

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
2002 Biennial Review of)	IB Docket No. 02-309
Telecommunications Regulations)	
)	

BIENNIAL REVIEW 2002 COMMENTS OF VERIZON

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I. INTRODUCTION

In conducting its Section 11 review, the Commission should follow the guidance previously set by the D.C. Circuit, and retain a regulation “only insofar as it is necessary in, not merely consonant with, the public interest.”² Moreover, the Act requires the Commission to review all of its regulations under this standard, and retain only those that it finds, based on substantial record evidence, remain necessary to serve the public interest. For present purposes, Verizon will identify those of particular importance to focus on as the Commission undertakes this comprehensive review.

In particular, with respect to international issues, the Commission should eliminate the reporting requirements contained in sections 43.61, 43.82, and 63.10(c) of the Commission’s rules, 47 C.F.R. §§ 43.61, 43.82, 63.10(c), because any benefits derived from the reports filed under these rules are far outweighed by the burden

¹ The Verizon 214 Licensees (“Verizon”) are various subsidiaries and affiliates of Verizon Communications Inc. holding international Section 214 authorizations, listed in Attachment A.

² *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002) (*Fox I*). Although on request from the Commission, the court on rehearing agreed to remove this interpretation of the “necessary” standard from its opinion because it was not essential to the court’s decision, as discussed below in section II.A, the court’s reasoning still remains valid.

associated with producing them. The Commission also should conform the notice period for discontinuance of international services by non-dominant carriers to that for domestic services to provide greater consistency in its rules.

II. UNDER THE EXPRESS TERMS OF THE ACT, THE COMMISSION MUST REVIEW AND ELIMINATE REGULATIONS UNLESS IT FINDS THEY ARE “NECESSARY IN THE PUBLIC INTEREST”

In 1996, Congress amended the Communications Act to create a “pro-competitive, de-regulatory national policy framework.”³ Section 11 requires the Commission to review “*all* regulations issued under this Act,” in “every even-numbered year” and states that it “*shall* repeal or modify” any regulation that is “is no longer *necessary* in the public interest as a result of meaningful economic competition.” 47 U.S.C. § 161 (emphasis added). There are three aspects of the binding statutory standard that are of particular importance:

a). *Only regulations that the Commission expressly finds remain “necessary” to serve the public interest may be retained.* Under the express terms of the Act, the Commission may retain only those regulations that it determines are “*necessary* in the public interest.”

The Commission has in the past argued that, “[t]erms such as ‘necessary’ and ‘required’ must be read in their statutory context and, so read, can reasonably be interpreted as meaning ‘useful’ or ‘appropriate’ rather than ‘indispensable’ or ‘essential.’”⁴ However, the plain language of the statute, statutory context, and recent

³ S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. at 1 (1996).

⁴ FCC Petition for Rehearing or Rehearing En Banc, *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, et al., at 5 (D.C. Cir. filed April 19, 2002) (“*Fox Petition for Rehearing*”).

D.C. Circuit precedent, all make clear that the term “necessary” requires a much more stringent showing.

In *Fox I*, the panel concluded that the Commission had applied “too low a standard” in its 1998 biennial review pursuant to Section 202(h).⁵ The panel found that: “The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”⁶ In response to the Commission’s petition for rehearing, the *Fox* court agreed to remove this discussion of the term “necessary” from its decision, to leave open for another day the question of the appropriate legal standard for review in Section 202(h).⁷ However, the court refused the Commission’s invitation to reverse this position and apply a lower standard.⁸ And the reasoning from the *Fox I* decision remains valid; the statutory language, when combined with the deregulatory purposes of the Act, plainly requires that a regulation may not be retained merely because it is “useful.” Rather, to justify its continuance, the Commission must find a regulation is “necessary” – *i.e.*, “required” or “absolutely needed.”

⁵ *Fox I*, 280 F.3d at 1050.

⁶ *Id.*

⁷ The FCC’s rehearing petition in *Fox* relied heavily on the fact that Section 202(h) used the “necessary in the public interest” language in the review section, but only “public interest” language in the repeal section. *Fox Petition for Rehearing*, at 9-10. The D.C. Circuit alluded to this fact in granting partial rehearing. *See Fox II*, 293 F.3d at 540 (“In these circumstances we think it better to leave unresolved precisely what § 202(h) means when it instructs the Commission first to determine whether a rule is ‘necessary in the public interest’ but then to ‘repeal or modify’ the rule if it is simply ‘no longer in the public interest’”). Because Section 11 uses “necessary in the public interest” consistently throughout its operative provisions, this argument against giving statutory purchase to the word “necessary” is inapplicable here.

⁸ *Fox II*, 293 F.3d at 540.

Under the plain meaning of the term,⁹ the inquiry into whether something is “necessary” asks whether it is “logically unavoidable,” “compulsory,” “absolutely needed,” or “required.”¹⁰ This meaning complies with past Commission construction of the term, as well as D.C. Circuit precedent. For example, in a number of proceedings, the Commission first determined, and later reaffirmed, that the term “necessary” means indispensable or a “prerequisite for competition,” as used in Section 251(d)(2)(A) of the 1996 Act.¹¹ Similarly, in interpreting the term “necessary” as used in Section 251(c)(6) of the 1996 Act, the D.C. Circuit expressly rejected the Commission’s reading of “necessary” to mean nothing more than “useful.”¹² The court explained that:

As is clear from the [Supreme] Court’s judgment in [*AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999)], a statutory reference to ‘necessary’ must be construed in a fashion that is consistent with the ordinary and fair meaning of the

⁹ The Commission must begin with the text of the statute, and, “unless contrary indications are present, . . . can assume that Congress intended the common usage of the term to apply.” See *Cummings v. Dept. of the Navy*, 279 F.3d 1051, 1053-54 (D.C. Cir. 2002) (“[C]ourts must presume that the Congress says in a statute what it means and means in a statute what it says there.”) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). See also *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (courts generally “construe a statutory term in accordance with its ordinary or natural meaning”).

¹⁰ *Merriam-Webster’s Collegiate Dictionary* 774 (10th ed. 2001).

¹¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3704 (1999) (“A proprietary network element is “necessary” within the meaning of section 251(d)(2)(A) if, . . . lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer”); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 282 (1996), *aff’d in part and vacated in part sub nom., Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (further history omitted) (“necessary” as used in Section 251(d)(2)(A) means that “an element is a prerequisite for competition”).

¹² *GTE v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000).

word, *i.e.*, so as to limit “necessary” to that which is required to achieve a desired goal.¹³

Accordingly, the FCC is not permitted to ignore the plain and ordinary meaning of the statutory term “necessary” in favor of an alternative, more permissive construction.

Nor does a weak reading of the word “necessary” comport with the purpose of Section 11. The preamble to the 1996 Act states that its purpose is “to promote competition and *reduce regulation*.”¹⁴ Section 11 itself is entitled “regulatory reform.”¹⁵ The Supreme Court has observed that the 1996 Act was an “unusually important legislative enactment” and that its “primary purpose,” was to “reduce regulation.”¹⁶ Interpreting Section 11 to impose no greater burden on the Commission than its preexisting duty to adopt rules only if they serve the “public interest” renders this bold deregulatory step a toothless tiger, and is inconsistent with the stated purpose of the 1996 Act in general and Section 11 in particular. For that reason, the Commission cannot rely on judicial precedent broadly construing the term “necessary” when used as part of broad power-granting phrases such as “necessary and proper.”¹⁷ Although courts have

¹³ *Id.* at 423 (emphasis added); see *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1269 (10th Cir. 2000) (upholding FCC decision to preempt state statute pursuant to Section 253 as “necessary” and interpreting the term to mean “required,” “essential” or “no available alternative”).

¹⁴ *The Telecommunications Act of 1996*, Pub. L. 104-104, Preamble (emphasis added); see *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, 16 FCC Rcd 20641, ¶ 26 (2001) (“[W]e recognize that another of the Act’s primary goals is to eliminate or avoid unnecessary, duplicative, or otherwise burdensome regulation”).

¹⁵ It is well established that the title of a provision may “shed light on some ambiguous word or phrase in the statute itself.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 483 (2001), quoting *Carter v. United States*, 530 U.S. 255, 267 (2000); see also *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947).

¹⁶ *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

¹⁷ See *Fox Rehearing Petition*, at 5-6 (citing U.S. Const Art. I, Sec. 8).

determined that certain grants of authority in the 1934 Act utilizing the term “necessary” endow the Commission with expansive regulatory powers,¹⁸ these provisions have no bearing on the proper construction of Section 11. The entire purpose of the 1934 Act was to *provide* the FCC with regulatory authority, while, as discussed above, this portion of the 1996 Act was focused on limiting FCC authority through mandatory *deregulation*. As prior court decisions make clear, when the word “necessary” is used as a limitation on agency authority, the agency is not free to shed statutory constraints through loose statutory construction.¹⁹

b). *The Commission must support any conclusion that rules remain necessary with substantial evidence.* The Commission cannot adopt a “wait and see” attitude toward its regulations – it must either supply clear evidence to justify their retention or repeal them.²⁰ In other words, as the Commission recognized in the context of another biennial review proceeding, “if we cannot identify a federal need for a regulation, we are not justified in maintaining such a requirement at the federal level.”²¹ Moreover, the Commission is not free to rest simply on its “predictive judgment” – it must provide

¹⁸ See, e.g., 47 U.S.C. § 201(b) (the Commission “may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act”); 47 U.S.C. 154(i) (the FCC “may . . . make such rules and regulations . . . not inconsistent with this Act, as may be necessary in the execution of its functions”).

¹⁹ See *Independent Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988) (“Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity”).

²⁰ See *Fox I*, 280 F.3d at 1042 (“[t]he Commission’s wait and see approach cannot be squared with its statutory mandate”).

²¹ See *Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301 and 80-286*, 16 FCC Rcd 19911, ¶ 207 (2001).

evidentiary support both for the existence of the problem and for the proposition that its regulation is an essential part of the solution.²² For example, in rejecting the Commission’s justification in *Fox I* for the rule imposing a broadcast ownership cap, the court found the Commission’s mere recitation of data inadequate. In particular, the court recognized that in order to retain the rule, the Commission would have to assess the “state of competition” for the relevant market and then make the “link” between those facts and the continuing need for the rule.²³ Thus, the Act places the burden squarely on the Commission to support its decision that any particular rule continues to be “necessary” with substantial record evidence, and to address and logically reject any proposals for more narrowly tailored alternatives that cannot meet the “necessary” standard.²⁴

c). *The Commission must review all of its regulations and reach its determination as to which remain necessary within the even-numbered year.* Section 11 unambiguously requires the Commission to take specific action with regard to each of its regulations every two years.²⁵ In “every even-numbered year” the Commission must “review *all* regulations issued under this Act” and “determine whether any such regulation is no

²² *Fox I*, 280 F.3d at 1051.

²³ *Id.* at 1044.

²⁴ *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (“We hold that the Commission has failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception *is not arbitrary and capricious*”) (emphasis added).

²⁵ 47 U.S.C. § 161(a).

longer necessary in the public interest.”²⁶ Once the Commission determines that a regulation is no longer necessary, it “shall repeal or modify” the regulation.²⁷

The requirement that the Commission review “*all* regulations” issued under the Act provides a clear mandate: The Commission must review each of its telecommunications regulations, and may not conduct a partial review of only some rules of its choosing.

In addition, the Commission must finish this “review” *and* make its “determinat[ion]” as to which rules remain necessary “[i]n every even-numbered year.”²⁸ The statute also commands that the “Effect of determination” that any regulation is no longer necessary requires action: “The Commission *shall repeal or modify* any regulation it determines to be no longer necessary in the public interest.” Thus, the biennial review mandate consists of three elements: a review of *all* regulations, a determination regarding *all* regulations, and *repeal or modification* of any regulation determined to be “no longer necessary.” Because the statute specifically states that the Commission must “review all regulations” *and* “*determine* whether any such regulation is no longer necessary” “[i]n every even-numbered year,” the review, determination and repeal or modification must be completed within the current calendar year.

The Act by its terms makes it clear that it would thwart Congress’ deregulatory goals to delay completion of these tasks beyond each even-numbered calendar year. Indeed, such delay would mean that regulations that cannot satisfy the stringent

²⁶ *Id.* § 161(a) (emphasis added).

²⁷ 47 U.S.C. § 161(b).

²⁸ 47 U.S.C. § 161(a) (emphasis added).

requirements of Section 11 remain on the books in direct contravention of the Congressional plan.

The Commission has stated in a previous biennial review proceeding that it need not “determine whether any such regulation is no longer necessary in the public interest” within the time set by the Act, but can merely “set[] forth the determinations that will form the basis for further action.”²⁹ However, this position is mistaken. As an initial matter, the Commission’s overly expansive reading of the term “determine” to mean little more than “set the framework” is contrary to the plain meaning of the text. And the title of Section 161(b), “Effect of determination,” clearly suggests that the action – repeal or modification – that must follow the necessary determination is ministerial in nature. Were the Commission permitted to indefinitely delay the repeal or modification of any rule determined to be no longer in the public interest, its biennial review obligation would be rendered a complete nullity. This simply cannot be the case.

III. THE COMMISSION SHOULD ELIMINATE THE REPORTING REQUIREMENTS CONTAINED IN SECTIONS 43.61, 43.82, AND 63.10(C) OF THE COMMISSION’S RULES

The Commission should eliminate the reporting requirements contained in sections 43.61, 43.82, and 63.10(c) of the Commission’s rules, 47 C.F.R. §§ 43.61, 43.82, 63.10(c), because any benefits derived from the reports filed under these rules are far outweighed by the burden associated with producing them.³⁰

²⁹ *Id.*

³⁰ The Commission has recently issued a Notice of Proposed Rulemaking with respect to its International Settlements Policy and its policies on international settlement rates, including International Simple Resale (ISR) and benchmarks, *International Settlements Policy Reform, International Settlement Rates*, IB Docket Nos. 02-324, 96-261, Notice of Proposed Rulemaking (rel. October 11, 2002) (“*ISP/ISR Reform NPRM*”). Although that rule-making will not be concluded in this calendar year, Verizon will comment on the Commission’s ISP and ISR rules in that docket.

Section 43.61 requires all telecommunications carriers providing international telecommunications services between the United States and any foreign point to file annual reports of “actual traffic and revenue data for each and every service provided by [the] carrier, divided among service billed in the United States, service billed outside the United States, and service transiting the United States.” 47 C.F.R. § 43.61(a)(1). Certain carriers must file quarterly traffic reports. *Id.* §§ 43.61(b)(1), (c); 63.10(c). Section 43.82 requires all facilities-based common carriers providing international telecommunications services between the United States and any foreign point to file annual circuit status reports providing “the total number of activated and the total number of idle circuits” to geographic points outside the United States.

As is evident simply from the rules’ statement of what must be filed, quoted above, these reports contain competitively sensitive information. The Commission has recognized that competition in the U.S.-international market is increasing. *See ISP/ISR Reform NPRM* ¶¶ 14-19. As a result of the increasingly competitive environment, Verizon finds that it must seek confidential treatment for more and more of the data it reports to the Commission.

The reports, however, do not appear to serve any useful purpose. Although the Commission has said that the information provided in each carrier’s report is used to monitor compliance with the Commission’s rules and policies, the Commission cannot tell from looking at the total minutes and total revenues reported by a carrier for a particular route whether the traffic exchanged is governed by the benchmarks policy (i.e., exchanged pursuant to a settlement agreement) or whether it was exchanged in compliance with that policy. The reports, therefore, do not serve the stated purpose. In a

competitive marketplace, the burden of collecting and producing sensitive market data far outweighs any benefit from the reports. As a result, the reporting requirement should be eliminated.³¹

IV. THE COMMISSION SHOULD CONFORM THE NOTICE PERIOD FOR DISCONTINUANCE OF INTERNATIONAL SERVICE TO THAT FOR DISCONTINUANCE OF DOMESTIC SERVICE

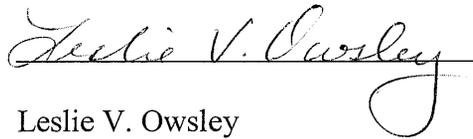
The Commission also should conform the notice period for discontinuance of international services by non-dominant carriers to that for domestic services to provide greater consistency and rationality in its rules.

Section 63.19 of the Commission's rules, 47 C.F.R. § 63.19, requires a non-dominant international carrier that seeks to discontinue service to provide written notice to all affected customers at least 60 days prior to the planned discontinuance. The carrier then must file that notice with the Commission. Once the notice period has passed, the carrier may discontinue service without any further FCC action. Section 63.71 of the Commission's rules, 47 C.F.R. § 63.71, also requires a non-dominant carrier that seeks to discontinue domestic service to provide written notice to all affected customers. For non-dominant domestic carriers, however, an application generally is automatically granted on the 31st day after the Commission releases a Public Notice accepting the application for filing. *See* 47 C.F.R. § 63.71(c). The Commission should reduce the notice period for non-dominant carriers seeking to discontinue international service to 30 days. This would allow the carrier to discontinue service on the 31st day.

³¹ Even if the Commission is able to determine, based on substantial record evidence, that these reports are necessary in the public interest, the requirement to provide quarterly reports should be eliminated and only the annual reporting requirement retained. *See* 47 C.F.R. §§ 43.61(b), (c); 63.10(c).

The Commission originally required 60 days notice for international services because of a concern that the lack of competitiveness in the international telecommunications market made it more difficult to replace the discontinued services. With the increased level of competition that now exists in the U.S.-international marketplace, consumers will be adequately protected by 30 days notice.³² The Commission has concluded that 30 days is adequate for domestic services and there is no logical reason why international services require a longer notice period. Moreover, conforming the notice period for discontinuance of international service to the time frames for discontinuance of domestic service will eliminate the potential for disjointed notices to affected customers, which could be confusing. It will also make the Commission's rules more consistent and rational.

Respectfully submitted,



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³² See *ISP/ISR Reform NPRM*, ¶¶ 1, 14, 19 (since 1999, “there has developed increased participation and competition in the U.S.-international marketplace”; “the number of international carriers worldwide has grown from approximately 587 in 1997 to 4,030 in 2001”).

THE VERIZON TELEPHONE COMPANIES

The Verizon 214 Licensees (“Verizon”) are various subsidiaries and affiliates of Verizon Communications Inc. holding international Section 214 authorizations. These are:

Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance
CANTV USA, Inc.
Codetel International Communications Incorporated
GTE Pacifica Incorporated d/b/a Verizon Pacifica
GTE Railfone LLC
GTE Wireless Incorporated
Iusatel USA, Inc.
NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions
PRT Larga Distancia, Inc.
Verizon Airfone Inc. (formerly GTE Airfone Incorporated)
Verizon Global Solutions Inc.
Verizon Hawaii International Inc.
Verizon Select Services Inc.