NOTES AND COMMENTS

ON MEDIA CONSOLIDATION, THE PUBLIC INTEREST, AND NOTICE AND AGENCY CONSIDERATION OF COMMENTS

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TABLE OF CONTENTS

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INTRODUCTION

Commissioner Adelstein, in dissent to the Federal Communications Commission's (FCC or Commission) decision to relax media ownership restrictions, defended the importance of public comments:

> The Americans I heard from know what they're talking about. This is the media they watch, listen to, and read every day. We have heard from people who have collectively spent billions of hours watching television, listening to the radio, and reading newspapers . . . . There is no more objective jury than the American people. They take it very personally, and they are very articulate.[1]

The Telecommunications Act of 1996 (1996 Act) requires the FCC to review regulations regarding media ownership periodically and to determine whether they are "necessary in the public interest."[2] To comply with this statutory provision, the Commission conducted the 2002 Biennial Regulatory Review (2002 Review),[3] which resulted in a relaxation of the ownership rules to permit greater levels of ownership on a national and local level, and across mediums. Hundreds of thousands of individual citizens weighed in on the proposal by filing comments with the Commission, and the vast majority opposed the possibility of further consolidation.[4] Despite this opposition, the FCC voted to go ahead and promote further consolidation. Public outcry continued, resulting in increased attention from Congress and the courts.[5] Many different public interest and consumer advocacy groups brought suit against the FCC, consolidated as *Prometheus Radio Project v. FCC*, claiming that the

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1. Statement of Commissioner Jonathan S. Adelstein, Dissenting, Report and Order In the Matter of 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules, 18 F.C.C.R. 13974, 13978 (July 2, 2003) [hereinafter Adelstein Dissent] ("It has been said that the public comments [received by the FCC] are too simple and offer no substantive basis from which to make our decision."). Commissioner Adelstein rejects this notion, having "read many of these comments" and "listened to hundreds of people firsthand in city halls, schools, churches and meeting rooms." *Id.*

2. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (codified at 47 U.S.C. § 161(a) (2000)).

3. In the Matter of 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003) [hereinafter 2002 Review].

4. *See* Adelstein Dissent, *supra* note 1, at 13978 (exclaiming that 99.9% of all comments received opposed the Federal Communications Commission's (FCC) consolidation efforts).

5. *See* Byron L. Dorgan, *The FCC and Media Ownership: The Loss of the Public Interest Standard*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443, 451-53 (2005) (noting the strong public opposition to the regulation, and the FCC's failure to consult with the public). Further, once the Commission released the 2002 Review, Senator Dorgan described the rules as "outrageous" and the FCC's action as "totally contraven[ing] statutory intent." *Id.*

deregulatory rules in the 2002 Review "contravened the Commission's statutory mandates as well as the Administrative Procedure Act."[6] As a result of the suit, the court remanded several of the challenged rules for further explanation by the FCC.[7] The FCC has reviewed the rules challenged by the *Prometheus* court as a part of its 2006 Quadrennial Regulatory Review (2006 Review),[8] in accordance with the 1996 Act, and has faced similar public opposition to media ownership proposals.[9] In November 2007, after the 2006 Review had been ongoing for eighteen months, Chairman Kevin Martin called for the proceeding to be wrapped up, and he narrowed the scope of the proceeding. Chairman Martin successfully pushed the rulemaking proceeding through just before the end of 2007, amidst public anger and despite threats from Congress and a much shortened period for comment on the modifications made in November.[10]

The importance of the current ownership proceedings cannot be understated: Commissioner Copps has referred to the 2002 Review as "the granddaddy of all reviews,"[11] and the 2006 Review has proven to be no different. Both deal with the future of media ownership—a topic that has aroused the intense scrutiny of the American public. The reality of American media is that powerful companies dominate nearly all of the media outlets that most Americans rely on daily for news and entertainment.[12] Media concentration can threaten democracy itself by

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6. Prometheus Radio Project v. FCC, 373 F.3d 372, 381 (3d Cir. 2004).

7. *See id.* at 382 (remanding several FCC rules that had relaxed ownership limits because the FCC had "not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets").

8. In the Matter of 2006 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking, 21 F.C.C.R. 8834 (2006) [hereinafter 2006 Review].

9. In January 2004, Congress amended § 202(h) to provide for a quadrennial rather than a biennial review. Consolidated Appropriations Act, 2004, § 629, Pub. L. No. 108-199, 118 Stat. 3, 99-100 (2004).

10. *See* Press Release, FCC, Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal 1 (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278142A1.pdf (arguing that the time for public comment was "grossly insufficient"); *see also* Frank Ahrens, *FCC Chief Rejects Call to Delay Vote*, WASH. POST, Dec. 14, 2007, at D02 (describing a hearing in which the Senate Commerce Committee demanded an explanation for "ramming" through this "unpopular" regulation and asked that he consider postponement).

11. Statement of Commissioner Michael J. Copps, Dissenting, 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13951, 13955 (July 2, 2003) [hereinafter Copps Dissent] (reacting negatively to the suggestion that those "who feel strongly . . . are being too emotional or are laying too much on one set of decisions"). Instead, Commissioner Copps characterizes this Review as "the granddaddy of all reviews" that will set "the direction for how the next review will get done and for how the media will look for many years to come." *Id.*

12. For a list of media holdings of the major firms, see Columbia Journalism Review, http://www.cjr.org/resources/ (last visited Dec. 29, 2007).

reducing the number of speakers, thus reducing the diversity of outlets for listeners.[13] Many people sense this threat to democracy posed by further consolidation and, as a result, hundreds of thousands of people filed comments in opposition to the 2002 review, while hundreds of thousands more filed opposition to the 2006 Review.[14] The FCC's only response to the citizen comments was a single paragraph in the 2002 Review:

> We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of these commenters that our ownership rules protect our critical diversity and competition goals . . . and we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace, and comply with our statutory responsibilities and limits.[15]

The Commission did not give the comments specific consideration but assured these thousands of voices that the FCC had heard their concerns, and that they had nothing to fear.[16]

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13. *See* Pennekamp v. Florida, 328 U.S. 331, 354 n.2 (1946) (Frankfurter, J., concurring).

> Today ideas are still flowing freely, but the sources from which they rise have shown a tendency to evaporate. . . . The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership. . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects; but if it is true, as this book suggests, that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged.

Id. (quoting E.B. White, Comment, THE NEW YORKER, Mar. 16, 1946, at 97); *see also* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 735 (2005) (arguing that on any level, be it local, state, or national, a concentrated media market allows owners to exercise market power in a way that is "undemocratic, largely unchecked, and potentially irresponsible" and that "no democracy should risk the danger").

14. *See infra* note 43 (comparing the number of comments from the 2006 Review to those from the 2002 Review); *see, e.g.*, Comment from Michele Sutter to the FCC; Martin, Copps, Adelstein, Tate, and McDowell (Oct. 12, 2006), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518538168 [hereinafter Comment of Michele Sutter] (demonstrating the kind of thoughtful response that some of the public commenters submitted to the FCC).

> Fewer people owning more and more and more media outlets equals less and less information making its way to the people . . . . It is the responsibility of the Federal Communication Commission to oversee the holders of the broadcast licenses on behalf of the people of the United States of America to support the free exchange of ideas to inform the populace. The result of responsible stewardship is a vibrant democracy.

Id.; *see also* Copps Dissent, *supra* note 11, at 13955 (noting "outright alarm" on the faces of citizens with regard to the threat of media concentration).

15. 2002 Review, *supra* note 3, at 13624.

16. *Id.* (noting that the Commission will address the "core concerns" of the commenters); *see, e.g.*, Comment of Jeff Jordan, M.B. Docket 02-277 (June 2, 2003),

If such generalized treatment of citizen comments is sufficient when an agency promulgates new regulations, then what is the link between comments filed and rules promulgated? This Comment argues that with regard to the FCC, the link should be a well-defined public interest standard, and for all agencies, there should be stronger guidelines for what it means to "consider" public comments under the Administrative Procedure Act (APA). Without further guidelines on how the Commission should consider citizen comments in a notice and comment rulemaking, or a stricter interpretation as to what constitutes the public interest, the FCC's ownership proceedings violate the requirements of notice and comment rulemaking under § 553 of the APA[17] and the agency's statutory obligation to regulate in the public interest.[18] Through a discussion of a specific proceeding at a specific agency, this Comment ultimately seeks to generate greater discussion of the role that public comment is meant to play in agency rulemakings, and to think about how to foster a better public trust relationship between the administrative state and the citizens being governed by that state.

In Part I, this Comment examines the FCC's actions in the media ownership proceedings in further detail. Part II discusses the laws and policies that govern the FCC's actions, mainly the public interest standard and § 553 of the APA. Part III compares the FCC's actions to the legal requirements and discusses the dissonance between them. Consequently, Part III develops the main contention of this Comment: the FCC's requirement to promulgate regulations in the public interest informs and heightens the Commission's obligations under APA § 553 to take citizen comments into consideration, but the FCC has not met this standard. Part IV explores how to solve this problem from a number of different perspectives. It suggests that because of the FCC's requirement to promulgate regulations in the public interest, the FCC should give more

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http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514152584 ("Allowing media consolidation is just one more nail in the coffin of the average American's opportunity to hear the diverse and necessary other side of the story."); *see also* Comment of Charles Tillinghast, M.B. Docket 02-277 (Jan. 31, 2003), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513405997 (calling attention to the different effects that competition would have on entertainment as opposed to news, asserting that "[c]ompetition surely won't produce better news coverage and analysis since competition relies on monetary return and a groundswell of public demand for more news coverage and analysis, creating a boutique niche for great advertising revenue, is unlikely").

17. Administrative Procedure Act, 5 U.S.C. § 553 (2000).

18. Federal Communications Act of 1934, 47 U.S.C. § 303(f) (2000); *see also* Michael J. Copps, *Where is the Public Interest in Media Consolidation*, *in* THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY 117, 118 (Robert McChesney, Russell Newman & Ben Scott eds., 2005) (discussing the importance of the role of the public interest standard in FCC regulation, and saying that while "some claim it's unworkable, even unknowable . . . there it is, appearing some 110 times in our enabling telecommunications statute, put there to be our lodestar").

substantive consideration to public comments. Further, both Congress and the courts need to play a role in protecting the public interest. Congress should consider legislation that clarifies what it means to consider public comments. The courts must also focus on enforcing the procedural requirements of the APA more strictly with regard to the public interest.

I. THE UNFOLDING OF THE MEDIA OWNERSHIP PROCEEDINGS AT THE FCC

The 2002 Review represented the FCC's articulation of the final ownership rules, promulgated after the notice and comment rulemaking procedure as prescribed by APA § 553.[19] The Commission conducted this review pursuant to § 202(h) of the 1996 Act, which required the FCC to review ownership rules, determine whether any of those rules are necessary in the public interest as the result of competition, and "repeal or modify" any such regulation.[20]

The 2002 Review affected three basic media ownership rules. First, it threw out the cross-ownership prohibition so that one entity could own both a broadcast station and a newspaper in a single market, and it weakened the restrictions against owning a television station and radio station in one market.[21] Second, it relaxed local television ownership rules, permitting

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19. *See* 2002 Review, *supra* note 3, at 13621 (stating that the Commission addressed the rules in light of the requirements imposed by Section 202(h) of the 1996 Act).

> In the Notice of Proposed Rulemaking in this proceeding . . . , we initiated review of four ownership rules: the national television multiple ownership rule; the local television multiple ownership rule; the radio-television cross-ownership rule; and the dual network rule. . . . In addition, the Commission previously initiated proceedings on the local radio ownership rule and the newspaper/broadcast cross-ownership rule. Comments filed in those proceedings have been incorporated into this docket . . . .

Id. at 13621-22 (citations omitted).

20. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996) (codified at 47 U.S.C. § 161(a)-(b) (2000)). In the 2002 Review, the FCC interpreted § 202(h) as appearing "to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *See* 2002 Review, *supra* note 3, at 13624 (instructing courts to set aside agency actions, findings and conclusions if arbitrary, capricious or an abuse of discretion (citing 5 U.S.C. § 706(2)(A))); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983) (requiring agencies that decide to change an existing rule by rescinding that rule, to provide an explanation and justification that goes beyond that offered when the agency first promulgated the rule). However, the *Prometheus* court would later disagree, holding that instead of weakening the justification requirement for regulations that the Commission was modifying, § 202(h) extended the justification requirement to existing regulations. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 395 (3d Cir. 2004) ("This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission's rulemaking authority and to contravene 'traditional administrative law principles.'").

21. *See* 2002 Review, *supra* note 3, at 13751-810 (evaluating the basis of the cross-ownership rule and finding it unnecessary in the public interest).

> In consideration of the record and our statutory charge, we conclude that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market . . . nor a cross-service restriction on common ownership

one entity to own two stations in markets with less than eighteen outlets, and three stations in markets with eighteen or more outlets, so long as not more than one of those stations was in the top four in the market based on audience share.[22] Third, it modified the national television ownership rule to permit an entity to own broadcast stations that reach forty-five percent of television households in the United States.[23]

The highly unusual characteristic of the 2002 Review was the public comment period. The Commission received its normal array of responses from industry players and special interest groups.[24] But this proceeding also caught the attention of the American public—hundreds of thousands of whom expressed their thoughts to the Commission via comments of their own.[25] The vast majority of these citizen comments opposed the measure.[26] While the FCC noted that it received these "brief" comments, it characterized them as "general concerns about the potential consequences of media consolidation," and never addressed them specifically.[27]

Once the FCC released the new relaxed rules, it faced a maelstrom of criticism from all sides, including media companies that argued the deregulations were not deregulatory enough.[28] Congress was concerned

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> of radio and television outlets in the same market . . . remains necessary in the public interest.

Id. at 13622-23.

22. *See id.* at 13668 (increasing the levels of ownership permitted in single markets).

23. *See id.* at 13814-15 (raising the cap from thirty-five percent).

24. *See id.* at 13876-77 (listing commenters, including Clear Channel Communications; Communications Workers of America; Consumer Federation of America; Fox Entertainment Group, Inc.; Gannett Company, Inc.; Minority Media and Telecommunications Council; National Association of Broadcasters; National Association of Black-Owned Broadcasters; Newspaper Association of America; Sinclair Broadcasting Group, Inc.; Tribune Company; United Church of Christ; Walt Disney Company).

25. There are contradictory statements as to how many comments were actually filed. *Compare* Adelstein Dissent, *supra* note 1, at 13977 ("Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals and virtually everyone in between. We have heard from nearly two million people in opposition to relaxing ownership rules, and only a handful in support."), *with* 2002 Review, *supra* note 3, at 13624 ("We received more than 500,000 brief comments and form letters."). Interestingly, the characterizations of such comments differ—the majority opinion referring to them as "brief comments and form letters," and Commissioner Adelstein referring to having "heard from" the public.

26. *See* Adelstein Dissent, *supra* note 1, at 13978 (saying that 99.9% of citizen comments opposed further media concentration); *see also* Michael A. McGregor, *When the "Public Interest" Is Not What Interests the Public*, 11 COMM. L. & POL'Y 207, 208 (2006) (distinguishing the ownership proceeding, to which the population at large responded in almost universal opposition, from typical agency proceedings, to which only regulated firms and special interest groups respond).

27. 2002 Review, supra note 3, at 13624. *But see* Adelstein Dissent, *supra* note 1, at 13978 (pointing out that "the statute does not let us simply dismiss the public's views with a passing reference in one paragraph").

28. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 381-82 (3d Cir. 2004) (including broadcasters, newspaper owners, and network associations such as the National Association of Broadcasters, and affiliate associations of each of the networks); *see also* Dorgan, *supra* note 5, at 453 (categorizing the complaints of public interest and consumer

about the FCC's loosening of the media ownership regulations, with some members suggesting that the FCC had gone beyond its statutory authority.[29] In reaction to the FCC, Congress passed legislation to lower the national television cap back to thirty-nine percent from the FCC's increase to forty-five percent.[30]

In *Prometheus Radio Project v. FCC*,[31] the Third Circuit Court of Appeals remanded the rules expanding local and national television ownership as well as the cross-ownership of limits of media in local markets. Using the "arbitrary and capricious" standard of review under the APA, the court found that the agency's obligation under § 202(h) is to determine whether its rules remain useful in the public interest, and, if not, repeal or modify those rules.[32] In articulating this standard, the court noted that whatever the Commission decided to do with a rule, its decision must be in the public interest and supported by a reasoned analysis.[33] The court held that the agency did not do enough procedurally to explain and justify its decisions in the 2002 Review, and that the numerical limits the FCC used to announce the new ownership scheme for local television and local radio ownership and for cross-media ownership required additional justification or modification.[34] This decision did not limit the Commission's discretion, nor did it specifically point to its treatment of the thousands of citizen comments.[35] The main thrust of this decision, at least as it pertains to this Comment, is that despite opposition to the substance of

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groups as not regulating enough, compared to the media interests' complaints that the rules did not deregulate enough).

29. *See* Dorgan, *supra* note 5, at 453 (describing congressional disapproval of the FCC's action, adding that it "contravened statutory intent").

30. *See id.* (noting that initially Congress decreased the cap to thirty-five percent). But subsequently, in the 2004 Appropriations Act, Congress increased "the national audience reach limitation for television stations" to 39%. *See* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004). The Senate further attached a resolution to the Appropriations Act, reading "Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership . . . and such rule shall have no force or effect," but the resolution was tabled in the House of Representatives. S.J. Res. 17, 108th Cong. (2003).

31. 373 F.3d at 382 (describing the terms of the remand); *see also* Stephanie N. DeClerk, Prometheus Radio Project v. FCC*: Where Will the Media Deregulation Trend End?*, 58 ARK. L. REV. 705, 728-29 (2005) (parsing out the precise issues that the FCC needed to address on remand and arguing that parts of the *Prometheus* decision signal that courts are still willing to attach some procedural requirements to the public interest standard).

32. *See Prometheus*, 373 F.3d at 395 (summarizing the standard of review analysis).

33. *See id.* (emphasizing that the court requires this reasoned analysis in the public interest whether or not the agency chooses to retain, repeal, or modify any rule regarding media ownership).

34. *See id.* at 435 (affirming much of the FCC's order, but finding that several provisions required more justification of its decision to "retain, repeal, or modify" in order to pass the threshold of lawful agency action).

35. *See id*. at 382 ("[W]e reject the contention that the Constitution or § 202(h) of the 1996 Act somehow provides rigid limits on the Commission's ability to regulate in the public interest.").

the rules from Congress and the public, the court did not have the power to object to the substance of the rule, but did have the power to overturn or remand a rulemaking if it found a procedural problem.[36] Thus, as long as the FCC fixes its procedural defects in the future, including consideration of comments, little else prevents the FCC from successfully relaxing ownership limits, at least in the eyes of the Third Circuit.[37]

The FCC used the 2006 Review to respond to the *Prometheus* remand, where the same ownership issues were vetted to the public. The rules under examination in the 2006 Review originally included the local television ownership limit,[38] the local radio ownership limit,[39] the newspaper-broadcast cross-ownership ban, the radio-television cross-ownership limit,[40] the dual network ban,[41] and a rule regarding certain discounts given in calculating the national television ownership limit.[42] The process proved to be lengthy because the FCC was likely trying to beef up its record in order to survive a potential future review of its findings in the 2006 Review. After publishing its proposed rule in the Federal Register in August 2006, the FCC accepted public comments and reply comments through January 2007.[43] Between October 2006 and November 2007, the FCC held a series of public hearings across the country addressing issues such as localism, diversity, competition, and minority ownership.[44] In addition, the FCC commissioned and released a number of studies about

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36. *See id.* (affirming that the power of the FCC to regulate the substance of media ownership is not rigidly limited by the Constitution or by § 202(h) of the 1996 Act); *see also* DeClerk, *supra* note 31, at 729 (noting that the *Prometheus* decision will not get in the way of further deregulation of media ownership, as the decision found fault in the procedure, not in the substance).

37. *See* DeClerk, *supra* note 31, at 729 (arguing further that the *Prometheus* decision leaves "the future of media ownership . . . predominantly in the hands of Congress and the FCC," as opposed to with the courts).

38. *See* 2006 Review, *supra* note 8, at 8839-42.

39. *See id.* at 8842-44.

40. *See id.* at 8844-48 (combining the discussion of both types of cross-ownership limits).

41. *See id.* at 8848.

42. *See id.* at 8848-49.

43. *See* In the Matter of 2006 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order, 21 F.C.C.R. 14460 (2006) (extending the deadline to January 16, 2007). While the number of comments received in total has not been released, signs indicate that the public commented as much as it did in the 2002 Review. The FCC's online comment viewing system retrieves 143,999 comments filed (as of Feb. 2, 2007), with roughly 143,639 presumably citizen comments. *See* Search for Filed Comments, FCC, http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (last visited Dec. 29, 2007) (select "Eliminate Brief Text Comments" checkbox and conduct search for comments to the 2006 Review).

44. *See* Public Hearings on Media Ownership Issues, FCC, http://www.fcc.gov/ownership/hearings.html (last visited Dec. 29, 2007) (listing the factors to be considered at public hearings, as well as the locations—Chicago, IL, Tampa, FL, Harrisburg, PA, Nashville, TN, Los Angeles, CA, El Segundo, CA, and Seattle, WA).

the different aspects of the ownership debate to the public for comment and response.[45] Overall, the FCC went to great lengths and great expense to conduct this review. But while adding these studies and results from public hearings to the record will no doubt make the record larger, it will not on its own cure the Commission's failure to adequately consider public comments. In November 2007—after spending over a year talking to the public in meetings across the country and conducting different studies—Chairman Martin, in an effort to push through the proceeding before 2008, modified the proposal to exclude all rules from consideration except the cross-ownership ban between newspapers and television or radio stations; he also established a deadline for public comment which was shorter than that normally given.[46] The reason for this move is mysterious: why should an agency commit so many resources to a proceeding only to push through a rule at the last minute, thereby clouding the potential transparency that the FCC had worked so hard to achieve? On December 18, 2007, Chairman Martin's proposal passed, and the thirty-two year old ban that prohibited one entity from owning both a television or radio station and a newspaper in the same city or area ended.[47] Although the scope of the 2006 Review narrowed, the primary issue was one the FCC had dealt with in the 2002 Review: cross-ownership is now permitted between a newspaper and a radio or television station in the twenty largest markets, citing the loss of newspaper viability due to the explosion of Internet news sources.[48] In opposition to this proposal, Commissioners Adelstein and Copps noted that this could lower the number of news sources for 120 million people or 43% of the population.[49] And while members of Congress requested ninety days for public comment, the Chairman gave the public only nineteen working days to comment on the actual proposal (as

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45. *See* Research Studies on Media Ownership, FCC, http://www.fcc.gov/ownership/studies.html (last visited Dec. 29, 2007) (listing ten studies that have been released, including "How People Get News and Information," "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," and "Station Ownership and Programming in Radio").

46. *See* Press Release, FCC, Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf (directing the public to file comments by December 11, 2007).

47. See Press Release, FCC, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (Dec. 18, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf (describing the ban, the reasons for ending it, and the presumptive parameters of the new rule). The rule has not been released as of the time of this publication.

48. *See id.* (proposing that no changes to the other media ownership rules currently under review be considered at that time).

49. *See* Press Release, FCC, Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal 1 (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278142A1.pdf (suggesting that Chairman Martin's proposal "could propel a frenzy of competition-stifling mergers across the land").

opposed to the notice, which is a general call for comments).[50] As far as giving more substantial consideration to public comment, this series of events has called into question whether the FCC has done a better job in the 2006 Review than it did in the 2002 Review. As Senator Daniel Inouye said, "A transparent regulatory process is essential. When agencies short-circuit the decision making process, public trust in their authority erodes."[51] The effects of the FCC's short circuiting of the 2006 Review decision remain to be seen.

II. THE PUBLIC INTEREST STANDARD AND § 553 GOVERN THE FCC'S ACTIONS

A. Requirements of the Public Interest Standard

Media ownership is first an issue of licensing. In order to broadcast television or radio signals over the spectrum, the FCC must grant a license authorizing a particular person or entity to broadcast over a certain wavelength. In turn, Congress decided that the FCC should grant licenses to broadcasters based on their commitment to "public convenience, interest, [and] necessity."[52] The 2006 Review of media ownership limits must define the point at which concentration of ownership is no longer in the public interest.

Historically, the public interest standard evolved out of the scarcity of the broadcast spectrum. Because the frequencies over which speakers may broadcast are a naturally scarce resource,[53] not every person who wants to broadcast is able to do so.[54] Because of this natural limitation, those whom

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50. *See id.* (arguing that nineteen days is grossly insufficient and that the American people should have just as many days as members of Congress).

51. *See* Daniel K. Inouye, Statement at the Federal Communications Commission Oversight Hearing (Dec. 13, 2007), *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=312.

52. 47 U.S.C. § 303 (2000).

53. *See* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) (explaining that the scarcity of radio frequencies justifies the governmental restraints on licensing "in favor of [those] whose views should be expressed on this unique medium"). But the Court also recognized that because this natural scarcity greatly restricted the average person's ability to broadcast, those who use the radio waves primarily for listening "retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount." The landscape of media has changed dramatically in the almost forty years since the Court's decision in *Red Lion*. Cable and satellite systems are now the norm in television, not broadcast. Because of this evolution, many question whether the original justifications of *Red Lion* still apply. While this is an interesting question, this Comment will maintain the assumption that *Red Lion*'s reasoning is still sound, or at least still applies in force to broadcasters, regardless of the evolution of cable and satellite systems.

54. *See id.* at 388-89 ("If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication . . . only a few can be licensed and the rest must be barred from the airwaves.").

the FCC decides to license carry an extra burden to broadcast in the "public convenience, interest, [and] necessity."[55] Through this licensing system, the FCC can permit broadcasters to use the public's airwaves for free, so long as they are serving the public interest.[56] But actually determining what the public interest is has varied greatly over time.[57] The Federal Radio Commission, the precursor agency to the FCC, defined the public interest in terms of a public trustee relationship, in which stations would be operated as if owned by the public.[58] The FCC made several additional attempts to define the public interest standard throughout the 1940s to the 1970s.[59] The FCC reversed its stance in the 1980s and took a deregulatory approach. It determined that competition in competitive markets was in the public's interest, and subsequently, the FCC has undone most of the public interest regulations that were in place.[60]

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55. 47 U.S.C. § 303.

56. *See Red Lion*, 395 U.S. at 376 n.5 (quoting a congressional sponsor of the Radio Act of 1927, who emphasized that licenses should be "issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art" and that the "broadcasting privilege will not be a right of selfishness . . . [but] will rest upon an assurance of public interest to be served").

57. Some have argued that this delegation of power by Congress to the FCC to promulgate regulations in the public interest, convenience, or necessity violates the Delegation Doctrine, which requires Congress to make important legislative and policy decisions itself, and not delegate those responsibilities to administrative agencies, which are organized under the Executive Branch. Indeterminate delegations permit the Executive Branch to exercise legislative power, which violates Article I of the Constitution—"[a]ll legislative Powers herein granted shall be vested" in Congress. U.S. CONST. art. 1, § 1; *see, e.g.*, Randolph J. May, *The Public Interest Standard: Is it Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 428 (2001) (arguing that "[t]his standard has proven so indeterminate that, in adopting it, Congress passed off to the new agency the power to make law in a way that would surely shock [John] Locke and the founders of our nation"); Gary Lawson, *Delegation and the Constitution*, 22 REGULATION No. 2, 23, 29 (1999), http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf (identifying the public interest standard as "[e]asy kill number [one]" in terms of statutory provisions that should be struck down on Delegation Doctrine grounds).

58. *See* Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 151 (2006) (describing the Federal Radio Commission's interpretation of the public trustee doctrine as requiring broadcasters to broadcast "[a]s if people of a community should own a station and turn it over to the best man in sight with this injunction: Manage this station in our interest" (quoting *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 J. FED. COMM. B. ASS'NS 5, 14 (1950))).

59. *See* Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 621-22, 624 (2004) (discussing the timeline of the FCC's various attempts at defining the public interest. It issued a report in 1946 known as the BLUEBOOK, which outlined the basic components of a broadcaster's obligations under the public interest standard. Another policy statement in 1960 listed fourteen components that are "usually necessary to meet the public interest." Finally, the Fairness Doctrine and Ascertainment requirements round out the FCC's public interest regulations through the early 1980s.).

60. *See id.* at 624-25 (describing the state of the FCC under Chairman Mark Fowler as a "deregulatory frenzy"). Chairman Fowler interpreted the public interest standard as "above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork." *Id.*

In the current concentration of mass media, more scholars and citizens are arguing that the FCC's deregulatory stance[61] does not create a marketplace best suited for serving the needs and interests of the public.[62] Further, the change in stance between pro-public interest regulations and the deregulated marketplace theory demonstrates the manipulability of the public interest standard. Generally, those in support of further consolidation argue that it is in the public's interest to create an environment of efficiency, while those against consolidation argue that it is in the public's interest to foster diversity in ownership and viewpoint over the nation's airwaves.[63] This uncertainty of what constitutes the public

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61. In an interesting discussion, Robert McChesney suggests that this deregulatory stance is deregulatory only in name. *See* JOHN NICHOLS & ROBERT W. MCCHESNEY, TRAGEDY AND FARCE: HOW THE AMERICAN MEDIA SELL WARS, SPIN ELECTIONS, AND DESTROY DEMOCRACY 173 (2005) (discussing why the term "deregulation" is misleading).

> Any media system . . . requires extensive government policymaking.
>
> That is why the term "deregulation" is so misleading and propagandistic when applied to media policy debates. We are often told, for example, that radio broadcasting was deregulated in 1996, when the Telecommunications Act removed any limit on the number of monopoly radio licenses a single firm could possess. As a result a company like Clear Channel, which for generations had been limited to owning less than a dozen stations nationally, could gobble up over 1,200 radio stations within a few years. . . . Is this deregulation? Try to broadcast on one of the frequencies Clear Channel is presently using, saying that since radio is now deregulated, it is your turn to use the airwaves. If you persist, you will do twenty years in Leavenworth or some other federal abode.
>
> In fact, radio is as regulated today as it has ever been, only it is regulated to serve the interest of corporations like Clear Channel. . . . The fact is that regulation is unavoidable; the question is how that regulation will be deployed and in whose interests.

Id. at 173-74.

62. *See* Copps Dissent, *supra* note 11, at 13954 (arguing that due to the loss of a strong public interest doctrine, the realization of the FCC's goals of localism, diversity, and competition has suffered, and that without change, the FCC is coming "perilously close to taking the 'public' out of the public airwaves"); *see also* Phillips, *supra* note 59, at 629 (arguing that "a renewed focus on regulation based on the public interest standard has never been more vital"); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 505-06 (2000) (rejecting the view that public interest regulating has no business in the expanding and diversifying media market, and suggesting "that television is no ordinary commodity, partly because of the collective benefits of good programming, partly because of the link between television and democracy, and partly because viewers are more like products offered to advertisers than consumers paying for entertainment on their own").

63. *See, e.g.*, Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 383-84 (2006) (indicating that each side has developed a distinct definition of public interest).

> Given that each side of the debate over regulating media ownership invokes the "public interest" as supporting its position, it is not surprising that the opposing sides have developed two distinct definitions of that concept. Proponents of deregulation define the public interest . . . in terms of fostering a market that does the best possible job of satisfying consumers' programming preferences. . . .
>
> Opponents of deregulation . . . typically define the public interest in terms of fostering constitutional and social values of quality and diversity, as well as preserving an effective forum for informed public debate.

Id.

interest could be used to justify nearly any outcome of an FCC rulemaking, simply by generalizing which public interests a proposal may serve and then reasoning backwards. The public interest standard is so vague that former Chairman Powell once noted that:

> The best that I can discern is that the public interest standard is a bit like modern art, people see in it what they want to see. That may be a fine quality for art, but it is a bit of a problem when that quality exists in a legal standard.[64]

B. Requirements of the Administrative Procedure Act

Every year, administrative agencies like the Department of Homeland Security, the Environmental Protection Agency, and the FCC create thousands of regulations, which are as binding on the public as any law passed by Congress and signed by the President.[65] In turn, the APA, which provides the legal framework for rulemaking, binds the agencies.[66] Adopted in 1946, the APA represented a compromise, giving agencies the leeway and discretion to carry out regulatory work, but normalizing required procedures and establishing a method for judicial review.[67] APA § 553 establishes three procedural requirements—known as notice and comment rulemaking—in order for an agency to promulgate a substantive rule: notice of a proposed rule, an opportunity for interested persons to comment, and "*[a]fter consideration of the relevant matter presented* . . . adopt[ion of] a concise general statement of their basis and purpose."[68] On the requirements imposed by the phrase, "consideration of the relevant matter presented," the APA is nearly silent; it does not explicitly require agencies to rely on any of the views expressed in public comments as the basis for their decision.[69] While it is well settled that consideration of

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64. Michael K. Powell, Comm'r, FCC, The Public Interest Standard: A New Regulator's Search for Enlightenment (Apr. 5, 1998), *available at* http://www.fcc.gov/Speeches/Powell/spmkp806.html.

65. *See* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S J. L. POL'Y 33, 33-34 (2004) (estimating that agencies promulgate approximately fifteen times as many rules as Congress).

66. Administrative Procedure Act (APA), 5 U.S.C. § 553 (2000); *see also* Coglianese, *supra* note 65, at 36-37 (including requirements in the rulemaking framework to publish notices of proposed rules and provide an opportunity for interested people to comment).

67. *See generally* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 20-21 (6th ed. 2006) (discussing how lawmakers, through the APA, reached a compromise in order to address the problem of agency discretion).

68. 5 U.S.C. § 553(b)-(c) (emphasis added).

69. *See, e.g.*, Coglianese, *supra* note 65, at 37.

> [T]he APA imposes a rather weak requirement for public participation. It does not require government to engage in any open deliberation with the public or even to adhere to the views contained in any comments submitted by the public. . . . [The APA] does not require that [agencies] rely on any expressed views of the public as a basis for their decisions.

Id.

relevant comments is required,[70] there is no clear standard of what constitutes actual consideration by the agency.[71]

What is clear is that agencies are not conducting a popularity contest when they consider relevant comments.[72] Agencies operate as expert bodies,[73] so one of the reasons for notice and comment procedures is to educate the agency on any issues it may have overlooked.[74] Agencies do not have to promulgate rules the way public opinion would have them promulgate rules.[75] If this were required, then interest groups commanding the most participation would easily capture the agencies.[76]

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70. *See* 5 U.S.C. § 553(c) (indicating that interested persons may participate through submission of "written data, views, or arguments with or without opportunity for oral presentation"); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasizing the consideration agencies must give to relevant comments, saying "there must be an *exchange* of views, information, and criticism between interested persons and the agency").

71. *See* Auto. Parts & Accessories Ass'n, Inc. v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (suggesting that agencies should take into account the realities of judicial scrutiny).

> We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that . . . "the concise general statement of basis and purpose" . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Id.; *see also* Am. Med. Ass'n v. Mathews, 429 F. Supp. 1179, 1204 (N.D. Ill. 1977) ("The agency is not required to supply specific and detailed findings and conclusions, but need only 'incorporate in the rules a concise general statement of their basis and purpose.'" (quoting 5 U.S.C. § 553(c))).

72. *See* McGregor, *supra* note 26, at 223 ("Commission decision making is not based on polls or comment tallies."); *see also* Copps Dissent, *supra* note 11, at 13958 ("The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails 'for' and the letters, cards and e-mails 'against' and awarding the victory to the side that tips the scale.").

73. *See, e.g.*, Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 385 (2002) (listing two main reasons why federal administrative agencies have been created).

> [I]t is generally accepted that an administrative body that is granted regulatory authority over a specific set of issues will naturally develop a certain level of "expertise" in that area, and that this development will result in better and more effective regulation of that area than would have been possible if it had been subject, instead, to more generalized governmental oversight.

Id. at 385-86 (citation omitted).

74. *See* Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969) (citing two justifications for notice and comment rulemaking: to give the public the opportunity to participate in rules that will bind them, and to enable "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated") (citation omitted); *see also Am. Med. Ass'n*, 429 F. Supp. at 1205 (providing that while courts bind agencies to consider the evidence in the record, they do not bind agencies to consider only the record, and agencies may make decisions based on their expertise).

75. *See* Adelstein Dissent, *supra* note 1, at 13978 ("I have heard it said we cannot make this decision by polls or by weighing postcards. That is fair enough.").

76. *See, e.g.*, Niles, *supra* note 73, at 385-90 (describing the theory of agency capture, the conditions which make it possible, and defining it as "when a regulated entity—like a large corporation, or more likely an association of corporate interests— . . . succeeds at

If the majority opinion dictated a rule's outcome, agencies would not be able to use their expertise, and instead would be subject to the ebbs and flows of public opinion. But ultimately, this is not a Comment asking the agency to listen to the braying mob. It seeks to ask the more important questions about the precise meaning of "consideration," the parameters of the agency's responsibility thereto, and the point at which an agency's neglect of such consideration rises to the level of being arbitrary and capricious.

III. DISSONANCE BETWEEN THE FCC'S ACTIONS IN THE MEDIA OWNERSHIP PROCEEDINGS AND BOTH THE PUBLIC INTEREST AND NOTICE AND COMMENT REQUIREMENTS

While it is true that the standard for consideration that an agency owes to relevant comments is vague, the FCC's lack of consideration with regard to citizen comments reflects a failure to uphold the public interest standard or meet the APA requirements. While overwhelming public opinion does not determine the outcome of a noticed rule, the fact that many thousands of people are commenting intensifies the FCC's obligation to consider these comments because the Commission is obligated to consider all of the relevant comments it receives.[77] The reality that the FCC has received thousands of comments thus becomes relevant in and of itself.

The FCC has fallen short of its procedural obligations in two ways. First, the FCC's current treatment of citizen comments should not be considered adequate for any rulemaking, even under the vague standards of APA § 553. This treatment exposes the rule to accusations of being arbitrary and capricious.[78] Second, the public interest standard should inform the FCC's obligation to consider relevant comments. Together, § 553 and the public interest standard heighten the level and quality of the consideration that the Commission should give to citizen comments.

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winning 'the hearts and minds of the regulators,' [then] regulation becomes 'a method of subsidizing private interests at the expense of the public good'") (citations omitted).

77. *See* Administrative Procedure Act, 5 U.S.C § 553(c) (2000) (mandating consideration after notice is given); *see also* Copps Dissent, *supra* note 11, at 13958 (suggesting that the "overwhelming response" on the part of the public obligates the FCC to "take notice"). *But see* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 n.58 (D.C. Cir. 1977) (recognizing that not all comments are relevant including those which are conjectural or reflect someone's unsubstantiated opinion, which are not deserving of consideration).

78. *See* Copps Dissent, *supra* note 11, at 13958 (demanding that "when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice").

A. The FCC's Consideration of Citizen Comments Is Insufficient Under Standards of Judicial Review

The major question remains: what does it mean to consider comments under the APA? When a court reviews agency rulemakings, what sorts of action (or inaction) will give rise to a finding that the rule was arbitrary and capricious?

While the APA left a gap in articulating a clear idea of what it means for an agency to "consider" comments, several courts have offered various interpretations of this term.[79] In its 2002 Review, the FCC's consideration of public comments amounted to one paragraph in the final rule.[80] In that paragraph, the Commission summed up the comments of around one million voices as "general concerns about the potential consequences of media consolidation" and simultaneously dismissed these voices by saying that the FCC "share[s] the concerns of these commenters" and assures readers that the Commission "believe[s] that the rules adopted . . . serve our public interest goals."[81]

While the APA does not explicate the standard for what constitutes "consideration of relevant comment," a few cases offer guideposts for such a determination. In reviewing agency decisions, one court has noted that "[c]ertainly the Administrative Procedure Act's requirement that an agency 'consider' the public comments received . . . must mean something more than a mere listing of abstracts of the comments totally unintegrated with the Order itself."[82] Except for that one paragraph in the 2002 Review, this is precisely what the FCC did: the only other mention of any citizen

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79. *See HBO*, 567 F.2d at 35-36 n.58 (recognizing that some public comments have no relevance to the rule and therefore do not deserve agency consideration).

80. *See supra* text accompanying note 15. Furthermore, Commissioner Copps identified additional procedural shortcomings with the 2002 Review. Before the vote on the new rules was to take place, the Commission refused to make public the proposed text of the rules until just three weeks prior to the vote. The Commission denied requests by Commissioners Adelstein and Copps to have more than three weeks time to review the proposals. Commissioner Copps has argued that these events further point out the deep flaws of the 2002 Review. *See* Copps Dissent, *supra* note 11, at 13955-58 (discussing the Commissioner's disappointment with the 2002 Review).

81. 2002 Review, *supra* note 3, at 13624.

82. ALASCOM, Inc. v. FCC, 727 F.2d 1212, 1221 n.38 (D.C. Cir. 1984) (identifying such action as preventing effective judicial review of agency action).

> Furthermore, we note that the Commission's method in this case of offering generalized justifications of its decisions often without discussing the opposing comments received on each issue, and then appending to the Order a separate unpublished summary of comments received containing no response to any of the comments, makes it difficult for a reviewing court to determine whether the agency has truly evaluated the comments it has received.

Id.

comments was an incomplete listing of commenters in an Appendix to the Order.[83]

The D.C. Circuit described the "consideration" required by agencies in the notice and comment process as a dialogue and a two-way street between the agency and the commenters.[84] Given the FCC's public attitude toward citizen comments, it is not a stretch to say that the FCC has not engaged in a back-and-forth dialogue with citizen comments. Commissioner Adelstein, in his dissent to the 2002 Review, said that the majority had "simply dismiss[ed] the public's views with a passing reference in one paragraph."[85]

In instructing agencies on their role with regard to public comments, the D.C. Circuit has also stated that "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[86] The FCC would likely argue that many of these citizen comments do not raise any significant points, and that instead, they only tell of general opposition. While in general this might be true on an individual basis, taken together, the overwhelming opposition ought to be treated as a significant point raised by the public. Given this guidance, the FCC's current treatment of citizen comments does not rise to the level of a "dialogue" or what should qualify as consideration, and has rendered meaningless the public's opportunity to comment.[87]

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83. *See* 2002 Review, *supra* note 3, at 13876-77 (listing commenters for MB Docket 02-277, primarily including names of associations and trade groups, along with a few individuals, mostly associated with universities, for instance, "Kidd, Dorothy (Univ. of San Francisco)").

84. *See HBO*, 567 F.2d at 35-36 (acknowledging that both notice by the agency and comment by the public are necessary to assist with judicial review and to provide fair treatment for individuals affected by the agency rule); *cf.* Prometheus Radio Project v. FCC, 373 F.3d 372, 412 (3d Cir. 2004) (warning that "the APA's notice obligations are not supposed to result in a notice-and-comment 'revolving door.' 'Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments.'" (quoting Cmty. Nutrition Inst. v. Block, 749 F.2d 50, 58 (D.C. Cir. 1984))); William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision*, 53 AM. U. L. REV. 583, 588 (2004) ("One can always do more, consider more, think longer or deeper, but neither common sense nor the law requires . . . the FCC . . . to seek a degree of comprehensiveness or profundity which is unrealistic and would require incremental effort disproportionate to the presumptive improvement in the analysis.") (citation omitted).

85. Adelstein Dissent, *supra* note 1, at 13978. Adelstein further describes the FCC's reaction as "overrid[ing] the better judgment of the American people. [The FCC's decision] instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest in massive deregulation. Those who would benefit by buying and selling the public airwaves won out over the public." *Id.*

86. *HBO*, 567 F.2d at 35-36 (citation omitted).

87. *See* Copps Dissent, *supra* note 11, at 13958 (stating that the only opportunity citizens have to comment is to file petitions after decisions have already been made).

> The FCC is not, of course, a public opinion survey agency. . . . But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the

How the agency deals with comments on a practical level is a different issue from whether a court will find that insufficient consideration of comments will rise to the level of arbitrariness and capriciousness. While it seems clear that the FCC did not give adequate consideration to the many thousands of comments filed in opposition to its proposed rule, a court finding that the result is arbitrary and capricious involves additional analysis.

The arbitrary and capricious standard underlies all action that an agency takes under the APA. Under arbitrariness review, courts must uphold the agency's rules unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[88] Despite being the underlying standard, the APA does not specifically define the term "arbitrary and capricious." Even though courts have developed different standards of judicial review that apply to various types of agency action, agency action must always pass the arbitrary and capricious test. This test is the most deferential test that courts will apply to agency action.[89] The Supreme Court's opinion in *Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Insurance Co*. fleshed out the court's role in determining whether an agency's actions satisfied the standard.[90] "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action."[91] With regard to agency consideration of comments, the D.C. Circuit described an arbitrary and capricious review as "searching and careful" and designed "to ensure that the agency's decision . . . has support in the record . . . includ[ing] the agency's addressing the significant comments made in the rulemaking proceeding."[92] This decision in the D.C. Circuit gives helpful guidance, connecting an agency's consideration of comments to arbitrary and capricious review.

> right call is to take these proposals, put them out for comment and then—only then—call the vote. Plausible arguments have been put forward that the letter of the Administrative Procedure Act requires this. Other legal experts demur. I do know this: the spirit underlying notice and comment is that important proposed changes need to be seen and vetted before they are voted. Today we vote before we vet.

Id.

88. APA, 5 U.S.C. § 706(2)(A) (2000).

89. *See, e.g.*, JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS 383 (2d ed. 2007) ("The APA standard never aimed at the type of sophisticated questions of methodology, consideration of factors, and other quirks of review that are so important today.").

90. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-43 (1983) (having little difficulty in determining the appropriate scope of judicial review).

91. *Id.* at 43.

92. NAACP v. FCC, 682 F.2d 993, 997-98 (D.C. Cir. 1982) (citation omitted).

Most of the time when courts examine an agency's consideration of comments, they do not find that consideration—or lack thereof—leads to an arbitrary rule. For instance in *Thompson v. Clark*, the D.C. Circuit found that the agency's failure to respond to 1,854 written comments did not result in an arbitrary and capricious rule. Instead, the court stated that the agency is under no obligation to respond to every comment.

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more, to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."[93]

Furthermore, in *Conference of State Bank Supervisors v. Office of Thrift Supervision*, the plaintiff argued that the agency failed to respond to substantive arguments in promulgating its final rule, undermining the plaintiff's right to provide meaningful comment.[94] The court found in favor of the agency, holding that agencies need not respond to every comment that is submitted, and that the agency effectively responded to the major issues that the comments raised.[95]

Because of this precedent, it is difficult, although not impossible, to make a successful argument that the FCC has ignored public comments to the point that its rule was arbitrary and capricious. In *Baltimore Gas & Electric Co. v. United States*,[96] the D.C. Circuit articulated the point at which an agency's lack of consideration becomes arbitrary and capricious. "Under the 'arbitrary and capricious' standard of review, an agency is . . . required to respond to significant comments that cast doubt on the reasonableness of the rule the agency adopts."[97] In other words, the court established that in order to find that the agency failed to consider and respond to comments, the challenging party needs to demonstrate an error in judgment on the part of the agency.[98] Arguing that the FCC acted arbitrarily and capriciously by virtually ignoring the mass of public comments that it received could be a successful argument under this

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93. Thompson v. Clark, 741 F.2d 401, 408-09 (D.C. Cir. 1984) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978)).

94. *See* Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F. Supp. 837, 846 (D.D.C. 1992) (arguing that even if the agency did respond to the comments, its responses were "conclusory or cursory in fashion").

95. *See id.* at 846-47 (interpreting 5 U.S.C. § 553(c)) (citations omitted).

96. 817 F.2d 108 (D.C. Cir. 1987).

97. *Id.* at 116.

98. *See* Hussion v. Madigan, 950 F.2d 1546, 1554 (11th Cir. 1992) (holding that because the agency's rulemaking accounted for objections raised by the plaintiff's comments and "f[e]ll far short" of a clear error of judgment by the agency, the rulemaking was neither arbitrary or capricious).

standard articulated in *Baltimore Gas*. The differentiating factors in this case are the number of public commenters, the seeming universality of their opinions, and the FCC's statutory relationship with the public interest. Together, this could show an error in judgment on the part of the FCC.

One way that a court could find that the agency has committed an error of judgment, and acted arbitrarily and capriciously, is by characterizing these public comments as a single piece of evidence—the overwhelming opposition out of concern for the number of speakers—which the agency must formally address as a procedural requirement. Put differently, the agency should have to deal explicitly with the sheer amount of ubiquitous opposition when it justifies its rule. The issue here is not just that any particular person voiced opposition in a comment and the FCC did not address his or her concerns personally. It is also not an issue of forcing the agency to listen to the voices of a braying mob that does not know the reasoning behind its own position. The issue is that the American public has collectively expressed its dismay and opposition to this rulemaking. And because the FCC must promulgate regulations in the public interest, it must deal with the overwhelming record evidence of these opinions in a more compelling way than the FCC has done thus far. Without more explanation in light of this overwhelming opposition in the record, the FCC faces a significant argument that its actions were so contrary to the record evidence that these actions approach the threshold of arbitrary and capricious.

B. The FCC Has a Heightened Duty to Consider Citizen Comments

The second way the FCC's current treatment of citizen comments falls short is the result of a logical argument, as opposed to a legal one. Even if the FCC did give basic consideration to citizen comments, this consideration would not rise to the level required by the APA under the influence of the public interest standard. This Comment's main argument is that the 2002 Review called for, and the 2006 Review now calls for, a heightened level of consideration for citizen comments because of the public interest standard and the level of public participation.

This so-called heightened level of consideration arises as a result of the FCC's own procedures. In the 2002 Review, the Commission knew that the public overwhelmingly opposed further media consolidation. In other rulemakings that do not engender such response, the Commission has more freedom to determine on its own what the public interest calls for in a given situation. But in the media consolidation proceeding, the FCC asked for

public comments,[99] outwardly displayed interest in what citizens had to say, effectively disregarded them, and subsequently claimed that it had satisfied its obligations under § 553 and the public interest standard.[100] There is a good reason for a heightened level of consideration: once the FCC ascertains the interests of the public through citizen comments, it has a duty to actively and in good faith take that information into consideration when promulgating rules in the public's interest. Here, the FCC has successfully ascertained the interests of the public, given the hundreds of thousands of comments it received through public hearings and the Commission's improved systems for submitting Internet and email comments.[101] To disregard these comments and still claim to be promulgating in the public interest is a logical disconnect, and it makes a sham of the notice and comment proceeding.

In an age where the Internet has made public comments more feasible,[102] where the Commission is saying that it urges public comment, and when the Commission has received record numbers of comments, the FCC cannot then ignore these comments and still stay true to either the public interest standard or to § 553 of the APA.

IV. FINDING A SOLUTION THROUGH FCC PROCEDURE AND JUDICIAL OVERSIGHT

Diversity of viewpoint implicates the First Amendment rights of viewers, as well as the democratic principles of the United States. As the logic goes, the greater the number and kind of speakers, the greater the

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99. *See* 2002 Review, *supra* note 3, *passim* (repeating in many paragraphs of the notice that the agency was seeking comment on various ownership issues); *see also* ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY 282 (2004) [hereinafter THE PROBLEM OF THE MEDIA] (saying that Chairman Michael Powell "had encouraged Americans to use the Internet to let the FCC know their thoughts on media ownership").

100. *See* THE PROBLEM OF THE MEDIA, *supra* note 99, at 283 ("Shamelessly, Powell boasted about the 'extraordinary amount of public comment' the FCC had received, enabling it to address the issues 'through the eyes and ears of the American public.'") (citation omitted).

101. *See* Copps Dissent, *supra* note 11, at 13956 (listing the locations of hearings and forums attended either by Commissioner Copps or Adelstein before promulgation of the rules in the 2002 Review, including New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta); Adelstein Dissent, *supra* note 1, at 13977 (ascertaining the public's interest in the course of these hearings and through email). Adelstein stated, "[o]f the hundreds of citizens I heard from directly at field hearings . . . not one stood up to call for relaxing the rules. Of the thousands of emails I personally received, only one did not oppose allowing further media concentration." He concluded that the "American people appear united in believing that media concentration has gone too far already and should go no further." *Id.*

102. While the increase in the quantity of comments might be a result of the e-rulemaking trend, any change in quality is debatable. For an excellent discussion of the effect of e-rulemaking on the administrative process, see Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 948 (2006).

diversity in what is spoken.[103] The FCC's role should be to foster that diversity, encouraging speakers and listeners to "create and perpetuate an educated, informed and empowered electorate."[104] It is not a fact that every large media outlet necessarily limits diversity, but allowing concentration in the hands of the few threatens democratic values.[105] Because consolidation of media ownership threatens these values, the FCC has a responsibility to correct the dissonance between the spirit of the law and its recent handling of the media ownership proceedings.

To correct this dissonance, the FCC needs to take greater and substantive notice of the opinions it has received. The outpouring of responses has continued from both the American people and their representatives in Congress—the FCC has a duty to respond.[106] Commissioner Copps has suggested that the FCC establish both "a longer timetable and procedure for implementation of these changes to the rules."[107] In the 2006 Review, the FCC conducted public hearings with commissioner participation to discuss viewpoint diversity and how it affects speakers and listeners, and has conducted studies that it publishes and opens for comment.[108] While these

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103. *See* Baker, *supra* note 13, at 734-35 ("For many people (and most theories), true democracy implies as wide as practical a dispersal of power within public discourse.") (citation omitted).

104. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 53-54 (2004) (discussing the competing schools of free speech theories: the Holmesian view, which argued that "the unencumbered exchange of conflicting ideas comes closest to yielding truth and the common good"; and the Madisonian perspective, which "was not principally interested in keeping the 'marketplace of ideas' free from government interference, but was concerned with ensuring that all voices were present and heard in the marketplace" (citation omitted)). It is the Madisonian conception of the First Amendment that Varona posits "lies at the heart of the broadcast public trustee doctrine." *Id.*

105. *See* Baker, *supra* note 13, at 735 ("But democratic values mean that it makes a huge difference whether any lack of a particular type of diversity is imposed by a few powerful actors or reflects the independent judgments of many different people, for example, owners, with the ultimate power to determine content.").

106. *See* discussion *supra* Part III.B. The FCC first has a duty to consider relevant comments under § 553, but further, it has a heightened duty to consider citizen comments when required to take the public interest into consideration.

107. Copps Dissent, *supra* note 11, at 13958.

> [Longer timetables and a procedure for implementation of new rules] would allow the Commission to consider petitions for reconsideration on these specific rules to protect against irreversible, unintended and unforeseen negative consequences. This would also allow the Commission to examine its proposed rules and determine if additional measures are needed to protect the public interest before consolidation occurs, and it would allow Congress opportunity for any input that it may deem appropriate.

Id.

108. *See* Adelstein Dissent, *supra* note 1, at 13996-97 (arguing that minority ownership "tends to foster diverse editorial viewpoints" and that the 2002 Review allows for more concentrated media markets that pose harm to small businesses, minorities and women). Further, he notes that "[w]e should have made sure we understood the full impact of consolidation on minority ownership, minority employment, issue coverage, and the

are important steps, Chairman Martin's decision to push through the rulemaking at the end of the year signals that the Commission still did not take these public comments into consideration.

Congress should also consider legislation to clarify and better articulate the public interest standard and what that standard entails. Such legislation would eliminate much of the confusion within the Commission with regard to ascertaining the public's interest, and it would limit the manipulability of the standard, hopefully guiding the Commission to give significant consideration to public opinion, especially citizen comments.

To ensure that the FCC makes sound rulemaking decisions, the courts also have a responsibility to hold the FCC to its procedural requirements under the APA and its statutory requirements under the Communications Act. In effect, the FCC has deferred to competition in the market in hopes that the outcome will be in the public's interest.[109] As a result, the FCC has ignored the overwhelming evidence in the record that the public does not agree with that determination. In this instance, procedural issues are just as important as substantive issues because procedure implicates the extent to which the agency gives real weight to the voice of the regulated public.[110] Reviewing courts should not permit the FCC to abdicate its obligation to the public interest or its obligations under the APA, and should require a well-reasoned response and real consideration of public comments. When the FCC has determined the public interest through notice and comment rulemaking, the court must hold the FCC to such determinations when the FCC issues its final rules. This is not just an issue of procedure. It gives real weight to the voice of the regulated public.

Courts that are reviewing the rules of administrative agencies should look deeper into § 553's consideration requirements, defining them more precisely and holding agencies to a stricter standard. For instance, when the *Prometheus* court said that deference is appropriate when the issue is "elusive," it noted that the agency's decision cannot run counter to the

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portrayal of minorities before rushing ahead with massive new consolidation opportunities." *Id.*

109. *See* Phillips, *supra* note 59, at 624 ("A new deregulatory FCC determined that competition and the marketplace would better serve the needs of the listening and viewing public.") (citation omitted).

110. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining the Court's course of judicial review under the arbitrary and capricious standard as "based on consideration of relevant factors," with a "searching and careful" review of the facts, but that substantively, the Court "is not empowered to substitute its judgment for that of the agency").

evidence before it.[111] In the future, a reviewing court should look at the evidence provided by citizen comments and give guidance to the FCC on how best to consider them.

Looking at the problems that the FCC faces in dealing with public comments on a massive scale is a way to look at an agency-wide problem with a real-world example. What standards should an agency be held to in considering and responding to comments? In terms of the FCC and the ownership proceedings, the answer may lie in a reconstruction of the public interest standard, either by the FCC or Congress. It would then be for the Commission to give due consideration to comments such that it satisfies the public interest standard. But this does not address the greater problem of what it means for an agency to consider public comments in a way that satisfies the APA. The answer is not to require the agency to tally the comments pro and con and to enact a rule as though a vote has taken place. Nor would it make sense, as this FCC proceeding demonstrates, to require thoughtful responses to every comment submitted. That would result in final rules that are thousands of pages in length, having inefficiently allocated agency resources and making those rules prohibitively long.

The appropriate locale for rectifying this procedural gap in the APA is Congress. Congress should address this lack of clarity of what "consideration" means in order to affect a clear standard in agency response to comments. Congress could give further definition to the current statutory direction: "After consideration of the relevant matter presented, the agency shall . . . adopt a concise general statement of their basis and purpose."[112] For instance, in the definitions section to the APA subchapter on procedure, Congress could add: "'consideration' means close examination of evidence to determine categories of responses by subject, and provide a reasoned response to issues brought up in those categories."

While this suggestion does not completely eliminate the abstract notion of a "close examination," this definition still gives more substance to the idea, and could better articulate the standard, which would then allow the courts to decide whether an agency has considered such comment evidence to an extent that satisfies its statutory duty. The creation of a categorical requirement would avoid an interpretation mandating the agency to respond to individual comments, and also prohibit an agency from clumping an entire class of comments—like the FCC did with citizen comments—to inadequately explain them away. This proposed legislation would not require agencies to keep a tally of comments. It would, however, give more meaning to the kind of response that should be required.

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111. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 390 (3d Cir. 2004) (adding that agency decisions also cannot be "patently unreasonable") (citation omitted).

112. APA, 5 U.S.C. § 553(c) (2000).

CONCLUSION

Given the number and character of the citizen comments filed against the FCC's proposals to permit greater media concentration, the FCC is violating the public interest standard and § 553 of the APA. The FCC should give greater consideration to these comments, and the courts should impose a higher burden on the Commission to show that it has complied.

"When all of us are united on an issue, then one of two things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept."[113] Media ownership is an issue that transcends normal divisions by party lines, geographic lines, and lines of race, sex, and age. And the American people are outspoken in their opposition. While the FCC had an opportunity in the 2006 Review to deal with this powerful opposition in a transparent, procedurally sound way, it seems to have again fallen short. Now it risks the wrath of the public, and investigation by Congress,[114] as well as the loss of viewpoint diversity on the public airwaves of this country.

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113. Copps Dissent, *supra* note 11, at 13957 (quoting Brent Bozell of the Parents Television Council).

114. Associated Press, House Committee Launches Probe of FCC Management, Jan. 8, 2008.