DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 342

[Docket No. RM20–14–000]

Five-Year Review of the Oil Pipeline Index

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Order establishing index level.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issues this Final Order concluding its five-year review of the index level used to determine annual changes to oil pipeline rate ceilings. The Commission establishes an index level of Producer Price Index for Finished Goods plus 0.09% (PPI–FG+0.09%) for the five-year period commencing July 1, 2021. As discussed below, we decline to adopt other changes to the index calculation proposed by commenters.

I. Background

A. Establishment of the Indexing Methodology

1. The Energy Policy Act of 1992 (EPAct 1992) required the Commission to establish a “simplified and generally applicable” ratemaking methodology that was consistent with the just and reasonable standard of the Interstate Commerce Act (ICA). To implement this mandate, the Commission issued Order No. 561 establishing an indexing methodology that allows oil pipelines to change their rates subject to certain ceiling levels as opposed to making cost-of-service filings.

2. In Order No. 561, the Commission committed to review the index level every five years to ensure that it adequately reflects changes to industry costs. The Commission conducted five-year index reviews in 2000, 2005, 2010, and 2015. In the 2015 review, the Commission established the index level of PPI–FG+1.23%, to be effective for the five-year period beginning July 1, 2016. The index level established herein results from the Commission’s fifth five-year review of the index level.

B. The Kahn Methodology

5. In Order No. 561 and each successive five-year review, the Commission has calculated the index level based upon a methodology developed by Dr. Alfred E. Kahn. The Kahn Methodology uses pipeline data from Form No. 6, page 700 from the prior five-year period to determine an appropriate adjustment to be applied to PPI–FG. The calculation is as follows. Each pipeline’s cost change on a per-barrel mile basis over the prior five-year period (e.g., the years 2014–2019 in this proceeding) is calculated. In order to remove statistical outliers and spurious data, under the Kahn Methodology, the resulting data set is trimmed to those oil pipelines in the middle 50% of cost changes (middle 50%). The Kahn Methodology then calculates three measures of the middle 50%’s central tendency: The median, the mean, and a weighted mean. The Kahn Methodology calculates a composite by averaging these measures of central tendency and measures the difference between the composite and the PPI–FG over the prior five-year period. The Commission then sets the index level at PPI–FG plus (or minus) this differential.

C. The 2020 Five-Year Review

6. On June 18, 2020, the Commission issued the NOI initiating its five-year methodology for calculating the index level.

2. For the reasons discussed below, we adopt an index level of PPI–FG+0.78%. The departure from the NOI results from: (a) Trimming the data set to the middle 80% of cost changes; (b) adopting Designated Carriers’ proposal to adjust the data set to remove the effects of the Commission’s 2018 income tax policy change for Master Limited Partnership (MLP)-owned pipelines; and (c) updated Form No. 6 filings and other corrections to the data set. The Commission’s indexing calculations and other data analysis are contained in Attachment A to this order. As discussed below, we decline to adopt other changes to the index calculation proposed by commenters.

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C. The 2020 Five-Year Review

6. On June 18, 2020, the Commission issued the NOI initiating its five-year
review to establish the index level for the July 1, 2021 to June 30, 2026 period. The NOI proposed an index level of PPI–FG+0.09% and requested comment on this proposal and any alternative methodologies for calculating the index level. The Commission explained that commenters could address issues including, but not limited to, different data trimming methodologies and whether, and if so how, the Commission should reflect the effects of cost-of-service policy changes in the index calculation.

II. Comments

7. Initial comments filed in response to the NOI were due on August 17, 2020, and reply comments were due on September 11, 2020. Comments were filed by the Association of Oil Pipe Lines (AOPL) (together with Designated Carriers, Pipelines), Designated Carriers, Kinder Morgan, Inc., Colonial Pipeline Company, Joint Commenters, the Liquids Shippers Group (Liquids Shippers), the Canadian Association of Petroleum Producers (CAPP) (together with joint Commenters and Liquids Shippers, Shippers), the Energy Infrastructure Council (EIC), the Pipeline Safety Trust, and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

8. The commenters discuss numerous issues related to the proposed index level, including statistical data trimming and whether the index should incorporate the effects of the Commission’s 2018 policy change requiring MLP-owned pipelines to eliminate the income tax allowance and previously accrued Accumulated Deferred Income Taxes (ADIT) balances from their page 700 summary costs of service (Income Tax Policy Change).

In addition, Liquids Shippers propose to replace the weighted mean in the Kahn Methodology’s calculation of central tendency with the weighted median and to replace the returns on equity (ROE) reported on page 700 for 2014 and 2019 with standardized, industry-wide ROEs for both years. The commenters propose varying index levels, including AOPL’s proposal to adopt an index level of at least PPI–FG+0.79%, Designated Carriers’ proposals of PPI–FG+1.27% (using the middle 80% of cost changes) or PPI–FG+0.82% (using the middle 50%), Joint Commenters’ proposal of PPI–FG–0.19%, and Liquids Shippers’ proposal of PPI–FG+1.58%.

III. Discussion

9. We adopt an index level of PPI–FG+0.78% for the five-year period beginning July 1, 2021. We adopt Designated Carriers’ proposed adjustment to remove the effects of the Income Tax Policy Change from the page 700 data used to derive the index and we adopt Pipelines’ proposal to calculate the index level using the middle 80% of cost changes. We also reject Liquids Shippers’ proposals to: (a) Calculate the composite measure of the data set’s central tendency using the median of the barrel-mile weighted unit cost change; and (b) replace the reported page 700 ROEs for 2014 and 2019 with standardized ROEs. We also address arguments regarding negotiated rate contracts as raised by CAPP, pipeline costs resulting from integrity management regulations, and the treatment of mergers and acquisitions in the data set.

A. 2018 MLP Income Tax Policy Change

1. Comments

10. Commenters disagree about whether the Commission should incorporate the effects of the Income Tax Policy Change in the index calculation. Pipelines argue that the Income Tax Policy Change should not be incorporated and present proposals for adjusting the page 700 data to remove its effects from the calculation. Shippers oppose Pipelines’ adjustments and contend that the policy change’s effects are appropriately reflected in the index.

11. AOPL argues that its proposed adjustment to eliminate the effects of the Income Tax Policy Change is necessary to calculate an index that accurately measures cost changes incurred during the 2014–2019 period and predicts the likely rate of future cost changes. According to AOPL, eliminating the income tax allowance from page 700 data for MLP pipelines’ income tax costs were the same before and after the policy change. Thus, AOPL asserts that the Commission should remove the policy change’s effects to ensure that the page 700 data reflects consistent policies.

12. To remove the policy change’s effects from the data set, AOPL’s witness Dr. Shehadeh proposes to adjust the reported page 700 data for pipelines that were MLPs in 2014–2019 period based upon the following steps. First, Dr. Shehadeh eliminates the 2014 income tax allowance for all pipelines that reduced their page 700 income tax allowance for 2016 from a positive number to zero following the Income Tax Policy Change. Second, Dr. Shehadeh adjusts these pipelines’ 2014 page 700 return on rate base to reflect the elimination of their previously accumulated ADIT balances. This adjustment involves, for each pipeline: (a) Taking the difference between the 2016 rate base reported in the pipeline’s April 18, 2017 page 700 filing (with ADIT balances included) and the higher 2016 rate base reported in its April 18, 2018 filing (with ADIT balances removed); (b) adding this amount to the 2014 rate base; and (c) calculating the return on the higher 2014 rate base by multiplying the higher rate base by the 2014 weighted average cost of capital.

13. Designated Carriers support AOPL’s position and propose to extend AOPL’s proposed adjustments to all pipelines that were owned by MLPs in 2014 and later converted to C-Corporations, not just those pipelines that were MLPs throughout the 2014–2019 data period. Designated Carriers contend that this approach is necessary to avoid treating one class of MLPs (those that were MLPs in 2014 and remained MLPs in 2019) differently from another class (those that were MLPs in 2014 and converted to C-Corporations in 2015).

14. Commenters either agree or do not dispute that the effects of the Tax Cuts and Jobs Act of 2017 (TCJA) are appropriately reflected in the data set; and no adjustment is necessary to reflect the Commission’s May 21, 2020 policy statement revising its ROE policy for natural gas and oil pipelines because that policy change occurred after the conclusion of the 2014–2019 period.


16. Id. P 8.

17. Joint Commenters include: The Airlines for America; Chevron Products Company; the National Propane Gas Association; and Valero Marketing and Supply Company.

18. For purposes of this proceeding, Liquids Shippers include: Apache Corporation; Cenovus Energy Marketing Services Ltd.; ConocoPhillips Company; Devon Gas Services, L.P.; Equinor Marketing & Trading US Inc.; Fieldwood Energy LLC; Marathon Oil Company; Murphy Exploration and Production Company—USA; Ovintiv Marketing Inc.; and Pioneer Natural Resources USA, Inc.


20. Id.; Shehadeh Initial Decl. at 16.

21. Commenters either agree or do not dispute that the effects of the Tax Cuts and Jobs Act of 2017 (TCJA) are appropriately reflected in the data set; and no adjustment is necessary to reflect the Commission’s May 21, 2020 policy statement revising its ROE policy for natural gas and oil pipelines because that policy change occurred after the conclusion of the 2014–2019 period.

22. AOPL Initial Comments at 28–29 (citing Shehadeh Initial Decl. at 14–15).

23. Id.; Shehadeh Initial Decl. at 16.
Corporations during the review period.

14. Shippers oppose Pipelines’ proposed adjustments and argue that the Commission should incorporate the effects of the Income Tax Policy Change in the index calculation. Shippers contend that the index is meant to reflect changes to recoverable pipeline costs as determined under the Commission’s Opinion No. 154–B cost-of-service methodology. Because the Income Tax Policy Change prohibits MLP pipelines from recovering an income tax allowance under that methodology, Shippers assert that the index should reflect this reduction in recoverable costs.

15. Furthermore, Shippers claim that adopting Pipelines’ proposals would contravene the Commission’s commitment in the 2018 Income Tax Policy Statement to “incorporate the effects of [the policy change] on industry-wide oil pipeline costs” and “ensure that the industry-wide reduced costs are not based on an industry-wide basis as part of the 2020 five-year review.” Shippers argue that the Commission opted to incorporate these effects in the index in lieu of directing pipelines to submit rate filings or initiating rate investigations to eliminate the income tax double recovery from MLP oil pipeline rates, as the Commission did for MLP natural gas pipelines. Thus, Shippers contend that the Commission must reflect the elimination of the income tax allowance and associated ADIT balances from MLP oil pipelines’ page 700 costs of service in order to bring those pipelines’ rates in line with their recoverable costs.

2. Commission Determination

16. Whether the index should reflect the effects of cost-of-service policy changes is an issue of first impression.

For the reasons discussed below, we adopt Designated Carriers’ proposal to adjust the page 700 data set to remove the effects of the Income Tax Policy Change from the index calculation. As a result, for all pipelines that were MLPs in 2014, we reduce the 2014 income tax allowance to zero and revise the 2014 return on rate base to reflect the removal of ADIT. We find that this adjustment is necessary to accurately calculate the index.

17. First, the purpose of indexing is to allow the indexed rate to keep pace with industry-wide cost changes, not to reflect alterations to the Commission’s Opinion No. 154–B cost-of-service methodology. Although the Commission uses the Opinion No. 154–B methodology cost data on page 700 for purposes of the five-year review, changes to the Opinion No. 154–B methodology itself are distinct from the annual changes to the pipeline costs that are input into the Opinion No. 154–B methodology. Where the Commission modifies an Opinion No. 154–B cost-of-service policy used to measure recoverable costs midway through the five-year review period, the Opinion No. 154–B cost of service reported on page 700 for the first and last years of the period will reflect different sets of policies. Just as a business must account for changes to its accounting policies when comparing its costs over two different periods, we must make a similar adjustment to the reported page 700 data here to derive an “apples-to-apples” comparison of pipeline cost changes. By contrast, comparing data reported under different sets of policies reviews using Form No. 6 accounting data, rather than the summary cost-of-service data reported on page 700. Because the Commission did not adopt any significant cost-of-service policy changes during the 2009–2014 review period, the Commission likewise did not have occasion to address this issue in the 2015 Index Review.


18. Second, although we recognize that in the 2018 Income Tax Policy Statement the Commission stated that it would “incorporate the effects of the post-United Airlines’ policy changes on industry-wide oil pipeline costs in the 2020 five-year review of the oil pipeline index level,” we conclude that the index is not an appropriate mechanism for incorporating the post-United Airlines’ policy changes. The index allows for incremental rate adjustments to enable pipelines to recover normal cost changes in future years. It is not a true-up designed to remedy prior over- or under-recoveries in pre-existing rates resulting from cost-of-service policy changes during the prior five-year period. Accordingly, we find that it would be improper to address any double recovery via the index.

19. Third, it is not clear that the double recovery of MLP pipelines’ income tax costs was ever incorporated into the index. Before the Commission updated its calculation of the index in the 2015 Index Review to use page 700 data, the Kahn Methodology used net carrier property as a proxy for capital costs and income taxes. This proxy did not reflect changes in the Commission’s Opinion No. 154–B methodology, including changes to the Commission’s income tax policy. As a result, the Commission’s prior policies permitting MLP pipelines to recover a partial or full income tax allowance were never directly incorporated into


34 Net carrier property measures changes to the book value of the pipeline’s asset base but does not incorporate changes to the costs of financing the asset base, such as ROE. As the Commission explained in the 2015 Index Review, the relationship between net carrier property and income tax costs is complicated because income taxes are dependent upon the pipeline’s ROE, not merely the size of the pipeline’s asset base. 2015 Index Review, 153 FERC ¶ 61,312 at P 14.


31 In 2015, the Commission adopted page 700 for the first and last years of the period. Accordingly, we find that it would be improper to address any double recovery via the index.
the index.\textsuperscript{37} Because no prior index calculation incorporated the policies allowing MLP pipelines to recover an index tax allowance, it is not necessary to reflect the policy change denying those pipelines an income tax allowance in the calculation here.

20. Accordingly, we adopt Designated Carriers’ proposal to adjust the historical page 700 data for 2014 to remove the effects of the Income Tax Policy Change for all pipelines that were MLPs in 2014, including those that later converted to a business form (such as a C-Corporation) eligible to recover an income tax allowance. This approach is broader than AOPL’s more limited proposal to adjust the data for only those pipelines that were MLPs in 2014 and that continued to be MLPs for the remainder of the 2014–2019 period.

Because the Commission’s revised income tax allowance policy applies equally to all MLP pipelines,\textsuperscript{38} we conclude that it is appropriate to make these adjustments for all pipelines that were MLPs in 2014, regardless of subsequent changes in corporate form. By applying these adjustments to all pipelines subject to the Income Tax Policy Change, we will ensure that the entirety of the page 700 data reflects the same MLP income tax allowance policy for both 2014 and 2019. Furthermore, those pipelines that converted from the MLP form to the corporate form incurred increased tax costs as a result of the change in business form. This cost change, just like any other cost change, should be reflected in the index.\textsuperscript{39}

\textbf{B. Statistical Data Trimming}

1. Comments

21. AOPL argues that the Commission should calculate the index level by trimming the data set to the middle 80%.\textsuperscript{40} AOPL asserts that absent errors in the data, it is preferable to use more data points because this makes the measurement of industry-wide cost changes more precise.\textsuperscript{41} AOPL contends that using the middle 50% in this proceeding would go beyond excluding statistical outliers by removing valuable data from the analysis, resulting in a less accurate measurement of industry cost changes.

22. In addition, AOPL maintains that considerations the Commission has previously found to support trimming the data set to the middle 50% should not control here. It states that whereas the Commission found in Order No. 561 that data reporting errors supported restricting the analysis to the middle 50%, subsequent improvements in reporting accuracy obviated these concerns.\textsuperscript{43} Furthermore, AOPL states that contrary to the Commission’s finding in the 2015 Index Review, the fact that pipelines in the middle 80% are further removed from the median does not support excluding their cost data unless that data is anomalous or spurious.\textsuperscript{44} Designated Carriers, Kinder Morgan, and EIC support AOPL’s proposal to rely solely on the middle 80%.

23. Shippers oppose use of the middle 80% and argue that the record does not provide a sufficient basis for departing from the Commission’s practice in the 2015 and 2010 Index Reviews of relying solely upon the middle 50%.\textsuperscript{46} Shippers cite the Commission’s findings in the 2015 and 2010 Index Reviews that using the middle 50% provides a simple and effective method of excluding outlying data from the sample and minimizes the need to analyze individual pipeline data. Here, Shippers argue that the middle 80% contains outlying data and that AOPL did not undertake a company-by-company review of the incremental data included in the middle 80% to prove otherwise.\textsuperscript{47} Joint Commenters also contend that the middle 80% is more dispersed than the middle 50% in this proceeding and the middle 80% in prior index reviews, indicating that it contains cost changes that are not representative of typical experience.\textsuperscript{48} Moreover, Shippers assert that it is unnecessary to use the middle 80% in this proceeding to obtain a representative sample of industry cost changes because the middle 50% contains a greater percentage of barrel-miles subject to the index (82%) than in the 2015 Index Review (56%) or the 2010 Index Review (76%).\textsuperscript{49}

24. Shippers further argue that AOPL’s arguments for using the middle 80% are unavailing and inconsistent with the Commission’s findings in the 2015 Index Review.\textsuperscript{50} Joint Commenters maintain that the Commission has previously rejected the argument that using the middle 50% will bias the index calculation downwards.\textsuperscript{51} Liquids Shippers state that AOPL incorrectly argues that the sole purpose of statistical data trimming is to remove inaccurate data and statistical outliers. According to Liquids Shippers, data trimming also serves to exclude data that, while accurate, fails to represent normal industry cost experience.\textsuperscript{52}

2. Commission Determination

25. Based upon our review of the instant record, we calculate the index level by trimming the data set to the middle 80%. We recognize that this is a departure from the Commission’s practice in the 2015 and 2010 Index Reviews of trimming the data set to the middle 50%.\textsuperscript{53} An agency may change its position in light of experience or further analysis so long as it articulates a satisfactory explanation for its new position.\textsuperscript{54} Thus, notwithstanding the

\textsuperscript{37} MLP pipelines therefore would not have been harmed by these policies unless they established an initial cost-based rate under 18 CFR 342.2(a) of the Commission’s regulations or changed an existing rate pursuant to the cost-of-service methodology under 18 CFR 342.4(a) while these policies were in effect. 18 CFR 342.20(a), 342.4(a).


\textsuperscript{39} See 30 F.Supp.3d 915, 922 (S.D.N.Y. 2018) (‘‘Commission erred in rejecting the proposal to use middle 80% in a new way when it is consistent with its previous practice and would result in a fairer calculation of the index’’).

\textsuperscript{40} AOPL Initial Comments at 18 (quoting 2015 Index Review, 153 FERC ¶ 61,312 at PP 42–44); AOPL Reply Comments at 19; AOPL Initial Comments at 19, Trimming the data set to the middle 50% would exclude 80 of the 160 pipelines in the data set, whereas trimming to the middle 80% would exclude 32 pipelines.

\textsuperscript{41} AOPL Initial Comments at 18 (quoting Sheehan Decl. at 23); AOPL Reply Comments at 9.

\textsuperscript{42} AOPL Initial Comments at 19. Trimming the data set to the middle 50% would exclude 80 of the 160 pipelines in the data set, whereas trimming to the middle 80% would exclude 32 pipelines.

\textsuperscript{43} AOPL Initial Comments at 20–21 (citing 2015 Index Review, 153 FERC ¶ 61,312 at PP 40, 43).

\textsuperscript{44} Id. at 23 (citing AOPL II, 281 F.3d at 245–46).

\textsuperscript{45} Designated Carriers Initial Comments at 7; Kinder Morgan Initial Comments at 3; EIC Comments at 7–8.

\textsuperscript{46} Joint Commenters Initial Comments at 15–16; Joint Commenters Reply Comments at 5–7; Liquids Shippers Reply Comments at 17; CAPP Reply Comments at 15–16.

\textsuperscript{47} Joint Commenters Reply Comments at 10 (citing Brattle Group Report at 13–20); Brattle Group Report at 22; Liquids Shippers Reply Comments at 19–21 (citing Crowe Reply Aff. at 4–5).

\textsuperscript{48} Id.; see also id. at 9–11 (quoting 2015 Index Review, 153 FERC ¶ 61,312 at P 42 n.80) (citing 2015 Index Review, 153 FERC ¶ 61,312 at P 43); Liquids Shippers Reply Comments at 23–25 (citing 2015 Index Review, 153 FERC ¶ 61,312 at PP 40, 43).

\textsuperscript{49} Joint Commenters Reply Comments, Brattle Group Report; LPAP’s Comments at 17–20 (citing Order No. 561–A, FERC Stats. & Regs. ¶ 31,097 at 31,100).

\textsuperscript{50} Liquids Shippers Reply Comments at 22–23 (citing Order No. 561–A, FERC Stats. & Regs. ¶ 31,097 at 31,100).

\textsuperscript{51} Joint Commenters Reply Comments, Brattle Group Report at 46–48 (citing 2015 Index Review, 153 FERC ¶ 61,312 at PP 43, 44); Order No. 561–A, FERC Stats. & Regs. ¶ 31,097 at 31,100.

\textsuperscript{52} 2015 Index Review, 153 FERC ¶ 61,312 at PP 42–44; 2010 Index Review, 133 FERC ¶ 61,228 at PP 60–63.

\textsuperscript{53} E.g., Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (‘‘Agencies are free to change their existing policies so long as they provide a reasoned explanation for the change. . . . But the agency must at least display awareness that it is changing position and show that there are good reasons for it’’).
Commission’s determinations in the 2015 and 2010 Index Reviews, the Commission “retain[s] a substantial measure of freedom to refine, reformulate, and even reverse [its] precedents in the light of new insights.”55 If it describes good reasons for the new policy,56 In the NOI, the Commission requested comments that address whether the Commission should continue to trim the data set to the middle 50% or adopt an alternative approach to data trimming, including using the middle 80%.57 Based upon our review of the comment record, we conclude that using the middle 80% is appropriate for this index review.

26. Three primary considerations support using the middle 80% instead of the middle 50% in this proceeding. First, we find it is appropriate to consider more data in measuring industry-wide cost changes rather than less. The Kahn Methodology derives the index level by computing the central tendency of a statistically trimmed data sample. As a general matter, considering a broader data sample should enhance the Commission’s calculation of the central tendency of industry cost experience. In this proceeding, using the middle 50% would exclude 48 pipelines58 from the Commission’s review of industry-wide cost changes over the 2014–2019 period. We are reluctant to discard this additional data.

27. Second, we find in this proceeding that “normal” cost changes are best defined by using the inclusive data sample embodied in the middle 80%. Prematurely discarding data prior to determining the central tendency could skew the index such that it does not actually reflect industry-wide trends. By using this inclusive data sample, the Commission is able to accurately identify the central tendency of industry-wide cost changes that reflects the “normal” cost changes recoverable by the index.59 Moreover, even if the middle 80% (or, for that matter, the middle 50%) includes relatively high cost changes at its upper bound, the index average will be significantly below that upper bound and will not allow pipelines to recover such extraordinary costs.60 Rather, the index will reflect the central tendency of the industry-wide data, which, by definition, represents normal industry-wide costs. Absent a compelling showing that including data from the middle 80% distorts our measurement of the industry-wide central tendency, we are inclined to consider this more comprehensive data set.

28. Third, along similar lines, we emphasize that mere generalized concerns about outlying or unrepresentative data do not justify excluding the experiences of pipelines in the incremental 30% (i.e., those pipelines that are included in the middle 80% but not the middle 50%) from the review of industry cost changes. Unlike in prior index reviews, the record in this proceeding does not contain sufficient evidence that pipelines in the incremental 30% experienced anomalous cost changes that would skew the index. In the 2015 and 2010 Index Reviews, commenters presented detailed analyses demonstrating that the incremental 30% contained anomalous cost changes resulting from factors not broadly shared across the industry that would materially distort the index calculation.61 The record here does not contain a comparably detailed analysis of the incremental 30%. Although Joint Commenters identify 7 pipelines (out of 48) with anomalous cost changes in the incremental 30%, removing those pipelines from the sample would only marginally affect the central tendency of the middle 80%.62 Furthermore, the record contains no evidence that the cost experiences of the remaining 41 pipelines similarly diverged from industry norms.63 Finally, the mere presence of pipelines with anomalous cost experiences in a data sample is not sufficient reason to adopt an alternative sample. The Commission recognized in the 2015 and 2010 Index Reviews that the middle 50% likely includes pipelines with idiosyncratic cost experiences, such as rate base expansions.64 Accordingly, this record does not justify discarding the additional data in the incremental 30% via statistical data trimming to the middle 50%.65

29. Shippers’ arguments for a contrary result are unavailing. Notwithstanding that the middle 80% is more dispersed than in prior reviews, the record contains no evidence addressing

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56 See also Defenders of Wildlife v. Zinke, 879 F.3d 1192, 1201 (9th Cir. 2017).
57 556 U.S. 502, 514–16 (2009)); 9452 Federal Register 61,239 at P 9 (rejecting this same argument).
58 Likewise, if the lower bound of the middle 80% includes pipelines with cost changes that are below industry norms, the index average will significantly exceed this lower bound.
59 The definition of idiosyncratic data can vary from review to review. In any given five-year review period, an historically high level of cost change (due to, e.g., new regulatory requirements) may be widely experienced by pipelines across the industry and, accordingly, will be reflected in the central tendency of the industry-wide data and thus identified as a “normal” cost change. On the other hand, if during a different five-year review period, only a small number of pipelines experience that same level of cost change, then the cost change will be idiosyncratic and will differ significantly from the central tendency of the industry-wide data. Generally, the best method of identifying normal and idiosyncratic costs is to consider an inclusive and broadly representative data set such as the middle 80% and to compare those costs to the central tendency of that data set.
60 Shippers contend that this argument is mathematically flawed and unsound. Joint Commenters Reply Comments at 24.}

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56 When these pipelines are removed from the data set, the mean of the middle 80% declines from 1.46% to 1.29%, while the median and weighted mean remain nearly unchanged. The composite central tendency of the middle 80% only marginally, from 0.78% to 0.72%. Compare Attachment A, Ex. 1, with id., Ex. 6. Furthermore, even this limited reduction may be exaggerated because it results in part from reducing the overall number of pipelines in the sample, which would tend to lower the mean of the sample. Additionally, because four of the seven removed pipelines are located below the median, it is unsurprising that excluding them from the middle 80% would reduce the mean.
61 See 2015 Index Review, 153 FERC ¶ 61,312 at P 33 n.60 (noting that 26 of the 41 pipelines that commenters proposed to exclude for reporting “non-comparable” data were included in the middle 50%); 2010 Index Review, 133 FERC ¶ 61,228 at P 48 n.25 (noting that 7 of the 25 pipelines that a commenter proposed to exclude for experiencing rate base expansions were included in the middle 50%).
62 AOPL also argues that the Commission should use the middle 80% because it conforms more closely to a lognormal distribution than the middle 50%. AOPL Initial Comments at 20–21, 24 (citing Sheehadhe Initial Decl. at 24); AOPL Reply Comments at 8–9. Shippers contend that this argument is mathematically flawed and unsound.
whether the more dispersed cost changes in the incremental 30% resulted from pipeline-specific factors rather than from broadly shared circumstances representative of ordinary pipeline operations. Furthermore, Shippers’ own evidence demonstrates the dispersion is primarily just a few pipelines at the top of the middle 80%. Although it may be possible that analyses of the middle 80% in this proceeding similar to those provided in prior index reviews would have raised similar concerns about considering the middle 80%, no commenter presented such a comprehensive analysis. In the absence of a more detailed showing, we prefer to use a larger sample, representing a broader array of cost experience, in determining the data set’s central tendency.

30. We are likewise unpersuaded by Shippers’ reliance upon the Commission’s findings in the 2015 and 2010 Index Reviews that the middle 80% includes pipelines further removed from the median and that using the middle 50% provides a more effective method of excluding outlying data. As discussed above, we have reconsidered our prior findings and now conclude that based upon the record in this proceeding, the benefits of considering the additional data in the middle 80% outweigh concerns about introducing anomalous data that could bias the index calculation.

31. We also find unpersuasive Shippers’ argument that it is unnecessary to use the middle 80% to obtain a representative sample of industry cost data. We acknowledge that the middle 50% represents a greater percentage of barrel-miles subject to the index than in 2015 or 2010. However, we find that on this record, it is preferable to consider additional data that more fully reflects the diversity of industry cost experience than the middle 50%.

32. Similarly, we disagree with Shippers’ assertion that using the middle 80% here would result in an index that encompasses extraordinary cost changes.66 As discussed above, the Kahn Methodology determines the index level using the central tendency of the trimmed data sample, and does not set the index at the sample’s upper or lower bounds. Thus, using the middle 80% will not allow pipelines at the top or bottom of the sample to recover their particular cost changes, which by definition would diverge from the experience of pipelines closer to the central tendency. Instead, this approach only ensures that those pipelines’ cost experiences are reflected in calculating the data set’s central tendency. As discussed above, we find that considering a wide spectrum of industry experience will aid the Commission in calculating a central tendency that better represents normal industry-wide cost changes.

C. Liquids Shippers’ Proposal To Calculate the Composite Measure of Central Tendency Using the Weighted Median

1. Comments

33. As discussed above, the Kahn Methodology calculates the median, mean, and weighted mean of the data set and averages the results to calculate a composite measure of central tendency. Liquids Shippers argue that the weighted mean of the data set in this proceeding accords undue weight to two pipelines, Colonial and Enbridge Energy, L.P. Liquids Shippers allege that these pipelines are substantial outliers in terms of barrel-miles and cost changes67 and that both reported inaccurate page 700 data for 2014 and 2019.68 Because the weighted mean accords significant weight to these pipelines, Liquids Shippers state that using it to calculate the composite measure of central tendency will skew the index level upwards and fail to track normal industry-wide cost changes.69

34. To remedy this issue, Liquids Shippers propose to replace the weighted mean in the index calculation with the median of the barrel-mile weighted cost changes in the middle 50% (weighted median),70 as calculated by their witness Elizabeth H. Crowe.

66 Liquids Shippers Initial Comments at 13–15. For instance, Liquids Shippers state that Colonial and Enbridge comprise 40% of the total barrel-miles for all of the 160 pipelines in the data set. Id. In addition, Liquids Shippers claim that Colonial reported a higher unit cost change over the 2014–2019 period than 69 of the 80 pipelines included in the middle 50% and Enbridge reported a higher cost change than 47 of those pipelines. Id. at 15.

67 Specifically, Liquids Shippers claim that Colonial reported an inaccurate capital structure in both 2014 and 2019 and that Enbridge’s reported ROEs are inconsistent with Commission policy. Id. at 17–19.

68 Id. at 16–19.

69 The standard median identifies the cost change for which the same number of pipelines have a smaller cost change and a larger cost change. By contrast, the weighted median identifies the cost change for which the same share of barrel-miles (rather than the number of pipelines) is accounted for by the pipelines below and above the selected median.

Liquids Shippers contend that the Commission has recognized that the median is the preferred statistical measure of central tendency where the data distribution is highly skewed.71 Thus, Liquids Shippers argue that using the weighted median is a statistically appropriate method of ameliorating the undue influence that Colonial and Enbridge exert upon the index calculation.72 Alternatively, if the Commission decides not to replace the weighted mean with the weighted median, Liquids Shippers propose reducing the weighting afforded to the weighted mean in the Kahn Methodology from 33.3% to 20% or 10%.73

35. Pipelines oppose this proposal and argue that Liquids Shippers have not justified modifying the Kahn Methodology to exclude the weighted mean. Pipelines disagree with Liquids Shippers’ claim that the weighted mean affords excessive weight to Colonial or Enbridge. Rather, Pipelines assert that averaging the weighted mean with the median and unweighted mean ensures that larger pipelines receive appropriate weighting in the index calculation, consistent with indexing’s aim to measure cost changes on an industry-wide basis. Pipelines also assert that neither Colonial nor Enbridge is an outlier because both pipelines are included in the middle 50% of the data set. In addition, Pipelines maintain that Liquids Shippers’ allegations regarding Colonial’s and Enbridge’s page 700 inputs are both irrelevant and outside the scope of the five-year review. Finally, Pipelines contend that Liquids Shippers’ calculation of the weighted median is methodologically flawed and would distort the index by affording undue weight to smaller pipelines in the data set.74 Colonial filed separate reply comments echoing these arguments and urging the Commission to disregard Liquids Shippers’ claims regarding its page 700.75

2. Commission Determination

36. We decline to adopt Liquids Shippers’ proposal to replace the weighted mean with the weighted median. First, removing the weighted mean from the index calculation would contravene longstanding Commission practice and Dr. Kahn’s testimony in the rulemaking proceeding that established...
the indexing regime. In proposing to average the weighted mean with the median and unweighted mean to derive the composite central tendency, Dr. Kahn explained that each of these measures "captured a significant aspect of the composite results from an industry perspective." The Commission credited Dr. Kahn's testimony and adopted this approach to calculating the composite central tendency in that proceeding and in all subsequent five-year reviews. As discussed below, we find that Liquids Shippers' arguments do not provide an adequate basis for departing from this consistent practice.

37. Second, we reject as unpersuasive Liquids Shippers' claim that the Commission should replace the weighted mean merely because it provides greater weight to larger pipelines like Colonial and Enbridge. The index strives to track cost changes measured at the barrel-mile level. The pipeline whose share of total barrel-miles causes the cumulative share to reach 50% represents the data set's central tendency.

38. Third, Ms. Crowe's calculation of the weighted median is methodologically flawed. AOPL's witness Dr. Shehadeh testifies that the established statistically appropriate method for calculating the weighted median, as applied to pipeline cost changes, is to identify the cost change in the data set for which the same share of barrel-miles (rather than the same number of pipelines) is accounted for by the pipelines below and above the selected median. Shehadeh Reply Decl. at 11 n.17 (citing Thomas H. Cormen, Introduction to Algorithms 194 (2009); 6 F.Y. Edgeworth, On Observations Relating to Several Quantities 279–85 (1887) (The weighted median may be defined as follows:

For $n$ distinct ordered elements $x_1, x_2, \ldots, x_n$ with positive weights $w_1, w_2, \ldots, w_n$ such that $\sum_{i=1}^{n} w_i = 1$, the weighted median is the element $x_k$ satisfying

$$\sum_{i=1}^{k-1} w_i \leq 1/2 \text{ and } \sum_{i=k+1}^{n} w_i \leq 1/2.$$  

This value is appropriately derived by ordering the pipelines by cost-change percentage, computing each pipeline's share of total barrel-miles, and measuring the cumulative share of total barrel-miles represented as each pipeline is included in the sample. The pipeline whose share of total barrel-miles causes the cumulative share to reach 50% represents the data set's weighted median.

39. Ms. Crowe, however, performed a different calculation by identifying the median weighted barrel-cost change percentage and dividing that figure by the average of those pipelines' 2014 barrel-miles. This calculation departs from the proper method of calculating the weighted median discussed above. Rather than identify the pipeline that causes the cumulative share of total-barrel miles represented in the sample to reach 50%, Ms. Crowe derives the median value of the weighted cost-change percentages for 2019 without regard to the barrel-miles represented below and above that cost change. Unlike the Commission's calculation of the standard median and Dr. Shehadeh's calculation of the weighted median, Ms. Crowe does not order pipelines by cost changes, and instead orders them by cost changes times barrel-miles. Thus, the median of Ms. Crowe's data sample does not capture the central tendency of industry-wide cost changes, as evidenced by the significant and multidirectional fluctuations above and pipelines based on these results from smallest to largest. Fourth, she determined the median of this data sample. Because Ms. Crowe's sample consists of an even number of pipelines, the median lies at the midpoint between two pipelines, Hilcorp Pipeline Company, LLC, and BOE Pipeline, LLC. Finally, she divided the median percentage cost change by those pipelines' 2014 barrel-miles, which produces a final result of –0.57%. See Crowe Initial Aff., App. 3, at Cost Changes Tab; Shehadeh Reply Decl. at 10, Figure 3 and App. B, at Figure 1—Chart Backup Tab.

40. For example, consider a set of numbers 3, 4, 6, 10, where each number is weighted 1, 2, 3, and 5, respectively. In this scenario, the weighted median of the data set would equal 6, because including 6 in the set increases the cumulative weighting to 50%. $\frac{1+2+3+4+5}{5} = 6$ with $\frac{5}{5} = 5$. By contrast, the standard median would be 5, which equals the average of the second and third numbers of the set.

41. Dr. Shehadeh correctly performs this calculation using Liquids Shippers' data set and derives a weighted median cost change of 0.68%, as reported by Enbridge. Shehadeh Reply Decl., App. B, Ex. 1.

42. Shehadeh Reply Decl. at 13; see also Crowe Initial Aff., App. 6 at Cost Changes Tab. Although Ms. Crowe's testimony on this issue was unclear, her understanding of her calculation is as follows. First, she identified the pipelines with percentage cost changes in the middle 50%. Second, she multiplied each pipeline's percentage cost change by its barrel-miles. Third, she arranged the median weighted barrel-cost change percentage and dividing that figure by the average of those pipelines' 2014 barrel-miles. This value is appropriately derived by ordering the pipelines by cost-change percentage, computing each pipeline's share of total barrel-miles, and measuring the cumulative share of total barrel-miles represented as each pipeline is included in the sample. The pipeline whose share of total barrel-miles causes the cumulative share to reach 50% represents the data set's weighted median. Ms. Crowe, however, performed a different calculation by identifying the median weighted barrel-cost change percentage and dividing that figure by the average of those pipelines' 2014 barrel-miles. This calculation departs from the proper method of calculating the weighted median discussed above. Rather than identify the pipeline that causes the cumulative share of total-barrel miles represented in the sample to reach 50%, Ms. Crowe derives the median value of the weighted cost-change percentages for 2019 without regard to the barrel-miles represented below and above that cost change. Unlike the Commission's calculation of the standard median and Dr. Shehadeh's calculation of the weighted median, Ms. Crowe does not order pipelines by cost changes, and instead orders them by cost changes times barrel-miles. Thus, the median of Ms. Crowe's data sample does not capture the central tendency of industry-wide cost changes, as evidenced by the significant and multidirectional fluctuations above and pipelines based on these results from smallest to largest. Fourth, she determined the median of this data sample. Because Ms. Crowe's sample consists of an even number of pipelines, the median lies at the midpoint between two pipelines, Hilcorp Pipeline Company, LLC, and BOE Pipeline, LLC. Finally, she divided the median percentage cost change by those pipelines' 2014 barrel-miles, which produces a final result of –0.57%. See Crowe Initial Aff., App. 3, at Cost Changes Tab; Shehadeh Reply Decl. at 10, Figure 3 and App. B, at Figure 1—Chart Backup Tab.

In essence, Ms. Crowe attempts to calculate the weighted median by using a modified version of the formula the Commission uses to compute the weighted mean. See Crowe Initial Aff., App. 3 at Cost Changes Tab. Under this approach, it is unclear whether the median pipeline of a given sample reported (a) relatively high cost changes and low barrel-miles or (b) relatively low cost changes and high barrel-miles.
below the purported median that follow no discernible pattern. Accordingly, we conclude that Ms. Crowe’s calculation does not provide a useful measure of central tendency for purposes of calculating the index.46

40. Fourth, Liquids Shippers’ challenges to Colonial’s and Enbridge’s page 700 data are both misplaced and unavailing on the merits. Indexing challenges to Colonial’s and Enbridge’s purposes of calculating the index.46

41. Liquids Shippers state that the Commission should replace the ROEs that pipelines reported on page 700 for 2014 and 2019 with single, standardized figures for both years.47 Liquids Shippers contend that the data used to calculate the index level should conform to the Commission’s cost-of-service methodology and that the reported ROEs for 2014 and 2019 are inconsistent with this methodology in two respects. First, Liquids Shippers claim that pipelines’ reported ROEs are self-selected and do not reflect what investors would demand in the market. Second, Liquids Shippers state that if all oil pipeline rates were litigated at the same time, absent unusual circumstances, the Commission would adopt the same ROE for every pipeline because regulated pipelines typically fall within a broad range of average risk.48 Liquids Shippers assert that the reported ROEs conflict with this principle because they vary substantially.49

42. Liquids Shippers also claim that uncertainty surrounding the Commission’s oil pipeline ROE policy undermines the reliability of the reported ROEs for 2019. They state that the Commission initiated a review of its ROE policy in Docket No. PL19–4–000 on March 21, 2019 but did not clarify its ROE methodology for oil pipelines until it issued the ROE Policy Statement on May 21, 2020.50 Because oil pipelines were required to submit page 700 cost-of-service data for 2019 in April 2020, Liquids Shippers allege that pipelines were not certain of the Commission’s prevailing policy when they reported their 2019 ROEs. In support of this claim, Liquids Shippers observe that two pipelines submitted updated Form No. 6 filings in July 2020 indicating that the page 700 ROEs they filed in April 2020 did not comply with the Commission’s then-applicable policy relying solely upon the DCF model.

43. In light of these concerns, Liquids Shippers urge the Commission to replace each pipeline’s reported page 700 ROE for 2014 and 2019 with standardized ROEs for purposes of calculating the index level. For 2014, Liquids Shippers propose a standardized ROE of 10.29%, which 54 pipelines reported in their 2014 page 700 filings.51 For 2019, Liquids Shippers propose to use the 10.02% ROE that Trial Staff has proposed in testimony in an ongoing oil pipeline rate proceeding based upon data for the six-month period ending in November 2019.

44. Pipelines oppose Liquids Shippers’ proposal and disagree with their assertions. AOPL disputes Liquids Shippers’ claim that variation in the reported page 700 ROEs indicates that this data is unreliable or inconsistent with Commission policy.52 Pipelines contend, moreover, that the Commission found in the 2015 Index Review that statistical data trimming is sufficient to remove pipelines with outlying equity cost changes from the data set and that Liquids Shippers’ arguments do not undermine this conclusion. In addition, AOPL argues that Liquids Shippers failed to support their proposed standardized ROEs and that adopting their proposal would complicate the five-year review by introducing complex cost-of-service ratemaking issues.

46 Liquid Shippers Initial Comments at 21–22.
47 Id. at 21, 25 (citing 2015 Index Review, 153 FERC ¶ 61,312 at PP 13, 15).
48 Id. at 21 (citing FPC v. Hope Nat. Gas Co., 320 U.S. 697, 692–93 (1943); Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984)).
49 Id. at 22–23. Liquids Shippers assert that regulated pipelines typically face comparable risks and that the Commission typically sets oil pipeline ROEs at the median of the proxy group results. Id. at 24. For instance, Liquids Shippers state that among the 160 pipelines included in the untrimmed data set, reported page 700 ROEs for 2019 ranged from 0.9% to 22.3%. Id. at 24 (citing Crowe Initial Aff. at 9).
50 Id. at 25–26 (citing Inquiry Regarding the Commission’s Policy for Determining Return on Equity, 156 FERC ¶ 61,207 (2019)). As discussed above, the Commission issued a policy statement revising its ROE methodology for natural gas and oil pipelines on May 21, 2020, ROE Policy Statement, 171 FERC ¶ 61,155.
51 Id. at 27–28 (citing Crowe Initial Aff., App. 4 at 1–2) (referring to updated Form No. 6 filings of Plains Pipeline, LP and Rocky Mountain Pipeline System LLC).
52 Id. at 28 (quoting 2015 Index Review, 153 FERC ¶ 61,312 at 17); Designated Carriers Reply Comments at 15–14 (same).
53 AOPL Reply Comments at 32.
2. Commission Determination

45. We decline to adopt Liquids Shippers’ proposal to replace the reported page 700 ROE data for 2014 and 2019 with standardized ROEs. We conclude that Liquids Shippers have not adequately demonstrated that the reported page 700 ROE data are unreliable or inconsistent with Commission policy.

46. Contrary to Liquids Shippers’ contention, the fact that page 700 ROEs are self-reported does not demonstrate that this data is unreliable or fails to capture the returns that investors would demand in the market. Rather, one of the primary reasons the Commission updated the index calculation to use page 700 data is that this data is based upon “established ratemaking techniques.”102 During the 2014–2019 period, these techniques included determining ROEs using the DCF model, which is designed to reflect investors’ required returns. The instructions on page 700 required pipelines to determine their ROE (as well as other page 700 inputs) consistent with this methodology and pipelines submitted page 700 under oath and subject to sanction if there were purposeful errors in their reported data.103 In addition, if a pipeline makes any major changes to its application of the Opinion No. 154–B methodology in preparing page 700, it must describe such changes in a footnote on page 700. Given these facts, we find that Liquids Shippers have not adequately demonstrated that the reported page 700 ROE data is unreliable merely because pipelines self-reported.104

47. Similarly, variation among page 700 ROEs does not indicate that the reported ROE data is unreliable. To the contrary, multiple factors can cause the DCF model to yield different results for different pipelines. For example, even when analyzing data from the same time period, the appropriate proxy group may vary from pipeline to pipeline depending upon differences in risk. Liquids Shippers themselves acknowledge105 that although the Commission typically sets the real ROE for oil pipelines at the median of the proxy group returns, it may set the ROE above or below the median where the record demonstrates that the pipeline faces anomalously high or low risks.106 Accordingly, the fact that pipelines reported different ROEs for the same years does not demonstrate that this data is inaccurate or inconsistent with Commission policy. Moreover, the Commission explained in the 2015 Index Review that to the extent a particular pipeline’s per barrel-mile equity cost changes departed substantially from industry norms, that pipeline would not be among the middle 50% used to calculate the index level.107 Similarly, such pipelines would not be among the middle 80% used to calculate the index level in this proceeding. Liquids Shippers provide no basis for altering this conclusion.

49. We conclude, moreover, that Liquids Shippers have not supported their proposed standardized ROEs. For 2014, Liquids Shippers seek to replace all pipelines’ reported ROEs with an ROE figure that only 29% of pipelines reported for that year.108 However, Liquids Shippers do not demonstrate that this figure accurately measures the investor-required cost of equity for all pipelines in the data set. Similarly, Liquids Shippers do not justify why the Commission should adopt, as the 2019 ROE for all pipelines in the data set, a figure that a participant has proposed in an ongoing hearing on which neither the Presiding Judge nor the Commission have opined.109 Given that oil pipelines have diverse business models and different risk levels, we cannot simply assume that any single ROE could reflect the investor-required return for all pipelines in the data set.

50. Finally, we find that adopting Liquids Shippers’ proposal would undermine indexing’s purpose as a simplified and streamlined ratemaking regime. Whereas the Kahn Methodology promotes simplification by relying upon reported page 700 data, Liquids Shippers’ proposal would require the Commission, in this proceeding and in future five-year reviews, to undertake separate analyses to determine just and reasonable industry-wide ROEs for the first and last years of the five-year review period. Determining a just and reasonable ROE, particularly on an industry-wide basis, would be a complex and fact-intensive inquiry that could require considerable time and resources to resolve. The Commission explained in the NOI that analyzing such complex cost-of-service issues would improperly complicate and prolong the five-year review process in violation of EPAct 1992’s mandate for simplified and streamlined ratemaking,110 and Liquids Shippers have not refuted these concerns.

E. CAPP’s Argument Regarding Negotiated Rate Contracts

1. Comments

51. CAPP argues that the Commission should quantify the effects of negotiated rate contracts upon oil pipelines’ reported costs of equity. CAPP states that these contracts typically contain provisions such as shipper volume commitments that serve to transfer risk from the pipeline to its shippers and that failing to reflect pipelines’ reduced risks in the page 700 data could improperly inflate the index calculation.111 CAPP notes that the Commission found in the 2015 Index Review that the page 700 total cost-of-service would reflect any reduction in the pipeline’s risk, but argues that the page 700 data in this proceeding does not indicate whether this occurred over the 2014–2019 period.112 To provide

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103 See BP W. Coast Prods. LLC v. SEPP, L.P., 121 FERC ¶ 61,243, at P 9 (observing that “pipelines submit their FERC Form No. 6 under oath and exposes the pipeline and its employees to civil and criminal sanctions if there are purposeful errors in” applying the Commission’s existing cost-of-service methodology to develop the underlying cost inputs). Furthermore, the Commission calculates the index level based upon changes in cost over the applicable review period, rather than total costs in a given year. Because the last year of any particular review period (e.g., 2014–2019) is the first year of the next review period (e.g., 2019–2024), any attempt by pipelines to support the index calculation by reporting inflated cost data in the last year of one period would harm their interests by establishing a higher cost baseline in the first year of the next period.
104 If a shipper determines that a pipeline has reported inaccurate data on its page 700, the shipper may file a complaint alleging that the pipeline did not properly apply the Opinion No. 154–B methodology in developing its page 700 cost inputs. See BP W. Coast Prods. LLC v. SEPP, L.P., 121 FERC ¶ 61,243 at P 9 (explaining that shippers may file “a complaint that provides reasonable grounds to conclude that the pipeline did not properly apply its existing cost-of-service methodology to develop the underlying cost inputs used to develop the Page 700 in its annual FERC-
108 Whereas Liquids Shippers state that 45 of 158 pipelines filing page 700 for 2014 reported an ROE of 10.29%, the Commission’s review of Form No. 6 data indicates that 54 of 184 filing pipelines reported that particular ROE for 2014. Compare Liquids Shippers Initial Comments at 31 with Attachment A, Ex. 7.
109 According to the most recently procedural schedule adopted in Docket Nos. OR18–7–002 et al., the initial decision in that proceeding is currently scheduled for issuance on May 28, 2021.
111 NOI, 171 FERC ¶ 61,239 at P 11.
112 CAPP Initial Comments at 2–5.
113 Id. at 4 (quoting 2015 Index Review, 153 FERC ¶ 61,312 at P 26).
increased transparency. CAPP urges the Commission to consider requiring pipelines to provide shippers with the workpapers underlying their page 700 calculations.\textsuperscript{113} AOPL contends CAPP’s claims are unsupported and that the Commission has previously rejected this precise argument.\textsuperscript{114}

2. Commission Determination

52. We find CAPP’s arguments unpersuasive. First, as the Commission explained in the 2015 Index Review, “[t]o the extent that volume commitments in [negotiated rate] agreements have reduced the pipeline’s risk, the page 700 total cost of service would reflect this reduction in the embedded costs of equity and costs of debt.”\textsuperscript{115} These effects would tend to reduce pipeline costs and thereby produce a lower index level, rendering CAPP’s concerns unfounded. Although CAPP questions whether the effects of reduced pipeline risk are reflected in the page 700 data, it provides no basis for the Commission to conclude that the reported data fails to adequately account for pipelines’ risks in measuring changes in cost of equity and costs of debt.

53. Second, to the extent that CAPP requests that the Commission review individual pipeline data to evaluate the effects of contract rates upon the pipeline’s risks, this request is both unsupported and misplaced. CAPP has not presented any method for quantifying any disparity in the risks pipelines face when using contract rates versus non-contract rates. Although CAPP states that the Commission should consider requiring pipelines to provide workpapers\textsuperscript{116} and CAPP has not provided a sufficient basis for the Commission to revisit this decision here. More broadly, the Kahn Methodology measures changes in barrel-mile costs on a generic, industry-wide basis. Thus, in calculating the index level, the Commission does not scrutinize the inputs underlying individual pipelines’ page 700 data. Accordingly, the review that CAPP appears to seek would exceed the scope of the five-year index review and conflict with streamlined and simplified ratemaking.\textsuperscript{117}

F. Pipeline Costs Resulting From Integrity Management Regulations and Other Developments

1. Comments

54. AOPL states that oil pipelines have experienced significant cost increases due to pipeline safety and integrity measures and that these costs are likely to increase in the future.\textsuperscript{118} AOPL submits a declaration from William R. Byrd identifying new and continuing regulatory obligations related to pipeline integrity as well as other factors affecting pipeline costs, such as expenditures related to security and cybersecurity, opposition to pipeline infrastructure, and the COVID–19 pandemic.\textsuperscript{119} Mr. Byrd also describes anticipated regulatory requirements that he states will increase pipelines’ obligations and compliance costs in the future.\textsuperscript{120} AOPL maintains that pipelines’ ability to undertake future expansions and adopt environmental, safety, and security measures in compliance with applicable regulatory requirements depends upon the Commission adopting an index level that allows pipelines to recover expected future cost increases.\textsuperscript{121}

55. Other commenters make similar assertions. PST states that pipeline safety requirements have increased over the last five years and that setting the index level too low could reduce pipelines’ incentives to invest in safety measures.\textsuperscript{122} EIC echoes AOPL’s statements regarding increasing costs and explains that pipelines’ ability to invest in building and operating facilities depends upon ready access to capital markets and a predictable regulatory environment that reduces investment risks. Thus, EIC asserts that the Commission should be mindful that an insufficiently high index level could impair pipelines’ ability to attract investment.\textsuperscript{123}

56. PHMSA filed comments describing safety rules it has enacted since the 2015 Index Review as well as several pending rulemakings that, if adopted, would impose additional costs upon pipeline operators. Although it takes no position on the specific index level the Commission should adopt, PHMSA states that the index should reflect the costs that its existing and future regulations impose upon pipeline operators.\textsuperscript{124}

57. Shippers reject these arguments and contend that the Commission has previously found that future costs are speculative and inappropriate for inclusion in the index calculation.\textsuperscript{125} Liquids Shippers argue that costs related to safety or integrity measures incurred during the 2014–2019 period should be reflected in the page 700 data.\textsuperscript{126} In addition, Joint Commenters and Liquids Shippers contend that if safety or integrity-related costs are not captured in this index calculation, they will be reflected in future index reviews and pipelines may seek to recover those costs in the interim through cost-of-service rate filings, where appropriate.\textsuperscript{127}

2. Commission Determination

58. We decline to alter our calculation of the index level based upon the arguments concerning safety or integrity-related costs. To the extent that new or continuing regulatory requirements caused pipelines’ barrel-mile costs to increase during the 2014–2019 period, those cost changes would be reflected in the page 700 data.\textsuperscript{128} We also decline to adjust the index calculation based upon projections of future costs or other developments occurring after the conclusion of the 2014–2019 period. As the Commission has previously explained, future cost projections related to regulatory changes are speculative and inappropriate for inclusion in the index.\textsuperscript{129} Additionally, because the Kahn Methodology only considers cost changes incurred during

\textsuperscript{117} As discussed above, if a shipper determines that a particular pipeline’s page 700 inputs do not accord with the Commission’s existing Opinion No. 154-II methodology, it may file a complaint to that effect with the Commission. \textit{BP W. Coast Prods. LLC v. SPPP, L.P.}, 121 FERC \S 61,243 at P 9.

\textsuperscript{118} AOPL Initial Comments at 36–39; Declaration of William R. Byrd, P.E. at 21.

\textsuperscript{119} Byrd Declaration at 7–17.

\textsuperscript{120} Id. at 17–20.

\textsuperscript{121} AOPL Initial Comments at 40 (quoting 2005 Index Review, 114 FERC \S 61,293 at P 83).

\textsuperscript{122} PST Comments at 1–2.

\textsuperscript{123} EIC Comments at 7, 11–16.

\textsuperscript{124} PHMSA Reply Comments at 1–4.

\textsuperscript{125} Joint Commenters Reply Comments at 19–20 (quoting 2010 Index Review, 133 FERC \S 61,312 at P 125); Liquids Shippers Reply Comments at 31–32 (same); CAPP Initial Comments at 2.

\textsuperscript{126} Liquids Shippers Reply Comments at 33.

\textsuperscript{127} Joint Commenters Reply Comments at 20; Liquids Shippers Reply Comments at 33.

\textsuperscript{128} If such obligations result in a substantial divergence between a pipeline’s actual costs and the rate resulting from application of the index, the pipeline may file to change its rate using the Commission’s cost-of-service methodology pursuant to 18 CFR 342.4(a) of its index regulations, 18 CFR 342.4(a); see also Order No. 561, FERC Stats. & Regs. \S 30,985 at 30,957 (explaining that “such circumstances as increased safety or environmental regulations may justify the use of a cost-of-service methodology”).

\textsuperscript{129} 2010 Index Review, 133 FERC \S 61,228 at P 125.
the prior five years, regulatory changes and other developments occurring after the 2014–2019 period concluded on December 31, 2019, are beyond the scope of this index review.

To the extent that such developments affect barrel-mile costs going forward, the Commission will incorporate those cost changes as reflected in page 700 cost-of-service data in future index calculations.

G. Treatment of Mergers in the Data Set

1. Comments

59. To account for mergers that occurred during the study period, the Kahn Methodology adds the separate costs the pipelines reported on Form No. 6 in the first year of the data set (e.g., 2014) and compares this sum to the newly combined company’s costs in the last year of the data set (e.g., 2019). The Commission employs a similar process for addressing divestitures, adding the separate costs that the pipelines reported on Form No. 6 in the last year of the data set and comparing this sum to the previously combined company’s costs in the first year of the data set. Joint Commenters and AOPL each propose to adjust the data set to account for merger activity that they claim occurred during the 2014–2019 period but was not reflected in the data underlying the Commission’s proposal in the NOI.

60. Joint Commenters propose to account for six additional mergers: (1) Plains Southcap Inc. and Plains Pipeline, LP; (2) Red River Crude Pipeline LLC and Enterprise Crude Pipeline LLC; (3) Regency Liquids Pipeline LLC and Lone Star NGL Pipeline LP; (4) Independent Trading & Transportation Company I, L.L.C. and Hiland Crude, LLC; (5) Phillips 66 Pipeline LLC and Phillips 66 Carrier LLC; and (6) Excel Pipeline LLC and Sunoco Pipeline L.P. AOPL proposes to reflect the Excel-Sunoco merger and two additional mergers: (i) Mid-Valley Pipeline Company and Energy Transfer Crude Oil Company LLC (Energy Transfer Crude); and (ii) The Premcor Pipeline Co. and Valero Partners Lucas, LLC (Valero Lucas).

Commenters disagree with AOPL’s proposals to reflect mergers between Mid-Valley-Energy Transfer Crude and Premcor-Valero Lucas.

2. Commission Determination

61. We will adjust the data set to reflect mergers between: (1) Plains Southcap Inc. and Plains Pipeline, LP; (2) Red River Crude Pipeline LLC and Enterprise Crude Pipeline LLC; (3) Regency Liquids Pipeline LLC and Lone Star NGL Pipeline LP; (4) Independent Trading & Transportation Company I, L.L.C. and Hiland Crude, LLC; (5) Phillips 66 Pipeline LLC and Phillips 66 Carrier LLC; and (6) Excel Pipeline LLC and Sunoco Pipeline L.P.

We have verified through a review of Form No. 6 data that these mergers took place during the 2014–2019 period and will therefore revise the data set to combine these pipelines’ costs in 2019 as appropriate.

62. We decline, however, to adopt AOPL’s proposal to reflect mergers between Mid-Valley-Energy Transfer Crude and Premcor-Valero Lucas. We find that the record does not support adjusting the Form No. 6 data to reflect these mergers. For instance, a review of the total miles owned at year end does not indicate that any transfer of assets took place between these companies during the review period.

The Commission’s review of other Form No. 6 data likewise did not confirm whether these mergers in fact took place.

IV. 2021–2026 Oil Pipeline Index

63. Based upon the foregoing, we calculate the index level used to determine annual changes to oil pipeline rate ceilings for the five-year period beginning July 1, 2021 as follows. First, as shown in Attachment A (Exhibit 2) we remove those pipelines that did not provide Form No. 6, page 700 data or provided incomplete data. Second, as shown in Attachment A (Exhibit 5), we consider the data on Form No. 6, page 700 to calculate each pipeline’s cost change on a per barrel-mile basis over the prior five-year period (e.g., the years 2014–2019 in this proceeding). Third, to remove statistical outliers and spurious or unrepresentative data, we trim the data set to those pipelines in the middle 80% of cost changes. Fourth, as shown in Attachment A (Exhibit 5), we calculate three measures of the middle 80%’s central tendency: The median, the mean, and a weighted mean. Fifth, we calculate a composite by taking a simple average of those three measures of central tendency, as shown in Attachment A (Exhibit 1). Finally, we compare this composite to the value of the PPI–FG index data over the same period (0.52% in this proceeding) and set the index level at PPI–FG plus (or minus) this differential. Using these calculations, we establish an index level of PPI–FG+0.78% for the five-year period beginning July 1, 2021.

The Commission Orders

Consistent with the discussion in this order, the Commission determines that the appropriate oil pipeline index level for the next five years, July 1, 2021 through June 30, 2026, is PPI–FG+0.78%.

By the Commission. Commissioner Glick is dissenting with a separate statement attached. Commissioner Clements is not participating.

Issued: December 17, 2020.

Kimberly D. Bose,
Secretary.

Federal Energy Regulatory Commission

Five-Year Review of Oil Pipeline Index

Glick, Commissioner, Dissenting

1. Today’s order is a complete abdication of the Commission’s responsibility to protect oil pipeline customers. It overthrows well-established Commission policy and goes back on explicit promises we made to customers just a few years ago. As a result, the Commission is handing oil pipelines a multi-billion-dollar windfall for which customers are left to pick up the tab. I dissent strongly from those unreasonable and indefensible determinations.

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2. A little background is necessary to appreciate just how seriously the Commission has fallen down on the job. In the Energy Policy Act of 1992, Congress directed the Commission to promulgate a rule to simplify its ratemaking methodology for oil pipelines. Shortly thereafter, the Commission issued Order No. 561, which adopted an indexing methodology as part of the Commission’s approach for regulating

oil pipeline rates. Under that approach, if an oil pipeline increases its rates by less than the annual ceiling established by the index, the pipeline does not need to justify those rates through a cost-of-service filing. The majority of oil pipelines under the Commission’s jurisdiction use this index to demonstrate that their rate increases are just and reasonable.

3. Following Order No. 561, the Commission updates the index every five years to ensure that it represents a reasonable measure of the annual change in a typical oil pipeline’s cost of service. To set the annual index, the Commission calculates each jurisdictional pipeline’s change in its cost-of-service over the previous five-year period—we call this oil pipelines’ “cost change data.” The Commission then uses that data to determine an appropriate adjustment to the Producer Price Index for Finished Goods (PPI–FG) established by the U.S. Department of Labor. To avoid outliers or other anomalous, unrepresentative cost data, the Commission historically relied only on the cost change data for the middle 50% of pipelines when updating the index—that is, it excludes data from the 25% of pipelines with the lowest cost changes and the data from the 25% of pipelines with the highest.

4. In June of this year, the Commission issued a notice of inquiry that commenced its five-year update to the index. In that notice, the Commission proposed an index level of PPI–FG +0.09, based on our historical practice of relying on the middle 50% of cost change data. Today’s order tosses that historical practice aside and establishes an index level that is nearly ten times higher at PPI–FG +0.78. That order of magnitude increase is largely the result of a pair of unreasoned, illogical and unsupported changes that lack any meaningful support in the record before us. I’ll discuss them in turn.

5. The Commission’s first major mistake is to abandon its well-established practice of updating the index using the cost change data from the middle 50% of oil pipelines. As noted, in order to weed out potential anomalous, unrepresentative cost data and ensure that the cost change data reflects the experience of a typical pipeline, the Commission’s established practice is to “trim” the data down to the middle 50% of cost changes. The Commission has explained that relying only on those central values best approximates the operations of a typical pipeline because it prevents the Commission from relying on unrepresentative cost changes, such as a one-time increase in rate base, plant retirement, significant expansions or acquisitions, or localized changes in supply and demand.

6. Today’s order abandons that approach and instead uses the data from the middle 80% of pipelines. That change dramatically increases the likelihood that the updated index will reflect anomalous data that does not shed light on the cost changes experienced by a typical pipeline, which, in practice, skews the index upwards. Relying upon those relative outliers is particularly inappropriate here since the middle 50% of pipelines corresponds to a much larger percentage of the total barrels of oil shipped over the last five years than in previous index updates. In other words, the middle 50% already corresponds to a significantly larger percentage of total oil transportation service provided than in previous index updates, which would seem to undermine any need to expand the dataset.

7. The Commission’s justification for abandoning the 50% approach consists of nothing more than variations on the theme that more data is better. But, as with most things in life, quality is more important than quantity. Including more cost change data is not necessarily an improvement when there is good reason to believe that the incremental data is made up of outliers whose experience is less representative of a typical oil pipeline with a normal cost structure. As noted, the purpose of the index is to approximate a typical oil pipeline’s change in cost—an exercise that does not benefit from including cost change data from pipelines that are, by definition, unrepresentative of the average pipeline. And that is exactly why the Commission has consistently rejected replacing the 50% approach with the 80% approach adopted in today’s order. In addition, the Commission agrees with shippers for not arguing that every pipeline whose cost change data would have been excluded using the middle 50% was an outlier. As an initial matter, the shippers did provide illustrative data explaining why seven of those pipelines’ cost change data was not representative, which you might think would suffice to support the Commission continuing its historical practice. In any case, the burden to show that the index is reasonable is on the Commission, and it cannot be carried simply by arguing that the shippers should have done more.

8. The Commission’s second major mistake is to break its promise to protect ratepayers following the U.S. Court of Appeals for the District of Columbia Circuit’s decision in United Airlines v. FERC, which struck down the Commission’s practice of allowing Master Limited Partnerships (MLPs) to double recover their income tax costs. As a result of that decision, MLPs may no longer recover an income tax.

9. See 2015 Index Review, 153 FERC ¶ 61,312 at P 43 (“[b]y definition, costs at the top (or bottom) of the middle 80 percent deviate significantly from the cost experience of other pipelines. To the extent that the middle 80 percent conforms to a lognormal distribution, outlying cost increases per barrel-mile will not be offset by similarly outlying cost decreases. Thus, using the middle 80 percent would skew the index upward based upon these outlying cost increases, which is contrary to the objective of the index to reflect normal industry-wide cost changes.”); 2010 Index Review, 133 FERC ¶ 61,228 at P 63 (“[t]he use of the middle 50 minimizes the risk of including pipelines that experienced either large increases or decreases in cost (or erratic data) that may be included in an 80 percent sample, while still capturing changes from a broad spectrum of the pipeline industry.”).

10. See 2015 Index Review, 153 FERC ¶ 61,312 at PP 42-44; 2010 Index Review, 133 FERC ¶ 61,228 at PP 60-63.


12. Id.

13. United Airlines, Inc. v. FERC, 827 F.3d 122 (D.C. Cir. 2016) (finding that the Commission permitted a double recovery of income tax costs by allowing an MLP to recover both an income tax allowance and a return on equity determined pursuant to the discounted cash flow methodology, which already reflects income tax costs).

allowance in their cost of service.18 Following United Airlines, in 2018, the Commission required natural gas pipelines to immediately eliminate that double recovery,19 but declined to require something similar for oil pipelines, promising, quite explicitly, that it would address the issue when it next updated the index.20 So much for that. In today’s order, the Commission goes back on its word and allows any oil pipeline that was an MLP in 2014 to retroactively remove its income tax allowance from its 2014 cost-of-service data.21 That change juices the data to make it look like oil pipeline costs increased by more than they actually did between 2014 and 2019, thereby leading to a higher index value. And, as that weren’t bad enough, today’s order also allows any pipeline that transitioned from an MLP to a C-Corporation, thereby regaining the right to an income tax allowance, to remove the income tax allowance from their 2014 numbers.22 The result is, you guessed it, another increase in the cost change data, a higher index level, and more expensive rates for customers. 10. Nothing in today’s order justifies that result. The Commission summarily concludes that the index update is not an appropriate vehicle for incorporating the post-United Airlines’ policy changes.23 That proposition is hardly self-evident, especially given that all five then-Commissioners felt differently just two years ago.24 In any case, the fact of the matter is that tax costs are real costs,25 meaning that oil pipelines’ costs in the past five years have changed as a result of the United Airlines decision. Finally, reneging on our promise in the 2018 Income Tax Policy Statement perpetuates the effects of the double recovery gravy train that the court invalidated in United Airlines. That is simply indefensible.

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11. The Commission’s actions today hand oil pipelines what will amount to a multi-billion-dollar windfall over the next five years. Calling these decisions arbitrary and capricious or unreasonable would let the Commission off easy. They represent a complete abdication of our statutory responsibility to protect consumers—the companies and individuals who will be stuck paying those additional billions of dollars to the oil pipelines. Although our responsibilities under the Interstate Commerce Act don’t always get the same attention from the public as some of our other proceedings, today’s order illustrates the financial consequences that they can have for everyday customers. I hope that proceedings like today’s lead interested parties everywhere to more closely scrutinize the Commission’s oil orders so that these multi-billion-dollar handouts do not become a matter of course. For these reasons, I respectfully dissent.

Richard Glick, Commissioner.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2021–0057]

RIN 1625–AA00

Emergency Safety Zone; Richmond Entrance Channel, Richmond, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters of the Richmond Entrance Channel off of Richmond, CA in support of the safe navigation of vessels and environmental response efforts to address the hydrocarbon release from the Richmond Long Wharf on February 09, 2021. Based on this information, this safety zone is necessary to protect life, vessels, and the maritime environment. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission from the Captain of the Port San Francisco or a Captain of the Port San Francisco designated representative.

DATES: This rule is effective without actual notice on February 16, 2021. For the purposes of enforcement, actual notice will be used from 12:01 a.m. February 10, 2021 until February 16, 2021.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket go to https://www.regulations.gov, type USCG–2021–0057 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Warrant Officer Mickey Price, Waterways Management, U.S. Coast Guard; telephone (415) 399–7442, email SFWaterways@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations

COTP Captain of the Port San Francisco

DHS Department of Homeland Security

§ Section


II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking with respect to this rule because it is impracticable. The Coast Guard received notice of the hydrocarbon release into the waterway and the resulting need for this safety zone on February 9, 2021. It is impracticable to go through the full rulemaking process, including providing a reasonable comment period and considering those comments, because the Coast Guard must establish this emergency temporary safety zone by February 10, 2021.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the Federal Register. Delaying the effective date of this rule would be contrary to public interest because immediate action is