SO MUCH TO COMMENT ON, SO LITTLE TIME: NOTICE-AND-COMMENT REQUIREMENTS IN AGENCY INFORMAL RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

Abstract: On February 1, 2019, the U.S. Court of Appeals for the District of Columbia Circuit decided *National Lifeline Ass'n v. FCC*. In *National Lifeline Ass'n*, the D.C. Circuit Court held that, by adopting changes to a tribal telecommunications subsidy that contradicted prior policy rationale after only a two-week comment period, the agency both: (1) acted in an arbitrary and capricious manner, and (2) violated procedural requirements of the Administrative Procedure Act (APA). *National Lifeline Ass'n* represented a matter of first impression among the federal circuit courts and established a minimum comment period of thirty days for informal agency rulemaking. This Comment argues that the D.C. Circuit Court's substantive holding aligned with prior case law, but that the procedural holding was inconsistent with the Supreme Court's 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* and the spirit of the APA.

INTRODUCTION

Federal agencies make decisions every day that affect Americans in both minute and significant ways.[1] Congress passed the Administrative Procedure

[1] *See generally* Agency List, FED. REG., https://www.federalregister.gov/agencies [https://perma.cc/7KVT-5HKS] (listing 449 federal agencies of varying size and scope, including the Gulf Coast Ecosystem Restoration Council, Center for Disease Control and Prevention, Federal Election Commission, Refugee Resettlement Office, State Department, Travel and Tourism Administration, Commission of Fine Arts, Financial Crimes Enforcement Network, Amtrak Reform Council, and the Civil Rights Commission). On any given day, agencies publish proposals to change or create regulations in the Federal Register. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 553(b) (2018) (requiring agencies to publish notices of proposed rules in the Federal Register); 44 U.S.C. §§ 1501–1505 (2018) (stating that all documents required to be published can be found in the Federal Register). The Federal Register is the "daily journal of the [f]ederal government." *About the Federal Register*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/the-federal-register/about.html [https://perma.cc/7LJN-G5QX]. The National Archives and Records Administration's Office of the Federal Register publishes the Federal Register each business day. *Id.* In addition to proposed rules, the Federal Register also contains final agency rules, executive orders, and other executive documents. *Id.* On September 28, 2019, for example, the current daily issue of the Federal Register contained eight proposed agency rules, pertaining to such issues as the Energy Department's test procedure for ceiling fans and the Pension Benefit Guaranty Corporation's regulations on benefits payable in terminating single-employer plans. *Document Search*, FED. REG., https://www.federalregister.gov/documents/search?conditions%5Bpublication_date%5D%5Bis%5D=2019-09-30&conditions%5Btype%5D%5B%5D=PRORULE [https://perma.cc/JJZ5-ATM7].

Act of 1946 (APA) in reaction to the rapid expansion of the administrative process.[2] Congress's goals were to: (1) create uniform procedure across diverse agencies and (2) "check" agency administrators who otherwise might push the boundaries of their agencies' legislative mandates.[3] The APA established procedural requirements for rulemaking and adjudication and created a mechanism for judicial review of agency decisions.[4] A court's ability to overturn an agency's substantive actions is limited under the APA.[5] Therefore, federal courts have focused on their role in enforcing the APA's procedural requirements.[6] When the U.S. Court of Appeals for the D.C. Circuit attempted to add procedural requirements above what is required by the APA, the Supreme Court reversed the holdings.[7] The APA requires three steps for informal rule-

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[2] United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

[3] Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950); *Morton Salt Co.*, 338 U.S. at 644. *See generally* 5 U.S.C. § 706 (requiring agencies to follow proscribed administrative procedure). Legislators were wary of administrators who, without sufficient protections, would impede individuals' private rights. *Morton Salt Co.*, 338 U.S. at 644. The Final Report of the Attorney General's Committee on Administrative Procedure, completed in 1941, guided the design of the Administrative Procedure Act (APA). Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31; COMM. ON ADMIN PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-78, at 27 (1st Sess. (1941)) [hereinafter THE MANUAL]). Courts have looked to *The Manual* to interpret the APA because the Department of Justice, which wrote *The Manual*, assisted in the promulgation of the APA. *See Brown*, 441 U.S. at 302 n.31 (citing *The Manual* as persuasive authority for interpreting the term "substantive rules" in the APA).

[4] *See* 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (governing agency rulemaking and adjudication); *id.* § 706 (limiting the scope of judicial review of agency actions to considerations of whether an agency action is arbitrary or capricious, violates constitutional rights, or exceeds the agency's jurisdiction). Rulemaking is an "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). The APA's definition of "rule" is broad. *Id.* § 551(4). A rule is a statement of general or particular applicability, and of future effect. *Id.* The rule could be to "implement, interpret, or prescribe law or policy," on the one hand, "or describe[e] the organization, procedure, or practice requirements of an agency" on the other. *Id.* The APA distinguishes rulemaking from agency adjudication, which means an "agency process for the formulation of an order," with order being defined as "a final disposition . . . of an agency in a matter other than rule making but including licensing." *Id.* § 551(5)–(7). Adjudication is more closely analogous to the judicial process of courts. FEDERAL ADMINISTRATIVE LAW 48 (Gary Lawson ed. 2016). A rule is comparable to a statute, so when an agency engages in rulemaking it must comply with certain procedures, just as a legislative body would in order to pass a law. *Id.* There is also a division within the rulemaking category between informal and formal rulemaking, although those terms are not included in the APA. *Id.* at 306. The informal rulemaking process is outlined in § 553 of the APA, whereas the formal process spans §§ 556–557. *Id.* at 306–07. Formal rulemaking mirrors a trial procedure before a court, whereas informal rulemaking only requires that an agency follow basic administrative procedures. *Id.* The APA requires agencies conducting informal rulemaking to give notice of proposed rulemakings and allow interested people to participate in the process. 5 U.S.C. § 553(c).

[5] *See infra* note 22 and accompanying text (summarizing the judicial constraints in overturning agency action on substantive grounds).

[6] FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 360–61.

[7] Vt.Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978). The Atomic Energy Commission (Commission) held a notice-and-comment period for a proposed rule about disposing uranium. *Id.* at 528. The Commission denied interested parties the ability to cross-examine the Commission about the staff-prepared report it relied on, "Environmental Survey of the

making: (1) publishing a notice of proposed rulemaking, (2) providing an opportunity for public comment, and (3) publishing the final rule, along with an explanation of the rationale for the rule.[8] The process of publishing a notice of proposed rule and receiving public comments is called a notice-and-comment period.[9]

In 2019, in *National Lifeline Ass'n v. FCC*, the D.C. Circuit held that an agency may not depart from prior policy without: (1) holding a new notice-and-comment proceeding of at least thirty days, (2) providing a reasoned explanation for the change, (3) addressing past contradictory findings, and (4) accounting for reliance on past policy.[10] The decision emphasized the importance of giving interested people a meaningful opportunity to participate in the rulemaking process, yet established a minimum number of days for a comment period that is lower than experts recommend.[11] The court's decision to establish a bright-line directive, to be applied to all agencies regardless of the scope or impact of their proposed rule, did not account for the diversity of

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Nuclear Fuel Cycle." *Id.* at 528–29. The Commission did, however, make the report public and solicit public comment on the proposed rule. *Id.* at 529. The Natural Resources Defense Council appealed the final rule. *Id.* The D.C. Circuit set aside the agency action and held that the Commission's rulemaking procedure was inadequate because the rule was complex and the Commission should have permitted the public to cross-examine the Commission on the integrity of the staff report. Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976). The Supreme Court granted certiorari, reversing the D.C. Circuit's holding and sending a clear message that courts may not prescribe additional procedural requirements for informal rulemaking, above what the APA requires. *Vt. Yankee*, 435 U.S. at 525. Because the APA does not require agencies to permit cross-examining during informal rulemaking, the D.C. Circuit overstepped. *Id.* at 546.

[8] 5 U.S.C. § 553.

[9] *Id.*

[10] *See* 921 F.3d 1102, 1112, 1114, 1117 (D.C. Cir. 2019) (pointing out the substantive and procedural deficiencies in the Federal Communication Commission's (FCC) adoption of two changes to the Tribal Lifeline program, a telecommunications subsidy for tribal lands); *see also infra* notes 93–95, 102–109 (explaining the procedural and substantive holdings of *National Lifeline Ass'n*). Substantively, the FCC arbitrarily and capriciously adopted a rule that would negatively impact telecommunications access and affordability. *Nat'l Lifeline Ass'n*, 921 F.3d at 1112, 1114. Procedurally, the FCC did not provide sufficient information in the proposed rule to solicit meaningful comments, nor did it give the public enough time to meaningfully comment. *Id.* at 1116, 1117. The FCC adopted the two changes without "providing any reasoned explanation for its [policy] reversal." *Id.* at 1112. The D.C. Circuit slightly amended the opinion on April 10, 2019, but did not change the holding of the case. Aaron L. Nielson, *D.C. Circuit Review—Reviewed:* Chevron *Waiver*, YALE J. REG. (Apr. 12, 2019), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-chevron-waiver/ [https://perma.cc/MAP9-CPJB]; *see Nat'l Lifeline Ass'n*, 915 F.3d 19 (D.C. Cir.), *amended by* 921 F.3d 1102 (D.C. Cir. 2019) (rearranging a few words in the holding to clarify the outcome of the case).

[11] *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (explaining that a two-week period was not an adequate period for "eliciting meaningful comments" and establishing a minimum comment period across all agency informal rulemaking of thirty days); ADMIN. CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 124 (1983) [hereinafter GUIDE TO FEDERAL AGENCY RULEMAKING] (recommending a sixty-day comment period for complicated proposals that involve specialized, scientific, or industrial materials).

agency mandates and processes and departed from procedural APA informal rulemaking case law.[12]

Part I of this Comment frames the APA's substantive and procedural requirements for agency rulemaking.[13] Part I also discusses the facts at issue in *National Lifeline Ass'n* that culminated in an APA challenge to the Federal Communication Commission's (FCC) changes to the Tribal Lifeline program, a voice and broadband services subsidy for low-income households on federally-recognized tribal lands.[14] Part II explains the different positions argued before the D.C. Circuit on whether the FCC violated the APA's procedural and substantive requirements.[15] Part III argues that the D.C. Circuit's ruling followed relevant case law and provided clear guidance for agencies to follow concerning the substantive requirements of the APA, but not the procedural requirements.[16]

I. SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF AGENCY INFORMAL RULEMAKING UNDER THE APA

In 2019, the U.S. Court of Appeals for the D.C. Circuit contributed to the wealth of case law interpreting the APA in *National Lifeline Ass'n v. FCC*.[17] Section A of this part discusses the APA's substantive requirements and the scope of judicial review of agency decisions.[18] Section B discusses the APA's

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[12] *See infra* notes 110–136 and accompanying text (suggesting that the *Nat'l Lifeline Ass'n* procedural holding departed from APA precedent and administrative law theory).

[13] *See infra* notes 17–49 (outlining the procedural requirements of agency rulemaking and describing judicial review of the substance and procedure of agency rulemaking). The APA imposes procedural requirements on agencies, such as publishing a notice of proposed rulemaking. 5 U.S.C. § 553(b). Substantively, the APA prohibits an agency from acting arbitrarily or capriciously, or abusing its discretion. *Id.* § 706(2).

[14] *Nat'l Lifeline Ass'n*, 921 F.3d at 1105, 1109, 1110; *see infra* notes 50–78 (illustrating the facts and procedural history of *National Lifeline Ass'n*).

[15] *See infra* notes 79–109 and accompanying text.

[16] *See infra* notes 110–136 and accompanying text (evaluating the *National Lifeline Ass'n* holding in light of prior case law).

[17] *Nat'l Lifeline Ass'n*, 921 F.3d at 1102; *see infra* note 22 and accompanying text (explaining the narrow judicial standard of review of the substance of agency decisions).

[18] *See infra* notes 21–31 and accompanying text (summarizing the APA substantive requirements and the scope of judicial review of agency decisions); *see also* § 706(2) (requiring that courts give deference to federal agency decisions and only set aside unlawful decisions); *Nat'l Lifeline Ass'n*, 921 F.3d at 1110–11 (applying the same limited scope of review as previous cases, which suggest reversal of agency decisions do not require a heightened standard of review). When an agency completely fails to hold a notice-and-comment period, the failure amounts to a non-harmless error, as opposed to a "mere technical defect." Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1384 (Fed. Cir. 2017). An error is harmless when it does not prejudice anyone. County of Del Norte v. United States, 732 F.2d 1462,1467 (9th Cir. 1984). *Compare* California Wilderness Coalition v. U.S. Dep't of Energy, 631 F.3d 1072, 1105–06 (9th Cir. 2011) (holding that the Department of Energy's decision not to complete an environmental study of the effects of designating national interest electric transmission corridors in an area covering four national forests was not a harmless error), *with* Ludwig v. Astrue, 681 F.3d 1047, 1054–55 (9th Cir. 2012) (holding that a Social Security Administration judge's error in considering ex parte evidence was harmless because the judge would have reached the same con-

procedural requirements, focusing on the notice-and-comment process.[19] Section C examines the factual and procedural history of *National Lifeline Ass'n*.[20]

A. Standard of Judicial Review of Federal Agency Decisions

Agencies have rulemaking power, but their final rules and the processes producing those rules are subject to judicial review by courts.[21] Under the APA, a court reviews an agency action narrowly, discerning whether the agency surveyed relevant data before acting.[22] An agency action at issue can be a full or a partial "agency rule, order, license, sanction, relief, or the equivalent or denial thereof."[23] A failure to act also qualifies as an agency action.[24] A

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clusion without the error). Courts do not set aside agency errors that are harmless. *County of Del Norte*, 732 F.2d at 1467. The party attacking an agency's determination bears the burden of showing that an error is harmful. Shinseki v. Sanders, 556 U.S. 396, 410 (2009).

[19] *See infra* notes 32–49; *see also* 5 U.S.C. § 553; *Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (adopting the thirty-day minimum period for comments during an agency's notice-and-comment process).

[20] *See infra* notes 50–78.

[21] 5 U.S.C. § 706(2).

[22] *Id.* (establishing areviewing court's scope of review of agency decisions); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (emphasizing the judicial tradition of agency deference); *Nat'l Lifeline Ass'n*, 921 F.3d at 1110, 1115 (holding the FCC "failed to refer to data considering the impact of its Tribal Rural Limitation on incentivizing infrastructure development"); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (concluding that courts do not have heightened level of scrutiny for reviewing agency decisions to reverse course); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (holding that an agency cannot substitute "*post hoc* rationalizations" of a decision to rescind an auto safety requirement during appellate review); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (holding that the agency made no findings about possible results from two different remedies available under the Interstate Commerce Act and National Labor Relations Act). The APA defines "agency" as any authority of the U.S. government, with some exceptions, including Congress, the courts, and agencies that are statutorily exempt. 5 U.S.C. § 701(b)(1). The reviewing court sets aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2). The agency's explanation must be clear enough that its "path may reasonably be discerned." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

[23] 5 U.S.C. § 551(13). The term "agency action" covers a broad scope of activity. *Id.* For example, a Navy Judge Advocate General's suspension of a civilian attorney from practicing before naval courts constituted agency action. Partington v. Houck, 723 F.3d 280, 289 (D.C. Cir. 2013). Conversely, the Bureau of Land Management's approval of a budget request that included an overview for a "reinvigorated wild horses and burros program" did not constitute agency action because the program strategies included in the budget approval did not bind the field offices that would make the decisions. Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 19, 20–21 (D.C. Cir. 2006). Additionally, denial of an immigrant investor visa petition constitutes agency action. *See* Chiayu Chang v. U.S. Citizenship & Immigration Servs., 289 F. Supp. 3d 177, 182 (D.D.C. 2018) (reviewing the USCIS's denial of a visa petition as an action under 5 U.S.C. § 706(2)(A)).

[24] 5 U.S.C. § 551(13). In *Jackson v. Lynn*, the Federal Housing Authority's (FHA) failure to ensure a home's compliance with a local building code as a prospective buyer proposed purchasing the home with an FHA-insured mortgage would constitute agency action, if properly requested and denied. 506 F.2d 233, 237–38 (D.C. Cir. 1974). The Atomic Energy Commission's failure to prepare an

court will set aside actions that constitute abuse of agencies' discretion, are arbitrary and capricious, or are otherwise unlawful.[25]

Courts do not employ a more searching standard of review for changes in agency policy than the standard of review for a new policy.[26] Just as they would for a new rule, agencies have to provide a reasoned explanation for a policy change, which would likely include demonstrating an awareness that it is changing its policy.[27] An agency does not need to provide a more detailed justification than what it would provide for a new policy so long as: (1) the policy change falls within its statutory mandate, (2) the agency is cognizant of the change of position, and (3) the agency can point to satisfactory justification for the change.[28] A court may not require an agency to prove that its new policy is better than the prior one.[29] An agency may not, however, ignore reliance interests on its past policy, nor factual findings that conflict with its new policy.[30] The court's judicial review, therefore, is confined to reviewing the administrative record to ensure that the agency made reasonable decisions supported by substantial evidence.[31]

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environmental impact statement prior to a power company acquiring the land would have qualified as agency action as well. Gage v. Commonwealth Edison Co., 356 F. Supp. 80, 84 (N.D. Ill. 1972).

[25] 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard is deferential. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007). A court may only vacate an agency's decision if the agency relied on factors Congress did not direct it to consider, ignored an important aspect of its decision, directly contradicted relevant evidence and was therefore illogical, or is "so implausible" that the action "could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *State Farm*, 463 U.S. at 43).

[26] *Fox*, 556 U.S. at 514.

[27] *Id.* at 515; *Nat'l Lifeline Ass'n*, 921 F.3d at 1110–11 (citing *Encino*, 136 S. Ct. at 2125); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000–01 (2005) (explaining that the FCC had a reasoned explanation for analyzing cable modem service differently than Digital Subscriber Line (DSL) service because there are substitute forms for internet transmission, whereas there were no substitutions for DSL).

[28] *Fox*, 556 U.S. at 515; *Nat'l Lifeline Ass'n*, 921 F.3d at 1111.

[29] *Fox*, 556 U.S. at 515.

[30] *Id.* Parties develop reliance on agencies' interpretations, so agencies must take this into account. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996). An agency decision that does not consider reliance interests on a prior agency position may be "arbitrary, capricious, [or] an abuse of discretion." *Id. But see* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (holding that where ramifications of reliance are not substantial or are speculative, an agency should not be prevented from considering a change).

[31] *Nat'l Lifeline Ass'n*, 921 F.3d at 1111; *see* Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1500 (D.C. Cir. 1984) (explaining that the court's role was to decide whether a commission examined pertinent factors, like oil pipeline operation risks for the Federal Energy Regulatory Commission's pipeline ratemaking rules, and provided a reasonable basis for its action). The administrative record is the "record of administrative proceedings." Wheatley v. Shields, 292 F. Supp. 608, 609 (S.D.N.Y. 1968).

B. Notice-and-Comment Under the APA

Congress intended the APA to strike a balance between empowering government agencies and holding them accountable.[32] To that end, the APA requires agencies to preview proposed rule changes and solicit feedback before implementation.[33] An agency must: (1) publish a notice of proposed rulemaking, (2) give interested parties a chance to submit comments, (3) consider the comments, an (4) publish the final substantive rule, along with a succinct statement explaining the rationale for the rule.[34] Through the APA's notice-and-comment requirements, the public has access to the rulemaking process and can therefore hold agencies accountable.[35]

Pursuant to § 553 of the APA, when an agency publishes a proposed change, it must provide its rationale and sufficient details to allow interested parties to provide informed comments.[36] The agency first publishes a notice of the proposed rule in the Federal Register, and then permits interested parties to submit written comments.[37] The APA does not set a minimum length for the comment period.[38] Courts have interpreted the APA as stating that agencies

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[32] Darren Botello-Samson, *The Neoliberal Erosion of Rights in Administrative Law*, 19 TEX. TECH ADMIN. L.J. 247, 255 (2018); *see also* KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 143 (4th ed. 2004) (describing the impetus for the APA and its systematic checks on agencies).

[33] 5 U.S.C. § 553(b)–(c); *see infra* note 4 (defining informal rulemaking).

[34] 5 U.S.C. § 553; Cynthia R. Farina, et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 401 (2011). The description of the proposed rule and supporting information are included in the Federal Register publication for the public to read. 5 U.S.C. § 553(b).

[35] Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1511 (2017); *see* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343–44 (2011) (explaining how rulemaking holds agencies accountable in a democratic system). The public is able to view and contribute to deliberations about proposed agency rules before they go into effect. Mendelson, *supra*, at 1343. Agency decisions are "kept aboveboard." *Id.*

[36] 5 U.S.C. § 553(c); *Nat'l Lifeline Ass'n*, 921 F.3d at 1115 (citing Fla. Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988)). Soliciting comments after promulgation of rules cannot replace a pre-promulgation notice-and-comment period. Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979). In certain emergencies, though, an agency can issue temporary interim rules that go into immediate effect. Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981). In *American Federation of Government Employees v. Block*, the Department of Agriculture issued final rules without notice-and-comment because a federal district court had ordered it to remedy discrimination in its poultry inspection rates enforcement. 655 F.2d at 1154–55. The D.C. Circuit held that issuing the emergency regulations was reasonable. *Id.* at 1157.

[37] 5 U.S.C. § 553(b)–(c) (requiring agencies to publish notice in the Federal Register that includes logistical details of the rulemaking process, a citation to the statutory basis for the proposed rule, and an overview of the proposed rule); *Nat'l Lifeline Ass'n*, 921 F.3d at 1115. The Federal Register is a daily serial publication of federal government documents that require public notice. Federal Register Act, 44 U.S.C. §§ 1504–1505. When a notice is published in the Federal Register, it is deemed to have been given to all residents of the United States. *Id.* § 1508. The Federal Register is published in three formats: (1) paper, (2) microfiche, and (3) online at https://www.federalregister.gov/ [https://perma.cc/FQ86-JXPN]. 1 C.F.R. § 5.10 (2020).

[38] *Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (citing Petry v. Block, 737 F.2d 1193, 1201 (D.C. Cir. 1984)). The APA merely requires that an agency publish notice of the proposed rule in the Federal

must give interested people sufficient time to comment meaningfully during the comment period.[39] In 1983, the Administrative Conference of the United States (the Administrative Conference) responded to a common misconception about the APA having a minimum comment period of thirty days.[40] Thirty days, the Administrative Conference wrote, is an inadequate time for people to respond to complicated proposals that involve specialized, scientific, or industrial materials.[41] Instead, the Administrative Conference opined that a sixty-day period is a "more reasonable minimum time for com[m]ent."[42]

Moreover, the original notice must sufficiently describe the proposed agency action, so that the subsequent final rule is a logical outgrowth of the initial proposal.[43] The party to be affected by the rule then can anticipate the

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Register and "give interested persons an opportunity to participate in the rule making" by submitting materials to the agency. 5 U.S.C. § 553(c).

[39] *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (explaining that thirty days is the minimum amount of time needed to respond meaningfully to agency proposals).

[40] *Petry*, 737 F.2d at 1201 (citing GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 11). Congress created the Administrative Conference, an independent federal agency with between 75 and 101 appointed members in 1966. Administrative Conference Act, 5 U.S.C. §§ 591, 593. One of its statutory purposes is to "promote more effective public participation and efficiency in the rulemaking process." *Id.* § 591(2). The Administrative Conference produced its *Guide to Federal Agency Rulemaking* in 1983. *Petry*, 737 F.2d at 1201.

[41] *Petry*, 737 F.2d at 1201. As the D.C. Circuit noted in *Petry v. Block*, there is nothing "talismanic" about a thirty-day minimum comment period. *Id.* In *Petry*, the Omnibus Budget Reconciliation Act of 1981 (OBRA) required the Department of Agriculture (Department) to expeditiously reduce certain reimbursements within the Child Care Food Program by ten percent. *Id.* at 1195. OBRA required the Department to implement regulations within sixty days, which it did, but without notice-and-comment. *Id.* The D.C. Circuit held that the Department permissibly waived notice-and-comment because it would have been impracticable. *Id.* at 1201. Thirty days is the "shortest time in which parties can meaningfully review a proposed rule and file informed responses." *Id.* But as the Administrative Conference suggested, sixty days is "a more reasonable minimum time" for notice-and-comment. *Id.* The Department therefore had insufficient time to conduct notice-and-comment before the statutory deadline, so it had good cause to waive the APA's requirements. *Id.*

[42] *Id.* (citing GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 11, at 124). The parties that will be affected by a proposed rule "often are large organizations and they need time to coordinate and approve an organizational response or to authorize expenditure of funds to do the research needed to produce informed comments." GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 11, at 125. The Administrative Conference cited Executive Order 12,044, which set a minimum comment period of sixty days for all federal agencies. 43 Fed. Reg. 12,661 (Mar. 24, 1978). The executive order expired on June 30, 1980. *Id.*

[43] *Nat'l Lifeline Ass'n*, 921 F.3d at 1115 (citing Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996)). In *Zen Magnets, LLC. v. Consumer Products Safety Commission*, the Consumer Product Safety Commission adopted a regulation "restricting the size and strength of [certain] rare earth magnets." 841 F.3d 1141, 1144 (10th Cir. 2016). The Third Circuit held that the agency's addition of "or commonly used" in the definition of a magnet set in the final rule was a logical outgrowth of the proposed rule. *Id.* at 1154. The agency had demonstrated concern in its proposed rule that its proposed definition "would not address the risks of magnets ostensibly marketed for purposes other than entertainment." *Id.* The addition was therefore foreseeable, and thus, a logical outgrowth of the proposed rule. *Id.* Conversely, in *Allina Health Services v. Sebelius*, the Department of Health and Human Service's (DHHS) final rule about calculating payment adjustments in Medicare reimbursements was not a logical outgrowth of the proposed rule. 746 F.3d 1102, 1105, 1107–08 (D.C. Cir. 2014). DHHS had

agency's final decision based on the notice.[44] The affected party also has the opportunity to participate meaningfully in the rulemaking by offering written input.[45] Following the notice period, the agency must include a "concise general statement of their basis and purpose" in the final rules.[46]

In reviewing agency decisions, courts may not impose additional procedural requirements on agencies for rulemaking beyond what is required under the APA.[47] In the 1978 landmark decision *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Supreme Court responded to the D.C. Circuit's activism in adding procedural steps to informal rulemaking.[48] The Supreme Court held in *Vermont Yankee* that because Congress intended agencies to exercise discretion in determining when to add procedural steps, a court may not remand an agency decision for procedural inadequacies if the agency complied with the minimum APA requirements.[49]

C. Factual and Procedural History of National Lifeline Ass'n

For decades, the federal government has tried to achieve universal communications services across the United States.[50] It has done this by passing legislation, first with radio in 1934, and again with telecommunications and information services in 1996.[51] In response to each congressional act, the FCC

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reversed its interpretation about the calculation without giving any indication in the proposed notice that it would "reconsider[] a longstanding practice." *Id.* at 1108. The final rule was not a logical outgrowth of the proposed rule because parties could not anticipate the change was possible. *Id.* at 1107, 1109.

[44] *Nat'l Lifeline Ass'n*, 921 F.3d at 1115 (citing Covad Commc'ns Co. v. FCC, 450 F.3d 528, 548 (D.C. Cir. 2006)).

[45] 5 U.S.C. § 553(c). Although it is not required, agencies may allow an interested party to offer oral input as well. *Id.*

[46] *Id.*

[47] *Vt. Yankee*, 435 U.S. at 548.

[48] *Id.*; *see infra* note 82 and accompanying text (citing cases where the D.C. Circuit added procedural steps above the APA's informal rulemaking requirements).

[49] *See Vt. Yankee*, 435 U.S. at 544, 546, 549 (holding that the D.C. Circuit improperly remanded agency decisions for lacking procedures that were not required by the APA).

[50] *See infra* note 51 and accompanying text (describing the legislation Congress passed to expand access to communications services). First, Congress focused on radio as a communications service, and later, telephone and cable. *See infra* note 51 and accompanying text. Before Congress passed the Telecommunications Act of 1996, only three percent of elementary and secondary education classrooms had internet access. S. REP. NO. 104-23, at 51 (1995).

[51] *See* Telecommunications Act of 1996, 47 U.S.C. § 254(b)(1), (3) (2018) (making rapid, efficient, reasonably-priced telecommunication services with adequate facilities available nationwide); Communications Act of 1934, 47 U.S.C. § 151 (making quality radio communications services available at just, reasonable, and affordable rates across all regions of the United States). The Communications Act of 1934 created the FCC, charged with regulating interstate and foreign communication commerce and expanding availability of wire and audio communication service with "adequate facilities at reasonable charges." 47 U.S.C. § 151. The key principles of the Telecommunications Act of 1996 were "quality and rates," "access to advanced services," "access in rural and high cost areas," "equitable and nondiscriminatory contributions," "specific and predictable support mechanisms," and

adopted various iterations of the Lifeline program, a voice and broadband services subsidy for low-income households, to ensure that low-income consumers have access to affordable landline telephone service.[52]

Access to telecommunications and information services is especially lacking on tribal lands.[53] After consulting various tribal leaders, the FCC created the Tribal Lifeline program in 2000, which offered people who live on tribal lands an increased telecommunications services subsidy of twenty-five dollars per month.[54] The Tribal Lifeline program considers tribal lands to be any "federally recognized Indian tribe's reservation, pueblo, or colony."[55] Before the FCC established the Tribal Lifeline program in 2000, only forty-seven percent of Indian tribal households had a telephone, whereas approximately ninety-four percent of all households in the United States had a telephone.[56] The FCC's "primary goal" in adopting the enhanced subsidy was to reduce the

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"access to advanced telecommunications services for schools, health care, and libraries." *Id.* § 254(b). The Telecommunications Act defines telecommunications as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). The Telecommunications Act defines information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* § 153(24).

[52] *Nat'l Lifeline Ass'n*, 921 F.3d at 1105; FCC, Fed.-State Joint Bd. on Universal Serv., 12 FCC Rcd. 8776, 8960 ¶ 346 (1997). The Lifeline Program provides a baseline monthly discount of $9.25 for telecommunications services. 47 C.F.R. § 54.403 (2020).

[53] *See infra* note 56 and accompanying text (describing the low percentage of people on tribal lands with telephones).

[54] *Nat'l Lifeline Ass'n*, 921 F.3d at 1107; 47 C.F.R. § 54.403(a)(3); Fed.-State Joint Bd. on Universal Serv., 15 FCC Rcd. 12208, 12212 ¶¶ 5, 13 (2000) (*2000 Tribal Lifeline Order*); Statement of Policy on Establishing a Gov't-to-Gov't Relationship with Indian Tribes, 16 FCC Rcd. 4078, 4081 (2000) (noting the FCC affirmed principles of tribal sovereignty by committing to consult tribal governments before enacting policies or rules that will impact their tribes). The FCC convened two meetings with Indian tribal leaders where the leaders identified telecommunications-access problems like "geographic isolation," "lack of information," and "economic barriers." Statement of Policy on Establishing a Gov't-to-Gov't Relationship with Indian Tribes, 16 FCC Rcd. at 4079. Participants in the process included representatives from Chickasaw Nation, Standing Rock Sioux Tribe, Salt River Pima-Maricopa Indian Community, Oneida Nation, and Cheyenne River Sioux. Fed.-State Joint Bd. on Universal Serv., 14 FCC Rcd. 21177, 21241 app. A (1999). The FCC explained that basic telecommunications services are a "fundamental necessity in modern society," and low-income individuals without basic telecommunications services fall further behind their counterparts connected to the telecommunications infrastructure. *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12212 ¶ 3.

[55] 47 C.F.R. §§ 54.400, 54.403(a)(3). Tribal lands also include: "former reservations in Oklahoma," "Alaska Native regions," "Indian allotments," "Hawaiian Home Lands," and any "off reservation" land designated as "tribal" by the FCC. *Id.* § 54.400 (citing 47 C.F.R § 54.412). Under the Federally Recognized Indian Tribe List Act of 1994, the Secretary of the Interior is required to publish in the Federal Register an annual list of all Indian Tribes that qualify for government services. 25 U.S.C. § 5131 (2018).

[56] *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12211–12.

monthly cost of telecommunications services for low-income households on tribal land, so that eligible people would subscribe to and continue services.[57]

Under the Tribal Lifeline Program, the FCC provides subsidies to eligible telecommunications carriers (ETCs).[58] To be an ETC, a carrier needs to offer telecommunications services employing entirely their own facilities or their own facilities supplemented with additional facilities owned by separate carriers.[59] Initially the FCC interpreted "own facilities" as implying that only facilities-based providers could qualify for Lifeline subsidies.[60] Facilities-based providers, as opposed to non-facilities-based providers, own the transmission facilities that they use to connect end users to the telecommunication services.[61] Beginning in 2005, recognizing that welcoming non-facilities-based providers to the program would expand consumer choice, the FCC departed from prior policy by allowing non-facilities-based providers to provide Lifeline services.[62] The FCC formalized this decision by issuing a forbearance order, granting providers reprieve from the facilities requirement for ETC designation for Lifeline support.[63] In 2015, almost two-thirds of customers living on

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[57] *Nat'l Lifeline Ass'n*, 921 F.3d at 1107 (citing *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12231 ¶¶ 44) (recognizing that households on tribal lands needed enhanced subsidy support because of the "extraordinarily low" average incomes in tribal areas, the high tolls in "limited local calling areas," "the disproportionately low subscribership levels," and the low participation in the standard Lifeline program).

[58] *Nat'l Lifeline Ass'n*, 921 F.3d at 1106–07 (citing 47 U.S.C. § 214 (e)(2), (6)).

[59] 47 U.S.C. § 214(e)(1)(A); *see infra* note 60 and accompanying text (explaining how the FCC has interpreted "own facilities"). An ETC must also advertise its telecommunications services through common media platforms. 47 U.S.C. § 214(e)(1)(B).

[60] *Nat'l Lifeline Ass'n*, 921 F.3d at 1108; *see infra* note 61 and accompanying text (defining facilities-based providers). The FCC's rationale before 2005 was that if eligible for the program, non-facilities-based providers would recover twice. *Nat'l Lifeline Ass'n*, 921 F.3d at 1108. The non-facilities-based providers would purchase services from the facilities-based providers, which were subsidized, and then would receive an additional subsidy as ETCs. *Id.*

[61] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 979 (2005) (explaining that non-facilities-based internet providers do not own the cable services that they provide to consumers but instead offer other providers' services to the consumers). The facilities-based providers do not need to contract with another provider for the transmission. *Id.* Transmission means "the passage of radio waves in the space between transmitting and receiving stations." *Transmission*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/transmission [https://perma.cc/54BB-6BSH].

[62] *Nat'l Lifeline Ass'n*, 921 F.3d at 1108. The FCC saw expanding consumer choice as beneficial. *Id.*

[63] *Id.* (citing Fed.-State Joint Bd. on Universal Serv., 20 FCC Rcd. 15095, 15100–01 (2005) (*TracFone Wireless*) (denying petition by TracFone Wireless for forbearance, and concluding the "own facilities" requirement met the 1996 Act's criteria for forbearance because: (1) there was no double recovery because resellers' rates were not subsidized, (2) forbearance would benefit consumers, and (3) forbearance would expand eligible participation, which was in the public interest). Forbearance means to "render inapplicable" part of a statute. Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L. J. 1548, 1551 (2016). The Communications Act permits the FCC to "formally deprive portions of the [Communications] Act of their legal force." *Id.* (citing 47 U.S.C. § 160). Because of the forbearance policy, non-facilities-based providers like TracFone Wireless were eligible

tribal lands who qualified for the program received Lifeline services through a non-facilities-based provider.[64]

Ten years after the forbearance order, the FCC embarked on revising the Lifeline services again.[65] In June 2015, the FCC opened a rulemaking proceeding to restructure both the Lifeline and Tribal Lifeline programs.[66] The FCC sought comment about potentially providing support exclusively to facilities-based providers (facilities requirement) and less populated tribal regions (rural limitation).[67] After the comment period closed, the FCC issued a final rule.[68] The rule made significant changes to the Lifeline program, but made no alterations to the Tribal Lifeline program.[69]

Despite stating in the 2016 order that it would hold another proceeding before making those changes, the FCC promulgated a draft order on October 26, 2017 that embodied a facilities requirement and a rural limitation.[70] The facilities requirement limited Tribal Lifeline support to "fixed or mobile wireless facilities-based" providers, as opposed to non-facilities-based, or reseller, providers.[71] The rural limitation restricted the Tribal Lifeline subsidy to people

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for Tribal Lifeline ETC designation. *Nat'l Lifeline Ass'n*, 921 F.3d at 1108. The FCC expected that low-income consumers would find TracFone's services more accessible than those of other providers, because its prepaid option was free from usage charges or long-term contracts. *TracFone Wireless*, 20 FCC Rcd. at 15101. Moreover, TracFone assured the FCC that consumers could place 911 calls from their phones, even when a consumer's plan was not active or had run out of prepaid minutes. *Id.* According to the Forbearance Order, the FCC had a duty to ensure a "seamless, ubiquitous, and reliable end-to-end infrastructure for public safety." *Id.* at 15102.

[64] *Nat'l Lifeline Ass'n*, 921 F.3d at 1108.

[65] *Id.* at 1109.

[66] *Id.*

[67] *Id.*; Lifeline & Link Up Reform & Modernization, 30 FCC Rcd. 7818, 7875–76 ¶¶ 167, 169–70 (2015) (*2015 Lifeline Second FNPRM*). The notice in 2015 did not specify a cut-off population density for its proposed limitation, but rather provided examples of areas with higher and lower population density. *2015 Lifeline Second FNPRM*, 30 FCC Rcd. at 7876 ¶¶ 169–70.

[68] *Nat'l Lifeline Ass'n*, 921 F.3d at 1109.

[69] *Id.* (citing Lifeline & Link Up Reform & Modernization, 31 FCC Rcd. 3962, 3964 ¶¶ 6–8, 4036–38 ¶¶ 205–11 (2016) (*2016 Lifeline Order*) ("[T]he Commission established minimum service standards for broadband and mobile voice services, created a National Verifier program to ensure only eligible subscribers may enroll in Lifeline support, and encouraged the entry of new broadband providers into the Lifeline program."); *2016 Lifeline Order*, 31 FCC Rcd. at 4036–38 ¶¶ 205–11 (stating that certain Tribal Lifeline eligibility issues it raised in the proceeding, including the proposed facilities requirement and eligibility restriction to only rural areas would "remain open for consideration in a future proceeding").

[70] *Nat'l Lifeline Ass'n*, 921 F.3d at 1109 (citing FCC, FCC FACT SHEET: BRIDGING THE DIGITAL DIVIDE FOR LOW-INCOME CONSUMERS (2017), https://www.fcc.gov/document/bridging-digital-divide-low-income-consumers [https://perma.cc/B6H9-JHSP] [hereinafter 2017 LIFELINE ORDER]); *2016 Lifeline Order*, 31 FCC Rcd. at 3962, 4036–38 ¶¶ 205–11; *see infra* notes 71, 72 and accompanying text (explaining the facilities requirement and rural limitation).

[71] 2017 LIFELINE ORDER, *supra* note 70, ¶¶ 22, 24 (defining a "fixed or mobile wireless facilities-based service" to mean providers that "hold usage rights under a spectrum license or a long-term spectrum leasing arrangement along with wireless network facilities that can provide wireless voice and broadband services"). About sixty-two percent of all Tribal Lifeline subscribers that use wireless services

living in rural, as opposed to urban, tribal areas.[72] Following a seven-day comment period, on November 9, 2017, the FCC announced the beginning of a Sunshine Period, during which interested persons could not lobby the FCC.[73] One week later, on November 16, 2017, the FCC formally instated the facilities requirement and rural limitation.[74]

Tribal Lifeline program beneficiaries filed a petition for an administrative stay of the order, which the FCC denied.[75] The beneficiaries then filed a motion for a judicial stay, which the D.C. Circuit Court granted.[76] The beneficiaries then sued the FCC, challenging the facilities requirement and rural limitation.[77] The D.C. Circuit Court of Appeals granted a petition for review to resolve two key issues: (1) whether the FCC acted arbitrarily and capriciously when it adopted the facilities requirement and rural limitation, and (2) whether its process violated APA informal rulemaking procedural requirements.[78]

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relied on non-facilities-based providers. Joint Opening Brief of Petitioner Crow Creek Sioux Tribe and Intervenor Oceti Sakowin Tribal Utility Authority at 11, *Nat'l Lifeline Ass'n*, 921 F.3d 1102 (Nos. 18-1026, 18-1080). Facilities-based wireless carriers like AT&T, Verizon, and T-Mobile ceased providing Lifeline services in many places because they were not profitable. Joint Opening Brief of Petitioner Crow Creek Sioux Tribe and Intervenor Oceti Sakowin Tribal Utility Authority, *supra*, at 8–9. This left Sprint as the only major carrier still actively participating in the program. *Id.* Smaller non-facilities-based providers that specialized in serving low-income consumers replaced the larger providers, becoming conduits between the larger, facilities-based providers and the beneficiaries of the Tribal Lifeline program. *Id.* at 7, 11–12. That shifting dynamic is what prompted the FCC to waive the facilities-based requirement through the forbearance policy in 2005. *Id.* at 10. Suddenly, with the facilities requirement implementation in 2017, these smaller providers that specialized in serving low-income customers could no longer qualify to participate in the Tribal Lifeline Program. *Id.* at 12.

[72] 2017 LIFELINE ORDER, *supra* note 70, ¶¶ 3–5 (adopting the definitions of "rural" and "urban" used in the FCC's Schools and Libraries Program, defining "urban" as an "area with a population equal to or greater than 25,000," and "rural" as any area that is not "urban"); 47 C.F.R. § 54.505(b)(3).

[73] *Nat'l Lifeline Ass'n*, 921 F.3d at 1109; *see* 47 C.F.R. § 1.1200(a) (prohibiting all presentations to the FCC about a proposal during a Sunshine Period).

[74] *Nat'l Lifeline Ass'n*, 921 F.3d at 1109.

[75] *Id.* at 1110. Pursuant to the APA, an agency may "postpone," or stay, "the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705; Sierra Club v. Jackson, 833 F. Supp. 2d 11, 33 (D.D.C. Cir. 2012). The FCC denied the stay petition filed collectively by Assist Wireless, LLC, Boomerang Wireless, LLC, Easy Telephone Services Company, the National Lifeline Association, the Crow Creek Sioux Tribe, and the Oceti Sakowin Tribal Unity Authority. Bridging the Digital Divide for Low-Income Consumers, 33 FCC Rcd. 6353, 6353 (2018) (order denying petition for stay).

[76] *Nat'l Lifeline Ass'n*, 921 F.3d at 1110; *see also* Nat'l Lifeline Ass'n v. FCC, No. 18-1026, 2018 WL 4154794 (D.C. Cir. 2018) (granting petitioner National Lifeline Association's motion for stay of the FCC's implementation of the 2017 changes to the Tribal Lifeline Program). A judicial stay "halt[s] or postpone[s] some portion of [a] proceeding" or "temporarily divest[s] an order of enforceability." Nken v. Holder, 556 U.S. 418, 434 (2009). A party requesting a judicial stay bears the burden of proving four factors. *Id.* The four factors are: (1) that the party will likely succeed on the merits of its claim, (2) that the party will be "irreparably injured absent a stay," (3) that a stay will not "substantially injure" other parties, and (4) that the public interest tilts in favor of a judicial stay. *Id.*

[77] *Nat'l Lifeline Ass'n*, 921 F.3d at 1110.

[78] *Id.* at 1105–06.

II. LEGAL CONTEXT AND FRAMEWORK OF *NATIONAL LIFELINE ASS'N*

Before 2019, no circuit court of appeals had set a bright-line rule for the minimum number of days of notice-and-comment in informal rulemaking under the APA.[79] The U.S. Court of Appeals for the District of Columbia Circuit's decision in *National Lifeline Ass'n v. FCC* was a matter of first impression regarding whether an agency may make changes to a program without convening a new notice-and-comment rulemaking proceeding of at least thirty days.[80] Circuit courts had previously ruled on what constitutes meaningful participation in an agency's rulemaking process.[81] Where the circuit courts, particularly the procedurally activist D.C. Circuit, have attempted to set certain bright-line rules for rulemaking processes above what the APA requires, the Supreme Court has reversed.[82] Unsurprisingly, then, no federal appellate court

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[79] *See infra* note 80 and accompanying text (explaining that the U.S. Court of Appeals for the District of Columbia Circuit decided on a matter of first impression in 2019 with regards to agency informal rulemaking procedures).

[80] 921 F.3d 1102, 1117 (D.C. Cir. 2019); Daniel Lyons, *Court Decision Casts Shadows on Lifeline Reforms*, AM. ENTERPRISE INST.: AEIDEAS (Feb. 5, 2019), https://www.aei.org/technology-and-innovation/telecommunications/court-decision-casts-shadow-on-lifeline-reforms/ [https://perma.cc/5E9W-RX33] (commenting that the ruling in *Nat'l Lifeline Ass'n* was the first time a circuit court had set a bright-line rule on the minimum number of days for a comment period in informal rulemaking); *see infra* notes 102–108 and accompanying text.

[81] *See supra* notes 32–49 and accompanying text (describing administrative procedure case law). The U.S. Court of Appeals for the Eighth Circuit also said that post-hoc comment periods are not adequate substitutes for prior notice-and-comment. U.S. Steel Corp. v. EPA, 649 F.2d 572, 577 (8th Cir. 1981).

[82] *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) (overturning the D.C. Circuit's holding for demanding procedural requirements above what the APA requires). The D.C. Circuit is familiar with judicial activism in the administrative law context. FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 356–58. The D.C. Circuit decides about one-third of all appeals pertaining to significant federal administrative law issues. *Id.* at 356. Beginning in the 1960s, the judges sitting on the D.C. Circuit became increasingly concerned with environmental issues and agency capture. *Id.* at 357–58. The judges debated the proper scope of judicial review of agency action, with Judge David Bazelon advocating to strengthen administrative procedures and Judge Harold Leventhal countering with the "hard look" alternative. Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999–1000, 1002 (2006). Judge Bazelon doubted judges' capabilities to evaluate agency decision making. *Id.* Instead, he thought that courts should establish agency procedural requirements that would assure reasoned decisions that withstand "the scrutiny of the scientific community and the public." *Id.* (quoting Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, J., concurring)). In contrast, under Judge Leventhal's "hard look" theory, the APA required courts to carefully examine agency records to determine whether the final rules adopted were rational and plausible. *Id.* at 1002. Notwithstanding this ideological divide, the D.C. Circuit focused its efforts on procedural activism and designed, through a series of cases, "hybrid APA rulemaking," which included an array of procedural additions to informal rulemaking, like permitting oral testimony and disclosing relevant studies to the public. FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 361; *see, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (1973) (requiring agencies to disclose studies they rely on for their proposed rules); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015, 1016 (D.C. Cir. 1971) (requiring agencies to grant parties the opportunity to present oral testimony in certain cases). This line of cases,

adopted a minimum number of days for an agency rulemaking comment period before *National Lifeline Ass'n*.[83] Part A will discuss the APA's substantive requirements, and Part B will discuss the procedural requirements.[84]

A. APA Substantive Requirements

The petitioner first challenged the FCC on substantive grounds.[85] Petitioner, National Lifeline Association, and co-parties requested that the D.C. Circuit Court strike down the changes to the Tribal Lifeline program.[86] Specifically, the petitioners posited that the FCC acted arbitrarily and capriciously in adopting the facilities requirement and rural limitation.[87]

In response, the FCC contended that both the facilities requirement and rural limitation were reasonable.[88] The FCC argued that the facilities requirement was reasonable because the FCC intended to improve program spending and better promote telecommunications infrastructure development in tribal areas.[89] To the FCC, the final facilities requirement rule was a logical out-

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which expanded procedural requirements, culminated in *Vermont Yankee*, where the Supreme Court halted the D.C. Circuit's development of a common law of hybrid APA rulemaking. *See* 435 U.S. at 546 (emphasizing that agencies can formulate their own rules of procedure as long as they meet the requirements within the APA, and that courts should not impose additional procedural requirements above what the APA requires).

[83] *Nat'l Lifeline Ass'n*, 921 F.3d at 1117; *see* Petry v. Block, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (citing GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 11, at 124) (explaining that the APA does not specify a minimum comment period in informal rulemaking, but that the Administrative Conference of the United States suggests that parties need at least thirty days to meaningfully comment on a proposed rule).

[84] *See infra* notes 85–95 and accompanying text (Part A); *infra* notes 96–109 and accompanying text (Part B).

[85] *See infra* note 86 and accompanying text.

[86] Final Brief of Petitioners National Lifeline Association; Assist Wireless, LLC; Boomerang Wireless, LLC d/b/a Entouch Wireless; Easy Telephone Services Company d/b/a Easy Wireless at 20, 26, 41, 48–49, *Nat'l Lifeline Ass'n*, 921 F.3d 1102 (Nos. 18-1026, 18-1080) [hereinafter Final Brief of Petitioners] (positing that the facilities requirement and rural limitation were not logical outgrowths of the 2015 proposal, the benefits of the two limitations were speculative, and the changes departed from FCC policy about facilities).

[87] Final Brief of Petitioners, *supra* note 86, at 26–27, 47, 49, 52 (arguing that the FCC's contention that limiting eligibility to facilities-based providers would promote facilities deployment on tribal lands was speculative and that the FCC unreasonably departed from years of findings that a facilities requirement would undermine the purposes of the Lifeline program). Petitioners argued that the facilities requirement would have the opposite of the intended effect, because restricting eligibility would force many providers out of business and reduce competition, thereby decreasing affordability of service. Final Brief of Petitioners, *supra* note 86, at 42.

[88] Corrected Brief for Respondents at 42, 47, *Nat'l Lifeline Ass'n*, 921 F.3d 1102 (Nos. 18-1026, 18-1080).

[89] *Id.* at 17. The FCC referenced an "exponential rise of Lifeline spending," and "waste, fraud, and abuse" that previous changes to the program did not successfully curtail. *Id.* By limiting ETC eligibility to facilities-based providers, the FCC would ensure that funds would go directly into providing services. *Id.* at 17, 18. Funding resellers, alternatively, could "marginally increase the ability and incentive of other providers to deploy or maintain facilities." *Id.* at 18–19. The marginal in-

growth of the agency's prior notice.[90] Additionally, the FCC contended that the rural limitation was reasonable because rural areas had the highest need, yet the fewest available providers.[91]

The D.C. Circuit sided with the National Lifeline Association, citing substantive deficiencies in the 2017 order for both the facilities requirement and the rural limitation.[92] The FCC had ignored how the changes would affect affordability and access and failed to rationalize the FCC's policy pivot on the "own facilities" requirement.[93] The FCC also failed to deliberate on important implications of a Tribal Lifeline facilities requirement.[94] The rural limitation was arbitrary and capricious as well because the FCC failed to evaluate relevant data on access to affordable telecommunications services in rural, as opposed to urban, tribal areas.[95]

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crease, however, was "outweighed by [the FCC's] need to prudently manage [Tribal Lifeline] Fund expenditures." *Id.* at 19. The FCC also argued that the changes were "firmly grounded in logic and in the record." *Id.* at 18.

[90] Corrected Brief for Respondents, *supra* note 88, at 22–23 (citing 5 U.S.C. § 553(b)(3)(2018) and Agape Church, Inc. v. FCC, 738 F.3d 397, 422 (D.C. Cir. 2013)). In *Agape Church, Inc.*, the FCC promulgated a rule allowing certain types of cable networks to provide conversion equipment for customers with analog, as opposed to digital, cable service, instead of converting the signals before transmission. 738 F.3d at 400, 401. The petitioners claimed the informal rulemaking process violated the APA because the final rule was not a "logical outgrowth" of the proposed rule. *Id.* at 401. The D.C. Circuit held that the final rule was a "logical outgrowth because "[t]he broadcasters in th[e] case certainly should have anticipated that the final rule was a viable result in light of the [notice of proposed rulemaking], and also in light of the fact that [the predecessor rule] was due to sunset unless extended." *Id.* at 412.

[91] Corrected Brief for Respondents, *supra* note 88, at iii, 13, 57, 59 (explaining that ninety-eight percent of Americans in urban areas already have access to multiple service providers, compared to thirty-seven percent in tribal rural areas).

[92] *See supra* notes 86–87 and accompanying text.

[93] *See Nat'l Lifeline Ass'n*, 921 F.3d at 1111–12 (pointing out that the FCC "never explained why its previous forbearance findings no longer applied" in 2017). Affordability and access are key goals for the Tribal Lifeline program. *Id.*

[94] *Id.* at 1114 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (holding that the FCC's departure from its prior forbearance policy without reasoned explanation and failing to consider the reality of the program was arbitrary and capricious). The FCC did not address the facilities-based providers' unwillingness to offer Tribal Lifeline services, the effect the change would have on access, affordability, and buildout, or the reliance interests of carriers and their consumers. *Id.* at 1105–06, 1111. Non-facilities-based providers had invested in participating in the Lifeline program, for example, by purchasing many telephone minutes from the larger carriers to resell to customers. *Id.* at 1114. Consumers relied on being able to afford services through the resellers. *Id.* The resellers estimated that seventy-five percent of Tribal Lifeline customers would not be able to pay the additional twenty-five dollars per month if resellers were no longer eligible. *Id.*

[95] *See id.* at 1115 (deciding that the FCC could not substantiate its claim that telecommunications services on urban tribal lands are cheaper and easier to access than those on rural tribal lands, so the FCC could not argue that limiting the subsidy to rural lands would better pursue the program's primary goals of access and affordability).

B. APA Procedural Requirements

Pursuant to the APA, agencies must conduct notice-and-comment before issuing final rules.[96] In the eyes of the petitioners, the FCC first and foremost violated the APA when it suggested to commenters that it would not implement changes to the Tribal Lifeline program in the 2015-2016 proceeding and then implemented them in 2017 without offering further notice and opportunity to comment.[97] The petitioners suggested that by declining to address the facilities requirement and rural limitation in the 2016 order and by emphasizing that issues not addressed in the order would be taken up in a future proceeding, the FCC committed to opening a new notice-and-comment proceeding before adopting new rules.[98]

Conversely, the FCC contended that it did not violate the APA's procedural requirements, because it provided plenty of notice and opportunity for comment prior to adopting the facilities requirement and rural limitation.[99] The FCC argued that, should the facilities requirement not be considered a logical outgrowth of the 2015 period, any inconsistency with APA procedure was harmless because the FCC published their intended changes for the 2017 order three weeks before they went into effect.[100] The FCC also contended that it consulted tribal governments, although it was not required to do so.[101]

Again, the D.C. Circuit Court sided with the petitioners, holding that the FCC's rulemaking process contained procedural failings that were not harmless.[102] First, the rural limitation was not a logical outgrowth of the FCC's pro-

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[96] 5 U.S.C. § 553(b)–(c).

[97] Final Brief of Petitioners, *supra* note 86 at 21.

[98] *Id.* at 22, 25 (arguing that by seeking comment in 2017 on many of the issues addressed in 2015, such as how to define "facilities" and "rural," the FCC showed its record in the 2017 proceeding was incomplete).

[99] Corrected Brief for Respondents, *supra* note 88, at 22–23 (citing 5 U.S.C. § 553(b)(3)) (arguing that the final rules were logical outgrowths of the proposed initiatives from 2015). The FCC argued that the FCC provided "general notice" of proposed rulemaking in 2015. *Id.* at 22. The FCC claimed it "made clear" that it was considering the two limitations to "encourag[e] infrastructure build-out" during the 2015 notice-and-comment rulemaking period and that petitioners could "hardly have been blindsided" by the 2017 changes. *Id.* at 23–24.

[100] Corrected Brief for Respondents, *supra* note 88, at 25 (arguing that the Commission received "substantial input" in response to the draft order, including comments from and meetings with petitioners). Respondents also said they typically close the rulemaking docket once they issue a final rule. *Id.* at 30. They kept the docket open in 2016, however, because they intended to resolve unaddressed questions in a "future proceeding." *Id.*

[101] Corrected Brief for Respondents, *supra* note 88 at 32. The tribal consultation policy is the FCC's commitment to "consult with Tribal governments" where "practicable" before adopting a rule that would "significantly impact 'Tribal governments, their land and resources.'" *Id.* (citing Statement of Policy on Establishing a Gov't-to-Gov't Relationship with Indian Tribes, 16 FCC Rcd. 4078, 4079 (2000). The respondents argued that their tribal consultation policy did not create enforceable rights, and regardless, the FCC satisfied its commitment by holding consultations in 2015. Corrected Brief for Respondents, *supra* note 88 at 32–33, 35–36.

[102] *Nat'l Lifeline Ass'n*, 921 F.3d at 1106.

posed rules in 2015.[103] Even though the prior notice of proposed rulemaking did not need to forecast the precise final rule to be implemented after the notice-and-comment period, the FCC did not even make searchable maps or digital shapefiles available to the public.[104] Without maps, interested parties did not comprehend the full impact of the proposed rural limitation because they could not see which communities would lose subsidies.[105] Additionally, the FCC improperly adopted the facilities requirement and rural limitation without starting a new notice-and-comment rulemaking proceeding as it had promised.[106] The procedural error caused harm because the petitioners possessed more relevant knowledge that they could have shared with the FCC, but they were not given the opportunity.[107] Crucially, the court held that when an agency proposes substantial rule changes, it must hold a comment period of at least thirty days, so that interested parties can provide thoughtful feedback.[108] The court therefore held that the lack of an adequate comment period was a violation of the APA.[109]

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[103] *See id.* at 1116. The proposal called for using the Department of Agriculture's rule excluding towns or cities with populations greater than 10,000. *Id.* The final rule, instead, excluded "urbanized areas" and "urban clusters" with total populations less than 25,000 people. *Id.* Conceivably, under the final rule, towns with populations less than 10,000 people could be excluded from Tribal Lifeline services if located in an "urbanized area" or "urban cluster," despite having a small population. *Id.*

[104] *See id.* (explaining that without making available either searchable maps or "shapefiles" during the comment period, affected parties could not realize the impact of the rule until the agency took final action). Shapefiles are digital maps containing geographic features' geometric locations. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1346 (2016). Geometric location is the "physical positional information," including coordinates like latitude and longitude, "in a particular reference system." *What Is Geometric Location*, IGI GLOBAL, https://www.igi-global.com/dictionary/positioning-methods-and-technologies-in-mobile-and-pervasive-computing/43476 [https://perma.cc/4ZM5-TNPK].

[105] *Nat'l Lifeline Ass'n*, 921 F.3d at 1116. Under the proposed limitation, some towns with populations under 10,000 people would lose Tribal Lifeline eligibility, in contrast to the rural limitation proposal in 2015 which excluded towns above 10,000 people. *Id.* It is possible that impacted parties would have submitted comments, or better-informed comments, if they saw the specific consequences of the changed eligibility requirements, on a town-to-town basis. *See id.* (noting that the FCC provided an unsatisfactory opportunity for meaningful comment).

[106] *See id.* (explaining that even though an agency could issue multiple orders based on a single notice-and-comment rulemaking, in this case, the FCC suggested to interested persons that they did not need to submit additional comments about a facilities requirement or rural limitation until the FCC started a new notice-and-comment period).

[107] *See id.* at 1117 (explaining that petitioners could have submitted comments about the rural maps, consumer cost data, updated information about facilities-based providers losing eligibility, and economic studies, if they had had the opportunity to submit them).

[108] *See id.* (citing Prometheus Radio Project v. FCC, 652 F.3d 431, 453 (3d Cir. 2011) and *Petry*, 737 F.2d at 1201) (holding that the two weeks of the Sunshine Period between the draft order on October 26 and the public notice on November 9 was not an "adequate period for eliciting meaningful comments"). In *Prometheus Radio Project*, the FCC proposed a rule about adopting a new approach to a certain type of ownership. 652 F.3d at 447. The FCC held a ninety-day comment period, and then permitted reply comments for an additional sixty days. *Id.* Just before the final hearing on the proposed rule, the chair of the FCC published an Op-Ed in the New York Times and a press release with a proposal for the rule. *Id.* at 448, 453. The chair invited additional comment for twenty-eight days. *Id.* It was not disputed that the Op-Ed and press release violated the APA's notice-and-comment require-

III. The D.C. Circuit's Decision to Create a Bright Line Rule for Comment Period Timelines Was Inconsistent with Case Law, Modern Agency Behavior Theory, and the Spirit of the APA

Although the U.S. Court of Appeals for the D.C. Circuit ruled clearly and consistently with prior case law on substantive matters, it did not do so on procedural matters.[110] The substantive analysis closely followed a line of cases requiring agencies to provide reasoned explanations for departing from prior policy and reconcile the rule with contradictory past findings.[111] Although the D.C. Circuit's substantive holding was consistent with the case law and policy goals of the APA, its procedural holding was not.[112] Part A argues that the procedural holding was inconsistent with prior case law, and Part B asserts that it was contrary to agency behavior theory and the spirit of the APA.[113]

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ments. *Id.* at 453. The Circuit Court of Appeals for the Third Circuit held that on the whole, the FCC failed to comply with the APA with issuing the rule because the initial proposal was too vague and the public was not aware of any specific approaches until the Op-Ed and press release. *Id.* In *Petry*, the D.C. Circuit held that the Department of Agriculture reasonably waived notice-and-comment to meet a statutory deadline for implementing budget cuts because comment periods are at least thirty days, but should be closer to sixty according to the Administrative Conference. 737 F.2d at 1201–02.

[109] *Nat'l Lifeline Ass'n*, 921 F.3d at 1117–18.

[110] *See* Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1105–06, 1117 (D.C. Cir. 2019) (vacating the FCC's adoption of the facilities requirement and rural limitation because: (1) the FCC's actions were arbitrary and capricious because it did not provide a reasoned and well-evidenced explanation for the change; and (2) the action contained procedural deficiencies because two weeks was an inadequate comment period, considering that the FCC said it would hold new notice-and-comment rulemaking for any subsequent Tribal Lifeline program changes after the 2015 order).

[111] *See id.* at 1110–11, 1114 (citing Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) and FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009)) (holding that the FCC failed to consider the impact of the changes on the program and to justify the policy reversal on forbearance in light of previous findings). In *Encino Motorcars, LLC*, the Department of Labor adopted a rule removing car service advisors' exemption from Fair Labor Standards Act requirements. 136 S. Ct. at 2123. The Supreme Court held that the rule was arbitrary and capricious because the Department of Labor did not explain its change in position and many parties had relied on its previous interpretation. *Id.* at 2126. In *Fox Television Stations Inc.*, the FCC adopted a stricter enforcement policy about indecent depictions on television. 556 U.S. at 517. The change was not arbitrary and capricious because the FCC was forthright in its policy change and the change was rational. *Id.* Technological advancement made it more feasible for broadcasters to "bleep out offending words." *Id.* at 518.

[112] *See supra* note 110 and accompanying text (explaining the *National Lifeline Ass'n* holding).

[113] *See infra* notes 114–125 and accompanying text (Part A); *infra* notes 126–136 and accompanying text (Part B).

A. The Thirty-Day Minimum for Comment Periods Is at Odds with the Supreme Court's Holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council

The procedural holding in *National Lifeline Ass'n v. FCC* is inconsistent with prior case law.[114] The D.C. Circuit defied Supreme Court precedent, namely, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[115] In *Vermont Yankee*, the Supreme Court admonished the D.C. Circuit for incorrectly overturning an agency action because the agency did not employ procedures beyond those required by Section 553 of the APA.[116] Section 553 of the APA established the maximum procedural requirements that the courts can impose upon agencies.[117] The majority opinion stated that a court may not impart its own opinions upon an agency of what a suitable procedure entails, where Congress delegated particular functions to an agency.[118] The Supreme Court cited the Senate and House Reports on the APA and the Attor-

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[114] *See infra* notes 115–125 and accompanying text (explaining why the procedural holding in *National Lifeline Ass'n* is inconsistent with Supreme Court jurisprudence).

[115] *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546, 548 (1978) (overturning the D.C. Circuit's holding for demanding procedure above what the APA requires); *Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (holding that a thirty-day minimum comment period is necessary for rule changes). The Supreme Court ruled the way it did in *Vermont Yankee* not only because the agency had complied with the APA, but also as a message to courts that they may not "add to the procedures otherwise laid down in positive law." Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 874 (2007). Court-imposed procedures would undermine the APA's goals of "predictability, informality, and flexibility" because agencies would employ additional procedures to preempt legal challenges. *Id.*

[116] 435 U.S. at 525. The D.C. Circuit overturned an Atomic Energy Commission rule because of deficient proceedings, even though the Commission employed the procedures required by the APA. *Id.* at 535. In particular, the D.C. Circuit faulted the Commission for disallowing discovery or cross-examination during the rulemaking proceedings. *Id.* at 541. On appeal, the Supreme Court ruled that absent compelling circumstances for additional processes, a court may not overturn an agency rule that was adopted with the minimum APA rulemaking procedures. *Id.* at 548. The minimum procedures entail: (1) publishing a notice of proposed rulemaking, (2) receiving public comment, and (3) publishing a final rule with a "concise general statement of [the rule's] basis and purpose." 5 U.S.C. § 553 (2018). The *Vermont Yankee* ruling was also striking because the decision was unanimous. Gillian E. Metzger, *From the Files of the Supreme Court: The Hidden Story of* Vermont Yankee, 31 ADMIN. & REG. L. NEWS 5, 6 (2006). Justices Brennan and Marshall, both considered judicial activists who would be open to more active court involvement in administrative law, joined the majority opinion. *Id.*

[117] *Vt. Yankee*, 435 U.S. at 523–24 (citing 5 U.S.C. § 553); *see supra* note 116 (identifying the statutory minimum procedures to informal rulemaking).

[118] *Vt. Yankee*, 435 U.S. at 525. Scholars suggest that the Circuit Courts of Appeal needed a "*Vermont Yankee II*" to affirm that courts are not entitled to transform the rulemaking process into an adjudicatory proceeding, because the courts have not heeded the Supreme Court's caution in the first *Vermont Yankee*. Beermann, *supra* note 115, at 901. Professor Paul Verkuil suggests that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the landmark Supreme Court case about agency deference, was actually "*Vermont Yankee II*." Paul R. Verkuil, *The Wait Is Over:* Chevron *as the Stealth* Vermont Yankee II, 75 GEO. WASH. L. REV. 921 (2007).

ney General's Manual on the APA.[119] All three sources supported the proposition that the APA was intended only to outline the minimum procedures for rulemaking, reserving discretion to the agencies for additional procedural devices.[120]

Forty years after the Supreme Court instructed the D.C. Circuit not to impart its own understanding of procedural best practices onto agency rulemaking, the D.C. Circuit did exactly that.[121] The APA requires that an agency: (1) publish a notice of proposed rulemaking in the Federal Register, (2) give interested parties a chance to submit comments, (3) consider the comments, and then (4) publish the final substantive rule, along with a succinct statement explaining the rationale for the rule.[122] The APA does not specify a minimum number of days for the second step.[123] Therefore, the D.C. Circuit imposed the judges' own ideas of what a sufficient comment period would entail, above what the APA explicitly required.[124] In doing so, it flouted Supreme Court precedent, most specifically, *Vermont Yankee*.[125]

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[119] *Vt. Yankee*, 435 U.S at 545–46 (citing THE MANUAL, *supra* note 3, at 31, 35; H.R. REP. NO. 79-1980, at 9, 16–17 (1946); S. REP. NO. 79-752, at 14–15 (1945)).

[120] *Id.* The Supreme Court listed a few reasons for interpreting § 553 as leaving discretion to the agencies for how best to utilize procedural devices. *Id.* at 546–47. First, judicial review would be unpredictable if courts reviewed agency proceedings to see whether they were tailored to reach the "best" or "correct" result. *Id.* at 546. Second, courts would be reviewing the agency's processes on the back end, with much more information available than what the agencies would have when structuring their proceedings. *Id.* at 547. Third, there would be little to no benefit of informal rulemaking if procedures were subject to such specific inquiry. *Id.* at 547–48.

[121] *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (establishing a thirty-day minimum comment period for informal agency rulemaking).

[122] 5 U.S.C. § 553.

[123] *See id.* (lacking a minimum comment period). Although the word "participate" may presuppose sufficient time to participate, the APA does not explicitly state a time frame. *See id.* (showing the omission of a specified minimum comment period).

[124] *See Vt. Yankee*, 435 U.S at 525 (prohibiting courts from remanding agency decisions on procedural grounds where agencies meet APA requirements); *Nat'l Lifeline Ass'n*, 921 F.3d at 1117–18 (remanding an agency decision on procedural grounds under the court-created rule that notice-and-comment must be at least thirty days). The U.S. Court of Appeals for the Tenth Circuit hinted that to require additional procedures would violate *Vermont Yankee* in *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). In *Phillips Petroleum*, the EPA refused to add thirty additional days to a forty-five-day comment period for a regulation of underground injection control on Native American lands to thirty days. 803 F.2d at 559. The Tenth Circuit held that the EPA's decision was not "arbitrary, capricious, or an abuse of discretion" because there is no statutory minimum number of days for a notice-and-comment period under § 553. *Id.* Section 553 only requires an "opportunity to participate" in rulemaking. *Id.* For a court to demand more exacting procedural requirements would violate the Supreme Court's holding in *Vermont Yankee* that courts should defer to agency discretion for deciding specific rulemaking procedures. *Id.*

[125] *See supra* note 124 and accompanying text (explaining the holding of *Vermont Yankee*). Then-Circuit Judge Brett Kavanaugh expounded a similar critique in his concurrence in *American Radio Relay League, Inc. v. FCC*., 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring); Matthew S. Brooker, *Taking the Path Less Travelled: FOIA's Impact on the Tension Between the D.C. Circuit and* Vermont Yankee, 102 VA. L. REV. 1101, 1102–03 (2016). In *American Radio Relay League, Inc.*,

B. The Thirty-Day Minimum for Comment Periods Is Inconsistent with Modern Agency Behavior Theory and the Spirit of the APA

Moreover, setting a thirty-day minimum for comment periods is inconsistent with modern theories of agency behavior and the spirit of the APA.[126] The APA as a whole reflects a significant degree of judicial deference towards agency expertise.[127] Recognizing that agencies have different legislative mandates to complete different types of work and solve different types of problems, no one rigid procedure suits the needs and complexities of all agencies.[128] Where thirty days may have been an appropriate time frame for parties to provide meaningful comment about the facilities requirement and rural limitation for the Tribal Lifeline Program, thirty days may be too few or too many for another agency's rulemaking.[129] As the D.C. Circuit itself recognized in

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the FCC published redacted studies with its proposed rule. 524 F.3d at 246. The D.C. Circuit remanded for new proceedings, holding that interested parties would only have a reasonable opportunity to submit comment if they had access to the unredacted versions of the studies. *Id.*; *see* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) (requiring agencies to disclose technical data or studies on which they relied in developing proposed rules). Judge Kavanaugh responded in his concurring opinion that *Portland Cement Ass'n v. Ruckelshaus*, the D.C. Circuit precedent that the court relied on in the case, stood on a "shaky legal foundation" after *Vermont Yankee*. *American Radio*, 524 F.3d at 246 (Kavanaugh, J., concurring); *Portland Cement Ass'n*, 486 F.2d at 393. Because the Supreme Court said in *Vermont Yankee* that courts cannot hold agencies to higher procedural standards than those prescribed by Congress in the APA, *Portland Cement*, which required agencies to disclose certain types of data, should no longer be good law. *American Radio*, 524 F.3d at 246 (Kavanaugh, J., concurring); *see also* Beermann, *supra* note 115, at 893–94 (pointing to court-imposed rulemaking requirements that are inconsistent with *Vermont Yankee*).

[126] *See supra* note 121 and accompanying text (summarizing the *National Lifeline Ass'n* procedural holding); *supra* notes 127–136.

[127] *See, e.g.*, *Chevron*, 467 U.S. at 844–45 (emphasizing the Supreme Court's tradition of deferring to administrative interpretation); FCC v. Scheiber, 381 U.S. 279, 290 (1965) (stating that Congress intended agencies to arrange their own administrative procedures because they are most familiar with the problems they are seeking to solve). Courts have a narrow scope of review of agency decisions and may only set aside unlawful actions. 5 U.S.C. § 706(2). At the time Congress passed the APA, the prevailing theory among the legal community was that agencies were full of "men bred to the facts," who were the best to make decisions about their work, subject to minimal judicial requirements. James M. Landis, *The Administrative Process*, *in* FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 72–73.

[128] *See generally* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357 (James Q. Wilson ed., 1980) (explaining that different agencies, because of the differences in the industries they regulate, are more susceptible to being influenced by the agencies they regulate than others); *Agency List*, *supra* note 1 (listing 450 federal agencies of varying size and scope, including the Census Bureau, Minority Business Development Agency, Air Quality National Commission, Architect of the Capitol, Congressional Budget Office, National Security Agency, Equal Employment Opportunity Commission, Federal Reserve Commission, Geographic Names Board, Centers for Medicare and Medicaid Services, Transportation Security Administration, and the Fish and Wildlife Service).

[129] *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (holding that two weeks was insufficient notice for the facilities requirement and rural limitation, but thirty days would have been sufficient); Wilson, *supra* note 128, at 366, 373, 392.

1984 in *Petry v. Block*, the Administrative Conference of the United States stated that thirty days is often an insufficient amount of time for people to respond to complicated proposals that involve specialized, scientific, or industrial materials.[130] On the other hand, thirty days may be too many for certain proposed agency rules.[131]

The thirty-day minimum comment period is also inconsistent with modern agency behavior theory.[132] The modern theory of agency behavior, reified by James Q. Wilson, emphasizes the complexity of agency work and consequently the need for flexible administrative law.[133] Modern theory of agency behavior posits that agencies' actions will impact different populations in different ways, so their procedures should reflect that same variety.[134] Because some agencies are more susceptible to capture by industry than others, a standard is more appropriate in this context.[135] Recognizing the diversity of agency

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[130] 737 F.2d 1193, 1201 (D.C. Cir. 1984) (citing GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 11, at 124); *see supra* note 39 and accompanying text (explaining *Petry*'s interpretation of the Administrative Conference of the United States' guidance about comment periods).

[131] *Cf.* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 93 (2015) (arguing that the agencies that are less likely to be sued tend to avoid publishing proposed rules for notice-and-comment). Under § 553(b)(3)(B), proposed agency rules can be exempt from the rulemaking requirements when notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." *Id.* at 86. Between 1995 and 2012, agencies circumvented the notice-and-comment process for approximately fifty-two percent of final agency rulemaking action. *Id.* at 91. The D.C. Circuit's procedural activism tendencies may produce unintended results because a bright-line rule of a thirty-day minimum for notice-and-comment periods might further incentivize agencies to seek exemptions to the APA requirements. *See id.* at 91–92 (explaining the prevalence of agency avoidance of notice-and-comment procedures).

[132] *See supra* note 121 and accompanying text (summarizing the *National Lifeline Ass'n* procedural holding); *infra* notes 133–136 (explaining how *Vt. Yankee* departs from modern agency behavior theory).

[133] *See* FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 72–77 (providing a historical overview of agency action theory, including James Q. Wilson's theory from 1980 as the most recent); Wilson, *supra* note 128, at 373 (calling for a revisit of administrative law theory because agencies have become "coalitions of diverse participants," composed of careerists, politicians, and professionals with competing motives).

[134] *See* Wilson, *supra* note 128, at 373 (illustrating the diversity of agency work and needs). The notice requirement in the APA is a standard, not a rule, and that distinction is significant. *See* 5 U.S.C. § 553(c) (lacking a specific number of days for agency notice-and-comment periods); Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401, 1407 (2015) (explaining that rules are precise and concretized ahead of time, whereas standards are imprecise, flexible, and take context into account). Standards typically involve "ambiguous" terms such as "reasonable," "material," or "excessive." Casey & Niblett, *supra*, at 1047 n.15.

[135] *See* Roger G. Noll, *Reforming Regulation*, *in* FEDERAL ADMINISTRATIVE LAW, *supra* note 4, at 74–75 (explaining why industry leaders seek to influence the decisions of the agencies that regulate them, and why, in turn, agencies eventually represent industry leaders' preferences). The agency capture theory posits that, over time, an agency will become aligned with the agency it regulates. *Id.* Industrial leaders, who have capital, are the most likely and able to challenge agency decisions. *Id.* They are also the most likely to assume positions in agencies because they have expertise. *Id.* The agencies that are most susceptible to capture by industry will benefit from notice-and-comment periods that are longer than thirty days, because thirty days may not be long enough for parties who are not capturing the

circumstances, the D.C. Circuit Court should heed the Supreme Court's holding in *Vermont Yankee* in future cases and focus more on agencies' substantive rationales for their actions than on their rulemaking procedures.[136]

CONCLUSION

In 2019, the U.S. Court of Appeals for the District of Columbia Circuit held in *National Lifeline Ass'n v. Federal Communications Commission* that an agency acted arbitrarily and capriciously where it departed from prior policy without providing a reasoned explanation, addressing contradictory past findings, and considering reliance interests. Additionally, the court held that an agency committed non-harmless procedural error by providing interested parties fewer than thirty days to submit comments on the proposal. Although the Federal Communications Commission's rulemaking process was problematic, the D.C. Circuit did not need to, and should not have, established a bright-line rule for notice-and-comment periods. Reinforcing the existing notice-and-comment standard, rather than creating a bright-line rule, would have been more appropriate and more consistent with both case law and the spirit of the Administrative Procedure Act.

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agency to participate in the process. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1064, 1069 (1997) (explaining the problem of industry leaders exercising influence over agency rulemaking procedures and shaping final rules).

[136] *See Vt. Yankee*, 435 U.S at 558 (holding that legitimate reasons for overturning agency action include "substantial procedural or substantive reasons"); Merrill, *supra* note 135, at 1095 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)) (holding that courts should ask agencies for more specific rationales, rather than procedures, to support their agency decisions, because that approach would better combat agency capture). The D.C. Circuit honed in on procedure in *National Lifeline Ass'n*, even after being instructed in *Vermont Yankee* to focus on rule substance instead. *Vt. Yankee*, 435 U.S. at 558; *see National Lifeline Ass'n*, 921 F.3d at 1117 (holding that two weeks was an insufficient notice-and-comment period because a minimum of thirty days is required).