The Quadrennial Review: The Federal Communications Commission's Latent Superpower & What Can Be Done to Free It

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I. INTRODUCTION

In 1996, Congress authorized the Federal Communications Commission (the "FCC") to review its media ownership rules every four years as part of the Quadrennial Review ("QR"),[1] with the goal of determining whether or not the rules continue to be "necessary in the public interest."[2] The QR is a powerful tool for the FCC as it allows the FCC to advance diversity in the news and among media owners, foster competition in the industry, and promote localism[3]—all in the name of serving the public interest. Much like a superhero who gains his or her abilities by chance, the FCC has tried to figure out the extent of its QR powers and how these powers can best be employed. To date, the FCC has struggled to implement new rules after its QRs, effectively neutralizing the power of the QR.[4]

The QR can be the FCC's way to stay on top of the changing media markets and a tool for the FCC to protect the public from further concentration of media ownership[5] as the industry shifts from media accessed via print and television to media accessed over the Internet. The entire Communications Act, as amended, hardly contemplates the "Internet," mentioning it only a few times; the QR can serve as a way for the FCC to monitor changing media consumption avenues, such as the growth of Internet media consumption.[6] The Communications Act, though the most important governing statute regarding communications regulation, barely touches on the Internet and how it should be regulated for telecommunications purposes—despite the fact that the Internet is becoming

1. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (2012).

2. *Id.*

3. *See* Andrew Jay Schartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 Fed. Comm. L.J. 581, 582-84 (2006) (discussing the history of Section 202(h)).

4. By way of example, the 2010 and 2014 Quadrennial Reviews had an Order released on August 25, 2016. *See* 2014 Quadrennial Regulatory Review – Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al., *Second Report and Order*, FCC 16-107, at para. 1 (2016) [hereinafter *2010 & 2014 Quadrennial Review*], https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-107A1.pdf [https://perma.cc/S67M-9K8Z].

5. *See* James B. Stewart, *When Media Mergers Limit More Than Competition*, N.Y. TIMES (July 25, 2014), https://www.nytimes.com/2014/07/26/business/a-21st-century-fox-time-warner-merger-would-narrow-already-dwindling-competition.html?_r=0 [https://perma.cc/PFB8-EUZG] ("[I]n 1983, 50 companies owned 90 percent of the media consumed by Americans. By 2012, just six companies — including Fox (then part of News Corporation) and Time Warner — controlled that 90 percent, according to testimony before the House Judiciary Committee examining Comcast's acquisition of NBCUniversal.").

6. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (2012).

the primary sources for news.[7] Currently, more consumers are getting their news from the Internet and moving away from print and television media.[8] Under Section 202(h) of the Telecommunications Act, the FCC can promulgate new media ownership rules or modify the current rules every four years (the Quadrennial Review) and regulate the industry from which the public is accessing its news.[9]

Peter Parker's (Spiderman's alter-ego) uncle Ben warned Peter that "[w]ith great power there must also come—great responsibility!"[10] Applying that principle to the FCC and the power of the QR, this quote would state, "with great power comes great responsibility; enough responsibility to inundate the power and overwhelm it!" As it stands, the FCC's various responsibilities include following Section 553 informal rulemaking procedures,[11] holding self-prescribed public hearing sessions,[12] and navigating the inevitable legal challenges, which ensue after the proposal of any rule.[13]

Taking a step back and looking at the QR from a big picture standpoint provides some clarity as to the choices that the FCC must make to free the QR from its current place of ineptitude. As required by Section 202(h), the FCC reviews media ownership rules every four years; the proposed rules are challenged in court and then, shortly thereafter, another QR is due.[14] This initial review forces the FCC to expend valuable

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7. *See* AMY MITCHELL ET AL., THE MODERN NEWS CONSUMER: NEWS ATTITUDES AND PRACTICES IN THE DIGITAL ERA 5–8, PEW RES. CTR. (July 7, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/07/07104931/PJ_2016.07.07_Modern-News-Consumer_FINAL.pdf [https://perma.cc/R592-XZV3].

8. *See generally 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 1; 2010 Quadrennial Regulatory Review – Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 25 FCC Rcd 6086, at para. 48 (2010) [hereinafter *2010 Quadrennial Review*] ("Recent PEJ research shows that on a typical day, 61% of Americans get news online, which puts the Internet just behind television and ahead of newspapers as a source for news." (citations omitted)); *see also* Monica Anderson & Andrea Caumont, *How Social Media Is Reshaping News*, PEW RES. CTR. (Sep. 24, 2014), http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/ [https://perma.cc/HG64-8KZ9].

9. *See 2010 Quadrennial Review Report and Order*, *supra* note 8, at n.2 ("In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially."); 2014 Quadrennial Regulatory Review – Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 29 FCC Rcd 4371, at n.10 (2014) [hereinafter *2014 Quadrennial Review Report and Order*].

10. *See* Stan Lee, *Amazing Fantasy #15* (Aug. 1962); *see also* SPIDER-MAN (Columbia Pictures 2002), https://www.youtube.com/watch?v=_5d6rTQcU2U.

11. *See* 5 U.S.C. § 553 (2016); Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 449 (3d Cir. 2011) (Scirica, J., dissenting)

12. *2014 Quadrennial Review Report and Order*, *supra* note 9, at para. 10.

13. *See, e.g.*, *Prometheus II*, 652 F.3d at 431; Fox Television Stations, Inc. v. FCC (*Fox I)*, 280 F.3d 1027, 1033 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002); Sinclair Broad. Grp. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

14. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.)

resources, time and consideration to study the current media ownership rules, and to deliberate and craft new rules or justifications for the standing rules. Then, the FCC expends valuable resources, time, and consideration in trying to justify its QR findings, when they are inevitably challenged in court. Regardless of the court's finding, the FCC must consider the media ownership rules once again when the next QR arrives, but now with the added wrinkle of needing to evaluate and consider the idiosyncrasies of the most recent judicial holding from the past-QR's legal challenge. *This* struggle is precisely why the QR has become inept.

New rules proposed under the FCC's QR power have yet to come to fruition,[15] because they are caught in a web of constant legal challenges and shifting lenses of judicial analysis.[16] This struggle of legal challenges that has plagued the FCC is not unique to the agency; it is part of a larger problem known as the "ossification" of rulemaking that has affected many other agencies.[17] Over the years, the QR process has changed and the FCC has tried to improve the process,[18] so as to stand a better chance in the face of legal challenges.[19] Still, more is needed before the FCC can be efficient and effective in using its QR power.

Congress, the courts, or the FCC must act now in order to free up the QR and allow the FCC to use this power to efficiently help the communications industry transition into the next age of media

15. *See FCC's Review of the Broadcast Ownership Rules*, FCC (Oct. 25, 2016), https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules [https://perma.cc/HWQ4-TVLY] (last visited Jan. 25, 2016) ("In July 2011, a court decision affirmed the Commission's decision in the 2006 quadrennial review to retain several of the rules, but vacated and remanded the modified newspaper/broadcast cross-ownership rule, as well as measures taken to foster ownership diversity."); *see generally 2010 & 2014 Quadrennial Review*, *supra* note 4.

16. *See generally* Peter DiCola, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 MICH. L. REV. 101, 117 (2007).

17. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992). "Ossification" is the tightening of the informal rulemaking process which was created to be fluid and easy for agencies to promulgate rules. *See id.* As Professor McGarity explains, "Professor E. Donald Elliott, former General Counsel of the Environmental Protection Agency, refers to this troublesome phenomenon as the 'ossification' of the rulemaking process, and many observers from across the political spectrum agree with him that it is one of the most serious problems currently facing regulatory agencies." *Id.* (citing E. Donald Elliot, Remarks at the Symposium on "Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics," at Duke University School of Law (Nov. 15, 1990); *see* Antonin Scalia, *Back to Basics: Making Law Without Making Rules,* REGULATION, July/August 1981, at 26 (characterizing the 1970s as the "era of rulemaking")).

18. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

19. *See 2010 Quadrennial Review Report and Order*, *supra* note 8 at para. 2

consumption.[20] Section II of this note will explore the QR's past by looking at the legislative history, the current procedures employed and the procedural history, and the legal history; also, Section II will explain the current media ownership rules and why now is the time for the FCC to realize its QR powers. The next Section of this Note will analyze some of the potential solutions, which can help free up the QR and help the FCC promulgate and enforce new media ownership rules. The final Section will look at how Congress can act to provide procedural protections for the QR, the courts can alter the applicable level of scrutiny applied to the QR, and the FCC can enact a different type of rule to help empower the QR.

II. HOW THE SMALL MOLEHILL OF THE QUADRENNIAL REVIEW GREW TO BECOME A "HULK"-ING MOUNTAIN FOR THE FCC

To fully understand why action is needed to free up the QR, it is important to consider how each potential entity that could provide a solution has interacted with the QR in the past. Analyzing the legislative history will provide context for how Congress created the QR and some of its intentions whereas analyzing the legal history and looking at past challenges to rules proposed under the QR will help provide context for how the courts have approached proposed FCC media ownership rules. It is helpful then to note where each of the major media ownership rules currently stands. Ultimately, analyzing the QR procedures will provide context for how the FCC has wrestled with the QR.

A. Legislative History: How the Quadrennial Review Came to Be and Why It Was Inserted into the Telecommunications Act of 1996

The QR, as embodied in Section 202(h) of the Telecommunications Act, has very little legislative history to explain why it was drafted the way

20. *See* Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33, 37, 61–62 (3d Cir. 2016) ("Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay—creating, in effect, complete deregulation in the industry. This is the administrative law equivalent of burning down the house to roast the pig, and we decline to order it. *However, we note that this remedy, while extreme, might be justified in the future if the Commission does not act quickly to carry out its legislative mandate.*") (emphasis added in italics). Dissenting, Circuit Judge Scirica indicated that an order compelling the FCC to act in regards to creating new broadcast ownership rules is a more efficient avenue than just admonishing the FCC as the majority opinion did.

that it was.[21] It appears that the rule was intended as a tool for large media corporations to get the national television ownership cap removed,[22] or at least progressively raised, every two years.[23] Because the FCC had to "justify" the cap at the level at which it was set, the two lobbyists who drafted Section 202(h) knew that this would be a difficult task for the FCC and would allow for industry challenges to any FCC media ownership determinations.[24] After the first Quadrennial Review, the FCC's determinations were challenged in the D.C. Circuit.[25] These first challenges led to the FCC raising the national media ownership cap ten percent from its previous level.[26] The national television ownership cap was eventually modified and led to a series of Congressional actions which lowered the cap from forty-five to thirty-nine percent, moved the biennial reviews to quadrennial, and lead to several other legal challenges to the findings of the original lawsuits as the FCC applied those holdings.[27]

Andrew Schwartzman, Harold Feld and Parul Desai, who all participated in some of the first cases concerning the QR and communications law experts, state in their article that "[d]espite the attempt to deregulate through the back door, it would seem that the courts have

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21. S. REP. NO. 104-230, at 163-64 (1996) (Conf. Rep.) ("Subsection (h) directs the Commission to review its rules adopted under section 202 and all of its ownership rules biennially. In its review, the Commission shall determine whether any of its ownership rules, including those adopted pursuant to this section, are necessary in the public interest as the result of competition. Based on its findings in such a review, the Commission is directed to repeal or modify any regulation it determines is no longer in the public interest. Apart from the biennial review required by subsection (h), the conferees are aware that the Commission already has several broadcast deregulation proceedings underway. It is the intention of the conferees that the Commission continue with these proceedings and conclude them in a timely manner.").

22. The national television ownership cap limits the total amount of stations that an entity may own; the FCC enforces this rule through a cap which limits the amount of households (39%) that a single entity may reach. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

23. *See* Schwartzman et al., *supra* note 3, at 582–84 (2006).

24. *See Id.* at 583—584 ("For a while, at least, it appeared that Section 202(h) would be a potent weapon. Although the Clinton-era FCC initially construed Section 202(h) as little more than a reporting requirement, News Corp., which reportedly had retained litigation counsel even before the FCC completed its first biennial review, mounted a successful judicial challenge, obtaining a ruling that temporarily gave a broad reading to Section 202(h).").

25. *See* Sinclair Broad. Grp. v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002); Fox Television Stations, Inc. v. FCC (*Fox I)*, 280 F.3d 1027, 1033 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002).

26. *See* Schwartzman et al., *supra* note 3, at 585.

27. Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 99 (2004). The legislation also amended § 202(h) in two ways: (1) making the Commission's biennial review obligation quadrennial; and (2) insulating from § 202(h) review "rules relating to the 39 percent national audience reach limitation." *See id*.; *see also* Prometheus Radio Project v. FCC (*Prometheus I)*, 373 F.3d 372, 389 (3d Cir. 2004) ("In January 2004, while the petitions to review the Order were pending in this Court, Congress amended the 1996 Act by increasing from 35% to 39% the national television ownership rule's audience reach cap in § 202(c)."); Schwartzman et al., *supra* note 3, at 585-86.

resolved ambiguities relating to the interpretation of Section 202(h) in favor of making it a less intrusive provision."[28] While Section 202(h) may have avoided becoming a tool for "deregulatory" purposes, it still remains a potentially powerful tool for the FCC to use to usher in a new era of media consumption. Empowering the QR to fully realize its potential would allow the FCC to change the lens used by the QR; instead of being a deregulatory tool for the industry (as it was intended to be when it was drafted), the FCC can use the QR can become the FCC's ability to regulate the media industry and lead it into the next age of media consumption.

B. Legal History: What Shaped the Quadrennial Review into What It Is Today and How It Is Still Influenced by Past Challenges

Since the inception of the QR, the FCC's proposed new media ownership rules have been challenged regularly. One of the first cases to challenge the proposed FCC media ownership rules was *Fox Television Stations, Inc. v. FCC* (*Fox I*),[29] where the D.C. Circuit found that the FCC failed to sufficiently justify its decision to retain the national TV station ownership,[30] as well as cable/broadcast cross-ownership rules.[31] The FCC argued to the court and in its order that the national television station ownership rule helped prevent broadcasters from maintaining too much control of a market, which would threaten competition and diversity in the media marketplace.[32] In regards to the cable/broadcast cross-ownership rule, the FCC argued a variety of reasons to the court and in its order—generally related to competition and diversity—as to how the rule was in accordance with the public interest, but not *necessary* to the public interest, and thusly the FCC's justifications were found to be unpersuasive.[33] The court found that the cable/broadcast cross-ownership rule was so insufficiently justified that only a complete repeal of the rule was proper—despite a subsequent appeal challenging this assertion.[34]

Of note, this case also established that Section 202(h) carries with it a presumption of "deregulation" indicating that any rule that cannot be

28. *See* Schwartzman et al., *supra* note 3, at 586.

29. *See generally Fox I*, 280 F.3d at 1027.

30. The national TV station ownership rule does provides a cap on the total amount of television stations a single entity may own – based on the percent of households the stations reach. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15 (for more information, please see Part II.C).

31. The cable/broadcast cross-ownership rule prevents a cable station and a broadcast station from being carried and from being owned by the same entity in a local market. Interestingly, the *Fox I* court never indicated what the cable/broadcast cross-ownership rule means in its opinion.

32. *See Fox I*, 280 F.3d at 1041–44.

33. *See id.* at 1051.

34. *See id.* at 1052.

justified as "*necessary* to the public interest"[35] should be repealed.[36] Contrastingly, the FCC interpreted the clause to turn on whether the rule *served a benefit* to the public interest.[37] On appeal, the same court modified its original opinion and indicated that any of its language regarding "necessary to the public interest" and the meaning of that term as construed by the *Fox I* opinion should be removed and was not intended to be precedential.[38] The appellate court in this case was likely highly analytical of any reasoning posited by the FCC because of the presumed deregulatory intent but the "strength" of the deregulatory intent of the QR seemed to weaken after the rehearing and modification of the meaning of the "necessary to the public interest" clause.

Shortly after *Fox I*, the D.C. Circuit heard *Sinclair Board Group, Inc. v. FCC*.[39] The FCC's local television ownership rule that was challenged "allows [for] common ownership of two television stations in the same local market if one of the stations is not among the four highest ranked stations in the market and eight independently owned, full-power, operational television stations remain in that market after the merger."[40] In *Sinclair*, the court determined that the FCC failed to explain why it was not arbitrary and capricious for the category of "non-broadcast media" to be excluded from its "eight voices exception" in the FCC record and the matter should be remanded to the FCC for reconsideration.[41] The court noted that the "eight voices exception" was unjustified and unneeded because there was insufficient explanation in the record to establish that the rule advanced anything that was "necessary to the public interest."[42] The court also employed an indispensable definition of "necessary,"[43] meaning that if the public interest could be served without this rule, then the rule was not necessary and indispensable to the public interest and should be repealed. The court was highly critical of the fact that the FCC failed to justify in the record why there would be two definitions to "voices" depending on the type of proposed rule.[44] Overall, the *Sinclair* court was thoroughly analytical

35. Sinclair Broad. Grp., Inc. v. FCC*,* 284 F.3d 148, 164 (D.C. Cir. 2002) ("This wait-and-see approach, however, cannot be squared with its statutory mandate . . . to repeal or modify any rule that is not necessary in the public interest." (citing Fox Television Stations, Inc., at 1042) (internal quotation marks omitted)) (emphasis added).

36. *See Fox I*, at 1033–34, 1048 ("Finally, and most important to this case, in § 202(h) of the Act, the Congress instructed the Commission, *in order to continue the process of deregulation*, to review each of the Commission's ownership rules every two years . . . .").

37. *See id.*, 280 F.3d at 1050; *See also* DiCola, *supra* note 16.

38. *See* Fox Television Stations, Inc. v. FCC, 293 F.3d 537, 540 (D.C. Cir. 2002). This secondary opinion (the "rehearing" portion of *Fox I*) was a quick appeal from the FCC in order to clarify some language of the *Fox I* opinion.

39. *See* Sinclair Broad. Grp., Inc. v. FCC*,* 284 F.3d 148 (D.C. Cir. 2002).

40. *Id.* at 152.

41. *See id.* at 152, 169.

42. *See id.* at 158–59, 163–64.

43. *See id.* at 159.

44. *See id.* at 162–65.

of any justification posited by the FCC—despite language in the opinion indicating the deferential arbitrary and capricious standard of review.[45]

In 2004, two cases impacted Section 202(h). *Cellco P'ship v. FCC* concerned a different provision contained within the Telecommunications Act, but the case turned on the definition of the word "necessary."[46] The D.C. Circuit found that the FCC's interpretation of the word "necessary" as "furthering the public interest" rather than "indispensable" to the public interest was valid and entitled to deference under the *Chevron* doctrine.[47] Later that year, the D.C. Circuit heard *Prometheus Radio Project v. FCC (*"*Prometheus I*").[48] Generally, the court found most of the radio ownership rules to be sufficiently supported by the record. Contrastingly, the court determined that the television ownership rules were all unsupported.[49] The court further noted that it would be very difficult for the FCC to sufficiently support numerical limits in proposed rules.[50] Additionally, *Prometheus I* ultimately set the definitions to be used in Section 202(h) analysis; "necessary" should follow the *Cellco* definition of "furthering the public interest" and not the *Fox I/Sinclair* definition.[51] Moreover, this court noted that the deregulatory presumption of Section 202(h) did not mandate a repeal of every rule that may have a weak justification because repealing every rule also required a sufficient justification for why that would serve the public interest.[52] In his dissenting opinion, Chief Judge Scirica highlighted the fact that the court was not really engaging in standard arbitrary and capricious review;[53] it was engaging in a very intense and thorough review and substituting its judgment for the FCC's—something it should not be doing.[54]

Later, the Third Circuit heard *Prometheus II*. The FCC attempted a quicker notice and comment type proceeding in an effort to hear some questions relevant to the QR by amending a standing notice of proposed rulemaking to include the fact that the FCC's decision will affect its QR determinations.[55] The court found this "quick" procedure to be contrary to

45. *See id.* at 159.

46. *See* 47 U.S.C. § 161(b) (2015) ("The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."); Cellco P'ship v. FCC, 357 F.3d 88 (D.C. Cir. 2004).

47. *See Cellco P'ship*, 357 F.3d at 97.

48. *See* Prometheus Radio Project (*Prometheus I*) v. FCC, 373 F.3d 372, 389 (3d Cir. 2004).

49. *See generally id.*

50. *See id.* at 430–35.

51. *See id.* at 391–95.

52. *See id.* at 395.

53. The Honorable Anthony Joseph Scirica served as Chief Judge for the Third Circuit Court of Appeals from 2003–2010 and served as a judge for the Third Circuit from 1987–2013. His dissent in *Prometheus I* was authored while he served as Chief Judge, and his dissent in *Prometheus II* was authored while he served as a circuit judge. For the sake of clarity throughout the article, he will be referred to as Chief Judge Scirica.

54. *See Prometheus I*, 373 F.3d at 435.

55. *See* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 445–49 (3d Cir. 2011).

APA notice and comment requirements,[56] discussed *infra*, and that the eligible entry definition employed by the FCC was arbitrary and capricious because there was no support for it in the record.[57] *Prometheus II* did have a slightly different tone to the court's analysis in that the review of the FCC's proposed rules was less searching and seemed to follow closer to the style of review Chief Judge Scirica indicated was proper in *Prometheus I*.[58]

In 2016, the Third Circuit heard *Prometheus III*.[59] To best understand the Court's opinion, it is essential to start with the Court's tone. The Court was mildly irritated that QR related issues were still pending before it.[60] Substantively, the Court presented several important holdings. *Prometheus III* began by declaring that it was "troubling is that nearly a decade has passed since the Commission last completed a review of its broadcast ownership rules."[61] The Court further explained that the QR "broke down" after *Prometheus II*.[62] *Prometheus III* analyzed both the FCC's delay to issue certain orders and the substance of an issued order.[63] In failing to create a new and updated definition of "eligible entry," the FCC cited "data concerns" for why a new definition could not be issued with the current record after Prometheus II; further the FCC promised to gather the data required to issue a new definition and in its next QR.[64] This promise from the FCC was insufficient to prevent the Court from requiring mediation between the parties to determine when the FCC could "promptly" issue an eligible entry definition.[65] The Court explained that the delay in completing a QR was "costly."[66] In an attempt to deregulate the entire field, Petitioners sought a vacatur of every media ownership rule; this attempt did not land with the Court and this relief was rejected.[67] Lastly, the 2014 Joint Sales Agreement Rule—intended to prevent a work-around to the local television ownership rule—was deemed to have been improperly promulgated without considering its effect on the local television ownership rule as part of the QR process and the FCC was required to include the Rule in its QR analysis.[68]

As the legal history indicates, when the FCC proposed new rules under its QR power, immediately thereafter, the rule was challenged. While the reviewing court changed in recent years from the D.C. Circuit to the

56. *See id.* at 449–54.
57. *See id.* at 468–72.
58. *See generally id.*
59. Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33 (3d Cir. 2016)
60. *See, e.g.*, *Prometheus III*, 824 F.3d at 37 ("In some respects the Commission has made progress in the intervening years. In key areas, however, it has fallen short. These shortcomings are at the center of this dispute—the third (and likely not the last) round in a protracted battle over the future of the nation's broadcast industry.")
61. *Id.* at 37.
62. *Id.* at 38.
63. *Id.* at 40.
64. *Id.* at 45–48.
65. *Id.* at 50.
66. *Id.* at 51–52.
67. *Id.* at 52–54.
68. *Id.* at 54–60.

Third Circuit, each reviewing court applied a very thorough and searching look to the proposed rules and generally overturned the proposed rules (or some component thereof) for either substantive and procedural reasons—despite a thorough record, general procedural compliance, and reasoned analysis on the part of the FCC.

C. Current Media Ownership Rules: Complex, Confusing, and Convoluted Principles Governing Media Ownership

During the QR review, the FCC examines five different media ownership rules: the newspaper and broadcast cross-ownership rule ("NBCO"); the dual TV network ownership rule; the local TV multiple ownership rule ("Local TV Rule"); the local radio and TV cross-ownership rule ("LRTCO"); and the local radio ownership rule.[69] Along with these five rules, the FCC also has reviewed its national TV ownership rule ("NTO") under the QR and it is regularly considered with the QR because of its media ownership implications.[70]

The NBCO prevents an entity from owning a newspaper and a broadcast station within the same "contour."[71] In 2006, the FCC attempted to modify this rule, but *Prometheus II* indicated that the FCC failed to comply with applicable notice-and-comment procedural requirements in proposing the new NBCO rule and remanded the matter back to the FCC.[72] Recently, the FCC reiterated the importance of this rule, stating:

> The proliferation of (primarily national) content available from cable and satellite programming networks and from online sources has not altered the enduring reality that traditional media outlets are the principal sources of essential local news and information. The rapid and ongoing changes to the overall media marketplace do not negate the rule's basic premise that the divergence of viewpoints between a cross-owned newspaper and broadcast station "cannot be expected to be the same as if they were antagonistically run."[73]

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69. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

70. *See 2010 Quadrennial Review Report and Order*, *supra* note 8, at para. 7.

71. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15. A contour is a geographic delineation of the market area which the broadcast provider can reach. *See* Prometheus Radio Project (*Prometheus I*) v. FCC, 373 F.3d 372, 387 (3d Cir. 2004). Of note, "contour" was redefined in light of the recent switch to digital television service and precisely how the contour and newspaper service areas overlap. *See 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 131.

72. *See* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 445–54 (3d Cir. 2011) (Scirica, J., concurring in part, dissenting in part) (finding that media owners may not have had formal notice, but were clearly on notice of NBCO rule from numerous prior formal FCC proceedings in which they had participated)

73. *See 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 129.

Further, the recent Order under the 2010 and 2014 Quadrennial Reviews, indicate a slight loosening of the Rule's restrictions; this is exemplified in the new exception to the rule permitting the acquisition of failing entities in the contour and case-by-case analysis of waivers to the Rule.[74]

The dual TV network ownership rule prevents any one of the top four broadcast networks (ABC, CBS, Fox and NBC) from merging together.[75] This rule was retained, despite a challenge to FCC reasoning, in *Prometheus II* because of the fact that these four broadcast networks clearly reach a larger audience than any other network and because any merger between these networks—due to the vertical integration of the four broadcast networks—would decrease diversity, programming and localism.[76]

The Local TV Rule states that a single entity can own two stations in a single designated market area ("DMA"), if: (1) "the digital [noise limited service contours] of the stations (as determined by [47 CFR § 73.622(e)] do not overlap; or (2) at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the DMA following the combination (the eight independent voices test)."[77]

The LRTCO employs a "sliding scale" to determine the maximum amount of radio and TV stations that can be owned by a single entity.[78] Under the LRTCO, if there are twenty or more independent media voices—defined as "full power TV stations and radio stations, major newspapers, and the cable system in the market"[79]—then an entity may own two TV and six radio stations or one TV and seven radio stations; [80] if there are between ten and twenty media voices, then an entity may own two TV and four radio stations; and if there are less than ten media voices, then an entity may own two TV stations and one radio station.[81] Also, an entity owning any local TV and radio stations must comply with the Local TV Rule and the local radio ownership rule.[82] The local radio ownership rule also employs a sliding scale, which outlines the number of radio stations an entity may own, depending on the size of the market.[83] Under the local radio ownership rule, there are four different tiers that break down the size of the market and the applicable ownership caps ranging from a maximum of eight stations that can be owned (if the market has forty-five or more stations) to a maximum

74. *See id.* at para. 132–33.

75. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

76. *See Prometheus II*, 652 F.3d at at 463-64; *see also 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 218.

77. *2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 7–18 (brackets and parenthesis added); *see also Prometheus II*, 652 F.3d at 458–61.

78. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

79. *See id.*

80. *See 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 198.

81. *See FCC's Review of the Broadcast Ownership Rules*, *supra* note 15.

82. *See id.*

83. *See id.*

of five stations (if the market has fifteen or less stations).[84] Also, the local radio ownership rule prevents an entity from concentrating their ownership in one radio service (AM or FM) and places certain "sub-caps" on each radio service.[85] The rules, complex in nature, become even more complicated knowing that they are subject to regular review, amendment or repeal depending on how the upcoming QR goes.

D. Chains Made from Kryptonite: The Procedures That Bind the Quadrennial Review and How They Have Changed from Their Original Implementation

From the text of the Telecommunications Act, there is little to indicate the precise procedures the QR is supposed to follow. The FCC generally has elected to follow Section 553 informal rulemaking, notice-and-comment procedures.[86] Recently though, the FCC has self-imposed certain other procedures in order to create a more thorough record.[87]

1. Originally Prescribed Procedures and the "Ossification" Plague

Section 202(h) contains no direct instructions for the FCC for how to hold a QR and the proper procedures to apply. With that being said, in *Prometheus I*, the Third Circuit noted that it was proper for the FCC to follow Administrative Procedure Act ("APA") Section 553 procedures.[88] But following the Section 553 informal procedures causes much of the problems for the FCC in the QR; this is best evidenced in *Prometheus I* when the Third Circuit struck down the proposed rules.[89]

Part of the reason why the FCC has struggled in promulgating new media ownership rules is due to the fact that informal rulemaking has

84. *See id.*

85. *See id.*

86. *See, e.g.*, Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 411 (3d Cir. 2004). Formal rulemaking must be explicitly triggered by precise language, such as "to be made on the record after opportunity for an agency hearing," in the rulemaking section of the agency's organic statute. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGALCONTEXT 48 (Robert C. Clark et al. eds., 2d ed. 2015). Formal rulemaking "contemplate[s] a hearing 'on the record' that closely resembles a judicial trial" and is governed by §§ 556 and 557 of the APA. *See id.* Informal rulemaking—or notice and comment rulemaking—is governed by § 553 of the APA and requires that "notice of a proposed rule be published in the Federal Register and must include the content of the rule, instructions for submitting comments, and other pertinent information." *See id.* at 47. Those interested in participating must be given an opportunity to submit written comments. *See id.* The agency must also explain why it adopted its precise final rule as part of the text of its final rule. *See id.*

87. *See* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 449 (3d Cir. 2011).

88. *See Prometheus I*, 373 F.3d at 411.

89. *See id.*

changed from its original conception. Notice-and-comment procedures were meant to be an efficient method of promulgating rules for an agency in an area of its expertise.[90] But as agencies began to promulgate rules in increasingly technical areas, agencies needed increased public participation from outside scientists for information, which caused heightened public analysis on the informal rulemaking process.[91] In effect, this changed a set of general procedures, which was intentionally deferential to the agency promoting its efficiency and expertise, to a highly involved process requiring public input and constant scrutiny.[92] The constant public scrutiny heightened awareness of regulated entities and created a system where every proposed rule was the subject to a legal challenge.[93] This shift is known as the "ossification" of the rulemaking process—a quick, fluid and efficient process has become solid and stagnant.[94]

Notice-and-comment rulemaking has never been the same. Across the board, many agencies have felt the consequences of ossification.[95] Specifically in the QR process, ossification required Congress to shift the biennial process to a quadrennial process, as we know it now.[96]

2. FCC's Self-Imposed Procedures as a "De-Ossification" Tool

To fight ossification and combat the stiffness caused by the increased scrutiny, the FCC has self-imposed additional procedures that go above the bare requirements to comply with Section 553. Most prominent amongst these efforts are the various public hearings held by the FCC across the country where interested parties can submit oral testimony and written materials to the FCC for its consideration in the QR.[97] Additionally, the FCC creates a dense record and iterates a thorough statement of basis of purpose in each of its proposed rules; all of these actions are undertaken with the intent to sufficiently support any conclusions the FCC makes. [98] The FCC

90. McGarity, *supra* note 17, at 1398.
91. *Id.* at 1398.
92. *Id.* at 1401.
93. *Id.* at 1401.
94. *Id.* at 1386 ("Professor E. Donald Elliott, former General Counsel of the Environmental Protection Agency, refers to this troublesome phenomenon as the "ossification" of the rulemaking process.")
95. *See generally* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012)
96. *See* Schwartzman et. al., *supra* note 3, at 585; *cf.* Fox Television Stations, Inc. v. FCC (*Fox I)*, 280 F.3d 1027, 1039 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("We appreciate that § 202(h) requires the Commission to undertake a significant task in a relatively short time, but we do not see how subjecting the result to judicial review makes the Commission's responsibility significantly more burdensome, let alone so formidable as to be improbable [that Congress intended to not have the FCC determinations subject to judicial review].").
97. *FCC's Review of the Broadcast Ownership Rules* , *supra* note 15.
98. *See 2014 Quadrennial Review Report and Order*, *supra* note 9, at para. 9–10.

has yet to see any material benefit from these heightened procedures, but their potential benefits are clear.[99] With the extra procedures, the FCC creates a more thorough record and enhances its own understanding of the various stakeholders, which—in theory—help it sufficiently support its QR proposals.

III. THE TIME IS NOW FOR THE FCC TO REALIZE ITS QUADRENNIAL REVIEW POWERS.

In *Fox I*, the court struck down the broadcasters' arguments that the scarcity rationale, which justifies the FCC's ability to limit the free speech rights of broadcasters through the national television ownership cap, as no longer persuasive and can no longer justify the abridgment of free speech through the FCC caps.[100] The broadcasters attempted to argue that the scarcity rationale in past Supreme Court cases, which found the FCC had the power to limit free speech via the national television ownership cap, was no longer applicable because advancements in the marketplace provided for a sufficient number of other broadcasters to not threaten the availability of viewpoints for consumers.[101] The *Fox I* court rejected this argument—though agreeing with its substantive position—noting that whether or not the scarcity rationale continues to "make sense" is not for the court to decide because the Supreme Court already has.[102]

The debate as to why media ownership rules are important has been settled—but it was settled over a decade ago in the first case challenging the QR. More media is consumed over the Internet. The *Fox I* court noted that the scarcity rationale is implicated in ownership caps because of "the limited physical capacity of the broadcast spectrum."[103] Media consumed over the Internet, does not threaten the "limited physical capacity of the broadcast spectrum" in the same way that justified the continued employment of the scarcity rationale.[104]

Is now the time for the FCC to abandon the scarcity rationale and employ a new rationale for its media ownership rules that restrict the free speech of broadcasters? Is now the time for the FCC to create a new policy blending the scarcity rationale with another to continue its ability to protect the consumers' right to a variety of viewpoints? Is now the time for the FCC to lower the media ownership caps because broadcasters can circumvent these caps by "broadcasting" in an "uncapped" manner through the Internet? Is now the time to abandon all media ownership caps because the Internet provides more opportunities to viewpoints than the limited broadcast

99. *See supra* Part II.B.

100. *See Fox I*, 280 F.3d at 1045–46.

101. *See id.* at 1045.

102. *Id.* at 1046 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994)) (affirming scarcity rationale).

103. *Id.*

104. *See 2014 Quadrennial Review Report and Order*, *supra* note 9, at para. 1–2.

spectrum ever could and there is no longer threat to a variety of viewpoints for the consumers?

No matter what the answer is to the above questions, the time *is* now for the FCC to realize its QR powers to answer any of those questions because if the QR continues to be stagnant, the old rules are not going to properly balance the First Amendment free speech right of broadcasters with the First Amendment right of consumers to have access to a variety of viewpoints.

A. In a Flash, Congress Can Prescribe Clean Air Act-Like Hybrid Rulemaking Procedures and Provide More Power to the FCC During the Quadrennial Review.

As mentioned before, there are various potential solutions, which Congress, the courts, and the FCC can implement in order to guide the QR to freedom from its current confines.

Hybrid rulemaking procedures[105]—a higher standard for the QR that must comply with informal notice-and-comment procedures of Section 553—could help the FCC more effectively promulgate media ownership rules.[106] Congress mandating the FCC utilize hybrid rulemaking is not entirely the solution because forced extra procedures will not help the QR alone. But the hybrid rulemaking procedures within the Clean Air Act ("CAA")[107] carry an advantage for the Environmental Protection Agency ("EPA"); if the EPA follows the hybrid rulemaking procedures, most procedural infirmities that occur during CAA rulemaking do not cause any proposed rule to be vacated, remanded, or repealed.[108] A similar provision protecting the FCC's QR practices would be beneficial.

105. Hybrid rulemaking procedures are those which "go beyond the requirements of notice and comment, but are less formal than a hearing under §§556 and 557[]" as required for formal rulemaking. *See* Glicksman & Levy, *supra* note 86, at 48. Hybrid rulemaking can be imposed by organic statute or can be self-imposed by the agency through the adoption of regulations governing its rulemaking process. *See Id.*

106. *See id.* at 361–62.

107. While the CAA is regularly involved in litigation, the majority of this litigation centers on the SIPs and FIPs the EPA mandates—not the structure of the hybrid rulemaking process. "A State Implementation Plan (SIP) is a collection of regulations and documents used by a state, territory, or local air district to reduce air pollution in areas that do not meet National Ambient Air Quality Standards, or NAAQS." *Basic Information About Air Quality SIPS*, U.S. EPA, https://www.epa.gov/sips/basic-information-air-quality-sips (last visited Oct. 18, 2017). "A Federal Implementation Plan (FIP) is an air quality plan developed by EPA under certain circumstances to help states or tribes attain and/or maintain the National Ambient Air Quality Standards (NAAQS) for common air pollutants." *Id.*

108. *See* 42 U.S.C. § 7607(d)(9)(D) (2015).

1. Clark Kent or Superman? The FCC's Self-Prescribed Procedures Are Nearly the Same as the Clean Air Act's Hybrid Rulemaking Requirements, But Without the Super-Impact.

The CAA mandates procedures that are more rigorous than Section 553 informal rulemaking procedures, but less stringent than formal rulemaking guided by Sections 556 and 557[109]—thusly coined "hybrid" rulemaking procedures. The EPA, as required by the CAA, must work with states to create various statewide, regional, and national plans (known as state implementation plans, or "SIPs" and "FIPs"), which reduce the levels of various air pollutants by establishing National Ambient Air Quality Standards ("NAAQS") that apply to pollution generated by both stationary and mobile sources.[110] The EPA is required to hold hearings with the state and has a higher level of support required in its final reports and orders.[111] These requirements exceed the informal notice-and-comment procedures contained within Section 553.

Similar to those requirements contained in the CAA's hybrid rulemaking system are the self-prescribed procedures the FCC has imposed on previous QRs. As enumerated above, the FCC has held numerous public hearings across the country to accumulate further information,[112] has generated dense, thorough records, and has explained a thorough basis and purpose for all proposed rules[113]—all of which are requirements for the EPA under the CAA's hybrid rulemaking system.[114]

These procedures exceed the bare minimum required in Section 553 informal rulemaking. The FCC effectively has self-imposed hybrid rulemaking procedures similar to those contained within the CAA. But, because the procedures are self-prescribed and not statutorily mandated, the FCC does not have the opportunity to enjoy the full benefit that the CAA affords the EPA for using the hybrid procedures.[115]

Under the CAA's hybrid approach, courts can only reverse or remand an agency action in narrow circumstances outlined in 42 U.S.C. § 7607(d)(9)(D): if the failure to follow the proscribed procedure was arbitrary and capricious, and an objection of "central relevance" to the rule comes before judicial review but after public hearing, and if ". . . the errors

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109. *See* 42 U.S.C. § 7607(d) (2015); 5 U.S.C. §§ 553, 556-57 (2016).

110. *See Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act [https://perma.cc/Q5DH-82PJ] (last visited Jan. 25, 2016).

111. *See* 42 U.S.C. § 7606 (2015).

112. *See FCC's Review of the Broadcast Ownership Rules* , *supra* note 15.

113. *See 2014 Quadrennial Review Report and Order*, *supra* note 9, at para. 9–14; *see generally*, *id.* (totaling over 300 pages).

114. 42 U.S.C. § 7607(d)(9)(D) (2015).

115. *See* Michael Dingerdissen, *Third Circuit Uses Procedural Grounds to Reject FCC's Weakening of Media Cross-Ownership Rules for A Second Time in Prometheus Radio Project v. FCC*, 6 J. LEGAL TECH. RISK MGMT. 1, 36–46 (2012); *see generally* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431 (3d Cir. 2011).

were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."[116] These circumstances arise in very few cases, and generally, when procedural infirmities are alleged, the court finds the error outside of the scope of required agency reconsideration.[117]

Air Pollution Control v. U.S. EPA highlights how impactful a procedural error must be in order for a court to overturn an agency proposal under section 7607(d)(9)(D).[118] On all alleged procedural infirmities committed by the EPA, the Sixth Circuit ruled in favor of the EPA after Jefferson County submitted its required "petition for interstate pollution abatement, filed pursuant to Section 126 of the Clean Air Act."[119] Jefferson County indicated that the EPA exceeded the statutory and court ordered deadlines to respond to Jefferson County's petition, but the county failed to establish that the procedural infirmity itself was "arbitrary and capricious" of the EPA because the EPA had "legitimate reasons" for its delay.[120] This provides a degree of deference for the EPA in any alleged procedural infirmities—along with the deference that would be accorded to the EPA for its substantive findings that are supported in its record.

Also, Jefferson County argued that when the EPA modified the applicable criteria for analyzing submitted petitions after Jefferson County's submission, it was denied due process.[121] In rejecting this claim, the court explained that "[t]he limited review authorized by section 7607(d)(9)(D) does not compel reversal here.[122] The procedures employed by the EPA, while not ideal, generally ensured that all parties were given ample opportunity to submit information and to comment on the EPA's determinations."[123] Further, the court even suggested that "Jefferson County's real quarrel seems to lie with the EPA's substantive

116. 42 U.S.C. § 7607(d)(8), (d)(9)(D)(i)-(iii) (2015).

117. *See* North Dakota v. U.S. EPA, 730 F.3d 750 (8th Cir. 2013) *cert. denied sub nom.* N. Dakota v. EPA, 134 S. Ct. 2662 (2014); Air Pollution Control Dist. v. U.S. EPA, 739 F.2d 1071, 1079 (6th Cir. 1984) ("Because the statute's conditions are stated conjunctively, a reviewing court may not reverse a decision of the EPA solely because the court determines that the Agency has not observed the procedures required by law. The EPA's failure to observe proper procedures must be arbitrary and capricious, and essentially, go to the heart of the decision-making process to justify reversal."); *see also* Am. Petroleum Inst. v. Costle, 665 F.2d 1176, 1184 (D.C. Cir. 1981) ("Reversal for procedural defaults under the Act will be rare because *the court must first find that the Administrator was arbitrary or capricious, that he overruled a relevant and timely objection on the point in question, and that the errors were so significant that the challenged rule would likely have been different without the error*." (emphasis added)).

118. *See generally Air Pollution Control Dist.*, 739 F.2d at 1079.

119. *See id.* at 1074, 1094.

120. *See id.* at 1079–80.

121. *See id.* at 1081–82.

122. *Air Pollution Control Dist.*, 739 F.2d at1082.

123. *See id.* at 1082.

determinations."[124] A similar assertion was made by the Court in *North Dakota v. U.S. EPA*, below.[125]

The *Air Pollution Control* case indicates a seemingly higher burden of pleading and proof on the petitioner when there is an alleged procedural infirmity in EPA determinations that follow hybrid rulemaking procedures, which appears to be more akin to the pleading with particularity requirement—a heightened burden of pleading—in cases of fraud or mistake.[126] This serves as a protection for the EPA, whose compliance with the extra, heightened procedures actually opens the door to more allegations of procedural error.

More recently, in *North Dakota v. U.S. EPA*, the Eighth Circuit highlighted the burden on a challenging party to indicate that the procedural violation was substantial enough that, were the violation to have not occurred, the rule would be "significantly changed,"[127] another element of the CAA procedural protection provision. After North Dakota submitted its SIPs for the reduction of pollutants outlined in the CAA, the EPA dismissed the North Dakota SIPs and issued its FIP in the same action.[128] The court noted that when a procedural violation is asserted, there must be some "demonstrat[ion] that vacating the final rule based upon this alleged procedural error is appropriate[]"[129] which effectively raises the bar on any entity alleging EPA procedural violations in CAA actions, as the standard requirement would merely be indicating a procedural violation exists and the court can decide on a less severe remedy. Here, the court needs to find an arbitrary and capricious procedural violation that had a substantial impact on the final rule before finding a remedy.

2. The Clean Air Act's Procedural Protections Provision Would Greatly Help the FCC and the Quadrennial Review.

Congress should pass new legislation which codifies the CAA hybrid rulemaking provisions in Section 202(h) because the FCC already follows these procedures and would see great benefit from the procedural protections. This proposal would likely be amenable to the FCC as it would "reward" the effort they have put into QRs. However, Congress may be

124. *See id.*

125. *See also* North Dakota v. U.S. EPA, 730 F.3d 750, 759 (8th Cir. 2013) *cert. denied sub nom.* N. Dakota v. EPA, 134 S. Ct. 2662 (2014) ("Although '[i]t may be poor policy to try to distinguish between the SIP and FIP in a single action [,]' *Oklahoma v. EPA,* 723 F.3d 1201, 1223 (10th Cir.2013), the State has failed to demonstrate that vacating the Final Rule based upon this alleged procedural error is appropriate.").

126. *See* FED. R. CIV. P. 9.

127. *See North Dakota,* 730 F.3d at 758–59 (quoting 42 U.S.C. § 7607(d)(9)(D)).

128. *See id.*

129. *See id.* at 759.

disinclined to amend a single, smaller provision of the 1996 Telecommunications Act. Moreover, regulated entities may also be disinclined to pass new legislation because it would further shield—in a Captain America-type way—FCC determinations from judicial review and potential reversal.

In applying these sentiments to the QR, the potential benefits become readily apparent. Both *Air Pollution Control* and *Prometheus II* dealt with time-based procedural infirmities.[130] While *Air Pollution Control* centered on the EPA exceeding statutory and court ordered deadlines and *Prometheus II* centered on the FCC failing to meet statutory deadlines, the *Air Pollution Control* court's reasoning is highly illuminating. The *Air Pollution Control* court was very critical of the fact that at no point did Jefferson County indicate that the EPA's failure to meet deadlines was because of "arbitrary and capricious" decision-making.[131] The court found that because there were "legitimate reasons" for the delay, the EPA's failure to meet the deadlines was presumptively not "arbitrary and capricious."[132]

This thinking could have changed the outcome of *Prometheus II*. In his dissent, Chief Judge Scirica opined that the challenging entities had notice of the proposed changes to the NBCO rule, and that the quicker notice-and-comment procedures employed by the FCC sufficiently apprised them of the ongoing nature of its consideration.[133] Chief Judge Scirica explained that there were several decisions over a long period of time that highlighted the ongoing nature of the FCC's consideration of the NBCO rule and that the further notice of proposed rulemaking (FNPRM) in 2006 was sufficient to keep the entities on notice.[134] In the context of Section 7607(d)(9)(D) procedural protections, the FCC had a "legitimate" reason for its employment of this procedure—it believed that the entities were sufficiently on notice—making the alleged NBCO procedural error insufficient to remand back to the FCC.[135]

North Dakota v. EPA indicates that unless the challenging entities could explain how the procedural violation was substantial enough that the rule would be "significantly changed," there could be no remand either.[136] The broadcasters in *Prometheus II* would have likely not have been successful in meeting this burden as the proposed NBCO rule in question was the same rule that was proposed a few years earlier—thus, demonstrating how the "procedural error" did not have a significant,

130. *See generally*, Air Pollution Control Dist. v. U.S. EPA, 739 F.2d 1071, 1079 (6th Cir. 1984); Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431 (3d Cir. 2011).

131. *See Air Pollution Control Dist.*, 739 F.2d at 1079–80.

132. *See id.*

133. *See Prometheus II*, 652 F.3d at 472–75.

134. *See id.*

135. *See generally id.*

136. *See* North Dakota v. U.S. EPA, 730 F.3d 750, 758–759 (8th Cir. 2013) *cert. denied sub nom.* N. Dakota v. EPA, 134 S. Ct. 2662 (2014) (quoting 42 U.S.C. § 7607(d)(9)(D)).

substantive impact.[137] Without evidence of how the procedural error created a substantive impact on the final rule, the broadcaster's claims would have been insufficient to warrant a remand back to the FCC—if there were procedural protections for the FCC like those contained in the CAA.

Some degree of procedural protections will help the FCC be more effective in using its QR powers. While still subject to scrutiny regarding the substantive nature of its proposed rules, removing the power of regulated entities to challenge minor procedural infirmities of the FCC in the QR, would empower the FCC to fully realize the potential latent in the QR.

B. The Judicial System Can Lighten the Level of Scrutiny Applied to FCC Proposed Media Ownership Rules from the Quadrennial Review.

More broadly, the procedural protection provisions of the CAA could help protect the FCC's proposed media ownership rules by altering the applicable lens of judicial scrutiny for proposed rules or modifications under the QR. The procedural protections provision of the CAA also stands for "[t]he essential message of so rigorous a standard is that Congress was concerned that EPA's rulemaking not be casually overturned for procedural reasons, and we of course must respect that judgment."[138] This sentiment of respect to the agency's findings can be applied to the level of scrutiny applied by the courts in reviewing proposed media ownership rules during the QR.

1. The Current Scrutiny Applied to Proposed Media Ownership Rules Is Akin to A "Hard Look" and Should Be Lightened and More Deferential.

In *Prometheus I*, then-Chief Judge Scirica in his dissent, questioned the level of scrutiny the court was applying, arguing that it was improper and noting that he would have found that each proposal was sufficiently supported in the FCC record.[139] The "rigorous standard" for finding an error embodied in the CAA procedural protections provision, as applied to the QR, may guide the courts to employ a different lens of scrutiny which may uphold more FCC proposed rules—as Chief Judge Scirica would have held.

Even beyond the judicial scrutiny in the procedural protections provision, altering how thoroughly courts analyze FCC proposed rules may create a more effective QR. A "hard look" from the courts at agency action

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137. *See Prometheus II*, 652 F.3d at 474 ("The *2006 FNPR* made clear that, on remand from *Prometheus I,* the FCC was planning a significant revision of the NBCO rule noticed by the *2001 NPRM* and appearing in the *2003 Order*, and was again considering tailoring cross-ownership limits to local markets. *See 2006 FNPR,* 21 FCC Rcd at 8848, ¶ 32.")

138. *See* Sierra Club v. Costle, 657 F.2d 298, 391 (D.C. Cir. 1981).

139. *See* Prometheus Radio Project v. FCC (*Prometheus I)*, 373 F.3d 372, 435 (3d Cir. 2004).

is not proper, and should be a more deferential approach to the agency determination[140]—should the agency have followed proper procedures (which the *State Farm* factors ensure).[141] But a "hard look" at the FCC's proposed media ownership rules is what occurs currently.

In *Prometheus I*, Chief Judge Scirica questioned the level of scrutiny being applied to FCC proposed rules:

> In my view, the Court's decision has upended the usual way the judiciary reviews agency rulemaking. Whether the standard is "arbitrary or capricious," "reasonableness," or some variant of a "deregulatory presumption," the Court has applied a threshold that supplants the well-known principles of deference accorded to agency decision-making. In so doing, the Court has substituted its own policy judgment for that of the Federal Communications Commission and upset the ongoing review of broadcast media regulation mandated by Congress in the Telecommunications Act of 1996.[142]

Chief Judge Scirica went further to explain that "[a]llowing the biennial (now quadrennial) review process to run its course will give the Commission and Congress the opportunity to monitor and evaluate the effect of the proposed rules on the media marketplace."[143]

Chief Judge Scirica argued that the way that the court analyzed the FCC's proposed rules was improper and harmed the effectiveness of the QR.[144] This line of argument—that courts are applying improperly thorough scrutiny, which then harms agency effectiveness—is exemplified best in *Ethyl Corp v. EPA*.[145] In *Ethyl Corp*, three Judges of the D.C. Circuit sitting *en banc* all posited different levels of scrutiny that the court should engage in when analyzing proposed EPA rules that followed Section 553 notice-

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140. *See* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit,* 90 GEO. L.J. 2599, 2631–32 (2002).

141. Iterated in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Supreme Court laid out a four part series of questions to ask in determining whether or not the agency rationale for any decision was arbitrary and capricious. The questions are: (1) did the agency rely on improper factors; (2) did the agency fail to consider a key component of the problem it was facing; (3) did the agency's final decision run contrary to the evidence before it; and (4) did the agency employ an explanation "so implausible" that it cannot be a result of the agency's expertise in the subject area and the data it had? *See* Glicksman & Levy, *supra* note 86, at 250; *Prometheus I*, 373 F.3d 440–41 (citing *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43).

142. *See Prometheus I*, 373 F.3d at 435.

143. *See id.*

144. *See id.* at 440 ("Although there are some similarities, I differ from the majority on the applicable standard of review. Moreover, I believe the majority's subsequent analysis oversteps the appropriate standard. In doing so, the majority substitutes its own judgment for policy decisions meant to be resolved by the Agency.").

145. *See* Ethyl Corp v. EPA, 541 F.2d 1, 66–70 (D.C. Cir. 1976) (Bazelon, C.J., concurring).

and-comment procedures.[146] The views ranged from a thorough scrutiny of the agency's proposed reasoning including highly technical areas of science, to avoiding the technical areas and analyzing strictly procedural compliance and thoroughness of reasoning.[147]

Since *Ethyl Corp*, the applicable lens of judicial scrutiny has been an issue for agencies attempting to promulgate rules. In the context of the QR, were the courts to lighten their scrutiny requiring a doctrinal shift, admittedly a tall task, the benefits would be enormous.

2. Lighter Scrutiny with Greater Deference to FCC Conclusions Would Allow the FCC to Be More Effective in Promulgating Rules During the Quadrennial Review.

Altering the applicable lens of judicial scrutiny has been considered as a potential solution to the ossification of the rulemaking process. In their articles targeting "deossification," four of seven solutions Professor proposes target the courts and their review of agency determinations and Professor McGarity discusses how altering the judicial review process may be a solution.[148] Specifically, in the context of rules proposed under the QR, *Fox I*, *Sinclair*, and *Prometheus I* all could have had the proposed rule upheld if the lens of review analyzing the substantive reasons for the proposed rule was slightly different. All the cases held that the FCC articulated at least *some* reasoning and rationale supporting its proposals, but that the record was insufficient to support those reasons, and thus, the rules

146. *See generally id*.

147. *See generally id.*

148. *See* Pierce, *supra* note 95, at 71–93; McGarity, *supra* note 17, at 1453 (employing a simile to describe proper lens of judicial review as "pass-fail prof" rather than current standard of "hard look" of evidence to indicate that despite disagreement with agency findings, a "pass-fail-prof"-court should only overrule if finding is arbitrary).

were remanded.[149] With a different scope of analysis, it is possible that the FCC's rules would have been upheld, which would have benefitted the QR because instead of employing the "hard look" scrutiny that has caused the FCC's rules to be rejected, the proposed rules would have stood. Generally, after the rules have been rejected by the court, the FCC reconsiders the matter in the next QR. If they were instead upheld, the FCC would have a standing baseline upon which it could build in subsequent QRs, which then could allow the FCC to allocate its resources to creating new rules to help transition to the Internet media age.

In *Prometheus I*, Chief Judge Scirica issued a forty-five page dissent finding each of the proposed rules amply supported in the FCC record.[150] His dissent started by iterating what he believed to be the proper scope of analysis—"arbitrary and capricious review" where the agency considers the relevant *State Farm* factors in determining whether or not the agency's reasoning was arbitrary and capricious:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.[151]

The majority posited a similar standard.[152] However, the majority and dissent differed on the analysis applied to the evidence contained in the FCC

149. *See* Fox Television Stations, Inc. v. FCC (*Fox I)*, 280 F.3d 1027, 1036 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("The Commission gave three primary reasons for retaining the NTSO Rule. . . . In the *1998 Report* the Commission decided that retaining the CBCO Rule was necessary to prevent cable operators from favoring their own stations and from discriminating against stations owned by others. *1998 Report* ¶ 104 ('current carriage and channel position rules prevent some of the discrimination problems, but not all of them')."); Sinclair Broad. Grp. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) ("Based on its finding that '[b]roadcast stations, particularly television stations, reach large audiences and are the primary source of news and entertainment programming for Americans,' and also because 'there remain unresolved questions about the extent to which [non-broadcast television] alternatives are widely accessible and provide meaningful substitutes to broad stations,' the Commission determined that the only medium to be counted for purposes of the 'eight-voices exception' is broadcast television, unlike the minimum voices exception in the radio-television cross-ownership rule, where certain local newspapers and cable television stations are counted."); *Prometheus I*, 373 F.3d at 386–88 (explaining FCC findings and reasoning in articulating its new media ownership rules); Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 440–42 (3d Cir. 2011) (also explaining FCC findings and reasoning in articulating its new media ownership rules).

150. *See generally Prometheus I*, 373 F.3d at 435-80 (majority opinion).

151. *See Prometheus I*, 373 F.3d at 440–41 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

152. *See Prometheus I*, 373 F.3d at 389-90.

record. The dissent argued that while there may have been errors in the reasoning of the FCC or questions that the court felt the FCC should have answered, those matters did not rise to the level of "arbitrary and capricious decision making" as indicated by the *State Farm* factors.[153] The majority, on the other hand, indicated that these unanswered or unaddressed elements of consideration were sufficient to overrule the FCC's determinations.[154]

The FCC in *Fox I* attempted to argue that its review of the media ownership rules under Section 202(h), and its determinations therein, should not be subject to judicial review.[155] The court rejected the FCC's arguments regarding statutory construction and the pragmatic argument advanced by the FCC to support its assertion and held that any determination under Section 202(h) is subject to judicial review.[156] Most important to this matter was the dismissive tone used by the court in rejecting the arguments advanced by the FCC.

In regards to the "pragmatic argument" employed by the FCC, the court held that the fact that the biennial reviews were subject to judicial review does not make the FCC's task more "burdensome" than if the final determinations of the FCC were not subject to subsequent judicial scrutiny.[157] This view, especially given the recent history of the QR and its numerous legal challenges, likely no longer would still be posited by the courts and was somewhat questionable to begin with considering the first review of media ownership rules was challenged and the subject of that very opinion. Overall, the court dismissed all of the legal and statutory construction arguments advanced by the FCC because of "the presumption that final agency action is reviewable" and the arguments advanced by the FCC did not provide "clear and convincing evidence" that this presumption should be overwhelmed.[158] Again, this conclusion by the court is questionable. Perhaps these arguments advanced by the FCC in *Fox I* should be given more credence or be regarded as further persuasive evidence that the current level of scrutiny applied is too demanding and should be lightened—at least to some degree.

While altering the level of judicial scrutiny is a broad solution, and would be difficult to implement,[159] its potential benefits to the QR and the FCC—and other agencies—is undeniable.

153. *See id.* at 445.
154. *See generally id.*
155. *See Fox I*, 280 F.3d at 1038–39.
156. *See id.*
157. *See id.* at 1039.
158. *See id.* at 1038–39 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967)).
159. *See* Pierce, *supra* note 95, at 95.

C. The FCC Can Elect to Issue Temporary Rules Along with Each Quadrennial Review to Avoid Immediate Legal Challenges to Its Proposed Rules.

Temporary rules are inherently less binding, expiring after a certain period of time.[160] By making the rules promulgated as part of the QR less binding and subject to immediate repeal if a secondary notice and comment series is not performed, regulated entities may be less "inclined to challenge [the rules]."[161] Professor McGarity discusses the fact that if the regulated entities know that a rule is subject to repeal, they may be less inclined to challenge it, especially provided the later, guaranteed notice and comment period.[162] While this seems somewhat circular in the context of the QR, which is already a later, guaranteed notice-and-comment period, "temporary rules" can still provide some benefit for the FCC and the regulated entities.

1. Temporary Rules Can Create an Opportunity for the FCC to "Experiment" and Gather Data Regarding Potential Rules or Amendments.

By changing the effectiveness and permanency of the FCC proposed rules under the QR, regulated entities may be less inclined to challenge the proposed rule. Primarily, this would allow the FCC to propose and issue rules that would be revisited at the next QR. Were the rule not to accomplish its purpose, the FCC—and regulated entities—would see the rule disappear with no further discussion. This solution would be amenable to both the FCC and the regulated entities. In order to make the temporary rule binding, the FCC would need to at the next QR propose the rule as "binding." This would give regulated entities a second bite at the apple to try and prove that the rule is not "in the public interest." These entities would be able to challenge the rule at its temporary stage and again when the rule was re-proposed as a binding rule. In the interim, the FCC would also be able to study the effects of the temporary rule as potential support to its final rule with sufficient evidence to survive legal challenges.[163]

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160. *See* McGarity, *supra* note 17, at 1460 (proposing "tentative" rules as a solution for "deossification.")

161. *See id.*

162. *See id.*

163. *See, e.g.*, Fox Television Stations, Inc. v. FCC (*Fox I)*, 280 F.3d 1027, 1042 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("As the networks point out, however, 'such figures alone, without some *tangible evidence* of an adverse effect on the market, are insufficient to support retention of the Cap.' Finally, the Commission's reference in the *1998 Report* to the national advertising and the program production markets is wholly *unsupported and undeveloped*. . . . Consequently, we must conclude, as the networks maintain, that the Commission has no valid reason to think the NTSO Rule is necessary to safeguard competition." (emphasis added) (citation omitted)).

Essentially, the temporary rules would provide an "experiment period" for the FCC and regulated entities.[164] Temporary rules, used as experimental rules, are not very common and comprise a fraction of rules issued by an agency.[165] These temporary rules could empower the FCC to grant short-term, limited waivers to some of its standing rules—which follows along with the "deregulatory presumption" of the QR.[166] These "waiver periods" could then be analyzed to see if the FCC's goals were served or if the waiver were not "in the public interest." Alternatively, the FCC could issue rules, which lower various ownership caps in specific markets to determine if there is any benefit seen in "diversity, localism and competition." If the FCC did see the benefits it desired in the experimental market, it could reassert that temporary rule in the following QR and make the rule binding because it would have adequate support on the record from the experimental period to survive a subsequent challenge.

2. The Data from the Experimental Period Can Be Used by the FCC to Support Final Rules and Reduce Subsequent Litigation.

Collecting information during this experimentation period would allow the FCC to issue binding rules, which could survive legal challenges while allowing regulated entities a second opportunity to petition for altering a rule or maintaining it. As Professor McGarity further argued, temporary rules would have even greater value where "new information is constantly becoming available."[167] For the FCC and the QR, gathering more data during the "experimental" temporary rules period follows closely with this idea of "new information" being gathered, as well as the fact that in the context of changing media consumption avenues, new information is going to arise.

A prime example of a situation where the potential benefits of the FCC's use of experimental rules could have arisen is the "eight voices exceptions" issue addressed above. Had the FCC employed an experimental rule, using a single market to test out "nine voices" and another market to

164. *See* Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014). Experimental or temporary rules sound like they exist through a loophole, but are generally well established and function through the use of a "sunset" provision which sets when the rule will expire. *See* Jacob E. Gersen*, Temporary Legislation,* 74 U. CHI. L. REV. 247, 248–49 (2007)

165. *See* Gubler, *supra* note 164, at 149–50, 152 (finding one percent of all Securities and Exchange Commission rules to be experimental rules and explaining "[f]or example, during the same decade-long period ending on December 31, 2011, the Commodity Futures Trading Commission promulgated 259 rules, yet only two of these (0.8%) were structured as experimental rules. The results are similar at the Federal Trade Commission (0.8%), the National Transportation Safety Board (none), and the Federal Energy Regulatory Commission (none)").

166. *See* Prometheus Radio Project v. FCC (*Prometheus I)*, 373 F.3d 372, 384 (3d Cir. 2004).

167. *See* McGarity, *supra* note 17, at 1460.

test out "seven voices," the FCC would have had more data regarding the effects of any given number of "voices" in a market. The FCC's final determination of eight—or any other number—would then have been justified sufficiently with evidence, meaning that when the next QR was around, the FCC could amend the rule or sufficiently justify its rule without amending it.[168] While it may take more time for the FCC to finalize its rules, it would be more efficient because it would be apparent to all regulated entities and other interested parties that after the experimental rule, the FCC *does* have the data to back up its final rule.

Equally important, for each challenge where the line drawn by the FCC is deemed "arbitrary" or "lacking sufficient support," the FCC would, under the theory behind experimental rules, be able to gather sufficient information to justify its determinations. While an inherently circular argument—temporary rules provide a solution to rules that must be reviewed every four years—temporary rules may provide an amenable solution to both regulated entities and the FCC. Further, these rules provide an opportunity for the FCC to act by itself to free the QR from its current stagnant place, another inherent efficiency to this solution.

IV. CONCLUSION

With media consumption avenues changing, the FCC is currently empowered to lead the way and help the average consumer safely reach the media. The QR provides that power for the FCC. But with the QR ossified and the need for guidance as the transition from print and television media to online media looms, some changes must be made to free the QR and the FCC. Congress, the courts, and the FCC can act to help free the QR. In terms of efficiency, were Congress to prescribe that the FCC conduct hybrid rulemaking procedures, similar to those contained with the Clean Air Act, the FCC would likely see its proposed rules upheld more frequently. Further, it could signal to the courts that the scrutiny applied needs to change as well—two solutions in one action. But the easiest solution would be for the FCC to elect to issue temporary rules under the QR, instead of binding rules, in order to potentially avoid legal challenges to its determinations. In any event, the time is now for Congress, the courts, or the FCC to act to help free the QR.

168. *Cf. 2010 & 2014 Quadrennial Review*, *supra* note 4, at para. 53–59.