

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1080

VERIZON TELEPHONE COMPANIES,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED.....	1
STATUTES AND REGULATIONS.....	2
JURISDICTIONAL STATEMENT.....	3
COUNTERSTATEMENT OF THE CASE.....	3
I. Statutory Background.....	3
A. Communications Act of 1934.....	3
B. 1996 Act.....	5
C. Initial Biennial Review Proceedings.....	6
II. The 2002 Biennial Review Proceeding.....	8
A. Initial Proceedings.....	8
B. Report.....	9
(1) “Necessary In The Public Interest”.....	9
(2) Biennial Review Presumptions and Burdens.....	12
(3) Temporal Requirements Of Section 11.....	13
C. Staff Reports.....	14
III. Judicial Proceedings And Related Cases.....	15
A. CellCo Partnership and CTIA.....	15
B. June 5 Order.....	16
STANDARD OF REVIEW.....	16
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	20
I. THE COURT SHOULD DISMISS BECAUSE VERIZON FAILED TO ESTABLISH ITS STANDING.....	20
II. THE COURT LACKS JURISDICTION TO REVIEW THE COMMISSION’S INTERPRETATION OF “NECESSARY IN THE PUBLIC INTEREST.”.....	25

A. Verizon Does Not Seek Review Of Final Agency Action.....25

B. The Report Is Not Ripe For Review.27

III. THE COMMISSION’S CONSTRUCTION OF “NECESSARY IN THE PUBLIC INTEREST” IS REASONABLE.31

A. The Phrase “Necessary In The Public Interest” Is Ambiguous.....31

B. The Statutory Language Supports The Commission’s Construction.....32

C. The Commission’s Construction Is Consistent With The Underlying Legislative Purpose And Legislative History.....36

IV. VERIZON’S CLAIM THAT THE COMMISSION VIOLATED SECTION 11 IN CONDUCTING THE 2002 BIENNIAL REVIEW IS NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT LACKS MERIT.....42

CONCLUSION.....47

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
* <u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136 (1963)	27, 28
<u>Alabama Power Co. v. FCC</u> , 311 F.3d 1357 (D.C. Cir. 2002)	4
<u>American Federation of Government Employees v. OPM</u> , 821 F.2d 761 (D.C. Cir. 1987)	30
<u>American Horse Protection Association, Inc. v. Lyng</u> , 812 F.2d 1 (D.C. Cir. 1987)	39
* <u>AT&T Corp. v. Iowa Utilities Board</u> , 525 U.S. 366 (1999)	3, 5, 30
* <u>AT&T v. EEOC</u> , 270 F.3d 973 (D.C. Cir. 2001)	22, 26
<u>Better Government Association v. Department of State</u> , 780 F.2d 86 (D.C. Cir. 1986)	28
<u>Capital Network System, Inc. v. FCC</u> , 3 F.2d 1526 (D.C. Cir. 1993)	25, 26
* <u>Cellular Telecommunications & Internet Association v. FCC</u> , 330 F.3d 502 (D.C. Cir. 2003)	15, 40
* <u>Chevron USA v. Natural Resources Defense Council</u> , 467 U.S. 837, <u>reh. denied</u> , 468 U.S. 1227 (1984)	16
<u>Chicago & Southern Air Lines v. Waterman S.S. Corp.</u> , 333 U.S. 103 (1948)	25
<u>Coalition for Noncommercial Media v. FCC</u> , 249 F.3d 1005 (D.C. Cir. 2001)	21
<u>Comsat Corp. v. FCC</u> , 77 F.3d 1419 (D.C. Cir. 1996)	31
<u>Consolidated Coal v. Federal Mine Safety & Health Review Commission</u> , 824 F.2d 1071 (D.C. Cir. 1987)	29
<u>Director, Office of Workers Compensation Department of Labor v. Newport News Shipbuilders Dry Dock Co.</u> , 514 U.S. 122 (1995)	22
<u>DRG Funding Corp. v. HUD</u> , 76 F.3d 1212 (D.C. Cir. 1996)	25, 26
<u>FCC v. National Citizens Committee For Broadcasting</u> , 436 U.S. 775 (1978)	4

Fox Television Stations v. FCC, 280 F.3d 1927 (D.C. Cir.), reh'g granted in part, 293 F.3d 537 (2002) 9, 24, 29, 31

Franklin v. Massachusetts, 505 U.S. 788 (1992) 26

Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169 (D.C. Cir. 1997) 43

FTC v. Ken Roberts Co., 276 F.3d 583 (D.C. Cir. 2001) 39

FTC v. Standard Oil of California, 449 U.S. 232 (1980) 29

General Instrument Corp. v. FCC, 213 F.3d 724 (D.C. Cir. 2000) 21

GTE Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000) 41

GTE Service Corp., 762 F.2d 1024 (D.C. Cir. 1985) 43

Gustafson v. Alloyd Company, Inc., 513 U.S. 561 (1995) 32

Jinks v. Richland County, 123 S.Ct. 1667 (2003) 31

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 22

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 27

Mobile Telecommunications Corp. of America v. FCC, 77 F.3d 1399 (D.C. Cir.), cert. denied, 519 U.S. 823 (1996) 4

Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060 (D.C. Cir. 1998) 39

National Association of Regulatory Utility Commissioners v. DOE, 851 F.2d 1424 (D.C. Cir. 1988) 30

National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) 36

National Customers Brokers & Forwarders Association of America, Inc. v. United States, 833 F.2d 93 (D.C. Cir. 1989) 39

National Park Hospitality Association v. Department of the Interior, 123 S.Ct. 2026 (2003) 27

Natural Resources Defense Council v. FAA, 292 F.3d 875 (D.C. Cir. 2002) 28, 29

New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101
(D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989)..... 4, 32

Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726
(1998)..... 27, 29, 30

Pfizer Inc. v. Shalala, 182 F.3d 975 (D.C. Cir. 1999)..... 29

Port of Boston Marine Terminal Association v. Rederiaktiebolaget
Transatlantic, 400 U.S. 62 (1970)..... 26

Rainbow/PUSH Coalition v. FCC, 330 F.3d 539 (D.C. Cir. 2003)..... 24

Regions Hospital v. Shalala, 522 U.S. 448 (1998) 32

* Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302 (D.C. Cir. 1997) 4, 23

Shell Oil v. FERC, 47 F.3d 1186 (D.C. Cir. 1995)..... 22

Sierra Club v. EPA, 292 F.3d 895 (D.C. Cir. 2002) 16, 21

Sinclair Broadcasting Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir.
2002) 38

Sprint Corp. v. FCC, 331 F.3d 952 (D.C. Cir. 2003)..... 28

State Farm Mutual Automobile Insurance v. Dole, 802 F.2d 474
(D.C. Cir. 1986) 28

Telecommunications Research and Action Center v. FCC, 750
F.2d 70 (D.C. Cir. 1984)..... 25

Texas v. United States, 523 U.S. 296 (1998)..... 29

Toilet Goods Association, Inc. v. Gardner, 387 U.S. 158 (1967)..... 28, 30

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)..... 4, 32

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002)..... 17

Vermont Agency of Natural Resources v. United States, 529 U.S.
765 (2000)..... 22

Vermont Yankee Nuclear Power Corp. v. Natural Resources
Defense Council, Inc., 435 U.S. 519 (1978)..... 41

Whitman v. American Trucking Associations, Inc., 531 U.S. 457
(2001)..... 28

Whitmore v. Arkansas, 495 U.S. 149 (1990)..... 22, 24

Williamson County Regional Planning v. Hamilton Bank, 473 U.S.
172 (1985)..... 26

Administrative Decisions

2000 Biennial Regulatory Review, 16 FCC Rcd 10647 (2001) 6

Review of Commission Consideration of Applications Under The
Cable Landing License Act, 16 FCC Rcd 22167 (2001)..... 6

Rules and Policies on Foreign Participation in the U.S.
Telecommunications Market, 15 FCC Rcd 18158 (2000)..... 6

Statutes and Regulations

5 U.S.C. § 551(5) 45

5 U.S.C. § 553(b) 14

5 U.S.C. § 553(c) 14

5 U.S.C. § 702..... 22

5 U.S.C. § 704 25

28 U.S.C. § 2342..... 25

28 U.S.C. § 2342(1) 3

28 U.S.C. § 2344..... 22

47 U.S.C. § 151..... 3

47 U.S.C. § 152..... 5

47 U.S.C. § 152(b) 36

47 U.S.C. § 153(10) 36

* 47 U.S.C. § 154(i)..... 4

* 47 U.S.C. § 155(c)(1)..... 4, 44

47 U.S.C. § 155(c)(3)..... 4, 44

47 U.S.C. § 155(c)(4)..... 4

* 47 U.S.C. § 155(c)(7).....	4, 23, 43
47 U.S.C. § 160.....	45
* 47 U.S.C. § 161.....	1
* 47 U.S.C. § 161(a)	6
* 47 U.S.C. § 161(a)(1).....	23
* 47 U.S.C. § 161(b)	6
* 47 U.S.C. § 201(b).....	3, 9
47 U.S.C. § 202(a)	3
47 U.S.C. § 204.....	3
47 U.S.C. § 205.....	3
47 U.S.C. § 206.....	3
47 U.S.C. § 207.....	3
47 U.S.C. § 208.....	3
47 U.S.C. § 209.....	3
47 U.S.C. § 224(e)(1).....	5
47 U.S.C. § 251(b)	5
47 U.S.C. § 251(d).....	5, 45
47 U.S.C. § 254.....	5
47 U.S.C. § 254 (g).....	5
47 U.S.C. § 259.....	5
47 U.S.C. § 271(d)(6)(B).....	5
47 U.S.C. § 276(b).....	5
* 47 U.S.C. § 303(r).....	3
47 U.S.C. § 402(a)	3, 22
* 47 U.S.C. § 405.....	43

	<u>Page</u>
47 U.S.C. § 503.....	3
47 U.S.C. § 653(b)(1)	5
47 C.F.R. § 1.115	14
47 C.F.R. § 1.115(d)	4, 23
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).....	1, 5

Others

H.R. Conf. Rep. No. 104-458, 104 th Cong., 2d Sess. 185 (1996).....	11, 37
S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)	5

**Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1934 Act	Communications Act of 1934
1996 Act	Telecommunications Act of 1996
APA	Administrative Procedure Act
CMRS	Commercial Mobile Radio Service
Commission	Federal Communications Commission

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Section 11 of the Telecommunications Act of 1996 (“1996 Act”)¹ requires the Federal Communications Commission to conduct biennial reassessments of regulations “that apply to the operations and activities of any provider of telecommunications service,” and to modify or repeal any such regulations it determines are “no longer necessary in the public interest as a result of meaningful competition.” 47 U.S.C. § 161. In the decision before the Court, the Commission, interpreting the phrase “necessary in the public interest,” determined that section 11 requires the repeal or modification of rules that the agency finds no longer serve the public interest in light of

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

the current state of competition. 2002 Biennial Regulatory Review, 18 FCC Rcd 4726 (2003) (J.A.) (“Report”). The Commission also reaffirmed an earlier determination that section 11(a), which requires the Commission to reassess certain rules in every even numbered year, did not obligate the Commission, within the calendar year in which the reassessment takes place, to complete action under section 11(b) to repeal or modify unnecessary rules. The questions presented are:

1. Whether the Court should summarily dismiss for lack of standing in light of Verizon’s failure to submit any evidence to establish its standing, in disregard of this Court’s explicit instructions in this case?

2. Whether the Court lacks jurisdiction to review the Commission’s facial interpretation of the statutory phrase “no longer necessary in the public interest” because the interpretation does not constitute final agency action and is not ripe for review?

3. If the Court has jurisdiction to review the Commission’s interpretation of “necessary in the public interest,” whether that construction is reasonable and therefore entitled to deference?

4. Whether the Court has jurisdiction to consider Verizon’s claim that the Commission violated deadlines in section 11 in conducting the 2002 Biennial Review, and, if so, whether the Commission satisfied that statute?

STATUTES AND REGULATIONS

Relevant statutes and regulations are contained in the statutory appendix.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to review Commission final orders under 47 U.S.C. §§ 402(a) and 28 U.S.C. § 2342(1). The Court lacks jurisdiction to review the Report because Verizon failed to establish its standing and because the Report is neither final agency action nor ripe for review.

COUNTERSTATEMENT OF THE CASE

I. Statutory Background

A. Communications Act of 1934

The Communications Act of 1934 created the Commission to regulate interstate and international wire and radio communications services. 47 U.S.C. § 151. The Act requires the Commission to ensure, *inter alia*, that the charges and practices for such services are just and reasonable, 47 U.S.C. § 201(b), and free of any undue discrimination or preference, 47 U.S.C. § 202(a).

Title II of the Communications Act requires or authorizes the Commission to undertake a number of investigative, quasi-legislative, adjudicatory, and enforcement actions to carry out its statutory responsibilities with respect to common carriers. For example, the Commission has authority to investigate the lawfulness of interstate carrier charges and practices (47 U.S.C. §§ 204, 205), to prescribe just and reasonable charges or practices (47 U.S.C. § 205), to adjudicate complaints of unlawful carrier conduct (47 U.S.C. §§ 206-09), and to levy forfeitures for carrier misconduct (47 U.S.C. § 503).

Section 201(b) gives the Commission the quasi-legislative authority to adopt regulations as may be “necessary in the public interest.” 47 U.S.C. § 201(b).² Similarly, section 4(i) – a

² See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 378 n.5 (1999) (“AT&T”). See also 47 U.S.C. § 303(r).

statutory "necessary and proper clause"³ – empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent [with the express provisions of the Act], as may be necessary in the execution of its functions." 47 U.S.C.

§ 154(i).⁴ The Supreme Court has held that the “general rulemaking power” of sections 201(b) and 4(i) authorizes the Commission broadly to adopt rules so long as they “are not an unreasonable means” to achieve “permissible public-interest goals.”⁵

With certain exceptions not applicable to this case, section 5(c)(1) authorizes the Commission to “delegate any of its functions” to its staff. 47 U.S.C. § 155(c)(1). A staff action issued under delegated authority has “the same force and effect . . . as other actions of the Commission.” 47 U.S.C. § 155(c)(3). Any person aggrieved by an action taken by the staff under delegated authority has the right to file an application for review by the Commission within 30 days of the staff action.⁶ The filing of an application for review is a “condition precedent to judicial review” of any staff decision. 47 U.S.C. § 155(c)(7).⁷

³ See Mobile Telecommunications Corp. of America v. FCC, 77 F.3d 1399, 1404 (D.C. Cir.), cert. denied, 519 U.S. 823 (1996); New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989) (internal quotations omitted).

⁴ The “wide-ranging source of authority” in section 4(i) empowers the Commission to take “appropriate and reasonable” actions in furtherance of its regulatory responsibilities. See New England Telephone, 826 F.2d at 1108.

⁵ FCC v. National Citizens Committee For Broadcasting, 436 U.S. 775, 796 (1978) (“NCCB”). See United States v. Storer Broadcasting Co., 351 U.S. 192, 201 (1956).

⁶ 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(d).

⁷ Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302, 1303-04 (D.C. Cir. 1997). See Alabama Power Co. v. FCC, 311 F.3d 1357, 1366 (D.C. Cir. 2002).

B. 1996 Act

Congress adopted the 1996 Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement). Congress adopted the 1996 Act "not as a freestanding enactment, but as an amendment to, and hence part of," the Communications Act.⁸ Section 601(c)(1) of the 1996 Act states that the 1996 Act "shall not be construed to modify, impair, or supersede" the Communications Act "unless expressly so provided." Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 47 U.S.C. § 152 note.

The broad policies established by the 1996 Act in large part were left to be implemented through agency regulations. Section 201(b) "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."⁹ The 1996 Act specifically required the Commission in expedited proceedings to adopt a multitude of new rules. For example, the 1996 Act directed the Commission to adopt new regulations governing local competition (47 U.S.C. § 251(d)), universal service (47 U.S.C. § 254), number portability (47 U.S.C. § 251(b)), rate and service integration (47 U.S.C. § 254 (g)), payphones (47 U.S.C. § 276(b)), open video systems (47 U.S.C. § 653(b)(1)), the availability of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" (47 U.S.C. § 259), unfair billing practices (Pub. L. No. 104-104, § 701, 110 Stat. 56), pole attachment charges (47 U.S.C. § 224(e)(1)), and complaint procedures (e.g., 47 U.S.C. § 271(d)(6)(B)).

⁸ AT&T, 525 U.S. at n.5 (1999) (emphasis omitted).

⁹ Id. 525 U.S. at 380.

The 1996 Act also directed the agency to make biennial reassessments of certain regulations. Section 11 requires the Commission “in every even-numbered year” to review its regulations “issued under this Act” that apply to the operations and activities of telecommunications providers, and to determine whether any such regulations are “no longer necessary in the public interest as the result of meaningful economic competition. . . .” 47 U.S.C. § 161(a). Following such review, the Commission is directed to repeal or modify any regulations that it determines “no longer [are] necessary in the public interest.” 47 U.S.C. § 161(b). Section 202(h) of the 1996 Act requires the Commission to undertake a similar biennial review of its broadcast ownership rules. Pub. L. No. 104-104, § 202(h), 110 Stat. 56.

C. Initial Biennial Review Proceedings

The biennial reviews have led the Commission to determine that many regulations applicable to telecommunications providers are no longer “necessary in the public interest” and to repeal and modify them. For example, in the international service market, the Commission in the 2000 Biennial Regulatory Review removed tariff regulation from interexchange services provided by non-dominant carriers,¹⁰ adopted optional streamlined procedures for processing applications for submarine cable landing licenses,¹¹ reduced the notification period in the foreign carrier affiliation notification rule, and exempted certain classes of foreign carriers from the requirement that they submit prior notification.¹² The Commission also eliminated a number of regulations governing wireless services, including the Commercial Mobile Radio Service

¹⁰ 2000 Biennial Regulatory Review, 16 FCC Rcd 10647 (2001).

¹¹ Review of Commission Consideration of Applications Under The Cable Landing License Act, 16 FCC Rcd 22167 (2001).

¹² Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 15 FCC Rcd 18158 (2000).

(“CMRS”) Spectrum Cap Rule, the cellular cross-interest rules in Metropolitan Statistical Areas, various Part 22 cellular rules, the wireless resale rule, and the separate affiliate requirement for in-region broadband CMRS service.¹³ In wireline communications, the Commission inter alia streamlined its uniform system of accounts, reformed its universal service rules, eliminated unnecessary tariff rules, streamlined regulations governing certain requests for transfers of control, repealed restrictions on the ability of common carriers to offer bundled packages of telecommunications services and customer-premises equipment at discounted prices, and privatized the technical criteria development and terminal equipment approval processes.¹⁴

The Commission in the 2000 Biennial Regulatory Review considered whether section 11 imposed deadlines on the review of regulations. The Commission concluded that section 11 did not require the agency to complete action to repeal or to modify its rules within a specified period. The Commission reasoned that section 11(a) requires the Commission in “every even-numbered year” to review the covered rules to “determine” whether those rules “are no longer necessary in the public interest.” After it makes that determination, section 11(b) requires the Commission to “repeal or modify” any unnecessary rule. The Commission explained that the two subsections distinguish between making determinations (i.e., “that certain rules are no longer [necessary] in the public interest”), which must occur in “every even numbered year,” and taking

¹³ Biennial Regulatory Review 2002, 18 FCC Rcd 4243, 4247-49 (¶¶ 12-18) (WTB, 2003) (“WTB Staff Report”).

¹⁴ Biennial Regulatory Review 2002, 18 FCC Rcd 4622 (WCB, 2002) (“WCB Staff Report”) at 4642-43, 4670-72, 4684, 4692, 4718 (J.A.).

action to repeal or modify rules, which is not subject to statutory time constraints. 2000 Biennial Regulatory Review, 16 FCC Rcd at 1210 (¶ 12).¹⁵

II. The 2002 Biennial Review Proceeding

A. Initial Proceedings

On September 26, 2002, the Commission in a series of public notices invited parties to submit comments on whether rules affecting telecommunications carriers were “no longer necessary in the public interest.”¹⁶ The Commission received more than 100 comments and reply comments.¹⁷ Most parties commented upon specific rules that they wanted the Commission to repeal, modify or retain. A few parties expressed views on the proper construction of section 11 and the Commission’s responsibilities in implementing it. Verizon, for example, argued that the “plain meaning” of section 11 obligated the Commission to modify or repeal any rule that is not “required” or “absolutely needed.”¹⁸

The Commission adopted a two-fold approach in responding to the comments. The Commission in the Report, at 4726 (J.A.), addressed the scope and meaning of section 11. At the same time, the Commission’s staff – through a series of reports issued under delegated authority – reviewed each rule covered by section 11 and determined whether that rule should be modified or repealed because it no longer is necessary in the public interest in light of

¹⁵ Neither Verizon nor any other party sought judicial review of the 2000 Biennial Regulatory Review.

¹⁶ See Report, at 4726 (¶ 3) & n.3 (J.A.).

¹⁷ Report, at 4727 (¶ 3) (J.A.).

¹⁸ Biennial Review 2002 Comments of Verizon, WC Docket No. 02-313 (Oct. 18, 2002) at 2, 3 (“Verizon Comments”) (J.A.).

meaningful competition.¹⁹ The Report and the staff reports were separately adopted on December 31, 2002, and released on March 14, 2003.

B. Report

(1) “Necessary In The Public Interest”

The Commission in the Report rejected the claim that section 11 by its plain meaning requires the Commission to repeal any rule that it does not find to be absolutely essential. Report, at 4730-36 (¶¶ 14-23) (J.A.).²⁰ While recognizing that the term “necessary” in some statutory contexts means “essential,” the Commission pointed out that “necessary” in other statutory contexts – including the context of FCC rulemaking under the Act – denotes “useful, convenient, or appropriate.” Report, at 4731 (¶ 15) (J.A.). The Commission concluded that the phrase “necessary in the public interest” in section 11 is ambiguous and is best construed “in its statutory context.” Report, at 4732 (¶ 15) (J.A.).

The Commission pointed that section 201(b) of the Act uses the identical phrase in authorizing the agency to adopt such rules as may be “necessary in the public interest.” 47 U.S.C. § 201(b). This standard permits the agency to adopt rules upon a finding that they “advance legitimate regulatory objectives – not that they are ‘necessary’ in the sense of indispensable.” Report, at 4732 n.25 & 4733 n.31 (J.A.). The Commission determined that

¹⁹ Biennial Regulatory Review 2002, 18 FCC Rcd 4196 (IB, 2002) (“IB Staff Report”); WTB Staff Report, 18 FCC Rcd 4243; Biennial Regulatory Review 2002, 18 FCC Rcd 4386 (OET, 2002) (“OET Staff Report”); Biennial Regulatory Review 2002, 18 FCC Rcd 4410 (CGA, 2002) (“CGA Staff Report”); WCB Staff Report, 18 FCC Rcd 4622.

²⁰ The Commission rejected the claim that Fox Television Stations v. FCC, 280 F.3d 1927 (D.C. Cir.), reh’g granted in part, 293 F.3d 537 (2002), compels it to interpret section 11 to require the repeal of any rule the Commission does not find to be essential. The Commission pointed out that on rehearing the Court in Fox explicitly left open the meaning of “necessary in the public interest” in section 202(h). Report, at 4730-31 (¶ 14 & n.21) (J.A.).

the “necessary in the public interest” standard should be interpreted in the same manner as the same phrase in section 201(b). Report, at 4730-36 (¶¶13-22) (J.A.). The Commission stated that “[i]f Congress had intended the Commission to apply a different standard in evaluating rules under [s]ection 11 than in adopting them [under section 201(b)], presumably it would have used two clearly distinct standards.” Report, at 4734 n.32 (J.A.).

The Commission found that the “crucial” phrase “no longer” provided further support for its interpretation. Report, at 4733 n.32 (J.A.). In directing the Commission to determine whether each covered regulation is “*no longer* necessary in the public interest,” the Commission reasoned, Congress had “presuppose[d] that each such regulation was once ‘necessary in the public interest.’” Id., at 4733 n.30, (J.A.).

The Commission rejected the argument that the use of different verbs preceding the “necessary in the public interest” standards in sections 201(b) and section 11 requires the conclusion that the two standards are different. The Commission stated that Congress would not have used the identically worded standard with different verbs if it intended the section 11 standard to be more stringent than the one in section 201(b). The Commission found nothing in the legislative history to suggest that the terms “may” in section 201(b) and “is” in section 11 indicate Congress’s intent to create two disparate standards. Report, at 4734 n.32 (J.A.). The Commission also found that both statutory provisions obligate the agency to make predictive judgments as to the “necessity” of a specific rule: section 201(b) requires a predictive judgment as to whether the rule is necessary “to carry out the provisions of the Act,” whereas section 11 entails the predictive judgment as to whether the rule remains necessary to achieve the stated objective in light of the current competitive environment. Report, at 4733 n.32, quoting 47 U.S.C. § 201(b) (J.A.).

The Commission noted that the Conference Report states that section 11 requires the Commission to determine whether any of the covered regulations “are no longer in the public interest because competition between providers renders the regulation no longer meaningful.” Report, at 4732 (¶ 17), quoting H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 185 (1996). The Commission concluded that the legislative history, by urging the Commission to focus on whether a rule is ‘no longer in the public interest’ or is ‘no longer meaningful,’ “reasonably suggests that the same public interest standard applies both under [s]ection 11 and when the Commission initially adopts a rule.” Report, at 4733 (¶ 17) (J.A.).

In addition, the Commission found that construing section 11 to impose the same standard for the reassessment that applies at the adoption of rules is necessary to avoid absurd results. Report, at 4733-4 (¶ 128 & n.34) (J.A.). The Commission pointed out that if section 11 established a more stringent “necessary in the public interest” standard than applies in section 201(b), the FCC could adopt new rules upon a finding that the rules serve the public interest but then would be forced to repeal or modify those rules two years later unless it could find under the higher standard that the rules were indispensable or essential. The Commission presumably could then reenact those same rules on a finding that they served the public interest, but only for two more years until the next biennial review. The Commission found nothing in the text, structure, or purpose of section 11, or its legislative history, suggests that Congress intended to create such a disjunction between the standards for adopting rules and retaining them. Report, 4734 (¶ 18) (J.A.).

The Commission rejected the argument that the deregulatory purpose underlying the 1996 Act compels the agency to construe “necessary” in section 11 to mean indispensable. Although the Commission acknowledged that “the 1996 Act favors competition and evidences a

faith that when competition takes hold, many regulations can be eliminated,” it found that the 1996 Act does not require the modification or repeal of agency rules that continue to serve the public interest. Report, at 4735 (¶ 21) (J.A.). Instead, the Commission concluded that section 11 directs the agency to “reevaluate [its] rules in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule – that it was needed to further the public interest – remains valid.” Id. at 4735 (¶ 21) (J.A.).

The Commission also rejected the argument that its construction of section 11 renders the statute meaningless. Id. at 21736 n.47 (J.A.). The Commission pointed out that its obligation under section 11 to re-examine the need for each covered regulation every two years and to repeal or modify those it finds no longer to be necessary in the public interest is “something that is not otherwise required.” Report, at 4736 n.47 (J.A.).

(2) Biennial Review Presumptions and Burdens

The Commission rejected Verizon’s contention that section 11 assigns the Commission the burden to support, with substantial record evidence, any finding that a rule remains necessary under section 11 and that a rule must be repealed immediately if that burden is not satisfied. Report, at 4737-39 (¶¶ 28-32) (J.A.). The Commission explained that section 11 did not “create a special burden of proof apart from [the Commission’s] standard obligation to provide a reasoned basis for [its] decisions. Id. at 47378 (¶ 28) (J.A.).

The Commission agreed that section 11 requires it to examine the covered rules critically and determine whether the existing state of competition has rendered those rules no longer necessary. Report, at 4738 (¶ 28) (J.A.). The Commission also acknowledged that “[s]ection 11 creates a presumption in favor of repealing or modifying covered rules, where the statutory criteria are met.” Id. at 4735 (¶ 21) (J.A.) (emphasis added). The Commission concluded,

however, that this presumption did not require the agency “to deregulate for deregulation’s sake.” Id.

(3) Temporal Requirements Of Section 11

The Commission adhered to its decision in the 2000 Biennial Review, 16 FCC Rcd at 1213 (¶ 12), not to interpret section 11(b) to establish a deadline for the repeal or modification of rules found to be unnecessary under section 11(a). Report, at 4739 (¶ 33) (J.A.). The Commission explained that section 11(a) directs the Commission in each even-numbered year to review the covered rules and determine whether they are no longer in the public interest as a result of meaningful competition. After it completes that review and makes the required determinations, section 11(b) directs the agency to repeal or modify any rule that is no longer necessary in the public interest. The Commission pointed out that section 11(b) establishes no deadline for the completion of regulatory actions. The Commission stated that Congress could have created a deadline for completing the regulatory actions contemplated by section 11(b) – as it did for the completion of some other actions under the 1996 Act – but did not include any temporal constraint in section 11(b). Report, at 4739 (¶ 33 & n.70), citing 47 U.S.C. §§ 160(c), 251(d) (J.A.).

The Commission also declined to adopt a deadline on its own for completion of the actions required by section 11(b). While emphasizing its commitment to timely biennial reviews, the Commission found that such a deadline might not permit it to develop an adequate record in such proceedings. Report, at 4740 (¶ 33 & n.71) (J.A.). The Commission pointed

out that any such deadline would make compliance with the notice and comment rulemaking procedures mandated by the Administrative Procedure Act (“APA”) very difficult.²¹

C. Staff Reports

At the same time the Commission issued the Report, each of the relevant operating bureaus on delegated authority issued reports addressing (1) the purposes of each covered rule it administers; (2) the advantages of the rule; (3) the disadvantages of the rule; and (4) the impact of competitive developments on the rule. Each report set forth the Bureau’s determination as to whether individual rules continue to be necessary in the public interest.²² The Commission stated that, on the basis of the staff determinations, it would issue required notices of proposed rulemaking to repeal or modify regulations that no longer serve the public interest. Report, at 4726, 4740 (¶¶ 1, 34) (J.A.).

The Commission invited anyone disagreeing with the staff determinations to seek Commission review of the staff reports. Report, at 4740 (¶ 34) (J.A.). See 47 C.F.R. § 1.115. Neither Verizon nor any other party filed an application for review of the staff reports. Rulemakings to repeal or modify rules the staff identified as no longer necessary now are under way.

²¹ Before an agency may adopt, modify, or repeal a substantive rule, the APA requires the agency to issue a notice of proposed rulemaking, to provide parties with the opportunity to submit comments, to consider those comments, and to publish a general statement of the basis and purpose of the action taken. 5 U.S.C. § 553(b), (c).

²² IB Staff Report, 18 FCC Rcd 4196; WTB Staff Report, 18 FCC Rcd 4243; OET Staff Report, 18 FCC Rcd 4386; CGA Staff Report, 18 FCC Rcd 4410; WCB Staff Report, 18 FCC Rcd 4622. The Report and the staff reports were each adopted separately on December 31, 2002, and released to the public on March 14, 2003. See Report, at 4746 (¶ 2) (J.A.).

III. Judicial Proceedings And Related Cases

A. CellCo Partnership and CTIA

Verizon's affiliate is challenging the Commission's construction of "necessary in the public interest" in section 11 in CellCo Partnership v. FCC, D.C. Cir. No. 02-1262. In CellCo Partnership, Verizon's affiliate argues that the term "necessary" plainly means indispensable and that section 11 thus unambiguously requires the Commission to repeal or modify any rule unless it finds the rule to be indispensable. The Court has set argument in CellCo Partnership on the same date and before the same panel as this case.

Verizon's affiliate earlier challenged the Commission's construction of the term "necessary" in section 10 of the 1996 Act, a statute that requires the Commission to forbear from applying regulations if the agency determines that certain conditions are met. Cellular Telecommunications & Internet Association v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003) ("CTIA"). In CTIA, Verizon's affiliate also argued that the plain meaning of "necessary" in that statute was indispensable. This Court rejected that argument, agreeing with the Commission that "necessary" has various meanings depending upon context, and that in "many situations" necessary "means something that is done, regardless of whether it is indispensable to achieve a particular end." 330 F.3d at 509. The Court held that the Commission reasonably decided not to construe "necessary" in section 10 to mean indispensable. The Court also stated that the petitioner's "rigid construction" of the term "necessary" was unreasonable and would lead to absurd results. 330 F.2d 512.

B. June 5 Order

On June 5, 2003, the Court established a briefing schedule and format for this case, explicitly reminding Verizon of its burden to establish standing.²³ The Court stated that Verizon may satisfy that burden by “citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim.”²⁴ The Court instructed Verizon that the evidence must be presented at the latest “with the petitioner’s opening brief – and not in reply to the brief of the respondent agency.”²⁵ The Court also told Verizon that its “Jurisdictional Statement” must contain “a concise recitation of the basis upon which it claims standing.”²⁶

Verizon’s opening brief in this case, filed on August 5, 2003, does not mention standing.

STANDARD OF REVIEW

In determining whether the Commission properly interpreted the Communications Act – including the 1996 amendments to that Act – the Court must review the agency’s decision in accordance with the standard articulated in Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, reh’g denied, 468 U.S. 1227 (1984). Under Chevron, the Court “employ[s] traditional tools of statutory construction” to determine “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 843 n.9, 842. If it has, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43.

²³ Order of the Court (June 5, 2003) (“June 5 Order”).

²⁴ June 5 Order at 2, quoting Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

²⁵ Id.

²⁶ Id.

If the statute is silent or ambiguous with respect to the specific issue, the agency may exercise reasonable discretion in interpreting the statute, and the reviewing court must defer to the expert agency's interpretation if it is reasonable. 467 U.S. at 843. See AT&T, 525 U.S. at 397 (Congress intended the Commission to resolve ambiguities in the 1996 Act); CTIA, 330 F.3d at 509-10. In such circumstances, “[t]he job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility.” Verizon Communications Inc. v. FCC, 535 U.S. 467, 539 (2002).

SUMMARY OF ARGUMENT

1. Even though this Court by order in this case reminded Verizon that it has the burden to prove standing, Verizon in its brief makes no attempt to establish its standing. Verizon's disregard of the Court's directive by itself warrants summary dismissal. In any event, the Court must dismiss because Verizon in fact lacks standing to challenge the Report. The Commission's facial interpretation of the “necessary in the public interest” standard in section 11 does not injure Verizon or restrain its conduct in any way.

Verizon also is not harmed by the Commission's construction of the temporal provisions of section 11 or by the agency's alleged failure to comply with a statutory deadline. And even if Verizon were injured, the remedy for that injury would be a writ of mandamus compelling the agency to act, not judicial review of an order that affirms the agency's prior construction of statutory time limits.

2. The Court lacks jurisdiction to review the Commission's interpretation of the statutory “necessary in the public interest” standard because it is not final action. The Commission takes final action when it applies that standard in deciding to repeal, modify or retain specific

regulations, not when it interprets the standard in the abstract. The Commission's facial construction of section 11 does not confer any rights or impose any obligations on Verizon.

The Report also is not ripe for review. Verizon's challenge is not fit for judicial decision because the Report is not final agency action and because deferring review until the Commission applies its interpretation in deciding to retain, modify, or repeal a specific rule affecting Verizon would advance the interests of the Commission and the Court. Verizon will not be harmed by postponing review until the Commission applies the section 11 standard because the Commission's construction of that standard does not in itself affect Verizon's primary conduct. Verizon's only aggrievement is a hypothetical, anticipatory injury premised upon the Commission's future application of the section 11 to particular rules, not harm arising from the Ruling itself.

3. If the Court reaches the merits, it should find that the Commission reasonably interpreted section 11. The term "necessary" has various meanings depending upon the context in which it is used. The Commission reasonably construed that term not to connote indispensability, but to mean in furtherance of the public interest. That construction comports with the meaning of "necessary" in the other sections of the Communications Act that define the Commission's authority and obligations in rulemaking, including section 201(b). Indeed, the identical phrase "necessary in the public interest" in section 201(b) has long been construed to permit the Commission to adopt rules that are appropriate or reasonably designed to carry out its statutory responsibilities. Use of the same phrase in section 11 strongly indicates that Congress intended the Commission to apply the same standard in reassessing rules that it uses in adopting the rules in the first place.

The statutory language directing the Commission to determine whether a rule is “no longer necessary in the public interest” provides additional support for the Commission’s construction. This language requires the agency to evaluate whether an existing rule, found to be “necessary in the public interest” under section 201(b) when it was initially promulgated, “no longer” satisfies the same standard.

Verizon’s contention that a higher standard applies under section 11 than under section 201(b) is both illogical and unworkable. It would permit the Commission to adopt new rules under one standard (section 201(b)), but then require those rules to be repealed or modified two years later if a higher standard (section 11) – expressed in exactly the same language as the first standard – is not met. The Commission presumably could again adopt the rule under section 201(b), but only for two more years until the next section 11 biennial review. Congress could not have intended that result.

The Commission’s construction does not frustrate any deregulatory objective underlying section 11 and 1996 Act generally. Although section 11 implements Congress’s determination that many regulations can (and should) be eliminated when full competition is realized, nothing in the 1996 Act requires the Commission to repeal or modify rules that it determines, after considering the current state of competition, continue to serve the public interest. Section 11 provides an orderly and regular mechanism to ensure that the Commission’s regulations reflect current competitive conditions and to prevent the retention of unneeded rules due to inertia or oversight. Section 11 does not announce a new standard for evaluating regulations.

4. The Court lacks jurisdiction to review Verizon’s claim that it violated the time constraints of section 11. Verizon filed with this Court a petition for review of the Ruling in which the Commission issued a facial interpretation of section 11, including its temporal

provisions. That petition does not permit the Court to consider the Commission’s alleged failure to act within any applicable time constraints. The remedy for unlawful Commission inaction or delay is a writ of mandamus compelling the agency to act – not court review of the Commission’s facial interpretation of section 11. The Court also lacks jurisdiction to review Verizon’s challenge to the staff determinations issued under delegated authority. Verizon failed to seek Commission review of the staff determinations, and section 5(c)(7) precludes judicial review of staff actions where, as here, the petitioner has not asked the agency to review the staff action.

If the Court reaches the merits of the temporal issues, it should find that the Commission reasonably construed section 11 and did not violate any statutory deadline. Section 11(a) requires the Commission every two years to reassess its rules and to determine whether they are no longer necessary in the public interest. The Commission adopted the Report and its staff adopted reports evaluating the covered rules within the calendar year 2002. Section 11(b), which requires the Commission to repeal or modify unnecessary rules, contains no reference to time. The Commission’s determination that section 11 did not require it to complete the rulemakings to repeal or modify unnecessary rules within the year 2002 is consistent with the language and the structure of section 11.

ARGUMENT

I. THE COURT SHOULD DISMISS BECAUSE VERIZON FAILED TO ESTABLISH ITS STANDING.

This Court explicitly reminded Verizon that where “standing is not self-evident” a petitioner must “establish its standing” by argument “and any affidavits or other evidence” in its

opening brief or earlier in the appellate proceeding.²⁷ The Court also directed Verizon in its opening brief to “include in the ‘Jurisdictional Statement’ a concise recitation of the basis upon which it claims standing.”²⁸

In the face of this Court’s reminder and directive, Verizon has not even asserted in its brief that it has standing to seek review of the Report, let alone provided “actual evidence . . . of facts that support its standing.”²⁹ Neither the Jurisdictional Statement nor any other part of Verizon’s opening brief mentions standing. Verizon’s failure to establish its standing in disregard of this Court’s order justifies summary dismissal.

The Court should not entertain any arguments or evidence on standing that Verizon may present in its reply brief. The June 5 Order instructed Verizon that it could not leave the issue of standing to its reply brief. The submission of arguments and evidentiary support at that late stage in the proceeding would deprive the Commission of the opportunity to respond in a brief, and in effect would reward Verizon for its apparent strategy of not showing its cards on this issue.³⁰

If the Court does not dismiss summarily because of Verizon’s failure to address standing in its opening brief, it nevertheless must dismiss because Verizon in fact lacks standing to seek review of the Report. Article III of the Constitution requires a litigant to establish its standing to invoke the power of a federal court. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561

²⁷ June 5 Order, quoting Sierra Club v. EPA, 292 F.3d at 900-01.

²⁸ Id.

²⁹ Rainbow/PUSH, 330 F.3d at 542.

³⁰ Even in the absence of a specific instruction such as the one here, a party may not raise a new argument in its reply brief. *E.g.*, Coalition for Noncommercial Media v. FCC, 249 F.3d 1005, 1010 (D.C. Cir. 2001); General Instrument Corp. v. FCC, 213 F.3d 724, 732 (D.C. Cir. 2000).

(1992).³¹ To satisfy the "irreducible constitutional minimum of standing,"³² Verizon must show that it suffers an actual or imminent injury³³ that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision.³⁴ The injury must be "real and immediate,"³⁵ "not conjectural or hypothetical."³⁶

Verizon does not have standing to challenge the Commission's construction of the statutory standard "necessary in the public interest." Unlike the adoption of a new regulatory requirement that directly constrains Verizon's primary conduct – and thus might cause injury even before it is applied – the Commission's facial interpretation of a provision of its governing statute imposes no burden on Verizon.³⁷ Verizon will not be injured unless and until the Commission applies its interpretation of section 11 in deciding to retain, modify, or repeal a specific regulation to Verizon's detriment.³⁸ The Commission took no such action in the Report.

Verizon's petition for review of the Report does not invoke the Court's jurisdiction to review the separate staff reports that contain determinations as to whether specific rules are "no

³¹This requirement also is reflected in the statutory provisions limiting review of agency action to "aggrieved" persons. 28 U.S.C. § 2344; 5 U.S.C. § 702; 47 U.S.C. § 402(a). See Director, Office of Workers Compensation Department of Labor v. Newport News Shipbuilders Dry Dock Co., 514 U.S. 122, 125 (1995).

³² Lujan, 504 U.S. at 560.

³³ See Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 771 (2000).

³⁴ 529 U.S. at 771.

³⁵ Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

³⁶ Lujan, 504 U.S. at 560, quoting Whitmore, 495 U.S. at 155.

³⁷ Shell Oil v. FERC, 47 F.3d 1186, 1203 (D.C. Cir. 1995).

³⁸ See AT&T v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001) (an agency does not cause injury by expressing its view of what the law requires.)

longer necessary in the public interest.” Verizon’s petition does not ask for judicial review of the staff reports and, even if it did, those reports are not subject to judicial review. Section 5(c)(7) of the Act makes the filing of an application for review with the full Commission a “condition precedent to judicial review” of such staff decisions. 47 U.S.C. § 155(c)(7).³⁹ Neither Verizon nor any other party filed an application for agency review of the staff reports, and the time for filing such applications has expired.⁴⁰ The staff determinations issued on delegated authority that particular rules continue to be necessary in the public interest are now final and not subject to judicial review.⁴¹

Any injury that might arise from the Commission’s application of the section 11 standard in future orders is too conjectural and remote to establish Verizon’s standing. The possibility that Verizon will be injured by a Commission decision at a later date to retain, modify or repeal some unspecified rule is purely speculative.⁴² To establish standing, Verizon must show an injury that is actual or “certainly impending,” not an unspecified future injury that merely is

³⁹ Richman Bros., 124 F.3d at 1303-04.

⁴⁰ The staff reports were released on March 14, 2003, and the deadline for filing applications for Commission review of those reports was April 14, 2003. See 47 C.F.R. § 1.115(d).

⁴¹ If Verizon were aggrieved by a staff determination that a particular rule should be left intact, it could have – and should have – filed an application for review with the Commission. The Commission’s ruling on that application either would have overturned the staff determination, thereby providing Verizon with an administrative remedy, or would have upheld the staff determination in a final order that is subject to judicial review. See 47 U.S.C. § 155(c)(7).

⁴² Since section 11 determinations apply only to rules that are "in effect at the time of the review" (47 U.S.C. § 161(a)(1)), it is uncertain what rules will be the subject of future biennial review determinations.

conceivable. Lujan, 504 U.S. at 561, 564 n.2. See Whitmore, 495 U.S. at 155 (“Allegations of possible future injury do not satisfy the requirements of Art. III.”).⁴³

Verizon also has not established its standing to argue that the Commission misconstrued the temporal provisions of section 11 and missed a statutory deadline. Verizon has not asserted that it is injured by these alleged errors, let alone produced the “actual evidence”⁴⁴ of injury necessary – and specifically required by the Court – to invoke the jurisdiction of this Court. As noted above, the Commission’s staff on delegated authority made specific determinations as to whether each rule covered by section 11 should be retained, modified, or repealed. Even though it was invited by the Commission to do so,⁴⁵ Verizon did not challenge any of these determinations before the agency. Verizon did not argue that the Commission erred in leaving intact any particular rule because it remains “necessary in the public interest.” Nor did Verizon claim that the Commission erred in failing to repeal or modify any rule. While Verizon argues that the Commission should have taken certain actions within the calendar year 2002, it does not identify how the allegedly unlawful failure to act caused it any harm.

Moreover, any injury that might arise from the Commission’s alleged failure to meet a statutory deadline would be traceable to agency inaction, i.e., the Commission’s failure to

⁴³ It is entirely possible that the Commission would reach the same decision to repeal, modify, or retain a rule whether it used the section 11 standard enunciated in the Report or some more stringent standard. In Fox, 293 F.3d at 532-40, the Court held that certain broadcast rules were unjustified under the “necessary in the public interest” standard in section 202(h) whether or not that standard requires a finding of indispensability. Similarly in CellCo Partnership, D.C. Cir. No. 02-1262, all parties argue that the outcome of the case does not depend upon whether the challenged rules are evaluated under the Commission’s construction of section 11 or the more stringent interpretation pressed by Verizon in this case.

⁴⁴ Rainbow/PUSH Coalition v. FCC, 330 F.3d 539, 542 (D.C. Cir. 2003).

⁴⁵ Report, at 4740 (¶ 34) (J.A.).

complete the biennial review process within prescribed time limits. That injury would not be traceable to a decision that merely reaffirmed the agency’s longstanding facial construction of section 11. Nor is the allegedly unlawful failure to complete the rulemakings to repeal or modify identified rules in 2002 redressible through judicial review of the Report. The remedy for unlawful agency delay is a writ of mandamus compelling agency action, see Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (“TRAC”), and Verizon has not sought that relief in this case.

II. THE COURT LACKS JURISDICTION TO REVIEW THE COMMISSION’S INTERPRETATION OF “NECESSARY IN THE PUBLIC INTEREST.”

A. Verizon Does Not Seek Review Of Final Agency Action.

Both the APA⁴⁶ and the Hobbs Act⁴⁷ limit the Court’s jurisdiction over FCC actions to the review of “final” orders.⁴⁸ To be final, the agency decision must satisfy two conditions. First, the decision “must mark the ‘consummation’ of the agency’s decision-making process”⁴⁹ and “represent[] a terminal, complete resolution of the case.”⁵⁰ Second, the decision “must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences

⁴⁶ 5 U.S.C. § 704 (judicial review limited to “final agency action.”).

⁴⁷ 28 U.S.C. § 2342 (judicial review limited to “final orders”).

⁴⁸ See DRG Funding Corp. v. HUD, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (finality requirement is “jurisdictional”).

⁴⁹ Bennett, 520 U.S. at 177-78, quoting Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

⁵⁰ E.g., Capital Network System, Inc. v. FCC, 3 F.2d 1526, 1529 (D.C. Cir. 1993).

will flow”⁵¹ that “‘inflict[] an actual, concrete injury’ upon the party seeking judicial review.”⁵²

The Report satisfies neither of these criteria.

The Report did not mark “a terminal, complete resolution”⁵³ of the 2002 Biennial Review. The Commission in that report construed a statutory standard that the agency will apply in the rulemaking phases of that proceeding and in future biennial reviews. The Commission “complete[s] its decision-making process” when it applies the section 11 standard in repealing, modifying or retaining rules, not when it interprets that standard in the abstract.⁵⁴

The Report also does not establish any rights, impose any obligations or subject Verizon to “actual, concrete injury.”⁵⁵ It merely articulates the standard the agency itself will apply in evaluating rules under section 11. Verizon’s rights and obligations will remain unchanged unless and until the Commission in a future order applies section 11 in retaining, modifying or repealing a rule that affects Verizon. And the Commission did not harm Verizon by “express[ing] its view of what the law requires.”⁵⁶ An agency decision is not final and reviewable where, as here, it “does not itself adversely affect [the litigant] but only affects his rights adversely on the contingency of future administrative action.”⁵⁷

⁵¹ Bennett, 520 U.S. at 178, quoting Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970).

⁵² AT&T v. EEOC, 270 F.3d at 975 (internal quotations omitted).

⁵³ Capital Network System, 3 F.3d at 1529.

⁵⁴ Franklin v. Massachusetts, 505 U.S. 788, 796 (1992). See DRG Funding, 76 F.3d at 1214.

⁵⁵ AT&T v. EEOC, 270 F.3d at 975.

⁵⁶ Id.

⁵⁷ See DRG Funding, 76 F.3d at 1214.

This Court in Fox, 280 F.3d at 1037-38, held that the Commission's decision in a biennial review proceeding under section 202(h) to retain certain specific ownership rules was final agency action. The Court explained that the Commission's decision to retain a rule was akin to a final action to deny a petition to initiate a rulemaking. 280 F.3d at 1037-38. Thus, under Fox the Commission takes final action in a biennial review proceeding when it decides finally to retain, repeal or modify specific rules. Unlike the agency order challenged in Fox, the Report did not repeal, modify, or retain any rule.

B. The Report Is Not Ripe For Review.

Apart from the finality requirement, the ripeness doctrine reflects a judgment that federal courts should avoid review of abstract issues in the absence of concrete harm.⁵⁸ An issue ordinarily is not considered ripe until its factual components have been fleshed out by some concrete action that adversely affects the litigant.⁵⁹ The Supreme Court has established a two-part test to determine ripeness: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."⁶⁰ The Commission's interpretation of the statutory phrase "necessary in the public interest" is not ripe under either part of the test.

⁵⁸ Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998). The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." E.g., National Park Hospitality Association v. Department of the Interior, 123 S.Ct. 2026, 2030 (2003), quoting, Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1963).

⁵⁹ Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

⁶⁰ National Park, 123 S.Ct. at 2030, quoting, Abbott Laboratories, 387 U.S. at 149.

In considering whether an issue is fit for judicial determination, the court evaluates whether the issue is purely legal and whether the agency action is final.⁶¹ Even where an agency has finally decided a purely legal issue, however, that issue may be unfit for resolution where “the courts and agency would benefit from postponing review until the questions at issue have taken on a more definite form,”⁶² *i.e.*, in a specific factual context. Although the issues Verizon raises may well be “purely legal,” they are not set forth in a final order.⁶³ Finality is an independent and “crucial prerequisite[e]” to ripeness.⁶⁴ As shown above, the Report is not final agency action.

Deterring review until the completion of the 2002 biennial review rulemaking proceedings furthers important administrative and judicial interests. The Commission in those rulemakings is considering whether section 11 requires the repeal or modification of specific regulations. Judicial review of the section 11 standard before the Commission has completed that task would “inappropriately interfere with further administrative action[s],”⁶⁵ and would

⁶¹ Abbott Laboratories, 387 U.S. at 147; Natural Resources Defense Council v. FAA, 292 F.3d 875, 881 (D.C. Cir. 2002).

⁶² Natural Resources Defense Council, 292 F.3d at 881. *See* State Farm Mutual Automobile Insurance v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986). The Supreme Court has dismissed as unripe purely legal challenges to final agency action. *E.g.*, National Park, 123 S.Ct. at 2031; Toilet Goods Association, Inc. v. Gardner, 387 U.S. 158, 162-63 (1967).

⁶³ *See, e.g.*, National Park, 123 S.Ct. at 2031.

⁶⁴ Sprint Corp. v. FCC, 331 F.3d 952, 956 (D.C. Cir. 2003), quoting Better Government Association v. Department of State, 780 F.2d 86, 88 (D.C. Cir. 1986). *See* Abbott Laboratories, 387 U.S. at 149-51; Utility Air Regulatory Group v. EPA, 320 F.3d 272, 279 (D.C. Cir. 2003).

⁶⁵ Ohio Forestry Association, 523 U.S. at 733. *See* Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 479 (2001).

frustrate the Commission's legitimate interest in "completing its decision-making process before its decision is subjected to judicial review."⁶⁶

Moreover, it is uncertain whether Verizon will object to any action the Commission takes at the end of the rulemaking proceedings. Verizon's challenge now to the Commission's statutory interpretation would interject the Court into precisely "the sort of abstract disagreement over an administrative policy at which the ripeness doctrine is aimed."⁶⁷ Deferring review also will prevent "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary."⁶⁸

If the Commission at the conclusion of the rulemaking proceedings decides to leave intact a regulation that Verizon believes should be repealed or modified, that final ruling would be subject to immediate judicial review on the petition of an aggrieved party. See Fox, 280 F.3d 1027.⁶⁹ Verizon thus "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." Ohio Forestry Association, 523 U.S. at 734. If the FCC never applies its interpretation in a way that aggrieves Verizon, review at this time will have used the resources of the Court and the public needlessly.

⁶⁶ Consolidated Coal v. Federal Mine Safety & Health Review Commission, 824 F.2d 1071, 1080 (D.C. Cir. 1987).

⁶⁷ Pfizer Inc. v. Shalala, 182 F.3d 975, 979 (D.C. Cir. 1999), quoting Texas v. United States, 523 U.S. 296, 301 (1998).

⁶⁸ FTC v. Standard Oil of California, 449 U.S. 232, 242 (1980). See Natural Resources Defense Council, 292 F.3d at 881.

⁶⁹ As noted above, the Commission staff on delegated authority found in the staff reports that certain rules continued to be necessary in the public interest. Verizon could have filed an application for Commission review of the staff determinations and could have sought judicial review if the Commission denied its application.

Even if Verizon's facial challenge were fit for judicial decision, immediate judicial review would not be appropriate.⁷⁰ An essential determinant in evaluating ripeness is whether withholding review will cause substantial hardship to the parties. E.g., Ohio Forestry Association, 523 U.S. at 732. In determining whether such hardship exists, a court evaluates whether the impact of the administrative action "could be felt immediately by those subject to it in conducting their day-to-day affairs." Toilet Goods Association, 387 U.S. at 164.

The Commission's construction of section 11 has no effect on Verizon's primary conduct. The interpretation "does not command anyone to do anything or to refrain from doing anything; it does not grant, withhold, or modify any formal legal license, power, or authority; it does not subject anyone to any civil or criminal liability; and it creates no legal rights or obligations."⁷¹ The construction also has no effect on Verizon's "day-to-day-business."⁷² Verizon's only aggrievement is "a hypothetical future injury owing to the [agency's] expected use of the [section 11 standard], not a present hardship resulting from the [Report] itself."⁷³

The Supreme Court's decision in AT&T, 525 U.S. 366, is instructive on the issue of ripeness here. The Court in that case dismissed as unripe a facial challenge to the Commission's statement that section 208 authorizes it to review interconnection agreements approved by state

⁷⁰ Where, as here, there is an "absence of hardship, only a minimum showing of countervailing judicial or administrative interest is needed, if any, to tip the balance against [judicial] review." American Federation of Government Employees v. OPM, 821 F.2d 761, 766 (D.C. Cir. 1987) (internal quotations omitted).

⁷¹ National Park, 123 S.Ct. at 2031, quoting Ohio Forestry Association, 523 U.S. at 733 (ellipses omitted).

⁷² Texas v. United States, 523 U.S. 296, 300 (1998), quoting Abbott Laboratories, 387 U.S. at 152.

⁷³ National Association of Regulatory Utility Commissioners v. DOE, 851 F.2d 1424, 1429 (D.C. Cir. 1988).

commissions under the local competition provisions of the 1996 Act, explaining that the agency’s statutory construction had “no immediate effect on the [petitioner’s] primary conduct.” 525 U.S. at 386. As in AT&T, the Commission’s interpretation in this case, has no impact on Verizon’s primary conduct.⁷⁴

III. THE COMMISSION’S CONSTRUCTION OF “NECESSARY IN THE PUBLIC INTEREST” IS REASONABLE.

A. The Phrase “Necessary In The Public Interest” Is Ambiguous.

As this Court recently pointed out, the meaning of the term “necessary” depends upon the context in which it is used. CTIA, 330 F.3d at 510. See Report, at 4731-32 (¶ 15) (J.A.). Although “necessary” in some contexts requires indispensability, in many other contexts “it suffices that ‘a [regulation] is conducive to’ . . . and is ‘plainly adapted’ to [its] end.”⁷⁵

The Commission in the Report determined that “necessary in the public interest” in the context of section 11 means “needed to further the public interest” and not “indispensable” to the public interest. Report, at 4735 (¶ 21) (J.A.). The Commission’s interpretation of this ambiguously worded statute in a complex regulatory context not only is reasonable but is the most natural reading of the statute. As shown below, that interpretation (1) is consistent with the statutory language, (2) furthers statutory objectives, and (3) comports with the legislative history.

⁷⁴ See Comsat Corp. v. FCC, 77 F.3d 1419, 1422 (D.C. Cir. 1996) (“[K]ey distinction” in determining ripeness is whether the agency action “affected the primary conduct of the petitioner”). This Court in Fox, 280 F.3d at 1039, held that the Commission’s final order leaving intact certain specific rules was ripe for review. The Court in Fox emphasized that the retention of the the challenged rules “significantly harm[ed]” the petitioners in that case. 280 F.3d at 1039. Unlike the agency decision challenged in Fox, the Report here did not retain, modify or repeal any agency regulation or harm Verizon in any way.

⁷⁵ 330 F.3d at 509, quoting Jinks v. Richland County, 123 S.Ct. 1667, 1671 (2003) (ellipses in original).

B. The Statutory Language Supports The Commission’s Construction.

The Communications Act, “like every Act of Congress, should not be read as a series of unrelated and isolated provisions.” Gustafson v. Alloyd Company, Inc., 513 U.S. 561, 570 (1995). One must “look to the provisions of the whole law,” taking into account “the statute’s full text [and] language.” United States National Bank of Oregon, 508 U.S. at 455.⁷⁶ The 1996 Act, of which section 11 is a part, “was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which” gave the Commission broad authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out [statutory] provisions.” AT&T, 525 U.S. at 378 n.5, quoting 47 U.S.C. § 201(b). Thus, in interpreting section 11, one must consider the Communications Act as a whole, including the other rulemaking provisions.

The Supreme Court and this Court have construed “necessary” in the sections of the Communications Act defining the Commission’s rulemaking authority to mean “appropriate,” “useful” or “reasonable.” For example, the Supreme Court has described section 201(b), which authorizes the Commission to adopt rules that are “necessary in the public interest,” as a “general grant of rulemaking authority.”⁷⁷ Similarly, section 4(i) – a provision that empowers the Commission to adopt rules and take other action “as may be necessary in the execution of its functions” – is a “wide-ranging source” of “general rulemaking power” that authorizes the Commission to take actions that are “appropriate and reasonable.”⁷⁸ And section 303(r), which

⁷⁶ See, e.g., King, 502 U.S. at 221 (a “cardinal rule” of statutory construction is that a statute “is to be read as a whole”). See also Regions Hospital v. Shalala, 522 U.S. 448, 460 n.5 (1998).

⁷⁷ AT&T, 525 U.S. at 378 n.5.

⁷⁸ Storer Broadcasting, 351 U.S. at 203; New England Telephone, 826 F.2d at 1108.

empowers the Commission in the broadcasting context to adopt rules that are “necessary to carry out the provisions of the Act,” broadly authorizes the Commission to adopt regulations that are “not unreasonable” implementations of statutory objectives.⁷⁹ Thus, in defining the Commission’s rulemaking authority – the very context in which “necessary in the public interest” is used in section 11 – the term “necessary” means “appropriate,” “useful,” or “reasonable.”

Congress in section 11 used the very same phrase – “necessary in the public interest” – that it used in section 201(b) to define the scope of the Commission’s rulemaking power. Congress in adopting section 11 was fully aware of the general grant of rulemaking authority in section 201(b). See AT&T, 525 U.S. at 378 n.5. Congress presumably also was aware that “necessary in the public interest” in section 201(b) had been construed consistently to allow the Commission to adopt rules that are “appropriate” or “reasonably related” to its functions under the Act as a whole. Congress’s choice of the identical phrase in section 11 strongly suggests an intent, in defining the Commission’s duty to reassess its rules, to incorporate the section 201(b) standard that authorizes the Commission to adopt those rules in the first place. See Report, at 4733 (¶ 18 & n.31) (J.A.).

The link between section 11 and section 201(b) is reinforced by the text of subsections 11(a)(2) and 11(b), which require the Commission to assess whether a rule is “no longer necessary in the public interest.” 47 U.S.C. §§ 161(a)(1), (b) (emphasis added). The phrase “no longer” tacitly, but unmistakably, refers back to the Commission’s initial adoption of the rule under section 201(b). Subsections 11(a)(2) and 11(b) thus require the Commission to assess

⁷⁹ NCCB, 436 U.S. at 796.

whether a rule it had found to be “necessary in the public interest” under section 201(b) when adopted “no longer” satisfies that same standard. See Report, at 4733 nn. 30, 32 (J.A.).

Verizon in its brief acknowledges that the Commission’s construction of “necessary” in section 11 is consistent with the construction of “necessary” in the other rulemaking sections of the Communications Act. Verizon argues, however, that the Commission erred in taking into account the established meaning of “necessary” in sections 4(i), 201(b) and 303(r) because these statutes grant the Commission rulemaking authority whereas section 11 allegedly limits the Commission’s rulemaking authority. Verizon Brief at 12, 23-25.

Verizon’s assertion that section 11 operates as a “limitation on the FCC’s authority”⁸⁰ is simply wrong. Instead of overriding specific rules as it did elsewhere in the 1996 Act,⁸¹ Congress in section 11 authorized a particular kind of rulemaking requiring the Commission to use its judgment and expertise to evaluate existing rules. First, section 11 requires the Commission to review each rule covered by section 11(a) to determine whether the rule is “no longer necessary in the public interest as a result of meaningful economic competition.” Second, if the Commission determines that a particular rule meets that statutory standard, section 11(b) directs the Commission to decide whether to repeal or modify the rule. Third, if the Commission elects to modify the rule, it must determine what changes to make so that the rule, as modified, is “necessary in the public interest” in light of the current state of competition. Although the end-result of the Commission’s exercise of section 11 is the modification or repeal of some -- or even

⁸⁰ Verizon Brief, at 23.

⁸¹ See, e.g., Pub. L. No. 104-104, § 202(f)(1), 110 Stat. 56 (1996) (legislative repeal of regulatory restrictions on cable/network cross-ownership).

many -- rules, proceedings conducted under sections 4(i), 201(b), and 303(r) also may result in the repeal or modification of rules.

In fact, section 201(b) and section 11 complement each other. Once the Commission decides to adopt a rule as “necessary in the public interest” under section 201(b), section 11 requires the Commission biennially to assess to whether that rule continues to be “necessary” under the same standard, taking account of the state of competition. Section 201(b) and 11 both require the expert agency to make predictive judgments regarding necessity: section 201(b) involves a predictive judgment as to whether the rule will serve the public interest and section 11 requires a predictive judgment as to whether the rule will continue to serve the public interest in light of the current state of economic competition. Report, at 4733 n.32 (J.A.).

Verizon suggests that the Commission’s statement that the biennial review rulemaking process involves a predictive judgment shows that the agency will not conduct a “meaningful reevaluation of the necessity of regulation.” Verizon Brief at 10. As the Commission pointed out, the biennial review evaluation process is “fact intensive.” Report, at 4736 n.47 (J.A.). It requires the Commission to perform a “thorough” and “critical[.]” assessment of the covered rules and to analyze the state of competition to determine whether competition has rendered those rules no longer necessary. Report, at 4736, 4738 (¶ 28 & n.47) (J.A.).⁸² That construction does not, as Verizon claims, “read all substance out of the statute.” Verizon Brief at 10.

⁸² Contrary to Verizon’s assertion, the Commission’s recognition that section 11 rulemaking involves a predictive judgment is not inconsistent with Fox, as it was limited on rehearing. See Verizon Brief at 10, 13, 19, 33. The Court in Fox did not hold that predictive judgments have no role in biennial reviews; rather, the Court held that the Commission had failed to justify the rules at issue even construing the “necessary in the public interest” standard to mean to in furtherance of the public interest. 293 F.3d at 540.

Verizon bases its claim that section 11 limits agency authority on the incorrect assumption that the term “shall” in section 11 imposes a restriction on the Commission’s authority. Verizon Brief at 25. In fact, the term “shall” in section 11 compels the Commission to perform the specific rulemaking tasks – just as the term “shall” in section 251(d)(1) requires the Commission to adopt rules implementing the local competition provisions of the 1996 Act (47 U.S.C. § 251(d)(1)) and the term “shall” in section 254(2)(h)(2) commands the Commission to adopt rules to enhance access to advanced telecommunications and information services for schools, healthcare providers, and libraries (47 U.S.C. § 254(2)(h)(2)). The term “shall” in the 1996 Act, as elsewhere, is the language of obligation, not restriction. Statutes truly limiting the Commission’s authority generally *prohibit* activity;⁸³ they do not require the Commission to take action that requires judgment and expertise.

C. The Commission’s Construction Is Consistent With The Underlying Legislative Purpose And Legislative History.

The overarching goal of the 1996 Act is to promote competition in the communications industry. Congress included in that Act an “ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with [those] competitive changes.” Report, at 4732 (¶ 16) (J.A.). Section 11 requires the Commission every two years to re-examine its rules in the light of developing competition, and to repeal or modify those rules that no longer are “necessary in the public interest.” The purpose of section 11 is ensure that the

⁸³ See, e.g., 47 U.S.C. § 152(b) (generally denying the FCC jurisdiction over intrastate communications). See also 47 U.S.C. § 153(10) (broadcasters are not deemed to be common carriers); National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976).

Commission's rules reflect current competitive market conditions and that unnecessary and inappropriate regulations are not retained as a result of regulatory oversight.

Verizon argues that the Commission's construction of section 11 frustrates the deregulatory purpose of the 1996 Act. But that very Act required the Commission to adopt numerous rules on an expedited schedule. A more accurate description of the Act's purposes is that it endorses the reduction of regulation as a corollary to the development of competition. Although the 1996 Act "reflects a faith that when competition takes hold many regulations can be eliminated," Report, at 4735 (¶ 21) (J.A.), it does not mandate the wholesale deregulation of the telecommunications industry in advance of full competition. The Commission acts consistently with the statutory purpose by interpreting section 11 to require the agency to repeal or modify only those rules that it determines, in light of its assessment of the current state of competition, no longer serve the public interest.

The legislative history reinforces the Commission's view. The Conference Report accompanying the 1996 Act states, in pertinent part:

[Section 11(a) requires the Commission biennially] 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. [Section 11(b)] requires the Commission to eliminate the regulations that it determines are no longer in the public interest.⁸⁴

The conferees thus describe the Commission's task as assessing whether the regulations are "no longer in the public interest" because competition "renders the regulation no longer meaningful."⁸⁵ The Conference Report does not suggest an intention to hold the Commission to

⁸⁴ H.R. Conf. Ref. No. 104-458, 104th Cong., 2d Sess. at 185 (1996) (emphasis added).

⁸⁵ Id.

a higher standard in deciding whether to retain an existing rule review than it applied in deciding whether to adopt the rule in the first place. See Report, at 4733-34 (¶ 18) (J.A.).

Verizon claims that the Commission erred by “disregard[ing] the presumption of deregulation” in section 11. Verizon Brief at 18. In fact, the Commission determined and asserted that section 11 creates an irrebuttable “presumption in favor of repealing or modifying covered rules, where the statutory criteria are met.” Report, at 4735 (¶ 21) (J.A.) (emphasis supplied). The Commission thus declared that section 11 establishes a conclusive presumption that a rule that the agency finds “no longer is necessary in the public interest” must be repealed or modified. Id. Because that presumption does not speak to the meaning of “necessary in the public interest,” it does not support Verizon’s claim that the standard must be stringently construed.⁸⁶

Moreover, Verizon’s claim that a higher standard applies under section 11 for reassessing agency regulations than applies under section 201(b) for adopting them is both illogical and unworkable. Under that interpretation, the Commission could lawfully adopt a rule under section 201(b) if it finds that the rule serves the public interest; but it would be forced to repeal or modify the rule two years later in the biennial review process unless it could determine that

⁸⁶ Fox and Sinclair Broadcasting Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), do not establish that a “presumption in favor of deregulation” “distinguishes the standard that applies in the biennial review from that which applies in the agency’s exercise of its general rulemaking authority.” Verizon Brief at 17. Although Fox and Sinclair allude to a statutory presumption, the Court did not endorse a strict construction of the “necessary in the public interest” standard in either case. The Court in Fox, 293 F.3d at 540, expressly declined to rule on the meaning of the statutory standard. And the Court in Sinclair upheld the bulk of the challenged rule as “necessary in the public interest” without articulating a new or higher public interest yardstick. Although the Court in Sinclair remanded certain aspects of the rule, it did so because it found the Commission’s explanation to be “deficien[t],” rather than because it failed to satisfy a stringent public interest test. 284 F.3d at 164. See Report, 4735 (¶ 20) (J.A.).

the rule is “necessary” under a stringent construction of the term. The Commission thereafter, presumably, could adopt the rule once again under the established standard of section 201(b) – but only for two more years until the next biennial review. Verizon’s construction thus violates the “long-standing rule that a statute should not be construed to produce an absurd result.”⁸⁷ Report, at 4733-34 (¶ 18 & n.33) (J.A.). Cf. CTIA, 330 F.3d at 511-12.

The Commission’s evaluation of the public interest necessarily requires the Commission to weigh both benefits and harms. Verizon’s strained construction of section 11 would compel the Commission to revoke or modify rules that the expert agency expressly finds have substantial net public benefits, even in a competitive market, because those beneficial rules fail a stringent test of absolute necessity. Congress did not intend such an anomalous result.

Contrary to Verizon assertion, the Commission’s construction does not render section 11 superfluous. Prior to section 11, review of a Commission decision not to institute a rulemaking proceeding to consider modification or deletion of a rule was “extremely limited [and] highly deferential.”⁸⁸ “[O]nly in the rarest and most compelling of circumstances” would a Court compel the agency to initiate rulemaking.⁸⁹ Under the Commission’s construction of section 11, the agency must re-examine each rule involving the operations or activities of telecommunications providers every two years. In addition, section 11 requires the Commission to make “an affirmative finding” as to the continued need of the rule in light of the current state

⁸⁷ E.g., Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1067 (D.C. Cir. 1998). See FTC v. Ken Roberts Co., 276 F.3d 583, 590 (D.C. Cir. 2001).

⁸⁸ National Customers Brokers & Forwarders Association of America, Inc. v. United States, 833 F.2d 93, 96 (D.C. Cir.1989).

⁸⁹ American Horse Protection Association, Inc. v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987).

of competition.⁹⁰ The requirement that the agency affirmatively find that the covered rules continue to serve the public interest under a recurring, fixed time schedule is not, as Verizon claims, a mere restatement of the agency's generalized obligation to monitor its rules and make appropriate adjustments.

In an effort to find support for its construction, Verizon distorts the holdings of this Court in several cases. For example, Verizon's brief relies heavily upon the original Fox decision without taking into account that the Court limited and modified that decision on rehearing. To be sure, the original Fox opinion asserted that, under section 202(h), it was not sufficient for the Commission to find that a covered rule was "merely consistent with the public interest." 280 F.3d at 1050. On rehearing, however, the Court decided to "leave unresolved" the meaning of the statutory standard. 293 F.3d at 540. The Court explained that its holding "did not turn at all upon interpreting 'necessary in the public interest' to mean [anything] more than 'in the public interest,'" because the challenged rules were not justified "under either standard." 293 F.3d at 540.

Verizon's claim that the Commission's construction "cannot be squared with" CTIA, 330 F.3d 502, is simply wrong. See Verizon Brief at 10. As Verizon did in the administrative proceedings below,⁹¹ Verizon's affiliate in CTIA argued broadly that "necessary" in section 10 of the 1996 Act has the plain meaning of "absolutely required." The Commission disagreed, determining instead that "necessary" has various meanings depending upon its context and that in the context of section 10 "necessary" means "useful" or "appropriate." See FCC Brief in

⁹⁰ See Report, at 4736 n.47 (J.A.).

⁹¹ Verizon Comments at 2, 3 (J.A.).

CTIA, at 25-26. The Court agreed that the term “necessary” is ambiguous and upheld the agency’s construction as reasonable. In addition, the Court concluded that the petitioner’s “rigid construction” of “necessary” was unreasonable and would lead to absurd results. 330 F.2d at 512. Although Verizon may disagree with the Commission’s construction (as its affiliate does with the CTIA decision itself), it cannot plausibly claim that CTIA “makes plain” that the Commission’s interpretation of section 11 “is untenable.”⁹² See Verizon Brief at 23.⁹³

After the Court issued its decision in CTIA, Verizon “changed positions as nimbly as if dancing a quadrille.”⁹⁴ Like its affiliate in the pending CellCo Partnership case, Verizon in the administrative proceedings below argued that “necessary” in section 11 plainly means indispensable or absolutely needed. Verizon now acknowledges that the statutory term is ambiguous. Verizon Brief at 23. And although its brief is unclear as to the precise meaning of “necessary” in section 11, Verizon apparently has retreated from its earlier position that the Commission must construe that term to mean indispensable or absolutely needed. See Verizon

⁹² Verizon claims that the Court in CTIA, by construing “necessary” in section 10 to refer to a “strong connection” between a rule and the achievement of a defined policy goal, “indisputably” adopted a stricter construction of “necessary” than the one adopted by the Commission in this case. Verizon Brief at 28. The only “indisputabl[e]” facts are that the Commission in CTIA argued that necessary in section 10 means useful or appropriate, see Verizon Brief at 27, and that the Court, over the CTIA petitioner’s objection, affirmed that construction as reasonable. Verizon also does not explain how the section 10 standard approved by the Court in CTIA is stricter than the “thorough” and “critical[]” reassessment the Commission found to be required under section 11. Report, at 4736, 4738 (¶ 28 & n.47) (J.A.).

⁹³ Verizon errs in claiming that the Commission “evade[d] its duty to reconcile its decision” with GTE Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000) and AT&T. See Verizon Brief at 29. The Commission discussed these cases in detail. See Report, at 4734-35 (¶ 19) (J.A.).

⁹⁴ Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 540 (1978) (internal quotations omitted).

Brief at 28. Verizon's brief in this case thus is inconsistent both with its position below and with its affiliate's position in CellCo Partnership.

IV. VERIZON'S CLAIM THAT THE COMMISSION VIOLATED SECTION 11 IN CONDUCTING THE 2002 BIENNIAL REVIEW IS NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT LACKS MERIT.

Verizon argues that the Commission violated section 11 in two ways. First, Verizon claims that the Commission disregarded the statutory deadline by allegedly failing in the year 2002 (1) to determine whether its rules continued to be necessary in the public interest, and (2) to repeal or modify unnecessary rules. Second, Verizon argues that the staff reports issued under delegated authority did not comply with section 11(a) and were otherwise defective.

Verizon has not properly invoked the Court's jurisdiction to consider its claim that the Commission violated the section 11 deadline. Verizon petitioned the Court to review an agency report that interprets in the abstract the meaning of certain terms and phrases in section 11, including the temporal provisions of that statute. The Commission through its staff made the section 11(a) assessments and determinations in separate reports issued under delegated authority. The Commission now is considering the modification or repeal of rules the staff found unnecessary in separate rulemaking proceedings consistent with the APA. Verizon's petition for review of the Report does not permit the Court to consider whether the agency failed to act within the time constraints of section 11. The remedy for unlawful agency inaction is a writ of mandamus, see TRAC, 750 F.2d 50, not judicial review of the agency's interpretation of its governing statute.

The Court also lacks jurisdiction to review Verizon's challenge to the assessments and determinations the Commission's staff made on delegated authority. "It is beyond dispute that a

court does not have jurisdiction to review an agency order unless a petition for review of the order has been filed in that court.” GTE Service Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985). Verizon petitioned the Court to review the Report, not the separate staff reports. Nor could Verizon invoke the Court’s jurisdiction to review the staff reports without taking further administrative steps. Section 5(c)(7) of the Act makes the filing of an application for review by the Commission “a condition precedent to judicial review” of a staff decision issued under delegated authority. 47 U.S.C. § 155(c)(7). See e.g., Richman Bros., 124 F.3d at 1303. Because Verizon did not file an application for administrative review of the staff reports, section 5(c)(7) would preclude judicial review of those reports even if Verizon had identified them in its petition for review (which it did not).

In addition, section 405 of the Communications Act bars the Court from considering issues of law or fact on which the Commission “has been afforded no opportunity to pass.” 47 U.S.C. § 405.⁹⁵ Because Verizon did not first present to the Commission its arguments concerning the adequacy of the assessments and determinations issued by the staff on delegated authority, section 405 independently bars the Court from considering those claims on review.

In any event, Verizon is wrong in claiming that the Commission violated section 11 in the timing and manner of its 2002 Biennial Review. Contrary to Verizon’s repeated assertion,⁹⁶ the Commission through its staff did make determinations as to the continued necessity of the covered rules. The Commission’s staff assessed the numerous rules covered by section 11 and determined with respect to each of these rules whether it no longer is necessary in the public

⁹⁵ E.g., Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 181 (D.C. Cir. 1997).

⁹⁶ See Verizon Brief at 2, 3, 8, 9, 11, 34, 35, 39.

interest in light of the current state of competition.⁹⁷ The staff reports, which in the aggregate total 350 pages, satisfy the Commission’s obligation under section 11(a) to review the covered rules and to determine whether competition has rendered any of them unnecessary. The Commission has statutory authority to delegate to its staff the assessments and determinations required by section 11(a), see 47 U.S.C. § 155(c)(1), and those staff actions have “the same force and effect” as other Commission actions, 47 U.S.C. § 155(c)(3).

Verizon also is wrong in claiming that the Commission violated the statutory deadline by not repealing or modifying unnecessary rules within the year 2002. “While the Commission is committed to timely biennial reviews under [u]nder section 11,”⁹⁸ it reasonably determined that section 11 does not require the Commission to complete the implementing rulemaking proceedings within the calendar year. As the Commission pointed out,⁹⁹ section 11 distinguishes between Commission review and Commission action. Section 11(a) requires the Commission in every even numbered year to review certain rules and to determine whether they continue to be necessary in the public interest. Section 11(b) directs the Commission subsequently to take action (modification or repeal) consistent with those determinations. In contrast to section 11(a), which requires the Commission to reassess rules and make determinations in “every numbered year,” section 11(b) contains no reference to time. Both the language and the structure of section 11 support the Commission’s interpretation that section 11(b) does not require it to complete

⁹⁷ IB Staff Report, 18 FCC Rcd 4196; WTB Staff Report, 18 FCC Rcd 4243; OET Staff Report, 18 FCC Rcd 4386; CGA Staff Report, 18 FCC Rcd 4410; WCB Staff Report, 18 FCC Rcd 4622.

⁹⁸ Report, at 4740 n.71 (J.A.).

⁹⁹ Report, at 4739-40 (¶ 33) (J.A.).

action repealing or modifying unnecessary rules within the calendar year in which its review commences.¹⁰⁰

Congress in other sections of the 1996 Act established firm deadlines for the completion of regulatory actions. See, e.g., 47 U.S.C. §§ 160, 251(d). The fact that Congress chose not to include a deadline in the text of section 11(b) shows that it did not intend to require the Commission to complete rulemaking proceedings to modify or repeal regulations within a single calendar year. See Report, at 4739 n.70 (J.A.).

The Commission's interpretation also is consistent with its obligations under the APA. The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule."¹⁰¹ The APA requires the Commission (1) to give public notice of any proposal to repeal or modify a substantive rule, (2) to provide interested parties with an opportunity to comment upon the proposal, (3) to consider the comments before repealing or modifying a rule, and (4) to publish a statement of the basis and purpose of the action taken. 5 U.S.C. § 553(b), (c).¹⁰² It would be very difficult – if not impossible – for the Commission, within a single calendar year, to complete the review process for the multitude of rules covered by section 11(a) and then

¹⁰⁰ Verizon claims that the Commission missed the section 11(a) deadline for determinations because it did not publicly release the staff reports in 2002. Verizon Brief at 39 n.22. As Verizon acknowledges, however, the adoption date for these reports was in 2002. Section 11(a) establishes a timetable for the Commission to make assessments and determinations, not a deadline to publish them. In any event, the staff reports have been adopted and published and thus Verizon's argument is moot.

¹⁰¹ 5 U.S.C. § 551(5).

¹⁰² Verizon argues that the determinations the Commission makes under section 11(a) are not "binding" in the subsequent rulemakings and thus do not satisfy section 11. Verizon Brief at 35. As noted above, however, the APA affirmatively requires the Commission to consider the comments of interested parties filed in response to a notice of proposed rulemaking before repealing or modifying any substantive rule. Section 11 does not excuse the Commission from this obligation.

comply with the APA rulemaking requirements with respect to each regulation that section 11(b) requires it to modify or repeal. Report, at 4739 n.70 (J.A.).

Verizon suggests that the Commission's adherence to notice and comment rulemaking procedures before repealing or modifying rules it determines no longer are necessary in the public interest would be "a waste of time and resources for the FCC and regulated agencies." Verizon Brief at 38. The FCC does not have the option of waiving the APA procedures because they may be regarded by some as a "waste of time." The Commission surely does not act contrary to section 11 by complying with the APA.¹⁰³

¹⁰³ Verizon suggests that notice and comment rulemakings are unnecessary because the Commission's rulemaking functions under section 11(b) are "ministerial in nature." Verizon Brief at 37. In fact, the Commission in carrying out those functions exercises its judgement and expertise (1) in determining whether it should repeal or modify a rule it has found no longer is necessary under section 11(a), and (2) in deciding how the rule should be changed if it opts to modify the rule.

CONCLUSION

The Court should dismiss. If the Court reaches the merits, it should deny the petition for review.

Respectfully submitted,

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September 4, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERIZON TELEPHONE COMPANIES,)
)
 PETITIONER,)
)
 V.)
)
 FEDERAL COMMUNICATIONS COMMISSION AND UNITED)
 STATES OF AMERICA,)
)
 RESPONDENTS.)
)
)
)

NO. 03-1080

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13777 words.

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