 U.S.C. § 215(a) (FCC report to Congress on whether legislation should be enacted authorizing agency to adopt certain regulations governing certain transactions between common carriers "as it shall prescribe as necessary in the public interest"). However, the term "necessary in the public interest" has not been judicially interpreted in the context of these statutory provisions. The Supreme Court has recognized that Congress granted the Commission broad discretion in determining how to effectuate the public interest goals of the Act so long as its determinations were based on consideration of permissible factors and [are] otherwise reasonable. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

[34] Petition for Rulemaking of the Cellular Telecommunications & Internet Association, July 25, 2002 (CTIA Rulemaking Petition) at 3; *see also* Sprint Reply Comments, WT Docket No. 02-310, at 2.

[35] 525 U.S. 366.

[36] 47 U.S.C. § 251; 525 U.S. at 387-89.

[37] The Court likewise held that the Commission improperly construed the "impair" standard for network elements, which considers whether an incumbent LEC's failure to provide access to a network element would "impair" the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. 525 U.S. at 388-90.

increase in cost or decrease in quality caused by the incumbent's denial of a network element was sufficient to constitute impairment.[38] In construing 47 U.S.C. § 251(c)(6) in *GTE Service Corp. v. FCC*,[39] the Court found the Commission's interpretation of the statute there, which included the term necessary "overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)."[40] The Court found particularly relevant that a "broader construction of 'necessary' under § 251(c)(6) might result in an *unnecessary* taking of private property."[41] Plainly, these contexts are very different from the more generic use of the term in Section 11.

20. In addition, the D.C. Circuit's most recent opinion reviewing Commission decisions under the "necessary in the public interest" standard provides further support for our reading of Section 11. In *Sinclair Broadcast Group v. FCC,* the D.C. Circuit resolved a challenge to the Commission's local television ownership rule.[42] Although *Sinclair* did not expressly address the meaning of the phrase "necessary in the public interest," it applied that standard and ultimately upheld the bulk of the Commission's local television ownership rule.[43] The Court noted that the "Commission adequately explained how the local ownership rule furthers diversity at the local level and is necessary in the 'public interest' under § 202(h) of the 1996 Act."[44] In doing so, the Court did not articulate a new or higher public interest yardstick. Even as to the voice count portions of the local ownership rule, which *Sinclair* remanded to the Commission, the Court highlighted the "deficiency of the Commission's explanation" and the "explanation it failed to give for defining 'voices' differently in the cross-ownership and local ownership rules."[45] It was the lack of reasonable explanation, rather than a higher public interest standard, that proved fatal.

21. The commenters' arguments that the deregulatory purpose of the 1996 Act dictates a more stringent reading of Section 11 are also misplaced. As noted above, we agree that the 1996 Act favors competition and evidences a faith that when competition takes hold, many regulations can be eliminated, but this does not translate into a direction to deregulate for deregulation sake. To be clear, we acknowledge Section 11 creates a presumption in favor of repealing or modifying covered rules, where the statutory criteria are met. Thus, we must reevaluate rules in light of current competitive market conditions to see that the conclusion we reached in adopting the rule—that it was needed to further the public interest—remains valid. What we reject is the notion that to retain a rule, we must conclude that it is "essential" or "indispensable." We believe that such a standard would likely create confusion and disruption and is not what Congress intended.

22. We therefore disagree with commenters who argue that the standard in Section 11 is more stringent than the "plain public interest" standard found in other parts of the Communications Act.[46]

---

[38] *Id.* at 390.

[39] 205 F.3d 416 (D.C. Cir. 2000).

[40] *Id*. at 422.

[41] *Id*. at 423 (emphasis in original).

[42] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (*Sinclair*). The local television ownership rule under review allowed common ownership of two television stations in the same local market if one of the stations was not among the four highest ranked stations in the market and eight independently owned, full-power, operational television stations would remain in that market after the merger.

[43] *See id.* at 160-61.

[44] *Id.* at 160.

[45] *Id.* at 164.

[46] *See, e.g.,* CTIA Rulemaking Petition at 1, 4; Further Comments of CTIA, WT Docket No. 02-310, at 2.

We find no evidence of a heightened standard in either the purposes of the 1996 Act, the language or legislative history of Section 11, or case law. To the contrary, all suggest that Congress intended a regularized review using the established public interest standard to see if covered rules remained necessary as competition developed.[47]

2. Meaningful Economic Competition

23. In interpreting the relationship between the phrases "meaningful economic competition" and "necessary in the public interest," we again begin with the language of the statute. Section 11(a)(2) requires the Commission to determine whether any regulation is "no longer necessary in the public interest *as the result of* meaningful economic competition between providers" of telecommunications service.[48] As such, the language of Section 11(a)(2) creates a causal connection between the existence of "meaningful economic competition between providers" and the finding that a regulation is "no longer necessary in the public interest."

24. As discussed above, the purpose of the 1996 Act as well as the legislative history of Section 11 confirms that competition is the touchstone of the Section 11 inquiry. The conferees, in explaining Section 11(a)(2), direct the Commission to determine whether its regulations are "no longer in the public interest *because* competition between providers renders the regulation no longer meaningful."[49] Section 11 contemplates a thorough review and assessment of the state of competition among providers of telecommunications service and a determination of how the regulatory framework should be adjusted to account for those changes.[50] We note, however, that the mere presence of meaningful economic competition will not always lead us to conclude that repeal or modification of a rule is in the public interest.[51] Rather, our task is to determine whether the competitive environment has changed such that the rule is no longer meaningful, *i.e.,* is not needed to further the public interest.

25. We are unpersuaded that interpreting Section 11 as we do would be inconsistent with the

[47] The dissent's contrary reading of the standard of review under Section 11 is based on at least two misconceptions. Contrary to the dissent's characterization, there is no simplistic meaning of the term "necessary." This Report recognizes cases interpreting the term "necessary" as "useful" as well as those concluding that the term means "indispensable." See discussion *supra* at ¶ 15. The very existence and number of these cases underscores the importance of context in interpreting Section 11.

The dissent also argues that our interpretation renders Section 11 meaningless. But, we clearly do not propose, as the dissent suggests, "simply to rest on the ground that the regulation at issue served some public interest purpose and that no one has proved that is no longer the case." Dissent, at 8. Nor do we suggest that it is appropriate to forego a "substantive and factual examination of the regulation and its effects." *Id.* To the contrary, the process described in this biennial review is a fact-intensive, on-going one. Report, *supra* at ¶ 3; *see generally*, Staff Reports. As this Report explains, Section 11 requires the Commission to re-examine the need for each covered regulation biennially and to make an affirmative finding in the biennial review process that a rule is needed to further the public interest, something that would not otherwise have been required. Report, *infra* at ¶¶ 24, 26 (noting that the plain text and legislative history of section 11 contemplates a thorough review and obligates the Commission to reassess constantly the state of competition—an obligation the majority's order and accompanying staff reports faithfully reflect).

[48] 47 U.S.C. § 161(a)(2) (emphasis added).

[49] H. R. Conf. Rep. No. 104-458, at 185 (1996) (emphasis added).

[50] *See Fox,* 280 F.3d at 1044 (faulting the Commission, in the Section 202(h) context, for not sufficiently analyzing the state of competition in the television industry).

[51] In a similar context, the D.C. Circuit concluded that "[a] rule may be retained if it is necessary 'in the public interest'; it need not be necessary specifically to safeguard competition." *See Fox,* 280 F.3d at 1052.

specific purpose of that provision and the deregulatory thrust of the 1996 Act.[52] Verizon and Sprint argue that Congress could not have intended the Commission to conduct an unlimited review of all its regulations, but then limited the Commission to determining that a rule is unnecessary only due to the existence of meaningful competition.[53] Verizon reasons that the language, "as the result of meaningful economic competition," is explanatory, not a prerequisite for review or elimination of unnecessary regulations.[54] USTA and NTCA agree and urge the Commission not to limit its review under Section 11 to whether meaningful economic competition alone justifies change, but to repeal or modify regulations when it would serve the public interest and lessen regulatory burdens.[55] By contrast, the Wyoming PSC urges the Commission to refocus its examination of its regulations based on the language of Section 11, rather than on a broader reading of the public interest standard.[56] AT&T and Covad also maintain that only to the extent the Commission determines that meaningful competition has rendered particular regulations "no longer necessary in the public interest," may it repeal or modify those regulations pursuant to Section 11.[57]

26. The LECs who comment in this proceeding seem to fear that without a broad mandate beyond competition considerations, the Commission will have no meaningful obligation under Section 11. We disagree. Section 11 reflects the legislative judgment that the development of meaningful economic competition in the telecommunications marketplace should yield a different regulatory framework from that designed for a non-competitive market characterized by few service providers or a monopoly. In other words, Section 11 obligates the Commission to reassess constantly the state of competition and directs the Commission to act when it determines that competition, and not regulation, can meet some or all of the objectives of a particular rule. As such, we believe that Congress intended the Commission to focus its Section 11 inquiry on whether meaningful competition exists. This qualitative assessment of competition would then undergird our determinations about the continued need for particular rules.

27. We, of course, acknowledge the Commission's broad authority, apart from Section 11, to consider proposed modifications to or elimination of its rules under the public interest standard.[58] In addition, Section 10 of the Communications Act allows the Commission to consider a broad range of public interest factors and to forbear from applying any regulation to telecommunications carriers when, along with two other factors, forbearance is "consistent with the public interest."[59] The competition analysis we conduct under Section 11 is a distinct arrow in the Commission's regulatory quiver and we decline the invitation to conflate these approaches into the Section 11 process.

3. Biennial Review Presumptions

28. Verizon has also argued that Section 11 places the burden on the Commission to support,

[52] *See* Verizon Reply Comments at 4-5; Sprint Reply Comments, WT Docket No. 02-310, at 2.

[53] *Id.*

[54] Verizon Reply Comments at 4-5.

[55] USTA Reply Comments at 2; Comments of the National Telecommunications Cooperative Association (NTCA), WC Docket No. 02-313, at 2.

[56] Wyoming PSC Comments at 2.

[57] AT&T Reply Comments at 3; Covad Reply Comments at 2.

[58] *See* discussion Part II.A *supra*.

[59] 47 U.S.C. § 160.

with substantial record evidence, any conclusion that its rules remain necessary in the public interest.[60] If the Commission is unable to meet this burden, Verizon argues that a regulation must be repealed immediately.[61] We see no such requirement in the statute. It is clear that Section 11 places an affirmative obligation on the Commission to examine critically rules subject to Section 11 review and to analyze the state of competition in the relevant market in order to determine whether competition has rendered those rules no longer necessary in the public interest.[62] We also acknowledge that Section 11 creates a presumption in favor of repealing or modifying covered rules, where the statutory criteria are met, but we do not read the statute to create a special burden of proof apart from our standard obligation to provide a reasoned basis for our decisions.[63]

29. Nothing in the language of the statute suggests that in the absence of Commission action, the presumption in favor of repeal or modification operates independently and leads to automatic repeal of any rule. In fact, the language of Section 11(a) does not create an alternative to the Commission conducting a review and making a determination of whether any regulation is no longer necessary in the public interest as the result of meaningful competition. Section 11(a) clearly states that the Commission "shall review all regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service." To read an automatic repeal into Section 11(a), captioned "Biennial Review of Regulations," would relieve the Commission of its fundamental responsibility under the section—namely conducting a comprehensive biennial review. Indeed, an automatic repeal approach ignores the congressional directive to the Commission in Section 11(a) to conduct a review as a prerequisite for elimination and modification of a rule. Accordingly, a biennial review is not an administrative luxury.

30. Moreover, the language of Section 11(b) provides not one, but two responses to a review and determination that regulations are no longer necessary in the public interest as the result of meaningful competition. Under Section 11(b), the Commission is not limited to eliminating a rule, automatically or otherwise; modification of the rule is a deregulatory tool as well.

31. Congress could have limited the Commission to only eliminating rules determined to be no longer necessary in the public interest. The legislative history of Section 11 makes it clear, however, that Congress explicitly declined to do so. The Senate Report preceding the Conference Report describes a bill which would have restricted the Commission to only eliminating (rather than eliminating *or* modifying) rules:

> This provision adds a new section 259 entitled "Regulatory Reform" to the 1934 Act. New subsection 259(a) requires the FCC, with respect to its regulations under the 1934 Act . . . to review in odd-numbered years beginning with 1997 all regulations issued under the 1934 Act . . . applicable to telecommunications services. It directs further that [the FCC] shall determine whether competition has made those regulations unnecessary

[60] Verizon Comments at 7. Cingular also contends that the Commission's biennial review decisions must be based on relevant factors and must articulate a satisfactory explanation for the agency's actions. Comments of Cingular Wireless, IB Docket No. 02-309, at 4.

[61] Verizon Comments at 7.

[62] In *Fox*, the court reviewed the Commission's determination to retain the national television station ownership rule and faulted the Commission for its failure to sufficiently assess the state of competition in relevant markets. *Fox*, 280 F.3d at 1043-44.

[63] *See id.* at 1048 (holding that Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules).

> to protect the public interest. Subsection 259(b) requires the FCC to *repeal* any regulations under the 1934 Act that are found to be no longer in the public interest . . . .[64]

While the Senate bill contained the above section, the House version did not. According to the House Conference Report, the conferees created and agreed on the language in Section 11, which provides for both modification and elimination, rather than the elimination-only language of the Senate bill.[65] Both the text of the statute and the history of Section 11 demonstrate that Congress provided for modification as well elimination as means to address regulations that are no longer in the public interest. Therefore, we find no basis for adopting an automatic repeal approach in lieu of the option to modify or eliminate a rule as appropriate.

32. Finally, we note that in the analogous context of Section 202(h), the D.C. Circuit has declined to treat a biennial review as requiring immediate repeal. In reviewing our treatment of the national television ownership cap in *Fox*, although the Court concluded that the Commission had failed to adequately explain its reasons for retaining the rule, the appropriate remedy was to remand rather than vacate.[66] The Court apparently saw no statutory requirement to immediately eliminate the rule. Similarly, we see none here.

C. Timing of Section 11 Review

33. A few commenters urge an interpretation of Section 11 under which the Commission would review all regulations and repeal or modify those no longer indispensable to the public interest by December 31st of each even-numbered year.[67] The Commission addressed this issue fully in the 2000 Biennial Review and we decline to reconsider our approach.[68] First, the language of Section 11 does not require such a compressed schedule. Sections 11(a)(1) and 11(a)(2) require the Commission to review certain of its rules in every even-numbered year and determine whether those rules are no longer necessary in the public interest as a result of meaningful economic competition. Subsequent to making those determinations, the Commission is directed to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[69] Congress thus distinguished between *making determinations* (that certain rules are no longer in the public interest), which must occur within a specified time period, *i.e.*, every even-numbered year, and *taking action* (to repeal or modify rules that are no longer in the public interest) which is not required to be completed within that specific time period.[70] Second, we

[64] S. Rep. No. 104-23, at 49 (1995) (emphasis added).

[65] H. R. Conf. Rep. No. 104-458, at 185 (1996).

[66] *Fox*, 280 F.3d at 1049.

[67] *See, e.g.,* Verizon Comments at 7-8; Verizon Reply Comments at 4; USTA Reply Comments at 2.

[68] *See 2000 Biennial Review,* 16 FCC Rcd at 1213 ¶ 12.

[69] 47 U.S.C. § 161(b).

[70] Congress could have created a deadline for completing the regulatory actions contemplated by Section 11(b), as it did in Section 251(d) and Section 10 of the 1996 Act. Instead, Section 11 merely directs the Commission to commence a review within even-numbered years. We also note, in this regard, that the Commission must comply fully with the requirements of the Administrative Procedure Act, which would prove a very difficult task within the timeframe proposed by commenters. Moreover, even were a statutory deadline missed, where Congress does not specify otherwise, agencies do not lose their power to act after the statutory deadline. *See Brock v. Pierce County*, 476 U.S. 253, 260 (1986); *Gottlieb v. Pena*, 41 F.3d 730, 737-738 (D.C. Cir. 1994). We note further that where Congress intends the failure to meet a deadline to have a regulatory consequence, it is quite able to indicate its intent. *See, e.g.*, 47 U.S.C. § 160(c) (failure to act on forbearance petition within statutory period causes it to be granted by operation of law).

believe that completing rule revisions within the even-numbered year would make it difficult to develop a sufficient record with respect to all the rules within the scope of Section 11. Accordingly, we decline to adopt a compressed schedule that Congress did not mandate.[71]

III. ADMINISTRATIVE MATTERS

34. *Applications for Review.* The Staff Reports that are being released concurrently with this order recommend which rules are no longer necessary in the public interest and should be modified or repealed. Persons disagreeing with any of these recommendations may file an application for review under Section 1.115 of the Commission's rules.[72] Otherwise, based on these Staff Reports, we will issue notices of proposed rulemaking, over the next year, to repeal or modify regulations as appropriate.

IV. CONCLUSION

35. We commend the Bureaus and Offices for working together to prepare the many recommendations that comprise the Staff Reports. Their enterprise, imagination, and coordinated effort made this review and these reports possible. A constant in each biennial review are the bedrock principles of promoting the public interest and alleviating regulatory burdens. We expect these principles will be reflected in forthcoming notices of proposed rule making.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[71] We also decline to adopt two proposals proffered by USTA to create formal deadlines for Commission action under Section 11. USTA suggests that rules identified for elimination in a biennial review would automatically sunset within 90 days, unless a petition to retain the rule is filed, and that biennial review rulemaking proceedings be initiated and completed within 90 days of the Commission's determination under Section 11(a). USTA Comments at 3. Neither the sunset procedure nor the one-size-fits-all, 90-day rulemaking timeframe is required by Section 11. While the Commission is committed to timely biennial reviews under Section 11, from a practical standpoint, these approaches could inadvertently prolong the biennial review and would place unnecessary administrative burdens on Commission staff.

[72] 47 C.F.R. § 1.115.

JOINT STATEMENT OF
CHAIRMAN MICHAEL K. POWELL
AND
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: The 2002 Biennial Regulatory Review, GC Docket No. 02-390

We write separately to comment on the Commission's interpretation of the biennial review standard in section 11 — in particular, our construction of the phrase "no longer necessary in the public interest." We are committed to achieving the procompetitive and deregulatory goals of the Act and have consistently supported policies to achieve those goals. And while we believe that the biennial review process is a demanding one, we do not believe that Congress intended to invent a wholly new — and inevitably inconsistent — standard for regulatory action. In our view, the interpretation of the phrase "no longer necessary in the public interest" in the foregoing Report is most faithful to the language of the statute and the intent of Congress. We recognize that, as the item makes clear and as the dissent emphasizes at length, some courts have concluded that the word "necessary" as used in other provisions of the statute means essential or indispensable. But numerous other court decisions — including both recent decisions and others tracing back to *McCulloch v. Maryland*,[73] one of the seminal decisions in the Supreme Court's constitutional jurisprudence — have construed "necessary" to mean convenient or useful.[74] In light of this conflict in the law, we conclude that we must interpret the term "necessary" based on the particular context in which it is used.

Here, we are guided principally by the fact that interpreting "necessary" as used in section 11 to mean indispensable would mean that the Commission would be authorized to adopt a rule that advances the public interest, but would be forced to repeal the rule two years later absent proof of its indispensability, only to remain free to reimpose the rule immediately thereafter based on a lesser showing of importance. It is black letter law that we should not construe a statute to lead to such an absurd result.[75]

The full text of the statute further supports this view. The statute requires the Commission to "determine whether any [covered] regulation is no longer necessary in the public interest as the result of meaningful economic competition." It is clear that Congress envisioned the emergence of competitive markets that would render many of our regulations "no longer necessary." The biennial review provision was designed to take account of these changing circumstances by peeling away regulations that were "no longer necessary in the public interest." This characterization as "*no longer* necessary" clearly implies that such regulations were once "necessary in the public interest." This is consistent with our view that the public interest standard of section 11 is the same standard the Commission uses in promulgating its rules in the first instance. The rules were once "necessary in the public interest" but changes in the competitive landscape have rendered them "no longer necessary in the public interest." The dissent, however, cannot explain how its higher standard of review — indispensable, essential, or absolutely required — can be squared with the "no longer" characterization. That is, the Commission has never promulgated rules pursuant to such an indispensability standard. For the dissent's argument to stand, therefore, Congress had to have created a sweeping statutory assumption in section 11 that every regulation was at one time deemed indispensable to the public interest. There is nothing in the text or

[73] *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316, 413 (1819).

[74] Report at para. 15 n.25.

[75] *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

legislative history to suggest such an assumption. If Congress intended to create an entirely new standard here, it would not have included the "no longer" language or implicitly assumed that our existing rules satisfied such a standard. The dissent offers no convincing explanation for this anomaly.[76]

Section 202(h) of the 1996 Act, which contains a parallel biennial review provision, also supports this view. That section appears to equate the phrase "necessary in the public interest" with "in the public interest," given that it instructs the Commission to determine which covered rules are "necessary in the public interest" and then to repeal or modify those that are simply "no longer in the public interest." While the appropriate standard of review under section 202(h) will be addressed fully in a separate proceeding, in the present context of interpreting section 11, we see no basis for concluding that Congress intended its omission of the word "necessary" in the final clause of section 202(h) to establish a different substantive standard than the one in section 11. To the contrary, all indications are that sections 11 and 202(h) were intended to establish identical review procedures for our telecommunications and media rules. The legislative history, while not dispositive, further indicates that Congress did not intend to create such a process.[77]

Finally, we disagree with the dissent's assertion that our interpretation of section 11 renders the presence or absence of competition irrelevant and the section 11 process meaningless. The dissent argues that failing to repeal a regulation that may no longer be necessary in the public interest for reasons unrelated to competition "renders the statute absurd." Dissent at 2. This logic reads section 11 in isolation and assumes incorrectly that section 11 is the only means by which the Commission can modify or eliminate a regulation that is no longer necessary in the public interest. If the Biennial Review process identifies rules that have become obsolete based on factors other than competition, it cannot be in the public interest to maintain such rules. The broad and clear deregulatory goals of the Act and our general public interest obligations require that we modify or eliminate such rules even when they fall outside the precise scope of the biennial review. The relevant distinction is that if such elimination or modification is warranted based on factors *other than meaningful economic competition*, it is not *required* as part of the section 11 biennial review process.[78]

---

[76] The Dissent argues that the Commission's obligation to act in the public interest when adopting rules is based on "predictive" judgments and therefore is more lenient than the indispensability standard the dissent proffers for judgments made during the biennial review. This argument is unavailing at two levels. First, the dissent's focus on the word "may" in section 201(b) simply fails to respond to our point that the use of "*no longer* necessary in the public interest" clearly indicates that Congress intended the same substantive standard to apply to rule adoptions and rule revocations. If Congress had wanted to establish a different standard for revocations, it would not have used precisely the same words — "necessary in the public interest" — that it used in section 201(b), and it presumably would have provided some hint of such an intent in the legislative history. Second, the dissent's argument ignores the fact that the Commission must make predictive judgments when it adopts rules *and* when it decides whether to retain a rule in light of the competitive environment. In neither case is the Commission required to "prove" the validity of its judgments, nor could it be as a practical matter. Rather, the Commission's obligation in all contexts is to make reasonable predictive judgments about a rule's consistency with the public interest.

[77] *See, e.g.*, H.R. Conf. Rep. No. 104-458 at 185 (Jan. 31, 1996).

[78] Oddly, the Dissent seems to suggest that in order to be intellectually pure in our reading of Section 11, the majority is required in each biennial review to retain rules that no longer serve the public interest as a result of factors other than competition. The Dissent argues that our suggestion that these rules too should be eliminated or modified weakens our interpretation of the underlying statute. We will not be bound up in such impracticalities of form over substance. Although for debate purposes we understand the assertion, the practical imperatives of the Commission's work requires that whenever outmoded rules are discovered, they should be amended to better serve the public interest.

Regardless of one's view of the correct interpretation of the *substantive* standard in section 11, there should be no doubt that the requirement to determine whether competition has rendered certain rules obsolete establishes a very meaningful *process*. The Commission must assess the state of competition in the relevant market for a given rule and then determine whether the rule in its current form is no longer necessary in the public interest as a result of meaningful economic competition. Before Congress enacted section 11, the FCC was under no requirement to ascertain regularly the continued relevance of its rules or to justify their retention in the face of meaningful competition. Now, the Commission conducts a thorough analysis of all covered rules every two years, and where we find that a particular regulation no longer serves the public interest as a result of competition, we are required to repeal or modify it. Section 11 thus provides an important tool in carrying out Congress's general preference for reducing regulation where competition has emerged, and that fact should not be obscured by the narrow debate over whether the Commission must repeal a rule that continues to serve the public interest solely because the rule cannot be proven to be indispensable. Ultimately, we hope that the Commission moves beyond this academic debate and translates words into deeds by actually reducing regulation where competition exists.

JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
AND
COMMISSIONER JONATHAN S. ADELSTEIN,
APPROVING

Re: The 2002 Biennial Regulatory Review

We approve the Order because it recognizes that Section 11 requires a two-step process. First, as the statute states, the Commission must determine if there is meaningful competition in the relevant market. The Order correctly notes, however, that "the mere presence of meaningful competition will not always lead us to conclude that repeal or modification of a rule is in the public interest. Rather, our task is to determine whether the competitive environment has changed such that the rule is no longer meaningful, *i.e.*, is not needed to further the public interest." In addition, the Order concludes that the public interest standard must be interpreted to mean the traditional Commission public interest standard, and does not require a heightened justification.

Furthermore, we view the attached Bureau reports as recommendations from that Bureau as to whether we should retain, modify, or repeal specific rules. Our approval of this item does not suggest a certain position as to the recommendations of the staffs of the respective Bureaus. We reserve our right to address these issues as they are presented to us in the proceedings that will manifest themselves as a result of this Biennial Review proceeding.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J . MARTIN

Re: *The 2002 Biennial Regulatory Review*, Report

I respectfully dissent in part from this item because I believe the majority has misinterpreted section 11's standard of review. Section 11 was added to the Communications Act by the Telecommunications Act of 1996 ("1996 Act") as part of the 1996 Act's effort "to promote competition and reduce regulation."[79] Entitled "regulatory reform," section 11 was meant to reduce regulation and to constrain the Commission's authority. The provision requires the Commission to review its regulations for providers of telecommunications service every two years and to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[80] Section 11 then mandates that "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."[81]

As I have explained repeatedly in previous decisions before the Commission, I believe the majority has failed to adhere to this language.[82] I also disagree with the majority's reading of the legislative history and the case law. However, what troubles me the most about the majority's decision is its view of the role of competition in the 1996 Act's statutory scheme.

A fundamental premise of the 1996 Act and section 11 is that where competition is present, competition – and not regulation – will best maximize consumer welfare. Congress thus made the presence or absence of meaningful competition a crucial factor in determining the nature and extent of regulation: competition first, then deregulation. Where there is competition to protect consumers, deregulation is appropriate and regulations should be retained only if they are necessary – *i.e.*, still *needed* to protect consumers. Where there is not competition, regulations may be appropriate to protect consumers. The majority's reading of section 11 is most problematic in ignoring this principle.

In this item, the majority concludes that the term "necessary" should be read to mean "useful," "convenient," or "appropriate" and asserts that the phrase "*necessary* in the public interest" means nothing more than "in the public interest."[83] As the majority reads section 11 then, the Commission is required to conduct a thorough analysis of all covered rules, conducting a market analysis to determine the state of competition relevant to each rule and then make an affirmative finding on whether each rule is

[79] Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996).

[80] 47 U.S.C. § 161(a).

[81] *Id.* § 161(b).

[82] *See* Separate Statement of Commissioner Kevin J. Martin, *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules To Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, Report and Order, WT Docket No. 01-108 (adopted Aug. 8, 2002); Separate Statement of Commissioner Kevin J. Martin, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion and Order, WT Docket No. 01-184, CC Docket No. 95-116 (adopted July 16, 2002); Separate statement of Commissioner Kevin J. Martin, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, CS Docket No. 01-290 (adopted June 13, 2002).

[83] *See* Report ¶¶ 15, 17-18.

"in the public interest." The problem with this reading is that, even without section 11, the Commission already has a statutory obligation to maintain only those rules that are in the public interest. Why would the Commission be required to conduct a market analysis if, regardless of the result of the analysis, the Commission has an obligation to eliminate rules no longer in the public interest? Either the presence of competition is irrelevant and section 11's standard is essentially meaningless, or section 11 allows the Commission to maintain regulations acknowledged to be no longer in the public interest if their lack of support was not due to the presence of competition. Either answer renders the statute "absurd[]."[84]

Nevertheless, the majority attempts both of them. On the one hand, the majority insists that the presence of competition matters under its interpretation, because, it argues, in conducting section 11's "thorough analysis of all covered rules," the Commission need repeal or modify only those rules that are no longer in the public interest as a result of the presence of competition.[85] Thus, it would seem to be entirely proper for the Commission, in a section 11 proceeding, to acknowledge that numerous regulations are no longer in the public interest but maintain them because their lack of support was caused by something other than the presence of competition, such as, for example, technological obsolescence. But on the other hand, the majority insists that the Commission must repeal or modify any rule found to be not in the public interest during a section 11 review, even if the reason for the rule's flaw is not the presence of competition: "If the Biennial Review process identifies rules that have become obsolete based on factors other than competition . . . the broad and clear deregulatory goals of the Act and our general public interest obligations require that we modify or eliminate such rules."[86] If this is true, however, it is unclear why the presence or absence of competition has any relevance. The majority offers no explanation.

There is little reason, moreover, for the majority to read the statute in this manner. Both the Supreme Court and the D.C. Circuit have held that the term "necessary" in the 1996 Act should be read in accordance with its ordinary meaning and does not mean merely "useful," "convenient," or "appropriate." The majority does not point to a single case construing the 1996 Act or, indeed, any statute intended to limit regulatory authority that supports its interpretation. Moreover, the majority not only interprets "necessary" in a manner that conflicts with the term's plain meaning; it goes on to read the word entirely out of the statute. In the majority's view, when "necessary" means "useful," "convenient," or "appropriate," the phrase "necessary in the public interest" means *exactly the same thing* as "in the public interest."

The majority's only real argument is that reading section 11's standard to require anything more than a showing that a regulation is in the public interest would require a greater showing when deciding whether to retain a rule than in deciding whether to adopt the rule in the first place. There are good reasons, however, to have a more permissive standard for deciding whether to adopt a rule. For example, unlike a decision whether to retain a rule, which is made after the rule has been in operation at least two years, a decision whether to adopt a rule is necessarily a predictive judgment that cannot be based on actual evidence of the rule's impact. The statute's text specifically recognizes this distinction. The decision whether to adopt a rule is governed by section 201(b) of the Communications Act, which, unlike section 11, requires only a determination that a rule is likely to – or "may" – be necessary in the public interest: "The Commission may prescribe such rules and regulations as *may* be necessary in the public interest to carry out the provisions of this chapter."[87] The majority offers no basis whatsoever for

[84] *Id.* ¶ 18 n.35.

[85] Separate Statement of Chairman Powell and Commissioner Abernathy; *see* Report ¶¶ 23-27.

[86] Separate Statement of Chairman Powell and Commissioner Abernathy.

[87] 47 U.S.C. § 201(b) (emphasis added).

equating the determination that a rule "*may* be necessary in the public interest" with the determination that a rule is "necessary in the public interest," which the majority has already argued means exactly the same thing as "in the public interest." The only way to make sense of the majority's argument is once again to read words completely out of the statute.

In my view, Congress intended section 11 to be a significant and coherent deregulatory provision that turns on the presence of competition to protect consumers. Competition is the best method of providing consumers choice, innovation, and affordability. Where meaningful competition is not present, Congress understood the importance of regulation, and the Commission has some latitude to adopt and maintain regulations. But where meaningful competition is present, regulation may be unnecessary or even harmful. Where there is such competition, section 11 requires repeal or modification of regulations that are no longer "*necessary* in the public interest" – a burden that, as the provision's terms make plain, is more substantial than the "in-the-public-interest" standard. This interpretation is faithful to the statute's language and best effectuates Congress's intent.

I. The Majority's Interpretation Conflicts With The Statute's Text

My reading of section 11 begins, as it must, with the statute's language. The Communications Act contains no statutory definition of the term "necessary," and, thus, the term should be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The term "necessary" is ordinarily defined as "absolutely required," "indispensable," or "essential." *Merriam Webster's Collegiate Dictionary* 774 (10th ed. 2000). Indeed, the majority acknowledges that "the word 'necessary' has an everyday meaning that implies indispensable." Report ¶ 15.

Both the Supreme Court and the D.C. Circuit have held, in interpreting other sections of the 1996 Act, that the term "necessary" must be read in accordance with its ordinary meaning and thus cannot mean merely "useful," "convenient," or "appropriate." In *AT&T vs. Iowa Utilities Board*, for example, the Supreme Court addressed section 251(d)(2) of the Act, which requires the Commission to consider whether access to a proprietary network element is "necessary" before ordering incumbent local exchange carriers ("LECs") to provide the element to competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Commission had found that access to an element is necessary if its denial would cause a competitor any increase in cost or decrease in quality. The Court rejected this interpretation: "the Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' . . . is simply not in accord with the ordinary and fair meaning of [the statute's] terms." *Id.* at 389-90.

The D.C. Circuit came to a similar conclusion in interpreting section 251(c)(6), which requires incumbent LECs to provide for physical collocation of equipment "necessary" for interconnection or access to unbundled network elements. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (2000). The Commission had interpreted this language to require collocation of any equipment "used or useful" for either interconnection or access to unbundled network elements. Rejecting the Commission's interpretation, the D.C. Circuit held that the statute must be interpreted in accordance with its plain meaning: "As is clear from the Court's judgment in *Iowa Utilities Board*, a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit 'necessary' to that which is required to achieve a desired goal." *Id.* at 423. The Court concluded that the word "necessary" is "fairly straightforward. Something is necessary if it is required or indispensable to achieve a certain result." *Id.* at 422.

To challenge this precedent, the majority makes much of *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), a case addressing the Commission's local television ownership rule, which limits ownership of multiple television stations in the same market. The D.C. Circuit in that case

applied the "necessary in the public interest" standard of section 202(h) of the 1996 Act. Similar to section 11, section 202(h) requires the Commission to review its broadcast ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition." 1996 Act § 202(h). The majority argues that *Sinclair* supports its interpretation of "necessary in the public interest" because the Court "ultimately upheld the bulk of the Commission's local ownership rule" and rejected other aspects of the rule for "lack of a reasonable explanation, rather than a higher public interest standard." Report ¶ 20.

But this argument makes no sense. To begin with, the meaning of the "necessary in the public interest" standard was not even at issue in *Sinclair*. Indeed, the majority concedes that the case "did not expressly address the meaning of the phrase." Report ¶ 20. That alone makes reliance on the case misplaced, as it is a long standing principle that judicial decisions do not serve as precedent for points that were not raised and analyzed. *See*, *e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).[88] Even leaving aside that problem, however, the majority's argument does not hold together. The mere fact that *Sinclair* upheld parts of the local television ownership rule under the "necessary in the public interest" standard could have no bearing whatsoever on the interpretive question at issue here unless those parts were merely "useful" or "appropriate" in the public interest but could not meet a higher standard – a point that is not readily apparent and that the majority in no way asserts. The majority's refusal even to make such an assertion, which is an essential premise of its argument, is a telling acknowledgment of the argument's weakness. Additionally, the fact that the court rejected other aspects of the local television ownership rule for lack of a reasonable explanation tells us nothing about whether there were additional flaws in the Commission's reasoning, as courts almost never address every ground upon which their decisions might rest. *See*, *e.g.*, *COMSAT Corp. v. FCC*, 283 F.3d 344, 349 (D.C. Cir. 2002).

Moreover, if we are going to look to the reasoning of cases that lack precedential value, the case most on point is *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002). In that case, the D.C. Circuit vacated the Commission's Cable/Broadcasting Cross Ownership rule ("CBCO"), which restricted the ability of television licensees to hold cable franchises. The Court applied the "necessary in the public interest" standard of section 202(h) and, in its initial opinion, rejected the precise argument the majority makes here. Specifically, the Court found that that "the Commission applied too lenient a standard when it concluded only that the CBCO Rule 'continues to serve the public interest,' and not that it was 'necessary' in the public interest." *Fox*, 280 F.3d at 1050. According to the Court, "*The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.*" *Id.* (emphasis added). On the Commission's petition for rehearing, the Court removed this reasoning from its opinion, because the issue had not been briefed by the parties and was unnecessary to the Court's decision. *See Fox*, 293 F.3d at 540-41. But the Court left open the proper interpretation of "necessary in the public interest," and its initial reasoning remains persuasive. At the very least, this explicit discussion of the issue by the D.C. Circuit is far more compelling than anything the majority gleans from *Sinclair*.[89]

II. Legislative History Does Not Support The Majority's Interpretation

[88] *See also*, *e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952).

[89] Of the other cases relied upon by the majority, none of them address the meaning of "necessary" in the 1996 Act, one of them does not address the term "necessary" at all (*see National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992)), and most were decided prior to 1947. *See* Report ¶ 15 n.25. Most importantly, none of the majority's cases involve a deregulatory provision like section 11, which, as discussed below, is a significant factor in interpreting the meaning of the provision's terms.

Despite the case law interpreting "necessary" in the 1996 Act and the majority's acknowledgment that "the word 'necessary' has an everyday meaning that implies indispensable," the majority concludes that the term should instead be read to mean "useful," "convenient," or "appropriate." *See* Report ¶ 15. The majority rests this conclusion in large part on a brief paragraph in the 1996 Act Conference Report, which appears to equate the phrase "necessary in the public interest" with the phrase "in the public interest." *See id.* ¶ 17. Apparently, under the majority's theory, if "necessary" means nothing more than "useful," "convenient," or "appropriate," the term has no meaning at all when attached to the phase "in the public interest." Indeed, there does seem to be no meaningful difference between saying something is "in the public interest" and saying that the same thing is "useful in the public interest" or "appropriate in the public interest." But whatever the merits of using legislative history to read the word "necessary" out of the statute, as the majority does – a problem I address in a moment – the majority's analysis does not take into account all of the relevant legislative history. In fact, there is ample evidence in the legislative history that "necessary" in section 11 was meant to have independent force and meaning. For example, the Senate Report on the bill that became the 1996 Act attaches independent meaning to the term "necessary," stating that the statute would require the Commission to "determine whether competition has made those regulations *unnecessary* to protect the public interest." S. Rep. No. 23, 104th Cong., 1st Sess. (Mar. 30, 1995) (emphasis added). Similarly, the bill's sponsor stated that the statute's biennial review provision would "ensure[] that regulations applicable to the telecommunications industry remain current and *necessary* in light of changes in the industry." 141 Cong. Rec. S7881-02, at S7887 (daily ed. Jun. 7, 1995) (statement of Sen. Pressler) (emphasis added) ("*Pressler Statement*").

In any case, regardless how one interprets the 1996 Act's legislative history, it is hornbook law that "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989).[90] As both the Supreme Court and D.C. Circuit have found, the meaning of "necessary" in the 1996 Act is clear. Accordingly, "we do not resort to legislative history." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Moreover, the majority does not seek to use legislative history merely to add an interpretive gloss to section 11. Instead, the majority wishes to read the word "necessary" completely out of the statute. The majority's argument thus runs up against another basic principle: "It is a time-honored tenet that [a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous." *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) (citation and quotation marks omitted).[91] Accordingly, the majority's interpretation is simply untenable.

III. The Statute's Context (As Well As Its Text) Undermines The Majority's Interpretation

Finally, the majority argues that "context" supports its interpretation. The majority points to section 201(b) of the Communications Act, which grants the Commission authority "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. § 201(b). The majority argues that this provision has not been interpreted to require anything more than a showing that a regulation is in the public interest. *See* Report ¶ 18 & n.33. According to the majority, reading section 11 to require a greater showing when deciding whether to retain a rule would "unreasonably hold the Commission to a different and higher standard in deciding

[90] A*ccord Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *PanAmSat Corp. v. FCC*, 198 F.3d 890, 895 (D.C. Cir. 1999).

[91] S*ee also Department of Revenue of Oregon v. ACF Indus., Inc*., 510 U.S. 332, 340 (1994) (It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.") (citation and quotation marks omitted).

whether to retain an existing rule in a biennial review proceeding than in deciding whether to adopt a rule in the first place." *Id.* ¶ 18. Such a result, the majority argues, would render section 11 an "absurdity." *Id.* ¶ 18 n.35.

This argument suffers from multiple flaws. To begin with, there is nothing "absurd" in having a more permissive standard for deciding whether to adopt a rule in the first instance than for deciding whether to retain a rule where competition has developed. A decision whether to adopt a rule is necessarily a predictive judgment that cannot be based on actual evidence of the rule's impact. It would make little sense, in that context, to hold the Commission to a more significant burden to justify the rule. Rather, what reasonably can be expected of the Commission before a rule is adopted is a determination whether the rule is likely to be necessary in the public interest. Indeed, as discussed below, the text of section 201(b) acknowledges that fact, granting the Commission authority to adopt rules that "*may* be necessary in the public interest." 47 U.S.C. § 201(b) (emphasis added).

Once a rule has been in place at least two years, however, we can assess the rule in light of actual experience. We will then have evidence of the rule's impact and are capable of meeting a greater burden to justify the rule. Under section 11, moreover, this greater burden is triggered only where competition has developed, which, as I discuss below, recognizes the importance Congress placed on the need for regulatory restraint in the presence of competition. The majority's suggestion that the Commission might continually readopt rules under section 201(b) that were required to be repealed pursuant to section 11 (*see* Report ¶ 18) is a straw man: Where competition has developed, the Commission's judgment about whether to adopt a rule will necessarily be informed by section 11's – and, for that matter, the entire 1996 Act's – admonition to exercise regulatory restraint in the presence of competition.

Unlike the majority's interpretation, moreover, my view that the standards of section 11 and section 201(b) differ is supported by the text of the provisions. In contrast to section 11, section 201(b) is phrased in lenient, permissive terms: "The Commission may prescribe such rules and regulations as *may* be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. § 201(b) (emphasis added). Section 201(b) thus makes clear that a decision whether to adopt a rule is held to a different standard than the decision whether to retain a rule. Unlike a decision to retain a rule, the decision to adopt a rule is, as discussed above, necessarily predictive and cannot be based on actual evidence of the rule's operation. Under section 201(b), such a decision can be justified if it is likely to – or "*may*" – be necessary in the public interest. This stands in marked contrast to section 11's mandate to retain a rule only if it is necessary in the public interest, without any qualifications.

The majority offers no basis whatsoever for equating these determinations. The majority simply reads the determination that a rule "*may* be necessary in the public interest" to be identical to the determination that a rule is "necessary in the public interest," which the majority has already argued means exactly the same thing as "in the public interest." Again, the only way to make sense of the majority's argument is to read words completely out of the statute. As the majority itself argues, it is better to presume that "Congress meant what it said." Report ¶ 17 n.32.[92]

[92] The language of section 201(b) also answers the majority's argument based on section 11's use of the phrase "*no longer* necessary in the public interest": it argues that the phrase "'*no longer* necessary' clearly implies that such regulations were once 'necessary in the public interest.'" Separate Statement of Chairman Powell and Commissioner Abernathy; *see also* Report ¶ 17 n.32. Under section 201(b), however, the Commission must determine that a rule "*may* be necessary in the public interest" in order to adopt it in the first instance. Section 11's mandate to repeal or modify rules "*no longer* necessary in the first instance" simply acknowledges that the rule "may" have been necessary in the public interest previously.

The contexts in which section 11 and section 201(b) were enacted were also quite different. Section 201(b) was enacted in 1938, a time when there was no competition in telecommunications. The entire purpose of this provision, as well as the 1934 Communications Act, was to *grant* the Commission regulatory authority. Section 11 and the 1996 Act, in contrast, were part of a fundamental "paradigm shift" to *limit* regulatory authority. *Pressler Statement*, 141 Cong. Rec. S7881-02 at S7888. While previous legislative efforts assumed "the concept of regulated monopoly as a given" – "that monopoly, like the poor, would always be with us" – the 1996 Act is based on the recognition that competition – not regulation – will maximize consumer welfare. *Id.* The 1996 Act was intended "*to promote competition and reduce regulation*." Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996) (emphasis added). It "was an unusually important legislative enactment. . . . *[I]ts primary purpose was to reduce regulation* . . . ." *Reno v. ACLU*, 521 U.S. 844, 857 (1997) (emphasis added) (quotation marks omitted). Section 11 was intended to be a significant part of the 1996 Act's deregulatory program. Entitled "regulatory reform," the provision was meant to reduce regulation and to constrain the Commission's authority. Congress wanted to ensure that, "[e]very 2 years . . . all the rules and regulations will be on the table." *Pressler Statement*, 141 Cong. Rec. S7881-02 at S7888.

The biggest problem with the majority's argument, however, is it that it would, to use the majority's terms, "render section 11 an absurdity." Report ¶ 18 n.35. That is because – irrespective of section 11 – the Commission already has an obligation to maintain only those rules that are in the public interest. *See Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (The Commission's "statutory mandate. . . [prohibits] employ[ing] a policy that, by its own determination, did not serve the public interest.").[93] On the majority's interpretation, section 11 would merely restate this obligation – and, even then – only in limited circumstances. As the majority rightly emphasizes, section 11 requires a finding of meaningful competition before its obligation to repeal or modify a rule comes into play. There must be a "causal connection" between the existence of competition and a finding that a regulation is longer "necessary in the public interest." Report ¶ 23. Thus, under the majority's theory, the Commission properly could, in a section 11 proceeding, acknowledge that numerous regulations are no longer in the public interest but maintain them because their lack of support was not due to the presence of competition. *See id.* ¶¶ 23-27.

The majority insists that it does not read the statute in this manner. At least according to the Chairman and Commissioner Abernathy, "If the Biennial Review process identifies rules that have become obsolete based on factors other than competition . . . the broad and clear deregulatory goals of the Act and our general public interest obligations require that we modify or eliminate such rules." Separate Statement of Chairman Powell and Commissioner Abernathy. The problem with this assertion, however, is that it renders the presence or absence of competition completely irrelevant. Whether or not there is meaningful competition, a rule that is no longer in the public interest must be repealed or modified. The only thing that turns on a finding of competition is apparently the legal citation attached to a rule's repeal or modification. If that is the case, why would Congress require a finding of meaningful competition at all? This reading of section 11 is, in the majority's words, "dysfunctional[]" at best. *Id.* ¶ 15 n.22.

In my view, a critical aspect of section 11 and the 1996 Act's deregulatory scheme – and one lost in the majority's interpretation – is the notion that, where competition is present, competition – and not regulation – is the best method of delivering choice, innovation, and affordability to our nation. Congress thus made the presence or absence of meaningful competition a crucial factor in determining the nature and extent of regulation. Where there is such competition, Congress intended there to be deregulation.

[93] *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.").

For example, in section 271, Congress conditioned Bell Operating Company entry into the long-distance market on the extent of competition in local markets. *See* 47 U.S.C. § 271. And, in section 10, Congress directed the Commission to examine "competitive market conditions" in deciding whether to grant a petition for forbearance. 47 U.S.C. § 160(b). Similarly, section 11 requires a finding of meaningful competition before its obligation to repeal or modify a rule comes into play.

Unlike the majority's interpretation, my reading of section 11 gives meaning to Congress's admonition that the Commission condition deregulation on the presence of competition. Where meaningful competition is not present, Congress understood the importance of regulation, and the Commission has some latitude to maintain regulations. But where meaningful competition is present, Congress believed that competition will maximize consumer welfare and that regulation may be unnecessary and potentially harmful. As the majority acknowledges, where competition is present, "Section 11 creates a presumption in favor of repealing or modifying covered rules." Report ¶ 28. In such circumstances, the burden shifts to the Commission to justify why continued regulation is "necessary in the public interest." In making that judgment, the Commission should not be able simply to rest on the ground that the regulation at issue served some public interest purpose and that no one has proved that is no longer the case. The issue is whether the regulation is superior to competition and still needed to serve that purpose. We should have to undertake a substantive and factual examination of the regulation and its effects to determine if its purpose can only be achieved through regulation instead of market forces. The ultimate question must be whether, in light of competition, the rule is "necessary." In my view, this approach is most faithful to the language of the statute and the intent of Congress.

* * *

Accordingly, for the reasons stated above, I respectfully dissent from this item's discussion of section 11's standard as well as from its application of that standard.