YOU'LL KNOW IT WHEN YOU SEE IT: THE FCC'S ELUSIVE PUBLIC INTEREST STANDARD

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INTRODUCTION

> The overriding consideration in accommodating the antitrust laws to regulated industry is that the public interest be served.
>
> —Roscoe L. Barrow[1]

The turn of the twentieth century sparked a period of innovation in the telecommunications industry that lives on today.[2] In 1934, Congress passed the Communications Act in response to industry-wide growth.[3] The legislation consolidated regulatory power over radio, telephone, and telegraph in the newly created Federal Communications Commission (FCC).[4] In support of creating the FCC, President Franklin D. Roosevelt wrote to Congress exclaiming that broad authority over the communications sector should be centralized in a single government agency.[5] The FCC's newly-combined power did more than simply police the radio spectrum.[6] As innovation flourished throughout the twentieth century,[7] each respective communications sector faced congressional

1. Roscoe L. Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 13 DUKE L.J. 282, 282 (1964).

2. *See, e.g.*, FED. COMMC'NS COMM'N, A SHORT HISTORY OF RADIO (2003) (highlighting the vast expansion and innovation in the telecommunications industry beginning with the invention of the radio in the late 1890s); *History of Telecommunications Industry*, TECHNOFUNK (June 23, 2012), https://www.technofunc.com/index.php/domain-knowledge-2/telecom-industry/item/history-of-telecommunications-industry (discussing the evolution of the telegraph, the telephone, cable, and the Internet); *see also* THOMAS WINSLOW HAZLETT, THE POLITICAL SPECTRUM 3–7 (2017) (discussing the transformative ability to hear events from across the world by the radio, and the regulatory gridlock imposed at the behest of regulators who sought to block competition and suppress innovation).

3. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

4. Communications Act of 1934, 47 U.S.C. § 151; *see* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 6–7 (1959) (explaining that Congress dissolved the Federal Radio Commission and transferred its power to regulate the radio industry to the Federal Communications Commission (FCC)).

5. S. DOC. NO. 73–144 (1934).

6. *See* Anne P. Jones & Harry W. Quillan, *Broadcasting Regulation: A Very Brief History*, 37 FED. COMMC'NS L.J. 107, 107–08 (1985) (explaining the Communications Act empowered the FCC to determine the makeup of the radio wavelengths—not just prevent stations from interfering with each other); *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 215–16 (1943) (Frankfurter, J.) ("[T]he [Communications] Act does not restrict the [FCC] merely to supervision of the traffic. It puts upon the [FCC] the burden of determining the composition of that traffic.").

7. *See* Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, ECON. HIST.

scrutiny over monopolization claims and defended against routine calls for heightened regulation.[8]

The statutory makeup of the Communications Act grants the FCC sweeping authority to regulate radio communications and transmissions of energy by radio.[9] Section 301 requires a license to make such communications and transmissions over all channels of radio,[10] and § 307(a) requires the FCC to grant the license "if public convenience, interest, or necessity will be served."[11] Further, § 310(d) restricts the assignment or transfer of any license, except upon application and the FCC finding that "the public interest, convenience, and necessity will be served."[12] Industry parties seeking to assign or transfer their radio licenses are not free to do it themselves; they must obtain the FCC's approval first. Thus, both lone license transfers and those that are a part of a larger corporate merger require

ASS'N (Mar. 26, 2008), https://eh.net/encyclopedia/the-history-of-the-radio-industry-in-the-united-states-to-1940/ (reporting the number of licensed amateur radio operators jumped from 322 in 1913 to 13,581 in 1917, which spurred nearly 60% of the nation's households to purchase a radio).

8. *See, e.g.*, CLINT BOLICK, CATO INST. POL'Y ANALYSIS NO. 34: CABLE TELEVISION: AN UNNATURAL MONOPOLY 3 (1984), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa034.pdf (explaining that structural conditions make the cable television industry ripe for only a single company to operate, known as a "natural monopoly"); *Growth of the Television Broadcasting Industry*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/arts/news-wires-white-papers-and-books/growth-television-broadcasting-industry (last visited Aug. 1, 2021) (discussing the FCC's different regulatory approaches to regulate the booming number of agency-issued broadcast licenses); Jennifer M. Proffitt & Michael Brown, *Regulating the Radio Monopoly: Ewin Davis and his Legislative Debates, 1923–1928*, 11 J. RADIO STUD. 100, 101–05 (2004) (noting the absence of structural protections against monopoly in the radio industry in the mid-1920s and ensuing efforts to prevent radio monopolization); Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REGUL. 517, 517–19 (1988) (arguing AT&T's monopoly was not only natural—offering affordability to customers—but also relatively benign).

9. *See Licensing*, FCC, https://www.fcc.gov/licensing (last visited Aug. 1, 2021, 7:27 PM) (asserting the FCC is responsible for managing and licensing the electromagnetic spectrum for commercial and noncommercial users, including mobile wireless services, broadcast television and radio, and satellite services). *See generally* Communications Act of 1934, 47 U.S.C. §§ 201–276 (outlining that most providers of telecommunications services are subject to regulation as common carriers); *id.* §§ 301–399 (creating a licensing scheme for radio transmissions, channels, and energy or communication transmissions).

10. Communications Act of 1934 § 301. *But see id.* § 302a(a) (authorizing the FCC to establish minimum performance standards aside from the license transfer process for home electronic equipment to reduce their susceptibility to radio frequency interference).

11. *Id.* § 307(a).

12. *Id.* § 310(d).

the FCC's approval.[13] If upon review, the FCC finds that granting the assignment or transfer will serve the public interest, it shall grant the application.[14] Alternatively, if the FCC finds that the public interest will not be served, it shall designate the transaction for an administrative hearing.[15] The FCC will then examine the facts of the license transfer, determine if the public interest will be served, and render a final decision.[16]

In 1996, the Telecommunications Act ushered in a comprehensive overhaul of communications regulation.[17] The goal of the Telecommunications Act was to promote competition,[18] but it left the FCC's key structural licensing authority, known as the public interest standard, untouched.[19] Despite the sweeping changes, the FCC has long used its complex statutory regime as a toolkit to allow, stop, and condition the transfer of radio licenses.[20]

Congress purposely delegated broad authority to the FCC under the Communications Act.[21] Additionally, Congress chose not to amend the

13. In this Comment, "license" refers to the radio license authorizing communications and transmissions over all channels of radio; "license transfer" refers to the process of transferring radio licenses—subject to FCC approval—from one party to another; and "merger" and "transaction" refer to a broader corporate transaction where two parties merge into a single entity, which may include ancillary license transfers to the newly-created entity.

14. Communications Act of 1934 § 309(a); *see, e.g.*, *Application of AT&T, Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, 26 FCC Rcd. 17589, 17623, ¶ 82 (2011) (finding AT&T's planned use of supplemental downlink technology over the spectrum it seeks to acquire from Qualcomm could lead to public interest benefits).

15. Communications Act of 1934 § 309(d)–(e); *see also infra* note 130 and accompanying text (discussing when the FCC determined that AT&T's proposed acquisition of T-Mobile was detrimental to the public interest and designated the transaction for an administrative hearing).

16. Communications Act of 1934 § 309(d)–(e).

17. *See Telecommunications Act of 1996*, FCC, https://www.fcc.gov/general/telecommunications-act-1996 (last visited Aug. 1, 2021).

18. *See* Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, ECON. NETWORKS (1998), http://neconomides.stern.nyu.edu/networks/telco96.html.

19. Jack Karsten, *90 Years Later, the Broadcast Public Interest Standard Remains Ill-Defined*, BROOKINGS INST. (Mar. 23, 2017), https://www.brookings.edu/blog/techtank/2017/03/23/90-years-later-the-broadcast-public-interest-standard-remains-ill-defined/.

20. *See* discussion on the FCC's statutory regime in practice *infra* Part II.

21. *See* S. REP. NO. 73–781, at 1 (1934) (Conf. Rep.) ("The purpose of [the Communications Act] is to create a communications commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."); *see also* David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N. UNIV. L. REV. 747, 755–56 (2002) (arguing that because the drafters of the Communications Act empowered the FCC to act under the public interest standard, they deliberately afforded the agency broad authority). Courts have long held that "Congress properly delegated power to the FCC to decide the composition of [the

regulatory license transfer process or the public interest standard when they had the opportunity.[22] The broad legal standard delegated to the FCC equips the agency with ample flexibility to adjust to the industry's rapid and multidirectional growth in telecommunications technology.[23] The complexity and constant innovation in the telecommunications field demands the FCC's expertise, especially when it comes to license transfers.[24] Moreover, antitrust enforcement agencies that play a parallel role in the merger review process do not consider the breadth of issues that the FCC reviews.[25]

The FCC construes the public interest standard beyond its originating text and armed itself with significant influence in authorizing entire telecommunications mergers.[26] The public interest language in the Communications Act allows the FCC's review to go "beyond the traditional strictures of antitrust laws."[27] Furthermore, the FCC uses the statutory language as a vehicle to look beyond the specific licenses to be transferred—typically only a small piece of a larger corporate transaction—and verge into new dimensions of merger analysis.[28] The FCC's expansive authority leads

telecommunications industry] using a standard of public interest." Free Speech v. Reno, No. 98 CIV. 2680(MBM), 1999 U.S. Dist. WL 147743, at *6 (S.D.N.Y. Mar. 18, 1999).

22. Karsten, *supra* note 19.

23. *See generally* Emanuel Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 L. & CONTEMP. PROBS. 549, 549–50 (1957) (discussing the sanctioned concentration in the television industry and the certain characteristics that distinguish it from other mass communications media).

24. *See, e.g.*, Nico Grove & Oliver Baumann, *Complexity in the Telecommunications Industry: When Integrating Infrastructure and Services Backfires*, TELECOMMS. POL'Y, Nov. 2011, at 40, 43 (highlighting how pure Internet-based service providers are putting pressure on incumbent telecommunications firms that provide services on their own infrastructure); Bernard Marr, *The 7 Biggest Technology Trends that Will Transform Telecoms in 2020*, FORBES (Oct. 14, 2019), https://www.forbes.com/sites/bernardmarr/2019/10/14/the-7-biggest-technology-trends-that-will-transform-telecoms-in-2020/?sh=7bf09aa86033 (noting recent innovations that are transforming the telecommunications sector, such as 5G, artificial intelligence, and cloud computing).

25. *See* Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 J. COMMC'NS L. & POL'Y 329, 332 (2010) ("Given the complexity of the communications industry, Congress understood that . . . the FCC also needs to consider a number of other factors that are not part of the typical Hart–Scott–Rodino antitrust merger review process.").

26. *See* discussion on how the FCC has expanded its merger review role *infra* Part I.B.

27. Trey O'Callaghan, *Unprotected and Unpersuaded: The FCC's Flawed Merger Review Procedures*, 15 DUKE L. & TECH. REV. 39, 39 (2017).

28. *See* Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMMC'NS L.J. 167, 170 (2008) (explaining how modern FCC merger review "invites a process of negotiated 'voluntary' conditions that often substitute for careful policymaking").

to uncertainty for regulated parties seeking merger clearance.[29] Illustrated differently: the industry parties seeking the green light from the FCC are the uninformed crowd at a magic show, and the FCC is the magician holding all of the cards. Additionally, when corporations expend resources in a drawn-out process to convince the FCC to grant their merger, industry members and consumers ultimately pay the price.[30] Congressional efforts to curtail the FCC's unassigned merger review role have been largely unsuccessful.[31]

On paper, the FCC's regulatory power over the license transfer process allows the agency to determine which license transfers are in the public interest. In practice, the FCC pushes that statutory authority to approve, condition, or block telecommunications mergers via the mercurial public interest standard.[32] Instead of reviewing mergers as a whole, the FCC must narrowly apply the public interest standard to license transfers. Part I of this Comment analyzes the public interest standard and its evolution into the FCC's well-recognized de facto merger review authority. Part II evaluates distinct periods over recent decades to underscore the patchwork of how the public interest standard has applied across different transactions. Part III analyzes the implications of *Chevron* deference on the FCC's interpretation of its statutory authority. Part IV recommends cabining the FCC's authority through issuing guidance documents, engaging in notice-and-comment rulemaking, and enacting legislation in Congress.

29. *See* discussion on the trouble merging parties face *infra* Part II.

30. *See generally* W. MARK CRAIN & NICOLE V. CRAIN, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS 1, 45 (2014) (discussing the costs of regulation). *But see* Herbert B. Cohn, *The Rationale and Benefits of Regulation*, 45 ANTITRUST L.J. 215, 216–20 (1976) (arguing some degree of regulation protects the public, reduces consumer costs, and cements reliable services).

31. *Compare* Telecommunications Merger Review Act of 2000, H.R. 4019, 106th Cong. (2d Sess. 2000) (advocating for constraints on the FCC's authority to review and impose conditions on licenses assigned or transferred in the course of mergers), *and The Telecommunications Act of 2000: Hearing Before the Subcomm. on Telecomms., Trade, and Consumer Prot. of the H. Comm. on Com.*, 106th Cong. 1 (2000) (statement of Rep. W.J. Tauzin, Chairman, H. Subcomm. on Telecomms., Trade, and Consumer Prot.) ("[D]espite our best efforts to make clear that the FCC's authority is limited to reviewing license transfers in connection with mergers, the Commission has nonetheless devised a random, ad hoc, subjective system for review that is imprudently broad, arbitrary and capricious and, by all objective reasoning, way out of control."), *with* Fairness in Telecommunications License Transfers Act of 1999, H.R. 2533, 106th Cong. (1st Sess. 1999) (forcing the FCC to promulgate rules defining the "public interest" with respect to applications for the transfer of licenses by amending the Communications Act).

32. *See* Harold Feld, *The Need for FCC Merger Review*, 18 COMMC'NS LAW. 20, 20 (2000) (describing how the public interest standard enshrined in the Communications Act empowers the FCC to approve and reject mergers).

I. THE FCC'S STATUTORY AUTHORITY, THE PUBLIC INTEREST STANDARD, AND THE FCC GETTING POLITICAL

The Communications Act sets the boundaries of the FCC's authority to review, condition, and approve proposed license transfers.[33] Included in the FCC's review is the public interest standard, which, when used effectively, encourages efficient collaboration between the agency and industry parties.[34] Given the politicization of the FCC's leadership and the varying use of the public interest standard, the FCC's review is difficult to define and ripe for abuse.[35]

A. The License Transfer Process, De Facto Merger Authority, and Shared Antitrust Responsibility

Section 310(d) of the Communications Act permits the FCC to grant license transfers based upon the public interest standard.[36] Mergers between telecommunications corporations regularly include the transfer of licenses.[37] Subsequently, the public interest standard gives the FCC de facto authority to allow, block, delay, or condition telecommunications mergers. The FCC has other statutory antitrust authority but rarely invokes it because of the flexibility the public interest standard allows.[38] The FCC's merger review complements antitrust review vested in the Federal Trade Commission and Department of Justice Antitrust Division,

33. *See generally* Communications Act of 1934, 47 U.S.C. §§ 301–399.

34. *Id.* § 310(d).

35. *See infra* text accompanying notes 70–76.

36. *See* Communications Act of 1934 § 310(d).

37. *See, e.g.*, James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 J. COMMC'NS L. & POL'Y 195, 197 (1998) (explaining that telecommunications providers generally have one or more licenses that the FCC must authorize before the providers can consummate a merger); *see also* SBC Commc'ns Inc. v. FCC, 56 F.3d 1484, 1489 (D.C. Cir. 1995) (highlighting AT&T's acquisition of McCaw Cellular Communications authorized the transfer of over 400 radio licenses).

38. *See* Clayton Act, 15 U.S.C. §§ 18, 21(a) (vesting authority in the FCC to oversee acquisitions of common carriers engaged in wire or radio communications or transmissions so that the acquisitions do not substantially lessen competition or create a monopoly); United States v. FCC, 652 F.2d 72, 87 (D.C. Cir. 1980) (holding the FCC has discretion in exercising its Clayton Act authority because other enforcement agencies have similar discretion); Weiss & Stern, *supra* note 37, at 198 (contrasting the FCC's flexible Communications Act authority with its Clayton Act authority, which requires the FCC to proceed through an administrative complaint proceeding to challenge a merger); *see also id.* (emphasizing the FCC has not utilized its Clayton Act authority to challenge a transaction in the last forty years).

known as the antitrust enforcers.[39] Because the FCC's and antitrust enforcers' merger reviews are relatively parallel, both outcomes may be substantially similar, except that the FCC has a much broader public interest stick by which it can frustrate transactions.[40]

Parties seeking to transfer licenses as part of a merger must wait for the FCC to grant their application prior to finalizing the transaction.[41] The FCC has no statutory deadline to complete the review, and transaction review typically lasts nine to twelve months.[42] Once parties file an application to transfer licenses, the FCC issues a Public Notice and provides for public comment on major transactions.[43] Throughout the FCC's review, its "overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest."[44] Bolstered beyond strictly analyzing the competitive effects of a proposed merger, the FCC's expansive review may lead to unbounded results. The FCC engages in this task confusingly—even struggling to apply the public interest standard itself.[45]

B. The Public Interest Standard

The Communications Act mandates all license transfers—therefore, mergers involving the transfer of licenses—serve the public interest, convenience, and

39. *See* Alexander Maltas et al., *A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective*, ANTITRUST SOURCE, Aug. 2016, at 2–4 ("Despite the different standards of review between the FCC and [the Department of Justice (DOJ)], disagreement between the agencies is rare . . . . Nonetheless, the FCC's public interest standard, of which antitrust analysis is only one component, could allow it to reach a different conclusion from the antitrust agencies.").

40. *See id.* For a brief overview on the multiagency antitrust review responsibility, *see* Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (requiring certain proposed transactions also be reported to the Federal Trade Commission (FTC) and DOJ); *id.* § 18a(f) (establishing the FTC's authority to challenge a proposed transaction); Clayton Act §§ 18a, 23 (cementing the DOJ's authority to challenge a merger before it is consummated).

41. Communications Act of 1934 §§ 309–10.

42. *See* Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, U. PA. LEGAL SCHOLARSHIP REPOSITORY 27 (2014) [hereinafter Yoo, *Merger Review*], https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2544&context=faculty_scholarship (explaining the FCC has a self-imposed 180-day review requirement, but most transactions end up taking longer).

43. *See* Victoria Peng, *Astroturf Campaigns: Transparency in Telecom Merger Review*, 49 U. MICH. J.L. REFORM 521, 527 (2016).

44. United States v. FCC, 652 F.2d 72, 104 (D.C. Cir. 1980).

45. *See* discussion *infra* Part II.

necessity.[46] Since its inception in the Communications Act and reaffirmation in the Telecommunications Act, the public interest standard has been described as nebulous, ill-defined, pervasive, penumbral, and amorphous.[47]

The first step of the FCC's self-prescribed public interest review process requires the agency to "assess whether the proposed transaction complies with the specific provisions of the [Communications] Act, other applicable statutes, and the [FCC's] rules."[48] From the beginning, if the proposed transfer of licenses is part of a broader merger or acquisition, the FCC can review the transaction as a whole, not just the licenses to be transferred. Second, if the proposed transaction does not violate a statute or rule, the public interest framework requires the FCC to evaluate any "substantially frustrating" public interest harms.[49] The quasi-competition-based review

46. Communications Act of 1934 § 310(d).

47. *See, e.g.*, Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1048 (7th Cir. 1992) (noting the public interest standard vests the FCC with an enormous amount of discretion and limits the scope of judicial review); Jason E. Friedrich, *Thinkable Mergers: The FCC's Evolving Public Interest Standard*, 6 J. COMMC'NS L. & POL'Y 261, 264 (1998) (recognizing the FCC's mandate is "a broad policy that does not lend itself to exactitude"); Karsten, *supra* note 19 (arguing the public interest standard has remained ill-defined for almost a century); Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMMC'NS L.J. 605, 606 (1998) (claiming the FCC's public interest standard is simply an "oft-repeated Holy Grail clause"); FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 91 (1953) ("[Courts decide] whether the [FCC] has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.'"); Brent Skorup & Christopher Koopman, *How FCC Transaction Reviews Threaten Rule of Law and the First Amendment* 13 (Geo. Mason Univ. Mercatus Ctr. Working Paper, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211661 ("[T]he FCC's reliance on its amorphous public interest standard to create rules through its transaction reviews rather than through its formal rulemaking is the most effective tool at the agency's disposal.").

48. *Applications of T-Mobile US, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197, Memorandum Opinion and Order, 34 FCC Rcd. 10578, 10595, ¶ 39 (2019) [hereinafter *T-Mobile–Sprint Order*].

49. *See Applications of XO Holdings and Verizon Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-70, Memorandum Opinion and Order, 31 FCC Rcd. 12501, 12504, ¶ 7 (2016); *see also Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd. 9131, 9134–35, ¶¶ 6–8 (2015) (finding the reduction in online video distribution competition, the short-term disincentive to deploy faster broadband, and the obstacle for low-income populations to purchase standalone broadband to be concerning public interest harms); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd. 23246, 23255–57, ¶¶ 27, 29–30 (2002)

and quasi-public interest review is informed by, but not limited to, traditional antitrust principles.[50] If the FCC deems there to be public interest harms, it may impose and enforce conditions to remedy the transaction's harms.[51] The FCC has broad authority to prescribe conditions "as may be necessary to carry out the provisions of [the Communications Act]."[52] The FCC often confines itself to imposing only narrowly tailored and transaction-specific conditions[53] that do not account for agency or industry-wide policy objectives. Despite the FCC's self-imposed constraint on imposing conditions unrelated to the licenses being transferred, conditions often go well beyond the confines of the transaction.[54]

Third, the FCC will consider a transaction's potential public interest benefits[55] and, if accepted, will balance them against any public interest harms.[56] If the FCC finds that the public interest benefits outweigh the public

[hereinafter *AT&T–Comcast Order*] (determining that limited competition, diversity among major media voices, and diminished competition in the production and packaging of video programming were substantial public interest harms).

50. *See, e.g.*, *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd. 6327, 6337, ¶ 28 (2016) [hereinafter *New Charter Order*]; United States v. FCC, 652 F.2d 72, 104 (D.C. Cir. 1980) (reasserting that fostering competition is not the FCC's main responsibility—promoting the public interest is).

51. Communications Act of 1934 § 303(r).

52. *Id.*

53. *See, e.g.*, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4249, 4278, ¶¶ 25, 100 (2011) [hereinafter *NBCU Order*] (noting the FCC's authority to impose transaction-specific conditions); *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. for Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-403, Memorandum Opinion and Order, 32 FCC Rcd. 9581, 9586–87, ¶ 11 (2017) [hereinafter *Level 3–CenturyLink Order*] (stating the FCC may impose narrowly tailored conditions).

54. *See* discussion *infra* Part II.D.

55. *See Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20063, ¶ 157 (1997) [hereinafter *NYNEX–Bell Atlantic Order*] (explaining the FCC will examine pro-competitive benefits of a transaction; applicants carry the burden of demonstrating the proposed transaction is in the public interest; and as public interest harms become greater and more certain, the degree of public interest benefits must also increase); *AT&T–Comcast Order*, *supra* note 49, at 23313–25, ¶¶ 173–206 (outlining the public interest benefits of the merger between AT&T and Comcast, including accelerated deployment of Internet and telephone service, increased supply of programming, greater market competition, and cost efficiencies).

56. *NBCU Order*, *supra* note 53, at 4247, ¶ 22 ("The [FCC] then employs a balancing test, weighing any potential public interest harms of the proposed transaction against any potential

interest harms, the FCC's inquiry ends, and it approves the transaction.[57] Finally, if the public interest harms outweigh the benefits, the FCC may employ mandatory conditions to ameliorate the harms and approve the transaction as conditioned.[58] Although the framework affords the FCC ample discretion in evaluating mergers involving license transfers,[59] the unpredictability of the assessment makes it more difficult for transacting parties to navigate the license transfer process and produces volatile approval conditions.[60]

The FCC often asserts that its multidimensional analysis is plainly permitted to come to different conclusions than a strict antitrust review.[61] The public interest framework goes beyond competition factors and opens the door to considerations like the proposed transaction's effects on universal service, national security, spectrum efficiency, technological innovation, children's programming, and the diversity of views and content.[62] The FCC's analysis regularly plunges into an exploration well beyond the confines of the specific

public interest benefits."); *cf.* FCC v. WNCN Listeners Guild, 450 U.S. 582, 594–95 (1981) (recognizing the FCC's decisions must sometimes rest on judgment and prediction rather than pure factual determinations). *But see* Alexander Maltas & Wesley Platt, *FCC Commissioners Debate Adjustments to Merger Review Standard*, HOGAN LOVELLS (Nov. 7, 2017), https://www.hlregulation.com/2017/11/07/fcc-commissioners-debate-adjustments-to-merger-review-standard/ (illuminating the FCC's omission of balancing public interest benefits against harms in its review of CenturyLink's acquisition of Level 3).

57. *See, e.g.*, *NYNEX–Bell Atlantic Order*, *supra* note 55, at 19987, ¶ 2.

58. *See, e.g.*, *Level 3–CenturyLink Order*, *supra* note 53, at 9585-87, ¶¶ 9–11.

59. *See* PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., RL 32589, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 7, 8 (2019) (discussing the FCC has not concretely defined the public interest standard, but the standard can apply based on the protection of the public at large, through regulation or market efficiency); *New Charter Order*, *supra* note 50, at 6338, ¶ 28 ("The Commission, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction."); *see also supra* notes 39–41 and accompanying text (explaining the FCC's industry-wide policy-driven merger review is substantively different than that of antitrust enforcers, which focuses on the proposed transaction's predicted effects on competition).

60. *See* T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHOENIX CTR., Oct. 2015, at 1, 5 (finding many of the concessions extracted by the FCC have little or no nexus to any merger-related harm); Michael Farr, *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, 70 FED. COMMC'NS L.J. 237, 244–48 (2018) (arguing the FCC's conditions may subvert formal rulemaking procedures, result in fines or revocation, or lead to costly administrative hearings).

61. Koutsky & Spiwak, *supra* note 25, at 339.

62. Weiss & Stern, *supra* note 37, at 198.

licenses to be transferred.[63] Additionally, the FCC sometimes considers whether a transaction will enhance, rather than just preserve, existing competition—and even demands it in some cases.[64] Further removed from the license transfer process, the FCC may take into account factors like the quality of communications services, diversity among media voices, and trends in the industry.[65] The wide-ranging list and opaque nature of possible considerations leaves transacting parties solely in the hands of the FCC's wishes and creativity.[66]

The combination of Congress's vast statutory delegation and courts' extensive deference[67] has caused even the FCC to struggle with how to apply a concrete public interest standard.[68] Inconsistencies and unpredictability during the review stage increase costs for transacting parties—likely passed down to consumers—by elongating the timeframe to prepare for and complete a transaction.[69]

C. The FCC's Policy-Driven Role

What exactly is in the public interest, according to the FCC? The broad endeavor of serving the public interest has spawned a wide fracture between the abstract meaning of the FCC's legal standard and how the FCC applies it in practice.[70] In many ways, the public interest standard reflects no standard at all. Aside from granting license transfers that serve the public

63. *See also* discussion on the expansive conditions in the Comcast–NBC Universal transaction *infra* Part II.C.

64. *New Charter Order*, *supra* note 50, at 6338, ¶ 29.

65. *Id.* at 6337, ¶ 27.

66. *See supra* text accompanying note 62.

67. *See* discussion *infra* Part III; FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("[Courts] have repeatedly emphasized that the [FCC's] judgment regarding how the public interest is best served is entitled to substantial judicial deference."); Nat'l Broad. Co. v. United States, 319 U.S. 190, 224–25 (1943) (holding it is not the duty of courts to say whether the FCC's findings further or bludgeon the public interest); NTCH, Inc. v. FCC, 950 F.3d 871, 879–80 (D.C. Cir. 2020) (noting courts will afford the greatest deference to the FCC's technical judgments when they are supported by a modicum of reasoned analysis) (internal quotations omitted).

68. *See* discussion *infra* Part II; *see also Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc. to AT&T Corp.*, CS Docket No. 98-24, 14 FCC Rcd. 3160, 3240, appendix (1999) (concurring statement of Commissioner Furchtgott-Roth) (arguing there is no discernable difference between license transfers that trigger extensive review and those that do not).

69. *See* Weiser, *supra* note 28, at 170; CRAIN & CRAIN, *supra* note 30, at 1; Yoo, *Merger Review*, *supra* note 42, at 27.

70. *Cf.* Skorup & Koopman, *supra* note 47, at 13 (arguing the FCC utilizes its public interest standard not just to pursue the public interest, but to achieve concrete policy outcomes in transactions without going through the rulemaking process).

interest, the FCC's multi-step framework finds no support in the text of the Communications Act.[71] Assuming the validity of the FCC's complex public interest review, the deficiency of consistent analytical principles or definitive factors has opened the door to the FCC reviewing and conditioning mergers based on larger industry-wide policy objectives.[72] Over the past forty years, policy judgments primarily stemming from differing perspectives within the FCC have directed how the agency interprets and expands the scope of the public interest standard.[73] The FCC subtly infuses industry-wide policy objectives by compounding them into merger conditions.[74]

Diverging policy perspectives sometimes separate neatly based on political principles, but even inside periods of parallel outlook, interpretation of the public interest standard can vary drastically. Since the late 1980s, predominately conservative leadership inside the FCC has pushed for deregulation and a narrower interpretation of the public interest standard.[75] Conversely, top progressive voices in the agency have viewed the public interest standard as a tool to implement innovative industry and social policy objectives.[76]

The task of implementing the FCC's statutory responsibility falls on the discretion and judgment of those inside the agency.[77] Congress structured the FCC as an independent agency to promote bipartisanship,[78] but the FCC still employs policy judgments throughout transaction review.[79] For example, say two telecommunication giants seek to merge so their product offerings can complement each other and reach a new audience, and there are radio licenses incident to the merger that require the FCC's approval. The administration's particular policy goals—such as increased internet access in low-income communities or

71. *See* discussion *supra* Part I.B.

72. *See* discussion of agency policy judgments *infra* Part II.

73. *Cf.* Skorup & Koopman, *supra* note 47, at 6 (asserting once the FCC begins analyzing a transaction, the parties and the agency engage in secret bargaining over what voluntary commitments the applicants need to make to remain in the agency's good graces).

74. *See id.*

75. *See infra* note 108 and accompanying text.

76. *See infra* note 87 and accompanying text (maintaining a larger focus on programming and deployment of broadband).

77. *See* Zachary Breig & Mitch Downey, *Agency Breadth and Political Influence*, SIOE 1, 2–3 (Working Paper, 2019) (noting agencies themselves are responsible for duties imposed by Congress).

78. Roscoe L. Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications*, 43 U. CIN. L. REV. 291, 291–92 (1974).

79. *See* Benjamin Kapnik, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 GEO. WASH. L. REV. 1527, 1545 (2012) ("[T]he [FCC] has been criticized heavily for allowing politicization of its decisionmaking process . . . .").

diversity in content—will partially guide the FCC's analysis and subsequent approval, denial, or conditioning of the entire merger.[80]

Although the agency is authorized to grant license transfers that are part of corporate mergers,[81] the FCC instead deploys its policy preferences over the merger as a whole.[82] Allowing agency policy motivations to guide the analysis of billion-dollar mergers—instead of merely the radio licenses involved—amplifies the FCC's duty well beyond what the Communications Act provides.[83] Additionally, assuming an administration's policy objectives are in the public interest, merging parties may face unexpected and problematic results when a new administration replaces the prior policy objectives with contradictory ones.

Arguably, by employing a merger review framework that accounts for social policy judgments, the FCC can accommodate for fluctuating values of society.[84] A broad, flexible definition of the public interest standard allows the FCC leadership to use the review of transactions to serve the varied needs of American citizens.[85] In the Comcast–NBC Universal merger, the FCC interpreted the standard expansively to "ensure that competition drives innovation in the emerging online video marketplace."[86] Similarly, in the Charter–Time Warner Cable–Bright House merger, the FCC imposed conditions to "bridge the communications divide" by requiring the parties to forge broadband Internet access to more Americans.[87] Thus, employing the public interest standard in a way that accounts for policy judgments helps advance ever-changing societal values.

Conversely, infusions of individual policy objectives are in contrast to the text of the Communications Act and to parties seeking to transfer radio licenses. In the Charter–Time Warner Cable–Bright House merger, the

80. *Compare* Krishnadev Calamur, *Broadband a 'Necessity,' Obama Says, As He Pushes FCC to Expand Access*, NPR (Jan. 14, 2015), https://www.npr.org/sections/thetwo-way/2015/01/14/377230778/obama-pushes-fcc-to-expand-broadband-access (highlighting President Barack Obama's fervent support for broadband expansion), *with infra* text accompanying note 126 (noting the strict conditions imposed during the Obama Administration on the Comcast–NBC Universal merger in part to extend access to broadband).

81. Communications Act of 1934, 47 U.S.C. § 310(d).

82. *See* discussion of policy judgments affecting review *infra* Part II.

83. *See* Communications Act of 1934 § 310(d) (restricting the assignment or transfer of any radio license, unless the FCC finds "the public interest, convenience, and necessity might be served.").

84. *See* Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 619 (2004).

85. *Id.* at 619–20.

86. *NBCU Order*, *supra* note 53, at 4510, appendix H (statement of Chairman Julius Genachowski).

87. *New Charter Order*, *supra* note 50, at 6664 (statement of Commissioner Mignon L. Clyburn). *But cf. id.* at 6666–67 (dissenting statement of Commissioner Ajit Pai) (arguing the merging parties cannot possibly comply with or implement this degree of regulatory decree).

FCC inflated the public interest standard to force the merged company into becoming a conduit for increasing broadband access to low-income households.[88] To the contrary, conditions in the CenturyLink acquisition focused strictly on the specific rate-increasing potential tied to the licenses being transferred, in line with the Communications Act mandate.[89] Therefore, a narrow focus on only the licenses to be transferred constrains the FCC's broad policy agenda and demarcates the extent of the FCC's review.

II. HOW THE PUBLIC INTEREST STANDARD HAS ENDURED OVER TIME

The Communications Act mandates the use of the public interest standard, but what the standard actually embodies is nearly a century's worth of FCC interpretations. As the public interest standard has evolved, it is important to judge whether the public interest has consistent defining characteristics, or if the public interest is merely a vehicle for FCC regulatory flexibility. Over recent decades, the vagueness inherent in the nebulous standard has led the FCC itself to struggle in determining what the public interest encompasses, allowing for routine inconsistency and politicization.

Since the passage of the Communications Act, the FCC's outlook on competition and monopoly in the telecommunications industry has shifted.[90] The blockbuster 1980s breakup of AT&T's telephone service monopoly, known as Ma Bell, signaled a new generation was ahead.[91] The AT&T divestiture, which cemented a pro-competition ethos, is an "ideal starting point for examining" the shifting tectonic plates of telecommunications policy.[92] Following the breakup, we began to see fractures appear in the FCC's application of a cogent and consistent public interest standard through successive decades.

88. *See* discussion of the merger conditions *infra* Part II.

89. *See infra* note 152 and accompanying text.

90. *Compare* Robinson, *supra* note 8 (arguing the Ma Bell monopoly was different than other monopolies we have loved to hate because the network performed exceedingly well and made life simpler for customers), *and* Larry Satkowiak, *How AT&T Became a Monopoly*, CABLEFAX (Jan. 30, 2013), https://www.cablefax.com/technology/how-at-amp-t-became-a-monopoly-2 (arguing the FCC largely protected the AT&T radio monopoly in the 1930s), *with* Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective*, 61 FED. COMMC'NS L.J. 1, 3 (2008) [hereinafter Yoo, *Enduring Lessons*] (contending that competitive Internet and wireless services would have been delayed if the AT&T monopoly was not broken up), *and* United States v. AT&T, 552 F. Supp. 131, 160–61, 165 (D.D.C. 1982) (forcing AT&T to divest from local operating companies due to its monopolistic stranglehold on the telephone industry).

91. Robinson, *supra* note 8, at 517–20.

92. Yoo, *Enduring Lessons*, *supra* note 90, at 2.

A. The Clinton Administration

Passed in the heart of the Clinton Administration, the Telecommunications Act was the first major overhaul of telecommunications law since the Communications Act,[93] and it sought to "let any communications business compete in any market against any other."[94] However, the intended deregulation and expected surge in competition has actually led to a wave of mergers and further industry consolidation.[95] The Telecommunications Act foundationally restructured regulation of the industry, but it left the public interest standard—and the FCC's de facto authority to review mergers—unscathed.[96]

With the goals of the Telecommunications Act codified, the FCC included "promoting competition" and "deregulation" as factors in the first step of its public interest inquiry.[97] Only two months after passage, two Baby Bells sought to consolidate once again.[98] In the $23 billion merger of Bell Atlantic and NYNEX, the two telephone companies combined to serve thirteen states and the District of Columbia.[99] In the FCC's Order approving the merger, the agency claimed its public interest review included the implementation of Congress's "pro-competitive, deregulatory national policy framework designed to . . . open all telecommunications markets to competition."[100] Without ample proffered commitments by the parties, determining the transaction to be in the public interest and approving the license transfers was a very close case.[101] As the FCC adds qualifying considerations to its amorphous

93. *Telecommunications Act of 1996*, *supra* note 17.

94. *Id.*

95. Michael Corcoran, *Democracy in Peril: Twenty Years of Media Consolidation Under the Telecommunications Act*, TRUTHOUT (Feb. 11, 2016), https://truthout.org/articles/democracy-in-peril-twenty-years-of-media-consolidation-under-the-telecommunications-act/ (arguing the Telecommunications Act fueled twenty years of profound industry consolidation).

96. *See, e.g.*, *Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Com.*, 104th Cong. 12–13 (1995) (statement of Rep. John Bryant, Member, H. Comm. on Com.) (noting the Telecommunications Act must remove barriers to competition while also leaving the FCC's public interest responsibility intact).

97. *NYNEX–Bell Atlantic Order*, *supra* note 55, at 20006, ¶ 35; *see supra* text accompanying note 48.

98. Farrell Kramer, *Baby Bells Agree to Biggest Telecommunications Merger Ever*, AP NEWS (Apr. 22, 1996), https://apnews.com/article/469c6f580eecaba2a0badacc0b23bcbb (discussing the merger of two Baby Bells, which were once a part of AT&T's Ma Bell telephone monopoly).

99. *Id.*

100. *NYNEX–Bell Atlantic Order*, *supra* note 55, at 20003, ¶ 31.

101. *Id.* at 19990–92, ¶¶ 8–11 (finding Bell Atlantic and NYNEX to be direct competitors in multiple territories and that their combination would strengthen their market power and increase the likelihood of coordinated action); *id.* at 19992–94, ¶¶ 12, 14–15 (holding that

public interest review, voluntary commitments and mandatory conditions become the norm to push transactions to approval.[102]

Following the passage of the Telecommunications Act, FCC Chairman Reed Hundt warned of a lack of "clear and predictable guidelines" in applying the public interest standard.[103] The absence of a clear standard sent a message of tolerance—and confusion—to those firms who sought to test the limits of merger policy.[104] In the NYNEX–Bell Atlantic merger, the FCC employed a condition-based balancing technique, using pro-competitive commitments to offset possible adverse effects on competition.[105] Problematically, the indefinite public interest standard and a holistic analysis of the entire merger can require more mandatory conditions because the possible adverse effects the FCC can consider are exceedingly broad. The FCC's public interest framework delves far beyond the effects of license transfers or a competition-based analysis and diminishes any limits on imposable conditions.[106]

The FCC fails to recognize any difference between authorizing license transfers and utilizing the public interest standard to look at the merits of entire mergers. When reviewing transfers of radio licenses that are a part of a larger merger, the FCC should confine its review to directly-related harms and benefits arising from the license transfer itself—leaving broader merger analysis to antitrust enforcers.[107] The end of the Clinton Administration is

without voluntary commitments—creating operating support systems, offering interconnection, and developing uniform interfaces—the transaction's public interest benefits may not have offset harms).

102. *See* Farr, *supra* note 60 (claiming the FCC's regular imposition of voluntary commitments is abusive overreach).

103. Reed E. Hundt, Chairman, Fed. Commc'ns Comm'n, Not So FAST (June 3, 1997), https://transition.fcc.gov/Speeches/Hundt/spreh729.html.

104. *Id.*

105. Reed E. Hundt, Chairman, Fed. Commc'ns Comm'n, Remarks by Chairman Reed Hundt to State Commissioners on the Bell Atlantic/NYNEX Merger (Oct. 3, 1997), https://transition.fcc.gov/Speeches/Hundt/spreh758.html; *see supra* note 101 and accompanying text (highlighting how pro-competitive commitments outweigh possible public interest harms).

106. For another transaction where the FCC's boundless public interest review led to overbroad mandatory conditions, see *In re Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, CC Docket No. 98-141, Memorandum Order and Opinion, 14 FCC Rcd. 14712, 14716–17, 14950, ¶¶ 571 (1999) [hereinafter *SBC–Ameritech Order*] (finding the proposed merger would harm consumers, but ultimately determining that thirty unprecedented conditions—designed to open local markets to competition, stimulate the deployment of broadband services, and strengthen the merged firm's incentives to expand competition—sufficiently offset merger harms).

107. *See supra* notes 39–40 and accompanying text.

emblematic for ushering in new, predominately conservative, momentum to narrow the FCC's broad merger review practice.

B. The Era of George W. Bush and Michael K. Powell

The new millennium ushered in the proliferation of the narrow utility of FCC merger review. Led by Chairman Michael K. Powell, the FCC focused on consumers, deregulation of the industry, and facilitating innovation in the impending digital medium explosion.[108] Chairman Powell pushed for less agency regulation and to let market systems work, which led to consumer welfare and innovation in the digital space.[109] From the beginning, he cast doubt on the broad public interest standard and multi-faceted agency review.[110] Supposedly, the renewed force for narrower public interest review should have translated to narrower review of license transfers rather than mergers as a whole.

In 2000, AOL and Time Warner Cable Inc. sought to become the world's largest media and online services company.[111] This proposed merger, the largest corporate merger in history at the time of announcement, was the "productive marriage of a new media giant with a traditional media giant."[112] In its Order approving the merger, the FCC emphasized that its multi-step review "focuse[d] on the potential for harms and benefits" flowing from the transaction.[113] Fears of vertical integration and solidification, instant message dominance, and incentives to discriminate against rivals drove the FCC to impose conditions on the transaction, focusing heavily on the harms to the advancement of instant messaging.[114]

Even during this period of relative hesitancy to review mergers, the FCC still imposes dozens of conditions on such transactions, concentrating on the future actions of the merged parties.[115] Dissenting from the Order,

108. *See Biography of Michael K. Powell*, FCC, https://www.fcc.gov/biography-michael-k-powell (last updated Mar. 18, 2005).

109. *See* Michael K. Powell, Chairman, Fed. Commc'ns Comm'n, Consumer Policy in Competitive Markets, Remarks Before the Federal Communications Bar Association (June 21, 2001), https://transition.fcc.gov/Speeches/Powell/2001/spmkp106.html.

110. *See id.*

111. *AOL, Time Warner to Merge*, WIRED (Jan. 10, 2000), https://www.wired.com/2000/01/aol-time-warner-to-merge/.

112. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner Inc.*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd. 6547, 6551, ¶ 8 (2001) [hereinafter *AOL–Time Warner Order*].

113. *Id.* at 6550, ¶ 6.

114. *Id.* at 6554, ¶ 18.

115. *Id.* at 6678–80, ¶¶ 317–34.

Chairman Powell expressed deep concern for the FCC's "tendency to adopt conditions that were divorced from the perceived harms."[116] Commissioner Furchgott-Roth, also dissenting, vociferously decried the FCC's review process as broken.[117] Some of the imposed conditions went beyond the transferred licenses themselves in an effort to remedy industry-wide concerns[118]—in direct opposition to the post-Clinton Administration momentum. Although the new millennium began harshly condemning the wide breadth of the public interest review, even its staunchest opposition seemed to approve of its inclusive nature in select situations.[119]

C. The Obama Administration

The Obama Administration symbolized the reincarnation of the FCC's nebulous public interest standard that Chairman Powell and Commissioner Furchgott-Roth sought to avoid. FCC Chairman Tom Wheeler had a contrasting outlook; he thought the public interest standard was a highly fluid mechanism.[120]

116. *Id.* at 6701–02 (dissenting statement of Commissioner Michael K. Powell) ("Our merger 'conditions' more often look like rules . . . affect[ing] the entire industry and not just the parties.").

117. *Id.* at 6699–700 (dissenting statement of Commissioner Harold W. Furchtgott-Roth) ("[The FCC's] job under the plain language of the Communications Act is to approve the transfer of radio licenses, not to pass on mergers.").

118. *Id.* at 6600–02, ¶ 126 (imposing Internet service provider choice, first screen limitation, direct billing, nondiscriminatory performance, FCC disclosure mandate, and enforcement conditions).

119. For an approved merger where the FCC—including proponents of a narrower public interest inquiry—evaluated the public interest benefits of the entire transaction, see *AT&T–Comcast Order*, *supra* note 49, at 23313–25, 23330, ¶¶ 175–206, 222 (concluding the $60 billion cable merger produced public interest benefits—intertwining of programming and distribution assets—that were too significant to pass up, even if increased consolidation was imminent); *id.* at 23351 (separate statement of Chairman Michael K. Powell) (calling the combination of the nation's first and third-largest cable providers and the acceleration of future broadband access significant public interest benefits of the transaction). *But see id.* at 23352 (dissenting statement of Commissioner Michael J. Copps) ("The sheer economic power created by this mega-combination, and the opportunities for abuse that would accompany it, outweigh the very limited public interest benefits that [the FCC] find here."); *cf.* John Eggerton, *Powell: FCC Needs to Get Out of Mergers and into Giving Wireless Its Due*, BROAD.+CABLE (Nov. 27, 2012), https://www.nexttv.com/news/powell-fcc-needs-get-out-mergers-and-giving-wireless-its-due-60832 (following Powell's service, he warned that the public interest standard's dark side was a sort of conditions bazaar).

120. Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS INST. (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/ ("My 'aha' moment was that the public interest [standard] was a pretty malleable concept.").

In 2009, Comcast sought to acquire NBC Universal from General Electric.[121] The FCC recognized the substantial harms that could result from unprecedented aggregation of video programming content.[122] The FCC prioritized the probable harms to competition and used the public interest standard to impose extremely strict conditions on the parties that extended beyond the specific merger itself, like protecting the development of online competition.[123] The online video distributor market was in its infancy—only Netflix, HBO, and Hulu at the time, so the FCC analyzed the proposed merger's impact on future sector development.[124] The FCC clearly analyzed the implications of the entire merger and used its public interest mandate to employ policy-driven industry-wide conditions.[125] It lauded the conditions as a way to spur broadband adoption among underserved communities, increase broadband access to schools and libraries, and to increase news coverage, children's television, and Spanish-language programming.[126] The FCC's prior attempts to confine broad interpretations of the public interest standard and resulting merger conditions crumbled in an effort to assist the advancement of the broadband market.[127] Merging parties must be aware of topical FCC policy initiatives in case their proposed transaction becomes the vehicle for industry-wide change.

In 2011, AT&T sought to purchase T-Mobile from Deutsche Telekom AG in an effort to become the largest telecommunications carrier in the United States.[128] Grave fears of consolidation and higher prices for

121. John Cook, *What Would a Comcast Purchase of NBC Universal Mean?*, BUS. INSIDER (Oct. 1, 2009), https://www.businessinsider.com/what-would-a-comcast-purchase-of-nbc-universal-mean-2009-10; *NBCU Order*, *supra* note 53, at 4239, ¶ 1 (highlighting the merger would combine the broadcast, cable programming, online content, movie studio, and other businesses of NBC Universal with some of Comcast's cable programming and online content businesses).

122. *NBCU Order*, *supra* note 53, at 4240, ¶ 3.

123. *Id.* at 4240–43, ¶¶ 4–7; *see also id.* at 4513, appendix H (joint concurring statement of Commissioners Robert M. McDowell & Meredith Attwell Baker) ("License transfer approvals should not serve as vehicles to extract from petitioners far-reaching and non-merger-specific policy concessions that are best left to broader rulemaking or legislative processes.").

124. Matthew J. Razzano, *Comcast-NBCU, Netflix, and the FCC: The Dual Merger Review Process as a House of Cards*, 94 NOTRE DAME L. REV. ONLINE 63, 65 (2018) (finding the FCC's imposition on burgeoning technologies—albeit well-intentioned to secure future development—through inconsistent review and costly processes to actually stymie growth).

125. *NBCU Order*, *supra* note 53, at 4240–43, ¶¶ 4–7.

126. *Id.* at 4510, appendix H (statement of Chairman Julius Genachowski).

127. *Id.*

128. *See* Mike Isaac, *AT&T Drops Its T-Mobile Merger Bid in $4B Fail*, WIRED (Dec. 19, 2011), https://www.wired.com/2011/12/att-tmobile-merger-ends/.

consumers sparked the FCC's concern.[129] Chairman Genachowski circulated a draft Order designating the proposed transaction for an administrative hearing, signifying that the FCC did not find the merger to be in the public interest; the parties withdrew their applications from consideration the next day.[130] The move, which effectively blocked the proposed transaction, was an effort to block further industry consolidation and higher prices. An administrative hearing in front of the FCC would require more time and money spent, with no guarantee of a positive outcome. After dropping the transaction, the parties were left to deal with the fallout.[131] Although the merger was never finalized, a hypothetical FCC approval would likely have analyzed the proposed effects of the entire merger and contained considerable conditions arguably to be within the scope of the public interest authority.[132] This period of all-inclusive FCC analysis all but cemented the broad public interest authority and throttled the agency back into the merger review business.

D. Trumpism and Reinvigorated Calls for Deregulation

The controversial election of President Donald J. Trump derailed the FCC's efforts to revive the broad public interest standard and reignited the two-decade-long call for deregulation.[133] Although the FCC refocused on narrowing the public interest inquiry with respect to the license transfer process, the path forward was not an effortless one.

Prior to Trump taking office, Charter Communications, Inc., Time Warner Cable Inc., and Bright House Networks (collectively New Charter) sought to merge into a single company that would provide cable television

129. *See* Sarah Thomas, *FCC Requests Hearing on AT&T/T-Mobile Merger*, LIGHTREADING (Nov. 22, 2011), https://www.lightreading.com/mobile/4g-lte/fcc-requests-hearing-on-atandt-t-mobile-merger/d/d-id/691766 (noting the likelihood of transaction approval was slim).

130. *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Order, 26 FCC Rcd. 16184, 16184–85, ¶¶ 2–3 (2011).

131. *See, e.g.*, Thomas, *supra* note 129 (highlighting AT&T would face significant spectrum constraints, and T-Mobile would lose its only clear path to long-term evolution if the deal fails); Isaac, *supra* note 128 (calculating AT&T lost nearly $4 billion when the FCC effectively blocked its merger bid with T-Mobile).

132. *See* Michael J. de la Merced, *AT&T Ends $39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011, 4:44 PM), https://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/ (discussing AT&T and T-Mobile's willingness to consider conditions to push the deal forward notwithstanding the FCC's vehement skepticism about the transaction).

133. *Cf.* Keith B. Belton & John D. Graham, *Deregulation Under Trump*, REGUL. REFORM, Summer 2020, at 14, 14 (noting President Trump's focus on deregulation to deconstruct the administrative state); *see also* Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017) (requiring agencies to eliminate two prior regulations for every new regulation issued).

and broadband access to more than twenty million customers.[134] The $70 billion mammoth merger would create the nation's second-largest cable television operator and broadband access provider.[135] The companies petitioned the FCC's approval for the necessary license transfers.[136] The FCC's Order approving the transaction was highly skeptical of the potential harms and imposed expansive conditions on the merger.[137]

The merged firm's likely broadband footprint expansion, incentives to increase prices for consumers, and ability to foreclose distributors' access to content in the online video market induced angst within the FCC.[138] Thus, the FCC imposed four multi-faceted conditions in order to approve the merger.[139] The first two conditions focused on eliminating probable anticompetitive conduct of the merging parties, but the other two conditions compelled the merging parties to further the FCC's agenda of enhancing widespread broadband availability.[140]

Chairman Ajit Pai argued in dissent that the FCC "turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy."[141] Also dissenting, Commissioner Michael O'Rielly exclaimed, "[o]nce delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption."[142] Again, two conditions remedied the probable competitive issues, but then the FCC

134. *See* CONG. RSCH. SERV., R44122, CHARTER-TIME WARNER CABLE-BRIGHT HOUSE NETWORKS MERGERS: OVERVIEW AND ISSUES 1 (2015), https://www.everycrsreport.com/files/20150724_R44122_257a0e62efcabf264b095fdb81ed29fb2224cbff.pdf.

135. *See* Meg James, *Charter Completes Purchase of Time Warner Cable, Bright House*, L.A. TIMES (May 18, 2016), https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-charter-time-warner-cable-20160517-snap-story.html.

136. *Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, 30 FCC Rcd. 9916, 9916 (2015).

137. *See New Charter Order*, *supra* note 50, at 6389–92, ¶¶ 131–40.

138. *See id.* at 6329–30, ¶¶ 3–8.

139. *Id.* at 6330, ¶ 8.

140. *Id.* at 6330, ¶¶ 9–12 (ordering four conditions on the transaction: (1) New Charter could not impose data caps or charge usage-based pricing for its residential broadband service for seven years; (2) New Charter must interconnect with qualifying companies for free; (3) New Charter must institute a program that provides broadband Internet service to at least 525,000 eligible low-income households; and (4) New Charter must build out its high-speed broadband infrastructure to two million more homes).

141. *Id.* at 6666 (dissenting statement of Commissioner Ajit Pai) (claiming the FCC's majority did not actually believe the merger was in the public interest).

142. *Id.* at 6671, 6674 (dissenting statement of Commissioner Michael P. O'Rielly).

imposed additional industry-focused conditions to accelerate its policy wish list. The merging parties begrudgingly accepted the FCC's harsh merger conditions in an effort to complete the deal, but frustrations with the conditioned approval lingered.

The Competitive Enterprise Institute, a third-party advocate group,[143] challenged the imposed conditions, claiming they went beyond the FCC's legal authority and were unrelated to the radio licenses or any transaction-specific harm.[144] In *Competitive Enterprise Institute v. Federal Communications Commission*,[145] the D.C. Circuit, in contrast to typical agency deference,[146] went on to excoriate the FCC for employing broad conditions sweeping beyond the individual radio licenses.[147] The D.C. Circuit channeled similar arguments to Commissioner Furchgott-Roth and claimed "the governing statutes focus on individual licenses, not entire mergers."[148] The Court called for the FCC to revert back to executing its mandate in the Communications Act.[149] Instead of allowing authority over entire mergers and beyond, the FCC's public interest review must be cabined to preserve the textual sanctity of the Communications Act.

Following the condemnation by the D.C. Circuit, the FCC changed its direction under the chairmanship of Ajit Pai. In 2017, CenturyLink sought to acquire Level 3 Communications in an effort to create a leading global network services company.[150] The FCC approved the merger subject to targeted transaction-specific conditions.[151] The conditions mandated the combined firm to refrain from increasing rates for service provided by ten specific fiber providers because divestiture was not a practical option.[152] The FCC's Order

143. *See About*, COMPETITIVE ENTER. INST., https://cei.org/about/ (last visited Aug. 1, 2021).

144. John Eggerton, *CEI Fires Opening Appeals Court Shot at FCC Charter-TWC Conditions*, BROAD.+CABLE (Jan. 15, 2019), https://www.nexttv.com/news/cei-fires-opening-appeals-court-shot-at-fcc-charter-twc-conditions.

145. 970 F.3d 372, 388 (D.C. Cir. 2020) (striking down the free interconnection condition and the 525,000 low-income household expansion condition).

146. *See* cases cited *supra* note 67 and accompanying text.

147. *Competitive Enter. Inst.*, 970 F.3d at 388 (finding the FCC majority readily acknowledged that one of the conditions was not a transaction-specific benefit, but still required it anyway).

148. *Id.*

149. *See id.*; *supra* text accompanying notes 9–16.

150. *See CenturyLink Completes Acquisition of Level 3*, LUMEN (Nov. 1, 2017), https://news.lumen.com/2017-11-01-CenturyLink-completes-acquisition-of-Level-3.

151. *Cf.* Maltas & Platt, *supra* note 56 (noting the FCC's formulation of the public interest standard differed from recent Obama-era formulations and focused on narrowly tailored conditions to address transaction-specific harms).

152. *Level 3–CenturyLink Order*, *supra* note 53, at 9593, ¶ 24.

resoundingly asserted that the rate containment conditions were narrowly tailored to remedy probable anticompetitive harms stemming from the license transfer.[153] This precise analysis and use of narrowly tailored conditions coincided with the original language of the Communications Act, successfully cabining the FCC's review to the specific licenses being transferred.

In 2018, T-Mobile and Sprint, the third- and fourth-largest wireless communication companies in the United States, announced their intention to merge.[154] The FCC approved the proposed merger in part due to conditions offered by the parties to streamline the deal.[155] The commitments offered by the parties promised to build out and expand the merged firm's 5G and broadband networks.[156] The FCC reasserted that it was limited to imposing narrowly tailored conditions, but would still accept the voluntary commitments, even if the commitments would go on to "resolve larger policy issues of general applicability."[157] Although the FCC focused heavily on narrowly tailored transaction-specific conditions in the CenturyLink approval, it seemed to cast aside that strategy by accepting T-Mobile and Sprint's expansive voluntary commitments to mitigate the transaction's impact.[158] Subsequently, merging parties are now left to discern the intensity of the FCC's public interest scrutiny and predict what voluntary commitments the FCC may require them to bring to the table.[159] At best, merging parties must absorb the costs and delays inherent in the FCC's confusing review.

153. *Id.* at 9615, appendix B (statement of Chairman Ajit Pai) ("If there are harms, the [FCC] then will consider narrowly-tailored, transaction-specific conditions to remedy the harm.").

154. *See* Roger Conrad, *T-Mobile US: The Sprint Merger So Far*, FORBES (June 23, 2020), https://www.forbes.com/sites/greatspeculations/2020/06/23/t-mobile-us-the-sprint-merger-so-far/?sh=4f76b86b271b.

155. *T-Mobile–Sprint Order*, *supra* note 48, at 10581, ¶ 6; *see also* Marguerite Reardon & Roger Cheng, *T-Mobile and Sprint Are One: What You Need to Know About the Mobile Mega-Merger*, CNET (Apr. 3, 2020), https://www.cnet.com/news/t-mobile-and-sprint-are-one-what-you-need-to-know-about-the-mobile-mega-merger/ (noting the highly anticipated merger took two years to receive FCC approval).

156. *T-Mobile–Sprint Order*, *supra* note 48, at 10581–82, ¶¶ 7–8.

157. *T-Mobile–Sprint Order*, *supra* note 48, at 10845–46, attachment A (statement of Commissioner Michael P. O'Rielly) (exclaiming the FCC "cannot stop a company from stabbing itself in the foot" by proffering voluntary commitments that resolve objectives related to the industry as a whole).

158. *See T-Mobile–Sprint Order*, *supra* note 48, at 10582, ¶ 9 (finding that absent the voluntary commitments from the parties, the FCC may not have approved the deal due to its mixed impact on competition).

159. *Cf.* Farr, *supra* note 60 (discussing the utility of voluntary commitments to win over the FCC's approval in a transaction involving license transfers).

III. *CHEVRON* DEFERENCE AND VAGUENESS IN THE FCC'S LEGAL STANDARD

Independent government agencies often interpret Congress's delegation of authority in their enabling statutes. As administrations change, the priorities of government agencies shift, causing the agency's prior interpretations of its statute to change. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[160] courts will defer to an agency's interpretation when Congress has authorized the agency to regulate with some force of law, including notice-and-comment rulemaking.[161] If Congress's meaning in the enabling statute is ambiguous, a reviewing court will accept the agency's interpretation so long as it is permissible.[162] The two-step inquiry, when employed, is highly deferential to the agency's interpretation.[163]

No merging party has ever challenged the FCC's interpretation of the public interest standard with respect to the parties' specific transaction under *Chevron*, but if a party did, the FCC and the public interest standard would likely prevail.[164] The Communications Act, the FCC's enabling statute, empowers the FCC to promulgate rules; therefore, the FCC is authorized with the force of law.[165] Section 310(d) requires the assignment or transfer of any license to serve the "public interest, convenience, and necessity,"[166] but the apparent ambiguity in the phrase "public interest" remains undefined in any other statutory provision or illuminated in any piece of legislative history. Thus, under the first step of the *Chevron* deference test, a court would likely determine that, using all statutory tools available, Congress did not speak directly to defining the public interest standard.

Once the hurdle of the first step is cleared, the agency must only show that its interpretation of the statute is not "arbitrary or capricious in substance, or

160. 467 U.S. 837 (1984).

161. *See* United States v. Mead Corp., 533 U.S. 218, 227 (2001) (holding an agency's power to engage in adjudication or notice-and-comment rulemaking signals that Congress authorized the agency to regulate with some force of law); Christensen v. Harris Cnty., 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (arguing *Chevron* deference does not apply where the court has doubt that Congress intended to delegate interpretive authority to the agency).

162. *Chevron*, 467 U.S. at 843.

163. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1, 30 (1998) (reporting that courts find the agency's interpretation acceptable 73% of the time under the *Chevron* deference doctrine).

164. *Cf.* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding the FCC's public interest standard as a lawful congressional delegation).

165. Communications Act of 1934, 47 U.S.C. § 154(i).

166. *Id.* § 310(d).

manifestly contrary to the statute."[167] Putting forth a cogent reasonableness argument and surmounting the step two threshold is relatively straightforward.[168] Due to the inherent vagueness and flexibility in defining what is in the public interest, even an extremely broad interpretation would likely be considered reasonable. Under a step two determination, a hypothetical interpretation of "public interest" that includes evaluating the public interest harms and benefits of a merger would likely be permissible. Speculatively, a court may only reject an interpretation of public interest that is so egregious that the interpretation leads to an outcome in a transaction that severely hinders the merging parties or hurts society as a whole.[169] Therefore, a relatively narrow or an exceedingly broad interpretation of the public interest standard would likely still receive *Chevron* deference.

Deferential courts and the vague contours of the public interest standard accord the FCC with extensive discretion and flexibility.[170] Arguably, the FCC is better equipped than the judiciary to fill gaps in the Communications Act statutory scheme because the FCC possesses greater telecommunications literacy.[171] Additionally, the inherent flexibility of a broad legal standard allows for shifting ideological values.[172] Moreover, the FCC's discretion in interpreting the standard allows the agency to satisfy private pressures from groups with economic or social agendas.[173] Since a vast majority of license transfers pass smoothly without FCC intervention, some private parties are less inclined to question the FCC's broad interpretation of what is in the public interest.

More importantly, highly deferential courts and the FCC's boundless authority present complications. The FCC consistently expands its authority under the Communications Act by broadening what it determines to be in

167. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011); *see* United States v. Mead Corp., 533 U.S. 218, 219 (2001) (finding under *Chevron* step two, the agency's interpretation need only be reasonable to receive deference, regardless if the court thinks the resolution is unwise).

168. *See, e.g.*, Kerr, *supra* note 163, at 30–31.

169. *See also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 30–31 (2017) (finding when *Chevron* deference is applied in circuit courts, an agency's interpretation of their enabling statute wins most of the time).

170. *See* discussion on the FCC's implementation *supra* Part II.

171. *See* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 578 (1997).

172. *See also* Akilah N. Folami, *Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio's Subversive Past*, 63 FED. COMMC'NS L.J. 141, 143 (2010) (commenting that the FCC's public interest standard is amenable to fluctuating beliefs).

173. *See* J. Gregory Sidak & Hal. J. Singer, *Foxes in the Henhouse: FCC Regulation Through Merger Review*, CRITERION ECON. 46, 47 (2008).

the public interest—a tool to push its industry preferences.[174] The flexible standard permits the agency to sidestep notice-and-comment rulemaking procedures by implementing regulations and policy through transaction review.[175] Additionally, amorphous review imposes costs and delays on the regulated parties.[176] A policy-driven FCC putting forth inconsistent interpretations of the public interest standard combined with private parties unwilling to fight deferential courts all but cements the FCC's role in reviewing entire mergers.

IV. RECOMMENDATIONS: A SHIFTING PATH FORWARD

The inability of the FCC to apply a cogent public interest standard has led to the demise of many transactions and infuriation of many merging parties. As shifting ideology has been a constant theme over recent decades within the FCC, a new chapter is unfolding in front of us with a new administration. It is critical for the FCC to rein in its policy-driven intentions and erect a dependable public interest standard. Above all, the FCC's public interest review must be consistent with the text of the Communications Act and focus on license transfers, not mergers as a whole.

On January 20, 2021, Joseph R. Biden was sworn in as President of the United States, marking a drastic shift in governance.[177] On the same day as Biden's inauguration, Ajit Pai stepped down as Chairman of the FCC.[178] Closing in on a three-to-two liberal majority, the FCC's perspective on many issues will likely shift away from that of the prior Republican-led majority.[179]

174. *E.g.*, Larry Downes & Geoffrey A. Manne, *The FCC's Unstructured Role in Transaction Reviews*, CPI ANTITRUST CHRON., Oct. 2012, at 1, 3 (finding modern approved transactions to be regularly accompanied with comically long lists of conditions—acting as wildly unrelated remedies).

175. *Id.* (arguing the FCC uses transaction reviews to subvert informal rulemaking procedures).

176. *See SBC–Ameritech Order*, *supra* note 106, at 15174, attachment *E* (dissenting statement of Commissioner Furchgott-Roth) (arguing inconsistent public interest review and mandatory conditions lead to undue burdens on market participants); CRAIN & CRAIN, *supra* note 30.

177. Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/20/us/politics/biden-president.html.

178. Press Release, New Am., OTI Statement on Ajit Pai's Resignation from the FCC (Jan. 19, 2021), https://www.newamerica.org/oti/press-releases/oti-statement-on-ajit-pais-resignation-from-the-fcc/.

179. *See* Tony Romm, *Biden Selects Slaughter as Acting Chair of Federal Trade Commission, Rosenworcel as Acting Chair of Federal Communications Commission*, WASH. POST (Jan. 21, 2021), https://www.washingtonpost.com/technology/2021/01/21/biden-ftc-fcc-chair/ (announcing Jessica Rosenworcel as the acting chairwoman of the FCC—leaving the FCC deadlocked at two Democrats and two Republicans with one vacancy left to fill); Amrita Khalid, *What the FCC Under President Biden Will Mean for Small Businesses*, INC. (Dec. 17, 2020), https://www.inc.com/amrita-khalid/president-biden-fcc-net-neutrality.html.

Though, with regards to FCC merger review, the public interest standard will almost certainly remain; the FCC will likely continue to exploit it by using merger review as a vehicle for industry-wide change.[180]

Biden's FCC appointees should immediately consider narrowing the public interest framework as one of the agency's top strategic goals. Properly cabining the FCC's de facto merger review authority could block litigating parties from raising arguments that the Supreme Court should reevaluate the public interest standard's constitutionality on nondelegation grounds[181] in the future.[182] Further, deferential courts are unlikely to strike down the FCC's broad interpretations.[183] Limiting the FCC's public interest review to analyzing cognizable effects of license transfers will prevent statutory overreach and better guide both the FCC and merging parties on the potential outcome of a transaction.

180. *Cf.* Communications Act, 47 U.S.C. § 154(i) (empowering the FCC to make such rules and regulations as may be necessary in the execution of its functions); *Rulemaking Process: How Does the Agency Identify the Need for Rulemaking?*, FCC, https://www.fcc.gov/about-fcc/rulemaking-process (last visited Aug. 1, 2021) (noting if the FCC identifies a problem with industry behavior, it may interpret, clarify, or modify an existing rule, or it may issue a new rule).

181. For a brief discussion on nondelegation doctrine principles and the doctrine's current state, see, e.g., Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (holding Congress must lay down an intelligible principle for the authorized party to follow to satisfy nondelegation muster); A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 454 (2017) (noting the Supreme Court has upheld the statute in nearly every delegation challenge—including remarkably broad delegations); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 475 (2001) (finding even in sweeping regulatory schemes, courts have never demanded that statutes provide a determinate criterion for the regulated harm). *But cf. Gundy*, 139 S. Ct. at 2132–36 (Gorsuch, J., dissenting) (arguing Congress cannot pass off its legislative power to the Executive Branch—leaving agencies only to fill up the details, execute fact-finding, and perform non-legislative responsibilities); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1881–83 (2019) (noting multiple Supreme Court Justices endorse a more vigorous nondelegation doctrine).

182. To understand opposing arguments for the public interest standard's validity under nondelegation doctrine principles, compare Gary Lawson, *Delegation and the Constitution*, REGUL., 1999, at 23, 29 (arguing the FCC's public interest mandate is "[e]asy kill number 1" on nondelegation doctrine grounds), and Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 ADMIN L. REV. 895, 900 (2008) (calling the public interest standard vague, indiscriminate, and near absolute discretion about a subject), with Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (rejecting a nondelegation doctrine attack on the public interest standard—cementing the mandate's utility in the FCC), and Robert W. Martin, *Legislative Delegations of Power and Judicial Review—Preventing Judicial Impotence*, 8 FLA. STATE U. L. REV. 43, 48 (1980) (discussing how broad phrases such as "public convenience and necessity" are sufficient in congressional delegations).

183. *See* discussion on *Chevron* deference *supra* Part III.

As the transition from President Trump to President Biden began, antitrust enforcers made it clear the "same status quo thinking that ha[d] allowed decades of vertical consolidation to go uninvestigated and unchallenged" would come to an abrupt halt.[184] Some believe the Biden Administration may focus on proactive deterrence rather than reactionary enforcement.[185] Biden's FCC appointees should commit to publishing guidance documents or engaging in notice-and-comment rulemaking to circumscribe the public interest standard. Informative guidance and new regulations could define and outline guideposts for how the agency will employ the standard. Further, additional legislation could provide concrete public interest principles to guide the FCC and merging parties.[186]

A. FCC Guidance

Independent government agencies can promulgate guidance documents to delineate agency policy objectives or interpret their own rules.[187] Under the Administrative Procedure Act (APA), guidance documents, including general policy statements and interpretive rules, are exempt from notice-and-comment rulemaking procedures and do not carry the force of law.[188] The FCC should publish guidance describing how the public interest, convenience, and necessity will consistently be served in the transfer of licenses between merging parties. The guidance should interpret the standard to mean the FCC can strictly review the direct harms and benefits of the transfer of licenses themselves and not the impact of the transfer on

184. FED. TRADE COMM'N, NO. P181201, JOINT DISSENTING STATEMENT OF COMMISSIONERS ROHIT CHOPRA AND REBECCA KELLY SLAUGHTER (2020); *see also* Press Release, H. Comm. on the Judiciary, Judiciary Antitrust Subcomm. Investigation Reveals Digit. Econ. Highly Concentrated, Impact by Monopoly Power (Oct. 6, 2020) (finding harmful consolidation in the digital economy); Lauren Feiner, *Klobuchar Unveils Sweeping Revamp of Antitrust Enforcement, Laying Out Vision as New Subcommittee Chair*, CNBC (Feb. 4, 2021, 9:34 AM), https://www.cnbc.com/2021/02/04/klobuchar-unveils-sweeping-antitrust-bill-laying-out-her-vision-as-new-subcommittee-chair-.html (introducing a sweeping antitrust reform bill to uproot "lax enforcement of existing antitrust laws").

185. Asher Schechter, *What Should the Biden Administration's Antitrust Agenda Look Like? A Roundtable*, PROMARKET (Dec. 2, 2020), https://promarket.org/2020/12/02/joe-biden-antitrust-agenda-zephyr-teachout-william-kovacic/ ("[T]he new administration should aim to work systematically to strengthen deterrence, rather than just reacting to events.").

186. *See also* One Agency Act, SIL21345 7HN, 117th Cong. (2021) (proposing to remove all license transfer review authority from the FCC and vest it solely in the DOJ).

187. Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A).

188. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226 (2001) (articulating that guidance documents are not binding).

industry-wide initiatives or objectives. Unconstrained analysis will allow the FCC to continue reviewing entire mergers—a role better suited for antitrust enforcers—instead of just the transfer of licenses. Additionally, formalized review will allow parties to better prepare for FCC scrutiny and limit costs and delays. Further, the agency guidance should mirror the narrow nature of § 310(d) of the Communications Act, and it should state that the FCC will only impose conditions to remedy direct harms caused by a license transfer itself.[189]

Conditions must be pertinent to the transfer of licenses and not to the merger or industry as a whole. Similar to the specific rate containment conditions in CenturyLink's acquisition of Level 3, mandated conditions must directly relate to cognizable harms associated with the licenses being transferred.[190] The FCC has no authority to impose the costs of sector change and advancement on parties simply attempting to transfer radio licenses. Publishing agency guidance is the most realistic and feasible choice for the FCC to halt its back-and-forth usage of the public interest review.[191] Upon any future judicial scrutiny, courts will likely uphold the FCC's guidance as long as it is purely interpretive and nonbinding.[192] Conversely, nonbinding guidance documents may only last as long as the Biden Administration and a liberal FCC majority, making guidance documents a temporary Band-Aid. Future FCC leadership could simply rescind the internal guidance or issue new guidance. Regardless of the finality, FCC guidance would inform merging parties of the exact form and scope of review they would be subjected to for at least the next four years, or until the FCC rescinds the guidance or issues additional guidance.

B. Notice-and-Comment Rulemaking

Under the APA, independent government agencies can "implement, interpret, [and] prescribe law or policy"[193] through the informal rulemaking process, known as notice-and-comment rulemaking. The agency must publish the substance of the proposed rule and reference to its legal authority in the Federal Register and give interested parties an opportunity to

189. *See* Communications Act of 1934, 47 U.S.C. §§ 310(d), 303(r).

190. *See supra* notes 150–153 and accompanying text.

191. *E.g.*, Stuart Shapiro, *The Role of Guidance Documents in Agency Regulation*, YALE J. ON REGUL. (May 9, 2019), https://www.yalejreg.com/nc/the-role-of-guidance-documents-in-agency-regulation-by-stuart-shapiro/ (commenting on the systematic ease of issuing guidance documents).

192. *See, e.g.*, Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) (holding that rules of a truly interpretive and nonbinding nature will be upheld).

193. Administrative Procedure Act, 5 U.S.C. § 551(4) (2012).

comment.[194] Notice-and-comment rulemaking is a simpler process than formal rulemaking, and it provides a final ruling that would require additional notice-and-comment to amend or revoke it.[195] Since future FCC leadership would need to go through additional notice-and-comment rulemaking to change a disapproving rule,[196] a solidified determination confining the public interest standard would provide much needed consistency to the agency and parties seeking to transfer radio licenses. Further, although many argue notice-and-comment rulemaking is becoming ossified,[197] it is still a feasible alternative that the FCC must consider. The FCC should engage in notice-and-comment rulemaking and issue a new rule that outlines factors built into the public interest standard and explains how the agency will employ the standard when reviewing radio license transfers.

The proposed rule should state that the FCC will confine its review to the direct harms and benefits of the specific transfer of licenses. The agency must specifically announce what factors it will analyze when determining if a license transfer is in the public interest or else it risks authorizing future FCC review well beyond the confines of the licenses themselves. Additionally, the proposed rule should mandate that any conditions imposed by the FCC or accepted voluntarily from the parties be within the nexus of the licenses, the direct harms, and the parties of the transaction. The additional stipulation creates a ceiling on the latitude of the FCC's creativity with mandatory and voluntary conditions. Also, the proposed rule must state that the FCC cannot impose conditions on license transfers that focus on unrelated industry-wide issues, even if the parties to the transaction are well suited to resolve the issues. Rather, if the FCC seeks to implement industry-wide change, it should employ its rulemaking authority directly regarding that specific preference.[198]

Again, the Communications Act does not grant the FCC authority to use license transferring requests as a conduit to initiate industry-wide change or improvement. The proposed rule should steer the FCC toward a circumscribed analysis of the discernable effects of the radio licenses changing hands. Using notice-and-comment rulemaking would allow the

194. *Id.* §§ 553(b)–(c).

195. *Id.* § 553(c) (mandating when rulemaking is required by a statute, Sections 556 and 557 of the Administrative Procedure Act also apply).

196. *Id.* § 551(5).

197. *E.g.*, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393–96 (2000) (highlighting the major elongation of the informal rulemaking process through many factors including intrusive judicial review).

198. *See* Communications Act of 1934, 47 U.S.C. § 154(i).

FCC to stipulate the exact contours of the new rule and limit internal and external politicization by inviting input from the public and regulated parties.[199] Additionally, the APA requires the FCC to issue a concise general statement outlining the agency's basis and purpose for the rule, keeping the agency accountable and subject to judicial review.[200] A rule imposing a structured framework within the license transfer process would serve the FCC and merging parties with at least some solidified understanding of the FCC's level of scrutiny.

C. Congressional Clarity

Congress can pass legislation to amend sections of the Communications Act to either overhaul the public interest standard or allocate guiding principles to the FCC's public interest review of license transfers.[201] Congress should amend § 310(d) of the Communications Act to limit the FCC's public interest review of license transfers to only direct harms and benefits of the specific licenses being transferred.[202] Confining the FCC to focus only on the licenses, and not the impacts of entire mergers, is of paramount concern. Parties seeking to transfer licenses must be assured that the FCC will restrict its review.

Additionally, Congress should amend § 303(r) so any conditions imposed pursuant to a license transfer must be related to the specific merging parties and to any harms deriving from the license transfer itself.[203] It is equally important that transacting parties are not the receptacle for vast conditions that protrude well beyond the licenses to be transferred. Also, new legislation would ensure elected representatives are guiding telecommunications law and promote separation of powers.[204] Congressional action is the most concrete way to limit

199. 5 U.S.C. § 553(c); *see, e.g.*, James T. Harrington & Barbara A. Frick, *Opportunities for Public Participation in Administrative Rulemaking*, 15 Nat'l Res. Law. 537, 537–39 (1982) (arguing to achieve well-drafted agency regulations, public participation in all stages of the regulatory process is essential); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 59 (1995) (asserting that allowing all members of the public to participate in the decisionmaking process enhances fairness).

200. 5 U.S.C. § 553(c); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (finding a concise general statement can assist judicial review).

201. *See* Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1214 (1988) (arguing only Congress can produce operational legal standards in antitrust law).

202. *See* Communications Act of 1934, 47 U.S.C. § 310(d).

203. *See id.* § 303(r).

204. *See* Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1258 (2006) ("[E]lected officials in the legislative and executive branches are to provide adequate political representation for their constituents."); *e.g.*, John A. Fairlie, *Separation of Powers*, 21

the FCC's discretion and prevent future abuse. Enacted legislation would provide parties transferring licenses with a definitive framework for review, while clear-cut public interest principles would restrain the FCC's ability to later elongate the statutory command through agency interpretations.

Congress has signaled that antitrust reform and future legislation could be impending; amendments to the Communications Act could easily attach to new legislation.[205] Drafting and passing new legislation is likely the most arduous—albeit the most absolute—path to a better understood legal standard. New legislation would certainly spark tumultuous partisan disagreement within the chambers of Congress.[206] The Biden Administration must focus on corralling Congress behind the singular mission of narrowing the FCC's public interest standard to promote consistency and prevent agency abuse of discretion.

CONCLUSION

It is imperative that we constrain the FCC's de facto merger review authority. The Communications Act combined inclusive regulatory authority within the FCC nearly a century ago, including the authority to review the transfer of radio licenses.[207] However, through decades of interpretation, these provisions have morphed into a strategic apparatus to approve, condition, or block entire mergers in the telecommunications space that contain transferrable licenses.[208] Issuing FCC guidance, utilizing notice-and-comment rulemaking, or passing new legislation to limit the FCC's broad public interest review is necessary to prevent inconsistency, politicization, and abuse of agency discretion.[209] Thus, merging parties will be better suited to pursue the license transfer process when the FCC's statutory mandate clearly outlines how the agency is to perform its public interest review.[210]

MICH. L. REV. 393, 399–401 (1923) (finding that the people, as well as the Constitution, confer Congress with its legislative authority).

205. *See* MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. (Comm. Print. 2020) (signaling increased antitrust enforcement is a priority for Congress, and additional legislation is forthcoming).

206. *See, e.g.*, Donald Wolfensberger, *The Politics and Processes of Congress*, WILSON CTR. (Jan. 6, 2021), https://www.wilsoncenter.org/publication/the-politics-and-processes-congress (underscoring the struggle of disagreement between our political parties).

207. *Supra* note 4 and accompanying text; *see also* Communications Act of 1934 § 310(d).

208. *See* discussion about decades of conflicting FCC interpretation *supra* Part II.

209. *Supra* Part IV.

210. *Supra* Part IV.