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*,[1] one of the seminal decisions in the Supreme Court's constitutional jurisprudence — have construed "necessary" to mean convenient or useful.[2] 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.[3]

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

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

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

[3] *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.[4]

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.[5]

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.[6]

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[4] 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.

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

[6] 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.