Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review

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I. INTRODUCTION

Imagine you walk into the offices of an unelected regulatory body tasked with setting policy at the highest levels. They've been busy crafting rules and regulations, but the slow process has reached a boiling point. Some are willing to do whatever it takes to speed up the process – including throwing the rulebook out altogether. You tell the regulators they don't need to look beyond its enabling statute, which allows them to make policy in an alternative fashion without the mess of following statutorily prescribed procedures or subjecting their decisions to the courts. The regulators say it sounds too good to be true, and asks if this is limitless authority. You reply with an emphatic "yes!" They then ask a follow-up question. Can we coerce American businesses in transactions to bend to our policy at-will? You once again reply in the affirmative and leave them with a newfound purpose and way of doing business.

As stakeholders who care deeply about the rule of law, this situational exaggeration of an example would be just how it sounds – fictional and silly. However, some have argued that it is closer to reality than we would like to think, particularly when it comes to the Federal Communications Commission ("FCC"). Over the course of many years, the independent agency has relied upon a single statutory provision to carve out for itself a role in reviewing communication industry transactions valued in the tens of billions of dollars, and in the process, imposes binding obligations ranging from digital literacy programs to mandated disaster relief donations. The agency has become more interested in using its ancillary antitrust authority as a first option to craft policy, rather than through their primary powers prescribed in the Administrative Procedures Act ("APA").

As a vast majority of the American legal community has come to accept, the administrative state must fit comfortably within the executive branch under Article II of the United States Constitution in order to survive a basic constitutional inquiry.[1] That is not to say that administrative agencies have always stayed in their lane.[2] Skeptics are often quick to label the administrative state as a "headless [f]ourth [b]ranch" of government when there is a perception of agency overreach.[3]

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1. Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 651 (1989).

2. *See generally,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (both finding a violation of the non-delegation doctrine).

3. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 525-26, 129 S. Ct. 1800, 1817, 173 L. Ed. 2d 738 (2009) (Scalia, J., opinion) ("There is no reason to magnify the separation-of-powers dilemma posed by the headless Fourth Branch by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive.").

The FCC's transaction review authority embodies this skepticism as it is tied to a vague public interest standard.[4] Among the FCC's statutory powers, reviewing transfers of licenses is unlike some other agencies that tend to review major transactions.[5] In applying this standard, the FCC has developed a unique tool – the voluntary commitment –to extract broad commitments from communications companies in transactions.[6] This, in turn, enables the FCC to use voluntary commitments as a mechanism to achieve public policy goals without going through the APA processes, and without sufficient judicial review.

The FCC circumvents the built-in checks and balances of the APA by achieving public policy goals through the imposition of voluntary commitments. This Note asserts that voluntary commitments are coercive because the FCC's approval of a transaction hinges on the acceptance of these terms. These voluntary commitments become conditions or effectively consent decrees, exempted under the APA or not, upon which noncompliance would result in the serious harm of revocation of a deal. This yields enormous discretion on the part of the FCC to further its own policy goals while circumventing procedural protections and adding an element of uncertainty about whether these conditions can be the subject of judicial review.

Therefore, this Note argues that the FCC's public interest standard, the preferred mechanism in achieving public policy goals, has been used to extract voluntary commitments from parties to a transaction, and this process for policy formation falls outside of lawful policymaking. In order to curb this overreach, Article III courts must have the final say on whether parties should contest to a commitment's imposition. At least one antitrust authority allows for judicial review in consent decree cases and there is no reason to think that voluntary commitments should operate any differently.[7]

Accordingly, Section II of this Note provides the basic underpinnings of the FCC's transaction review authority. Section III offers examples that illustrate the FCC's overreach in imposing voluntary commitments to circumvent agency law, and the hurdles for reviewability of these commitments. Finally, Section IV contends that this abuse must be checked by the courts and offers arguments for why judicial review is appropriate in transaction review.

II. THE FCC'S LEGAL FRAMEWORK FOR REVIEWING COMMUNICATION INDUSTRY TRANSACTIONS

The FCC has statutory authority to review transfers of licenses it has issued, including in the case of a merger or acquisition among licensees, all

4. *See infra* note 17.
5. *See infra* note 9.
6. *See infra* note 39.
7. Antitrust Procedures and Penalties Act (Tunney Act) Pub. L. 93–528, 88 Stat. 1708, enacted December 21, 1974, 15 U.S.C. § 16

of which are reviewed based on a public interest standard.[8] The traditional manner in which the FCC achieves its policy goals is through formal APA rulemaking. Typically, Article III courts can review agency actions in promulgating policy this way. Another way in which the FCC crafts policy is through imposing voluntary commitments on transactions involving licenses in order to win its approval. A rich amount of case law has developed on whether courts can review agency "no action" decisions (like not prosecuting a case), as opposed to traditional actions (like rulemaking). Reviewability depends on the characterization of the decision. It is not clear whether the imposition of voluntary commitments is an action or no action. In order to properly understand the constitutional issues surrounding the FCC's transaction review authority, it is necessary to understand how the FCC crafts rules and regulations to enact policy.

A. Overview of the FCC's Antitrust Mandate to Review Transactions

In most industries, either the Federal Trade Commission ("FTC") or the Department of Justice ("DOJ") reviews big transactions to assess their compliance with antitrust laws.[9] Under the Hart-Scott-Rodino Act, the FTC and DOJ review proposed transactions that affect interstate commerce and may take legal action to prevent mergers that the agencies think "substantially lessen competition." [10] By contrast, the FCC reviews transactions relating to its jurisdiction, including the transfer of licenses granted to communications companies, under the Communications Act of 1934.[11] If there are no transfers of licenses, the FCC is without jurisdictional authority to approve or deny the merger, as the FTC or DOJ would instead be the relevant agency to conduct the review.[12] While the statute does not explicitly grant transaction or merger review authority, the FCC has treated incidental license transfers as a means to evaluate and approve communication industry transactions and mergers.[13] The FCC approves the transaction as long as it serves "the public interest, convenience, and

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8. 47 U.S.C. § 309-10.

9. James R. Weiss, Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMM. LAW CONSPECTUS 195 (1998)

10. FTC, Merger Review. Last accessed April 3, 2017. https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review

11. 47 U.S.C. § 151 et seq.; *see also* Weiss, *supra* note 9, at 197.

12. Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 200 (2008).

13. *Novel Procedures in FCC License Transfer Proceedings: Hearing Before the Subcomm. on Commercial and Administrative Law Oversight of the H. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Harold W. Furchtgott-Roth, FCC Commissioner), https://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr925.html#N_1_ ("[M]ost orders involving mergers do not even identify the radio licenses or section 214 authorizations at issue or discuss the consequences of their conveyance, but instead move directly to a discussion of the merger…").

necessity."[14] Those seeking approval bear the burden of proving the transaction enhances the public interest.[15]

In transactions involving telecommunications firms, agencies ranging from public utility commissions to international antitrust authorities could be involved to review a wide array of potential concerns.[16] Arguably, no government agency has more discretion in their review than the FCC.[17] This is so because the FCC reviews big transactions under a "public interest standard"[18] – a more expansive standard of review than the FTC or DOJ's competition-based review.[19]

The broad scope of the FCC's standard in transaction review is well understood. The Supreme Court has characterized the FCC's public interest standard as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[20] The FCC claims that the public interest standard focuses on maintaining "competition, diversity, localism," encouraging advancements in technology, and the potential benefits to the public that a transaction would bring about.[21] In giving its approval or disapproval of transactions, the FCC inherently makes policy decisions.

Under its governing statutes, the Communications Act of 1934 and the APA, the FCC formally makes policy through its delegated rulemaking authority.[22] However, under the public interest standard, the FCC has carved out an alternate path of policymaking, outside the confines of APA rulemaking procedures. The FCC accomplishes this alternate policymaking through the extraction of "voluntary" commitments (or conditions for FCC approval) from the parties to a transaction under review.[23]

B. *How the FCC Achieves the Public Interest: Modes and Actions*

There are three ways in which the FCC applies its public interest standard in transaction review under the APA: through rulemaking, non-legislative rules, and adjudication. Rulemaking is an agency statement of

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14. 47 U.S.C. § 252 (e)(2)(A)(ii)

15. 47 U.S.C. § 157 (a).

16. David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 748 (2002)

17. J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615, 635 (2014)

18. 47 U.S.C. § 310(d) ("[U]pon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

19. Rachel E. Barkow, Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 29 (2000).

20. F.C.C v. WNCN Listeners Guild, 450 U.S. 582, 593, 101 S. Ct. 1266, 1274, 67 L. Ed. 2d 521 (1981).

21. Federal Communications Commission, Frequently Asked Questions. https://www.fcc.gov/reports-research/guides/mergers-frequently-asked-questions (last visited Apr. 7, 2017) [https://perma.cc/F4HZ-BQ73].

22. *See supra* note 17 at 635-36.

23. *See infra* Sec. III.A.

policy that is designed to implement, interpret or preserve a law or existing policy.[24] Rulemaking can either be a formal, on the record proceeding or an informal procedure requiring notice and comment, depending on the organic act.[25] Although not binding, the agency may also publish non-legislative rules that interpret existing rules, issue general statements of policy, or are rules of agency organization, practice, or procedure.[26] These non-legislative rules are exempt from notice and comment procedures.[27] The FCC traditionally conducts informal rulemaking but may also adjudicate claims as a means of exercising their investigatory and/or enforcement powers.

Adjudication is the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a manner other than rulemaking but including licensing.[28] Adjudication is usually a formal, on the record proceeding but can also be informal, requiring fewer formalities than a hearing. When the FCC uses adjudication, it is normally formal adjudication. Lastly, the public has an important role in making their grievances heard with regards to policymaking. Therefore, under 5 U.S.C. § 553(c), an interested person has the right to petition for the issuance, amendment or repeal of a rule.

C. Policymaking Through Voluntary Commitments in Communication Industry Transactions

The easiest way to explain policymaking through the imposition of voluntary commitments in communications industry transactions is by imagination. Suppose for a moment that you are an executive at a major communications company in Los Angeles and you are making a proposal to the acquisitions team to purchase a large amount of local television and radio stations in Chicago. Expect to prepare for your proposal how this purchase will ultimately positively impact the public interest. If you can't see how this purchase will positively shape the community-at-large, don't worry – the FCC will propose a host of actions your communications company may take and maintain, for years, in order to win their approval of your transaction. It remains your choice to abide by these commitments, as the FCC says they are just voluntary. But be careful, if you don't accept their terms and abide by them for the duration of the commitment, the deal is off.

This is the scenario that most communications companies face in a given transaction– the imposition of voluntary commitments in order to win approval of a merger or large-scale transaction involving the transfer of licenses. By invoking its public interest standard, the FCC pursues a different form of policymaking when conducting transaction reviews. The

24. 5 U.S.C. § 551 (5).
25. 5 U.S.C. § 553 (c).
26. 5 U.S.C. § 553 (b)(A).
27. 5 U.S.C. § 553 (b)(A).
28. 5 U.S.C. § 554 (a).

FCC pounces on the chance for quick and easy policymaking when negotiating with parties, particularly on the extent to which the communications companies must make commitments that are often outside the merits of the transaction itself. Some have expressed concern about the FCC's use of the public interest standard to effectuate policy.[29] Harsher critiques have coined it "jawboning," coercing companies using informal regulation and threats under vague standards.[30] Using these informal enforcement mechanisms hides what, in reality, is state action cloaked in private choice. Such regulation in case-by-case transactions has produced harsh legal and constitutional effects.[31]

Since these voluntary commitments are not enacted in accordance with the APA, the issue of whether a party to a transaction may later contest the imposed conditions is unclear. Aside from complaints that can arise when parties sit down to negotiate a deal (such as fraud in inducement or bad faith that can normally give rise to litigation), it is unsettled whether a condition imposed by the FCC would constitute a final agency action that is reviewable. The question remains, should transactions ending in voluntary commitments be thought of more as agency actions subject to judicial review, or more like no action decisions that are presumptively unreviewable? If the latter is true, can we analogize to any other agency decision-making powers where judicial review is available even in the absence of the APA?

III. ESTABLISHING THE OVERREACH OF VOLUNTARY COMMITMENTS AND THE ROAD TO REVIEWABILITY

The FCC's overreach is proven by the imposition of voluntary commitments that are wholly outside, or ancillary at best, to the merits of a communications industry transaction. A snapshot of a few transactions listed below highlights this notion. In order to remedy these perceived abuses, the actions must be reviewable by a court of law. Classifying transaction review under the public interest standard, either as an agency action or no action, remains a hurdle towards reviewability. While decisions committed to agency discretion by law are presumptively unreviewable, case law has emerged that could rebut this presumption for voluntary commitments. Lastly, these commitments could also be seen in a light akin to settlement negotiations or consent decrees in order to obtain reviewability.

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29. Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1855 (2011).

30. Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 REV. IND. ORGAN. 295, 312 (2014) (noting that since 2004, "conditions have become increasingly common features of [FCC] merger clearances); *see also* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 126 (2015) ("Jawboning of Internet intermediaries is increasingly common, and it operates beneath the notice of both courts and commentators."); T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC* 5 (Phoenix Center, Policy Paper No. 49, 2015), http://www.phoenix-center .org/pcpp/PCPP49Final.pdf.

31. Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 65 (2015).

A. *The FCC's Imposition of Voluntary Commitments is De Facto Rulemaking*

According to the FCC's then-General Counsel Jon Sallet, transaction review starts with a thorough review of the proposed transaction to determine whether it serves the public interest.[32] Approval of the deal may be conditioned on the parties taking on voluntary commitments to please the public interest standard.[33] Violating the voluntary commitments after agreement may result in fines or revocation of the deal.[34] If the FCC is unable to approve the transaction, the agency assigns the case to an administrative hearing.[35] After the hearing, the FCC makes a final decision that is subject to judicial review.[36] However, the costs associated with the pre-hearing approval process usually deters parties from ever getting to an administrative hearing.[37] Nevertheless, under the public interest standard, the FCC uses its transaction authority to engage in de facto rulemaking.

If an agency can increase its jurisdiction and ease the way it creates regulations, then the FCC's reliance on the public interest standard to create rules would be the most effective way for agencies to maximize power.[38] The FCC's use of this legal standard to achieve policy goals unrelated or ancillary to a transaction represents de facto rulemaking. The below examples illustrate the following two fundamental considerations. First is to consider how closely related the conditions related to the transaction are, and second, whether the FCC could have equally accomplished what the commitments set out to address through the formalities of the APA. While there is a lot of uncertainty as to why the FCC chooses de facto rulemaking

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32. Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.

33. Mergers and Acquisitions, FCC, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions (last visited Mar. 12, 2017) ("The Commission reviews applications for the transfer of control and assignment of licenses and authorizations to ensure that the public interest would be served by approving the applications. The vast majority of transfer of control and assignment applications are simple and unopposed and are processed quickly. Some transactions, however, present more complex legal, economic or other public interest issues and are likely to elicit a significant amount of public comment, thus requiring more extensive Commission review.").

34. Georg Szalai, *FCC Fines Comcast for Violation of NBCUniversal Deal Condition*, HOLLYWOOD REPORTER (June 28, 2012), http://www.hollywoodreporter.com/comcast-fcc-fine-broadband-nbcuniversal-13353 [https://perma.cc/NL6D-H2QS].

35. Practically speaking, such a hearing rarely sees the light of day as this step is akin to a death sentence for the deal. Parties cut their losses at this point and back away.

36. Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest ("Although such hearings have been rare, the Commission has been ready to use them as the statute requires. For example, at the time that the applicants in the AT&T/T-Mobile merger withdrew their applications, the Commission's staff had prepared a report recommending that the transaction be designated for hearing.").

37. Brent Skorup & Christopher Koopman, *How FCC Transaction Reviews Threaten Rule of Law and the First Amendment*, 77 GEORGE MASON U. 35, 66 (2016)

38. *Id.*

over APA rulemaking, it is important to judge them on a sliding scale. On one extreme is a blatant disregard for APA procedures and a clear unconstitutional overreach of power. On the other is an entirely appropriate and necessary component to their statutory authority to review transactions in the public interest.[39]

1. AT&T/BellSouth

In 2006, AT&T purchased BellSouth for $86 billion and signed on to 11 pages of voluntary commitments.[40] Some of the commitments directly addressed the FCC's concerns regarding competitiveness, which arguably is the primary issue in transaction review.[41] AT&T agreed to adhere to net neutrality principles for two years and divest from BellSouth's spectrum holding.[42] However, other commitments were completely unrelated to the transaction itself. For instance, AT&T agreed to make disaster recovery capabilities available in BellSouth's territory and to donate $1 million toward supporting public safety initiatives.[43] The public safety initiatives stemmed from a 2006 FCC panel recommendation on how telecommunications firms could more effectively address potential disaster relief.[44] In addition, the agreement required AT&T to report to the FCC on how it serves customers with disabilities. This was an issue the FCC had problems implementing since the passage of the American with Disabilities Act ("ADA") in 1990.[45] Lastly, AT&T agreed to bring some outsourced jobs back to America and cut rates charged to competitors requesting to lease high-speed data lines.[46] The latter commitment was instrumental for the FCC because it failed to reform special access feels across telecommunications firms.[47]

39. This Note doesn't challenge the FCC's determination that these actions actually were in the public interest, and in fact the companies might have taken these steps anyway. However, the point of this assessment is to illustrate how the FCC is achieving these policy goals outside of the normal process.

40. Julie Vorman, *AT&T closes $86 billion BellSouth deal*, REUTERS (Jan 21, 2017), https://www.reuters.com/article/businesspro-bellsouth-fcc-dc/att-closes-86-billion-bellsouth-deal-idUSWBT00636120061230.

41. *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar. 26, 2007) (AT&T/BellSouth Merger Order) (Commissioner McDowell not participating).

42. *Id.*

43. *Id.* at 148.

44. WILEY REIN & FIELDING, REPORT AND RECOMMENDATIONS OF THE INDEPENDENT PANEL REVIEWING THE IMPACT OF HURRICANE KATRINA ON COMMUNICATIONS NETWORKS, (June 2011), http://transition.fcc.gov/pshs/docs/advisory/hkip/karrp.pdf.

45. Gwen Lisa Shaffer & Scott Jordan, *Classic Conditioning: the FCC's use of merger conditions to advance policy goals*. 35 MEDIA CULTURE AND SOCIETY 392, 396 (2013).

46. *See supra* note 41, at 147.

47. Surely there are financial and business benefits for AT&T and others to provide Internet access and other services to the disabled and other groups of people. However, the issue is about parties coming to terms with these ideas on their own volition.

It is clear that commitments to ensure competitiveness was an appropriate use of the FCC's power. With AT&T's purchase of BellSouth, AT&T would assume too much power in spectrum access and lead to anti-competitive concerns. The divestiture requirement was closely related to the merits of the transaction and could be effectively and legally required through the FCC's transaction authority. This particularized divestiture requirement was more appropriate to go through with their transaction review authority than an APA adjudication for the sake of efficiency, and because there were no facts in dispute.

However, some of the remaining conditions show the relative ease with which the FCC utilizes its transaction review authority when it cannot accomplish policy goals through the rulemaking process. This is illustrated in the disaster relief donation, which has nothing to do with the merger's merits but stemmed from a recommendation of an earlier panel on how best to address public safety the FCC wouldn't issue an industry-wide rule mandating donations, considering corporations play a special role in social reform. Instead, the FCC reserved the donation mandate in order to bend parties to its particular charitable interests. [48]

2. Ameritech/SBC

One particular example of the FCC's choice of transaction authority over traditional rulemaking procedures was the Ameritech and SBC merger at the turn of the millennium. In negotiating with the FCC, Ameritech and SBC agreed to provide advanced services to customers through a separate affiliate in order "to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent local exchange carriers."[49] While on its face this looks like a perfectly legitimate exercise of transaction authority on the part of the FCC, a further inquiry reveals the FCC's true motives. At the time the FCC was negotiating this deal, a similar policy was being considered for rulemaking, which was to apply to the entire industry.[50] Presumably foreseeing a stall in the enactment of the regulation, the FCC anticipatorily attached it as a condition to the Ameritech/SBC merger.[51]

48. Gwen Lisa Shaffer & Scott Jordan, *Classic Conditioning: the FCC's use of merger conditions to advance policy goals*. 35 MEDIA CULTURE AND SOCIETY 392, 396 (2013).

49. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141.

50. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rec 24011, 24051-64, 85-117 (1998).

51. Rachel E. Barkow, Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. L.F. 64 (2000).

In his concurrence, then-Commissioner Harold Furchtgott-Roth criticized the FCC's position of imposing these conditions in many ways that this Note aims to do. For instance, he warned that imposing conditions to alleviate "harms so vague and speculative that the actual nexus between those harms and the remedies imposed is difficult to ascertain[,] . . . creates problems of fair notice, increases the potential for arbitrary decision-making, and implicates the non-delegation doctrine."[52] More importantly, Furchtgott-Roth points out that the conditions require conduct by the parties "that it could not require outright in a rulemaking[,] creates new processing schemes to suit [the FCC's] fancy in individual transfer proceedings, [and] raise[s] questions about the neutrality of [the FCC's] decision-making."[53]

3. Comcast/NBC Universal

The imposition of voluntary commitments on media transactions reached an apex in the Comcast and NBC-Universal merger. In January 2011, the DOJ and FCC imposed one of the most onerous voluntary commitments of any cable deal in its history in approving the Comcast/NBC-Universal merger. In negotiating with the FCC, Comcast and NBC-Universal agreed to a host of conditions requiring it to purchase new weekly business news programs, expand local and public interest programing, enter into agreements with local nonprofit news organizations, provide 1500+ choices of video-on-demand children's programming, and spend $15 million yearly on digital literacy, FDA nutritional guidelines, and childhood obesity on networks that have young family audiences.[54] Undeniably, the list is extensive. It is worth noting that the FCC would later fine Comcast $800,000 for noncompliance with one of these conditions.[55] While it is almost indisputable that these conditions have sufficient public interest benefits, it is clear that the FCC went wild with their transaction review authority.

For example, "the 'Internet Essentials' program incorporated into the merger agreement ensures that every household in Comcast's footprint with children eligible for the federal free lunch program qualifies for 'economy' broadband service for $10 per month, a $150 PC, and access to digital

52. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141.

53. *Id.*

54. Applications of Comcast Corp. and NBCUniversal, For Consent to Transfer Control of Licenses, MB Docket No. 10-56, FCC 11-4 (Jan. 18, 2011), https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56.

55. Georg Szalai, *FCC Fines Comcast for Violation of NBCUniversal Deal Condition*, HOLLYWOOD REPORTER (June 28, 2012), http://www.hollywoodreporter.com/comcast-fcc-fine-broadband-nbcuniversal-13353.

literacy training."[56] It is clear that this condition did not relate to competitiveness, which should dominate merger review by the FCC. Instead, it directly advanced the FCC's digital inclusion goals incorporated in the National Broadband Plan in 2010 and was wholly outside the merits of the transaction itself.[57] Additionally, the company's promise to "establish three-year partnerships between non-profit news organizations and at least five NBC-owned television affiliates" was not based on the merits of the transaction.[58] In fact, this condition stems from a 2009 Senate hearing on journalism and was previously introduced in the Newspaper Revitalization Act.[59] Lastly, the parties agreed that 10 NBC-owned stations would produce an additional 1000 hours of original local news programming, with Telemundo (Spanish) getting a new multicast channel.[60] The focus on increasing Spanish stations' airtime could be traced not to the merits of the transaction, but to then-FCC Commissioner Kevin Martin, who in front of the Congressional Hispanic Leadership institute called for the FCC's "special responsibility" to engage Spanish-speaking viewers.[61] Most, if not all, of the conditions imposed on this merger should have been enacted under the APA because they were so far outside the merits of the deal. Evidently, the FCC's overreach was more prominent and blatant than previously thought possible.

B. The Concept of Reviewability: Agency Action and No-Action

For the purposes of this Note, whether agency decisions are subject to judicial review largely hinges on the characterization of the agency decision to act or not to act. For the most part, the courts have held that agency actions are presumptively reviewable, while agency no action is presumptively unreviewable, if those decisions are committed to agency discretion by law. However, there is a small possibility of getting judicial review of agency no actions. Characterizing where voluntary commitments lie on the spectrum of agency actions or no actions is therefore fundamental in order to understand which legal framework to apply.

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56. Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, FCC 11-4, para. 6 (2011) [hereinafter *Comcast Order*], https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56.

57. Gwen Lisa Shaffer & Scott Jordan, *Classic Conditioning: The FCC's Use of Merger Conditions to Advance Policy Goals,* 35 MEDIA, CULTURE & SOCIETY 392, 399 (2013).

58. *Id.*

59. *Id.*

60. Applications of Comcast Corp. and NBCUniversal, For Consent to Transfer Control of Licenses, MB Docket No. 10-56, FCC 11-4 (Jan. 18, 2011), https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56.

61. Gwen Lisa Shaffer & Scott Jordan, *Classic Conditioning: The FCC's Use of Merger Conditions to Advance Policy Goals,* 35 MEDIA, CULTURE & SOCIETY 392, 400 (2013).

1. Decisions Committed to Agency Discretion by Law are Unreviewable

Under § 551 of the APA, agency action is an "agency rule, order, license, sanction, [grant or denial of] relief, . . . or a failure to act."[62] An agency action is final when there is a final disposition of a matter,[63] which the Supreme Court in *Bennett v. Spear* more fully defined as, "the 'consummation' of [an] agency's decisionmaking process . . . and when 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[64] The issuance of a rule or an order, or the denial of a petition, is considered a final agency action that is ripe for judicial review by any person adversely affect or aggrieved by the agency action.[65] [66]

The APA provides two exceptions to the general rule on reviewability. Section 701(a)(1) provides that an agency's organic statute can preclude review and § 701(a)(2) states that agency action committed to agency discretion by law is unreviewable.[67] Section 701(a)(2) is contentious, in part, by the inconsistency presented in the "scope of review" section of the APA. The "scope of review" section, § 706(a)(2), allows for judicial review of agency abuse of discretion.[68] The obvious question is: how can the courts review an agency's abuse of discretion if § 701(a)(2) precludes review of agency action committed to agency discretion by law?

The courts have wrestled with this idea first in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In *Overton Park*, plaintiffs alleged that the Secretary of Transportation did not take "feasible and prudent" measures as required by the governing statute before approving the construction of a highway through a public park.[69] The citizen group claimed that not making formal findings was a violation of the Secretary's organic statute. The Supreme Court found this to be an "action" by an agency and entitled it to judicial review because the "feasible and prudent" standards established that there was "law to apply."[70] The Court latched on to legislative history to hold that when a statute has "no law to apply," agency actions would be unreviewable under § 701(a)(2), as that would be committed to agency discretion by law.[71] However, the circuit courts were confused over whether the "no law to apply" test only applied in

62. 5 U.S.C. § 551(13).

63. Jason Fowler, *Finality, What Constitutes Final Agency Action*, 24 J. NAT'L ASSN. ADMIN L. JUDICIARY 311,315 (2004).

64. Bennett v. Spear, 520 U.S. 154, 178 (1997).

65. 5 U.S.C. §§ 702, 704.

66. While other elements (such as mootness, ripeness, and standing) must be met in order to satisfy reviewability, such considerations are assumed for the purposes of this note, as they are not the focus here.

67. 5 U.S.C. § 701(a).

68. 5 U.S.C. § 706 (a)(2).

69. *Overton Park*, 401 U.S. at 405–06.

70. *Id.* at 413.

71. *Id.* at 410.

cases relating to an agency's organic statute, or whether the presence of an abuse of discretion standard, such as the APA's, would be considered a "law to apply." The Third and Ninth circuits would find that as long as there was an abuse of discretion standard, there will always be "law to apply."[72] Conversely, the Eleventh circuit ruled that if the statute or other sources of law do not limit an agency's discretion, then there is "no law to apply."[73] The Supreme Court would later step in to reaffirm its "no law to apply" standard but would also introduce an independent factor analysis to help guide its decision on whether no-action decisions are presumptively unreviewable.

2. Heckler v. Chaney: Four Factors to Overcome the Presumption of Unreviewability in Decisions Committed to Agency Discretion by Law

In *Heckler v. Chaney*, the Supreme Court articulated four factors to overcome the presumption of unreviewability in decisions committed to agency discretion by law. In the case, prisoners on death row had petitioned the Food and Drug Administration ("FDA") to remove drugs used for lethal injects from the safe drug list, as such listings violated the Food, Drug, and Cosmetic Act.[74] The petitioners asked the FDA to step in to stop the use of these drugs, but the agency denied the request.[75] This made the action reviewable in federal court. The Supreme Court, however, found that denying a request to take an enforcement action was presumptively unreviewable under § 701(a)(2), and that all no-action decisions are therefore presumptively unreviewable.[76] The Court arrived at this decision first by reiterating its "no law to apply" standard from *Overton Park*, holding that when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," that action is unreviewable.[77] Then, without providing a clear relationship to the "no law to apply" standard, the Court laid out four principles to help decide if agency action is committed to agency discretion by law. The considerations were whether there was a complicated balancing of agency interest (such as resource allocations), refusals to act generally are not coercive and infringe on private interests, lack of focus for judicial review, and an analogy to prosecutorial discretion.[78]

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72. Chehazeh v. Attorney Gen. of the U.S., 666 F.3d 118, 128–30 (3d Cir. 2012); Pinnacle Armor, Inc. v. United States, 648 F.3d 708, 720 (9th Cir. 2011).

73. Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1082 (11th Cir. 2012).

74. 470 U.S. 821, 823-24 (1985).

75. *Id.*

76. *Id.* at 832-33.

77. *Id.* at 830.

78. *Id.* at 831-32; *See also infra* note 79.

The first factor of whether there was a complicated balancing of agency interest is the factor most frequently employed and discussed of the four.[79] Courts traditionally defer when they feel that the agency is more equipped to pick and choose how to use its resources in carrying out its mandate. For instance, in *Heckler,* the Court looked favorably upon the FDA being able to choose how it allocates its resources by focusing on new drugs and unhealthy foods, rather than products that were not controversial, such as the lethal injection drugs. However, at least one court has not as readily accepted a resource allocation argument when an action requires a determination to be made "in the interest of justice."[80] Justice, the D.C. Circuit reasoned, does not lie exclusively within the expertise of an agency.[81]

The second factor, of whether coercive force was taken by the agency, will only weigh in favor of review when the agency action has a "direct influence" on the parties. For instance, in *Heckler,* the denial of the death row inmate's petition was an indirect influence because it was only "through allowing the drugs to be used that the prisoners themselves were influence by the agency action."[82] The denial of a rulemaking didn't directly influence anyone. Likewise, the D.C. circuit court has held that decisions that amount to a "rescissions of commitments" are reviewable due to the fact that it's a "direct influence" on the parties.[83]

The third factor in determining whether agency decisions are reviewable is when there is a focus for review. Denials of citizen petitions under § 553(c), for instance, have a focus for review in that the APA requires agencies to give a brief explanation for their refusals.[84] Likewise, when an agency's organic act requires the agency to examine its decision, there is a focus for review. Even when an agency is not compelled by its statute to examine a decision but does so, that decision becomes a focus for review in subsequent, analogous situations.

The fourth factor in determining whether agency decisions are reviewable is whether courts have traditionally been reluctant to intervene, particularly with regard to prosecutorial discretion and national security.[85] Courts stay in their realm here so as to not offend a basic structure of the Constitution that leaves enforcement actions of the law and national security

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79. Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 486 (2008).

80. *See* Dickson v. Sec'y of Def., 68 F.3d 1396, 1403 (D.C. Cir. 1995).

81. *Id.*

82. Dustin Plotnic, *Agency Settlement Reviewability*, 83 FORDHAM L.R. 1367, 1388 (2013).

83. Robbins v. Reagan, 780 F.2d 37, 47 (D.C. Cir. 1985).

84. 5 U.S.C. § 553(c).

85. *See, e.g.*, N.D. *ex rel.* Bd. of Univ. & Sch. Lands v. Yeutter, 914 F.2d 1031, 1038 (8th Cir. 1990) (Larson, J., concurring in part and dissenting in part) (identifying prosecutorial discretion and national security); Shearson v. Holder, 865 F. Supp. 2d 850, 866 (N.D. Ohio 2011) (relating prosecutorial discretion and national security).

within the executive branch of the government.[86] However, whether prosecutorial discretion is an action by an agency or a no-action is unclear.[87]

C. *Voluntary Commitment's First Cousins: Settlement Negotiations and Consent Decrees*

Voluntary commitments are comparable to both settlement negotiations and consent decrees because all are agency negotiations that result in legal obligations. There is an argument that perhaps settlement negotiations should be free from judicial review because it is inherently the province of the prosecuting office to exercise discretion normally vested in executive functions. After all, discretion allows agencies to decide what is best for their resource allocation. However, too much discretion could lead to arbitrary decision-making and abuses. Nevertheless, there is a circuit split on whether settlements are subject to judicial review.

The D.C. circuit court is the only court to hold that settlements are presumptively unreviewable as essentially prosecutorial discretion.[88] Other courts, including the Third and Ninth Circuits, have held otherwise.[89] For instance, in *U.S. v. Carpenter*, the court found that an agency no-action (settlement) was effectively an action subject to judicial review.[90] Likewise, in *Mahoney v. U.S. Consumer Prods. Safety Comm'n,* a third party was able to sue a BB gun manufacturer after a settlement was reached with the defendant for damages because the settlement was a final agency action.[91] However, there is no true consensus among the circuit courts.[92]

Voluntary commitments are also essentially a preliminary consent decree. A consent decree is "an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a

86. Shearson v. Holder, F.Supp. 2d, 850, 866 (N.D. Ohio 2011).

87. *See* Ctr. for Auto Safety v. Dole, 828 F.2d 799, 819 (D.C. Cir. 1987) (Bork, J., dissenting) (arguing that decisions to deny a petition to reopen enforcement investigations should be unreviewable because it was similar to prosecutorial discretion). *Contra* Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 1, 9 (D. D.C. 2007) (holding than agency decision not to review a permit issuance was reviewable because it was not similar to prosecutorial discretion enough to be a no-action decision).

88. Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1031 (D.C. Cir. 2007).

89. *See* United States v. Carpenter, 526 F.3d 1237, 1241 (9th Cir. 2008); Portland Gen. Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1013, 1031–32 (9th Cir. 2007); Mahoney v. U.S. Consumer Prods. Safety Comm'n, 146 F. App'x 587, 590 (3d Cir. 2005).

90. *See* U.S. v. Carpenter, 526 F.35 1237 (9th Cir. 2008).

91. *See Mahoney*, 146 F. App'x at 590.

92. *See, e.g.*, Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983) ("A consent decree is essentially a settlement judgment subject to continued judicial policing."); United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) ("'[T]he [consent] judgment is not an *inter partes* contract . . . when [the court] has rendered a consent judgment it has made an adjudication.'" (quoting 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, para. 0.409[5], at 1030 (2d ed. 1980))); *see also* 46 AM JUR. 2D. *Judgments* §§ 183, 200 (2006).

judgment."[93] The DOJ and FTC are subject to judicial review for consent decrees relating to competition.[94] For instance, in the DOJ's antitrust division, challenges that are settled before litigation result in a consent decree subject to public comment and judicial review under the Tunney Act.[95] However, the FCC's statutory framework does not provide for such judicial review under its public interest standard.[96] If "compliance with the Commission['s] orders is not optional,"[97] then these are essentially consent decrees. In order to remedy the abuses in the absence of judicial review, an alternative would be for Congress to reform the FCC and adopt a Tunney Act-like amendment to the FCC's enabling statute.

IV. Judicial Review as the Remedy for the FCC's Overreach in Transaction Review

The FCC may levy exorbitant fines and revoke their approval if parties to a transaction fail to live up to their voluntary commitments.[98] However, there is uncertainty about whether this is a two-way street. If the parties to a transaction feel that the FCC coerced them to make concessions, it is unclear whether the parties may seek judicial review of the transaction for arbitrary or capricious coercion. This uncertainty exists because it is unsettled where voluntary commitments fit within the APA. It is argued in this Note that the imposition of commitments is an agency action because voluntary commitments have all the attributes of a final agency action but without any of the procedural protections of the APA. In the alternative, Congress should act by passing a Tunney Act-like amendment for the imposition of voluntary commitments because they are essentially consent decrees. What is clear is that having no check on this type of agency

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93. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988). Professor Kramer notes there is no consensus view on the precise meaning of a consent decree.

94. *See* Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 177-224 (arguing all agencies should abide by principles and procedures similar to those established by the Tunney Act).

95. Donald J. Russell & Sherri L. Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 147 (2002).

96. *Id.*

97. Georg Szalai, *FCC Fines Comcast for Violation of NBCUniversal Deal Condition*, HOLLYWOOD REPORTER (June 28, 2012), http://www.hollywoodreporter.com/comcast-fcc-fine-broadband-nbcuniversal-13353.

98. *Id.*

decision-making jeopardizes the legitimacy and integrity of the APA and our constitutional structure.[99]

After reviewing the above examples of how voluntary commitments exemplify agency overreach, it is clear that some reforms must be taken to remedy the FCC's abuse in transaction review. One option is to advocate for the FCC itself to refrain from imposing merger conditions that are not closely related to specific concerns raised by the transaction, thereby exercising restraint. As seen above, the FCC superficially already operates under this assumption, but voluntary commitments are still being imposed that are irrelevant to the merits.[100] Therefore, this option most likely will not alleviate any concerns.[101]

A second option is to analyze voluntary commitments like agency actions that are subject to judicial review. Under the APA, the imposition of voluntary commitments acts like agency decision-making that has all the same rulemaking attributes because there is "law to apply" by virtue of the public interest standard and, once imposed, the parties have a legal obligation to comply with the order, which essentially makes the imposition a final agency action.[102] Further, should a dispute arise about whether this is an action or no action, the *Heckler* factors cut in favor of rebutting the presumption of unreviewability. Lastly, we should treat voluntary commitments akin to settlement negotiations and consent decrees that some circuit courts have found to be reviewable under the APA.

Finally, in the alternative, Congress must provide an avenue for judicial review of voluntary commitments. An idea of this nature was already proposed in 2011. At a hearing in front of the House Subcommittee on Communications and Technology, under the Committee on Energy and Commerce, a bill was considered that would require "any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the [FCC] may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same

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99. This note acknowledges the difficulty of obtaining judicial review in practice. One is quite sure that after parties spend millions of dollars and thousands of hours trying to push a deal through the FCC only to get rejected, these parties all would cut their losses and never litigate. Practically speaking, judicial review of transactions may need to be automatically given post-FCC approval, but this could bog-down the process and parties would not want to litigate this either. Here represents a purely economic reality when it comes to procedural protections. Sometimes, parties would rather waive rights in the name of economic efficiency. However, the law must prevail.

100. *See* Applications of AT&T Inc. and Centennial Communications Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, FCC 09-97, WT Docket No. 08-246, Memorandum Opinion and Order, released November 5, 2009, at 55, para. 133 ("AT&T-Centennial Order") (The Commission will "impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms) . . . ."), https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-97A1.pdf.

101. While a pro-business Trump Administration could sway the independent agency to adopt the President's will, there is no evidence to suggest the FCC will change course at this time.

102. 5 U.S.C. § 704.

effect."[103] However, efforts to get Congress involved on a comprehensive FCC reform bill have remained at a standstill.[104] An argument can be made that these voluntary commitments act like consent decrees and that any reform should reflect the Tunney Act's granting of judicial review of consent decrees pursuant to the DOJ and FTC's competition review authority. Calling on Congress to act in reforming the FCC's transaction review in light of analogous legislation is an entirely appropriate and feasible alternative. In the end, either the agency or Congress needs to curb these abuses by making voluntary commitments subject to judicial review.

A. *Obtaining Judicial Review by Virtue of the APA*

Article III courts should be able to review the FCC's overreach because voluntary commitments are final agency actions not presumptively unreviewable under the APA, and are akin to settlement negotiations that some circuit courts find to be reviewable under the APA. Whether these voluntary commitments often positively affect the public interest should be irrelevant. Agencies have limited delegations of power and Congress enacted the APA to keep agencies in check. There is no reason to believe that the FCC should be exempted from such statutorily prescribed procedures to enact policy. When agencies violate the APA, they are subject to the review of Article III courts in order to preserve separation of powers and to keep legislative efforts the province of Congress.[105] Therefore, the FCC's imposition of voluntary commitments must be afforded the same remedy as agency law dictates today and be subjected to judicial review by Article III courts.

In order for voluntary commitments to be appropriate for judicial review, they must be reviewable final agency actions where there is "law to apply." Further, voluntary commitments should be treated as settlement negotiations that both the Third and Ninth circuit courts find to be reviewable.

1. Article III Courts are Necessary and Appropriate to Adjudicate Claims of the FCC's Overreach in Transaction Review

Article III courts are well-suited to adjudicate claims of the FCC's overreach in imposing voluntary conditions that fall outside the merits of the

103. TESTIMONY OF RANDOLPH J. MAY, HEARING ON "REFORMING FCC PROCESS" BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY, COMMITTEE ON ENERGY AND COMMERCE, U.S. HOUSE OF REPRESENTATIVES 4 (June, 22, 2011), http://www.freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_Hearing_on_FCC_Reform_-_June_22,_2011.pdf [https://perma.cc/QWE5-SQV3].

104. Randolph J. May, Seth L. Cooper, *The FCC Threatens the Rule of Law: A Focus on Agency Enforcement and Merger Review Abuses*, 17 FEDERALIST SOC'Y REV. 54, 59 (2016).

105. 5 U.S.C. § 702.

transaction. It is clear that Congress, in passing the APA, wanted the judiciary to be able to resolve agency abuses of power.[106] While certain classes of decisions enjoy a level of discretion, this is an area that evades the bounds of constitutionally delegated power to the agency.

One answer is that voluntary commitments are plainly outside of the APA, and are enforced purely under the agency's public interest standard of review in transactions. If that is the accepted view, does that mean that these actions cannot be challenged? Why should the FCC be able to enforce these conditions, but the parties cannot reciprocate suit if the imposition of the commitments was arbitrary and capricious? This notion cannot be correct as voluntary commitments have all the attributes of a final agency action but without any of the procedural protections of the APA. Pointing to a different authority to invoke policy cannot be the end of the matter because that lessens our ability to hold our agencies accountable for arbitrary and capricious regulations -- the principal reason for APA's enactment. Therefore, these actions must be reviewed under the APA and courts must be involved in this process because they have unique expertise in adjudicating administrative agency law claims.

2. Voluntary Commitments Are Not Presumptively Unreviewable under 5 U.S.C. § 701(a)(2) Because It Weighs in Favor of the Heckler's Factors

Judicial review under the APA requires a final agency action that is reviewable.[107] The easy hurdle to get over is whether transactions ending in voluntary commitments are final agency actions. It's clear that the FCC's acceptance or refusal of a transaction is a final agency action. As articulated in *Overton Park,* for an agency action to be reviewable, there must be "law to apply."[108] Here, there is law to apply, namely, the FCC's public interest standard.[109] While the courts have acknowledged it as a "supple instrument," others have found that there is a manageable and working framework to guide the agency in carrying out its transaction review authority.[110] Therefore, under an *Overton Park* analysis, there is law to apply to survive and rebut the "committed to agency discretion by law" standard.

Transactions ending in voluntary commitments should not be considered presumptively unreviewable under § 701(a)(2) because they survive the *Heckler* factors in a totality of the circumstances review. In the first consideration of complicated balancing, agency efficiency and expertise in handling transaction review comes at the expense of government

106. *See* 5 U.S.C. § 701.
107. *See* 5 U.S.C. § 704.
108. *See Overton Park*, 401 U.S. at 413–14.
109. *See* 47 U.S.C. § 151 et seq.
110. F.C.C v. WNCN Listeners Guild, 450 U.S. 582, 593, 101 S. Ct. 1266, 1274, 67 L. Ed. 2d 521 (1981); s*ee* J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

exceeding its statutory authority. It is easy to concede that normally, courts side with the agency on this balancing factor, as this is a specialized arena for agencies to review potential harms and improve public benefits through transaction review.[111] However, that is not the end of the analysis. The three remaining *Heckler* factors weigh in favor of judicial review.

Under the second *Heckler* factor, these voluntary commitments are coercive. Refusing to accept the conditions effectively renders a denial of a merger. As stated by then-Commissioner Furchtgott-Roth, these voluntary commitments are a legally troublesome.[112] Under the third *Heckler* consideration transactions ending in voluntary commitments weighs in favor of judicial intervention because the courts know that the focus for the review of the conditions should be based on the merits to the transactions, as it relates to the "public interest, convenience, or necessity."[113] Courts could use the FCC's own statement of policy, such as promoting competition, localism, and diversity, as its focus for reviewing transaction conditions that are not sufficiently tied to the merits and do not further the FCC's stated objectives.[114] As the above five transaction examples show, there is a clear departure from imposing conditions solely on the merits. Lastly, under *Heckler's* fourth consideration of prosecutorial discretion, no prosecution is taking place. Discretion is not removed from using the material facts of the transaction to remedy a problem it should address through APA procedures. Therefore, the imposition of the FCC's voluntary commitments should be considered final agency actions that survive the presumption of unreviewability by the courts.

3. Voluntary Commitments are Settlement Negotiations Reviewable by Article III Courts

Voluntary commitments could be treated as settlement negotiations that some circuit courts find to be reviewable under the APA. Settlements are different than no-action decisions because no-action decisions are decisions whether to *initiate* actions, whereas settlements are decisions to conclude them.[115] Even though settlement negotiations may be more akin to prosecutorial discretion than final agency actions, the end result of a

111. *See* Heckler v. Chaney, 470 U.S. 821 (1985).

112. *See Novel Procedures in FCC License Transfer Proceedings: Hearing Before the Subcomm. on Commercial and Administrative Law Oversight of the H. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Harold W. Furchtgott-Roth, FCC Commissioner), https://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr922.html [https://perma.cc/LU5H-QNKG].

113. 47 U.S.C. § 252.

114. *Frequently Asked Questions*, FCC, https://www.fcc.gov/reports-research/guides/mergers-frequently-asked-questions (last visited Apr. 17, 2017) [https://perma.cc/F4HZ-BQ73].

115. Dustin Plotnick. *Agency Settlement Reviewability*. 82 FORDHAM L. R. 1367, 1396-98 (2013); *see also* N.Y. State Dept. v. FCC, 984 F.2d 1209 (D.C. Cir. 1993).

settlement negotiation places legal obligations on the parties.[116] Therefore, there is little distinction between voluntary commitments and settlements. In fact, settlements probably represent more choice for companies to escape lengthy and expensive litigation. Voluntary commitments, on the other hand, are so coercive because if parties disagree with the conditions, their merger or transaction fails.[117] In settlement negotiations, the parties can dispute the term of a settlement themselves or fight their claims on the merits in court. However, for voluntary commitments, the commitments that parties would challenge are the ones that are unrelated to the merits of the transaction. Both the Third and Ninth circuit courts agree that settlements are final agency actions subject to judicial review, while the influential D.C. Circuit has placed this notion in utmost uncertainty by finding continuously for supreme agency discretion.[118] Nevertheless, we should treat voluntary commitments no different because the end result is the same.

B. Obtaining Judicial Review through Congress: The Tunney Act as a Blueprint

In the alternative, if voluntary commitments are not final agency actions subject to APA procedures, are presumptively unreviewable under § 701(a)(2), or the D.C. Circuit's line of reasoning prevails, voluntary commitments nonetheless must be able to obtain judicial review because they are analogous to consent decrees. Congress has afforded special protections for the review of consent decrees with respect to antitrust concerns in enacting the Tunney Act.[119] If the FCC's public interest standard truly focuses on competition, and the Tunney Act is implemented to check the amount of power antitrust authorities had in imposing consent decrees relating to competition, then there is no reason to think that a Tunney Act-like amendment to the Communications Act of 1934 would be so incredulous. Perhaps the previously failed effort by Congress to enact legislation to bring voluntary commitments to a screeching halt has left advocates skeptical of Congressional action. However, using the Tunney

116. *See* United States v. Carpenter, 526 F.3d 1237, 1241 (9th Cir. 2008); Portland Gen. Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1013, 1031–32 (9th Cir. 2007); Mahoney v. U.S. Consumer Prods. Safety Comm'n, 146 F. App'x 587, 590 (3d Cir. 2005).

117. Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 REV. IND. ORGAN. 295, 312 (2014) (noting that since 2004, "conditions have become increasingly common features of [FCC] merger clearances); s*ee also* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 126 (2015) ("Jawboning of Internet intermediaries is increasingly common, and it operates beneath the notice of both courts and commentators."); T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC* 5 (Phoenix Center, Policy Paper No. 49, 2015), http://www.phoenix-center .org/pcpp/PCPP49Final.pdf.

118. *See* United States v. Carpenter, 526 F.3d 1237, 1241 (9th Cir. 2008); Portland Gen. Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1013, 1031–32 (9th Cir. 2007); Mahoney v. U.S. Consumer Prods. Safety Comm'n, 146 F. App'x 587, 590 (3d Cir. 2005).

119. Antitrust Procedures and Penalties Act (Tunney Act) Pub.L. 93–528, 88 Stat. 1708, enacted December 21, 1974, 15 U.S.C. § 16.

Act as a foundational blueprint could more effectively allow Congress to pass legislation subjecting voluntary commitments to the review of the courts. Therefore, the legislature must turn their focus to the FCC's transaction review authority in order to afford judicial review to parties contesting to voluntary commitments.[120]

Voluntary commitments and consent decrees are similar enough to warrant a Tunney Act-like proposal. When the FCC approves a transaction, it essentially leaves the door open for agency enforcement after the fact. This is a hallmark attribute of a consent decree, but goes one step further. It creates the same benefit for the agency as a consent decree but without the formality of a judicial seal. The approval is final for all intents and purposes as there is no other procedure or involvement by the agency, except to the extent that it acts as an enforcer. As noted above, the FCC may enforce the commitments by either revoking the deal or levying a fine. However, whether the obligating parties may sue for arbitrary and capricious commitments that are wholly irrelevant to the merits of the transaction remains in doubt. In order to provide clarity and consistency to transaction review among the various antitrust authorities, a Tunney Act-like solution may be our last line of defense to our constitutional structure.

V. CONCLUSION

In sum, the FCC crafts policy under the APA and its transaction (merger) review authority. The FCC has abused its power by formulating policy through the imposition of voluntary commitments unrelated or ancillary to the merits of the transaction at hand. This de facto rulemaking wholly offends the APA and our constitutional structure. In order to curb this overreach by the FCC, judicial review is a necessary and appropriate solution to the problem. Voluntary commitments are final agency actions that must be reviewable by Article III courts. In the alternative, a comparison of voluntary commitments to settlement negotiations and consent decrees pragmatically defends obtaining judicial review outside of the APA. Our constitutional structure depends on the power of the judiciary and the bravery of Congress to act now.

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120. *See* Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 177-224 (arguing that all agencies should abide by principles and procedures similar to those established by the Tunney Act).