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."[1] 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."[2] Section 11 then mandates that "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."[3]

As I have explained repeatedly in previous decisions before the Commission, I believe the majority has failed to adhere to this language.[4] 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

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[1] Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996).
[2] 47 U.S.C. § 161(a).
[3] *Id.* § 161(b).
[4] *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).

the public interest" means nothing more than "in the public interest."[5] 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 "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[]."[6]

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.[7] 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."[8] 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."

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[5] *See* Report ¶¶ 15, 17-18.
[6] *Id.* ¶ 18 n.35.
[7] Separate Statement of Chairman Powell and Commissioner Abernathy; *see* Report ¶¶ 23-27.
[8] Separate Statement of Chairman Powell and Commissioner Abernathy.

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."[9] The majority offers no basis whatsoever for 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

[9] 47 U.S.C. § 201(b) (emphasis added).

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).[10] 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

[10] *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).

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*.[11]

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

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

[11] 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.

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).[12] 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).[13] 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

[12] 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).

[13] 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).

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 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.[14]

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.").[15] 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 no longer "necessary in the public interest." Report ¶ 23. Thus, under

[14] 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.

[15] *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.").

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. 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.

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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.