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JUDICIAL REVIEW OF STREAMLINED TARIFF PROTEST DENIALS  
*Frank W. Krogh*

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# Judicial Review of Streamlined Tariff Protest Denials

Frank W. Krogh<sup>\*</sup>

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## I. INTRODUCTION

Section 204(a) of the Communications Act of 1934 (“Communications Act”), as amended, sets forth the authority of the Federal Communications Commission (“FCC” or “Commission”) to review new interstate service tariffs filed by telecommunications common carriers.<sup>1</sup> Section 204(a) states, in part:

Whenever there is filed with the Commission any new or revised charge . . . or practice, the Commission may either upon complaint or upon its own initiative . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission . . . may suspend the operation of such charge . . . or practice . . . .<sup>2</sup>

Under section 204(a), a party may petition to reject or suspend and investigate a carrier’s new tariff filing.<sup>3</sup> Such tariff protests are reviewed under the procedures outlined in the FCC’s Rule 1.773(a)(1), which provides that a tariff meeting certain technical criteria “will not be suspended . . . unless” the petition shows:

- (A) That there is a high probability the tariff would be found unlawful after investigation;
- (B) That the suspension would not substantially harm other interested parties;
- (C) That irreparable injury will result if the tariff filing is not suspended; and
- (D) That the suspension would not otherwise be contrary to the public interest.<sup>4</sup>

The FCC will not suspend a proposed tariff “if any one of these prongs is not met.”<sup>5</sup>

Traditionally, a decision denying a petition to reject or suspend and investigate a new tariff filing has been treated as nonfinal and unreviewable, both in the case of FCC tariff protest denials and similar

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1. 47 U.S.C. § 204(a) (2006).

2. *Id.*

3. Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, *Report and Order*, FCC 97-23, para. 52 (1997) [hereinafter *Streamlined Tariff Order*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-97-23A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-97-23A1.pdf), *recon. denied*, *Order on Reconsideration*, FCC 02-242 (2002) [hereinafter *Streamlined Tariff Reconsideration Order*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-242A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-242A1.pdf).

4. 47 C.F.R. § 1.773(a)(1)(iv) (2011).

5. Ameritech Operating Cos. Tariff F.C.C. No. 2, *Order*, FCC 08-42, para. 7 (2008), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-08-42A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-08-42A1.pdf).

orders of other agencies overseeing parallel tariff regimes.<sup>6</sup> That is because judicial review is appropriate only in cases involving agency “orders of definitive impact, where judicial abstention would result in irreparable injury to a party.”<sup>7</sup> Typically, agency denial of a petition challenging a tariff, thereby allowing the tariff to go into effect without suspension or investigation, is unreviewable because: (1) denial of such a tariff protest is an interlocutory action involving no determination on the merits; (2) review is not necessary to prevent irreparable injury, since there is the possibility of refunds or damages; and (3) judicial intervention would invade the province reserved to agency discretion.<sup>8</sup>

Most significantly, for purposes of this article, a party may later challenge the same tariff in a formal complaint brought under sections 206-08 of the Communications Act<sup>9</sup> and collect damages for any injury caused by a tariff found to be in violation of the statute.<sup>10</sup> That is because

A denial of a mere petition to reject or to suspend and investigate a tariff filing is neither an approval of the filed rates nor a barrier of [sic] challenges to their lawfulness. . . . Their lawfulness . . . remains subject to challenge until the FCC approves the rates after “full opportunity for hearing.” That hearing may be initiated by filing a complaint under § 208 . . . .<sup>11</sup>

Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 (“1996 Act”), however, upended this regime in the case of interstate tariffs filed by local exchange carriers (“LECs”) by adding a new subsection (3) to section 204(a).<sup>12</sup> Section 204(a)(3) enables LECs to file tariffs “on a streamlined basis” and provides that such a tariff “shall be deemed lawful and shall be effective” seven days (in the case of a rate reduction), or fifteen days (in the case of an increase), “after the date on which it is filed . . . unless the Commission takes action [to suspend or investigate the tariff] . . . before the end of that . . . period.”<sup>13</sup> According to the FCC, this provision was intended to accelerate its review of LEC tariffs.<sup>14</sup> All LEC tariffs meeting the criteria of section 204(a)(3) are eligible for streamlined treatment.<sup>15</sup>

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6. See, e.g., *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980).

7. *Papago*, 628 F.2d at 238.

8. *Id.* at 239-40. See also *Aeronautical Radio*, 642 F.2d at 1234.

9. See generally 47 U.S.C. §§ 206-08 (2006).

10. *ABC, Inc. v. FCC*, 662 F.2d 155, 158-59 (2d Cir. 1981).

11. *Id.* at 158.

12. Telecommunications Act of 1996, Pub. L. No. 104-104, § 402(b)(1)(A)(iii), 110 Stat. 56 (1996).

13. 47 U.S.C. § 204(a)(3) (2006).

14. *Streamlined Tariff Order*, *supra* note 3, at para. 1 n.2.

15. *Id.* at paras. 31-34.

In the *Streamlined Tariff Order*,<sup>16</sup> the FCC adopted rules implementing the new provision that eliminated the retrospective damages remedy conferred by sections 206-07 of the Communications Act in the case of LEC streamlined tariffs permitted to become effective without suspension or investigation.<sup>17</sup> The FCC interpreted the phrase “shall be deemed lawful”<sup>18</sup> to mean that a new LEC streamlined tariff, unless suspended or investigated, is “conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect.”<sup>19</sup> Accordingly, in any subsequent section 208 complaint case that results in a finding that a streamlined tariff is unlawful, the FCC will invalidate the tariff prospectively but will also deny any damages relief for the entire period that the tariff was in effect up to the date of its invalidation.<sup>20</sup>

The Commission also set forth the procedures to be followed when parties seek to challenge LEC streamlined tariffs. Such tariffs are not “deemed lawful” immediately upon filing.<sup>21</sup> Rather, they “become both effective and ‘deemed lawful’” only if the Commission has not exercised its suspension or investigation authority by the end of the seven or fifteen day notice period.<sup>22</sup> The Commission denied petitions for reconsideration of its interpretation of “deemed lawful” in the *Streamlined Tariff Reconsideration Order*.<sup>23</sup>

The consequences of this “deemed lawful” treatment of streamlined tariffs are illustrated by an FCC order denying any damages to a long distance carrier in its formal complaint case against an LEC in spite of the FCC’s finding that the LEC “vastly exceeded the prescribed rate of return” over a two year period,<sup>24</sup> a finding that would have resulted in damages

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16. See generally *Streamlined Tariff Order*, *supra* note 3.

17. 47 U.S.C. §§ 206-07 (2006).

18. *Id.* § 204(a)(3).

19. *Streamlined Tariff Order*, *supra* note 3, at para. 19.

20. *Id.* at paras. 19-20. See also 47 U.S.C. § 208 (2006).

21. *Streamlined Tariff Order*, *supra* note 3, at para. 22.

22. *Id.* Petitions challenging tariffs that are effective on seven days’ notice must be filed within three calendar days from the date of the tariff filing, and petitions challenging fifteen day streamlined tariffs must be filed within seven calendar days of the tariff filing. *Id.* at paras. 78-79.

23. Separately, the United States Court of Appeals for the District of Columbia Circuit, in *ACS of Anchorage, Inc. v. FCC*, also upheld the *Streamlined Tariff Order*’s interpretation of “deemed lawful.” 290 F.3d 403, 410-11 (D.C. Cir. 2002). Based on that interpretation, *ACS* reversed an FCC order requiring an LEC to pay damages to a customer taking access service under a streamlined tariff. *Id.* In the *Streamlined Tariff Reconsideration Order*, *supra* note 3, at para. 5 & nn.17-19, the FCC cited *ACS* as additional support for its interpretation.

24. *Qwest Comm. Corp. v. Farmers & Merch. Mut. Tel. Co.*, *Memorandum Opinion and Order*, FCC 07-175, para. 25 (2007) [hereinafter *Qwest Order*], available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-175A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-175A1.pdf), *aff’d sub nom. Farmers & Merch. Mut. Tel. Co. of Wayland, Iowa v. FCC*, 668 F.3d 714 (D.C. Cir. 2011).

liability prior to the 1996 Act.<sup>25</sup> Even though the LEC “manipulated the Commission’s rules to achieve a result unintended by the rules,”<sup>26</sup> damages were denied solely because the LEC’s overearning tariffs had been filed on a streamlined basis and had not been suspended or investigated. Thus, the conclusive presumption of lawfulness arising from an FCC decision not to investigate or suspend such a tariff confers on the tariffing LEC an extraordinary immunity from damages.<sup>27</sup>

In light of the immunity from damages and irreparable injury to customers that results from this presumption of lawfulness, judicial review should be available to parties who are unsuccessful in challenging new LEC streamlined tariffs at the FCC. Currently, there are at least two pending applications seeking review by the full Commission of denials by the Wireline Competition Bureau (“Bureau”) of petitions challenging a streamlined tariff.<sup>28</sup> Affirmance by the full Commission of the Bureau’s denial would directly present the question of whether such a denial is judicially reviewable and thus whether petitioners can ever secure damages relief from harmful practices in the case of a wrongful protest denial.

Part I of this article provides a general discussion of the effect of the “deemed lawful” presumption on the judicial reviewability of orders denying streamlined tariff protests. Part II examines in greater detail one aspect of this issue, namely, whether such orders are “committed to agency discretion by law” under 5 U.S.C. section 701(a)(2). The remainder of the article delves into some of the implications of judicial review of streamlined tariff protest denials. Part III discusses the standards to be applied by courts in reviewing such orders and the interplay of the standard of review and the issue of reviewability. Finally, Part IV examines some of the practical problems that are likely to be encountered in vindicating the right to judicial review of streamlined tariff protest denials.

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25. See, e.g., *AT&T v. Nw. Bell Tel. Co.*, *Memorandum Opinion and Order*, FCC 89-343, 5 FCC Rcd. 143 (1990), *appeal dismissed sub nom.* *Mountain States Tel. & Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam), *damages determined in AT&T v. Nw. Bell Tel. Co.*, *Memorandum Opinion and Order*, FCC 93-69, 8 FCC Rcd. 1014 (1993).

26. *Qwest Order*, *supra* note 24, at para. 27.

27. See generally *Streamlined Tariff Order*, *supra* note 3, at paras. 19-20.

28. See App’n for Review of Sprint Comm. Co., Bluegrass Tel. Co., Transmittal No. 3, Tariff FCC No. 3, FCC WC Docket No. 10-227 (filed Nov. 15, 2010) [hereinafter Sprint Application]; Emergency App’n for Review of Qwest Comm. Co., Bluegrass Tel. Co., Transmittal No. 3, Tariff FCC No. 3, FCC WC Docket No. 10-227 (filed Nov. 8, 2010) [hereinafter Qwest Application]; Comment Sought on Qwest Comm. Co., LLC, Emergency App’n for Review of the Bluegrass Tel. Co., Inc. Tariff, *Public Notice*, DA 10-2219 (WCB 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-2219A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-2219A1.pdf). Typically, petitions to reject or to suspend and investigate tariffs are handled by the Bureau. An application for review by the full Commission under section 1.115 of the FCC’s rules of a Bureau tariff protest denial is “a condition precedent to judicial review” of such denial. 47 C.F.R. § 1.115(k) (2011). See *infra* Part I.

## II. THE EFFECT OF THE “DEEMED LAWFUL” PRESUMPTION ON REVIEWABILITY

In the *Streamlined Tariff Order*, the Commission recognized that its interpretation of the “deemed lawful” language in section 204(a)(3) changed “significantly the legal consequences of allowing tariffs filed under this provision to become effective without suspension.”<sup>29</sup>

Under current practice, a tariff filing that becomes effective without suspension or investigation is the legal rate but is not conclusively presumed to be lawful for the period it is in effect. Indeed, if such a tariff filing is subsequently determined to be unlawful in a complaint proceeding . . . customers who obtained service under the tariff prior to that determination may be entitled to damages. In contrast, tariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful . . . would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.<sup>30</sup>

The Commission found that a streamlined tariff could be found unlawful in a section 208 complaint proceeding or in a tariff investigation under section 205, but only “as to its future effect.”<sup>31</sup> Thus, for streamlined tariffs the “deemed lawful” provision reversed the legal status of a filed, unsuspended tariff from what it would have been under the regime prior to the 1996 Act—from merely “legal” to conclusively “lawful”—at least during the period the tariff is in effect.<sup>32</sup>

Although the Commission recognized some of the implications of its interpretation of “deemed lawful,” it has overlooked the effect of that interpretation on the potential reviewability of its decisions not to suspend or investigate such tariffs. Generally, under section 402 of the Communications Act, “any order of the Commission” may be appealed to the United States Court of Appeals for the District of Columbia.<sup>33</sup>

There is, however, an exception to this reviewability requirement in the case of decisions not to suspend or investigate traditional tariffs, which arises largely from the interlocutory nature, involving no determination on

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29. *Streamlined Tariff Order*, *supra* note 3, at para. 20.

30. *Id.*

31. *Id.* at para. 21.

32. See Investigation of Certain 2007 Annual Access Tariffs, *Order Designating Issues for Investigation*, DA 07-3738, para. 3 & n.13 (WCB 2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3738A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3738A1.pdf).

33. 47 U.S.C. § 402(b) (2006). A staff decision not to suspend or investigate a tariff must be reviewed by the full Commission before it becomes a final “order of the Commission” under section 402(b). See *supra* note 12.



the merits, and the lack of “irreparable injury,” of such decisions.<sup>34</sup> In *Southern Railway*, the Supreme Court found that an Interstate Commerce Commission decision not to investigate a tariff was non-final and unreviewable because the complaint procedure was still available.<sup>35</sup> Relying on *Southern Railway*, the court in *Aeronautical Radio* found that an FCC decision to accept a tariff filing without suspension or investigation was not subject to judicial review because “a complaint . . . procedure comparable to that of the Interstate Commerce Act is available.”<sup>36</sup> Finally, judicial review of an agency decision to accept a traditional tariff filing without suspension or investigation invades the province of the agency “by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration.”<sup>37</sup>

Under the Commission’s application of section 204(a)(3), however, these criteria require the opposite result in the case of an appeal of a decision not to suspend or investigate an LEC streamlined tariff. With respect to finality, “an agency order is final for purposes of appellate review when it ‘imposes an obligation, denies a right, or fixes some legal relationship.’”<sup>38</sup> Under the Commission’s application of section 204(a)(3), the denial of a petition to reject or to suspend and investigate an LEC streamlined tariff, thereby allowing it to go into effect, permanently “denies a right”<sup>39</sup> to damages for the entire period that the tariff remains in effect. The immunity conferred by such a tariff protest denial is final, not interlocutory, since damages from the effective date of the tariff will never be available. Unlike merely reducing the measure of damages from restitution to actual damages, a complete denial of damages “necessarily affects [a] citizen’s ultimate rights’ so as to permit judicial review.”<sup>40</sup> As the court pointed out in *Nader v. Civil Aeronautics Board*,<sup>41</sup> “the nonreviewability-of-[tariff] suspension-orders doctrine is predicated on the interlocutory nature of the suspension orders, and . . . it should therefore not be extended beyond that context . . . .”<sup>42</sup>

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34. *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239-40 (D.C. Cir. 1980). *See also Aeronautical Radio v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980).

35. *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979).

36. *Aeronautical Radio*, 642 F.2d at 1235. In *Southern Railway* and *Aeronautical Radio*, the courts commented that although the complaint procedure shifts the burden of proof onto the party challenging a tariff and restricts the challenger’s remedy to actual damages, rather than full restitution, neither of these consequences “necessarily affects any citizen’s ultimate rights’ so as to permit judicial review.” *Id.* at 1235 n.34 (quoting *S. Ry.*, 442 U.S. at 454-55).

37. *Papago*, 628 F.2d at 242 (quoting *S. Ry.*, 442 U.S. at 460).

38. *Id.* at 239 (citation omitted).

39. *Id.*

40. *Aeronautical Radio*, 642 F.2d at 1235 n.34 (quoting *S. Ry.*, 442 U.S. at 454-55).

41. *See generally Nader v. Civil Aeronautics Bd.*, 657 F.2d 453 (D.C. Cir. 1981).

42. *Id.* at 456 n.10. *See also Advanced Micro Devices v. Civil Aeronautics Bd.*, 742 F.2d 1520, 1528 (D.C. Cir. 1984).

Similarly, “irreparable injury” can be shown where a party has “no practical means of procuring effective relief after the close of the proceeding”<sup>43</sup> or can “prove the existence of a ‘concrete, perceptible harm of a real, non-speculative nature.’”<sup>44</sup> For example, courts have noted that, in certain nontelecommunications regulated market contexts, where refunds are an inadequate remedy for excessive charges, customers might be entitled to judicial review of agency orders accepting rate filings.<sup>45</sup> Similarly, the denial of an LEC streamlined tariff protest confers immunity from damages for the period that the tariff is effective. Therefore, anyone that unsuccessfully petitions against a tariff at the FCC and then pays rates later held to be unreasonable can show a “‘concrete, perceptible harm’” for which no “effective relief” can ever be procured.<sup>46</sup>

In an analogous context, one court cautioned against “lenient[]” review of the Civil Aeronautics Board’s interim approval of a fare agreement, pending further investigation of the fares, because “even interim approval would have a serious impact upon those adversely affected,” given that the interim approval “*operates with finality to invest the agreement with immunity to the antitrust laws.*”<sup>47</sup>

Finally, judicial review of a Commission denial of a challenge to an LEC streamlined tariff would not invade the province of the agency, since there can be no FCC proceeding in which damages covering the period that the tariff was effective will ever be addressed. Nor, as a practical matter, will such an appellate review interfere with an effective tariff.<sup>48</sup> Therefore,

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43. *Papago*, 628 F.2d at 240 (suggesting that irreparable injury might entitle party to judicial review).

44. *N.C. Utils. Comm’n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981) (quoting *Pub. Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 716 (D.C. Cir. 1977)) (requirements for a showing of “aggravement” resulting from agency action). *See also id.* at 668 (respondent’s reviewability argument closely tied to its “aggravement” argument).

45. *See Papago*, 628 F.2d at 241 n.15, and cases cited therein.

46. *N.C. Utils. Comm’n*, 653 F.2d at 662; *Papago*, 628 F.2d at 240.

47. *Nat’l Air Carrier Ass’n v. Civil Aeronautics Bd.*, 436 F.2d 185, 191 (D.C. Cir. 1970) (emphasis added). In the case of the denial of a petition to reject or suspend a streamlined tariff, the immunity from damages conferred thereby is not any less final because its significance is contingent on the subsequent filing of a section 208 complaint against the tariff by the petitioner and the securing of a final order invalidating the tariff prospectively. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (“Because the [decision] attach[es] legal consequences to . . . future . . . proceedings,” it is final.); *Papago*, 628 F.2d at 239 (“The ultimate test of reviewability is . . . in the need of the review to protect from the irreparable injury threatened . . . by administrative rulings which attach legal consequences to action taken in advance of other . . . adjudications that may follow, the results of which the regulations purport to control.”). *See also City of Tacoma v. FERC*, 331 F.3d 106, 113 (D.C. Cir. 2003) (holding that agency proceedings subsequent to order are irrelevant to its finality if order “firmly establish[es] [agency’s] position on the issues under review”).

48. The only purpose to be served by appealing the denial of a streamlined tariff protest is to provide a basis for retrospective damages resulting from a tariff that has been invalidated in a section 208 complaint proceeding. Thus, a party will only prosecute such an appeal if it has filed a formal complaint under section 208 of the Communications Act

parties unsuccessfully challenging LEC streamlined tariff filings at the FCC should be able to seek judicial review of Commission decisions affirming Bureau denials.

Because of the concrete harm resulting from a decision to allow a streamlined tariff to go into effect without suspension or investigation and the absence of any remedy for that harm, such a decision is more akin to agency decisions to *suspend or to reject* traditional tariffs than it is to decisions to allow traditional tariffs to go into effect without suspension or investigation. Agency orders rejecting rate filings are final orders disposing of all issues for which the filing carrier can never obtain a remedy from the agency in any subsequent proceeding.<sup>49</sup> Judge Skelly Wright made a similar point in his concurring opinion in *Exxon*, involving a tariff suspension order of the Federal Energy Regulatory Commission (“FERC”),<sup>50</sup> where he noted that, unlike a decision to allow a traditional tariff to go into effect without suspension, decisions to suspend traditional tariffs for lengthy periods “are final decisions that can have substantial impact on the rights of private parties” and are thus reviewable, at least as to the length of the suspension.<sup>51</sup> If a suspended higher rate is ultimately found reasonable, the carrier can never recoup the amount that could have been charged during the period of the suspension.<sup>52</sup>

Thus, it is the finality and absence of another remedy that led to reviewability, not whether a tariff is suspended. Indeed, as Judge Wright observed, “[i]f the Commission’s failure to suspend permanently cut off all remedies for the customers, *it would be reviewable*.”<sup>53</sup> That is precisely the situation presented by a decision to allow an LEC streamlined tariff to go into effect without suspension or investigation.<sup>54</sup>

Agency decisions accepting tariff filings are also reviewable in another context that provides a useful analogy to LEC streamlined tariff filings. The *Sierra-Mobile* doctrine holds that a utility cannot file a revised tariff in contravention of its contractual obligations unless and until the agency finds the contractual rate unjust and unreasonable.<sup>55</sup> In cases where orders accepting tariff filings were challenged on *Sierra-Mobile* grounds,

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resulting in the invalidation of the tariff. Accordingly, by the time that a court can review the tariff protest denial, the tariff will no longer be in effect. *See infra* Part III.

49. *See Papago*, 628 F.2d at 241 n.16.

50. *Exxon Pipeline Co. v. FERC*, 725 F.2d 1467, 1477 (D.C. Cir. 1984) (Wright, J., concurring).

51. *Id.*

52. *Id.* at 1482-83.

53. *Id.* at 1478 n.7 (emphasis added).

54. *Cf. Verizon Cal. Inc. v. Peevey*, 413 F.3d 1069, 1075-84 (9th Cir. 2005) (Bea, J., concurring) (interim rates inflicting loss that cannot be remedied by subsequent “true-up” meet finality and hardship criteria for purposes of assessing ripeness for review).

55. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-44 (1956); *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 352-53 (1956); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 244 n.22 (D.C. Cir. 1980) (referring to *Mobile Gas* and *Sierra Pac.* collectively as “*Sierra-Mobile*”).

courts have addressed those issues on review. As the court explained in *Papago*,

The Supreme Court and this court have treated orders deciding *Sierra-Mobile* claims as immediately reviewable . . . . At first blush, this may appear anomalous since such orders are a subcategory of orders accepting . . . rate filings . . . . However, *Sierra-Mobile* orders are sharply different . . . in their finality, their irremediable consequences, and their relation to agency discretion.<sup>56</sup>

A decision allowing a challenged LEC streamlined tariff to go into effect without suspension has a similar impact. Like a decision to accept a tariff challenged under the *Sierra-Mobile* doctrine, an order allowing an LEC streamlined tariff to go into effect without suspension has denied a claim on the merits that cannot be reviewed or remedied later.<sup>57</sup> As the court explained in *Papago*, denial of a petition to reject a tariff filing challenged on *Sierra-Mobile* grounds “finally disposes of a substantive claim of right” because the legal issue of contractual interpretation will not be addressed later in a tariff investigation.<sup>58</sup> Thus, review of the agency’s decision will not disrupt any ongoing tariff investigation.<sup>59</sup> Moreover, the customer “will have been denied its contractual right to purchase . . . at the agreed-upon rate during the administrative process,” which “cannot be restored upon review of a final order.”<sup>60</sup> “[I]n their finality, their irremediable consequences, and their relation to agency discretion,” streamlined tariff protest denials—which forever deny customers the right to any retrospective damages—are similar to “*Sierra-Mobile* orders” and thus should be equally reviewable.<sup>61</sup>

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56. *Papago*, 628 F.2d at 244-45.

57. Often, a tariff filing challenged on *Sierra-Mobile* grounds is suspended when it is accepted for filing, but agency orders accepting and then suspending such tariffs are nonetheless relevant here because they are judicially reviewable on the *Sierra-Mobile* issues prior to any full agency hearing on the merits of the non-*Sierra-Mobile* issues. See, e.g., *id.* at 237 n.3, 244 n.24 (citing *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 916, 918-20 (D.C. Cir. 1979)).

58. *Id.* at 245.

59. *Id.*

60. *Id.*

61. *Id.* at 244-45. The court also mentioned another factor favoring reviewability in the case of tariffs challenged on *Sierra-Mobile* grounds, namely, the agency’s lack of discretion to accept a rate filing that contravenes a contract. *Id.* at 245. Although section 204(a)(3) may give the FCC some discretion to allow a challenged LEC streamlined tariff to go into effect without suspension or investigation, review of such decisions is not precluded on the grounds that they are “committed to agency discretion by law.” See *infra* Part II.

### III. DENIALS OF PETITIONS TO REJECT OR SUSPEND LEC STREAMLINED TARIFFS ARE NOT COMMITTED TO FCC DISCRETION.

At first blush, it may seem that an FCC decision to deny a challenge to a LEC streamlined tariff and to let it go into effect without suspension or investigation is the type of agency action “committed to agency discretion by law” under 5 U.S.C. section 701(a)(2) and thus unreviewable. In *Chaney*, the Supreme Court explained that review was not appropriate “if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion,” i.e., where ““there is no law to apply.””<sup>62</sup> Over the years, the Court has found certain categories of agency actions to fit this standard and thus “presumptively unreviewable.”<sup>63</sup> Among the types of actions held to be committed to agency discretion under section 701(a)(2) are decisions not to undertake enforcement proceedings, the termination of employees for national security reasons, refusals to grant reconsideration of an action, the allocation of funds from lump sum appropriations<sup>64</sup> and “managerial decisions,” such as the granting of rent increases<sup>65</sup>—i.e., decisions

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62. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

63. *Id.* at 832.

64. *See Lincoln v. Vigil*, 508 U.S. 182, 190-95 (1993); *Chaney*, 470 U.S. at 831-32.

65. *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970). *Hahn* relies, *see id.* at 1249-50, on *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317 (1958) (holding that “initiation of a proceeding for readjustment of” Panama Canal tolls presents “problems of . . . cost accounting” and “involve[s] nice issues of judgment and choice,” which are committed to agency discretion). Although *Panama* has been criticized as “opaque,” *see Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1391 n.14 (5th Cir. 1979), and has not been cited in any subsequent Supreme Court case, it retains some vitality in cases addressing similar accounting and managerial decisions. *See Fla. v. Dep’t of Interior*, 768 F.2d 1248, 1255-57 (11th Cir. 1985) (citing *Panama*) (decision of the Secretary of the Interior to exercise authority, “in his discretion,” to acquire land in trust for Native Americans not reviewable); *Rank v. Nimmo*, 677 F.2d 692, 700 (9th Cir. 1982) (citing *Panama*) (Veterans Administration (“VA”) decision not to assign and refund VA mortgage loan in default not reviewable); *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003-04 (9th Cir. 1998) (citing *Panama*) (“whether, and in what amount, a government loan should be afforded is an area of executive action usually reserved to agency discretion”); *see also Forsyth Cnty. v. U.S. Army Corps of Eng’rs*, 633 F.3d 1032, 1040-42 (11th Cir. 2011) (citing *Florida*, 768 F.2d 1248) (Army Corps of Engineers exercise of authority to award lease at water resource development project that it determines to be “reasonable in the public interest” not reviewable). *But see Pac. Nw. Generating Coop. v. Bonneville Power Admin.*, 596 F.3d 1065, 1072-1074 (9th Cir. 2010) (Bonneville Power Administration’s decision to sell electric power was reviewable for “consisten[cy] with sound business principles”).

addressing “resource allocation and policy priorities.”<sup>66</sup> “[T]here continues to be a ‘strong presumption’ that other agency action is reviewable.”<sup>67</sup>

It is not entirely clear how *Chaney*’s “no law to apply” standard interacts with these presumptively unreviewable categories of cases. *Chaney* states that the presumption of nonreviewability of nonenforcement decisions, for example, “may be rebutted where the substantive statute has provided guidelines”—i.e., law to apply—“for the agency to follow in exercising its enforcement powers.”<sup>68</sup> Similarly, *Lincoln* notes, in holding agency decisions to allocate funds generally unreviewable, that “Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes.”<sup>69</sup> On the other hand, “detail[ed]” statutory “criteria” do not necessarily provide sufficient “law to apply” in a presumptively unreviewable case.<sup>70</sup> In any event, the “law to apply” standard generally appears to govern in a situation not involving a presumptively unreviewable category of cases, although, as discussed below, other factors may affect how the “law to apply” standard is interpreted in a given case.

Section 204 of the Communications Act does not explicitly provide any standards to govern the FCC’s decision whether to allow an LEC streamlined tariff to become effective without suspension or investigation.<sup>71</sup> Section 204(a)(3) simply states that a new LEC streamlined tariff “shall be deemed lawful and shall be effective” seven or fifteen days, as the case may be, “after the date on which it is filed . . . unless the Commission takes action [to suspend or investigate the tariff] under paragraph (1) before the end of that . . . period.”<sup>72</sup> Subsection 1 of section 204(a) provides, in part, that when a new tariff is filed, “the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and . . . the Commission . . . may suspend the operation of such [tariff] . . . .”<sup>73</sup>

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66. *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1135 (D.C. Cir. 1995).

67. *Robbins v. Reagan*, 780 F.2d 37, 44 (D.C. Cir. 1985) (citing *Chaney*, 470 U.S. at 830).

68. *Chaney*, 470 U.S. at 832-33. *See also* *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988) (nonenforcement decision reviewable because there is law to apply). Even agency regulations can provide the requisite law to apply to the review of nonenforcement decisions. *See, e.g., Greater L.A. Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987).

69. *Lincoln*, 508 U.S. at 193

70. *City of Santa Clara v. Andrus*, 572 F.2d 660, 668 (9th Cir. 1978) (pointing out that the statute at issue in *Panama* “set out in some detail the criteria to be considered . . . in prescribing tolls”). Justice Scalia has questioned whether the “law to apply” standard adequately explains all of the situations in which agency action has been held to be committed to agency discretion. *Webster v. Doe*, 486 U.S. 592, 608-10 (1988) (Scalia, J., dissenting).

71. *See* 47 U.S.C. § 204 (2006).

72. *Id.* § 204(a)(3).

73. *Id.* § 204(a)(1).

In *Southern Railway*, the Court observed that similar language in the cognate provision of the Interstate Commerce Act “is written in the language of permission and discretion.”<sup>74</sup> The Court noted that “[t]he statute is silent on what factors should guide the Commission’s decision; . . . there is simply ‘no law to apply’ in determining if the decision is correct. Similar circumstances have been emphasized in cases in which we have inferred nonreviewability.”<sup>75</sup>

*Southern Railway*, however, should not be determinative in the case of the denial of a challenge to a new streamlined tariff, for a number of reasons. First, tariff protest denials allowing traditional tariffs to go into effect without suspension or investigation fit easily within the category of nonenforcement decisions, which are presumptively committed to agency discretion.<sup>76</sup> In fact, Justice Marshall, in his concurring opinion in *Chaney*, characterized *Southern Railway* as “a denial of enforcement case.”<sup>77</sup> By contrast, in deciding to allow a LEC *streamlined* tariff into effect without suspension or investigation, the FCC has taken action that finally determines parties’ rights and found tariffed rates lawful for the period that the tariff is effective. The FCC thus has “exercise[d] its *coercive* power over . . . property rights,” which is not the case with a mere nonenforcement decision.<sup>78</sup>

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74. *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

75. *Id.* (citations and footnotes omitted) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

76. *See Lincoln v. Vigil*, 508 U.S. 182, 190-95 (1993).

77. *Heckler v. Chaney*, 470 U.S. 821, 844 n.3 (1985) (Marshall, J., concurring). Although *Southern Railway* addressed only the reviewability of a decision not to investigate a tariff, rather than the concomitant decision not to suspend it, the Court noted that the reviewability analysis is the same, explaining that “[t]he two powers are inextricably linked because the Commission has no occasion to suspend a rate unless it also intends to investigate it.” *S. Ry.*, 442 U.S. at 458. It is possible for the FCC to conduct a tariff investigation without suspending the tariff. *See Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, First Report and Order*, 85 F.C.C. 2d 1, para. 108 n.93 (1980) [hereinafter *Tariffing Rules*], *modified by Second Report and Order*, 91 F.C.C. 2d 59 (1982), *extended by Third Report and Order*, 48 Fed. Reg. 46791-01 (CCB 1983), *modified by Fourth Report and Order*, 95 F.C.C. 2d 554 (1983), *vacated on other grounds*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *modified by Fifth Report and Order*, 98 F.C.C. 2d 1191 (1984), *modified by Sixth Report and Order*, 99 F.C.C. 2d 1020, (1985), *rev’d on other grounds*, *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Nevertheless, in the overwhelming majority of cases, a tariff is not likely to be investigated without also being suspended, if only for one day. *See, e.g.*, July 1, 2007, Annual Access Charge Tariff Filings, *Order*, DA 07-2862, paras. 2, 9 (WCB 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-2862A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-2862A1.pdf); Investigation of Certain 2007 Annual Access Tariffs, *Order Designating Issues for Investigation*, DA 07-3738, (WCB/PPD 2007) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3738A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3738A1.pdf). In any event, either suspension or investigation would seem to qualify as “action under paragraph (1)” of section 204(a) of the Communications Act, which would preclude “deemed lawful” status for the challenged tariff. 47 U.S.C. § 204(a)(3) (2006).

78. *Chaney*, 470 U.S. at 832. *See also Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (Department of Health, Education and Welfare policy of “actively” funding

Second, a uniform “law to apply” standard may not always explain whether a particular agency action regarding a tariff is committed to agency discretion. In the case of the reviewability of FCC actions concerning traditional tariffs decided under the section 204(a) criteria, as well as analogous actions under similar tariffing regimes, a double standard applies depending on which way the agency decides. For example, both the Interstate Commerce Act and the Communications Act provide that the relevant agency, upon delivery to a carrier of a “statement in writing of its reasons,” “may” “suspend” the carrier’s tariff.<sup>79</sup> Under these provisions, tariff protest denials that allow traditional tariffs to go into effect without suspension or investigation are not typically reviewable. Orders suspending tariffs, however, are reviewable for the purpose of evaluating the reasoning given for the length of the suspension.<sup>80</sup>

This ambiguous standard poses an analytical problem for purposes of the “committed to agency discretion” rubric because the same discretionary statutory language governs both reviewable agency decisions to suspend and investigate tariffs and unreviewable decisions allowing traditional tariffs to go into effect without suspension or investigation. Under this rubric, an agency decision to take an authorized action under a permissive statutory standard generally is “functionally the same as” a decision not to take such action, for purposes of assessing reviewability.<sup>81</sup> Accordingly, an agency decision not to take an action that it “may” take should be no more discretionary or less reviewable than a decision to take such action, all other factors being equal.<sup>82</sup>

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segregated schools was reviewable because the policy did not constitute mere nonenforcement of Title VI of the Civil Rights Act of 1964).

79. See *Exxon Pipeline Co. v. FERC*, 725 F.2d 1467, 1470 n.7 (D.C. Cir. 1984) (discussing Interstate Commerce Act tariff suspension authority); 47 U.S.C. § 204(a)(1) (2006) (Communications Act tariff suspension authority).

80. Compare *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980) (decision allowing a tariff to go into effect without suspension is unreviewable), with *Exxon*, 725 F.2d at 1470, 1473 (tariff suspension order reviewable).

81. *McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997).

82. See, e.g., *Dickson v. Sec’y of Def.*, 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) (provision stating that military board “may” waive “a failure to file” subjects the board’s denial of such waiver to judicial review); *Env’tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (provision stating that Secretary “may” suspend registration of an agricultural poison allows judicial review of his inaction on a request for suspension).

In some situations, however, statutory goals may justify a different reviewability conclusion depending on which way the agency decided. For example, in *State v. Spellings*, 453 F. Supp. 2d 459, 495 n.21, 497 (D. Conn. 2006), *judgment entered sub nom. State v. Duncan*, 549 F. Supp. 2d 161 (D. Conn. 2008), *aff’d in part and modified in part*, 612 F.3d 107 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011), the court suggested that, in certain circumstances, grant of a waiver would be reviewable, but denial of a waiver under the same statutory and regulatory criteria would not be reviewable, partly because denial leaves all statutory requirements in place. Here, however, as explained *infra* Part III, statutory goals would not justify denial of the limited judicial review required to scrutinize streamlined tariff protest denials.



The answer to the double standard affecting tariff actions may be, as discussed *supra* Part I, that it is the finality of a suspension order, at least as to the length of the suspension, as well as the absence of another remedy, that lead to reviewability. As Judge Wright explained in *Exxon*, “[i]t is presumed that final agency decisions that can cause irreparable injury are not committed to agency discretion.”<sup>83</sup> Similarly, agency orders rejecting rate filings, as opposed to decisions allowing traditional tariffs to go into effect without suspension or investigation, are final orders disposing of all issues, for which the filing carrier can never obtain a remedy from the agency in any subsequent proceeding.<sup>84</sup> As the Court noted in *Southern Railway*, “a ‘no-suspension’ decision” would be “far more conducive to a finding of reviewability” where “non-reviewability would leave the aggrieved party without any judicial remedy at all.”<sup>85</sup>

A streamlined tariff protest denial thus has the characteristics of reviewable orders suspending or rejecting traditional tariffs and is unlike a traditional tariff protest denial. Indeed, the consumer harm that results from the damages immunity conferred by the deemed lawful status of a nonsuspended streamlined tariff is potentially far more irreparable than the harm to a carrier from the reviewable rejection of its tariff. Thus, the factors favoring review discussed *supra* Part I—finality and irreparable harm—also weigh heavily in determining whether agency action is committed to its discretion, independently of the “law to apply” standard.

Third, notwithstanding the Court’s emphasis in *Southern Railway* on permissive statutory language, the use of a “permissive term . . . rather than a mandatory term . . . does not mean the matter is *committed* exclusively to agency discretion.”<sup>86</sup> For example, although agencies are authorized under the Administrative Procedure Act (“APA”) to grant or withhold declaratory relief in their “sound discretion,” an agency’s refusal to initiate a declaratory relief proceeding is nevertheless reviewable.<sup>87</sup> Similarly, although the decision to institute a rulemaking “is one that is largely committed to agency discretion,” an agency’s refusal to initiate a

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83. *Exxon*, 725 F.2d at 1481 n.15 (Wright, J., concurring) (emphasis added). See also *Envntl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 592 n.20 (D.C. Cir. 1971) (“The irreparable character of any harm threatened is . . . relevant to . . . the propriety of permitting judicial review of an order that lacks some of the ordinary indicia of finality.”).

84. See *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 241, n.16 (D.C. Cir. 1980); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204-06 (D.C. Cir. 1994) (challenge to tariff rejection order considered without discussion of reviewability); *N. Cent. Truck Lines, Inc. v. ICC*, 559 F.2d 802, 805 (D.C. Cir. 1977) (same).

85. *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 459 n.12 (1979).

86. *Dickson*, 68 F.3d at 1401-04 (provision stating that military board “may” waive “a failure to file” “in the interest of justice” subjects board’s decision to judicial review).

87. *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 & n.3, 107 n.4, 108 (D.C. Cir. 1984). See also *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986).

rulemaking is reviewable.<sup>88</sup> Where there is “irreparable injury”—unlike the situation in *Southern Railway*—the fact that the governing statute “is drafted in permissive rather than mandatory terms” is not a sufficient basis to find that the agency’s decision is “committed . . . to unreviewable administrative discretion” and thus “beyond judicial scrutiny.”<sup>89</sup>

Another distinguishing factor is *Southern Railway*’s exclusive focus on the relevant *statutory* tariff suspension provision.<sup>90</sup> Courts will also find that there is “law to apply” if the agency has promulgated *regulations* that “set forth sufficiently ‘law-like’ criteria to provide guideposts for a reasoned judicial decision.”<sup>91</sup> In the case of the FCC’s review of tariffs under section 204 of the Communications Act, FCC Rule 1.773 (a)(1) provides regulatory criteria.<sup>92</sup> For example, under Rule 1.773(a)(1), a particular category of LEC tariff “will not be suspended . . . unless” the petition shows:

- (A) That there is a high probability the tariff would be found unlawful after investigation;
- (B) That the suspension would not substantially harm other interested parties;
- (C) That irreparable injury will result if the tariff filing is not suspended; and
- (D) That the suspension would not otherwise be contrary to the public interest.<sup>93</sup>

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88. *WWHT, Inc. v. FCC*, 656 F.2d 807, 815 (D.C. Cir. 1981). *See also* *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987).

89. *Env’tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097-99 (D.C. Cir. 1970) (provision stating that Secretary “may” suspend registration of an agricultural poison allows judicial review of his inaction on a request for suspension, resulting in “irreparable injury”). *Hardin* was “reaffirm[ed]” on this point by *Env’tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 (D.C. Cir. 1971), which also stated that “the permissive statutory term ‘may’ does not preclude judicial review.” *Id.* at 590 n.9. *See also* *Tooahnippah v. Hickel*, 397 U.S. 598, 599, 600 n.3, 607 (1970) (allowing review under statute providing that Secretary of the Interior “may approve or disapprove” the will of an Indian under certain circumstances, noting that the phrase “‘in his discretion’” does not “cloak[] the Secretary’s actions with immunity from judicial review”); *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (“discretionary language does not make agency action unreviewable”); *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985) (Department of Health and Human Services (“HHS”) authority “to make grants . . . ‘related to the purposes’ of [relevant statute] . . . provides sufficient guidance” for review of HHS decision to *rescind* commitment to fund shelter).

90. *S. Ry.*, 442 U.S. at 454-64 (explaining nonreviewability under the Interstate Commerce Act of order allowing tariff to go into effect without investigation).

91. *Miami Nation of Indians of Ind., Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001). *See also, e.g.*, *Service v. Dulles*, 354 U.S. 363, 388 (1957); *McAlpine v. United States*, 112 F.3d 1429, 1433-34 (10th Cir. 1997); *Robbins*, 780 F.2d at 45-46; *Cal. Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1048-49 (D.C. Cir. 1985).

92. *See* 47 C.F.R. § 1.773(a)(1) (2011).

93. *Id.* § 1.773(a)(1)(iv).

The “high probability” of unlawfulness, “irreparable injury” and “public interest” criteria, as well as variations on the “harm to other parties” criterion, apply to all other types of tariff filings as well, all of which may be filed by an LEC on a streamlined basis.<sup>94</sup> Although the “will not be suspended . . . unless” language of Rule 1.773(a)(1) makes suspensions of tariffs more clearly reviewable, it does not impose similar mandatory requirements for decisions not to suspend tariffs. Nevertheless, by providing specific criteria to be applied in reaching a suspension decision, the rule provides sufficient “law to apply,” which could be used to review streamlined tariff protest denial decisions.<sup>95</sup>

Other than categories of cases traditionally held to be committed to agency discretion, such as non-enforcement decisions, numerous cases have held similarly permissive regulatory standards to provide “law to apply” sufficient for judicial review.<sup>96</sup> In fact, although a 1975 case held that a “broad” authorizing statute did not provide sufficient “law to apply” to review the denial of a special use permit by the Forest Service, later cases held that intervening permissive procedural regulations governing applications for such permits do provide “some law to apply,” thereby enabling judicial review.<sup>97</sup> Statutory or regulatory permissive standards that

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94. See *id.* §§ 1.773(a)(1)(ii), (iii), (v) (referring to different types of LEC tariffs, all of which may be filed as streamlined tariffs, see *Streamlined Tariff Order*, *supra* note 3, at para. 31).

95. See *Cardoza v. Commodity Futures Trading Comm’n*, 768 F.2d 1542, 1549-52 (7th Cir. 1985) (regulation setting forth standards that agency “may consider” in exercising “its discretion” whether to grant or deny review of exchange action provides “meaningful standards” for courts to review agency action); *W.G. Cosby Transfer & Storage Corp. v. Froehlike*, 480 F.2d 498, 501-02 (4th Cir. 1973) (regulation providing that officer “may . . . grant” an exemption if specified criteria are met “provides the applicable law for judicial review” of denial of exemption).

96. See, e.g., *Menkes v. Dep’t of Homeland Sec.*, 486 F.3d 1307, 1310 n.3, 1313 (D.C. Cir. 2007) (regulation authorizing Coast Guard to appoint pilot when “pilotage service” is not otherwise available “because of a physical or economic inability to do so” provides “manageable standards” for review of decision to terminate pilot’s appointment); *Payton v. USDA*, 337 F.3d 1163, 1168 (10th Cir. 2003) (contract termination is reviewable under regulation providing that agency “may terminate” contract under specified conditions); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 347-48 (4th Cir. 2001) (rule stating that agency “may dismiss” party’s appeal to agency “[i]f the [party] fails to submit a final position paper” provides “judicially manageable standards” for review of agency’s dismissal of appeal); *McAlpine*, 112 F.3d at 1434 (regulation requiring agency to consider certain factors in responding to requests to take land into trust status, without specifying weight to be given factors, provides “a meaningful and objective standard” on review); *Schneider Nat’l, Inc. v. ICC*, 948 F.2d 338, 342-43 (7th Cir. 1991) (agency procedural regulations “provide adequate guidelines for judicial review” of agency denial of petition); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1389-91 (5th Cir. 1979) (holding reviewable rejection of a bid for an oil and gas lease under permissive statute and regulations).

97. Compare *Ness Inv. Corp. v. USDA*, 512 F.2d 706, 715-16 (9th Cir. 1975) (statute is “drawn in such broad terms that there is no law to apply”), with *United States v. Means*, 858 F.2d 404, 408 n.8 (8th Cir. 1988) (“[a]dditional and more specific regulations” provide “some law to apply” to review of denial of permit), and *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 813-14 (9th Cir. 1987) (“supplemental regulations”

provide little or no guidance or specificity, or that provide subjective or vague criteria, however, have been held not to provide sufficient “law to apply.”<sup>98</sup> In light of all of the factors discussed above favoring reviewability of streamlined tariff protest denials, the Rule 1.773(a)(1) standards—particularly the one addressing a “high probability” of unlawfulness—are more than adequate to provide the “law to apply” to satisfy the requirements of 5 U.S.C. section 701(a)(2) and thereby enable review of such denials.<sup>99</sup>

Moreover, unlike most cases involving permissive regulatory language, the tariff suspension standard in Rule 1.773(a)(1) “parallels the one courts use in determining whether to issue stays or preliminary

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“constitute sufficient ‘law’ for this court to apply” to review of decision to issue permit), *rev’d on other grounds*, 490 U.S. 332 (1989).

98. See, e.g., *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 406-07 (6th Cir. 2006) (statute authorizing Tennessee Valley Authority to include any terms and conditions in contract for sale of surplus power “as in its judgment may be necessary or desirable for carrying out the purpose of this chapter” did not provide meaningful standard for review of contract term prohibiting refunds); *Joelson v. United States*, 86 F.3d 1413, 1418-19 (6th Cir. 1996) (statute authorizing United States Trustee to supervise bankruptcy trustees “by . . . taking such action as the United States trustee deems to be appropriate” provides no “express or substantive guidelines upon which a court could base its review”); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1127-30 (6th Cir. 1996) (regulations requiring submission of “relevant and current” data “as responsible Department officials . . . may determine to be necessary” to ascertain compliance do not provide specific “factors” or “meaningful standard” by which to review Department’s failure to collect relevant data); *N.D. ex rel. Bd. of Univ. & Sch. Lands v. Yeutter*, 914 F.2d 1031, 1035 (8th Cir. 1990), *cert. denied sub nom.* *N.D. Bd. of Univ. & Sch. Lands v. Madigan*, 500 U.S. 952 (1991) (statute providing for waiver of requirements for enrollment of land in conservation program if “the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for [certain] purpose” “supplies no objective criteria” by which to review Secretary’s decision not to grant waiver); *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 n.2 (8th Cir. 1987) (statute providing that agency “may” make a loan if agency “determines that an applicant . . . has the ability to repay” loan does not provide sufficiently meaningful standards to permit review); *Electricities of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1264-67 (4th Cir. 1985) (statute permitting agency to dispose of certain electric power “in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles” “is too vague to provide a standard” for judicial review).

Not every “law to apply” case fits this pattern precisely. There are anomalies in both directions. Compare, e.g., *Cnty. of Esmeralda v. U.S. Dep’t. of Energy*, 925 F.2d 1216, 1218-19 (9th Cir. 1991) (decision that may be made “at the discretion of” the Secretary of Energy, with no “specific factors for him to use” provided by the authorizing statute, held reviewable), with *Perales v. Casillas*, 903 F.2d 1043, 1047-51 (5th Cir. 1990) (INS regulation stating that a deportable alien “may be granted permission to be employed” prior to voluntary departure and listing factors “which may be considered” did not provide sufficient guidance for judicial review of denial of employment request).

99. See *Cardoza*, 768 F.2d 1542; *W.G. Cosby Transfer & Storage Corp.*, 480 F.2d 498; *Menkes*, 486 F.3d 1307; *Payton*, 337 F.3d 1163; *Inova Alexandria Hosp.*, 244 F.3d 342; *McAlpine*, 112 F.3d 1429; *Schneider Nat’l, Inc.*, 948 F.2d 338; *Andrus*, 588 F.2d 1383.

injunctions”<sup>100</sup> and, in fact, “has its roots in these judicial remedies.”<sup>101</sup> Regulatory language that “originated with the judiciary” should be judicially reviewable.<sup>102</sup> The denial of a stay or preliminary injunction is certainly discretionary, but is also appealable under an abuse of discretion standard.<sup>103</sup> The “parallel[]” denial of a petition to reject or suspend a streamlined tariff filing, once it is affirmed by the agency, should be equally reviewable.<sup>104</sup> Permissive, discretionary standards governing agency actions that are “similar to the kind of . . . decisions that courts routinely review” have been held to provide “judicially manageable standards” for review in other contexts as well.<sup>105</sup>

Accordingly, the three criteria discussed above governing whether an agency action is committed to its discretion—finality, irreparable harm and “law to apply”—are met in the case of FCC decisions denying petitions to reject or suspend LEC streamlined tariffs.<sup>106</sup>

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100. *Advanced Micro Devices v. Civil Aeronautics Bd.*, 742 F.2d 1520, 1533 (commenting on similar tariff suspension standard for CAB). The “irreparable injury” required by Rule 1.773(a)(1)(iv)(C) is perhaps not as stringent as the standard applied to petitions for injunctive relief, *see* Policy and Rules Concerning Rates for Dominant Carriers, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 89-91, 4 FCC Rcd. 2873, paras. 446, 457 (1989), *modified on recon.*, *Memorandum Opinion and Order on Reconsideration*, FCC 91-15, 6 FCC Rcd. 665 (1991), *rev’d on other grounds sub nom.* *AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992), but the lesser standard for suspension would, if anything, heighten the need for an explanation for, and judicial review of, denial of a suspension request.

101. *Tariffing Rules*, *supra* note 77, at para. 109 (citing *Arrow Transp. Co. v. S. Ry. Co.*, 372 U.S. 658, 662-69 (1963)).

102. *Shipbuilders Council of Am. v. U.S. Dep’t of Homeland Sec.*, 551 F. Supp. 2d 447, 451-52 (E.D. Va. 2008) (“As the statutory language originated with the judiciary, there is no reason to find that the judiciary could not reasonably review an agency’s interpretation of that statutory language.”), *rev’d on other grounds*, 578 F.3d 234 (4th Cir. 2009).

103. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-56 (1986) (denial of preliminary injunction appealable), *overruled in part on other grounds*; *Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1298-1300 (7th Cir. 1997) (denial of stay appealable, court noting its “serious consequences”); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 22 (7th Cir. 1992) (denial of preliminary injunction vacated); *United States v. Wood*, 295 F.2d 772, 778 (5th Cir. 1961) (denial of TRO appealable), *cert. denied*, 369 U.S. 850 (1962).

104. *Advanced Micro Devices*, 742 F.2d at 1533. In this connection, it should be noted that an FCC tariff order has been judicially reviewed on the basis of Rule 1.773(a)(1). In *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994), the court considered whether the rejection of a tariff was permissible in light of the rebuttable presumption of lawfulness applied to tariffs by Rule 1.773(a)(1).

105. *See Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 347-48 (4th Cir. 2001) (agency decision to dismiss administrative appeal pursuant to regulation providing that agency “may dismiss” administrative appeal “is similar to the kind of dismissal decisions that courts routinely review” and thus is not committed to agency discretion).

106. One commentator has pointed out that when an agency acts solely under its enabling statute, rather than pursuant to an independent executive power, a finding that its action is committed to its discretion because there is no law to apply would raise troublesome unconstitutional delegation of power issues. *See* Viktoria Lovei, Comment,

In some cases, courts have held that the goals and structure of the statute under which an agency acts commit some aspects of its decisions to its discretion, but allow limited judicial review of other aspects. Because reviewability and the scope of review are so intertwined in those cases, they are discussed in Part IV below.

#### IV. STREAMLINED TARIFF PROTEST DENIALS SHOULD BE REVIEWED UNDER THE APA'S "ARBITRARY AND CAPRICIOUS" STANDARD

Because an FCC decision denying a petition to reject or suspend and investigate an LEC streamlined tariff involves informal agency action, judicial review is limited to whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.<sup>107</sup> Judicial review under the APA's "arbitrary and capricious" standard in 5 U.S.C. section 706(2)(A), which applies to agency adjudications,<sup>108</sup> addresses whether the reasons for the agency's decision were legally permissible and reasoned ones, and whether there was adequate factual support for the decision.<sup>109</sup>

In exceptional circumstances, courts have held that only limited judicial review is appropriate and that, in such cases, it is improper to go behind the agency's facial rationale and look into the factual basis for its decision. In *Dunlop v. Bachowski*,<sup>110</sup> the Supreme Court held that although the decision of the Secretary of Labor not to sue to set aside a union election was not entirely committed to the agency's discretion under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), the purposes evident in that statute limited the scope of judicial review. Specifically, the LMRDA bars a judicial "challenge to the factual basis for the Secretary's decision,"<sup>111</sup> thereby limiting judicial review to "examination of the [Secretary's] 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious."<sup>112</sup>

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*Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047 (2006). It is not clear that any identifiable executive power, independent of Congress' delegated authority under the Commerce Clause, would authorize the denial of a petition to suspend and investigate a streamlined tariff under the Communications Act.

107. 5 U.S.C. § 706(2)(A) (2006).

108. *See, e.g.,* *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

109. *Id.* at 142-43; *McAlpine v. United States*, 112 F.3d 1429, at 1436-37 (10th Cir. 1997); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

110. *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975).

111. *Id.* at 577.

112. *Id.* at 572-73.

The Court's rationale for this limitation on judicial review was the congressional goal underlying the LMRDA, namely, to prevent individuals from blocking or delaying resolution of post-election disputes, to quickly settle the cloud on incumbents' titles to office and to protect unions from frivolous litigation and unnecessary interference with their elections.<sup>113</sup> The Court reasoned that allowing court challenges to the factual basis for the Secretary's conclusion would defeat these objectives.<sup>114</sup>

In *East Oakland-Fruitvale Planning Council v. Rumsfeld*,<sup>115</sup> the court addressed a challenge by a California nonprofit community council to the refusal by the Office of Economic Opportunity ("OEO") to override the Governor's veto of an OEO grant to the council. Based on the legislative history and language of the Economic Opportunity Act ("EOA"), the court held:

[T]he standard to be applied by the [OEO] in determining whether to override a governor's veto [of an OEO grant] requires an evaluation of the "wisdom or desirability" of the particular project as a means to further the purposes of the [EOA] . . . . This standard is extremely general. . . . [I]t would not afford a reviewing court a practicable rule for determining the legality of the [OEO's] ultimate decision to override or not to override. That decision is therefore not subject to judicial review.<sup>116</sup>

The court also held, however, that "[i]t does not follow . . . that no aspect of [OEO's] action can be reviewed . . . . '[P]artial review may be available for separable issues, as to which discretion or expertise is insignificant.'"<sup>117</sup> For example, the court noted that OEO could be held on review to its obligation to reconsider a vetoed program even though the merits of the decision on reconsideration are unreviewable, and procedural issues could be raised on review.<sup>118</sup> Moreover, a court could review OEO's compliance with its obligation to consider only factors relevant to the merits of the vetoed project.<sup>119</sup>

Similarly, in *Save the Bay*, the court held that the decision of the Environmental Protection Agency ("EPA") not to veto a pollution

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113. *Id.* at 572-73.

114. *Id.* at 577. Subsequent decisions have expanded the *Dunlop* scope of review in LMRDA cases to the extent of examining the Secretary's statement of reasons "in relation to the evidence before the Secretary." *Doyle v. Brock*, 821 F.2d 778, 783 n.3 (D.C. Cir. 1987).

115. *E. Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F.2d 524 (9th Cir. 1972).

116. *Id.* at 533 (quoting H.R. REP. NO. 89-428, at 14 (1965)).

117. *Id.* (quoting Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 372 (1968)).

118. *Id.* at 534.

119. *Id.* at 533-35.

discharge permit issued by a state environmental commission was committed to EPA's discretion.<sup>120</sup> Citing *Rumsfeld*, however, the court stated that this decision

does not mean that the [EPA] is completely beyond the scrutiny of the federal courts in performing the supervisory role over state permits that Congress . . . saw fit to establish . . . .

. . . .  
. . . . [J]udicial review may appropriately confine EPA's discretion. . . . [N]othing in the statute or its history suggest [sic] any basis for allowing EPA in reviewing the merits of a permit totally to omit consideration of a particular violation of the guidelines and requirements of the [statute] . . . . Accordingly, an aggrieved person must be able to present a claim . . . that a proposed permit contains a violation . . . that the agency has failed to consider. Upon sufficient showing of a violation, the agency, if it claims to have attended to the factor during its review, will have to explain . . . how it concluded the violation did not warrant veto.<sup>121</sup>

The court also stated that review was available to consider whether EPA based its decision on "unlawful factors."<sup>122</sup> Citing *Dunlop*, the court noted that this limited review is justified partly by the absence of any other "avenue for challenging the terms of a permit once EPA has allowed it to issue," just as *Dunlop* justified limited review of the decision of the Secretary of Labor not to bring suit to set aside a union election partly on the grounds that such a suit provides the exclusive post-election remedy under the LMRDA.<sup>123</sup> The permissive terms of the statute at issue also did not commit the EPA's decision to its unreviewable discretion.<sup>124</sup>

A similarly limited scope of review has been applied to judicial challenges to certain agency tariff suspension orders. In *Exxon*, the court affirmed FERC's tariff suspension order against a challenge to the duration of the suspension.<sup>125</sup> The court limited the scope of its review to an inquiry as to whether the reasons given by FERC for the length of the suspension were related to "FERC's interim or ultimate inquiries."<sup>126</sup> It declined to

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120. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295-96 (5th Cir. 1977).

121. *Id.* at 1295-96.

122. *Id.* at 1296.

123. *Id.* at 1296-97 n.15. *See also* *Morris v. Gressette*, 432 U.S. 491, 505-07 & n.20 (1977) (distinguishing *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975)) (Attorney General's failure to object to state voting law held unreviewable partly because law could be challenged in subsequent judicial action).

124. *Save the Bay*, 556 F.2d at 1293.

125. *See Exxon Pipeline Co.*, 725 F.2d 1467, at 1469-75 (D.C. Cir. 1984).

126. *Id.* at 1473.



review the “merits” of the suspension order, explaining that such an inquiry “would disrupt the Commission’s regulatory function, by forcing a consideration of the reasonableness of a proposed rate prior to a final FERC ruling on that very question.”<sup>127</sup>

As Judge Wright explained in his concurring opinion in *Exxon*:

[T]he decision whether or not to suspend rates . . . is not reviewable; the decision to suspend rates for a lengthy time (*i.e.*, “the reasons behind imposing a rate suspension of a given length”) is reviewable . . . .

. . . .  
[B]ecause Commission decisions to suspend new rates for lengthy periods are final (as to the length of suspension) and can injure the substantial rights of parties (if the new rates are in fact reasonable), the precedents militate strongly in favor of review of such long suspensions.<sup>128</sup>

Thus, the “injur[y]” to “the substantial rights of parties” is the decisional factor in differentiating the length of a tariff suspension from the suspension itself with regard to reviewability.<sup>129</sup>

These cases demonstrate that “the question of reviewability cannot be divorced from that of scope of review. In cases where courts have evidenced serious doubts about the reviewability of agency action, they have tended to couple their decision to review with a particularly narrow scope of review.”<sup>130</sup> For the reasons discussed *supra* Part II, however, the reviewability of decisions denying challenges to streamlined tariffs should not be subject to such “serious doubts,” nor should such denials be limited to such “narrow” review. In streamlined tariff protest denials, the FCC has made a final ruling on the lawfulness of the proposed rate during its effectiveness. Unlike the situation in *Exxon*, there is no current or future regulatory proceeding concerning the tariffing LEC’s liability for damages to “disrupt” because the LEC is immune from damages for the entire period of the streamlined tariff’s effectiveness.<sup>131</sup> Moreover, as noted above, Judge Wright pointed out in his concurring opinion in *Exxon* that “[i]f the Commission’s failure to suspend permanently cut off all remedies for the

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127. *Id.*

128. *Id.* at 1483-84 (Wright, J., conc.).

129. *See id.* at 1484.

130. *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979) (citing *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975)).

131. *Exxon*, 725 F.2d at 1473. *See also Nat’l Air Carrier Ass’n v. Civil Aeronautics Bd.*, 436 F.2d 185, 191, 194-95 (D.C. Cir. 1970) (explaining that interim approval of a fare agreement, pending further investigation of fares, that “operates with finality to invest the agreement with immunity to the antitrust laws” is subject to review for reasonableness and whether approval is “based upon substantial evidence”).

customers, it would be reviewable,” citing *Dunlop*.<sup>132</sup> Non-suspension of a streamlined tariff “permanently cut[s] off all [damages] remedies for the customers.” Thus, “the serious doubts about . . . reviewability” typically attending tariff protest denials do not apply in these circumstances, and there is no corresponding need to “narrow” the scope of review.<sup>133</sup>

Furthermore, aside from finality and the absence of alternative remedies, the other unique circumstances mandating limited review in *Dunlop*, *Exxon*, and the other cases discussed immediately above are not presented by review of the denial of a petition to reject or suspend an LEC streamlined tariff. Unlike the LMRDA at issue in *Dunlop*, there is nothing in the legislative history of the 1996 Act that suggests a legislative intent to modify in any way judicial reviewability of tariff actions.<sup>134</sup> Congress certainly intended to accelerate the FCC tariff review process for streamlined tariffs,<sup>135</sup> but it “did not amend the Act to eliminate the Commission’s suspension authority for LEC tariffs”<sup>136</sup> or to affect the reviewability of tariff-related actions in the case of streamlined tariffs. Thus, streamlined tariffs and all other tariffs are equally subject to suspension and investigation under Rule 1.773.

In any event, the limited nature of the issue to be determined on appeal minimizes the interference caused by review of a streamlined tariff protest denial and is similar to the limited scope of review in *Dunlop*, *Exxon*, and the other cases discussed above. It is clear that, under the procedure dictated by section 204(a)(3), the FCC could not possibly conduct a full investigation of reasonableness in the seven or fifteen days prior to the effectiveness of an LEC streamlined tariff. As discussed above, however, a decision to allow a streamlined tariff into effect without suspension or investigation is based on a much more limited determination, namely, that petitioner has failed to demonstrate at least one of the four predicates for suspension under Rule 1.773(a)(1), such as a showing that there is a high probability that the tariff will be found unreasonable after an investigation. There is nothing in the structure of the 1996 Act that precludes a full review under the arbitrary and capricious standard of that limited determination.

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132. *Exxon*, 725 F.2d at 1478 n.7.

133. *NRDC*, 606 F.2d at 1052.

134. Senator Dole (R. Kan.) had a summary of the bill that became the 1996 Act printed in the Congressional Record. The summary briefly describes the streamlined tariff provision and concludes with the statement that “[t]o block such changes, FCC must justify its actions.” 141 CONG. REC. S7898 (daily ed. June 7, 1995) (statement of Sen. Dole). This statement certainly reinforces the intent to speed up the tariff review process for streamlined tariffs, but it says nothing about the reviewability of streamlined tariff protest denials. That it requires the FCC to justify the suspension of streamlined tariffs but says nothing about protest denials is hardly sufficient to overcome the presumption of reviewability.

135. See *Streamlined Tariff Order*, *supra* note 3, at para. 1 n.2.

136. *Id.* at para. 22.

The findings that the FCC must make in order to support non-suspension of an LEC streamlined tariff—e.g., that petitioner failed to show that there is a high probability of unlawfulness or that suspension would not substantially harm other interested parties—set a fairly low bar for the FCC to meet. It should not have difficulty defending the reasonableness of and factual basis for such findings on appeal.<sup>137</sup> For example, analogous to *Save the Bay*, a party appealing from a streamlined tariff protest denial “must be able to present a claim . . . that a proposed [tariff] contains a violation . . . that the [FCC] has failed to consider” adequately and that “[u]pon sufficient showing of a violation, the [FCC] . . . will have to explain . . . how it concluded the violation did not warrant” suspension.<sup>138</sup> As noted, *supra* Part II, this examination of the coherence of the FCC’s reasons for denying a tariff protest is analogous to an examination of a lower court’s refusal to grant a stay or preliminary injunction and does not require a review of the ultimate merits to any greater degree than is required in reviewing denial of a stay or preliminary injunction or, for that matter, in reviewing the length of a suspension order, as permitted in *Exxon*.

The minimal burden of judicial review is especially apparent given that the purpose of the appeal is to remove the immunity from damages conferred by such denials. That immunity becomes significant only if a petitioner files a subsequent section 208 complaint against the tariffed rates and prevails in a final order. At that point, the immunity becomes relevant to the issue of whether petitioner will be able to collect damages for the period that the challenged rates were in effect. Thus, the appeal of the tariff protest denial could be heard simultaneously with the appeal of the order resolving petitioner’s complaint case, with no delay to any administrative processes.<sup>139</sup>

The only additional burden that judicial review under the APA’s arbitrary and capricious standard will create is the need for the FCC to explain its reasons for finding that the petitioner has not demonstrated the factors necessary for a suspension under Rule 1.773(a)(1). Since 1986, the Bureau’s policy has been to avoid preparing “orders addressing substantive or procedural issues raised by petitioners regarding tariff filings that are being allowed to take effect without imposition of an investigation or accounting or reporting requirements.”<sup>140</sup> Such decisions

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137. As a practical matter, very few unsuccessful petitioners will appeal decisions to allow LEC streamlined tariffs into effect without suspension in the face of such a rigorous standard for suspension, further reducing the administrative burden of judicial review.

138. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295-96 (5th Cir. 1977).

139. As explained *infra* Part IV, the decision to allow an LEC streamlined tariff to go into effect without suspension must be reviewed by the full Commission before it may be judicially reviewed.

140. Common Carrier Bureau Announces New Policy Regarding Issuance of Tariff Orders, *Public Notice*, Mimeo No. 3805 (CCB April 15, 1986) [hereinafter *Tariff Policy Notice*], *aff’d*, 1 FCC Rcd. 179 (1986).

are simply announced in “a brief Order . . . listing the petitions to reject, suspend or investigate that are being denied.”<sup>141</sup> Application of the APA’s arbitrary and capricious standard will require that Bureau denials of petitions challenging LEC streamlined tariffs address the issues raised by petitioners and provide an explanation for the decision.<sup>142</sup>

However, since petitions challenging tariffs are relatively infrequent and the standard set by Rule 1.773 is low, it should not be especially burdensome for the Bureau to explain in a brief order why petitioners have not made the required showings to have the tariff investigated or suspended. There have been only two public notices for tariff protest denials released in 2012<sup>143</sup> and only a handful in both 2010 and 2011, one of which is the protest denial at issue in the Sprint and Qwest Applications.<sup>144</sup> In addition, in both 2006 and 2009, there was only one such notice, and none in 2007 or 2008.<sup>145</sup> Moreover, the additional burden imposed on the agency by the need for an order addressing a petitioner’s objections is quite modest relative to the extraordinary immunity conferred on an LEC filing a streamlined tariff that is allowed to take effect without

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141. *Id.*

142. *See, e.g.,* Dickson v. Sec’y of Def., 68 F.3d 1396, 1404-07 (D.C. Cir. 1995); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 (finding decision lacking “intelligible explanation” by agency reversed); Action on Smoking & Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1215-16 (D.C. Cir. 1983) (finding it arbitrary and capricious for agency not to respond to significant comments and explain how agency resolved issues raised).

143. *See* Protested Tariff Transmittal Action Taken, *Public Notice*, DA 12-101 (WCB/Pricing 2012), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-12-101A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-101A1.pdf); Protested Tariff Transmittal Action Taken, *Public Notice*, DA 12-21 (WCB/Pricing 2012), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-12-21A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-21A1.pdf).

144. *See, e.g.,* Protested Tariff Transmittal Action Taken, *Public Notice*, DA 11-1393 (WCB/Pricing 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1393A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1393A1.pdf); Protested Tariff Transmittals Action Taken, *Public Notice*, DA 11-1156 (WCB/Pricing 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1156A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1156A1.pdf); Protested Tariff Transmittal Action Taken, *Public Notice*, DA 11-21 (WCB/Pricing 2011), available at [fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-21A1\\_Rcd.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-11-21A1_Rcd.pdf); Protested Tariff Transmittal Action Taken, *Public Notice*, DA 10-1970 (WCB/Pricing 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-1970A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1970A1.pdf) (the protest denial at issue in the Sprint and Qwest Applications); Protested Tariff Transmittals Action Taken, *Public Notice*, DA 10-1917 (WCB/Pricing 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-1917A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1917A1.pdf); Protested Tariff Transmittal Action Taken, *Public Notice*, DA 10-1783 (WCB/Pricing 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-1783A1\\_Rcd.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1783A1_Rcd.pdf); Protested Tariff Transmittals Action Taken, *Public Notice*, DA 10-1252 (WCB/Pricing 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-1252A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1252A1.pdf).

145. *See, e.g.,* Protested Tariff Transmittals Action Taken, *Public Notice*, DA 09-1493 (WCB/Pricing 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1493A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1493A1.pdf); Protested Tariff Transmittals Action Taken, *Public Notice*, DA 06-1351 (WCB/Pricing 2006) [hereinafter 2006 Protest Notice], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-06-1351A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-1351A1.pdf).

suspension or investigation. As the United States Court of Appeals for the District of Columbia Circuit has commented:

No one pretends that judicial review of agency action is a pleasant day at the beach for agencies, and although escaping judicial review would of course be less “disruptive to . . . operations,” it would also leave regulated entities . . . unprotected from arbitrary and capricious agency action.<sup>146</sup>

The FCC’s pre-1986 practice of explaining rejections of petitions challenging tariffs in brief orders<sup>147</sup> demonstrates that availability of full judicial review for decisions allowing LEC streamlined tariffs to go into effect without suspension or investigation would not impose an undue burden. Even under the streamlining regime, the FCC is able to issue orders explaining its suspension of LEC tariffs within the short notice periods applicable to streamlined tariffs.<sup>148</sup> Given the low bar for nonsuspension of a tariff—i.e., an absence of any one of the stringent showings required for suspension, including a high probability of unlawfulness—preparation of an order explaining the nonsuspension of an LEC streamlined tariff should not pose any greater burden than an order explaining the suspension of such a tariff.

In short, full judicial review of a decision allowing an LEC streamlined tariff to go into effect without suspension under the APA’s arbitrary and capricious standard will not interfere with the objectives of section 204(a)(3). A brief order setting forth the FCC’s rationale for denying a challenge to a LEC streamlined tariff under the stringent suspension criteria of section 1.773 of the FCC’s rules will suffice to meet the FCC’s obligation under the arbitrary and capricious standard. The limited scope of judicial review of such a protest denial is similar to the limited judicial review conducted in *Dunlop* and *Exxon*, as described above.<sup>149</sup> The infrequency of tariff protests further ensures that judicial

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146 *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 602 (D.C. Cir. 2007) (citations omitted) (quoting FAA brief).

147 See, e.g., AT&T Commc’ns; Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, 1985 FCC LEXIS 2845 (CC 1985); AT&T Commc’ns; Revisions to Tariff FCC No. 1, *Memorandum Opinion and Order*, 1985 FCC LEXIS 2560 (CC 1985).

148 See, e.g., July 1, 2007 Annual Access Charge Tariff Filings, *Order*, DA 07-2862 (WCB/Pricing 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-2862A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-2862A1.pdf) (streamlined tariffs filed June 15, 2007 suspended by order released June 28, 2007); Ameritech Long-Term Number Portability Query Servs.; Ameritech Tariff F.C.C. No. 2, *Memorandum Opinion and Order*, DA 98-648, 13 FCC Rcd. 6695 (CC/CPD 1998) (streamlined tariff filed March 31, 1998 suspended by order released April 3, 1998); Sw. Bell Tel. Co. Tariff F.C.C. No. 73, *Suspension Order*, DA 97-696, 12 FCC Rcd. 4201 (CC/CPD 1997) (streamlined tariff filed March 25, 1997 suspended by order released April 8, 1997).

149 See *Dunlop v. Bachowski*, 421 U.S. 560, 572-73, 577 (1975); *Exxon Pipeline Co. v. FERC*, 725 F.2d 1467, 1469-75 (D.C. Cir. 1984).

review will not impose a significant burden on the streamlined tariff review process.

Finally, even a judicial reversal and remand of an LEC streamlined tariff protest denial will not cause significant interference in the FCC's processes. Appeal of a streamlined tariff protest denial would not delay or otherwise disturb the tariff's effectiveness. As discussed above, the "deemed lawful" status of a streamlined tariff only has significance with regard to a potential damages claim in the event that the tariff is ultimately found unlawful and prospectively invalidated in a separate formal complaint proceeding brought under section 208 of the Communications Act.

Accordingly, a party will follow through on an appeal of a streamlined tariff protest denial only if the party has brought a section 208 complaint against the LEC resulting in the prospective invalidation of the tariff and a denial of damages on the basis of the "deemed lawful" provision in section 204(a)(3).<sup>150</sup> The complaint likely would have been filed shortly after the protest denial and would proceed while the protest denial is challenged at the FCC and then in court. If the complaint is unsuccessful, and the tariff remains in effect, there would be no point to an appeal of the protest denial, and it would be dropped. If the complainant wins the section 208 case, however, the complainant would then appeal the denial of damages relief in the complaint proceeding along with its appeal of the protest denial. Thus, the tariff at issue will already have been invalidated in the section 208 proceeding by the time the protest denial is judicially reviewed, precluding any impact on an effective tariff.

## V. OVERCOMING THE INITIAL OBSTACLES TO JUDICIAL REVIEW

The FCC is not likely to acknowledge a right to judicial review of its decisions not to suspend or reject LEC streamlined tariffs. Exercise of that right will take some patience, at least in the first case seeking such review. First, a party seeking such review must file a petition to reject or suspend and investigate an LEC streamlined tariff within the time allowed by the FCC's streamlined tariff procedures, discussed above.<sup>151</sup> Unless such a petition is filed in a timely manner or there is a Commission decision to take action on its own motion, there will be no Commission "action" to review.<sup>152</sup>

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150. See *Streamlined Tariff Order*, *supra* note 3, at para. 20 (party filing complaint challenging streamlined tariff that was not suspended may obtain only prospective remedy, not damages for the period that the tariff was in effect).

151. See *supra* note 22.

152. See, e.g., AT&T Commc'ns Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, FCC 87-20, 2 FCC Rcd. 548, paras. 11-12 (1987), *petition for review dismissed sub nom. Me. Pub. Advocate v. FCC*, 828 F.2d 68 (1st Cir. 1987).

Bureau denials of such petitions are announced in a public notice of tariff protest denials.<sup>153</sup> Once the protest denial public notice is released, the petitioner will need to file an application for review of the denial, under section 1.115 of the FCC's rules, in order to secure a final, appealable decision by the full Commission, as was done in the case of the pending Sprint and Qwest Applications.<sup>154</sup> The FCC might treat the application for review as one for review of the denial of a petition to reject or to suspend and investigate a traditional tariff filing and accordingly might incorrectly deny the application on the grounds that the action under review is not final because it does not preclude a subsequent section 208 complaint proceeding challenging the tariff or an investigation of the tariff initiated by the FCC under section 205.<sup>155</sup> Once the FCC denied the application for review, however, the petitioner would have an order of the full Commission that could be judicially reviewed by the United States Court of Appeals.

Assuming that a reviewing court is persuaded that an FCC order affirming a Bureau streamlined tariff protest denial is reviewable, reversal of the FCC would seem almost certain if the FCC did not provide some rationale for its affirmance. As discussed above, the Bureau makes no effort to explain its rationale or to support its conclusions in allowing a streamlined tariff to go into effect without suspension and simply announces the list of petitions to reject or to suspend and investigate that are being denied.<sup>156</sup> If the Commission order denying review of the Bureau's tariff protest denial supplied no additional rationale beyond the point that such orders are not reviewable, it would not meet the requirement for APA's arbitrary and capricious standard.<sup>157</sup> It should be noted, however, that the FCC occasionally has ruled on the merits of applications for review of Bureau decisions denying petitions to reject or suspend a tariff.<sup>158</sup> In those cases, the reviewing court would apply the APA's "arbitrary and capricious" standard to the Commission's explanation.<sup>159</sup>

Another important point is the request for relief. Section 204(a)(3) provides that an LEC streamlined tariff "shall be deemed lawful and shall

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153. See, e.g., *2006 Protest Notice*, *supra* note 145.

154. See *supra* note 28 and related text; see also 47 C.F.R. § 1.115(k) (2011) (filing of application for review "shall be a condition precedent to judicial review of any action taken pursuant to delegated authority").

155. See, e.g., AT&T Commc'ns Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, FCC 93-540, 9 FCC Rcd. 292, para. 7 (1994).

156. See *2006 Protest Notice*, *supra* note 145; see also *Tariff Policy Notice*, *supra* note 140.

157. See, e.g., *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404-07 (D.C. Cir. 1995); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746-47 (D.C. Cir. 1986); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

158. See, e.g., *Micronesia Telecomms. Corp. Revision to Tariff* FCC No. 1, *Memorandum Opinion and Order*, FCC 04-84 (2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-84A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-84A1.pdf).

159. See *supra* note 109 and related text.

be effective [seven or fifteen days] after the date on which it is filed . . . unless the Commission takes action under [section 204(a)(1)] before the end of that 7-day or 15-day period, as is appropriate.”<sup>160</sup> Section 204(a)(1) authorizes the FCC to initiate an investigation “either upon complaint or upon its own initiative.” As discussed above, however, by the time the appeal of the tariff protest denial is judicially reviewed, the tariff will have been invalidated prospectively in the appellant’s corresponding section 208 complaint action. There will be no effective tariff to be suspended or investigated. The appropriate request for relief in the appeal of the tariff protest denial, therefore, would be to instruct the FCC to give retroactive effect to the court’s reversal by retroactively altering the status of the tariff from “deemed lawful” to merely “legal”; the status it would have had if it had been suspended.

Courts may certainly provide this type of retroactive relief in reversing a tariff order. In fact, retroactive reversal of the legal status of a streamlined tariff was ordered by the court in *Virgin Islands*—in that case, from “legal” to “deemed lawful”—as a result of the FCC’s own reconsideration of its prior suspension order.<sup>161</sup> A comparable retroactive remedy, but in the opposite direction, should be equally appropriate in the case of a reversal of an FCC streamlined tariff protest denial.

Another example of retroactive relief from a tariff order is *MRFC*.<sup>162</sup> There, the court reversed a Federal Power Commission (“FPC”) order rejecting a natural gas utility’s tariff without a hearing as beyond the agency’s authority and required the agency to accept the rejected filing. The court ordered that the tariffed rates be given immediate effect, but subject to the agency’s right to initiate an investigation of the rates, notwithstanding that the statutory period within which the FPC may initiate an investigation of a newly-filed natural gas tariff had long since passed.<sup>163</sup> Thus, the condition imposed by the court caused its reversal to operate retroactively, placing the parties in the position they would have been in if the agency had permitted the tariff to be filed.<sup>164</sup> Similarly, in *Indiana & Michigan Electric*,<sup>165</sup> the court vacated a tariff suspension order and held that the utility could collect the tariffed rate retroactively during the period of the wrongful suspension.<sup>166</sup> Thus, a court may order the FCC to give

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160. 47 U.S.C. § 204(a)(3) (2006).

161. *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 673 (D.C. Cir. 2006) (FCC reconsideration order setting aside order suspending streamlined tariff “restored the tariff to its [deemed lawful] legal status quo ante”).

162. *Miss. River Fuel Corp. v. Fed. Power Comm’n*, 202 F.2d 899 (3d Cir. 1953).

163. *Id.* at 903.

164. The court, however, would not allow the utility to retroactively charge the tariffed rate to its customers for the initial period because its principal customer had already resold the natural gas based on the original rate. *Id.* at 903-04.

165. *Ind. & Mich. Elec. Co. v. Fed. Power Comm’n*, 502 F.2d 336, 339 & n.8 (D.C. Cir. 1974).

166. On rehearing, the court modified the relief it previously ordered to ameliorate the impact on the utility’s customers, noting that a court “sitting in review of an



retroactive effect to its reversal of the FCC's prior action allowing an LEC streamlined tariff into effect, thereby removing the tariff's "deemed lawful" status.

It should be noted, however, that, although such a retroactive change in legal status is theoretically possible, it is also possible that the first appeal of an LEC streamlined tariff protest denial will result only in a remand in order to give the FCC an opportunity to either retroactively change the status of the tariff or issue the order that should have been prepared to explain its denial of the petition to reject or suspend the tariff.<sup>167</sup> Should the FCC be unable to satisfy the court with an order explaining its decision not to suspend or reject, the court would then be in a position to vacate the FCC's tariff protest denial and require a retroactive change in tariff status.

## VI. CONCLUSION

None of the factors typically cited as reasons to deny judicial review of agency actions allowing traditional tariffs to go into effect without suspension—lack of finality and irreparable injury and interference with agency discretion—are present in the case of an FCC decision denying a challenge to an LEC streamlined tariff, thereby allowing it to go into effect without suspension or investigation. Without such review, the potential injury that can be inflicted by the extraordinary damages immunity conferred by such protest denials cannot be remedied, either by the FCC or the courts.

Moreover, given the high bar against tariff suspensions erected by Rule 1.773(a)(1), it would not be unduly burdensome for the FCC to issue brief orders explaining its decisions to deny petitions challenging LEC streamlined tariffs. In addition, review of an FCC denial of a petition challenging a streamlined tariff would not interfere with the effectiveness of the tariff itself. Therefore, review of such orders under the APA's arbitrary and capricious rubric would not undermine any identifiable goals of the 1996 Act. With the FCC's decreasing reliance on direct regulation to ensure just and reasonable rates, the complaint process will play an even more vital role. Judicial review of Commission decisions allowing LEC streamlined tariffs to go into effect without suspension or investigation is

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administrative agency . . . 'may adjust [its] relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" *Id.* at 346 (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

167. *See, e.g., Ass'n of Oil Pipe Lines v. FERC*, 281 F.3d 239, 248 (D.C. Cir. 2002) (case remanded but order not vacated because "it is unclear whether the remanded issues will change" the outcome); *Sprint Comm. Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001) (decision whether to remand or vacate depends on "'the extent of doubt whether the agency chose correctly'" (quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993))).

crucial to an effective damages remedy in the case of unjust and unreasonable LEC rates and practices.